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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. 2018-0013

Appeal of September 2017 Competitive Oil
and Gas Lease Sale Decision Record,
Finding of No Significant Impact, and
Environmental Assessment (DOI-BLM-
UT-W020-2017-0001-EA)

**APPELLANTS’ RESPONSE IN
OPPOSITION TO BLM’S MOTION
TO DISMISS**

Appellants Western Watersheds Project (“WWP”), Center for Biological Diversity (“CBD”), and American Bird Conservancy (“ABC”) (collectively, “Appellants”) hereby submit this Response in Opposition to the Motion to Dismiss filed by Respondent Bureau of Land Management (“BLM”) on November 8, 2017. Attached as exhibits are a Supplemental Declaration of Colyn Kilmer (**Exhibit A**) and map of the lease sale area obtained by FOIA request from BLM (**Exhibit B**). This response brief is also supported by the Declarations of Kevin Mueller, Colyn Kilmer, Steve Holmer, Amy Haak, Ph.D., and Dr. Clait Braun, all

previously submitted in support of Appellants' Notice of Appeal, Statement of Reasons, and Petition for Stay.¹

For the reasons discussed below, Appellants respectfully request that the Board deny BLM's Motion to Dismiss in its entirety.

LEGAL STANDARD

Standing is governed by 43 C.F.R. § 4.410, which requires an appellant to demonstrate it is both a "party to a case" and "adversely affected" by the decision. 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).

Adverse effect "may be shown through evidence of use of the land in question." *Wyoming Outdoor Council*, 153 IBLA 379, 384 (2000). However, "one may also establish he or she is adversely affected 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." *The Coalition of Concerned National Park Retirees, et al.*, 165 IBLA 79, 84 (2005). "In the oil and gas lease sale context, if one can show a connection between a legally cognizable interest that would likely be injured by leasing one or more parcels, then one has established he or she is or may be adversely affected as to those parcels." *Id.* "Such interests may include cultural, recreational, and aesthetic use and enjoyment of the public lands, including

¹ Appellants reserve the right to submit supplemental standing declarations from their members who, due to personal circumstances, were unable to prepare such declarations before the response deadline.

lands in the area of a parcel for which leasing has been proposed.” *Colorado Environmental Coalition, et al.*, 173 IBLA 362, 367 (2008).

“[T]he threat of injury and its effect on the appellant must be more than hypothetical.” *Western Watersheds Project*, 185 IBLA 293, 299 (2015) (quoting *Colorado Open Space Council*, 109 IBLA 274, 280 (1989)). However, “[t]he appellant need not prove that an adverse effect will, in fact, occur as a result of the BLM action.” *Id.* A threat of injury will suffice, so long as it arises beyond “mere speculation.” *Id.*

Where “the appellant is an organization that claims to have standing to sue on behalf of its members, it must show that (1) its members would have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) the issues to be resolved do not require the individual participation of the members.” *Pres. Of Los Olivos v. Pacific Reg’l Director*, 58 IBLA 278, 282 n.6 (2014).

ARGUMENT

BLM has filed a motion to dismiss this appeal for lack of standing. BLM does not dispute that Appellants are parties to the case, but rather claims that Appellants fail to meet the “adversely affected” prong of the standing requirement. Specifically, BLM argues that Appellants fail to establish a “geographical nexus” to the specific land and resources affected by the September Lease Sale, and that that any harm from the September lease sale is purely speculative.

BLM is wrong as a matter of law and fact. Its motion ignores numerous details in Appellants’ supporting declarations and misconstrues this Board’s standing jurisprudence. Contrary to BLM’s position, Appellants’ members meet the requirements of standing under 43 CFR § 4.410. They have set forth several concrete aesthetic and recreational interests in the lease

sale parcels themselves and adjacent lands that will be impacted by the challenged action, and the record demonstrates that there is a substantial risk of such impacts if leasing proceeds. For these reasons, set forth in detail below, the Board should deny BLM's Motion to Dismiss.

I. APPELLANTS' MEMBERS WILL BE ADVERSELY AFFECTED BY THE OIL AND GAS LEASE SALE

Appellants have established all three elements of associational standing. As explained below, Appellants' expert and member/staff declarations establish that the oil and gas lease sale will adversely affect the interests of ABC, CBD, and WWP and their staff and members in several respects, including by harming their scenic and recreational interests, wildlife viewing, and conservation of the Sheeprocks sage-grouse population and greater sage-grouse as a species.

CBD, WWP, and ABC have each established that one or more of their members has aesthetic and recreational interests in the land and resources that will be adversely affected by the September 2017 oil and gas lease sale. They have demonstrated the requisite geographic nexus, by connecting their members' interests to the particular scenic resources and bird populations that will be impacted by that lease sale. Finally, they have established that the threat of injury from exploratory drilling is not merely speculative. Accordingly, Appellants have adequately established that they will be "adversely affected" by the decision being appealed to as to establish standing under 43 CFR 4.410.

A. CBD and WWP Members Have Established Aesthetic and Recreational Interests in the Scenic Resources that will be Adversely Affected

Declarants for WWP and CBD—Kevin Mueller and Colyn Kilmer—attest that they have frequently traversed through or within view of the lease sale nine parcels and that visual impacts from the September 2017 lease sale would detract from their scenic enjoyment of this area.

The lease sale parcels are located in the remote and scenic West Desert region of central Utah, west of the towns of Nephi and Levan. *See* Final EA at 69 (parcel map); *see also* Exhibit B (parcel map). The landscape consists of broad sagebrush valleys accented by low mountain ranges. *See* Final EA at 21. The western parcels encompass portions of Dog Valley and Sage Valley. *See* Exhibit B. These valleys are flanked to the west by Furner Ridge and the East Tintic Mountains. *Id.* The eastern parcels encompass parts of the West Hills, a small mountain range running alongside Highway 15. *Id.* The Uinta National Forest and Mount Nebo Wilderness Areas begin roughly seven miles to the east of these parcels, just beyond Nephi and Levan. *Id.* These ranges overlook the hills and valleys containing the nine lease sale parcels. *Id.*; *see also* Kilmer Supp. Decl., Ex. A. ¶ 5. (“When you get up into the mountains between Levan and Wales, you can see west a long way, over into the West Hills and Sheeprocks”). Several scenic roads cut across the West Desert and near the nine lease sale parcels, including Highway 15 and Utah Route 132. *Id.*

Oil and gas leasing would impact the visual resources and scenic character of the landscape in and around the lease parcels. The visual impacts of oil and gas development include the construction of well-pads and new access roads, presence of drilling equipment, the visual contrast from vegetation clearing, increased traffic associated with operations, fugitive dust, and construction of other ancillary facilities in producing fields. *See* Final EA at 6–9 (discussing visual impacts, such as well-pad and road construction).²

² *See also, e.g.*, U.S. Bureau of Land Mgmt., DOI-BLM-UT-G010-2015-089-EA, Environmental Assessment: November 2015 Lease Sale 38 (Nov. 2015), https://eplanning.blm.gov/epl-front-office/projects/nepa/55342/70745/77437/Vernal_508_Compliant_EA_2-29.pdf (discussing visual impacts of oil and gas development in more detail)

Given the West Desert's open terrain, and the proximity of nearby roads, any surface disturbances on the nine parcels and adjacent federal lands would impact the viewsheds of Highway 15 and Utah Route 132. Highway 15 runs along the eastern edge of the lease parcels, directly through Parcel 006, less than one mile from Parcel 005, three miles from Parcel 004, and four miles from Parcel 009. Route 132 runs east-west through the lease sale area, directly through Parcel 001 and within one mile of parcels 002, 003, and 007. It passes just three miles from Parcel 008. Assuming a viewing distance of just five miles, surface disturbances on all nine lease sale parcels will be visible to drivers on these two roads.

The visual impacts from the challenged lease sale would not be restricted to these nine parcels. As acknowledged in the Final EA, leasing would encourage development on adjacent non-federal lands in Dog Valley to directionally access federal minerals on the PHMA portions of parcels 001, 002, 003, and 007, which are subject to a No Surface Occupancy stipulation. *See* Final EA at 31. This private surface development would have potentially greater visual impacts to drivers, as the private lands adjacent to these PHMA parcels lie even closer to Utah Route 132.

The inevitable surface disturbance on the lease sale parcels, and resulting degradation of the viewsheds from Highway 15 and Route 132, will adversely affect Appellants' members. Members of WWP and CBD have established that they routinely drive through the lease sale area to enjoy the views, solitude, and wildlife. Their declarations also establish that visual impacts from the September 2017 lease sale would detract from their scenic enjoyment of this area and deter them from recreating in the West Desert. *See* Kilmer Decl.; Mueller Decl.; Kilmer Supp. Decl. Specifically, Colyn Kilmer, an employee and member of CBD, indicates that she has "taken many scenic drives along [Utah State Route] 132" including the segment which runs

through the lease sale parcels. Kilmer Supp. Decl. ¶¶ 3, 8; *see also* Kilmer Decl. ¶ 9. She describes Route 132 as “a relatively quiet two-lane road with not too much traffic and beautiful scenery.” Kilmer Supp. Decl. ¶ 3. She enjoys pulling off to side roads along the way “to sit and enjoy the environment” and “see what wildlife might be out and about.” *Id.* Kilmer also testifies that she has “taken numerous scenic drives on Interstate 15” and notes that the section passing through parcel 006 is “especially impressive” due to its views of the San Pitch Mountains to the east and West Hills to the west. *Id.* ¶ 4. She considers this area to be her home and plans to return to this area “within the near future.” Kilmer Supp. Decl. ¶¶ 7, 8; Kilmer Decl. ¶ 13. She indicates that her scenic and recreational value “would be drastically diminished by oil and gas leasing” in this area,” Kilmer Supp. Decl. ¶¶ 8, 12, and that leasing would impair her future plans to visit the West Desert. *See* Kilmer Decl. ¶ 13 (“Construction of oil wells, roads, and other surface infrastructure would degrade the scenery, wildlife, and wilderness values in the region and deter me from visiting the region to recreate and find sanctuary.”).

Kevin Mueller, employee and member of WWP, has similar interests in the scenery and wilderness quality of the lands that will be impacted by the lease sale. *See* Mueller Decl. ¶ 18. He notes that the lease sale parcels are located along the roads that serve as the “gateway to Utah’s West Desert” and that he has driven through this gateway “so many times over the last two decades that I have lost count.” *Id.* ¶ 15. Mueller asserts an aesthetic interest in the scenery and remoteness of the landscape along this corridor. *Id.* ¶ 13 (“Traveling from east to west, it is right as you come over the West Hills that one finds oneself breathing a deep sigh of relief and relaxation as one enters into the remote and magically quiet West Desert.”). He points out that this stretch of Route 132 “is exactly where the proposed oil and gas lease parcels overlap with the sage grouse Priority Habitat Management Areas (PHMA).” *Id.* Mueller also attests that oil

and gas leasing in this area would impair his future plans to recreate in the West Desert area. *Id.*

¶ 18 (“Construction of oil wells, roads, and other surface infrastructure would degrade the scenery, wildlife, and wilderness values in the region and deter me from visiting the region to recreate and to practice grounding, mindfulness and rejuvenation.”).

The Board has routinely stated that both recreational and aesthetic enjoyment are legally cognizable interests under 43 C.F.R. § 4.410. *See Colorado Environmental Coalition, et al.*, 173 IBLA 362, 367 (Feb. 27, 2008) (“Such interests may include cultural, recreational, and aesthetic use and enjoyment of the public lands, including lands in the area of a parcel for which leasing has been proposed.”). In *The Coalition of Concerned National Park Service Retirees*, 165 IBLA 79 (2005), the Board more specifically held that deterioration of a road’s viewshed is a cognizable injury for standing purposes. In that appeal of an oil and gas lease sale, environmental appellants submitted a declaration from a member stating that, on his camping trips to the Dinosaur National Monument, he had “stopped at several points along Harper’s Corner Drive to enjoy the spectacular views; observe wildlife, including countless deer and small flocks of sage grouse.” *Id.* at 86–87. The Board found that the member’s statement that “he drove Harpers Corner Drive to Echo Park within the Monument and stopped at several points to enjoy the views and observe wildlife connects those organizations’ interest in visual resources and wildlife to all 27 parcels” and that appellants therefore had a “right to appeal BLM’s decision dismissing the protest as to all 27 parcels.” *Id.* at 87; *accord S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1155 (10th Cir. 2013) (finding member’s statement that he “traversed through or within view of the parcels of land where oil and gas development will occur, and plans to return as often as possible” sufficient to confer standing; district court “misapplied the law when it rejected standing on the basis that the affidavits failed to show its members have visited each of the [39]

leases at issue”). Just as in *Coalition of Concerned National Park Service Retirees*, the statements of Kilmer and Mueller that they have driven and enjoyed the views from Route 132 and Highway 15 connects their interests to all nine parcels.

Moreover, Kilmer and Mueller both established that the lease sale would adversely affect their recreational interests in the West Desert, insofar as the unsightly impacts from oil and gas development would deter them from recreating there in the future. *See* Mueller Decl. ¶ 18; Kilmer Decl. Ex A. ¶ 13. The U.S. Supreme Court has long recognized deterrence of future recreation as an injury sufficient to confer standing. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000); *see also National Wildlife Federation v. U.S. Army Corps of Engineers*, 170 F. Supp.3d 6 (D.D.C. 2016) (holding that recreationist’s avoidance of unsightly river infrastructure was a cognizable injury for purposes of standing, because “[i]njury can take the form of adjusting behavior”).

B. ABD Has Established an Interest in the Bird Populations that Will Be Adversely Affected by the Lease Sale

ABC has established that the September 2017 lease sale will adversely affect its members’ interest in observing, studying, enjoying the local bird populations that inhabit the lease sale and surrounding area, including greater sage-grouse.

In support of its statement of standing, ABC submitted the declaration of long-time ABC employee Steve Holmer. Holmer explained that ABC is a national bird conservation organization and its members and supporters routinely observe birds in sagebrush communities in Utah and have an interest in birds located “in the lease sale parcels, surrounding area, and other sagebrush communities in central Utah.” Holmer Decl. ¶¶ 3, 10. He notes that the nine lease sale parcels include habitat for several bird species of interest to ABC members, including the “Long-billed Curlew, Loggerhead Shrike, Sage Sparrow, Brewer’s Sparrow, and Greater Sage-Grouse, all of

which depend on sagebrush communities for breeding, nesting, and/or wintering.” *Id.* ¶ 10. The lease sale will decrease the abundance of these bird species and their habitat, degrading the bird-watching opportunities in the lands these bird populations inhabit, which extend far beyond the lease sale parcels themselves. *Id.* As explained in the expert declarations of Dr. Clait Braun (one of the world’s leading sage-grouse authorities, who is also familiar with the Sheeprocks area and sage-grouse population), and Amy Haak, Ph.D. (a geographer and conservation biologist who analyzed sage-grouse habitat and population data in the area), the oil and gas lease sale poses significant adverse impacts both to the local Sheeprocks sage-grouse population and to greater sage-grouse more broadly. Indeed, BLM itself forecasts impacts to the Sheeprocks population of sage-grouse. *See* Final EA at 31–32, 35. Holmer thus explains that, “[i]f allowed to proceed, the challenged lease sale would impair the interests of ABC’s staff, members, and supporters who observe, study, enjoy, and otherwise benefit from the sagebrush habitat and birds in the lease sale parcels, surrounding area, and other sagebrush communities in central Utah.” *Id.*

Holmer’s declaration establishes that ABC members have an interest in observing, studying, and otherwise enjoying the specific bird populations whose numbers and habitat will be adversely affected by the lease sale. It is well-established that the desire to “observe an animal species, even for purely esthetic purposes, is . . . a cognizable interest for purpose[s] of standing.” *See Lujan*, 504 U.S. at 562–63. Accordingly, ABC has demonstrated that its standing to appeal BLM’s decision under the IBLA regulations.

C. Appellants Have Also Established Procedural Injuries for NEPA Standing

NEPA is a procedural statute, intended to “ensure[] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983). An agency’s failure to comply with NEPA creates an increased risk of environmental harm, due to the agency’s uninformed decisionmaking. *See Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445 (10th Cir. 1998). This injury is cognizable for standing purposes, provided the plaintiff can show a geographic or other “nexus” to the violation. *See Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 484-86 (9th Cir. 2011) (requiring a geographic nexus “between the individual asserting the claim and the location suffering an environmental impact.”) (internal citations omitted); *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445 449 (10th Cir. 1998) (requiring a “‘geographical nexus’ to, or actual use of the site”); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 & fns 7-8 (1992); *Cantrell v. City of Long Beach*, 241 F.3d 674, 679-90 (9th Cir. 2001) (noting that “NEPA is a procedural statute,” and holding that birdwatchers had standing based on NEPA “procedural injuries” to challenge EIS for failing to disclose impacts on birds at site they regularly viewed); *Citizens for Better Forestry v. Dept. of Agriculture*, 341 F.3d 961, 971 (9th Cir. 2003) (plaintiffs had standing based on procedural injuries under NEPA, where they used affected areas).

Here, BLM has violated Appellants’ procedural rights under NEPA by failing to prepare an EIS and relying instead on an inadequate EA. *See* SOR. BLM’s disregard of its procedural violations have led to an increased risk of environmental harm to the land and resources that will be affected by the lease sale. *Id.* As explained below, Appellants have established that they will suffer from these environmental consequences by virtue of their geographic nexus to the land

and resources that will be affected by the lease sale. Therefore, they have also alleged a cognizable procedural injury sufficient to confer standing to raise their NEPA claims.

II. APPELLANTS HAVE ESTABLISHED THE REQUISITE GEOGRAPHIC NEXUS TO THE AFFECTED LAND AND RESOURCES

BLM wrongly asserts that Appellants “fail to establish a geographical nexus to the specific lands and resources *encompassed* by the particular parcels offered in the September lease sale.” Motion to Dismiss at 4 (emphasis added).³

Contrary to BLM’s claim, Appellants have established a geographic nexus between their members’ interests and the precise viewsheds that will be degraded by the lease sale. Both declarants Mueller and Kilmer establish that they have, on countless occasions, taken scenic drives directly through Parcels 001 and 006 and within view of all others. They averred that the viewsheds from these drives will be affected by surface development resulting from this specific lease sale. This showing is more than sufficient to establish the requisite geographical nexus for standing on behalf of WWP and CBD, of which they are staff and members.

ABC established a geographic nexus to the project area by demonstrating that its members have an interest in the specific population segments of birds that would be impacted by the lease sale. For claims of wildlife impacts, the specificity required to satisfy the “geographic nexus” test is not a high bar. A party may establish the requisite geographic nexus by establishing adverse effects to some portion of the species with which he has a specific connection. *See Mayo v. Jarvis*, 177 F. Supp. 3d 91, 131 (D.D.C. 2016), *vacated in part on other*

³ This Board has never required parties to demonstrate an interest in the lands and resources “*encompassed*” by each parcel offered in a lease sale. Rather, it is the land and resources *affected* by the agency’s decision that matter, even if they are found outside the parcel boundaries. *See The Coalition of Concerned National Park Retirees, et al.*, 165 IBLA 79, 84 (March 14, 2005) (“[O]ne may also establish he or she is adversely affected by setting forth interests in resources or in other land or its resources affected by a decision . . .”).

grounds Mayo v. Reynolds, 16-5282, 2017 WL 5146111 (D.C. Cir. Nov. 7, 2017) (“an alleged injury to a population segment of animals the plaintiffs have directly visited, observed, or studied is sufficient to support standing”); *Oceana, Inc. v. Pritzker*, 75 F. Supp. 3d 469, 480 (D.D.C. 2014) (plaintiffs had standing to sue, where its members “study and observe loggerheads who belong to the specific population segment that is adversely affected” by the challenged action); *see also Ctr. For Biological Diversity v. Kempthorne*, 588 F.3d 701, 707–08 (9th Cir. 2009) (holding that the plaintiff suffered a “geographically specific” injury where its members alleged “that they have viewed polar bears and walrus in the *Beaufort Sea region*, enjoy doing so, and have plans to return”) (emphasis added).

Here, ABC’s members have expressed an interest in viewing the specific population segments of greater sage-grouse and other bird species that inhabit this region of Utah and would be impacted by the lease sale parcel. *See* Holmer Decl. ¶ 10 (“If allowed to proceed, the challenged lease sale would impair the interests of ABC’s staff, members, and supporters *who observe, study, enjoy, and otherwise benefit from the sagebrush habitat and birds in the lease sale parcels, surrounding area, and other sagebrush communities in central Utah.*”) (emphasis added). This is sufficient to establish the requisite geographic nexus.

Moreover, as established in the Braun and Haak Declarations and explained in Appellants’ Statement of Reasons (SOR), the challenged lease sale poses adverse impacts to the greater sage-grouse species on a range-wide basis, given the Sheeprocks population’s contributions to the species’ conservation portfolio. *See* SOR at 18–20; Braun Decl.; Haak Decl. Thus, the relevant portion of the species is not limited to the Sheeprocks population but extends to greater sage-grouse rangewide.

III. THE ADVERSE IMPACTS ARE NOT SPECULATIVE OR HYPOTHETICAL

BLM also challenges Appellants' standing on the ground that their alleged injuries are merely "speculative." *See* Motion to Dismiss at 4. Contrary to BLM's position, the record demonstrates that there is a substantial risk of exploratory oil and gas development if these parcels are leased, and such development will perceptibly degrade the visual resources and wildlife enjoyed by Appellants' members.

This Board has held that an "appellant need not prove that an adverse effect will, in fact, occur as a result of the BLM action[.]" *Western Watersheds Project*, 185 IBLA 293, 299 (2015). The injury must only be "substantially likely." 43 C.F.R. 4.410(d). A "threat of injury" will suffice so long as it arises beyond "mere speculation." *Western Watersheds Project*, 185 IBLA at 299. Also significant here is the well-established principle of Article III standing that harm can be actual or threatened. *See Valley Forge Coll. v. Americans United*, 454 U.S. 464, 472 (1982); *see also Laub v. Department of Interior*, 342 F.3d 1080 (9th Cir. 2003) ("when, as here, a procedural violation is the injury alleged, the requirements of immediacy of the threatened harm are relaxed"). For Article III standing, plaintiffs need only establish "reasonable concerns" that their recreational and aesthetic interests in the area will be lessened by the challenged action. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 183-84 (2000).

Appellants have done just that. BLM itself projects that the lease sale will result in surface impacts from exploratory drilling. The Reasonably Foreseeable Development Scenario (RFD) underlying the Final Environmental Assessment for the lease sale anticipates exploratory or "wildcat" drilling to occur on the lease sale parcels. *See* Final EA at 6. While the likelihood of subsequent productive drilling on these parcels may be low, BLM also acknowledges that "new methods for finding and extracting hydrocarbons" may allow these wells to become productive

in the future. *Id.* The fact that industry itself nominated these parcels for competitive sale supports this conclusion.

Exploratory oil and gas drilling is, in turn, substantially likely to adversely affect wildlife populations and the scenic quality of the landscape. *See* Final EA at 6–9 (discussing visual impacts, such as well-pad and road construction); *id.* at 30 (discussing wildlife impacts). BLM points to the NSO stipulation, which would limit surface disturbances on some parcels. However, as argued more fully in Appellants’ Statement of Reasons, the NSO stipulation is subject to exceptions. *See* Final EA at 31; SOR at 11–13; 25. Furthermore, the NSO restriction on federal PHMA will incentive lessees to develop on adjacent, private lands to directionally access the federal minerals. *See* Final EA at 31; SOR at 25.

BLM may also argue that simply offering parcels for leasing will not result in 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).

V. THE BOARD SHOULD ABANDON ITS PARCEL-BY-PARCEL APPROACH TO STANDING FOR CLAIMS THAT A MULTIPLE-PARCEL LEASE SALE VIOLATES NEPA

Appellants have established that their members will be adversely affected by leasing on each of the nine parcels included in the September 2017 lease sale. However, even if Appellants establish standing only as to a single parcel included in the sale, the Board should find that Appellants have standing to pursue their NEPA claims and seek a stay as to the entire lease sale.

In *Wyoming Outdoor Council*, 153 IBLA 379 (2000), this Board established a general rule that an appellant seeking review of a BLM dismissal of a competitive oil and gas lease sale protest must establish standing to appeal the dismissal decision on a parcel-by-parcel basis. The Board explained:

Appellants contend, in reliance on John R. Jolley, 145 IBLA 34 (1998), that they need only show use of one of the 48 parcels of land leased in the February 2000 lease sale in order to establish standing to challenge the Acting Deputy State Director's decision as it relates to all those parcels. In the Jolley case, . . . [the Board] held that a in order to have standing to appeal a person challenging a multiple parcel land exchange did not have to allege use of each parcel of public land in the exchange in order to satisfy the Board's standing requirements and thereby appeal the dismissal of his protest of the entire exchange. *Id.* at 37.

We believe appellants' reliance on Jolley is misplaced and that the Jolley ruling on standing is limited to the land exchange situation in which each parcel is a integral part of the proposed exchange. Clearly, each parcel in an oil and gas lease sale is not essential to the sale. BLM could conduct a sale for one parcel or for a hundred parcels. Each individual parcel has its own characteristics and is offered separate from every other parcel. Thus, while an individual or a group has the right under 43 C.F.R. § 4.450-2 to protest all parcels offered at a lease sale, dismissal of such a protest does not guarantee the right to appeal the dismissal decision as to all parcels. Dismissal of the protest of the individual or group establishes “party to a case” status under 43 C.F.R. § 4.410(a). However, in order to maintain an appeal one must also show that he or she is adversely affected by the decision being appealed. As discussed above, this may be shown through evidence of use of the land in question. *In the oil and gas lease sale context, that means providing evidence of use of each particular parcel to which the appeal relates.*

Wyoming Outdoor Council, 153 IBLA at 384–84.

The decision in *Wyoming Outdoor Council* illustrates how a parcel-by-parcel approach to standing—at least in the context of NEPA claims—leads to illogical results. In that case, appellants provided evidence of use for only three parcels. *Id.* at 384. The Board therefore

concluded that appellants had “standing to appeal the Acting Deputy Director's decision only as it relates to those three parcels--WY-0002-082, WY-0002-092, and WY-0002-093.” *Id.* The Board went on to find that a stay was appropriate because BLM appeared to have violated both NEPA and FLPMA in conducting the lease sale. *Id.* However, the IBLA issued a stay only as to those leases for which Appellants established standing, allowed the remaining forty-five unlawfully-issued leases to go into effect. *Id.*

A parcel-by-parcel standing rule, applied in the context of a wholesale challenge to the validity of a lease sale, is both illogical and contrary to standing requirements under 43 C.F.R. § 4.410 and Article III. To begin, the plain terms of 43 C.F.R. § 4.410 allow a party “adversely affected” by an unlawful Decision Record, Environmental Assessment, and Finding of No Significant Impact to challenge those decisions in their entirety. Moreover, federal courts have never required a plaintiff challenging a programmatic or non-site specific EIS or EA to establish standing as to all covered land or resources. *See, e.g., WildEarth Guardians v. U.S. Dep’t of Agric.*, 795 F.3d 1148, 1155 (9th Cir. 2015) (“the fact that the PEIS also applies to programs in states for which WildEarth has not submitted member declarations does not prevent WildEarth from challenging the continued use of the PEIS”); *see also Alaska Ctr. for Env’t v. Browner*, 20 F.3d 981, 985 (9th Cir.1994) (upholding environmental group’s standing to challenge to statewide failure to regulate water quality when the plaintiffs alleged specific injury relating to some, but not all, streams within Alaska); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011) (holding that plaintiffs may challenge a programmatic regulation that affects multiple forests so long as they allege a particularized injury in a specific area affected by that regulation).

The Board should therefore limit the application of its holding in *Wyoming Outdoor Council*. Where, as here, appellants challenge the sufficiency of the NEPA analysis underlying

an entire lease sale, the Board should evaluate standing not on a parcel-by-parcel basis but at the level of the entire sale. Appellants' assertions of standing have demonstrated that they will "adversely affected" by the agency decisions which they appeal—the overarching EA, FONSI, and Decision Record for the September 2017 lease sale. To require a showing of standing as to each parcel covered by those wholesale documents slices the salami too thin.

CONCLUSION

For all of these reasons, WWP, CBD, and ABC each have standing to bring this appeal pursuant to 43 C.F.R. 4.410 and Article III. Appellants respectfully request that the IBLA deny BLM's Motion to Dismiss and grant the Petition for Stay submitted by Appellants.

Respectfully submitted this 22nd day of November 2017.



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Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this November 22, 2017, I caused a true and correct copy of the foregoing Response in Opposition to BLM's Motion to Dismiss, together with attached Exhibits, to be served by Federal Express, next business day delivery, upon the following (with courtesy copies by email as noted below):

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

Leah Peterson
Office of the Regional Solicitor, Intermountain Region
U.S. Department of the Interior
125 South State St., Suite 6201
Salt Lake City, UT 84138-1180
Courtesy copy by email to: leah.peterson@sol.doi.gov

Kent Hoffman
Deputy State Director, Division of Lands and Minerals
Bureau of Land Management
440 West 200 South, Suite 500
Salt Lake City, UT 84101-1345



~~Laird J. Lucas~~
Sarah Stellberg