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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

WESTERN WATERSHEDS PROJECT, CENTER FOR BIOLOGICAL DIVERSITY, and AMERICAN BIRD CONSERVANCY, Appellants, v. BUREAU OF LAND MANAGEMENT, Respondent.	IBLA No. _____ **NOTICE OF APPEAL, STATEMENT OF REASONS, AND PETITION FOR STAY** Appeal of the Decision Record, Finding of No Significant Impact, Environmental Assessment DOI-BLM-UT-W020-2017-0001-EA for the September 2017 Competitive Oil and Gas Lease Sale

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NOTICE OF APPEAL[1]

Pursuant to 43 C.F.R. Part 4, Western Watersheds Project, Center for Biological Diversity, and American Bird Conservancy (collectively, "Appellants") file this Notice of Appeal, Statement of Reasons, and Petition for Stay of the September 22, 2017 decision of Kent Hoffman, Deputy State Director, Lands and Minerals, Utah State Office, Bureau of Land Management ("BLM") to approve the inclusion of nine parcels located in BLM's West Desert District in the September 2017 Competitive Oil and Gas Lease Sale ("lease sale" or "leasing decision").[2] The decision was documented in a September 22, 2017 Decision Record ("DR") and incorporates the Finding of No Significant Impact ("FONSI") and Environmental Assessment #DOI-BLM-UT-W020-2017-0001-EA ("EA"). Appellants also appeal the sale or issuance of any leases in reliance on the challenged DR, FONSI, and EA. This appeal is timely. 43 C.F.R. § 4.411.[3]

INTRODUCTION AND BACKGROUND

This appeal challenges BLM's decision to lease priority sage-grouse habitat in central Utah for oil and gas development, a move which jeopardizes the survival and recovery of the imperiled Sheeprocks population of greater sage-grouse. The Sheeprocks population was found by the U.S. Fish and Wildlife service to be "a relatively isolated population center" and "is considered high risk." U.S. Fish and Wildlife Service, *2013 Greater Sage-Grouse Conservation Objectives Team Report* 71–72 ("COT Report"). It experienced a nearly 40 percent decrease over the last four years and saw its male numbers drop from 190 in 2006 to just 23 in 2015. Melissa Chelak and Terry A. Messmer, *Population Dynamics and Seasonal Movements of Translocated and Resident Greater Sage-Grouse (Centrocercus*

[1] All cited references are provided on the enclosed thumb drive, and all declarations are attached as hard copies. Each reference on the hard drive is labeled with the author's name (last name or agency acronym), publication year, and title or description of the document.
[2] Those parcels are: UTU92485 (UT-001), UTU92486 (UT-002), UTU92487 (UT-003), UTU92488 (UT-004), UTU92489 (UT-005), UTU92490 (UT-006), UTU92491 (UT-007), UTU92492 (UT-008), UTU92493 (UT-009).
[3] Appellants received BLM's denial of their protest by Certified Mail on Monday, October 2, 2017. This Notice of Appeal is therefore filed within the 30-day deadline. See 43 C.F.R. § 4.411(a)(2)(i).

urophasianus), Sheeprock Sage-Grouse Management Area: 2016 Annual Report 8 (Dec. 2016).[4] The Sheeprocks population remains at high risk of local extirpation. *See* Braun Decl. ¶¶ 27, 31 (noting that the present Sheeprocks population "is not viable.").

Preserving peripheral populations like Sheeprocks is essential to arresting the decline of greater sage-grouse toward extinction and Endangered Species Act listing. *See* U.S. Fish and Wildlife Service, *2013 Greater Sage-Grouse Conservation Objectives Team Report* 12–13 ("COT Report").[5] Accordingly, the 2015 Utah Greater Sage-Grouse Resource Management Plan Amendment ("Utah ARMPA") included "hard triggers" for immediate actions to save local populations in a downward spiral. *See* U.S. Bureau of Land Mgmt., Utah Greater Sage-Grouse Approved Resource Management Plant Amendment, at Appendix I (Sept. 2017) ("Utah ARMPA"). The Sheeprocks population recently tripped this hard trigger, resulting in the conversion of 111,950 acres of Sheeprocks habitat to Priority Habitat Management Area ("PHMA") and corresponding changes in management practices. *See* Final EA at 21; Chelak and Messmer, *supra*, at 8. As described in the Utah ARMPA, this hard trigger "represent[s] a threshold indicating that immediate action is necessary to stop severe deviation from [sage-grouse] conservation objectives." Utah ARMPA, *supra*, at 4-3.

Federal and state agencies have also undertaken proactive management efforts to avoid extirpation of the Sheeprocks birds. BLM and the Utah Division of Wildlife Resources have been translocating roughly 40 sage-grouse each year into the Sheeprocks Sage-Grouse Management Area ("SGMA"), in conjunction with habitat restoration and predator management projects. *See* Chelak and Messmer, *supra*, at 6. Nearly $1 million was directed toward Sheeprocks sage-grouse conservation in

[4] For an overview of Sheeprocks population trend data, *see* Utah Department of Natural Resource's *2016 Annual Report: Implementing Utah's Greater Sage-grouse Conservation Plan*, at 8; U.S. Bureau of Land Mgmt., Greater Sheeprocks Sage-Grouse Habitat Restoration and Hazardous Fuels Treatment at 40, DOI-BLM-UT-W020-2016-0008-EA (June 2017) ("Habitat Restoration EA"); Utah ARMPA, *supra*, at Appendix I, I-27.

[5] The COT Report was prepared by five representatives from the U.S. Fish and Wildlife Service and ten from State agencies in a collaborative effort to develop range-wide conservation objectives for greater sage-grouse and to inform Fish and Wildlife Service in its 2015 Endangered Act listing decision. *See id*.

2016 alone.[6] In February 2017, BLM issued a press release calling attention to the serious decline in the Sheeprocks population and stating that it would "prioritize habitat restoration efforts" in the Sheeprocks SGMA. *See* Press Release, *BLM Implements Measures to Restore and Maintain Habitat for the Sheeprocks Greater Sage-Grouse Population in Central Utah* (Feb. 6, 2017). A "Causal Factor Analysis" to determine what environmental factors are responsible for the population decline has just been initiated by the Salt Lake Field Office, but this analysis remains far from completion. Telephone conversation between Nancy Fisher, BLM and Erik Molvar, Western Watersheds Project, October 27, 2017.[7]

Despite these efforts, and the lack of a completed Causal Factor Analysis, on September 12, 2017 the Fillmore Field Office of BLM held an oil and gas lease sale encompassing critical sage-grouse habitat in the Sheeprocks area. Five of the nine lease sale parcels encompass[8] or are directly adjacent to[9] Sheeprocks PHMA. Three parcels totaling 4,101.71 acres, including one parcel encompassing PHMA, were sold at auction.[10] The six leases offered for sale by BLM that did not receive bids remain available for noncompetitive sale.

Oil and gas development in the Sheeprocks area could be devastating to the birds. The Utah Division of Wildlife Resources indicated that there were multiple sage-grouse sightings in the 1990s within one mile of parcels of Parcels 001 and 002. Final EA at 21. The parcels are also located just 5

[6] In 2016, the U.S. Department of Agriculture, through its Regional Conservation Partnership Program, allocated $1 million for projects aimed restoring priority sage-grouse habitat in the Sheeprocks area. *See* News Release, U.S. Dep't of Agriculture, *Sheeprocks Area in Tooele County Focal Point of Multi-year Restoration Effort; Nearly $1 million in Funding Committed by USDA this Year* (Apr. 21, 2016). This work will include efforts to reduce pinyon-juniper encroachment, weed invasion, and risk of catastrophic fire. This $1 million figure does not capture the full scale of spending already underway.

[7] This causal factor analysis is mandated in the Utah ARMPA as a "hard trigger" management response. *See* Utah ARMPA at Appendix I, I-8.

[8] Parcels 001, 002, 003, and 007 contain PHMA. *See* Final EA at Appendix E (Map of Parcels).

[9] Parcel 008 is directly adjacent to PHMA. *Id.*

[10] These and other results of the September 12, 2017 Lease Sale are available in two summary documents issued by the BLM. *See* U.S. Bureau of Land Mgmt., Utah State Office, *September 12, 2017 Sale Results*, https://www.blm.gov/sites/blm.gov/files/Programs_OilandGas_Leasing_RegionalLeaseSales_Utah_2017_SALERESULTS.pdf; U.S. Bureau of Land Mgmt., Utah State Office, *Oil and Gas Competitive Lease Sale Results Summary, Color County District, Fillmore Field Office, September 12, 2017*, https://www.blm.gov/sites/blm.gov/files/Programs_OilandGas_Leasing_RegionalLeaseSales_Utah_2017_SUMMARY_0.pdf.

miles from the active Furner Valley lek. *Id.* at 24. While nesting habitat typically occurs within about 2 miles of leks, it has been well documented that nesting can occur as far as 12 miles away. *See* Braun Decl. ¶ 48. Brood-rearing and winter habitats may be even farther away from leks. *Id.* ¶ 49. A recent study of Utah greater sage-grouse tracked movements of over 16 miles from leks to seasonal habitat; females moved up to 36 miles from nest to summer habitat. *Id.* ¶ 36; *see also* Dahlgren et al., *Seasonal Movements of Greater Sage Grouse Populations in Utah: Implications for Species Conservation*, Wildlife Society Bulletin 40(2): 288–99 (2016).[11] Thus, the lease sale parcels are well within the radius of viable Sheeprocks habitat. Moreover, ongoing juniper reduction treatments are being undertaken to improve connectivity between the Furner Valley lek and the lease parcels. Final EA at 22.

Energy development has well-documented adverse effects on sage grouse survival, breeding, and behavior. *See* Braun Decl. ¶¶ 32–38. Roads, pipelines, wells, and other infrastructure cause direct habitat loss and fragmentation. *Id.* Surface development can disrupt breeding activities and cause birds to avoid suitable habitat, resulting in population declines. *Id.* Noise associated with energy development is also known to disrupt the sage-grouse life cycle. *Id.* ¶ 36. Research suggests that drilling activity can affect sage-grouse more than 12 miles away. *Id.* ¶ 48.

Because the Sheeprocks population is small and in critical decline, habitat losses and surface disturbances from oil and gas development could be disastrous for its long-term viability. As BLM itself conceded, oil and gas activities on the lease sale parcels "will contribute to reduced habitat quantity/quality, habitat fragmentation, and reduced connectivity as well as may alter seasonal movements and habitat use. Because [the Sheeprocks] population of sage-grouse is small and in a critical population decline, the resistance and resiliency of this population to recovery . . . could be further imperiled." Draft EA at 38. Dr. Clait E. Braun,[12] a leading sage-grouse researcher, concludes in his

[11] Converted from km to miles using data found in Tables 6 and 7.

[12] Dr. Clait Braun is a retired wildlife biologist and one of the preeminent sage-grouse experts in the nation. Dr. Braun led the Colorado Division of Wildlife's research efforts on greater sage grouse and their habitats for over 30 years, retiring in 2001. He has studied greater sage-grouse throughout its range and published over 300 peer-reviewed articles on sage-grouse and ornithology over his long career. *See* Braun Decl. at Ex. 1.

accompanying declaration that oil and gas development in the lease sale area will contribute to the extirpation of the Sheeprocks population. *See* Braun Decl. ¶ 52. He explains:

> BLM's analysis fails, in my professional judgment, to adequately identify the likely extent and severity of impacts on the Sheeprocks population of greater sage-grouse. I conclude that authorizing oil and gas development in the lease sale area will have a significant adverse impact on the Sheeprocks sage-grouse and, given the size of the present population, lead to extirpation. The Sheeprock greater sage-grouse population is already critically endangered and not likely to recover if oil and gas development is pursued. The obvious and supportable conclusion is that the likely impact of oil/gas development in the Sheeprocks area will be to cause an already imperiled population to be extirpated.

Id.

BLM's decision to lease these parcels violates its obligations under the National Environmental Policy Act ("NEPA") and the Federal Land Policy and Management Act ("FLPMA"). By issuing fluid mineral leases that authorize surface occupancy, BLM will irrevocably lose the authority to prevent surface-disturbing activities that are likely to adversely impact the Sheeprocks population of greater sage-grouse. *See* 43 C.F.R. § 3101.1-2. NEPA therefore requires full consideration of the reasonably foreseeable consequences of its irrevocable commitment of these lands to oil and gas development. The leasing action rested on an Environmental Assessment ("EA") that failed to adequately discuss the risks to sage-grouse and other wildlife species. The principal flaws in BLM's NEPA analysis include:

1. Failure to take a hard look at the impacts to the Sheeprocks greater sage-grouse population, including new telemetry data and ongoing efforts to restore habitat and to supplement the population;
2. Failure to consider the environmental effects of potential exceptions to the No Surface Occupancy ("NSO") stipulation in greater sage-grouse PHMA;
3. Failure to consider how adverse effects to the Sheeprocks population might impact the viability of the greater sage-grouse species overall, in light of the Sheeprock population's contributions to genetic and habitat diversity;
4. Failure to engage in any site-specific analysis of the foreseeable consequences to particular mule deer subpopulations, winter use areas, and/or migration corridors;

5. Failure to consider new research on the adverse effects of energy development on mule deer;
6. Failure to prepare an Environmental Impact Statement ("EIS") despite the potential for significant environmental impacts not discussed in prior EISs, including potential extirpation of the imperiled Sheeprocks population of greater sage-grouse and related impacts on the species range wide.

In addition, BLM violated its obligation under FLPMA to manage public lands in conformance with the governing Resource Management Plan. The Utah ARMPA clearly mandates that priority must be given to oil and gas leasing outside PHMAs, in order to protect priority sage-grouse habitats and their populations from further fragmentation and decline. Despite this directive, BLM elected to lease four of the nine auctioned parcels containing PHMA for Utah's most critically imperiled sage-grouse population, in violation of the ARMPA and FLPMA.

Accordingly, Appellants file this appeal, petition for stay, and statement of reasons seeking to reverse and remand BLM's September 22, 2017 DR and associated EA and FONSI. Appellants request a decision on their Petition for Stay within the 45 day period established under the Department of Interior's administrative appeal regulations at 43 C.F.R. Part 4. Because the sale of fluid mineral leases authorizing surface occupancy is the irrevocable point at which the lessee acquires a right to use of the public lands, a stay of BLM's decisions and issuance of any leases is necessary to prevent irreparable harm to the environment and to Appellants.

If a stay is not granted within the 45 day period, Appellants will dismiss this appeal and consider seeking relief in federal court. If a stay is timely granted, Appellants request that the IBLA vacate the unlawfully issued leases and reverse the challenged DR, EA, and FONSI.

STATEMENT OF STANDING

To maintain an appeal, Appellants must (1) be a party to the case; and (2) be adversely affected by the decision being appealed. 43 C.F.R. § 4.410(a) ("[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management . . . shall have a right to appeal to the

Board."). Those regulations define "party to a case" to include "one who has . . . participated in the process leading to the decision under appeal . . . e.g., [] by commenting on an environmental document." *Id.* § 4.410(b).

A party is adversely affected "when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest." *Id.* § 4.410(d). A legally cognizable interest can include cultural, recreational, and aesthetic uses and enjoyment of public lands. *Center for Biological Diversity*, 181 IBLA 325, 338 (2012); *Southern Utah Wilderness Alliance*, 127 IBLA 325, 326 (1993); *Animal Protection Institute of America*, 117 IBLA 208, 210 (1990). "Showing use of each parcel by an organization's member(s) is a direct way to establish standing, but a party may show an adverse effect 'by setting forth interests in resources or in other land or its resources affected by a decision and showing how the decision has caused or is substantially likely to cause injury to those interests.'" *Board of Commissioners of Pitkin County*, 173 IBLA 173, 178 (2007) (quoting *The Coalition of Concerned National Park Service Retirees*, 165 IBLA 79, 84; *see also Colorado Environmental Coalition, et al.*, 171 IBLA 256 (May 9, 2007).

Appellants qualify as "parties" within the meaning of section 4.410(b) because they submitted formal comments on the draft EA and protested the lease sale with the BLM. The issues presented in this Notice of Appeal and Petition for Stay were raised with reasonable specificity in Appellants' prior comments and protest. *See Center for Native Ecosystems*, 163 IBLA 86, 88 (2004).

Furthermore, Appellants and their staff, members, and supporters will be adversely affected by BLM's leasing action. Appellant Western Watersheds Project ("WWP") is a non-profit organization with more than 5,000 members, and supporters, many of whom have particular interests in conserving greater sage-grouse populations and habitats, particularly on public lands. *See* Mueller Decl. ¶ 5. Its mission is to protect and restore western watersheds and wildlife through education, public policy initiatives, and legal advocacy. *Id.* WWP has long-standing interests in preserving and conserving greater sage-grouse populations and habitat in Idaho and other states across the range of the greater sage-grouse. *Id.* ¶¶ 6–10.

Appellant Center for Biological Diversity ("Center") is a non-profit organization dedicated to the preservation, protection, and restoration of biodiversity, native species, and ecosystems. *See* Kilmer Decl. ¶ 4. The Center has more than 55,000 members, including many who reside in, explore, and enjoy the native species and ecosystems of the Interior Mountain West, where the greater sage-grouse is found. *Id.* The Center has an organizational interest in protecting the many native, imperiled, and sensitive species and their habitats that may be affected by the proposed oil and gas leasing, including the greater sage-grouse. *Id.* ¶¶ 5–6.

Appellant American Bird Conservancy ("ABC") is a 501(c)(3) non-profit organization whose mission is to conserve native birds and their habitats throughout the Americas. *See* Holmer Decl. ¶ 3. It works to safeguard the rarest bird species, protect and restore habitats, and reduce threats to bird species. ABC has more than 8,000 individual members and 60,000 constituents, many of whom enjoy viewing, studying, and photographing migratory and resident birds. *Id.* ABC and its staff, members, and supporters have a particular interest in reversing the sage-grouse's decline in Utah and across the Intermountain West. *Id.* ¶ 5. ABC drew attention to the threats faced by sagebrush habitat in 2006, when it placed it third in the list of The Top 20 Most Threatened Bird Habitats in the U.S., based on the damage caused by livestock grazing, oil and gas development, and the spread of invasive cheatgrass. *Id.* The sage-grouse was also highlighted on ABC's 2014 "Watch List" of birds of greatest conservation concern. *Id.* ABC also supports various other scientific research, advocacy, and regulatory efforts to reduce threats to sage-grouse from habitat destruction. *Id.* ¶¶ 5–7.

Appellants' staff, members, and supporters derive similar recreational, professional, scientific, inspirational, educational, and conservational interests in protecting greater sage-grouse and its sagebrush habitat in Utah. For example, Kevin Mueller testifies that he is a member and employee of WWP, and that he has personally visited places adjacent to, and with views of, the lease sale area for recreational and aesthetic purposes. *See* Mueller Decl. ¶¶ 4, 15. Mr. Mueller further testifies that he intends to return to the lease sale area in the near future, *id.* ¶ 14, and that the surface disturbances and wildlife losses made

reasonably foreseeable by BLM's leasing decision will harm his recreational, aesthetic, and conservational interests in this area, *id.* ¶¶ 17–18.

Similarly, Colyn Kilmer declares that she is a member and employee of the Center, and that she has recreated on the BLM lands that are part of the lease sale area, as well as areas that will likely be affected by the lease sale. *See* Kilmer Decl. ¶¶ 1, 3, 9. She enjoys the scenic beauty of the lease sale area and wildlife that use the area. *Id.* ¶ 11. She has family in the West Desert area and intends to return there to recreate and find sanctuary. *Id.* ¶¶ 1, 13 Ms. Kilmer testifies that she has recreational, aesthetic, and conservational interests in the protection of wildlife in the region that will be impacted by the lease sale. ¶¶ 7–11. Her declaration also establishes that BLM's decision to approve the lease sale will adversely affect these interests through road and well-pad construction, wildlife impacts, increased air pollution, and other environmental impacts that are foreseeable within the lease sale area as a result of BLM's leasing decision. *Id.* ¶¶ 12–13.

STATEMENT OF REASONS

I. BLM'S NEPA ANALYSIS WAS INADEQUATE

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The statute's twin objectives are (1) to ensure that federal agencies "consider every significant aspect of the environmental impact of a proposed action" and (2) "inform the public that [they have] indeed considered environmental concerns in its decisionmaking process." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153–54 (9th Cir. 2006) (citation omitted). NEPA requires federal agencies to "take seriously the potential environmental consequences of a proposed action" by taking a "hard look" at the action's likely environmental impacts. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005) (citation omitted).

NEPA requires federal agencies to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS must "provide full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. Agencies must "consider every

significant aspect of the environmental impact of a proposed action." *Ore. Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1130 (9th Cir. 2008) (citing *Vermont Yankee Nuclear Pwr. Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978)). This includes studying the direct and indirect effects and cumulative impacts of the action. *See* 40 C.F.R. §§ 1508.7, 1508.8.

BLM's EA for the challenged lease sale violated NEPA for three reasons. First, BLM failed to take the required "hard look" at all foreseeable impacts to greater sage-grouse, including the Sheeprocks population and impacts to the species more broadly. Second, BLM failed to take a "hard look" at the impacts to mule deer and elk and their seasonal ranges. Third, BLM failed to prepare an EIS, despite the potential for significant environmental impacts not discussed in prior NEPA analyses to which the EA tiered. We address each deficiency in detail below.

A. BLM Failed to Take a "Hard Look" at Foreseeable Impacts of the Proposed Action on Greater Sage-Grouse

BLM violated NEPA in failing to take the requisite "hard look" at the direct, indirect and cumulative impacts of the proposed action on greater sage-grouse, both range wide and to the local Sheeprocks population.

NEPA requires an EA to "contain[] sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a 'hard look' at environmental factors, and to make a reasoned decision." *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 371 (D.C.Cir. 1981) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)). The agency may not rely on incorrect assumptions or data, and "[g]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). Conclusory remarks do not constitute a "hard look," because they "do not equip a decisionmaker to make an informed decision about alternative courses of action or a court to review the Secretary's reasoning." *NRDC v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988).

The BLM's EA is inadequate in four major respects: (1) it fails to consider impacts from potential exceptions to the NSO stipulation; (2) it fails to use available telemetry data on sage-grouse migration routes and seasonal ranges near the project area; (3) it understates the habitat value of the affected parcels; and (4) it fails to consider the range-wide impacts of any adverse effects to the peripheral Sheeprocks population.

1. *The EA Fails to Analyze Impacts of NSO Stipulation Exceptions*

BLM failed to consider the environmental effects of likely exceptions to the No Surface Occupancy ("NSO") stipulation attached to PHMA, despite facts in the record demonstrating that BLM will consider granting such exceptions. Moreover, BLM has taken the position that such exceptions may be granted without further NEPA analysis, meaning that these effects must be considered at the leasing stage.

The EA notes that the portions of parcels 001, 002, 003, and 007 that are within PHMA would be subject to the NSO stipulation, which prohibits occupancy or disturbance on the lease surface. BLM then asserts that this NSO stipulation would avoid all "direct impacts to greater sage-grouse or its habitat within PHMA[.]" *See* Final EA at 31. This assumption is unfounded.

As BLM admits, lease stipulations are not absolute. BLM may grant an exception to the NSO stipulation on PHMA if it determines that the proposed action: "(i) Would not have direct, indirect, or cumulative effects on [greater sage-grouse] or its habitat; OR, (ii) Is proposed to be undertaken *as an alternative to a similar action occurring on a nearby parcel*, and *would provide a clear conservation gain to GRSG*." *See* Final EA at 49 (emphasis added). BLM addressed this issue in response to comments but erroneously concluded that the NSO exception would result in no adverse environmental effects:

> Although an exception to the NSO could be considered, as outlined in the sage-grouse ARMPA (BLM 2015) it would only be allowed when granting the exception would have either no impacts or would reduce impacts on GRSG. In addition, if the NSO exception were granted other stipulations would also apply (e.g., disturbance cap, seasonal restrictions). Because of these aspects of the NSO exception, the protective effects from oil and gas development would persist on public lands in PHMA even if an exception were granted.

Final EA at 31.

This is the kind of conclusory statement that NEPA forbids, and, in addition, reflects a key flaw in its reasoning. The second prong of the NSO exception appears to guarantee only a *net* conservation gain—that is, it would allow habitat losses so long as they are offset by a conservation "gain" elsewhere. It would therefore allow BLM to authorize surface-disturbing activities on greater sage-grouse PHMA so long as the lessee more than offsets any adverse effects through conservation efforts, such as juniper removal or predator management, on a neighboring parcel. But guaranteeing, or even measuring, a supposed "conservation gain" from the offsetting activities is nearly impossible. Sagebrush communities are exceedingly difficult to restore, habitat restoration takes protracted periods of time, and the success or failure of restoration often cannot be measured for decades. *See* Braun Decl. ¶ 30; Tamera J. Minnick and Richard D. Alward, *Plant–soil feedbacks and the partial recovery of soil spatial patterns on abandoned well pads in a sagebrush shrubland*, Ecological Applications 25(1), 3-10 (2015); *Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions to List the Greater Sage-Grouse (Centrocercus urophasianus) as Threatened or Endangered*, 75 Fed. Reg. 13,910, 13,917 (Mar. 23, 2010) (restoration may be impossible where disturbances to nutrient cycles, topsoil, and soil crusts have "exceeded recovery thresholds"). Therefore, the "conservation gains" promised under this NSO exception would be essentially impossible to guarantee in practice, and they might not occur until after the population is already extirpated.

The EA failed to acknowledge or address these issues and should have, since BLM will not conduct further NEPA analysis before it may grant an exception. The grant of exceptions to the NSO stipulation on PHMA is not a mere hypothetical concern: BLM has already stated that it will consider them.[13] *See also* Braun Decl. ¶ 50 ("My experience and BLM's own records indicate that few request for waivers, exceptions, and modifications are refused."). What's more, BLM generally makes decisions

[13] In the Lease Sale's Errata Sheet, the BLM responded to a comment from Kathleen Clarke, the former National Director of the BLM, that the NSO stipulation should be removed from portions of the PHMA which do not contain suitable Sage-Grouse habitat. Clarke letter at 3. BLM replied, "exception[s] to the NSO stipulation can be considered." Errata Sheet at 4.

regarding lease stipulation exceptions without the benefit of public participation or further NEPA analysis. As detailed in a 2017 report by the General Accountability Office (GAO):

> BLM generally [does] not involve the public when considering an operator's request for an exception to a lease or permit requirement. . . . According to BLM's policy, public notification is not required unless granting an exception would result in a substantial modification or waiver of a lease requirement. According to BLM officials, this is seldom the case, particularly if the exception criteria are outlined in the land use plan.

U.S. Gen. Accounting Office, GAO-17-307, Oil and Gas Leasing: Improved Collection and Use of Data Could Enhance BLM's Ability to Assess and Mitigate Environmental Impacts 17, 20 (2017). The GAO also found that field offices lack a consistent process for considering or documenting requests for exceptions. *Id.* at 11. The report concluded that "[w]ithout consistent and clear documentation of exception decisions, BLM may not be able to justify its decisions and provide reasonable assurance that its decisions were consistent with its responsibilities under NEPA." *Id.* at 16–17. Given this lack of transparency and public participation, it is critical that BLM undertake a satisfactory NEPA analysis at this stage.

In effect, therefore, PHMA remains open to development despite the NSO stipulation. Accordingly, BLM's determination that the leasing action would have "no direct impacts to greater sage-grouse or its habitat within PHMA" was arbitrary, capricious, and contrary to law.

2. *The EA Fails to Analyze Available Telemetry Data*

BLM largely ignored available site-specific, empirical data on sage-grouse migration routes, habitat use, and seasonal ranges near the project area. This data was produced in 2016 through a study by Chelak and Messmer as a result of a comprehensive habitat restoration, predation management, and bird translocation program aimed at stabilizing the Sheeprocks population. *See* Chelak and Messmer, *supra*. As part of this project, researchers radio-marked 47 resident and translocated birds and began collecting data on their movement and habitat use. *Id.* Chelak and Messmer published their preliminary findings in a December 2016 Annual Report. *Id.*

BLM does not appear to have analyzed the Chelak and Messmer data in any meaningful fashion. The EA mentions the study in passing but notes only that "no data points were identified within the parcels being analyzed in this action." Final EA at 21. This observation incorrectly suggests that birds outside the lease area would not be impacted. Substantial peer-reviewed research indicates, however, that drilling activity within the lease area could impact birds in adjacent lands up to twelve miles away. *See* Braun Decl. ¶ 48; *see also* Rebecca L. Taylor, David E. Naugle and L. Scott Mills, *Viability analyses for conservation of sage-grouse populations: Buffalo Field Office, Wyoming*, Prepared for BLM Buffalo Field Office (Feb. 2012); Manier, D.J., Bowen, Z.H., Brooks, M.L., Casazza, M.L., Coates, P.S., Deibert, P.A., Hanser, S.E., and Johnson, D.H., 2014, *Conservation buffer distance estimates for Greater Sage-Grouse—A review: U.S. Geological Survey Open-File Report* (Nov. 2014). And, as BLM acknowledges, the NSO stipulation on PHMA will foreseeably increase the likelihood of surface development on adjacent private lands, resulting in both direct impacts to sage-grouse and to suitable habitat outside the PHMA portions of the lease parcels and indirect and cumulative impacts to birds on federal PHMA. *See* Final EA at 31. Accordingly, BLM should have assessed whether any mapped locations of grouse habitat use from the Chelak and Messmer study were identified *in proximity to* the lease sale parcels. Its failure to do so was arbitrary and capricious, and in violation of NEPA and its implementing regulations. *See* 40 C.F.R. § 1500.1 (b) ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.").

BLM's meager discussion of the Chelak and Messmer data represents a more critical flaw of the EA—the failure to identify, study, and map sage-grouse seasonal habitats that may be impacted by the leasing action. Understanding the reasonably foreseeable indirect impacts of oil and gas leasing and resulting development requires first documenting what exists in the area, including nesting, brood-rearing, summer, or winter habitat. *See* Braun Decl. ¶¶ 53–61. Numerous courts have held, in other sage-grouse cases, that the failure to accurately describe and assess seasonal habitats and their role in sage-grouse persistence violates NEPA. *See, e.g., Oregon Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 568–73 (9th

Cir. 2016) (reversing BLM approval of right-of-way for industrial wind facility atop Steens Mountain in eastern Oregon for failing to assess sage-grouse winter habitats, in violation of NEPA); *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1083-85, 1100 (9th Cir. 2011) (invalidating decision approving construction of a railroad line where agency failed to collect data on sage-grouse habitat, including wintering areas, that would be affected by proposed project, in violation of NEPA); *Native Ecosystems Council v. Tidwell*, 599 F.3d 926 (9th Cir. 2010) (Forest Service violated NEPA in failing to assess impacts of grazing upon sage-grouse nesting and other habitats); *WWP v. Bennett*, 392 F. Supp. 2d 1217 (D. Idaho 2005) (BLM violated NEPA in authorizing grazing without evaluating impacts on sage-grouse).

BLM had at its fingertips a wealth of relevant site-specific data, including from the Chelak and Messmer study, yet failed to conduct any analysis of how sage-grouse currently use the lease parcels and surrounding public and private lands. BLM's treatment of readily available telemetry data falls short of the "hard look" demanded under NEPA.

The EA also fails completely to consider the effect that oil and gas leasing and resulting likelihood of development may have on restoration efforts, such as the juniper removal projects mentioned in the Final EA, at 31, and in Chelak and Messmer, at 8. "The West Desert Adaptive Resource Management (WDARM) Local Working Group was formed in 2002 to identify voluntary conservation actions that could be implemented to manage sage-grouse. In 2007 the group published a conservation plan to guide management action in the area." Chelak and Messmer at 7-8. The EA contains no analysis whatsoever of how additional oil and gas leasing and resulting development may impact the ability of the WDARM to achieve its conservation goals.

3. *The EA Fails to Take a "Hard Look" at Project's Effect on Greater Sage-Grouse Habitat*

The EA concludes that impacts to the Sheeprocks sage-grouse population will be minimal because the area of the proposed leases is "in low-quality [sage-grouse] habitat." Final EA at 35. There are four key flaws with this analysis.

First, facts in the record contradict BLM's conclusion that the affected habitat is "low quality." BLM's own "Site Inspection Report" of the lease sale parcels concluded that the northern parcels—i.e., those containing PHMA and closest to the boundary of the Sheeprocks SGMA—"had some excellent habit for sage grouse, whereas the southernmost parcels of what we could see from the east end was more sparagtic [sic]." BLM, Fillmore Field Office, *Site Inspection Report – Oil & Gas Lease Parcels Inspection* 1 (Jan. 27, 2017). The report also concluded that the valley around Parcel 001 is "quite full of sage grouse habitat." *Id.* at 2; *see also* Memo to File from James Priest, Wildlife Biologist, FFO (Feb. 11, 2017) ("There is sufficient sagebrush habitat, although fragmented and variable quality, for sage-grouse to potentially use Dog Valley from time-to-time."). The EA itself acknowledges that "fundamental sage-grouse habitat elements such as sagebrush, perennial grasses and preferred forbs do occur [in parcels 002, 003, and 007], suggesting that there is a potential for sage-grouse to use these parcels[.]" Final EA at 31. BLM fails to reconcile its initial characterization of the parcels as "excellent" habitat with its later of the parcels as "low-quality habitat."

Second, BLM ignores the restoration potential of the affected habitat. Pinyon and juniper reduction treatments are already ongoing near the lease sale parcels, which is expected to improve habitat quality of the lease parcels and their connectivity with the Furner Valley lek. *See* Chelak and Messmer, *supra*, at 20, 21.[14] The EA itself acknowledges that the PHMA parcels "could be improved by removing encroaching juniper and improving the community composition and reducing fragmentation." Final EA at 31; *see also* Final EA at 22 (concluding that these ongoing conifer removal projects will create new travel corridors and improve habitat quality). These restoration projects will have potentially significant impacts on the habitat value of the parcels and adjacent land and should have been considered in the EA.

[14] It is also questionable whether these projects will succeed, as Dr. Braun notes in his declaration. Dr. Braun is one of the world's leading Sage-Grouse experts and advises that restoring Sage-Grouse habitats is a difficult and lengthy process, and that similar vegetation treatment projects in Oregon have not demonstrated successes claimed by proponents. BLM's EA should have taken a "hard look" at the assumption that the conifer removal projects here will be successful.

Third, the EA appears to assume that low-quality habitat would not support sage-grouse, without assessing actual use of the parcels—by resident or translocated birds. Understanding how birds currently use the lease sale parcels is key to assessing the habitat's value to sage-grouse and potential risks of direct disturbance, displacement, or mortality. Nonetheless, BLM failed to review available telemetry data showing actual use of the Sheeprocks area by 40 resident and translocated birds. It also failed to consider that translocated birds have been making larger movements than resident birds, suggesting that they may expand the current occupied range of resident sage-grouse. *See* Chelak and Messmer, *supra*, at 20 (noting the "extensive movements" made by translocated birds). The EA should have considered information on actual use, by both resident translocated birds, in assessing the habitat value of the lease sale area.

Finally, in describing the affected habitat as "low-quality," the EA downplays its important role in ensuring recovery of the Sheeprocks population. Habitat preservation and recovery is a fundamental objective of sage-grouse conservation planning. *See* Utah ARMPA, *supra*, at 1-2 ("Securing [] large landscapes from further degradation and adding more habitat through restoration is the primary conservation action for GRSG."); *see also* COT Report, Interested Reader Letter ("The highest level objective identified in the report is to minimize habitat threats to the species."). In some cases, this will involve protecting currently unsuitable habitat, if it can be restored, or currently unoccupied habitat, if a rebounding population can expand or shift into those areas.

The Utah ARMPA itself recognizes that even lower-quality habitat at the margins of the Sheeprocks range, previously categorized as GHMA, is critical to the population's recovery. This is evident in the "hard trigger" management responses, which include re-designating and protecting all Sheeprocks GHMA according to the more restrictive protections attached to PHMA. *See* Utah ARMPA, *supra*, at Appendix I. PHMA is defined under the Utah ARMPA as land "having the highest value to maintaining sustainable GRSG populations." *Id.* at 1-5. It is short-sighted and antithetical to the PHMA designation, purpose of the "hard trigger," and fundamental species conservation principles to argue that the lease sale area is of little value to the imperiled Sheeprocks population.

4. *The EA Fails to Consider Range-wide Impacts to Greater Sage-Grouse*

BLM also failed to acknowledge or assess the range-wide impacts of the proposed lease sale upon greater sage-grouse, from a habitat and genetic diversity perspective. The Sheeprocks sage-grouse are an isolated and peripheral population of the greater sage-grouse species. *See* Final EA at 37. "Peripheral" populations are those found at the geographic edge of a species' habitat range. *See, e.g.*, Amy Haak et al., *Conserving Peripheral Trout Populations: The Values and Risks of Life on the Edge*, 35 Fisheries 530–549 (Nov. 2010). Peripheral populations often have unique conservation value, due to their contributions to genetic variability, habitat range and connectivity, and population persistence. *Id.* at 530–31. Loss of peripheral populations can therefore diminish the long-term viability of a species. *Id.*

The conservation value of peripheral species is linked to the "Three R's" of conservation biology—representation, redundancy, and resiliency. *See* U.S. Fish and Wildlife Service, *Greater Sage-Grouse (*Centrocercus urophasianus*) Conservation Objectives: Final Report* 12 (Feb. 2013) ("COT Report"); *see also* Haak Decl. ¶¶ 8–11. "Representation" involves conserving the breadth of the genetic makeup of the species to conserve its adaptive capabilities. COT Report, *supra*, at 12. "Resiliency" involves ensuring that each population is sufficiently large to withstand stochastic (random) events. *Id.* Redundancy involves ensuring a sufficient number of populations to provide a margin of safety for the species to withstand catastrophic events. *Id.* Peripheral populations often contribute to all three metrics. *See* Haak et al., *supra*, at 530–31. The "Three R's" is one of the U.S. Fish and Wildlife Service's guiding biological principles. *See, e.g.*, U.S. Fish and Wildlife Service, *Species Status Assessment Framework* 4, 6, 12–13 (Ver. 3.4, Aug. 2016) ("SSA uses the conservation biology principles of resiliency, redundancy, and representation . . . as a lens to evaluate the current and future condition of the species.").

BLM's own analysis suggests that oil and gas development may contribute to the extirpation of the Sheeprocks peripheral population. *See* Final EA at 35; *see also* Braun Decl. ¶ 67. Nonetheless, the EA fails to even acknowledge that this loss could impact the representation, redundancy, and resiliency of the greater sage-grouse species, from a habitat or diversity perspective. Nor does BLM attempt to assess the

nature or scale of such impacts by evaluating the genetic distinctness of Sheeprocks, the uniqueness of its ecological setting, or the potential for a significant gap in the range of greater sage-grouse if this population is lost.

This omission is significant. The importance of peripheral populations has been widely recognized in sage-grouse planning documents. For example, the COT Report is built on the guiding concepts of redundancy, representation, and resilience. It concluded:

> For sage-grouse, retaining redundancy, representation, and resilience means having multiple and geographically distributed sage-grouse populations across the species' ecological niche and geographic range. . . . By conserving well distributed sage-grouse populations across geographic and ecological gradients, species adaptive traits can be preserved, and populations can be maintained at levels that make sage-grouse more resilient in the face of catastrophes or environmental change.

COT Report, *supra*, at 12–13.[15] Extirpation of peripheral sage-grouse populations has already reduced resiliency and redundancy for the Bi-State distinct population segment of greater sage-grouse in Nevada and California. *See* 75 Fed. Reg. at 13,994, 14002, 14009 (USFWS's March 2010 "warranted but precluded" finding). Appellants raised this issue in both their comments and protest. *See* WWP et al. Comments at 3; WWP et al. Protest at 6 ("[E]xtirpation of the Sheeprocks sage-grouse population would make recovery of the greater sage-grouse as a whole more difficult[.]").

Moreover, the accompanying expert declaration of Dr. Amy Haak[16] demonstrates that the Sheeprocks population does meaningfully contribute, at minimum, to the habitat biodiversity of the greater sage-grouse species, and therefore to its long-term viability. *See* Haak Decl. ¶ 27. Dr. Haak's analysis of the habitat composition of the Sheeprocks area, in relation to the historical sage-grouse habitat diversity, demonstrates that the Sheeprocks area makes a significant contribution to the "Representation" and "Redundancy" of the greater sage-grouse's habitat, and to the diversity of its "conservation

[15] The COT report was a key input to the BLM's Utah Greater Sage-Grouse Approved Resource Management Plant Amendment. *See* Utah ARMPA, *supra*, at 6-2 ("References").

[16] Amy Haak, Ph.D., has over 30 years of experience in the application of geospatial technologies to conservation planning, environmental characterization, and ecological assessments. She spent a decade with Trout Unlimited's national science program, where she published numerous peer reviewed studies based on "Three R's" principles. She has provided expert testimony in a variety of sage-grouse cases in federal court. Dr. Haak holds a B.A. in Geography from Dartmouth College and an M.S. and Ph.D. in Geography from the University of Idaho.

portfolio." *Id.* Communities with diverse conservation portfolios—i.e., those that occupy a wide and varying landscape—are better able to withstand disturbance events and swings in environmental conditions that would destabilize with a less diverse portfolio. *Id.* ¶ 7. Therefore, Dr. Haak concludes that the Sheeprocks contribute to the overall viability of the greater sage-grouse species, from a habitat diversity perspective. *Id.* ¶ 27. The Sheeprocks may offer further unstudied benefits to the greater sage-grouse species in terms of genetic diversity.

Given the decline of sage-grouse on a range-wide basis, protecting all remaining sage-grouse populations and habitats, and especially peripheral populations with outsized conservation value, is important to prevent further decline of the species and possible Endangered Species Act listing. BLM's failure to assess the range-wide impacts of threats to the Sheeprocks population is a significant and reversible omission.

B. BLM Failed to Take a "Hard Look" at Foreseeable Impacts on Mule Deer and Elk and their Seasonal Ranges

As noted above, NEPA requires federal agencies to take a "hard look" at the environmental impacts of its decisions, and "[g]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). Conclusory statements do not constitute a "hard look," because "conclusory remarks . . . do not equip a decisionmaker to make an informed decision about alternative courses of action or a court to review the Secretary's reasoning." *NRDC v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988).

BLM failed to meet its NEPA obligations by admitting that its leasing action could impact big game habitat but concluding, without supporting analysis, that big game populations would not be affected. The EA's discussion of "Cumulative Impacts" explains that motorized vehicles, fire, and invasive plant species have caused wildlife habitat losses and fragmentation, and acknowledges that oil and gas development could cause additional habitat disturbances. *Id.* at 35. The EA then concludes,

however—without explanation or analysis—that habitat disturbances would not affect local deer and elk populations. *Id*. The entirety of the EA's discussion of big game impacts is as follows:

> Impacts in this area that are occurring and will continue to occur, such as dispersed recreational use, motorized vehicles, fire and invasive plant species, are the major threats to wildlife caused by human disturbance and habitat fragmentation. The proposed action would contribute to impacts resulting from past, presently occurring and future activities in the CIAA. There could potentially be additional disturbance to habitat yet not enough to effect the population of local deer and elk populations.

Id.

The conclusion that big game populations would not be affected is unsupported by the record and falls far short of the searching inquiry required under NEPA. The proposed lease parcels provide substantial winter and spring mule deer habitat and yearlong elk habitat. *See* EA at 72. However, because the habitat is not designated as "critical" or "crucial," none of the lease sale parcels contains stipulations for protecting big game. *See id.* at 67. Human development has known impacts on both mule deer and elk. Recent studies have confirmed, for example, that energy development affects mule deer habitat use and migration patterns by creating barriers to migration routes and causing site avoidance of infrastructure, such as well pads and roads. *See, e.g.*, Hall Sawyer, et al., *Mule Deer and Energy Development—Long-term trends of habituation and abundance*, 23 Global Change Biology 4521 (2017); Hall Sawyer, et al., *A framework for understanding semi-permeable barrier effects on migratory ungulates*, 50 J. Applied Ecology 68 (2013); P.E. Lendrum, et al., *Habitat selection by mule deer during migration: effects of landscape structure and natural-gas development*, 3 Ecosphere, Vol. 9, Sept. 2012, at 1. Mule deer may suffer higher mortality rates in developed landscapes because of increased vehicle collisions, accidents, and hunting. H.E. Johnson, et al., *Increases in residential and energy development are associated with reductions in recruitment for a large ungulate*, 23 Global Change Biology 578 (2016).

Despite these recognized impacts, BLM failed to conduct any site-specific assessment of the effects on particular deer or elk subpopulations, winter use areas, or migration corridors. Understanding the potential or likely impacts of energy development requires first identifying and documenting what exists in the area. There is also no discussion of the specific threats energy development poses to mule

deer and elk and their seasonal habitats, aside from the general observation that habitat may be "disturbed." The EA fails to discuss, for example, how habitat disturbances may impact big game migration patterns, behavior, and mortality rates.

Even worse, BLM simply concludes—without providing any reasoning—that local deer and elk populations would not be affected by habitat disturbances. *See* Final EA at 35. Courts have routinely found such conclusory statements insufficient to constitute a hard look. For example, in *Government of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37 (D.D.C. 2010), the court found that the Bureau of Reclamation failed to adequately assess, in its EA supporting a water diversion project, the cumulative impacts of water withdrawals on Lake Sakakawea and the Missouri River. *Id.* at 47. The Bureau of Reclamation acknowledged such impacts but concluded without analysis that "the incremental effect of the . . . withdrawal, when added to other past, present, and reasonably foreseeable future withdrawals from the Missouri River system, will not be measurable below Lake Sakakawea." *Id.* The reviewing court concluded that this analysis was "a glance at the issue, not a 'hard look.' Such 'conclusory remarks' are insufficient to discharge the agency's NEPA obligations, as they 'do not equip a decisionmaker to make an informed decision about alternative courses of action or a court to review the Secretary's reasoning.'" *Id.* at 48 (quoting *NRDC v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988).

Similarly, in *Environmental Protection Information Center v. Blackwell*, 389 F. Supp. 2d 1174 (N.D. Cal. 2004), the court found that the Forest Service "failed to provide a useful cumulative impacts analysis because . . . the agency summarily concluded, without any real explanation why, that the [habitat] fragmentation was not a problem and that there would still be sufficient dispersal habitat after the sales." *Id.* at 1190–91. The Court held that the conclusory analysis in the EA "fail[s] to establish the hard look required of the agency in assessing cumulative impacts." *Id.* at 1192. *See also Friends of the Earth, Inc. v. United States Army Corps of Eng'rs*, 109 F.Supp.2d 30, 42 (D.D.C. 2000) (observing that, while the Army Corps "dedicated nine or ten pages of each EA to cumulative impacts," "[t]here is no actual analysis" to support the conclusion that the cumulative direct impacts 'have been minimal' ").

too, the EA provides no factual or analytical support for the conclusion that big game populations will not be impacted by oil and gas development on these parcels, and therefore fails to satisfy NEPA.

Moreover, evidence in the record undermines BLM's assertion that oil and gas leasing will have no impact on deer and elk populations, rendering its conclusion arbitrary and capricious. In response to comments, BLM vowed to consider other "steps to mitigate oil and gas activities to avoid and minimize loss of habitat, noise, traffic collisions and restore and/or enhance impacted habitats if any exploration and development are pursued." Final EA at 72–73. BLM also declared that "[h]ealthy and sustainable mule deer and elk herds and the habitat they depend on are a management emphasis for the BLM. A project/site reclamation plan will be developed to restore impacted landscape to their original forms as possible." Final EA at 73. BLM's admission that oil and gas leasing, exploration, and development may impact deer and elk populations, thus necessitating mitigation measures, undermines its earlier assertion that the proposed action will have no impact on deer and elk populations.

Insofar as BLM relies on anticipated mitigation measures to conclude that big game populations would not be affected, this too is lacking. BLM does not raise the possibility of mitigation measures in the body of the EA, and its brief remarks in response to comments fall far short of what NEPA requires. "A perfunctory description or mere listing of mitigation measures, without supporting analytical data, is not sufficient to support a finding of no significant impact." *NPCA v. Babbitt*, 241 F.3d 722, 733–34 (9th Cir. 2001); *see also Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999) (requiring evaluation of adverse effects, and prohibiting "mere list of possible mitigation measures"). BLM failed to identify much less evaluate the effectiveness of the mitigation measures it proposes to take.

Moreover, science shows the habitat mitigation measures likely won't work. In promising to restore big game habitat, for example, BLM entirely ignored new scientific literature indicating that sagebrush communities, which are critical for wintering game, are nearly impossible to restore.[17] Habitat

[17] *See* Lester, Liza, Sagebrush Ecosystem Recovery Hobbled By Loss of Soil Complexity at Development Sites, Ecological Society of America (Jan. 26, 2015). Notably, this research was published after the issuance of the 2015 GRSG EIS and therefore not considered in prior NEPA analysis to which the present EA was tiered.

disturbances and fragmentation from oil and gas development may be permanent. Once a lease is held by production or becomes part of a communitization agreement or unit plan, *see* 43 C.F.R. § 3107.1, oil and gas production legally continues as long as hydrocarbons are produced in paying quantities—a period of many decades in the case of existing oil and gas fields. Appellants brought new research regarding the difficulty of sagebrush restoration to the agency's attention in their comments and formal protest, but it received no apparent consideration. *See* Final EA at 73–74. Instead, BLM steadfastly maintained, without supporting evidence, that it would both be able to restore impacted sagebrush habitat and would have sufficient resources to do so. *See id.* Absent a realistic appraisal of possible mitigation measures, as informed by recent research, BLM could not properly evaluate the severity of the adverse effects on mule deer and elk populations.

In sum, the EA's cursory and arbitrary treatment of big game impacts fails to satisfy NEPA's requirements.

C. BLM Violated NEPA by Failing to Prepare a Full EIS

1. *The Environmental Impacts of the Project are "Significant," in Light of Possible Extirpation of the Sheeprocks Population of Greater Sage-Grouse*

NEPA demands that a federal agency prepare an EIS before taking "major Federal actions significantly affecting the quality of the human environment." *See* 42 U.S.C. § 4332(2)(C); *Pennaco Energy, Inc. v. United States DOI*, 377 F.3d 1147, 1150 (10th Cir. 2004). "[A]n EIS must be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.'" *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)). "To trigger this requirement a 'plaintiff need not show that significant effects will in fact occur,' [but] raising 'substantial questions whether a project may have a significant effect' is sufficient." *Id.* at 1150 (quoting *Greenpeace*, 14 F.3d at 1332).

Significance is determined in part by the "severity of the impact," as measured by a number of "intensity" factors. 40 C.F.R. § 1508.27(b). These include unique characteristics of the geographic area;

uncertainty about effects; and potential for adverse effects on an endangered or threatened species or its habitat, or on a critical habitat. *Id.* The presence of any one factor may be sufficient to require an EIS. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005).

Appellants have raised a substantial question about the leasing action's potential significant impact on the environment. Before even considering the "intensity" factors outlined above, it is clear that the project would jeopardize the survival of the Sheeprocks population of greater sage-grouse—an undeniably significant effect, given the critical status of the greater sage-grouse as a species.

The scope of impacts to sage-grouse are "far greater than portrayed in the EA." *See* Braun Decl. ¶ 46. BLM builds its "finding of no significant impacts" largely around the fiction of the NSO stipulation and assertion that the impacted habitat is "low-quality." *See* Final EA at 35. The facts in the record, and the habitat's designation as PHMA, contradict that assertion. Moreover, the assertion that "impacts from development will not occur on public lands," because of the NSO stipulation is plainly false. *Id.* As explained above, surface development on PHMA is foreseeable, given the availability of exceptions to the NSO stipulation. What's more, "[r]esearch indicates that stipulations commonly applied by the BLM and Forest Service to oil and gas leases and permits do not adequately address the scope of negative influences of development on [sage grouse]." Utah ARMPA EIS at 4-22.

The NSO stipulation also would not protect sage-grouse on priority habitat from indirect effects of oil and gas leasing. Disturbances from drilling activity on non-habitat can affect sage-grouse more than 12 miles away. *See* Braun Decl. ¶ 48. Furthermore, the NSO restriction on federal PHMA gives lessees an incentive to develop on adjacent, private lands to directionally access the federal minerals, and private PHMA lacks the NSO provision placed on federal PHMA. *See* Final EA at 31 ("[T]here is a potential that NSO restrictions placed on the federal mineral estate in PHMA could cause operators to develop adjacent nonfederal lands."). Development on nonfederal land will indirectly affect federal sage-grouse habitats and effectively reduce the overall size of protected habitat.

These direct and indirect impacts to the Sheeprocks population of greater sage-grouse would likely be significant, given its already imperiled status. *See* Braun Decl. ¶ 67 (concluding that the lease sale will "risk extirpation of this local population."). These adverse effects would be compounded range wide, due to the contribution of the Sheeprocks population to the greater sage-grouse species' genetic variability, habitat range, and connectivity. Given the decline of sage-grouse on a range-wide basis, protecting all remaining populations and habitats is important to arrest its decline toward Endangered Species Act listing.

These risks to the greater sage-grouse—both locally and range-wide—are significant environmental effects of BLM's leasing decision that alone warrant preparation of an EIS. BLM's leasing decision also triggers several of the NEPA "significance" factors, any of which was also sufficient to require an EIS:

Adverse effects to a special status species. The decision is likely to adversely affect special status species—the greater sage-grouse. While the greater sage-grouse has not been listed under the ESA, it remains listed as a BLM "sensitive species" warranting special attention and management. The Sheeprocks population is already at high risk of local extirpation, and BLM's own analysis found that the Sheeprocks sage-grouse population could be further imperiled by oil and gas development. Final EA at 37.

Unique Characteristics. The lease sale area possesses "unique characteristics" because it contains greater sage-grouse PHMA used by a population in critical decline. Numerous courts have found that the "unique characteristics" factor is satisfied where the action affects important wildlife habitat. *See, e.g., Cascadia Wildlands v. Carlton*, No. 6:16-cv-01095-JR, 2017 WL 1807607, *10 (D. Or. Mar. 20, 2017); *Wilderness Soc'y v. U.S. Forest Serv.*, 850 F. Supp. 2d 1144, 1160-61 (D. Idaho 2012); *Native Ecosystems Council & Alliance for the Wild Rockies v. U.S. Forest Serv. ex rel. Davey*, 866 F. Supp. 2d 1209, 1228 (D. Idaho 2012); *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 978-79 (D. Hawai'i

2008). As in these cases, BLM has acknowledged that the leasing action will impact sage-grouse PHMA, undoubtedly important wildlife habitat. *See* Final EA at 31.

Highly Uncertain or Unique Risks. BLM's leasing decision presents "highly uncertain" risks to greater sage-grouse, both locally and range wide. The impacts of BLM's leasing action will depend on factors such as: (a) the success or failure of ongoing mitigation efforts in restoring Sheeprocks population size; (b) changes in habitat quality and connectivity as a result of juniper removal; (c) movement patterns and habitat use of translocated birds; (d) the scale of surface development on both private and federal lands; (e) the number of exceptions granted to the NSO stipulation; and (f) contributions of the Sheeprocks population to the genetic and habitat diversity of the overall population. Science establishes that all of the above may have significant and uncertain effects on sage-grouse and their habitat. Moreover, this uncertainty could have been "resolved by further collection of data." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732 (9th Cir. 2001) ("Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent 'speculation on potential . . . effects.'"). Thus, under NEPA, BLM was required to examine and assess these uncertainties in a comprehensive EIS. *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1081 (E.D. Cal. 2004) (Forest Service was required to conduct an EIS in part due to the uncertain effects of a timber project on northern spotted owls, where the Forest service failed to conduct area surveys to determine whether existing "core areas and home ranges . . . are active or if proposed treatments would reduce the ability of owls to persist in these areas.").

Given the potential loss of the Sheeprocks population and reverberating impacts on the greater sage-grouse species range wide, the proposed oil and gas leasing entails "significant" environmental impacts. BLM's failure to prepare an EIS therefore violates NEPA.

2. *BLM Improperly Tiered its EA to Other NEPA Documents*

BLM "tiered" its assessment to prior EISs which, according to BLM, obviated the need to prepare a separate environmental impact statement. These prior EISs include the 1986 House Range Resource

Area RMP and Final EIS ("HRRA EIS") and the Utah Greater Sage-Grouse Proposed Land Use Plan Amendment and Final EIS ("Utah ARMPA EIS"). *See* FONSI at 2; Final EA at 4–5.

NEPA regulations define "tiering" as "the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses." 40 C.F.R. § 1508.28. Tiering is appropriate only when the prior analysis "adequately assesses the environmental effects of the proposed action and reasonable alternatives." *See* 43 C.F.R. § 46.120(c); *see also id.* § 46.300 ("A bureau must ensure that an [EA] is prepared for all proposed Federal actions, except those . . . [t]hat are covered sufficiently by an earlier environmental document [.]"). Furthermore, an agency must supplement prior NEPA analysis if "[t]here 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).

BLM's tiering was both procedurally and substantively flawed. Substantively, the prior NEPA analyses on which BLM relied did not "adequately" or "sufficiently" cover all significant environmental effects of the leasing action, as required by regulation. *See* 43 C.F.R. §§ 46.120(c), 46.300. The Utah ARMPA EIS was too general to meaningfully address the significant site-specific impacts of oil and gas development on the Sheeprocks sage-grouse, or the reverberating impacts of the loss of this peripheral population on sage grouse range-wide. It also assumed that if a "hard trigger" was tripped due to rapid population declines, habitat protections would immediately go into effect. *See* Utah ARMPA, *supra*, at Appendix I, I-9 (noting adaptive management responses, including conversion to PHMA and "habitat improvement and restoration" projects.").

Moreover, "significant new circumstances or information" have arisen since these EISs were prepared. Most notably, the Utah ARMPA EIS was drafted before recent information came to light showing the sharp downward trend of the Sheeprocks population, leaving it at risk of extirpation. The Utah ARMPA EIS described the population as "stable to increasing." Utah ARMPA EIS at 4-36. Sheeprocks have since tripped the "hard trigger" in the Utah ARMPA. New information about Sheeprocks population numbers and seasonal movements, including detailed telemetry data, have also

since become available. The Sheeprocks area is now the subject of a comprehensive habitat restoration, predation management, and bird translocation program—changed circumstances from those which guided the ARMPA EIS's analysis. For both reasons, BLM improperly concluded that all significant environmental impacts of its leasing decision were adequately addressed in prior EISs.

Procedurally, BLM also inadequately documented its tiering decision. NEPA regulations require BLM to support its decision to tier in the record. *See* 43 CFR § 46.120. The IBLA has summarized this obligation as follows:

> BLM must determine, *with appropriate supporting documentation*, that the existing environmental analyses assess the environmental effects of the proposed action and reasonable alternatives, and the supporting record must include an evaluation of whether new circumstances, new information, or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects. *If BLM fails to do so, the decision that relied upon the inadequate documentation will be set aside and remanded for compliance with 43 C.F.R. § 46.120*.

Montana Trout Unlimited, 178 IBLA 159, 171 (2009) (emphasis added) (setting aside a BLM decision given the "paucity of supporting documentation" of its decision to rely exclusively on existing environmental analyses). Here, BLM failed to appropriately document in the record its determination (1) that the existing EISs adequately assess all significant environmental effects of the leasing action, and (2) that there are no new circumstances or information not previously analyzed that may result in significantly different environmental effects. BLM's EA/FONSI and RD may be set aside on this ground alone.

II. BLM VIOLATED FLPMA, NEPA, AND APA BY FAILING TO PRIORITIZE LEASING OUTSIDE SAGE-GROUSE HABITAT

A. BLM's Interpretation of "Prioritization" is Clearly Erroneous

FLPMA requires the BLM to "manage the public lands . . . in accordance with the land use plans . . ." 43 U.S.C. § 1732(a). Department of Interior regulations also provide that once BLM has approved a land use plan, or "Resource Management Plan" ("RMP"), "all future resource management authorizations and actions . . . shall conform to the approved plan." 43 C.F.R. § 1610.5-3(a). Under this "consistency" requirement, a BLM decision must be set aside if it is not consistent with the operative land use plan,

including by not conforming to RMP measures for conservation and protection of sensitive species such as sage-grouse. *See, e.g., Western Watersheds Project v. Bennett*, 392 F.Supp.2d 1217 (D. Idaho 2005) (reversing BLM grazing decisions not consistent with RMP requirements for protecting sage-grouse); *Western Watersheds Project v. Jewell*, 2014 WL 4853121 (D. Idaho Sept. 29, 2014) (same).

The relevant land use plan in this case, the Utah ARMPA, states that "[p]riority will be given to leasing and development of fluid mineral resources . . . outside of PHMA and GHMA. When analyzing leasing and authorizing development of fluid mineral resources . . . priority will be given to development in non-habitat areas first and then in the least suitable habitat for GRSG." Utah ARMPA, *supra*, at 2-25 (emphasis added). The Great Basin ROD explains the purpose of this prioritization mandate for the Utah ARMPA and other ARPMAs adopted by BLM for the Great Basin region in 2015 as follows:

> [T]he ARMPAs prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs to further limit future surface disturbance and to encourage new development in areas that would not conflict with GRSG. *This objective is intended to guide development to lower conflict areas and, as such, protect important habitat and reduce the time and cost associated with oil and gas leasing development.*

Great Basin ROD, *supra*, at 1-23 (emphasis added).

Nothing in the record demonstrates that BLM prioritized oil and gas leasing outside of identified PHMA. BLM acknowledges its duty to prioritize, but claims that prioritization was not required under the circumstances, explaining as follows:

> The FFO staff had sufficient resources to process and analyze all nine parcels and conduct analysis of the parcels in the PHMA within the given time frame. Had the FFO parcel list been larger or if there were inadequate staff resources, the UTSO, in coordination with the FFO, could have trimmed the parcel list to a manageable size by excluding parcels in greater sage-grouse habitat in accordance with the prioritization sequence criteria and evaluation factors. However, for the September 2017 Lease Sale, there was no need to apply the prioritization sequence criteria because FFO staff were able to conduct the necessary analyses of all parcels.

Final EA at 71. In other words, BLM believes it must do nothing more than "prioritize[e] the order in which [it] processes and analyzes lease nominations." *See* WWP Protest Decision at 3. Because it had sufficient resources to process all nominated parcels in this case, BLM claims there was no need to

prioritize leasing outside sage-grouse priority habitats here in order to protect those habitats, as the ARMPA and Great Basin ROD expressly require.

This interpretation of "prioritization" does not pass muster. To begin, it is inconsistent with the plain language and purpose of the Utah ARMPA. The text states that "priority will be given to *development* in non-habitat areas first." Utah ARMPA, *supra*, at 2-25. It does not merely require prioritization of "*nominations*" in non-habitat areas. Nor does the obligation end after BLM has analyzed all nominated parcels, as BLM claims. The text expressly requires the agency to prioritize "[w]hen *analyzing leasing* and *authorizing development* of fluid mineral resources." *Id.* Indeed, BLM is required to "protect important habitat." Great Basin ROD, *supra*, at 1-23. The words mean just what they say.

BLM's interpretation would also lead to absurd results. It would bring prioritization into play only when a BLM District or Field Office has "inadequate staff resources" and a backlog of nominations to review. It strains reason to conclude that understaffing would be deemed a "key component" of the sage-grouse protections under the Utah ARMPA. The plan amendments demand more.

If the plan drafters intended to prioritize only the review and processing of lease nominations, they knew how to say so. In the context of livestock grazing, the Utah ARMPA imposes an obligation to "[p]rioritize *the review and processing of* grazing permits and leases in SFA, followed by PHMA." Utah ARMPA, *supra*, at 1-11. It does not use the phrase "*review and processing*" in the oil and gas context. Rather, the text imposes a more direct obligation to "Prioritize *the leasing and development of* fluid mineral resources outside of GRSG habitat." *Id.* That distinct phrasing is carried throughout the document. The most natural reading of the text is that something more than administrative prioritization is required of BLM in the oil and gas leasing context. *See Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C. Cir. 2007) ("[W]e have repeatedly held that where different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings.").

BLM's approach to prioritization in this lease sale also breaks with its treatment of prioritization in other recent lease sale EAs. For example, in the Preliminary EA for Wyoming BLM's August 2017

Lease Sale, BLM conducted a detailed prioritization analysis and actually deferred the sale of certain parcels based on their location on important sage-grouse habitat:

> After careful review of the parcels, the BLM has determined that it was appropriate to defer certain parcels nominated for inclusion in the August 2017 oil and gas lease sale . . . . [T]hese deferrals were made consistent with the BLM's sage-grouse conservation plans and strategy, which direct the BLM to prioritize oil and gas leasing and development in a manner than minimizes resource conflicts in order to protect important habitat and reduce development time and costs. Parcels deferred are generally located in sage-grouse important life-history habitat features such as active or occupied leks, and/or are not proximate to existing development, and are in areas of low oil and gas development potential. . . . Parcels WY-1708-153 and WY-1708-154 are proximate or adjacent to federal oil and gas leases with active development and production (within 2 miles of leases currently held by production), and have no known sage-grouse leks within the boundaries. The area is also proximate to bentonite mining claims, disturbance, and activity.

Wyoming Preliminary EA at 1-2 to 1-3, 3-8. In the Wyoming sale, BLM interpreted "prioritization" as more than a clerical objective by weighing the habitat and development potential of the leasing parcels, actively deferring leasing on lands with quality sage-grouse habitat, and instead carrying forward leasing on parcels with higher potential for oil and gas development and lesser habitat quality. This analysis and reasoning is not apparent in this Utah lease sale.

To truly "guide development" outside sage grouse habitat, as the ROD envisions, BLM must go beyond a mere paper shuffling exercise and actively prioritize oil and gas development *outside* sage-grouse priority habitat. BLM's current reading of the prioritization directive is plainly erroneous and contrary to the agency's duty under the Utah ARMPA.

B. BLM Violated NEPA and the APA by Failing to Adequately Assess IM 2016-143's Prioritization Requirements

In addition to violating the "prioritization" obligation of the Utah ARMPA, BLM also violated its own interpretation, contained in IM 2016-143, of what "prioritization" requires. While the Department of Interior contends that IMs do not carry the force of law, BLM's assertion that it complied with IM 2016-143 renders its decision arbitrary, capricious, and in violation of NEPA.

The BLM recently issued an Instruction Memorandum providing guidance to agency officials on the prioritization of sage-grouse habitat when making oil and gas leasing decisions. *See* Implementation

of Greater Sage-Grouse Resource Management Plan Revisions or Amendments – Oil and Gas Leasing and Development Sequential Prioritization, BLM Instruction Memorandum 2016-143 ("IM 2016-143").[18] The IM requires BLM to employ a two-step prioritization process. The first step, the "prioritization sequence," requires BLM to sort the leases by category (non-habitat, GHMA, and PHMA) and prioritize leasing first in non-habitat, then in GHMA, then in PHMA. *Id.* The second step, the "parcel-specific factors," requires BLM to prioritize individual parcels within each of these three categories (non-habitat, GHMA, and PHMA) according to the following prioritization factors:

- Parcels immediately adjacent or proximate to existing oil and gas leases and development operations or other land use development should be more appropriate for consideration before parcels that are not near existing operations. This is the most important factor to consider, as the objective is to minimize disturbance footprints and preserve the integrity of habitat for conservation.

- Parcels that are within existing Federal oil and gas units should be more appropriate for consideration than parcels not within existing Federal oil and gas units.

- Parcels in areas with higher potential for development (for example, considering the oil and gas potential maps developed by the BLM for the GRSG Plans) are more appropriate for consideration than parcels with lower potential for development. The Authorized Officer may conclude that an area has "higher potential" based on all pertinent information, and is not limited to the Reasonable Foreseeable Development (RFD) potential maps from Plans analysis.

- Parcels in areas of lower-value sage-grouse habitat or further away from important life-history habitat features (for example, distance from any active sage-grouse leks) are more appropriate for consideration than parcels in higher-value habitat or closer to important life-history habitat features (i.e. lek, nesting, winter range areas). At the time the leasing priority is determined, when leasing within GHMA or PHMA is considered, BLM should consider, first, areas determined to be non-sage-grouse habitat and then consider areas of lower value habitat.

- Parcels within areas having completed field-development Environmental Impact Statements or Master Leasing Plans that allow for adequate site-specific mitigation and are in conformance with the objectives and provisions in the GRSG Plans may be more appropriate for consideration than parcels that have not been evaluated by the BLM in this manner.

[18] The Instruction Manual explains that its guidance "is intended to ensure *consideration* of the lands outside of GHMAs and PHMSs for leasing and development before *considering* any lands within PHMAs for leasing and development" and that lands outside of PHMAs and GHMAs "should be the first priority for leasing *in any given lease sale*." IM 2016-143 (emphasis added). Insofar as the IM demands only prioritized review and processing of nominations outside Sage-Grouse habitat, the IM suffers from the same deficiencies outlined above, and fails to ensure compliance with the Utah ARMPA.

- Parcels within areas where law or regulation indicates that offering the lands for leasing is in the government's interest (such as in instances where there is drainage of Federal minerals, 43 CFR § 3162.2-2, or trespass drilling on unleased lands) will generally be considered more appropriate for leasing, but lease terms will include all appropriate conservation objectives and provisions from the GRSG Plans.

- As appropriate, use the BLM's Surface Disturbance Analysis and Reclamation Tracking Tool (SDARTT) to check EOI parcels in PHMA, to ensure that existing surface disturbance does not exceed the disturbance and density caps and that development of valid existing rights (Solid Minerals, ROW) for approved-but-not-yet-constructed surface disturbing activities would not exceed the caps.

Id. at "Factors to Consider While Evaluating EOIs in Each Category."

BLM asserts that it complied with IM 2016-143. *See* Final EA at 2–3, 20, 71-72. However, the EA provides absolutely no discussion of the parcel-specific factors or evidence that the agency applied the "prioritization sequence." In its response to protests, BLM explains this omission by arguing, once again, that it had sufficient resources to process all nominations, obviating the need to prioritize. *See* TWS Protest Decision at 3. It explained that it did not discuss the parcel-specific factors in the EA "for this same reason." *Id.* at 4.

This interpretation is inconsistent with the language of the IM 2016-143, which does not relieve BLM of the obligation to assess the site-specific factors simply because it has adequate resources to review and process all nominated parcels. It also breaks with its treatment of prioritization in other recent lease sale EAs. For example, in the Final EA for Wyoming BLM's August 2017 Lease Sale in the Wind River/Bighorn Basin District, BLM expressly applied the parcel-specific factors and described how the factors informed its proposed action. *See* BLM-Wyoming August 2017 Competitive Oil & Gas Lease Sale Wind River/Bighorn Basin District, Environmental Assessment, DOI-BLM-WY-R000-2017-0001-EA at 1-2 to 1-3. The Final EA for Utah's December 2017 Oil and Gas Lease Sale in the Vernal Field Office did the same. *See* December 2017 Competitive Oil and Gas Lease Sale, Environmental Assessment, DOI-BLM-UT-G010-2017-0028-EA at 35–45.

Had the EA discussed these site-specific factors, its analysis would have revealed that at least three key factors weigh against leasing these nine parcels. As for factor 4, the parcels encompass or are

adjacent to PHMA of high value to a sage-grouse population which the BLM itself has stated is in jeopardy. The PHMA portions of the parcels include 1,908.2 acres of sagebrush habitat used for two important sage-grouse life-history activities: winter habitat and brood-rearing. *See* Final EA at 24, Table 5. As for factors 1 and 3, these parcels are far from existing development and fall on lands with low potential for successful development. *See* Final EA at 8–9. All three factors weigh in favor of deferring leasing on some or all of the parcels.

The IBLA has previously held that an IM is not a regulation and does not have the force and effect of law. *See Biodiversity Conservation Alliance*, 174 IBLA 174, 180 (2008); *see also Wyoming Outdoor Council*, 171 IBLA 153, 167 (2007). Nonetheless, BLM's failure to apply the prioritization sequence and parcel-specific factors, where it purported to comply with IM 2016-143, is arbitrary, capricious, and a violation of NEPA. *See Ecology Center v. Austin*, 430 F.3d 1057, 1069-70 (9th Cir. 2005) (overruled on other grounds by *Lands Council v. McNair*, 537 F.3d 981, 991 (9th Cir. 2008) (en banc) (concluding that the Forest Service's failure to comply with a non-binding soil standard was arbitrary and capricious, and "misleading in violation of NEPA," where its own EIS purported to comply with the standard); *Cotton Petroleum Corp vs. United States Department of the Interior, Bureau of Indian Affairs*, 870 F.2d 1515, 1527 (10th Cir. 1989) (finding that BIA acted arbitrarily by failing to discuss or analyze factors set forth in internal guidance memorandum); *see also ACAP Fin., Inc. v. U.S. S.E.C.*, 783 F.3d 763, 767 (10th Cir. 2015) (holding that "an agency's unexplained failure to consult its own decisional guidelines can be the makings of a claim of arbitrary decision-making and the basis for reversal."); *see also Resources Ltd. v. Robertson*, 35 F.3d 1300, 1304 n. 3 (9th Cir. 1994) (concluding that the Forest Service could not treat the Interagency Grizzly Bear Guidelines as optional where the Fish and Wildlife Service made its "no jeopardy" conclusion contingent on adherence to the Guidelines); *Animal Def. Council*, 840 F.2d at 1439 (noting that a misleading EIS violates NEPA).

Here, as in *Ecology Center*, 430 F.3d 1057, BLM purported to comply with IM 2016-143 in its NEPA analysis. The EA asserts that "[t]he Fillmore Field Office prioritized proposed lease parcels

outside of sage-grouse PHMA and GHMA *consistent with the IM*" and "based on . . . *parcel-specific* factors[] elected to consider leasing 4 parcel within PHMA as well." Final EA at 3. However, there is no evidence in the record that BLM actually considered the parcel-specific factors or otherwise complied with the IM. Its failure to do so was arbitrary, capricious, and a violation of NEPA. *ACAP Fin.*, 783 F.3d at 767; *Ecology Center*, 430 F.3d at 1069.

III. BLM VIOLATED FLPMA BY FAILING TO FOLLOW THE UTAH ARMPA'S HARD TRIGGER ADAPTIVE MANAGEMENT RESPONSES

BLM also violated FLPMA's consistency requirement by failing to apply all "hard trigger" adaptive management responses required under the Utah ARMPA in response to the declining Sheeprocks population.

The Utah ARMPA includes a variety of adaptive management responses to be applied if certain habitat or population criteria are met. *See generally* Utah ARMPA, *supra*, at Appendix I. The Sheeprocks population recently tripped these "hard trigger" management responses due to its dramatic population declines. As described in the Utah ARMPA, a hard trigger "represent[s] a threshold indicating that immediate action is necessary to stop severe deviation from GRSG conservation objectives set forth in the ARMPA." *Id.* at 4-3. The ARMPA also provides that "[t]here should be no expectation of hitting a hard trigger; if unforeseen circumstances occur that trip either a population or habitat hard trigger, more restrictive management will be required." *Id.* at Appendix I, I-7.

One of the mandatory management responses reads as follows:

> [I]n the event that new scientific information becomes available demonstrating that the hard wired response would be insufficient to stop a severe deviation from GRSG conservation objectives set forth in the BLM plan, the BLM will immediately implement a formal directive akin to BLM Instruction Memorandum 2012-043 to protect GRSG and its habitat and to ensure that conservation options are not foreclosed in the area where the trigger has been met.

Id. at I-10.

The facts now in BLM's possession about the severe decline of the Sheeprocks population and its habitat, and its grim prospects for recovery, *see, e.g.*, Braun Decl. ¶¶ 26-31, amount to "new scientific information . . . demonstrating that the hard wired response would be insufficient to stop a severe

deviation from GRSG conservation objectives." Additionally, allowing oil and gas leasing on these parcels would "foreclose future conservation options" for the Sheeprocks population, insofar as it would result in irrevocable habitat loss and other disturbances within and surrounding the affected PHMA. Accordingly, BLM is obligated to "immediately implement a formal directive . . . to protect GRSG and its habitat[.]" Utah ARMPA, *supra*, at I-10. Its failure to do so is contrary to its obligations under the Utah ARMPA and a violation of FLPMA.

Accordingly, for the reasons above and set forth in Appellant's comments and protest, the BLM's challenged EA, FONSI, and DN are arbitrary, capricious, an abuse of discretion, and contrary to law, and they along with the lease sale decisions challenged here should be reversed and remanded.

PETITION FOR STAY

Pursuant to 43 C.F.R. § 4.21, Appellants respectfully request that the IBLA grant a stay of the challenged DR, EA, FONSI, and any agency actions in reliance on the unlawful NEPA analysis. As shown above, Appellants are likely to succeed on the merits of their claims that BLM violated NEPA, FLPMA, and the APA in authorizing the September 2017 Oil and Gas Lease Sale. Moreover, a stay of BLM's decisions and further leasing is necessary to prevent irreparable harm to the environment and Appellants. In contrast, a stay while this Board deliberates will not harm BLM or any other party. Finally, the public interest favors environmental protection and legal compliance in this case. Appellants therefore meet all the requirements for a stay.

I. LEGAL STANDARD FOR A STAY

To prevail on a petition for stay, Appellants must demonstrate that (1) the balance of harms weighs in favor of granting a stay, (2) they are likely to succeed on the merits of the appeal, (3) irreparable harm is likely if a stay is not granted, and (4) the public interest favors granting a stay. 43 C.F.R. § 4.21(b)(1). As this Board has explained:

> In balancing the likelihood of movant's success against the potential consequences of a stay on the other parties it has been held that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus more deliberative investigation.

Wyo. Outdoor Council Inc., 153 IBLA 379, 388 (2000) (internal quotes omitted).

II. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS

In requesting a stay, an appellant need only raise "serious questions" going to the merits. *Wyoming Outdoor Council*, 153 IBLA 379, 388 (2000); *Sierra Club*, 108 IBLA 381, 384–85 (1989). An appellant's likelihood of success need not be "free from doubt." *Jan Wroncy*, 124 IBLA 150, 152 (1992); *Island Mountain Protectors*, 144 IBLA 168 (1997). Appellants meet these standards. As explained above, BLM's EA, FONSI, DN and lease decisions were based on inadequate environmental analysis in violation of NEPA, failed to comply with the applicable land use plan in violation of FLPMA, and are arbitrary, capricious and an abuse of discretion, in violation of the APA. Appellants are thus likely to succeed on the merits of these claims.

III. APPELLANTS WILL SUFFER IRREPARABLE HARM

A. Appellants Will Suffer Irreparable Harm to Their Interests in the Affected Wildlife and Habitat if a Stay Is Not Granted

Appellants face a significant risk of irreparable environmental harm if a stay is not granted. BLM's Fillmore field office has already leased several of the parcels and may lease more, granting the right for lease holders to move forward with developing their leases, and BLM may grant exceptions to the NSO stipulation without any further NEPA analysis. Appellants will be irreparably harmed by injury to the Sheeprocks greater sage-grouse population and its habitat if oil and gas development proceeds on the lease sale parcels. The nature and extent of these effects are discussed above and in the accompanying Declaration of Dr. Clait Braun. Moreover, any impacts to sagebrush habitat are likely irreparable. *See* Minnick and Alward, *supra* (suggesting that disturbances may be permanent).

BLM may argue that simply offering parcels for leasing will not result in irreparable harm, because lessees must submit an Application for Permit to Drill ("APD") before oil exploration and other surface-disturbing activities can begin. However, the lease issuance represents a critical legal event that conveys the lessee certain, defined surface use rights. *See* 43 C.F.R. § 3101 .1-2 ("A lessee shall have the

right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove, and dispose of all the leased resource in a leasehold . . ."). Once a lease is issued, BLM's authority to impose conditions on or reject APDs is limited by statute and regulation. Therefore, courts routinely note that the point of "irretrievable and irreversible commitment" occurs at the point of lease issuance. *See S. Utah Wilderness All. v. Norton*, 457 F. Supp. 2d 1253, 1256 (D. Utah 2006).

B. Appellants Will Suffer Irreparable Harm From Bureaucratic Commitment to the Lease Sale, Even if NEPA Compliance Is Later Demanded

Irreparable injury is also threatened here because the inadequate NEPA compliance will skew BLM's decisionmaking toward its original decision to approve leasing on all parcels. "Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide.'" *Com. of Mass. v. Watt*, 716 F.2d 946, 952–53 (1st Cir. 1983). Thus, if the agency is allowed to proceed before the environmental analyses is complete, there is a risk that the NEPA analysis will be skewed toward the agency's original decision. *Id.*

The Tenth Circuit and other courts of appeals have long held that this phenomenon may justify a preliminary injunction in NEPA cases, even where no immediate environmental harm is likely. In *Davis*, for example, the Tenth Circuit concluded that plaintiffs would suffer irreparable injury if a highway project was allowed to proceed because "if any construction is permitted on the Project before the environmental analyses is complete, a serious risk arises that the analysis of alternatives required by NEPA will be skewed toward completion of the entire Project." 302 F.3d at 1115.

Similarly, in *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989), the First Circuit found a likelihood of irreparable harm from delayed NEPA compliance, reasoning as follows:

> A district court, when considering a request for a preliminary injunction, must realize the important fact of administrative life that we described in *Watt*: as time goes on, it will become ever more difficult to undo an improper decision (a decision that, in the presence of adequate environmental information, might have come out differently). The relevant agencies and the relevant interest groups (suppliers, workers, potential customers, local officials, neighborhoods) may become ever more committed to the action initially chosen. They may become ever more reluctant to spend the ever greater amounts of time, energy and money that would be needed to

> undo the earlier action and to embark upon a new and different course of action. And the court, under NEPA, normally can do no more than require the agency to produce and consider a proper EIS. It cannot force the agency to choose a new course of action. Given the realities, the farther along the initially chosen path the agency has trod, the more likely it becomes that any later effort to bring about a new choice, simply by asking the agency administrator to read some new document, will prove an exercise in futility.

Id.; *see also Watt*, 716 F.2d at 952 (finding a likelihood of irreparable harm from non-compliance with NEPA even though the challenged oil and gas lease sale did not entitle lease buyers to drill for oil immediately); *Colorado Wild v. United States Forest Serv.*, 523 F. Supp.2d 1213, 1220-21 (D. Colo. 2007) (finding irreparable harm in "difficulty of stopping 'a bureaucratic steam roller' once it is launched").

Here, too, the more time and resources BLM and lessees are allowed to invest in developing these parcels, the greater the likelihood that future compliance with NEPA and FLPMA will prove to be a merely empty gesture. Therefore, despite the additional bureaucratic steps BLM would have had to take before the physical effects of oil and gas leasing are fully realized, the failure to follow NEPA creates a risk that real environmental harm will occur. Thus, a stay is necessary to ensure that Appellants can obtain meaningful relief in this case.

IV. THE BALANCE OF HARMS FAVORS A STAY

In contrast, there is little to no harm to BLM from a stay. BLM may claim that a stay would result in economic harm to oil and gas lessees, but this prong of the test is not concerned with harm to non-parties. This is also not a case where an injunction would halt ongoing economic activity; it would simply delay the issuance of new leases. Further, economic harm is not irreparable, especially where any stay would be only temporary. *See S. Fork Band Council*, 588 F.3d at 728 (economic injuries to mining operations temporary); *S.E. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1101 (9th Cir. 2006) ("there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the mine's operation"); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) ("loss of anticipated revenues . . . does not outweigh the potential irreparable damage to the environment"). Any

harm to the agency in delaying its receipt of sale proceeds would be minimal and not irreparable. The September 2017 Lease Sale auction brought in only $14,837. *See* BLM, September 12, 2017 Sale Results, *supra*.

Moreover, granting a stay actually furthers BLM's interests, insofar as it will allow the agency to adequately study the potential impacts to greater sage-grouse, reduce the likelihood and need for the species to be listed under the ESA, and therefore avoid constraining BLM's flexibility in managing public lands across the sage-grouse range.

V. THE PUBLIC INTEREST SUPPORTS A STAY

Finally, the issuance of a stay would serve the public interest. Allowing oil and gas development to proceed would leave critical wildlife and habitat vulnerable to permanent damage. Courts have "held time and again that the public interest in preserving nature and avoiding irreparable injury outweighs economic concerns . . . ." *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005)." Here, too, the risk to the environment is of greater public interest than hasty leasing of these lands. And to allow the BLM to begin issuing leases before it has fully analyzed the project's impacts, or ensured compliance with the applicable land use plan, would harm the public's interest in reasoned government decisionmaking and lawful management of public lands. *See Sierra Forest Legacy*, 526 F.3d at 1234 (citing Amoco, 480 U.S. at 545) (noting the public's inherent interest in enforcing environmental laws).

CONCLUSION

Appellants respectfully pray that the IBLA grant a stay of the challenged DR, FONSI, and EA and, following a review on the merits, reverse and set aside such decisions and vacate any unlawfully issued leases.[19]

Respectfully submitted this 30th day of October 2017.

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Attorneys for Appellants

[19] If the IBLA does not timely grant a stay of the BLM decisions challenged here, Appellants—or any of them—reserve the right to dismiss their appeal and seek relief in federal court.

CERTIFICATE OF SERVICE

I certify that on October 30, 2017, I served this Notice of Appeal, Statement of Reasons, and Petition for Stay, together with exhibits, by FEDERAL EXPRESS NEXT DAY DELIVERY ~~certified mail, return receipt requested~~, upon:

Interior Board of Land Appeals
Office of Hearings and Appeals
U.S. Department of the Interior
801 N. Quincy St., Ste. 300
Arlington, VA 22203

Regional Solicitor, Intermountain Region
U.S. Department of the Interior
6201 Federal Building
125 South State St.
Salt Lake City, UT 84138-1180

State Director and Deputy State Director
BLM Utah State Office
440 West 200 South, Suite 500
Salt Lake City, UT 84101-1345

Laird J. Lucas, Advocates for the West