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BLM Buffalo Field Office
Re: August Unit Zeta POD EA
1425 Fort Street
Buffalo, Wyoming 82834

July 8, 2009

Re: Comments on the Environmental Assessment for the Augusta Unit Zeta Plan of Development

To Whom It May Concern:

These comments are submitted by the Wyoming Outdoor Council regarding the Environmental Assessment (EA) for the Augusta Unit Zeta Plan of Development (POD), hereinafter referred to as the “AUZ project” or the “AUZ EA.” The Bureau of Land Management (BLM) should not approve this project as currently planned because if it did so the BLM would authorize a project that would cause unnecessary or undue degradation of the public lands. It would also violate its multiple use management obligations. Prior to approving this project the BLM should prepare an environmental impact statement (EIS) to ensure all impacts are fully considered and mitigated.

THE BLM MUST PREVENT UNNECESSARY OR UNDUE DEGRADATION OF THE PUBLIC LANDS AND ABIDE BY ITS MULTIPLE USE MANDATE

The Federal Land Policy and Management Act (FLPMA) provides that, “[i]n managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the [public] lands.” 43 U.S.C. § 1732(b). The AUZ EA makes it clear that if the project were authorized as planned unnecessary or undue degradation would occur.

The AUZ EA makes it clear that, at a minimum, severe and irreversible impacts would occur to the elk herd that uses the area and to greater sage-grouse in the area. With respect to elk,

The results modeled indicate a 100% reduction of effective elk habitat within the project area as a result of the operator’s non-federal CBNG development. Loss of effective habitat anticipated with the implementation of the operator’s federal CBNG development is 100% within the Augusta Unit Zeta POD. The BLM’s

ability to minimize effects to crucial elk habitat was affected by the existing fee development.

The Augusta Unit Zeta POD is expected to affect elk occupying the Fortification Creek area and the immediate surrounding habitat. There is likely to be a larger amount of habitat effectiveness loss due to avoidance and displacement of animals and their altered behavior reacting to the CBNG activities with most of this occurring during the actual development stages.

AUZ EA at 69. The EA describes a number of other impacts to the elk herd, some of which would be essentially permanent (such as altering the distribution of elk, since not all elk that once used the project area will reoccupy it following drilling).

With respect to the sage-grouse,

Using 0.6 miles as a distance for impacts (Holloran et al. 2007, Aldridge and Boyce 2007), effective sage-grouse habitat loss will be 4,795 acres from roads, and 723.5 acres from 67 well locations. These numbers are not additive since each well location has an associated road and power[ine] and in many cases wells are closer than 0.6 miles to each other. Therefore, the above numbers over-represent anticipated impacts within the project area if totaled, however since most well locations are within 0.6 miles of each other the entire project area (approximately 9,560 acres within the POD boundaries) can be considered affected.

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Based on the best available science, which is summarized below, the proposed action will most likely contribute to the extirpation of the local grouse population and subsequent abandonment of the 2 leks within 2 miles of the project area.

AUZ EA at 82-83.

Given the levels of these impacts, the BLM would violate the prohibition on authorizing projects that cause unnecessary or undue degradation if it approved the AUZ project as currently planned. This is clearly a mandatory obligation (BLM “shall” prevent these kinds of impacts). Moreover, it is important to emphasize that the FLPMA’s mandate to prevent unnecessary or undue degradation imposes *dual* action requirements on the BLM; it must take *any action necessary* to prevent *both* unnecessary degradation as well as undue degradation of the public lands. *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 42 (D.D.C. 2003). We would note that the decision in *Mineral Policy Center* stands as the final word as to what the unnecessary or undue degradation clause means—the Department of the Interior did not appeal this decision, and thus it is the final word as to the Department’s responsibilities and has been accepted as binding by the Department.

Addressing this dual action requirement, the court made plain that “Congress’s intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary to mining, is undue or excessive.” *292 F.Supp.2d at 42*. That is, while the unnecessary degradation prohibition may only prevent activities that are not generally recognized or used to pursue mining operations, the undue degradation prohibition establishes a *further* requirement to prevent activities that would unduly harm or degrade the public land. As stated by the court, “FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.” *Id.* Any attempt to read the plain language of FLPMA in the conjunctive (“and”) rather than the disjunctive (“or”) was firmly rejected by the *Mineral Policy Center* court. The court clearly held that the undue degradation prohibition establishes a second coequal obligation to prevent degradation of the environment on the public lands, not just limiting what is or is not necessary for *mining*. It is impossible for the BLM to fully meet its obligations under this law unless it fully acknowledges the dual mandate.

The BLM would violate both prongs of this dual mandate if it proceeded with the AUZ project as currently planned. Approval of the project as currently planned would cause unnecessary degradation of the public land and undue degradation of the environment on the public lands. The BLM has at its disposal numerous options that could allow development to proceed but which would greatly reduce impacts. That is, the currently proposed approach to oil and gas development is not “necessary” for the development of oil and gas and thus the resulting impacts mentioned above are “unnecessary.” BLM could require directional drilling, it could suspend leases, it could insist on lease unification in order to deal with drainage concerns, it could pursue lease buyout and/or trade, it could impose additional conditions of approval (such as not allowing any development within 4 miles of sage-grouse leks), and it could further “cluster” the development or insist that it be done in a “phased” manner. There probably are other additional measures that the BLM could require to reduce impacts and none of these are addressed or fully considered in the AUZ EA. Given that the BLM has at its disposal additional options that it is not requiring, this project would by definition cause unnecessary degradation of the public lands, which is illegal.

And given the magnitude of the impacts to elk and sage-grouse mentioned above, it is also clear that this project, as currently configured, would cause undue degradation of the public lands. Many of the above-described impacts are essentially permanent and certainly impacts that cause 100 percent loss of elk habitat effectiveness and extirpation of sage-grouse populations and abandonment of leks are impacts that would “degrade” the public lands, as stated by the *Mineral Policy Center* court. This is impermissible and thus this project should not be pursued until it is configured in a way that prevents these kinds of unnecessary and undue impacts. The Interior Board of Land Appeals’ recent decisions in *Yates Petroleum Corp.*, 176 IBLA 144 (2008) and *William P. Maycock et al.*, 177 IBLA 1 (2009) emphasize the BLM’s strong regulatory authority to protect the sage-grouse and in fact its obligations to do so. Given that these decisions were related to oil and gas development in the Buffalo Field Office, the BLM should ensure careful adherence to them, something it does not appear to be doing based on the lack of required sage-grouse mitigations in the AUZ EA.

In 1991 the BLM issued Instruction Memorandum (IM) 92-67. While this IM expired long ago, the BLM appears to continue to treat it as though it is in full effect. The purpose of this IM was to provide an interpretation of BLM's reserved authority with respect to its regulation at 43 C.F.R. § 3101.1-2, which allows BLM to condition development on a leasehold. In this IM the BLM recognized that the requirement to prevent unnecessary and undue degradation was "within the terms of the lease" and that all leases are subject to this requirement. The BLM stated that "mitigation required to protect public lands from unnecessary and undue degradation is consistent with the lease rights granted."¹ Thus it is clear that the BLM can condition the AUZ project so as to prevent unnecessary or undue degradation—such actions are fully consistent with any lease rights granted.² The BLM is not obligated to—in fact is prohibited from—approving a project that will cause 100 percent loss of effective elk habitat and extirpation of sage-grouse populations and the abandonment of leks.

The IM went on to state that, "[u]sing a FLPMA standard to determine if an exception to 200 meter/60days is consistent with lease rights places the resolution of this issue clearly within the concept of striking the best multiple use balance." Thus, the IM not only recognized that the FLPMA unnecessary or undue degradation clause was consistent with lease terms and the BLM should modify operations to comply with this requirement, but in addition the BLM had a companion duty to strike the best multiple use balance, as also required by FLPMA. The term "multiple use" is defined in FLPMA, and among other things means the "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land" with consideration being given to the relative values of the resources and "not necessarily the combination of uses that will give the greatest economic return or the greatest unit output." 43 U.S.C. § 1702(c). As discussed above, at least with respect to elk and sage-grouse, the BLM is explicitly planning to impair the permanent productivity of the land, which is inconsistent with BLM's multiple use management obligations. Moreover, to the extent the BLM is seeking to maximize oil and gas production and the operator's economic returns—which is the goal stated in the BLM's purpose and need statement for this project—such a myopic focus is a violation of the requirement to consider the relative values of the resources and to not necessarily seek a combination of uses that gives the greatest economic return or the greatest unit output. So again, if the BLM pursues the AUZ project as currently envisioned, not only would it violate the requirement to prevent unnecessary or undue degradation, it would also violate the BLM's multiple use management responsibilities.

¹ The BLM incorrectly used the conjunctive "and" here and other places in the IM rather than the plain language of the statute which is "or," and which the *Mineral Policy Court* made plain is the correct (dual obligation) way to interpret the unnecessary or undue degradation prohibition. Thus, this IM is legally deficient because it provides an illegal (limited) statement of what the statute actually requires.

² The IM stated that in order to impose requirements that went beyond the "200 meter/60 day rule" and beyond any stipulations that were attached to a lease the BLM must show that these additional requirements were "clearly and convincingly documented." Putting aside whether this is a legally permissible standard for making decisions that prevent unnecessary or undue degradation—we certainly do not agree that it is—we believe that the BLM has clearly met this standard in the AUZ EA. The AUZ EA explicitly documents very severe impacts that will occur to the elk and sage-grouse. Thus, the BLM has already met the clear and convincing evidence test.

**THE AUZ PROJECT SHOULD BE CONSIDERED IN CONJUNCTION WITH THE NEW
BUFFALO FIELD OFFICE RESOURCE MANAGEMENT PLAN AND THE
FORTIFICATION CREEK PLANNING AREA AMENDMENT EA**

In addition to the overriding legal concerns we have with the BLM permitting a project that would cause unnecessary or undue degradation of public lands and violate BLM's multiple use mandate, we also believe that it would be premature to permit a project of this scale prior to the release of the Buffalo Field Office's new Resource Management Plan (RMP) and the RMP Amendment for the Fortification Creek Planning Area (FCPA). In particular, we are unclear why the BLM chose not to properly evaluate an alternative that would defer the approval of the 134 proposed wells to coincide with the proposed phased development strategy recommended as the Environmentally Preferred Alternative in the RMP Amendment for the FCPA.

The BLM asserts that planning issues associated with the FCPA do not apply to the AUZ project area. AUZ EA at 37. We disagree that planning issues that were developed to protect the Fortification Creek elk herd do not apply to the proposed project, given the project's anticipated impacts on this herd. BLM's designation of the FCPA boundary (and its subsequent decision that planning issues related to the FCPA are not relevant to the AUZ project area) does not reflect the biological reality of the Fortification elk herds' habitat use and seasonal movements. By disassociating impacts to elk in the AUZ POD from existing and pending impacts in the FCPA, BLM fails to properly analyze cumulative impacts of development on the Fortification Creek herd. Although the AUZ POD is located outside the designated FCPA, the project area is crucial winter and parturition range for the Fortification Creek elk herd and merits the same consideration and protective measures as those that are being developed for the FCPA. Failure to evaluate this alternative appears to be based principally on economic considerations ("[b]ecause there are producing CBNG wells in the area, there is the potential that drainage of the lease area and loss of the CBNG resource could occur prior to the time of approval. AUZ EA at 37). As mentioned above, consideration must be given to the relative values of the public lands' resources, rather than opting for the "combination of uses that will give the greatest economic return or the greatest unit output."³ 43 U.S.C. § 1702(c). Adoption of the phased development component of the draft RMP amendment's preferred alternative could help mitigate significant impacts to the Fortification Creek elk herd while still allowing for future energy development, and therefore should be evaluated.

As stated by the BLM:

Phased development is a principal component of the RMP Amendment's preferred alternative presented in the draft EA. The objective of phased development is to provide the elk with secure habitat in two-thirds of the FCPA while CBNG development is proceeding in the remaining third. Another principal component of the preferred alternative is a security habitat/road density standard which would limit construction of new roads in order to keep security habitat loss less than 20% of the 2005 base-line conditions. Approximately 90 miles of new road could be constructed within the entire

³ And as noted above, any issues with drainage could likely be met through unitization of leases and other means that BLM has at its disposal to deal with this issue. *See, e.g.*, 43 C.F.R. § 3162.2-4 (outlining protective actions that are available to BLM to protect a lease from drainage).

yearlong range of the FCPA without compromising this standard. To maximize CBNG development potential, the RMP amendment proposes that CBNG operators work together to coordinate and consolidate road corridors. The phased development approach and the security habitat loss/road density standard were developed to allow for economic CBNG development while preventing significant impacts to the Fortification Creek elk.

AUZ EA at 37. Given that the number of producing wells has dropped significantly in the past year, presumably because of the economic climate, a natural gas surplus, and reduced prices, we feel that waiting a year or so for the FCPA RMP Amendment EA to be finalized would be prudent and advisable and would better allow for the responsible integration of some permutation of the proposed project.

THE BLM MUST PREPARE AN EIS FOR THE AUZ PROJECT

We also are concerned with the BLM's apparent belief that the opportunity to tier into the Powder River Basin Oil and Gas Project Environmental Impact Statement and Resource Management Plan Amendment (PRB FEIS), #WY-070-02-065 (approved April 30, 2003), pursuant to 40 CFR 1508.28 and 1502.21, relieves it of the necessity of preparing an EIS for the AUZ POD. Given the changes in the new administration's priorities for energy development, the Governor of Wyoming's Executive Order (2-2008) that established a new approach to mitigating the impacts of energy development on sage-grouse, emerging knowledge on the impact of fossil fuels on our global climate, and the severe predicted impacts of the proposed project on local natural resources, we believe that an EIS that provides a comprehensive evaluation of this particular project's potential impacts is needed. The extent of the cumulative impacts that would be incurred on the area's natural resources by the additional development proposed for the AUZ project area further justifies a more comprehensive analysis of impacts than has been provided with an EA.

Given the BLM's statements, documented above, regarding the anticipated 100 percent reduction in effective elk habitat and the predicted extirpation of the local sage-grouse population that would result if this project proceeds as outlined in the adopted Alternative C, we are baffled as to how the BLM arrived at a finding-of-no-significant-impact (FONSI) determination. Based on the BLM's stated impacts to wildlife resources, the agency cannot adopt such a determination and must initiate a comprehensive EIS.

The BLM can only adopt a FONSI, and thus avoid preparing an EIS, if it can show that a project "will not" have a significant effect on the human environment. 40 C.F.R. § 1508.13. If a project "may" have significant impacts or if there is uncertainty of any sort, that is not a sufficient rationale on which to base a FONSI, and an EIS must be prepared. The project must *not* have significant impacts on the environment, otherwise an EIS is required. Yet here, the BLM has stated unequivocally that at a minimum there will be substantial impacts to the elk herd and sage-grouse. Thus, an EIS must be prepared before the AUZ project can be approved.

ADDITIONAL ISSUES TO BE CONSIDERED BY THE BLM

Aside from our grave concerns over impacts to sage-grouse and elk (outlined in detail in another letter to which the Wyoming Outdoor Council is a party), we wish to highlight several additional details that we believe must be amended or dealt with more extensively in an EIS.

We recommend that the BLM conduct more extensive amphibian surveys during the appropriate season to better determine the presence and distribution of the Northern leopard frog and to evaluate the project's potential impact on this species, since the U.S. Fish and Wildlife Service recently announced that western populations of the Northern leopard frog may warrant protection under the Endangered Species Act (74 Fed. Reg. 31389). We also note that the Northern leopard frog is a BLM sensitive species and thus BLM must fully comply with its special status species manual relative to protecting this species.

In addition, we ask that the BLM provide maps of the projected development area and potentially impacted resources to better enable the public to evaluate possible impacts of development on wildlife and other resources. Other clarifications or corrections on the part of the BLM also would contribute to a more transparent analysis of the project's proposed impacts. For example, the BLM states that "Based on the best available science ... the proposed action will most likely contribute to the extirpation of the local grouse population and subsequent abandonment of the 2 leks within 2 miles of the project area. AUZ EA at 82-83. Later, the BLM states that "Based on the best available science ... the proposed action will most likely contribute to the abandonment of the **ten** leks within four miles of the project area. (Emphasis added). AUZ EA at 85-86. Such discrepancies create confusion and hamper the public's ability to determine the true scale of projected impacts from the proposed project.

BLM further adds to the confusion regarding the proposed project's impact on sage-grouse by claiming in its FONSI for the AUZ POD that: "With the application of mitigation measures in Alternative C, sage-grouse population viability in the project area will not be compromised due to the larger scope of planning actions and research initiated by the BLM, Buffalo Field Office." FONSI at 6. However, in its EA, BLM acknowledges "the proposed action will most likely contribute to the extirpation of the local grouse population and subsequent abandonment of the 2 leks within 2 miles of the project area." EA at 83. Such contradictory analyses and conflicting statements further undermine the BLM's FONSI determination and argue for the need for an EIS.

We urge the BLM to complete and present a more extensive analysis on the project's impact on sharp-tailed grouse. This species' biology and habits are sufficiently distinct from greater sage-grouse that impacts may be quite different for both species and should be addressed separately. Additional analysis on the economic impacts of the projected decline in the Fortification Creek elk herd's population numbers from reduced wildlife viewing and hunting opportunities also is warranted.

Given this project's violation of the BLM's obligation to prevent undue or unnecessary degradation of the public lands and its multiple use mandate, as well as the BLM's incomplete analysis and contradictory findings regarding the project's potential impacts, we urge the BLM

to reverse its FONSI determination and initiate the preparation of a much-needed EIS, so that the agency remains compliant with its own management mandates.

Thank you for considering these comments.

Sincerely,

Bruce Pendery

Sophie Osborn

cc: Governor Dave Freudenthal