

Modified DECISION RECORD
For
Yates Petroleum Corporation
All Day POD
ENVIRONMENTAL ASSESSMENT –WY-070-08-026

This is a modified decision record; it is not a new decision record. This modified decision record augments the decision record in the specific 12 issues addressed in SDR WY-2010-030. In summary those issues generally included the deferral or denial of 9 applications for permit to drill (APDs), 9 impoundments, and conditions on a utility corridor. New information is used to augment the analysis and rationale, and thus complete the environmental record of review. Some of the new information, analysis, and decisions result in changes to conditions of approval (COAs). New COAs replace the earlier COAs.

Compliance. This decision complies with:

- Federal Land Policy and Management Act of 1976 (FLPMA) (43 USC 1701).
- Mineral Leasing Act of 1920 (30 U.S.C. 181) and 43 CFR Part 3160 to include On Shore Order No. 1.
- National Environmental Policy Act of 1969 (NEPA) (42 USC 4321).
- Native American Graves Protection and Repatriation Act (NAGPRA) (25 USC 3001).
- National Historic Preservation Act of 1966 (NHPA) (16 USC 470).
- Bald and Golden Eagle Protection Act (BGEPA) (16 USC 668).
- Migratory Bird Treaty Act (MBTA) (16 USC 703).
- Buffalo Final Environmental Impact Statement (FEIS) (1985), and FEIS for the Powder River Basin (PRB) Oil and Gas Project, supplement of 2003.
- Buffalo Resource Management Plan (RMP), 1985, Amendments 2001, 2003.
- Update of the Bureau of Land Management (BLM), Wyoming, Sensitive Species List, (WY-IM-2010-027), Apr 2010.
- Biological Opinion for the Wyoming BLM RMPs and their Effects to the Bald Eagle, (ES-6-WY-04-F002), Jun 2004.
- RMP Maintenance Action: Incorporation of BLM Programmatic Biological Assessment (BA) for Bald Eagle and the United States Fish and Wildlife Service (FWS) Biological Opinion (BO) into Field Office RMPs, (WY-IM-2004-051), Jun 2004.
- Bald Eagle Delisting Guidance, (WY-IM-2007-037), Sep 2007.
- Wyoming State Director Review No. WY-2010-030, Sep 2010.
- U.S. Department of Interior Order (USDI) 3310, Dec 2010; BLM 6301; 6302; and 6303 (Feb 25, 2011).

The Selected Alternative.

Features. BLM's decision approves a combination of alternatives C and D as summarized in the earlier decision record and as augmented below in this modified decision record, and as described in the EA¹ and Appendix 1-3, below. The BLM approved 35 wells, authorized 19 impoundments to accept federal water, and 1 utility corridor for this POD in August 2009. To date the operator drilled 1 well on January 4, 2010 and shut it in on the 15th. The following decisions are based upon the completion of the environmental record of review.

¹ Environmental Assessment, WY-070-08-026 occurred during a period of shifting policy for sage-grouse conservation at federal, department, bureau, and state levels. Subsequent refined policy provided clarification and decision space for updated analysis, findings, and final decisions. The BFO considered, approved, and issued the vast bulk of over 1,000 APDs received during that time period. About 90 APDs were denied (two-thirds of which were in two proposed developments).

These 7 APDs were previously onsite and are now approved based on new information and its analysis.

	Twp	Rng	Sec	Well Name	Well#	Qtr	Lease
1	43N	74W	18	ALL DAY CS	9	SWNW	WYW131722
2	43N	75W	27	ALL DAY PEPPERSTONE CS	1	NESW	WYW141656
3	43N	75W	27	ALL DAY PEPPERSTONE CS	2	SWSW	WYW141656
4	43N	75W	27	ALL DAY PEPPERSTONE CS	3	SWSE	WYW141656
5	43N	76W	13	ALL DAY ENDLESS CS	6	SWNE	WYW130096
6	43N	75W	13	ALL DAY FOREVER CS	1	NESE	WYW142078
7	43N	75W	13	ALL DAY FOREVER CS	2	SWSE	WYW142078

The following 7 impoundments were previously onsite and are now authorized to accept federally produced water based on new information and its analysis.

	IMPOUNDMENT Name / Number	Qtr/Qtr	Section	TWP	RNG	Capacity (Acre Feet)	Surface Disturbance (Acres)	Lease #
1	Little Black Butte #1	NENE	34	43	75	16.7	4.4	WDEQ
2	Little Black Butte #2	NWSE	35	42	75	17.4	2.7	WYW141656
3	Little Black Butte #4	SWSW	34	42	75	18.6	2.8	WYW135911
4	Little Black Butte #5	NWSE	33	42	75	16.7	2.5	WYW135911
5	Little Black Butte #6	SWNE	35	42	75	8.1	3.7	WDEQ
6	Little Black Butte #7	NENE	35	42	75	14.8	2.4	WDEQ
7	North Black Butte	NWSE	27	42	75	13.8	2.3	WYW141656

This approval is subject to adherence with all of the operating plans and mitigation measures contained in the Master Surface Use Plan of Operations, Drilling Plan, Water Management Plan, and information in individual APDs. This approval is also subject to operator compliance with all mitigation and monitoring requirements contained within the ROD and RMP Amendments for the Powder River Oil and Gas Project, (PRB ROD) approved April 30, 2003, and the modified COAs.

Limitations.

There are no deferrals of APDs or impoundments.

The following APDs are denied:

	Twp	Rng	Sec	Well Name	Well#	Qtr	Lease
Page 9	43N	76W	12	ALL DAY ENDLESS CS	1	NENE	WYW130096
Page 10	43N	75W	9	ALL DAY CINNABAR CS	13	SESE	WYW130608

The following impoundments are denied or are not authorized to accept federally produced water:

	IMPOUNDMENT Name / Number	Qtr/Qtr	Section	TWP	RNG	Capacity (Acre Feet)	Surface Disturbance (Acres)	Lease #
Page 10	Pumpkin Pie	SESW	9	42	75	4.8	0.9	WYW130608
Page 11	Little Black Butte #3	SENE	35	42	75	14.0	1.3	WDEQ

THE MODIFIED FINDING OF NO SIGNIFICANT IMPACT. The FONSI found no significant impacts, thus an EIS was not required. The Modified FONSI for WY-070-08-026, considered the new information, analysis, and rationale and found no significant impact on the human environment aside from those disclosed in the Powder River Basin EIS and Supplement (2003).

COMMENT OR NEW INFORMATION SUMMARY.

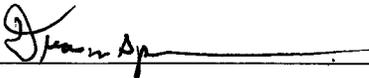
Critical items of new information became available requiring augmenting the environmental record of review through this modified decision record, in accordance with BLM NEPA Handbook, 8.5.1, Documenting the Decision, and web guide examples (last updated July 29, 2010). This modified decision record is not impermissible supplementation of an EA (Id. 5.3). The most important new information was receipt of WY BLM sage-grouse policy, the policy's maintenance into the RMP, USDI Order 3310 and its implementing manuals that were available 25 February 2011, written comments on the All Day POD from the US Fish and Wildlife Service (FWS), state director review, and the 7 March 2011 Wyoming State Office Memorandum, *Bald Eagle and Raptor Protections in the Buffalo Field Office*.

DECISION RATIONALE.

The new information includes the maintenance of the RMP incorporating the new WY sage-grouse policy, the All Day POD SDR No. WY-2010-030, USDI Order 3310 and manuals, and site-specific coordination recommendations from the FWS. The decision authorizing 7 APDs, the use of federal water in 7 impoundments, and other POD infrastructure as described in Appendix 1-3 and EA WY-070-08-026 – which are both incorporated here by reference, is based on the following:

1. The additional infrastructure will not result in any undue or unnecessary environmental degradation.
2. This federal action is clearly lacking wilderness characteristics because it has surface areas with infrastructure from extensive coal bed natural gas development.
3. The selected alternative will help meet the nation's energy needs, and help stimulate local economies by maintaining workforce stability.
4. The Operator, in their POD, committed to:
 - Comply with all applicable federal, state and local laws and regulations.
 - Obtain the necessary permits from other agencies for the drilling, completion and production of these wells including water rights appropriations, the installation of water management facilities, water discharge permits, and relevant air quality permits.
 - Offer water well agreements to the owners of record for permitted water wells within 0.5 mile of a federal CBNG producing well in the POD.
 - Provide water analysis from a designated reference well in each coal zone.
5. The Operator certified that it has a Surface Use Agreement with the Landowners or posted bond.

ADMINISTRATIVE REVIEW AND APPEAL: Under BLM regulations, this decision is subject to administrative review in accordance with 43 CFR 3165. Request for administrative review of this decision must include information required under 43 CFR 3165.3(b) (State Director Review), including all supporting documentation. A request must be filed in writing with the State Director, Bureau of Land Management, P.O. Box 1828, Cheyenne, Wyoming 82003, no later than 20 business days after this Decision Record is received or considered to have been received. Any party who is adversely affected by the State Director's decision may appeal that decision to the Interior Board of Land Appeals, as provided in 43 CFR 3165.4.

Field Office Manager: 

Date: 4/8/11

Modified FINDING OF NO SIGNIFICANT IMPACT
For Yates Petroleum Corporation
All Day POD
ENVIRONMENTAL ASSESSMENT –WY-070-08-026

FINDING OF NO SIGNIFICANT IMPACT:

On the basis of the information contained in the environmental assessment (EA)¹, updated sage-grouse policies received from the BLM Wyoming resulting in the maintenance of the RMP for sage-grouse mitigation, US Fish and Wildlife Service (FWS) written coordination with site-specific mitigation, USDI Order 3310, and SDR WY 2010-30 and all other information available to me, it is my finding that:

1. The approval of 7 applications for permit to drill (APDs), use of federal water in 7 impoundments, 1 utility corridor previously onsited in the Yates Petroleum Corporation's (Yates) All Day Coal Bed Natural Gas (CBNG) plan of development (POD) will not have significant environmental impacts beyond those already addressed in Powder River Basin Oil and Gas Project Final Environmental Impact Statement (PRB FEIS) to which the EA is tiered;
2. The authorizing 7 APDs, the use of federal water in 7 impoundments, and 1 utility corridor previously onsited conforms to the Buffalo Resource Management Plan (RMP) (1985, 2001, 2003) as analyzed in Appendixes 1-3 of the accompanying decision record and incorporated here by reference, in addition to EA WY-070-08-026, are tiered to these documents; and,
3. The approval of the 7 previously onsited APDs, use of federal water in 7 impoundments, and 1 utility corridor, by themselves or cumulatively with the earlier approved APDs, reservoirs and infrastructure of the All Day POD does not constitute a major federal action having a significant effect on the human or natural environment. Therefore there is no requirement for preparing an EIS.

CONTEXT:

Mineral development (coal, oil and gas, bentonite, and uranium) is a long-standing and common land use within the PRB. About 40% of the nation's coal production comes from the PRB. The PRB FEIS reasonably foreseeable development predicted and analyzed the development of 51,000 CBNG wells and 3,200 oil wells. The additional CBNG development as described in the combination of Alternatives C and D, and in the modified decision record with attachment is insignificant within the national, regional, and local context. The *Record of Decision, Powder River Oil and Gas Project Environmental Impact Statement and Resource Management Plan Amendment* BLM Buffalo Field Office initiated actions within the PRB FEIS analysis area in response to additional information regarding impacts to sage-grouse. This finding is based on my consideration of the Council on Environmental Quality's (CEQ) criteria for significance (40 CFR 1508.27), both with regard to the context and to the intensity of the impacts described in the EA.

INTENSITY:

The implementation of a combination of Alternative C and D will result in beneficial effects with natural gas and revenue production however; there will also be adverse effects to the environment. Design features and mitigation measures were included within Alternative C and D to prevent significant adverse environmental effects.

¹ Environmental Assessment, WY-070-08-026 occurred during a period of great ambiguity and shifting of policy for sage-grouse conservation at federal, department, agency, and state levels. Passage of time, subsequent decisions, and refined policy provided necessary decision space and clarification for updated analysis, findings, and decisions.

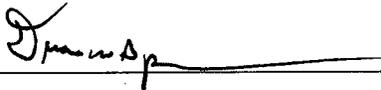
The preferred alternative does not pose a significant risk to public health and safety. The geographic area of the POD contains unique characteristics identified within the 1985 RMP, 2003 PRB FEIS – specifically a portion of what is commonly referred to as the Pumpkin Buttes traditional cultural property (TCP) – and this was accounted for in the analysis, this finding and the subsequent modified decision. The geographic area of the POD contains no unique characteristics related to other legislative or regulatory processes aside from a winter roost for eagles, an eagle nest, and numerous raptor nests – which will be adversely impacted. The area of the proposed development clearly lacks wilderness characteristics due to the extensive improved roads, oil and natural gas development.

Relevant scientific literature and professional expertise were used in preparing the EA. The scientific community is reasonably consistent with their conclusions on environmental effects relative to oil and gas development. Research findings on the nature of the environmental effects are not highly controversial, highly uncertain, or involve unique or unknown risks.

CBNG development of the nature proposed with this POD and similar PODs was predicted and analyzed in the PRB FEIS; the selected alternative does not establish a precedent for future actions with significant effects.

There are cultural or historical resources present that will be adversely affected by the selected alternative – the Pumpkin Buttes TCP. Significant impacts to the TCP were mitigated through denial of 1 APD and use of federal water in 1 impoundment. No species listed under the Endangered Species Act or their designated critical habitat will be adversely affected.

The implementation of the selected alternative best meets the stated need for the proposed action. With the application of mitigating measures selected from alternatives C and D, sage-grouse population viability in the PRB will not be significantly compromised due to the larger scope of planning actions and research initiated by the BLM, and the Buffalo Field Office.

Field Manager:  Date: 4/8/11

Appendix 1, Details of the New Information and Analysis

The new information includes an RMP maintenance action incorporating the December 29, 2009 WY sage-grouse policy, the All Day POD SDR No. WY-2010-030, USDI Order 3310, and site-specific coordination comments from the FWS. The 12 issues identified in bold in the SDR frame this new information and its analysis. The bold page numbers generally refer to where the issue appears in the SDR.

1. Mowing limitations (II. Site Specific COAs – Unnumbered) (pp. 2-5)

Remanded:

“We remand this matter to the BFO for further [clarity and] analysis, with the instruction to consider if limiting brush-hogging and mowing distances would result in [clear and accurate depictions of] the potential for increased risks at the well site. The BFO will remove or revise this COA”

Buffalo Field Office Reply and Rationale:

Removed COA. Sage-grouse habitat concerns that underpinned this COA are covered in the sage-grouse maintenance action to the RMP. Thus this requires no additional analysis.

2. Bald eagle protection measures (II. Site Specific COAs, Wildlife – Bald Eagles: First, Second, and Third Bullets) (pp. 5-9; see also p. 24)

Remanded in part (first and second bullets), Affirmed in part (third bullet):

“The decision to apply the first and second bullet in this COA is remanded to the BFO. The BFO is directed to supplement the environmental record of review and issue a revised COA following either (1) the programmatic COA in the 2003 PRB ROD (Pages A-34 to A-35 and already provided under “Programmatic Mitigation Measures in the COAs” at Page 3) or (2) protection measures applicable to the site-specific circumstances and with written concurrence by the FWS. Pending re-issuance of the revised COA, the APD approvals remain valid and Yates shall follow those programmatic COAs provided in the COAs at Page 3. Should “project related actions” be restricted or prohibited, the BFO is directed to provide a detailed description of which activities this would include, criteria for consideration of exceptions, and an evaluation of the impacts arising from the limiting of such activities in the environmental record of review. . . . We affirm the BFO’s use of this [Third Bullet] COA”

Buffalo Field Office Reply and Rationale:

Replaced the first 2 bullets in bald eagle site specific COAs with the following Programmatic Mitigation Measures from the PRB ROD page A-34-35. The inclusion of these programmatic mitigation measures will not alter the environmental analysis.

1. Surveys for active bald eagle nests and winter roost sites will be conducted within suitable habitat by a BLM approved biologist. Surface disturbing activities will not be permitted within one mile of suitable habitat prior to survey completion. This applies to habitat along Dry Willow Creek and will affect the following permitted POD items:

Township/Range/Section	Wells and Infrastructure
T43N R75W Sections 12	ALL DAY ENDLESS CS 2, ALL DAY ENDLESS CS 3 wells and associated corridors in the NE of section 12
T43N R75W Sections 7	South Dry Willow Reservoir 1 and 2

2. A minimum disturbance-free buffer zone of 0.5 mile (i.e., no surface occupancy) will be established year-round for all bald eagle nest sites. A seasonal minimum disturbance-free buffer zone of one mile will be established for all bald eagle nest sites (February 15 – August 15).

3. A seasonal minimum disturbance-free buffer zone of 1 mile will be established for all bald eagle winter roost sites (November 1 – April 1). These buffer zones and timing may be adjusted based on site-specific information through coordination with, and written approval from, the USFWS. This will be applied specifically to the known roost in SWSW of Section 6, T43N, R75W. This will apply to the following permitted POD items:

Township/Range/Section	Wells and Infrastructure
T43N R76W Section 12	ALL DAY ENDLESS CS 2, ALL DAY ENDLESS CS 3wells and associated corridors in the NE of section 12

4. Within 0.5 mile of bald eagle winter roost sites additional measures such as remote monitoring and restricting maintenance visitation to between 9:00am and 3:00pm are necessary to prevent disturbance (November 1 – April 1).

[Also refer to SDR issue 8, below, for denied eagle-related APD, Endless 1.]

3. Sage-grouse protection measures (II. Site Specific COAs, Wildlife – Greater Sage-grouse: Number 3) (pp. 9-11)

Affirmed: “We affirm the BFO’s decision in applying this COA.”

4. Sage-grouse protection measures (II. Site Specific COAs, Wildlife – Greater Sage-grouse: Number 4) (pp. 11-13)

Remanded:

“We remand for further analysis the limitation on site visits. . . .

In the COAs for protection of sage-grouse, the BFO requires (COAs at Page 7):

Well metering, maintenance and other site visits will be allowed monthly, 3 per week for the first six months after the wells are completed. The company will be required to monitor frequency of site visits along with repairs made and problems identified resulting from the visits. Reports containing results of this monitoring will be submitted to BLM at the end of every month. The BLM will use this data to determine the necessity of multiple monthly site visits during the sage-grouse breeding and nesting periods (March 1 to June 15).”

Buffalo Field Office Reply and Rationale: Removed COA.

5. Impoundment reclamation (II. Site Specific COAs, Water Management: Number 1) (pp. 13-19)

[The reader is cross-referenced to SDR issue 9, below for analysis of impoundments denied or deferred the use of federal water.]

Reversed in part (off-lease impoundments) and remanded in part: (as to lease facility impoundments):

“For these seven impoundments, the BFO has provided authorization under Onshore Oil and Gas Order No. 7 “for use in association with the water management strategy for the POD” (FONSI/DR at Page 1). Unless modification of their Onshore Order No. 7 approval is necessary, the BFO has no further role in management (including reclamation) of these seven off-lease impoundments.”

“For the remaining 12 impoundments which are lease facilities, we remand the portion of the COA mandating reclamation of all impoundments to the BFO for modification consistent with the new direction provided in their July 19, 2010 letter to the operators. Should a surface owner wish to keep one or more of these 12 impoundments upon cessation of Federal oil and gas lease development, we believe the BFO’s policy will provide the BLM, operator, and surface owner with the opportunity to consider such a request; will allow the BLM to consider the surface owner’s wishes while remaining in

conformance with the land use plan; and will provide adequate protections for the public and the environment.”

Buffalo Field Office Reply and Rationale:

The COA is revised as listed below to reflect the information provided in and requested by the BFO Impoundment Reclamation Guidance.

1. Impoundments constructed over Federal minerals or on Federal surface to manage CBNG-produced water will be evaluated for reclamation once the production phase concludes. Structures will be assessed according to BFO “Impoundment Reclamation Guidance” issued July 19, 2010. In order to establish soil chemistry goals for reclamation, baseline soil samples will be collected from the impoundments listed below. This baseline analysis will characterize existing soil chemistry and set reclamation target ranges. If the operator does not establish baseline parameters prior to impoundment construction, they would be required to do so at the time of reclamation by sampling locations upstream of the facility.

	Impoundment Name	Qtr/Qtr	Section	Township	Range	Capacity (Acre Feet)	Surface Disturbance (Acres)	Lease Number
1	City Bowl	NWSW	14	42	75	14.5	4.3	WYW159992
2	Cosner	NWNW	12	42	75	16	4.1	WYW142823
3	Drilling	SWSE	17	42	74	19.4	6.5	WYW131722
4	East Eychaner	SENE	14	42	75	19	2.9	WYW138135
5	East Pasture #2	SWNE	3	42	75	12.2	1.8	WYW128603
6	East Pasture #3	NWSW	3	42	75	19	4.6	WYW128603
7	North Dump	NESE	13	42	76	18.9	2.8	WYW130096
8	North Pinnacle	SESE	14	42	75	19.9	3.8	WYW142078
9	Ox Bar	NESW	18	42	75	6.3	1.3	WYW153068
10	Snow Fence	NWNW	17	42	74	19.9	2.8	WYW131722
11	South Pinnacle	NESE	23	42	75	4.2	0.9	WYW159992
12	Wagoneer	NWSW	6	42	74	18.2	3.7	WYW141222
13	East Pasture #1	SESE	3	42	75	41.2	5.8	WYW145149
14	West Side	SWSW	9	43	75	14.6	3.1	WYW130608
15	Little Black Butte #2	NWSE	35	42	75	17.4	2.7	WYW141656
16	Little Black Butte #4	SWSW	34	42	75	18.6	2.8	WYW135911
17	Little Black Butte #5	NWSE	33	42	75	16.7	2.5	WYW135911
18	North Black Butte	NWSE	27	42	75	13.8	2.3	WYW141656

Samples will be taken from the approximate proposed deepest point in the pool area prior to any construction. The recommended location is 10 feet upstream of the proposed low level outlet within the reservoir pool. Discrete samples will be taken from 0-6 inches, 6 to 24 inches and 24 to 48 inches for analysis for the following parameters:

- Texture
- pH
- EC

- Soluble Ca
- Soluble Mg
- Soluble Na
- Soluble K
- SAR
- Total Organic Carbon (TOC)
- Total metals including:
 - Al
 - Ba
 - B
 - Cd
 - Cu
 - Fe
 - Mn
 - Mo
 - Ra-226
 - Se
 - Zn

Standard soil sampling protocol will be used. Two copies of the analysis results will be sent to the BLM BFO Authorized Officer.

After the construction of the impoundment, an additional surface sample will be taken from 0 to 6 inches at the lowest point in the pool area and analyzed for the same parameters, with two copies of the analysis results sent to the BLM BFO Authorized Officer.

6. Cultural resource protection (II. Site Specific COAs, Cultural: Number 1(a)) (pp. 19-20)

Affirmed:

“We modify this COA, eliminating the word “the” underlined, above, and clarify that only “surface-disturbing” activities meeting the criteria of this COA must be monitored. We affirm the BFO’s use of this COA, as modified.”

7. Biological opinion terms and conditions (II. Standard COAs, General: Number 8) (p. 20)

Reversed and Remanded:

“The BFO’s issuance of this COA is reversed [and removed, see also WY SDR No. 2010-011].”

Buffalo Field Office Reply and Rationale: Removed COA.

8. Denial and deferral of nine APDs and appurtenant infrastructure (pp. 20-28)

Summary

Remand:

For the 4 deferred wells BFO is instructed to complete their review of the APDs and issue a decision consistent with Onshore Oil and Gas Order No. 1.

Buffalo Field Office Reply and Rationale: The Buffalo Field Office Approves the ALL DAY PEPPERSTONE CS 1, ALL DAY PEPPERSTONE CS 2, ALL DAY PEPPERSTONE CS 3, and ALL DAY ENDLESS CS 6 wells

Rationale, ALL DAY PEPPERSTONE CS wells (p. 21)

ALL DAY PEPPERSTONE CS 1: Adverse impacts to sage-grouse are supported in RMP maintenance and COAs.

ALL DAY PEPPERSTONE CS 2: Adverse impacts to sage-grouse are supported in RMP maintenance and COAs.

ALL DAY PEPPERSTONE CS 3: Adverse impacts to sage-grouse are supported in RMP maintenance and COAs.

Since the time of the deferrals of ALL DAY PEPPERSTONE CS 1, 2, and 3, the WY BLM sage-grouse management strategy solidified (BLM Instruction Memorandum WY-2010-012), implemented as an RMP maintenance action and aligned with the State of Wyoming's Greater Sage-Grouse Core Area Protection (WY EO 2010-4). As such, the APD locations do not occur within sage-grouse key habitats (Wyoming core, BFO focus, and connectivity), and their construction is in conformance with the Wyoming BLM policy to manage sage-grouse seasonal habitats and maintain habitat connectivity to support population objectives set by the Wyoming Game and Fish (WGFD). No additional analysis is required as these 3 APDs were analyzed in Alternates B and C.)

Rationale, ALL DAY ENDLESS CS 6 well (p. 21)

ALL DAY ENDLESS CS 6: approved subject to the following site-specific COAs that are also applied to ALL DAY ENDLESS CS 4 and ALL DAY ENDLESS CS 5 wells:

1. No surface disturbing activity shall occur within 0.5 mile of all identified raptor nests from February 1 through July 31, annually, prior to a raptor nest occupancy survey for the current breeding season.
2. Surveys to document nest occupancy shall be conducted by a biologist following BLM protocol, between April 15 and June 30. All survey results shall be submitted in writing to a Buffalo BLM biologist and approved prior to surface disturbing activities. Surveys outside this window may not depict nesting activity. If a survey identifies active raptor nests, a 0.5 mile timing buffer will be implemented. The timing buffer restricts surface disturbing activities within 0.5 mile of occupied raptor nests from February 1 to July 31.
3. Nest occupancy checks shall be completed for nests within a 0.5 mile of any surface disturbing activities (e.g., well drilling or pipeline installation) across the entire POD for as long as the POD is under construction. Once construction of the POD has ceased, nest occupancy checks shall continue for the first 5 years on all nests that are within a 0.5 mile of locations where any surface-disturbing activities took place. Survey results will be submitted to a Buffalo BLM biologist in writing no later than July 31 of each survey year.

The ALL DAY ENDLESS CS 6 well and access road were deferred pending additional onsite visits to determine potential impacts to raptor nests and negotiate an alternative location. The operator and the BLM could not agree on an alternative; nor did the operator suggest additional mitigation. (BFO's Post Onsite Deficiency Letter for the All Day POD, undated, circa May 27, 2008, pages unnumbered, third page, last entry on table.)

Additional ALL DAY ENDLESS CS 6 raptor nest information:

Nest #	Last known species	Distance to 6 Endless well (feet)	Years w/ survey	Nest activity status
10759 and 6539 in same tree	unknown	415	2009 only year w/ data	Unknown. Does not have three years of data.
6200	unknown	720	2007, 2009	Unknown. Does not have three years of data.
6185	unknown	1250	2006, 2007	Unknown. Does not have three years of data.
4228	Red-tail	2300	2006-2009	inactive
4249	unknown	2500	2006-2009	inactive
4536	Great-horned owl	1250	2007-2009	active

Timing limitations that prohibit surface disturbance would prohibit construction of the ALL DAY ENDLESS CS 6 well and associated infrastructure in the breeding season; however, operations and maintenance of the well would disrupt breeding and cause a reduction in reproductive success and/or abandonment of the #10759, #6539, #6200, #1250, #6185 and #4536 nests. (See 176 IBLA at 157 and 160.) In addition to the impacts from human disturbance at the well, the ALL DAY ENDLESS CS 6 access road is in sight and above (looking down on) nests #4536 and #6185. Vehicle traffic to and from the ALL DAY ENDLESS CS 6 well would disrupt raptor breeding and/or nesting at these nests. Nests #4228 and #4229 are approximately 800 feet from the access road to the ALL DAY ENDLESS CS 6 well and would be sufficiently protected by a restriction on surface disturbance (construction) during the nesting season.

The December 28, 2010 FWS coordination letter (Appendix 3) identifies that the standard conservation measures for raptors in the current RMP are not as effective as originally anticipated. The FWS comments support the BLM wildlife biologist's recommendation to deny the ALL DAY ENDLESS CS 6 well and access; and also by extension provide the biological bases for this site-specific mitigation and COAs. However, the denial of the ALL DAY ENDLESS CS 6 well would not be in conformance with the Mitigation Measures and Standard COAs, Appendix A, described in the 2003 PRB FEIS ROD, and the BLM cannot determine that permitting the ALL DAY ENDLESS CS 6 well would result in a violation of the Migratory Bird Treaty Act. New information regarding adequate conservation measures for raptor protection is being incorporated into alternative development for the ongoing BFO RMP Revision, (para. 1.b. and 2, Bald Eagle and Raptor Protections in the Buffalo Field Office, March 7, 2011).

Remanded: ALL DAY FOREVER CS 1 & ALL DAY FOREVER CS 2 wells (pp. 21-24)

"We remand the denial of these two wells to the BFO, with instruction to [(1)] supplement the environmental record of review in order to determine if the timing restrictions provided in the approved RMP are sufficient to approve these wells and avoid a violation of the MBTA. If not, the BFO is instructed to [(2)] provide a rationale describing whether there are site-specific circumstances and scientific justification that distinguish this nesting location and preclude the wells' approval."

Buffalo Field Office Reply and Rationale: The Buffalo Field Office approves the ALL DAY FOREVER CS 1 & ALL DAY FOREVER CS 2 wells.

Rationale, ALL DAY FOREVER CS 1 & ALL DAY FOREVER CS 2 wells

ALL DAY FOREVER CS 1 & ALL DAY FOREVER CS 2: approved subject to the following site-specific COAs

1. No surface disturbing activity shall occur within 0.5 mile of the removed raptor nest #4151 from February 1 through July 31, annually, prior to a raptor nest occupancy survey for the current breeding season.
2. Surveys to document nest occupancy shall be conducted by a biologist following BLM protocol, between April 15 and June 30. All survey results shall be submitted in writing to a Buffalo BLM biologist and approved prior to surface disturbing activities. Surveys outside this window may not depict nesting activity. If a survey identifies active raptor nests, a 0.5 mile timing buffer will be implemented. The timing buffer restricts surface disturbing activities within 0.5 mile of occupied raptor nests from February 1 to July 31.
3. Nest occupancy checks shall be completed for nests within a 0.5 mile of any surface disturbing activities (e.g., well drilling or pipeline installation) across the entire POD for as long as the POD is under construction. Once construction of the POD has ceased, nest occupancy checks shall continue for the first five years on all nests that are within a 0.5 mile of locations where any surface-disturbing activities took place. Survey results will be submitted to a Buffalo BLM biologist in writing no later than July 31 of each survey year.

The ALL DAY FOREVER CS 1 and ALL DAY FOREVER CS 2 wells were denied due to their proximity to ferruginous hawk nest #4151. The ferruginous hawk is a Special Status Species in Wyoming (BLM Wyoming Sensitive Species Policy and List (2010)). The nest was constructed in a windmill that has since been removed by the landowner. Though the original substrate has been removed, there is a high likelihood that the hawk pair will attempt nesting on the ground in the same location since they had multiple reproductive successes at this location. The site is the concern – not the substrate (windmill) because ferruginous hawks are ground nesters. The BLM biologist recommends deferring the ALL DAY FOREVER CS 1 and ALL DAY FOREVER CS 2 well approvals pending one-year of raptor surveys to determine if the ferruginous hawk pair have initiated nesting in a new, adjacent, location.

If the ferruginous hawk pair nests at nest site #4541, and if either of the ALL DAY FOREVER CS 1 and ALL DAY FOREVER CS 2 wells are constructed, operated and maintained as proposed, then the nest site will likely become permanently compromised. The rationale describing the site-specific circumstances and scientific justification distinguishing this nesting site show that this nest site was approximately 450 feet from the ALL DAY FOREVER CS 2 well, and 1200 feet from the ALL DAY FOREVER CS 1 well. RMP timing limitations prohibiting surface disturbance would prohibit construction of the wells and associated infrastructure in one breeding season; however, operations and maintenance of the wells would likely disrupt subsequent breeding and cause a reduction in reproductive success and/or potential abandonment of the nest, (see 176 IBLA at 157 and 160).

The FWS comments support the BLM wildlife biologist's recommendation to deny the ALL DAY FOREVER CS 1 & ALL DAY FOREVER CS 2 wells; and also by extension provide the biological bases for this site-specific mitigation and COAs. However, the deferral and potential denial of the ALL DAY FOREVER CS 1 & ALL DAY FOREVER CS 2 wells would not be in conformance with the Mitigation Measures and Standard COAs, Appendix A, described in the 2003 PRB FEIS ROD, and the BLM cannot determine that permitting the ALL DAY FOREVER CS 1 & ALL DAY FOREVER CS 2 wells would result in a violation of the Migratory Bird Treaty Act. New information regarding adequate conservation measures for raptor protection is being incorporated into alternative development for the ongoing BFO RMP Revision, (para. 1.b. and 2, Bald Eagle and Raptor Protections in the Buffalo Field Office, March 7, 2011).

Remanded: – ALL DAY CS 9 Well (p. 23-24)

“We remand the BFO's decision to deny the ALL DAY CS 9 Well with instruction to issue a new decision that is in conformance with the RMP and upon completion of the additional record of review.”

Buffalo Field Office Reply and Rationale: The Buffalo Field Office approves the ALL DAY CS 9 Well.

Rationale, ALL DAY CS 9 Well

ALL DAY CS 9 Well: approved subject to the following site-specific COAs

1. No surface disturbing activity shall occur within 0.5 mile of all identified raptor nests from February 1 through July 31, annually, prior to a raptor nest occupancy survey for the current breeding season.
2. Surveys to document nest occupancy shall be conducted by a biologist following BLM protocol, between April 15 and June 30. All survey results shall be submitted in writing to a Buffalo BLM biologist and approved prior to surface disturbing activities. Surveys outside this window may not depict nesting activity. If a survey identifies active raptor nests, a 0.5 mile timing buffer will be implemented. The timing buffer restricts surface disturbing activities within 0.5 mile of occupied raptor nests from February 1 to July 31.
3. Nest occupancy checks shall be completed for nests within a 0.5 mile of any surface disturbing activities (e.g., well drilling or pipeline installation) across the entire POD for as long as the POD is under construction. Once construction of the POD has ceased, nest occupancy checks shall continue for the first five years on all nests that are within a 0.5 mile of locations where any surface-disturbing activities took place. Survey results will be submitted to a Buffalo BLM biologist in writing no later than July 31 of each survey year.

This ferruginous hawk nest location (BLM #5220) was listed as inactive in 2007, 2008, and 2009. The Buffalo RMP does not provide protections to inactive nests, with inactivity defined as three years without nesting activity. The BFO has collected field office area raptor data since completion of the 2003 PRB FEIS ROD. In an evaluation of a sample data-set about 14% of the known ferruginous hawk nests would not be protected by applying the 3-year inactivity rule. For ferruginous hawks, which use multiple nests over multiple years, the period between activities for any given nest should be longer. ferruginous hawk is a Special Status Species in Wyoming (BLM Wyoming Sensitive Species Policy and List (2010)), and its management is guided by BLM Manual 6840. Loss of 14% of ferruginous hawk nests by implementing the 3-year rule discussed above may compromise the policy in the BLM Manual 6840 at 06.2.B (2008). Lastly, the US Fish and Wildlife Service Wyoming Ecological Services Field Office recommend a 1 mile buffer for ferruginous hawk nests (March 15 to July 31). The denial of the All Day 9 APD is not in conformance with the Mitigation Measures and Standard COAs, Appendix A, described in the 2003 PRB FEIS ROD. New information regarding adequate conservation measures for raptor protection is being incorporated into alternative development for the ongoing BFO RMP Revision, (para. 1.b. and 2, Bald Eagle and Raptor Protections in the Buffalo Field Office, March 7, 2011).

The BLM project wildlife biologist recommended denial of the ALL DAY CS 9 APD. However, the authorized officer determined that, due to the nest inactivity dating from 2007, the application of a timing limitation COA would adequately protect the nest. The ALL DAY CS 9 APD will be subject to a timing limitation on surface disturbing activity in order to allow one more potential nesting season.

Remanded: Bald Eagle Roost (1 APD) [ALL DAY ENDLESS CS 1] (p. 24-25)

“We remand the denial of this well to the BFO, with instruction to [(1)] supplement the environmental record of review in order to determine if the timing restrictions provided in the approved RMP are sufficient to approve these wells and prevent a violation of the BGEPA or MBTA. If not, the BFO is instructed to [(2)] provide analysis evaluating whether there are site-specific circumstances and scientific justification that distinguish this nesting location and preclude the well’s approval.”

Buffalo Field Office Reply and Rationale: The Buffalo Field Office denies the ALL DAY ENDLESS CS 1 Well.

Rationale, ALL DAY ENDLESS CS 1 Well:

ALL DAY ENDLESS CS 1 Well: denied due to impacts to bald eagle roost, as described below

(1) The environmental record of review is augmented. Though the denial of the ALL DAY ENDLESS CS 1 Well is not in conformance with the Mitigation Measures and Standard COAs, Appendix A, described in the 2003 PRB FEIS ROD, the BFO will apply the conservation measures under the 2007 Biological Opinion, incorporating the following site-specific analysis and referencing site specific recommendations from the FWS. The 2007 re-initiation for the PRB FEIS essentially maintained the same term and condition in Term and Condition 4: "The Service has combined and clarified the Bureau's Conservation Measure (CM) 8 and CM9. A year-round disturbance-free buffer zone of at least 0.5 mile shall be established for known active bald eagle nests and winter roosts. Additionally, a 1-mile limited activity zone shall be established for known active nests and roosts (February 1 to August 15 and November 1 to April 1, respectively). In coordination with the Service and based on site-specific action and/or site specific biology, the Bureau may modify the distance and/or timing measures to allow certain activities."

The December 28, 2010 FWS coordination letter (Appendix 3) identifies that the standard conservation measures for raptors in the current RMP are not as effective as originally anticipated, and here are not adequate to prevent violations of the MBTA and BGEPA. If the ALL DAY ENDLESS CS 1 Well is constructed and operated where proposed, then the bald eagle winter roost and golden eagle nest site #4528 will foreseeably become permanently compromised, resulting in a violation of the BGPTA and MBTA by causing nest site abandonment, breeding or fledging failure, and harassment. The bald eagle roost co-located with the golden eagle nest shows consistent use by bald eagles and was recorded as a communal roost with 13 bald eagles documented on February 11, 2009. The proposed well location and roost area were visited on December 21, 2010 to confirm the roost location, determine activity, and further investigate site-specific conditions. The roost is associated with a group of cottonwoods in the Dry Willow Creek channel. At the December 21, 2010 site visit, 6 eagles were seen using trees in Dry Willow Creek: 2 eagles flushed from a tree approximately 0.2 mile to the north of the proposed well location in response to the 2 pick-up trucks approaching the well location, and 4 eagles were seen in association with cottonwoods extending upstream (south) approximately 0.3 mile.

(2) Site-specific circumstances and scientific justification distinguish this nesting location and preclude the well's approval. The timing limitation prescribed in Appendix A, of the Buffalo RMP PRB ROD (2003) is analyzed in consideration of the spatial relationships, line-of-site, and site-specific analysis of this nest and roost to the adjacent proposed APDs. As the site-specific coordination by the US Fish and Wildlife Service noted, ALL DAY ENDLESS CS 2 Well is also within 0.5 mile of the roost (a parameter invoking the timing limitation). The ALL DAY ENDLESS CS 2 Well location is at the outer range of the 0.5 mile roost buffer (0.47 mile), is not within line-of-site of the roost, and is immediately adjacent to an existing, heavily used road. The ALL DAY ENDLESS CS 2 Well can be reasonably constructed, operated, and maintained without causing undue harm to eagles at the nest or roost or resulting in a foreseeable violation of the BGPTA or MBTA.

The site-specific review provided by the FWS augments the environmental record of review and demonstrates that timing restrictions are not sufficient protections to allow approval of the ALL DAY ENDLESS CS 1 Well. (See Appendix 3, Comments on All Day Coalbed Methane Federal Plan of Development State Director Review, pp 2, 3, 5-7, Dec 2010, are incorporated here by reference.) New information regarding adequate conservation measures for raptor protection is being incorporated into alternative development for the ongoing BFO RMP Revision, (para. 1.b. and 2, Bald Eagle and Raptor Protections in the Buffalo Field Office, March 7, 2011).

The USFWS comments for this project (All Day SDR) are attached as Appendix 3 and incorporated here by reference. In summary they request any future federal wells be drilled outside the 0.5 mile buffer from the Dry Willow Roost.

While the denial of ALL DAY ENDLESS CS 1 Well may affect the leasee's ability to recover gas from this well, adjacent wells will likely recover sufficient or major quantities of natural gas that would have gone up the proposed well bore of this well. BFO is not foreclosing the operator's ability to propose additional mitigation of modification to the proposal for the ALL DAY ENDLESS CS 1 APD in future submissions. The denial of ALL DAY ENDLESS CS 1 Well has no major effects on the All Day POD and has negligible effects on the natural gas market, price, or availability; see All Day POD Table, Appendix 2.

[Also refer to SDR issue 2, above, for analysis of bald eagle protection measures.]

Affirmed: ALL DAY CINNABAR CS 13 well denial. (pp. 25-28)
"We affirm the BFO's denial of this APD [13 Cinnabar]."

4. Denial and deferral of nine produced water impoundments (pp. 28-35)

Deferred impoundments; Little Black Butte #2, Little Black Butte #4, Little Black Butte #5, Little Black Butte #6, Little Black Butte #7, and North Black Butte

Remanded:

"We remand the BFO's deferral of these six impoundments, and . . . BFO's final decision must comply with statutory and regulatory requirements, including NEPA. As such, any documentation of NEPA compliance must take a "hard look" at the impacts associated with the proposed action and alternatives, and must also consider the impacts to the operations under the POD if approval is withheld"

Buffalo Field Office Reply and Rationale:

The BLM does not have the authority to regulate surface disturbing activities at the proposed locations for Little Black Butte #1, Little Black Butte #3, Little Black Butte#6, and Little Black Butte #7.

Previously deferred impoundments Little Black Butte #2, Little Black Butte #4, Little Black Butte #5, and North Black Butte are approved for the use of federal water. Earlier the BFO's NEPA "hard look" and its decisions were crafted to provide decision space while the BLM sage-grouse policy was in development. Since the time of the deferrals, the WY BLM sage-grouse management strategy solidified (BLM Instruction Memorandum WY-2010-012), implemented as an RMP maintenance action and aligned with the State of Wyoming's Greater Sage-Grouse Core Area Protection (WY EO 2010-4). As such, the impoundment locations do not occur within sage-grouse key habitats (Wyoming core, BFO focus, and connectivity), and their construction is in conformance with the Wyoming BLM policy to manage sage-grouse seasonal habitats and maintain habitat connectivity to support population objectives set by the Wyoming Game and Fish (WGFD). No additional analysis is required as these four impoundments were analyzed in Alternates B and C.

Affirmed in part, Remanded in part:

"Of the three originally denied impoundments, (Pumpkin Pie) was denied with the rationale that "it is within the cultural TCP boundary" (FONSI/DR at Page 3), and the other two (Little Black Butte 1 and 3) were denied because of concerns regarding the presence of a ferruginous hawk nest and/or high quality sage-grouse habitat (*Id.*). We will consider each impoundment, in turn."

Affirmed: denial of impoundment Pumpkin Pie

"We affirm the BFO's denial of this impoundment [Pumpkin Pie]."

Remanded: Little Black Butte 1 (pp. 33-34)

“The BFO is instructed to complete the environmental record of review as necessary and, in their modified decision, address the fate of the Little Black Butte # 1 impoundment (in light of more recent BLM guidance for the protection of sage-grouse).”

Buffalo Field Office Reply and Rationale:

Impoundments Little Black Butte 1, Little Black Butte 6, and Little Black Butte 7 are approved to accept federally produced water. The BLM does not have the authority to regulate surface disturbing activities at these locations. For the purposes of Oil and Gas Order #7 “federal lands” include private surface over federal minerals, 58 FR 47356. These impoundments are not on federal surface or over federal minerals. (See SDR-WY-2011-001, p. 5 and footnote 10.)

Since the time of the deferrals, the WY BLM sage-grouse management strategy solidified (BLM Instruction Memorandum WY-2010-012), implemented through RMP maintenance, and aligned with the State of Wyoming’s Greater Sage-grouse Core Area Protection (WY EO 2010-4). As such, the impoundment locations do not occur within sage-grouse key habitats (Wyoming core, BFO focus, and connectivity), and its construction is in conformance with the Wyoming BLM policy to manage sage-grouse seasonal habitats and maintain habitat connectivity to support population objectives set by the Wyoming Game and Fish (WGFD).

Remanded: Little Black Butte 3 (pp. 34-35)

“We remand this matter to the BFO with instruction to evaluate and consider whether construction of the Little Black Butte #3, when mitigated through the seasonal restrictions provided for under the approved RMP, as updated and amended, will result in MBTA violations or significant impacts to nesting raptors.”

Buffalo Field Office Reply and Remand:

The BLM does not have the authority to regulate surface disturbing activities at this location (see preceding discussion of “federal lands”). BLM will not approve the release of federally produced water to Little Black Butte #3 for the following reasons.

An active ferruginous hawk nest (#4553) is approximately 100 meters (300 feet) from the proposed dam for Little Black Butte #3. The ferruginous hawk is a species of special concern. It is predominately a vulnerable ground nester. Heightened awareness and conservation measures are warranted to protect this nest site and further conservation protection for this sensitive specie. This management decision is based upon site-specific recommendations of BLM wildlife biologists and fully comports to the ROD and RMP Amendment, p. 14 (2003). (See biological analysis and sensitive specie policy analysis in ALL DAY CS 9, ALL DAY FOREVER CS 1, and ALL DAY FOREVER CS 2, above, and it is incorporated here by reference.) Though construction of the reservoir may not result in the direct loss of the nest location, it would be impossible to avoid directly impacting the nest site during construction or during impoundment maintenance. Since the BLM has no authority to require mitigation for impacts of the Little Black Butte # 3 impoundment as it is not on “federal land”, including timing limitations contained in the PRB FEIS, the authorized officer will not authorize the Little Black Butte # 3 impoundment to receive federally produced water. (See also BFO’s Annotated Post Onsite Deficiency Letter for the All Day POD, undated, circa May 27, 2008, annotation date stamped Sep. 12, 2008, pages unnumbered, third page, section Wildlife Survey, Number 2.)

BFO previously approved the All Day POD water management plan. Additional impoundments now approved through this modified decision record, bring the total approved capacity to 476.2 ac-ft which represents 96.2 % the requested volume. BFO determined the water plan remains viable without federal water from this impoundment. BFO finds this is the least restrictive means given the site-specific circumstances to further sensitive species conservation.

BFO finds this decision has no effect on lease rights and is consistent with granted lease rights. The previous analysis of lease rights is incorporated here by reference.

BFO finds this decision has no effect on fluid mineral recovery and socioeconomics.

[Also refer to SDR issue 5, for analysis of impoundment reclamation.]

5. Prohibition of points of visitation within 0.6 mile of the Little Black Butte lek (pp.35-36)

Remanded:

“We remand this matter to the BFO for further analysis and a new decision in light of current BLM policy.”

Buffalo Field Office Reply and Rationale: The Buffalo Field Office approves visitation points within 0.6 mile of the Little Black Butte Lek, under conditions described in BLM WY-2010-012 (restated below).

Rationale

Current BLM sage-grouse policy supports the following COAs. Wyoming BLM Sage-grouse management strategy solidified (BLM Instruction Memorandum WY-2010-012), implemented through RMP maintenance, is largely aligned with the U.S. Department of the Interior and the State of Wyoming’s Greater Sage-grouse Core Area Protection (WY EO 2010-4) since the All Day POD was processed. Therefore the Little Black Butte lek will be treated as directed in the WY-2010-012 IM Policy Statement 2: Sage-grouse leks outside Core Areas (as implemented through RMP maintenance):

Surface disturbing activities or surface occupancy is prohibited or restricted on or within one quarter (0.25) mile radius of the perimeter of occupied or undetermined sage-grouse leks.

Specifically, no surface occupancy (e.g. above ground structure) is permitted within 0.25miles of the Little Black Butte Lek.

Disruptive activity is restricted on or within one quarter (0.25) mile radius of the perimeter of occupied or undetermined sage-grouse leks from 6 PM to 8 AM from March 15-May 15. Specifically, POD related travel within 0.25 miles of the Little Black Butte lek will be prohibited between 6 PM and 8 AM, from March 15 to May 15.

6. Denial of access road (pp. 36-38)

Remanded:

“We remand this matter to the BFO to coordinate with Yates and the surface owners, consider this and/or other routes of access to reach the wells, complete the environmental record of review (including the necessary documentation of NEPA compliance), and issue a new decision consistent with their findings.”

Buffalo Field Office Reply and Rationale: The Buffalo Field Office approves the use of the existing access under conditions described in BLM WY-2010-012 (restated below).

Rationale

The use of the existing access road is approved with limitations. Wyoming BLM sage-grouse management strategy solidified (BLM Instruction Memorandum WY-2010 -012), implemented through RMP maintenance, is largely aligned with the U.S. Department of the Interior and the State of Wyoming’s Greater Sage-grouse Core Area Protection (WY EO 2010-4) since the All Day POD was processed. Therefore the Little Black Butte lek will be treated as directed in the WY-2010-012 IM Policy Statement 2: Sage-grouse leks outside Core Areas (as implemented through RMP maintenance):

Surface disturbing activities or surface occupancy is prohibited or restricted on or within one quarter (0.25) mile radius of the perimeter of occupied or undetermined sage-grouse leks.

Disruptive activity is restricted on or within one quarter (0.25) mile radius of the perimeter of occupied or undetermined sage-grouse leks from 6 PM to 8 AM from March 15-May 15.

7. Denial of power drops and power generators (pp.38-39)

Reversed and remanded:

“We reverse the BFO’s decision to not approve the power drops and temporary generators. We remand the decision to the BFO for new analysis.”

Buffalo Field Office Reply and Rationale: The power drops are approved.

Rationale

The environmental analysis in Alternative C of the original EA included the analysis of the proposed overhead power and associated drops.

Appendix 2, All Day POD Potential Well Production

Assuming these wells are not drilled and there are no offsetting wells							
Twp	Rng	Sec	Qtr/Qtr	Lease	Well Name	Unrecovered CBM	
						High	Low
43N	76W	12	NENE	WYW130096	ALL DAY ENDLESS CS 1	1155	
43N	76W	13	SWNE	WYW130096	ALL DAY ENDLESS CS 6	1105	
All numbers are in thousands of MCF, Low numbers were not used since there is no production surrounding these wells.							
Assuming these wells are not drilled but all surrounding 80s are							
Twp	Rng	Sec	Qtr/Qtr	Lease	Well Name	Unrecovered CBM	
						High	Low
43N	76W	12	NENE	WYW130096	ALL DAY ENDLESS CS 1	127	
43N	76W	13	SWNE	WYW130096	ALL DAY ENDLESS CS 6	121	
All numbers are in thousands of MCF, Low numbers were not used since there is no production surrounding these wells.							

Appendix 3, Comments on All Day Coalbed Methane Federal Plan of Development State Director Review, US Fish and Wildlife Service

See Below



United States Department of the Interior

FISH AND WILDLIFE SERVICE



**Ecological Services
5353 Yellowstone Road, Suite 308A
Cheyenne, Wyoming 82009**

DEC 28 2010

In Reply Refer To:
ES-61411/WY11CPA0060 and WY11TA0080

Memorandum

To: Field Manager, Bureau of Land Management, Buffalo Field Office,
Buffalo, Wyoming

From: *for* Field Supervisor, U.S. Fish and Wildlife Service, Wyoming Field Office,
Cheyenne, Wyoming *Janice McKee*

Subject: Comments on All Day Coalbed Methane Federal Plan of Development State
Director Review

Thank you for your letter of December 22, 2010, received in our office the same day, regarding the Yates Petroleum Corporation's (Yates) All Day Coalbed Methane (CBM) Federal Plan of Development (POD) located in Campbell County, Wyoming. The Bureau of Land Management, Wyoming State Director has reviewed and remanded the decision made by the Bureau's Buffalo Field Office in approving the All Day CBM POD (SDR No. WY-2010-030). In your letter, you requested the U.S. Fish and Wildlife Service (Service) provide technical assistance and recommendations regarding potential impacts to bald eagles and other migratory birds from the proposed development of All Day CBM Federal POD. We have limited our comments, given the time allowed, to the three issues raised in your letter.

On December 21, 2010, Mr. Bradley Rogers (Fish and Wildlife Biologist), of my staff, attended a site visit to the All Day POD with Mr. Bill Ostheimer (Wildlife Biologist).

Comments on the All Day CBM Federal POD State Director Review

SDR No. WY-2010-030, Page 6: the last sentence states, "the BFO has not amended or maintained their RMP to include any bald eagle conservation measures recommended by the FWS..." The Service wishes to remind the Bureau's Wyoming State Office that conservation measures identified in a Service biological opinion are not the recommendations of the Service. Rather, they are project specific measures identified by the Federal action agency (in this case the Bureau) in a biological assessment which attempt to avoid or minimize the direct, indirect and cumulative effect of the project to species listed under the Endangered Species Act of 1973 (Act), as amended, 16 USC 1532 *et seq.* The conservation measures proposed by the action agency therefore are binding parts of the Federal Action over the life of the action pursuant to the Act.

SDR No. WY-2010-030, Page 7: the last sentence of the second paragraph states, “conversely, a “disturbance-free buffer zone” appears to limit only those surface-disturbing activities approved in the All Day POD.” In developing concurrence letters, biological opinions with their associated non-discretionary terms and conditions and recommendations the Service must follow the definitions of “take” in the Act, Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 and Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. 668. Take is defined as:

Act definition of take - to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct. [ESA §3(19)] Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is defined by the Service as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. [50 CFR §17.3]

Regulatory definition of take (50 CFR 10.12) - means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to hunt, shoot, wound, kill, trap, capture, or collect a migratory bird. Activities that result in the unpermitted take (e.g., result in death, possession, collection, or wounding) of migratory birds or their eggs are illegal and fully prosecutable under the MBTA. Removal or destruction of active nests (i.e., nests that contain eggs or young), or causing abandonment of an active nest, could constitute a violation of the MBTA, the BGEPA, or both statutes.

BEGPA definition of take - prohibits knowingly taking, or taking with wanton disregard for the consequences of an activity, any bald or golden eagle or their body parts, nests, chicks or eggs, which includes collection, possession, molestation, disturbance, or killing. The term “disturb” is defined as “to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior” (50 CFR 22.3 and see also 72 FR 31132).

Nothing in the above definitions limits “take” to applying only to surface-disturbing activities. As stated in the Service’s 2002 biological opinion for the Powder River Basin Oil and Gas Project (page 26), “bald eagles may be affected by the project in several ways, including disturbance by humans and equipment noise and direct injuries...” On page 27 the 2002 biological opinion states, “bald eagles may be affected by disturbance near winter roost sites and perch areas. Much of the project area is devoid of significant human disturbance, especially during the winter. Many of the eagles wintering in the area may be unaccustomed to activities involving large equipment and significant human activity for even a short period of time...”

We believe the Wyoming State Office’s interpretation of the term “disturbance-free buffer zone” to limit only, surface-disturbing activities, is arrived at without full consideration of the regulatory definitions of “take” and the Service’s responsibilities to address all forms of direct,

indirect and cumulative effects, including human presence (disturbance) in the 2003 biological opinion.

Protections under the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 and Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. 668:

Under the MBTA, BGEPA and the MOU implementing Executive Order 13186, the Bureau has a mandatory obligation to protect migratory birds, including eagles and other raptors, which may occur within Federal projects under its jurisdiction. Of particular focus are the species identified in the Service's *Birds of Conservation Concern 2002*, which includes "species, subspecies, and populations of all migratory nongame birds that, without additional conservation actions, are likely to become candidates for listing" under the Act. This report is intended to stimulate coordinated and proactive conservation actions among Federal, State, and private partners and is available at

<http://www.fws.gov/migratorybirds/NewReportsPublications/SpecialTopics/BCC2008/BCC2008.pdf>

The MBTA protects migratory birds, eggs and nests from possession, sale, purchase, barter, transport, import, export, and take. The regulatory definition of take, defined in 50 CFR 10.12, means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to hunt, shoot, wound, kill, trap, capture, or collect a migratory bird. Activities that result in the unpermitted take (e.g., result in death, possession, collection, or wounding) of migratory birds or their eggs are illegal and fully prosecutable under the MBTA. Removal or destruction of active nests (i.e., nests that contain eggs or young), or causing abandonment of an active nest, could constitute a violation of the MBTA, the BGEPA, or both statutes. Removal of any active migratory bird nest or any structure that contains an active nest (e.g., tree) where such removal results in take is prohibited. Therefore, if nesting migratory birds are present on or near a project area, project timing is an important consideration during project planning. As discussed below, the BGEPA provides additional protections for bald and golden eagles and their nests. For additional information concerning nests and protections under the MBTA, please see the Service Migratory Bird Permit Memorandum, MBMP-2 available at <http://www.fws.gov/policy/m0208.pdf>.

The BGEPA protections include provisions not included in the MBTA, such as the protection of unoccupied nests and a prohibition on disturbing eagles. Specifically, the BGEPA prohibits knowingly taking, or taking with wanton disregard for the consequences of an activity, any bald or golden eagle or their body parts, nests, chicks or eggs, which includes collection, possession, molestation, disturbance, or killing. The term "disturb" is defined as "to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior" (50 CFR 22.3 and see also 72 FR 31132).

The Service has developed National Bald Eagle Management Guidelines to advise land managers when and under what circumstances the protective provisions of the MBTA and BGEPA may apply to their activities. Please note that in more open habitats typical to

Wyoming, in addition to the general recommendation in the national guidelines, additional conservation recommendations may also be necessary (our Wyoming specific recommendations are described below).

For infrastructure (or facilities) that have increased potential to cause eagle mortality (e.g., wind turbines, guyed towers, airports, waste water disposal facilities, transmission lines, etc.), we recommend locating the infrastructure outside of areas with high levels of eagle use (i.e., away from areas used for nesting, foraging, roosting or migrating) and outside of eagle travel corridors between such high-use areas. If the wildlife survey data available for the proposed project area and vicinity do not provide the detail needed to determine normal bird habitat use and movements, we recommend collecting that information prior to determining locations for infrastructure with increased potential for causing eagle mortalities. We also recommend contacting the Service's Wyoming Ecological Services office for project specific recommendations.

When the proposed infrastructure and facilities do not pose an increased risk of direct mortality, we recommend using the following general guidelines for work within Wyoming in order to avoid disturbing eagles and adequately protecting their habitat:

1. Conduct surveys within 0.5-mile of proposed activity for eagle nests and/or roosts during the appropriate time of year. Contact the Service's Ecological Services Wyoming Field Office if your project will occur within 0.5-mile of a known nest or roost to determine the potential impact of your activity to nesting and/or roosting bald eagles.
2. Avoid project-related disturbance and habitat alteration within 0.5-mile of bald eagle nests from the period of early courtship to post-fledging of chicks (January 1 through August 15).
3. Avoid disturbance within 0.5-mile of communal winter roosts from November 1 to April 1.
4. Avoid construction of aboveground structures within 0.5-mile of bald eagle nest sites and communal winter roost sites. Below ground structures (e.g., pipelines, buried power lines, fiber optic lines) may be sited closer as long as construction occurs outside of the active nesting or roosting season and will not result in the loss of alternate nest sites or roost trees.

A protective buffer for foraging areas (i.e., a linear length of river) will also be needed if the proposed activity may preclude use of foraging areas (e.g., extensive human activities on or near the water). Sensitivity to disturbance by roosting and nesting bald eagles may vary between individual eagles based on topography, density of vegetation, and intensity of activities. Modification of protective buffer recommendations may be considered where biologically supported and developed in coordination with the Service's Wyoming Ecological Services Field Office.

Because many raptors are particularly sensitive to disturbance (that may result in take) during the breeding season, we recommend implementing the attached spatial and seasonal buffer zones to protect individual nest sites/territories (Table 1, attached). Specifically, the Service recommends buffering active ferruginous hawk nests with a 1-mile buffer, and applying a seasonal buffer

from March 15 through July 31; and a buffer of 1/2-mile for golden eagle nests, with a seasonal buffer of January 15 through July 31.

The buffers serve to minimize visual and auditory impacts associated with human activities near nest sites. Ideally, buffers would be large enough to protect existing nest trees and provide for alternative or replacement nest trees. The size and shape of effective buffers vary depending on the topography and other ecological characteristics surrounding the nest site. In open areas where there is little or no forested or topographical separation, distance alone must serve as the buffer. Adequate nesting buffers will help ensure activities do not take breeding birds, their young or eggs. For optimal conservation benefit, we recommend that no temporary or permanent surface occupancy occur within species-specific spatial buffer zones. Buffer recommendations may be modified on a site-specific or project-specific basis based on field observations and local conditions. The sensitivity of raptors to disturbance may be dependent on local topography, density of vegetation, and intensity of activities. Additionally, individual birds may be habituated to varying levels of disturbance and human-induced impacts. Modification of protective buffer recommendations may be considered where biologically supported and developed in coordination with the Service's Wyoming Ecological Services Field Office.

Activities should not occur within the spatial/seasonal buffer of any nest (occupied or unoccupied) when raptors are in the process of courtship and nest site selection. Long-term land-use activities and human-use activities should not occur within the species-specific spatial buffer of occupied nests. Short-term land use and human-use activities proposed to occur within the spatial buffer of an occupied nest should only proceed during the seasonal buffer after coordination with the Service, State, and Tribal wildlife resources management agencies, and/or land-management agency biologists. If, after coordination, it is determined that due to human or environmental safety or otherwise unavoidable factors, activities require temporary incursions within the spatial and seasonal buffers, those activities should be planned to minimize impacts and monitored to determine whether impacts to birds occurred. Mitigation for habitat loss or degradation should be identified and planned in coordination with applicable agencies.

The recommended spatial and seasonal buffer zones are not regulatory, and they do not supersede provisions of the MBTA and the BGEPA. In addition, they do not supersede state, local, or tribal regulations that may be more restrictive. Assessing legal compliance with the MBTA or the BGEPA and its implementing regulations is ultimately the authority and responsibility of the Service's law enforcement personnel. It is not possible under the MBTA or BGEPA to absolve agencies, individuals or companies from liability under the MBTA or BGEPA.

Specific Comments

Dry Willow Bald Eagle Winter Roost (T43N, R75W, SWSW Section 6, NWNW Section 7, & T43N, R76W, SESE Section 1, NENE Section 12): Potentially impacted by the All Day Endless CS #1 Federal CBM well and the All Day Endless CS #2 Federal CBM well.

Currently there are three wells within 0.5-mile of the Dry Willow bald eagle winter roost. The Wyoming Resources Corporation, Federal AP W-49754 #1 injection well (Spud date November 2, 1979) is located 0.33-mile north of the winter roost. The Wyoming Resources Corporation, Federal Parker 34-6X oil well (Spud date March 25, 1985) is located 0.47-mile east-northeast of the winter roost. The Anadarko Petroleum Corporation, Dry Willow Federal 4376 1-34 CBM well (Spud date January 16, 2010) is located 0.32-mile west of the winter roost.

Federal wells and infrastructure exist on three sides of this winter roost site. These facilities have the potential to negatively affect bald and golden eagles, which could result in violations of the BGEPA and/or MBTA. We recommend the Bureau not authorize any additional Federal actions, which have the potential to create additional negative effects to migratory birds, and eagles in particular.

During our site visit, we made the following observations:

1. The survey data from ICF Jones and Stokes conducted on February 11, 2009, identified "ten adult and three immature bald eagles perched in three cottonwood trees." The GPS location given is UTM E 425603, N 4841684. However, during our site visit we noted there are no cottonwood trees near that GPS location. The closest cottonwood trees are located more than 700-feet to the south in the ephemeral draw of Dry Willow Creek. Based on this information and our observations of six eagles perched in the cottonwood trees along Dry Willow Creek along we adjusted our GIS files to represent the actual trees being used by eagles for winter roosting (Figure 1, attached).
2. While driving the proposed access road to the Yates All Day Endless CS #1 CBM well location we disturbed (flushed) a bald eagle, which was roosting in the cottonwood trees along Dry Willow Creek. When we arrived at this well location, we flushed another eagle from a tree further down Dry Willow Creek. The Fish and Wildlife Service has determined that human presence associated with the construction, operation and maintenance of the All Day Endless CS #1 Federal CBM well has the potential to negatively affect bald and golden eagles using the Dry Willow winter roost, which could result in violations of the BGEPA and/or MBTA.
3. We observed six eagles (five bald eagles and one golden eagle) roosting in these same cottonwood trees along Dry Willow Creek. All the eagles flushed from their original roost locations at the point when our vehicle became visible to them.

Based on the Service's site-specific review of the All Day Endless CS #1 Federal CBM well and the All Day Endless CS #2 Federal CBM well locations we are providing the following recommendations which should avoid additional negative affects to bald and golden eagles using the Dry Willow winter roost site:

1. Move the All Day Endless CS #1 Federal CBM well and access road outside of 0.5-mile buffer for the Dry Willow bald eagle winter roost site.

2. The All Day Endless CS #2 Federal CBM well is located approximately 0.47-mile, and out of line-of-sight of the Dry Willow bald eagle winter roost site. We do not believe the All Day Endless CS #2 Federal CBM well, as currently proposed, will have any negative affects to bald or golden eagles using the Dry Willow winter roost.

Golden Eagle Nest, BLM Nest Number 4528 (T43N, R75W, NWNW Section 6): This nest was active 2007 and 2008, inactive in 2009 and 2010. There is one existing well location, the Wyoming Resources Corporation, Federal AP W-49754 #1 injection well (Spud date November 2, 1979), which is located 0.49-mile northwest of golden eagle nest 4528. The access road to the Wyoming Resources Corporation, Federal Parker 34-6X oil well is located within 0.16-mile north of this nest. The All Day Endless CS #1 Federal CBM well is located 0.24-mile west south west of golden eagle nest number 4528. This nest is located in one of the cottonwood trees identified as part of the Dry Willow winter roost site.

Federal wells and infrastructure exist on three sides of this winter roost site. These facilities have the potential to negatively affect bald and golden eagles, which could result in violations of the BGEPA and/or MBTA. We recommend that the Bureau not authorize any additional Federal actions, which have the potential to create additional negative effects to migratory birds, and eagles in particular.

Based on the Service's site-specific review of the All Day Endless CS #1 Federal CBM well and golden eagle nest 4528, we are providing the following recommendations which should avoid additional negative affects to nesting golden eagles using the 452 nest location, which could result in violations of the BGEPA and/or MBTA:

1. Move the All Day Endless CS #1 Federal CBM well and access road outside of 0.5-mile buffer for golden eagle nest number 4528.

Red-Tailed Hawk Nest, BLM Nest Number 4228 (NESW, Section 12, T43N, R76W), Unknown Raptor Nest, BLM Nest Number 4249 (NESW, Section 12, T43N, R76W), Great-Horned Owl Nest, BLM Nest Number 4536 (NENE, Section 13, T43N, R76W), Unknown Raptor Nest, BLM Nest Number 6185 (NENE, Section 13, T43N, R76W), Unknown Raptor Nest, BLM Nest Number 6200 (NESW, Section 12, T43N, R76W), Unknown Raptor Nest, BLM Nest Number 10759 (N1/2 Center, Section 13, T43N, R76W), Unknown Raptor Nest, BLM Nest Number 6539 (NESW, Section 12, T43N, R76W): The Bureau states, "all of these nests have either been active in the past three years or do not have enough survey data to mark them as inactive."

- BLM Nest Number 4228 is approximately 1130-feet from the proposed All Day Endless CS #4 Federal CBM well location and access road to the All Day Endless CS #6 Federal CBM well.
- BLM Nest Number 4249 is approximately 1003-feet from the proposed All Day Endless CS #4 Federal CBM well location and access road to the All Day Endless CS #6 Federal CBM well.

- BLM Nest Number 4536 is approximately 1000-feet from the proposed All Day Endless CS #6 Federal CBM well location and 650-feet from the access road.
- BLM Nest Number 6185 is approximately 1100-feet from the proposed All Day Endless CS #6 Federal CBM well location and 700-feet from the access road.
- BLM Nest Number 6200 is approximately 600-feet from the proposed All Day Endless CS #6 Federal CBM well location and access road.
- BLM Nest Number 10759 and 6539 are approximately 415-feet from the proposed All Day Endless CS #6 Federal CBM well location and access road.

Based on the Service's site-specific review of the All Day Endless CS #4 and All Day Endless CS #6 Federal CBM wells, access road and their proximity to seven raptor nests we are providing the following recommendation, which should avoid additional negative, affects to nesting raptors:

1. Given the lack of information for five of the seven nest sites, we recommend no development within 0.5-mile of these nests until additional information can be gathered to determine the species using these nests.
2. Move the All Day Endless CS #4 and 6 Federal CBM wells and access road outside of species appropriate buffers for all seven of these nest sites.

We appreciate your efforts in coordinating with us. If you have questions regarding the recommendations in this memorandum, the status of the golden eagle, permit requirements, or if you require technical assistance regarding the Act, MBTA or BGEPA, please contact Bradley Rogers at (307) 684-1046.

Attachments (2)

cc: BLM, Wildlife Biologist, Buffalo, WY (B. Ostheimer)
 BLM-State Office, Wildlife Biologist (D. Saville)
 USFWS, Special Agent, Casper, WY (S. Darrah)
 WGFD, Statewide Habitat Protection Coordinator, Cheyenne, WY (M. Flanderka)
 WGFD, Non-Game Coordinator, Lander, WY (B. Oakleaf)

U.S. Fish and Wildlife Service, Wyoming Ecological Services Field Office

Protections for Raptors

Raptors, or birds of prey, and the majority of other birds in the United States are protected by the Migratory Bird Treaty Act, 16 U.S.C. 703 (MBTA). A complete list of migratory bird species can be found in the Code of Federal Regulations at 50 CFR 10.13. Eagles are also protected by the Bald and Golden Eagle Protection Act, 16 U.S.C. 668 (Eagle Act).

The MBTA protects migratory birds, eggs and nests from possession, sale, purchase, barter, transport, import, export, and take. The regulatory definition of take, defined in 50 CFR 10.12, means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to hunt, shoot, wound, kill, trap, capture, or collect a migratory bird. Activities that result in the unpermitted take (e.g., result in death, possession, collection, or wounding) of migratory birds or their eggs are illegal and fully prosecutable under the MBTA. Removal or destruction of active nests (i.e., nests that contain eggs or young), or causing abandonment of an active nest, could constitute a violation of the MBTA, the Eagle Act, or both statutes. Removal of any active migratory bird nest or any structure that contains an active nest (e.g., tree) where such removal results in take is prohibited. Therefore, if nesting migratory birds are present on or near a project area, project timing is an important consideration during project planning. As discussed below, the Eagle Act provides additional protections for bald and golden eagles and their nests. For additional information concerning nests and protections under the MBTA, please see the U.S. Fish and Wildlife Service's (Service) Migratory Bird Permit Memorandum, MBMP-2.

The Service's Wyoming Ecological Services Field Office works to raise public awareness about the possible occurrence of birds in proposed project areas and the risk of violating the MBTA, while also providing guidance to minimize the likelihood that take will occur. We encourage you to coordinate with our office before conducting actions that could lead to the take of a migratory bird, their young, eggs, or active nests (e.g., construction or other activity in the vicinity of a nest that could result in a take). If nest manipulation is proposed for a project in Wyoming, the project proponent should also contact the Service's Migratory Bird Office in Denver at 303-236-8171 to see if a permit can be issued. Permits generally are not issued for an active nest of any migratory bird species, unless removal of the nest is necessary for human health and safety. If a permit cannot be issued, the project may need to be modified to ensure take of migratory birds, their young or eggs will not occur.

For infrastructure (or facilities) that have potential to cause direct avian mortality (e.g., wind turbines, guyed towers, airports, wastewater disposal facilities, transmission lines), we recommend locating structures away from high avian-use areas such as those used for nesting, foraging, roosting or migrating, and the travel zones between high-use areas. If the wildlife survey data available for the proposed project area and vicinity do not provide the detail needed to identify normal bird habitat use and movements, we recommend collecting that information prior to determining locations for any infrastructure that may create an increased potential for avian mortalities. We also recommend contacting the Service's Wyoming Ecological Services office for project-specific recommendations.

Additional Protections for Eagles

The Eagle Act protections include provisions not included in the MBTA, such as the protection of unoccupied nests and a prohibition on disturbing eagles. Specifically, the Eagle Act prohibits knowingly taking, or taking with wanton disregard for the consequences of an activity, any bald or golden eagle or their body parts, nests, chicks or eggs, which includes collection, possession, molestation, disturbance, or killing. The term "disturb" is defined as "to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior" (50 CFR 22.3 and see also 72 FR 31132).

Attachment 1

The Eagle Act includes limited exceptions to its prohibitions through a permitting process. The Service has issued regulations concerning the permit procedures for exceptions to the Eagle Act's prohibitions (74 FR 46836), including permits to take golden eagle nests which interfere with resource development or recovery operations (50 CFR 22.25). The regulations identify the conditions under which a permit may be issued (i.e., status of eagles, need for action), application requirements, and other issues (e.g., mitigation, monitoring) necessary in order for a permit to be issued.

For additional recommendations specific to Bald Eagles please see our Bald Eagle information web page (<http://www.fws.gov/wyominges>).

Recommended Steps for Addressing Raptors in Project Planning

Using the following steps in early project planning, agencies and proponents can more easily minimize impacts to raptors, streamline planning and permitting processes, and incorporate measures into an adaptive management program:

1. Coordinate with appropriate Service offices, Wyoming Game and Fish Department, Tribal governments, and land-management agencies at the earliest stage of project planning.
2. Identify species and distribution of raptors occurring within the project area by searching existing data sources (e.g., Wyoming Game and Fish Department, Federal land-management agencies) and by conducting on-site surveys.
3. Plan and schedule short-term and long-term project disturbances and human-related activities to avoid raptor nesting and roosting areas, particularly during crucial breeding and wintering periods
4. Determine location and distribution of important raptor habitat, nests, roost sites, migration zones and, if feasible, available prey base in the project impact area.
5. Document the type, extent, timing, and duration of raptor activity in important use areas to establish a baseline of raptor activity.
6. Ascertain the type, extent, timing, and duration of development or human activities proposed to occur, and the extent to which this differs from baseline conditions.
7. Consider cumulative effects to raptors from proposed projects when added to past, present, and reasonably foreseeable actions. Ensure that project mitigation adequately addresses cumulative effects to raptors.
8. Minimize loss of raptor habitats and avoid long-term habitat degradation. Mitigate for unavoidable losses of high-valued raptor habitats, including (but not limited to) nesting, roosting, migration, and foraging areas.
9. Monitor and document the status of raptor populations and, if feasible, their prey base post project completion, and evaluate the success of mitigation efforts.
10. Document meaningful data and evaluations in a format that can be readily shared and incorporated into wildlife databases (contact the Service's Wyoming Ecological Services office for details).

Protection of nesting, wintering (including communal roost sites), and foraging activities is considered essential to conserving raptors. In order to promote the conservation of migratory bird populations and their habitats, Federal agencies should implement those strategies directed by Executive Order 13186, "Responsibilities of Federal Agencies To Protect Migratory Birds" (66 FR 3853).

Recommended Seasonal and Spatial Buffers to Protect Nesting Raptors

Because many raptors are particularly sensitive to disturbance (that may result in take) during the breeding season, we recommend implementing spatial and seasonal buffer zones to protect individual nest sites/territories (Table 1). The buffers serve to minimize visual and auditory impacts associated with human activities near nest sites. Ideally, buffers would be large enough to protect existing nest trees and provide for alternative or

Attachment 1

replacement nest trees. The size and shape of effective buffers vary depending on the topography and other ecological characteristics surrounding the nest site. In open areas where there is little or no forested or topographical separation, distance alone must serve as the buffer. Adequate nesting buffers will help ensure activities do not take breeding birds, their young or eggs. For optimal conservation benefit, we recommend that no temporary or permanent surface occupancy occur within species-specific spatial buffer zones. For some activities with very substantial auditory impacts (e.g., seismic exploration and blasting) or visual impacts (e.g., tall drilling rig), a larger buffer than listed in Table 1 may be necessary, please contact the Service's Wyoming Ecological Services office for project specific recommendations on adequate buffers.

As discussed above, for infrastructure that may create an increased potential for raptor mortalities, the spatial buffers listed in Table 1 may not be sufficient to reduce the incidence of raptor mortalities (for example, if a wind turbine is placed outside a nest disturbance buffer, but inadvertently still within areas of normal daily or migratory bird movements); therefore, please contact the Service's Wyoming Ecological Services office for project specific recommendations on adequate buffers.

Buffer recommendations may be modified on a site-specific or project-specific basis based on field observations and local conditions. The sensitivity of raptors to disturbance may be dependent on local topography, density of vegetation, and intensity of activities. Additionally, individual birds may be habituated to varying levels of disturbance and human-induced impacts. Modification of protective buffer recommendations may be considered where biologically supported and developed in coordination with the Service's Wyoming Ecological Services Field Office.

Because raptor nests are often initially not identified to species (e.g., preliminary aerial surveys in winter), we first recommend a generic raptor nest seasonal buffer guideline of January 15th – August 15th. Similarly, for spatial nesting buffers, until the nesting species has been confirmed, we recommend applying a 1-mile spatial buffer around the nest. Once the raptor species is confirmed, we then make species-specific and site-specific recommendations on seasonal and spatial buffers (Table 1).

Activities should not occur within the spatial/seasonal buffer of any nest (occupied or unoccupied) when raptors are in the process of courtship and nest site selection. Long-term land-use activities and human-use activities should not occur within the species-specific spatial buffer of occupied nests. Short-term land use and human-use activities proposed to occur within the spatial buffer of an occupied nest should only proceed during the seasonal buffer after coordination with the Service, State, and Tribal wildlife resources management agencies, and/or land-management agency biologists. If, after coordination, it is determined that due to human or environmental safety or otherwise unavoidable factors, activities require temporary incursions within the spatial and seasonal buffers, those activities should be planned to minimize impacts and monitored to determine whether impacts to birds occurred. Mitigation for habitat loss or degradation should be identified and planned in coordination with applicable agencies.

Please contact the Service's Wyoming Ecological Services Field Office if you have any questions regarding the status of the bald eagle, permit requirements, or if you require technical assistance regarding the MBTA, Eagle Act, or the above recommendations. The recommended spatial and seasonal buffers are voluntary (unless made a condition of permit or license) and are not regulatory, and they do not supersede provisions of the MBTA, Eagle Act, Migratory Bird Permit Memorandum (MBMP-2), and Endangered Species Act. Assessing legal compliance with the MBTA or the Eagle Act and the implementing regulations is ultimately the authority and responsibility of the Service's law enforcement personnel. Our recommendations also do not supersede Federal, State, local, or Tribal regulations or permit conditions that may be more restrictive.

Attachment 1

Table 1. Service’s Wyoming Ecological Services Field Office’s Recommended Spatial and Seasonal Buffers for Breeding Raptors

<u>Raptors of Conservation Concern (see below for more information)</u>		
Common Name	Spatial buffer (miles)	Seasonal buffer
Golden Eagle	0.5	January 15 - July 31
Ferruginous Hawk	1	March 15 - July 31
Swainson's Hawk	0.25	April 1 - August 31
Bald Eagle	see our <u>Bald Eagle information web page</u> ¹	
Prairie Falcon	0.5	March 1 - August 15
Peregrine Falcon	0.5	March 1 - August 15
Short-eared Owl	0.25	March 15- August 1
Burrowing Owl	0.25	April 1 – September 15
Northern Goshawk	0.5	April 1 - August 15

Additional Wyoming Raptors

Common Name	Spatial buffer (miles)	Seasonal buffer
Osprey	0.25	April 1 - August 31
Cooper's Hawk	0.25	March 15 – August 31
Sharp-shinned Hawk	0.25	March 15 – August 31
Red-tailed Hawk	0.25	February 1 – August 15
Rough-legged Hawk (winter resident only)	----	----
Northern Harrier	0.25	April 1 - August 15
Merlin	0.5	April 1 - August 15
American Kestrel	0.125	April 1 – August 15
Common Barn Owl	0.125	February 1 – September 15
Northern Saw-whet Owl	0.25	March 1 - August 31
Boreal Owl	0.25	February 1 – July 31
Long-eared Owl	0.25	February 1 – August 15
Great Horned Owl	0.125	December 1 – September 30
Northern Pygmy-Owl	0.25	April 1 – August 1
Eastern Screech -owl	0.125	March 1 – August 15
Western Screech-owl	0.125	March 1 – August 15
Great Gray Owl	0.25	March 15 – August 31

¹ http://www.fws.gov/wyominges/Pages/Species/Species_SpeciesConcern/BaldEagle.html

Raptors of Conservation Concern

The Service’s Birds of Conservation Concern (2008) report identifies “species, subspecies, and populations of all migratory nongame birds that, without additional conservation actions, are likely to become candidates for listing” under the Endangered Species Act (16 U.S.C 1531 et seq.). This report is intended to stimulate coordinated and proactive conservation actions among Federal, State, and private partners. The Wyoming Partners in Flight Wyoming Bird Conservation Plan identifies priority bird species and habitats, and establishes objectives for bird populations and habitats in Wyoming. This plan also recommends conservation actions to accomplish the population and habitat objectives.

We encourage project planners to develop and implement protective measures for the Birds of Conservation Concern as well as other high-priority species identified in the Wyoming Bird Conservation Plan. For additional information on the Birds of Conservation Concern that occur in Wyoming, please see our Birds of Conservation Concern web page.

Additional Planning Resources

Avian Power Line Interaction Committee (APLIC). 2006. Suggested Practices for Avian Protection on Power Lines: The State of the Art in 2006. Edison Electric Institute, APLIC, and the California Energy Commission. Washington, D.C. and Sacramento, CA.

Edison Electric Institute and the Raptor Research Foundation. 1996. Suggested Practices for Raptor Protection on Power Lines - The State of the Art in 1996. Washington, D.C.

Edison Electric Institute's Avian Power Line Interaction Committee and U.S. Fish and Wildlife Service. 2005. Avian Protection Plan Guidelines.

Edison Electric Institute and the Raptor Research Foundation. 1994. Mitigating Bird Collisions with Power Lines - The State of the Art in 1994. Washington, D.C.

U.S. Fish and Wildlife Service. 2000. Siting, Construction, Operation and Decommissioning of Communications Towers and Tower Site Evaluation Form (Directors Memorandum September 14, 2000), Arlington, Virginia.

U.S. Fish and Wildlife Service. 2007. National Bald Eagle Management Guidelines. United States Department of Interior, Fish and Wildlife Service, Arlington, Virginia. 23 pp.

Wyoming Game and Fish Department Internet Link to Raptor Information

References

50 CFR 10.12 – Code of Federal Regulations. Title 50--Wildlife and Fisheries, Chapter I--United States Fish and Wildlife Service, Department of the Interior, Part 10--General Provisions.

50 CFR 10.13– Code of Federal Regulations. Title 50--Wildlife and Fisheries, Chapter I--United States Fish and Wildlife Service, Department of the Interior, Part 10--General Provisions.

50 CFR 22.3 – Code of Federal Regulations. Title 50--Wildlife and Fisheries, Chapter I--United States Fish and Wildlife Service, Department of the Interior, Part 22—Eagle Permits.

50 CFR 22.25– Code of Federal Regulations. Title 50--Wildlife and Fisheries, Chapter I--United States Fish and Wildlife Service, Department of the Interior, Part 22—Eagle Permits.

66 FR 3853 - Presidential Documents. Executive Order 13186 of January 10, 2001. Responsibilities of Federal Agencies To Protect Migratory Birds. Federal Register, January 17, 2001.

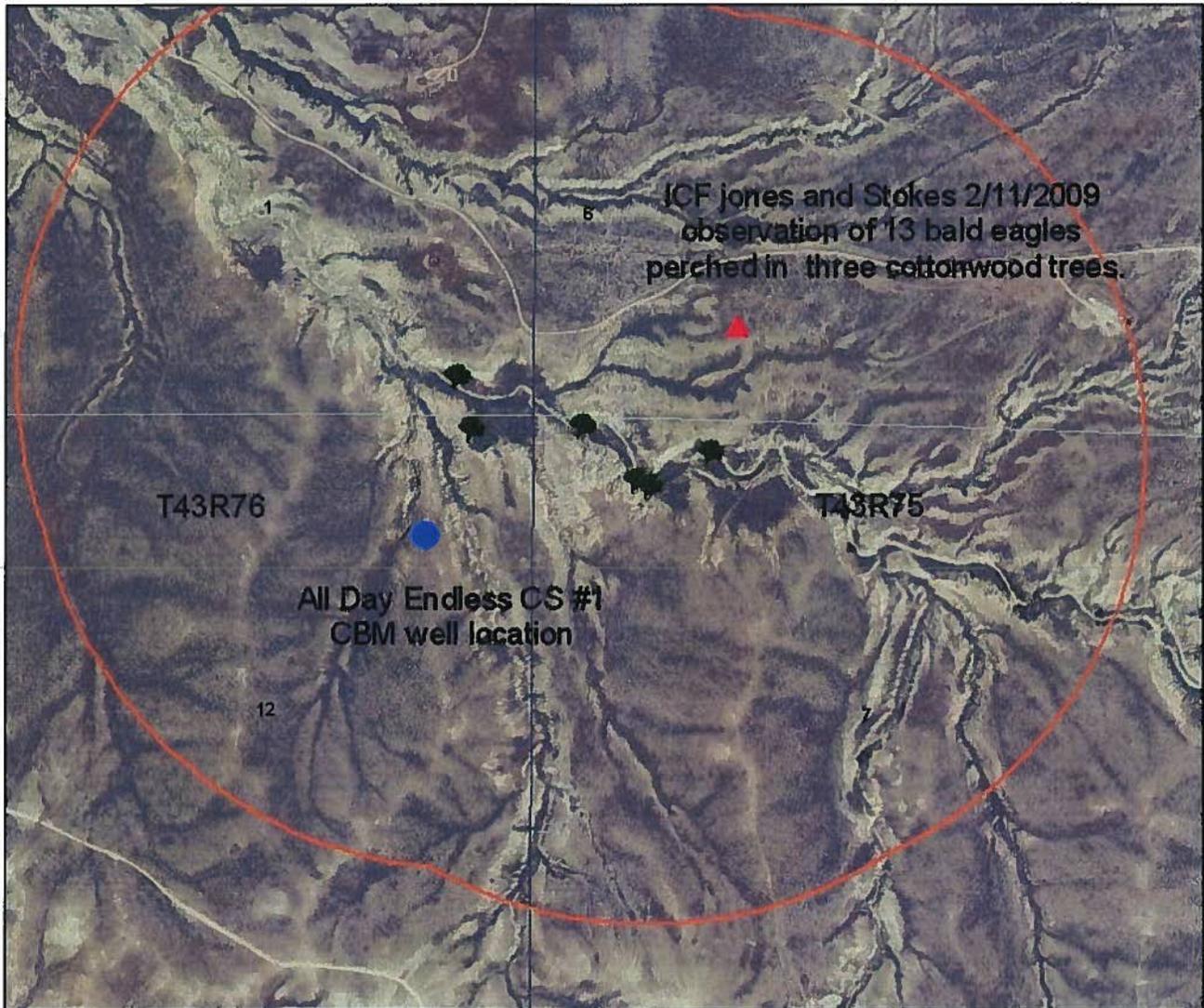
72 FR 31132 - Protection of Eagles; Definition of “Disturb”. Final Rule. Federal Register, June 5, 2007.

74 FR 46836 - Eagle Permits; Take Necessary To Protect Interests in Particular Localities. Final Rule. Federal Register, September 11, 2009.

U.S. Fish and Wildlife Service. 2003. Migratory Bird Permit Memorandum, MBMP-2, Nest Destruction (Directors Memorandum April 15, 2003), Washington, D.C.

U.S. Fish and Wildlife Service. 2008. Birds of Conservation Concern 2008. United States Department of Interior, Fish and Wildlife Service, Division of Migratory Bird Management, Arlington, Virginia. 85 pp.

Figure 1. Dry Willow Bald Eagle Winter Roost Location, 0.5-Mile Buffer and Proposed Location of All Day Endless #1 CBM Well Location



Legend

- Dry_Willow_BE_Roost
- Dry_Willow_BE_Roost_Buffer
- stateTR
- state-s
- Imagery\4_Meter\Region_2\Wyoming_NAIP09_4_Band
- RGB**
- Red: Band_1
- Green: Band_2
- Blue: Band_3

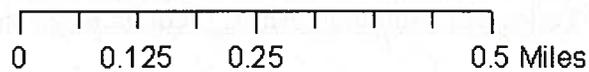


Image created March 23, 2010, by B. Rogers, U.S. Fish and Wildlife Service
projection in NAD 83
Based on Bureau of Land Management Raptor Database Files
Bureau of Land Management, Buffalo Field Office
Buffalo, WY

