

**WYOMING OUTDOOR COUNCIL • WYOMING WILDLIFE FEDERATION •
WYOMING CHAPTER OF THE SIERRA CLUB • NATURAL RESOURCES
DEFENSE COUNCIL • BIODIVERSITY CONSERVATION ALLIANCE •
GREATER YELLOWSTONE COALITION • TROUT UNLIMITED • THE
WILDERNESS SOCIETY • UPPER GREEN RIVER VALLEY COALITION •
NATIONAL WILDLIFE FEDERATION • JACKSON HOLE CONSERVATION
ALLIANCE**

February 11, 2008

Mr. Caleb Hiner, Project Lead
Bureau of Land Management
Pinedale Field Office
1625 West Pine Street
P.O. Box 768
Pinedale, WY 82941

**Re: Comments on the Revised Draft Supplemental Environmental Impact
Statement for the Pinedale Anticline Oil and Gas Exploration and
Development Project**

Dear Mr. Hiner:

Please except these comments of the Wyoming Outdoor Council, Wyoming Wildlife Federation, Wyoming Chapter of the Sierra Club, Natural Resources Defense Council, Biodiversity Conservation Alliance, Greater Yellowstone Coalition, Trout Unlimited, The Wilderness Society, National Wildlife Federation, Jackson Hole Conservation Alliance, and the Upper Green River Valley Coalition on the Revised Draft Supplemental Environmental Impact Statement for the Pinedale Anticline Oil and Gas Exploration and Development Project (hereinafter, "Revised SEIS").

**I. UPDATE AND INCORPORATION BY REFERENCE OF PRIOR
COMMENTS. INCORPORATION BY REFERENCE OF OTHER
COMMENTS SUBMITTED ON THIS REVISED SEIS.**

We would like to incorporate by reference the comments we submitted on April 5, 2007 on the Draft Supplemental Environmental Impact Statement for the Pinedale Anticline Oil and Gas Exploration and Development Project (hereinafter, "SEIS"). We also incorporate by reference the Exhibits attached to those comments, in particular the expert comments prepared on our behalf regarding big game, sage grouse, and air quality issues. In addition, we have attached those comments to these comments as Exhibit 1. Those comments should be considered fully as part of these comments.

Given that the Bureau of Land Management (BLM) has considered two new alternatives in the Revised SEIS that were not considered in the SEIS, we will briefly update some of the prior comments incorporated by reference. In our prior comments we invested a significant amount of time in demonstrating the substantial impacts that have already occurred on the Pinedale Anticline due to oil and gas development, and the likely significant additional impacts that would occur under the BLM's preferred intensified development plan (SEIS Alternative C). Now the BLM has added two new alternatives, Alternatives D and E. But these new alternatives do not fundamentally change the prior point, namely that the Pinedale Anticline Project Area will suffer severe environmental impacts under BLM's preferred alternative, which is now Alternative D. The environmental impacts of Alternative D will include but are not limited to:

- Nearly 500 acres of additional disturbance in visual resource management (VRM) Class II areas. Page 2-62.¹
- Over 1500 acres of new impacts to Sensitive Viewsheds. Page 2-62.
- Over 1300 acres of additional disturbance to the Lander Trail Sensitive Resource Management Zone. Page 2-62.
- Forty to 45 days of significant visibility impairment in the Bridger Wilderness Class I area until approximately 2013 and 10 days of impairment even after "Phase II" mitigation is implemented. Exceedance of the increment for nitrogen dioxide and particulate matter (PM10). Exceedance of the deposition analysis threshold for nitrogen and sulfur. Appendices 16 and 18, Tables 16.8, 16.9, 16.11, 16.12, 18.15, 18.29, 18.16, 18.30, 18.18, and 18.32.
- Significantly increased noise levels up to 2,800 feet away from drilling and completion operations. Page 2-64.
- Loss, damage or destruction of fossil resources in the Blue Rim area on 1,162 acres. Page 2-64.
- A 20 percent increase in sediment yields in six hydrologic sub-basins. Page 2-64.
- Greatly increased impacts to highly erosive soils. Page 2-64.
- The direct loss of an additional 3,519 acres of pronghorn crucial winter range and 4,593 acres of crucial mule deer winter range. Pages 2-65, 2-66.
- Dramatically increased impacts to sage grouse and sage grouse habitat. Page 2-66.

As pointed out in our prior comments, the BLM cannot approve environmental impacts at this level, and in any event it has not provided the required "hard look" at the consequences of these impacts, of means to mitigate those impacts, or of reasonable alternatives that could reduce environmental impacts.

In our prior comments we submitted the expert comments of Dr. Clait Braun regarding sage grouse, Dr. William Alldredge regarding impacts to big game, and the comments of Ms. Megan Williams and Ms. Cindy Copeland regarding air quality

¹ In these comments we will refer to page numbers in the Revised SEIS by simply stating the page number. If there is a need to refer to page numbers in another document, particularly the SEIS, we will make clear what document is being referenced.

impacts. We believe all of those comments are still highly relevant and the new analysis of Alternatives D and E has not changed the significance of the points made in those comments in any appreciable way. Thus, we believe those expert comments are still highly relevant, and ask that they be considered. Exhibit 1. Moreover, Dr. William Allredge has provided updated comments based on his review of the Revised SEIS, and we incorporate those comments into these comments by this reference and include his updated comments here as Exhibit 2. The import of these comments is that the BLM has failed to take a hard look at the environmental consequences of the revised Pinedale Anticline infill project.

Other issues not adequately considered in the SEIS that we believe continue to be lacking in analysis in the Revised SEIS include the analysis of impacts to the bald eagle, impacts to water quality, and socio-economic impacts and issues. As to bald eagles, while this species may no longer be protected under the Endangered Species Act (ESA), we believe the continuing protection afforded to that species under the Migratory Bird Treaty Act, Bald and Golden Eagle Protection Act, and the Statewide Bald Eagle Programmatic Biological Opinion referenced in the Revised SEIS mean that essentially the same levels of protective requirements still apply and the BLM still has similar obligations to protect this species.² Thus, we believe our prior comments remain entirely valid.

Similarly, the discussion of socio-economic impacts and issues prepared by Dr. Joe Kerkvliet and attached as Appendix 1 to our SEIS comments remains entirely valid and the points made do not change in any substantial way due to the consideration now of Alternatives D and E. Moreover, Dr. Kerkvleit has prepared additional comments on the Revised SEIS, and those comments are attached as Exhibit 3. His new comments further elaborate on the shortcomings of the socio-economic analysis in the Revised SEIS.

In our comments on the SEIS we addressed impacts on water quality in some detail. See SEIS comments at pages 14-22. Attached here as Exhibit 4 are the comments of Mr. Don Duerr which further elaborate on water quality issues in the Revised SEIS. We incorporate those comments fully into these comments by this reference.

In all of these cases, we believe the deficiencies identified earlier—as to sage grouse, big game, air quality, issues related to the bald eagle and water quality, and socio-economic issues—remain valid and in our view stand for the proposition that the Revised SEIS has not provided a hard look at the indicated environmental impacts.³

In our prior comments we identified as a deficiency the fact that the SEIS had not considered a conservation alternative or a reduced pace of development alternative.

² In particular, we believe the “modifications to protective buffers” suggested on page 9C-3 may potentially violate these obligations and laws.

³ Additionally, attached as Exhibit 5 are comments prepared by The Wilderness Society that were submitted as comments on the revised Pinedale Resource Management Plan Draft Environmental Impact Statement. These comments address a number of important issues related to oil and gas development, especially issues related to habitat fragmentation, and we would like them considered as comments on this Revised SEIS as well.

Those concerns remain in place, at least relative to the failure to consider a conservation alternative because the BLM still has refused to consider a conservation alternative in the Revised SEIS. Page 2-59. This issue will be addressed in detail below.

A key basis for our contention that the BLM must consider a true conservation alternative for implementation on the Pinedale Anticline was the discussion on pages 28 to 33 of our April 5, 2007 comments. We would like to update two aspects of that discussion. First, as to the fact that leases have been made “subject to” “applicable laws” that was mentioned on page 30 of our prior comments, we would like to add the following just below the bullet points on pages 30-31:

Special mention may be needed with respect to the first limitation on conveyed rights. The standard Offer to Lease and Lease for Oil and Gas (Form 3100-11) makes the removal of oil and gas “subject to applicable laws.” This is a considerably broader provision than the reference to non-discretionary statutes in the 3101.1-2 regulation. Many laws are applicable even if they are not strictly non-discretionary. A number of these laws, such as provisions in the Clean Air Act and the Clean Water Act were noted above. These provisions are certainly “applicable” even if they are not “non-discretionary,” and thus the leasehold—and the lessee—have been made “subject to” these laws under the explicit terms of the standard lease contract. Any number of other laws are also “applicable,” even if they are less well known. For example, the Neotropical Bird Conservation Act requires the Secretary of the Interior to coordinate activities and projects “to enhance conservation of neotropical migratory bird species.” 16 U.S.C. § 6106. Many neotropical migrant bird species inhabit BLM lands on the Pinedale Anticline (and some of them are BLM sensitive species), so even this relatively obscure law and policy is “applicable” and thus leases are “subject to” it.⁴

Before moving on, we would also note that the “terms, conditions, and stipulations of this lease,” to which the lease—and lessee—are also “subject to” under form 3100-11, specifically includes the three limitations noted above. That is, the rate of development can be specified as needed in the public interest, reasonable measures deemed necessary to minimize adverse impacts can be required, and if the impacts of the proposed operation are substantially greater than normal, operations can be denied. All of these provisions are also specifically made conditions of the lease.

In addition, the following should be considered as a conclusion to those prior comments and inserted just below the first partial paragraph at the top of page 33:

At least one implication of the above review of the degree of retained rights enjoyed by the BLM is that “takings” concerns are not of such a certain, severe magnitude that the BLM must in essence capitulate to the

⁴ As is the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712.

development desires of industry. In our experience, the BLM often quickly invokes (or bows to) concerns about there being a “taking” if it were to strongly regulate oil and gas development. Such concerns are greatly overstated.

Before a taking can occur, a property right must have been given. While certainly the BLM has conveyed the right to extract oil and gas from a leasehold, it has done so subject to any development occurring under a highly regulated, comprehensive framework, as discussed in detail above. Specifically, whatever property right has been “given” has been made “subject to” applicable laws; terms, conditions and stipulations in the lease itself; other regulations and orders in place when the lease was granted; later-issued regulations if not inconsistent with the lease; specific, non-discretionary statutes; and any reasonable measures that the BLM may require. The lease has been made “subject to” lease terms 4, 6, and 7, discussed above. To quote the Supreme Court again, a federal lease is “subjected [] to exacting restrictions and continuing supervision” and “does not give the lessee anything approaching the full ownership of a fee patentee.” Boesche at 477-78. Having given only a highly conditional opportunity to pursue development, the BLM can fully regulate development of existing leases with little fear of there being a “taking,” and under the legal authorities discussed above it in fact must do so.⁵

Furthermore, besides the fact that the BLM has given only a significantly limited right, it is well established that a regulatory taking can only occur if the BLM deprives the leaseholder of all economically viable uses of the leasehold. See Lucas v South Carolina Coastal Council, 505 U.S. 1003 (1992). This is “black letter law” reemphasized time and again by the Supreme Court. It seems unlikely that any restrictions that the BLM might place on lease development would deprive the leaseholder of all economically viable uses of the lease, and certainly a taking does not occur just because the leaseholder does not get to develop the lease in

⁵ In addition there also is little chance that there will be a breach of contract if the BLM carefully regulates development on a lease. We have not suggested that applicable laws enacted after lease issuance are necessarily enforceable, although it is not at all apparent that the conditions where the Supreme Court found a contract repudiation in the context of the Outer Continental Shelf Land Act and offshore leases is replicated in the language of the onshore standard lease form where the lease is made subject to applicable laws with no mention made of such a limitation only being applicable to laws existing at the time of entering the contract. See Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) (finding repudiation of offshore oil lease occurred where the government imposed restrictions established by a later-enacted law). As the court observed, “the need to obtain Government approvals so qualified the likely future enjoyment of the exploration and development rights that the contract, in practice, amounted primarily to an *opportunity* to try to obtain exploration and development rights in accordance with the procedures and under the standards specified in the cross-referenced statutes and regulations.” Id. at 2436. All that was bought was a promise that the government would not deviate significantly from the terms of the lease; that the “gateway” to enjoyment of the rights granted would not be significantly narrowed (which in Mobil Oil the government had done). Id. No more is demanded of onshore leases, so a breach of contract is unlikely.

exactly the manner or on exactly the timeline they might desire. It is difficult for any “taking” to occur and the BLM should recognize this.

These are the primary updates to our prior comments that we have, although other updates, clarifications and further elaboration on points made in those prior comments will be made throughout these comments.

II. THE BLM SHOULD ADOPT A HYBRID OF ALTERNATIVES D AND E FOR IMPLEMENTATION ON THE PINEDALE ANTICLINE.

Here we will describe for the BLM the elements that we believe are needed in the alternative the BLM selects for implementation on the Pinedale Anticline. Fundamentally, what we think is needed (and required) is a combination of elements of Alternative D (BLM’s current preferred alternative) and Alternative E, the slower pace of development alternative. Given this, following is what we believe is a conservation alternative that should be fully considered (and in fact adopted) by the BLM:

Provisions that Should Be Adopted from Alternative D (as modified in some cases).	Provisions that Should Be Adopted from Alternative E (as modified in some cases).
Requirements for installation of additional liquids gathering system, more directional drilling, computer assisted operations, 80 percent NO _x reduction (or more if needed to achieve zero days of visibility impairment in Class I areas), other air quality mitigation measures applicable to this alternative, no more than 250 additional well pads (535 total) and generally concentrated development. See Pages 2-42, 2-43, 2-52, Appendix 4.	The maintenance of seasonal timing limitation stipulations, especially relative mule deer and pronghorn crucial winter ranges and sage grouse nesting areas.
Adoption of a Wildlife Monitoring and Mitigation Matrix, Appendix 10, but modified in the ways discussed herein and in the expert comments submitted by Dr. Alldredge (Exhibit 2). Pages 2-42, 2-43, 2-52, Appendix 4.	The continuation of limitations on well pad density and disturbed acreage limitations in the identified special management areas. Table 2.4-13, Appendix 13. However, the buffer and flank areas should not allow for these levels of development, these areas should be off limits to drilling until the core area has been fully drilled and reclamation is established. As noted in Dr. Alldredge’s comments, the percent of disturbed habitat that would be allowed in the buffer and flanks exceeds the percentage already shown by Hall Sawyer’s research to be extremely detrimental to mule deer in this

AL-1

EG-1-1

AL-2

EG-1-2

<p>AL-3 EG-1-3</p> <p>Suspension of leases; the 49,903 acres specified in this alternative being minimum although as will be discussed below there are greater opportunities. Suspensions should be continued until drilling in the core area has been completed and at a minimum interim reclamation standards have been met. The flank areas (including the Potential Development Area (PDA)) should affirmatively be made off limits to drilling until the core area has been fully drilled and reclamation is established.</p>	<p>area.</p> <p>The slower pace of development provided for in this alternative should be maintained.</p>
<p>AL-4 EG-1-4</p> <p>Provision for the Pinedale Anticline Mitigation and Monitoring Fund, although as discussed in Dr. Alldredge’s comments, funds should be provided until there has been complete restoration of habitat. Additional needs are discussed below.</p>	<p>The number of well pads allowed for (415 new well pads, 700 total) should not be permitted, rather the provisions for maximum number of well pads provided for in Alternative D should be adhered to.</p>
<p>AL-5 EG-1-5</p> <p>The provisions in Appendices 5D, 8D, and 9C related to transportation plans, reclamation plans, and the wildlife mitigation plan.</p>	<p>Appendix 8D reclamation plan.</p>
<p>AL-6 EG-1-6</p> <p>Because the operators can access the area with directional drilling, there should be no PDA, this area should be made part of the “flanks” and managed as such (no development until the core area has been fully drilled and at a minimum interim reclamation standards have been met).</p>	<p>There should be no “buffer” area, this area should be made part of the “flanks” and managed as such (no development until the core area has been fully drilled and at a minimum interim reclamation standards have been met).</p>
<p>AL-7 EG-1-7</p> <p>Provisions related to limiting disturbance around raptor nests, bald eagle wintering areas and nests, sage grouse leks, and the Lander Trail should be maintained. <u>See</u> Appendix 4 at pages 4-18 to 4-22. <u>See also</u> page 2-21.</p>	<p>Provisions related to limiting disturbance around raptor nests, bald eagle wintering areas and nests, sage grouse leks, and the Lander Trail should be maintained. <u>See</u> Appendix 4 at pages 4-18 to 4-22. <u>See also</u> page 2-21.</p>

LS-2
LS-1
E-1-8

We would like to note two provisions not included in the above list that we feel should also be components of the preferred alternative ultimately selected by the BLM. First, rather large areas of the Pinedale Anticline Project Area are no longer under lease, especially on the west side of the Pinedale Anticline. Map 1.1-2. The BLM should affirmatively designate these areas off-limits to future leasing at least until the leased areas on the Pinedale Anticline have not only been reclaimed following development, but actually restored. Similar provisions should apply outside of the Pinedale Anticline,

LS-2
 AQ-1
 EG-1-8

especially in the Ryegrass and Cottonwood (also known as Bench Corral) areas because this would help preserve effective offsite mitigation opportunities. Second, in the SEIS issued last spring, the BLM stated that under the preferred alternative “any and all available means” could be used to ensure there were zero days of significant visibility impairment in Class I areas due to project emissions. SEIS page 4-75. Now that language has been watered down. Page 4-85. The “any and all available means” language should be restored and made part of the approved Pinedale Anticline project requirements. We will discuss this issue in more detail below.

We feel we must note that under either Alternative D or E the BLM predicts that the operators on the Pinedale Anticline can achieve full recovery of the oil and gas on their leases. Page 4-97. Consequently, we believe the same is likely true of the hybrid alternative we have proposed here. The inability to fully recover oil and gas would not appear to be a bar to pursuing what we have proposed. Furthermore, while we propose that the Alternative E limitations on well pad densities and surface disturbance not be applicable in the flanks and the buffer, that these areas not be subject to drilling at all until the core has been completely drilled and at a minimum interim reclamation established, we do not believe this limitation would preclude the drilling of all 4,399 wells, either. According to Map 2.4-10, there are roughly 78 sections included in the Alternative E core area, and according to Table 2.4-13, roughly 6 well pads can be drilled in each section in the core area, on average.⁶ That would be 468 well pads, and since each well pad may contain as many as 32 wells, Appendix 7 at 7-4, this would allow for far more than 4,399 wells to be drilled (approximately 14,976 wells could be drilled). And as shown in Map 2.4-4, essentially all of the very high and high potential natural gas areas are included in the Alternative E core area. So it seems very unlikely that limiting drilling to just the core area would preclude full development of the natural gas on the Pinedale Anticline.

In our prior comments we discussed in some detail why we believe the BLM not only can adopt provisions such as those presented here, but in fact is obligated to do so under the many laws that are applicable to oil and gas development on the public lands. In particular, the high degree of “retained rights” that the BLM enjoys even in areas it has leased would allow for this management direction and would clearly help prevent some of the severe impacts noted above. See SEIS comments pages 28-33 and the additions to those comments presented above. The remainder of these comments will identify many other reasons why the BLM can, should, and must pursue this direction.

III. THE BLM WILL VIOLATE MANY LEGAL REQUIRMENTS IF IT ADOPTS ALTERNATIVE D, AND IT IS CLEAR THAT THE DIRECTION OF MANY LAWS DEMANDS THAT THE BLM ADOPT THE PROVISIONS ADVOCATED FOR HERE.

In our comments on the SEIS last spring we focused primarily on issues related to the “procedural” obligations created by the National Environmental Policy Act (NEPA),

⁶ This is probably an underestimate since much of the Alternative E core area is in management area 5 or management area 6 where 8 active well pads are permitted per section.

obligations the courts clearly enforce. We explained that the SEIS had not taken a hard look at many significant environmental issues, had failed to consider a reasonable range of alternatives, and had not adequately considered options for mitigating environmental impacts. We believe those problems remain in the Revised SEIS for the reasons discussed in our comments last spring and throughout these comments. Below, however, we do not focus on these “procedural” obligations so much as “substantive” obligations. While it may be uncertain the degree to which a court would enforce these obligations, we feel there is no doubt the BLM must abide by these provisions, and if it does so it would move toward adopting the provisions suggested above in its final preferred alternative for the Pinedale Anticline.

A. The BLM Must Prevent Unnecessary or Undue Degradation of the Public Lands.

In our comments on the SEIS last spring, we discussed in some detail the requirement to prevent unnecessary or undue degradation of the public lands that is established by the Federal Land Policy and Management Act (FLPMA), particularly as it was interpreted by the court in Mineral Policy Center v. Norton, 292 F.Supp.2d 30 (D.D.C. 2003). See SEIS comments at page 29. FLPMA, establishes a dual obligation, both unnecessary degradation and undue degradation of the public lands must be prevented, and the undue degradation prong relates to prohibiting environmentally excessive or degrading activities, even if necessary for mining.

The Revised SEIS makes it clear that implementation of Alternative D will lead to a number of severe environmental impacts. Some of these impacts were noted above. The BLM likes to refer to these as “significant” impacts, but by any measure they are prohibited “undue” impacts under the terms of the FLPMA. 43 U.S.C. § 1732(b) (BLM is required to take “any” “action” that is necessary to prevent unnecessary or undue degradation of the public lands). This is especially true since as discussed above and in our comments on the SEIS (see pages 28 to 33), the BLM has almost complete authority to specify the time, place, and manner of oil and gas development. Almost none of the impacts described in the Revised SEIS are unavoidable or beyond the BLM’s authority to better regulate, and consequently they are undue.

By any measure the level of impacts described in the Revised SEIS are a prohibited “undue” impact on the environment of the Pinedale Field Office, and the Pinedale Anticline. The Mineral Policy Center court recognized that “FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.” 292 F.Supp.2d at 42 (emphasis added). Because the BLM has almost complete authority to regulate the time, place and manner of oil and gas development—and in fact an obligation to do so under many “applicable” laws and many other “non-discretionary” laws—none of these impacts have to be accepted by the BLM as inevitable, unavoidable or acceptable, and thus by definition they are undue and prohibited, even if they are standard or typical practices in the oil and gas industry. If the provisions we have advocated for above were adopted by the BLM, however, the level of environmental

impacts from the Pinedale Anticline project could be reduced below the undue threshold, while still allowing for development of the natural gas.

B. The BLM’s Obligation to Manage the Public Lands for Multiple Use Demands That The Pinedale Anticline SEIS Ensure That Resources in the Pinedale Field Office are Fully Protected.

The definition of multiple use in FLPMA is long, but key provisions include the following: (1) public lands and their resource values must be managed so that they “best meet the present and future needs of the American people;” (2) it is appropriate that some land be used “for less than all of the resources;” and (3) there must be harmonious and coordinated resource management that is done “without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or greatest unit output.” 43 U.S.C. § 1702(c). Of course, BLM management actions must be done “under principles of multiple use and sustained yield.” 43 U.S.C. § 1732(a).

In addition to the requirement to manage for multiple use and sustained yield, Congress declared a policy in FLPMA that public lands are to be “managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values” as well as to “preserve and protect certain public lands in their natural condition” and provide “food and habitat for fish and wildlife.” 43 U.S.C. §1701(a)(8) (emphasis added). Consequently, Congress has made clear that strong environmental protection must be provided in BLM management actions.

When the multiple use mandate as defined by FLPMA is considered, it is apparent that the BLM has an obligation to fully protect the resources on the Pinedale Anticline. It must ensure the long-term needs of the American people are met, it need not provide for all resource uses on all areas of the public lands, and it must ensure there is no permanent impairment of the productivity of the land and quality of the environment. As currently formulated, Alternative D would violate these multiple use principles. In contrast, the provisions we have asked for above would better meet these obligations because the long-term needs of the American people would be better provided for (there would be a slower pace of development), areas such as the flanks would not be subject to development at this time (the entire area would not be subject to development), and there would be less permanent impairment of the productivity of the land and quality of the environment, and in particular the “combination of uses that will give the greatest economic return or greatest unit output” in the short-term would not be central to decision-making, as is currently the case.

C. The National Environmental Policy Act Imposes Obligations on the BLM That Must Be Reflected in the Pinedale Anticline Development Plan.

We are of course well aware of the standard mantra that the NEPA is a procedural statute, not substantive. But things are not nearly that simple. Even if the NEPA does not impose specific standards that the courts will enforce, there is also no doubt that it does in fact demand that the BLM make a real effort to comply with its policy and stated end. NEPA demands that the BLM actively pursue environmental protection.

So the place to start is with NEPA's policy and stated end. "[I]t is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of the present and future generations of Americans." 42 U.S.C. § 4331(a). With that policy established, the Congress went on to express the end which was to be achieved through NEPA. "[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may:

- fulfill the responsibilities of each generation as trustee of the environment for succeeding generations,
- assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings,
- attain the widest range of beneficial uses of the environment without degradation . . . or other undesirable or unintended consequences,
- preserve important historic, cultural and natural aspects of our national heritage . . . ,
- achieve a balance between population and resource use . . . , and
- enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

42 U.S.C. §§ 4331(b)(1)-(6). With that underlying policy and end established, the Congress then "direct[ed] that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . ." Id. § 4332(1). It is impossible to view these commandments as purely "procedural" even if they are not specifically enforceable by a court. Congress clearly wanted more than "procedure," it wanted the policies of NEPA to be given effect through the NEPA process. As noted in our comments last spring, this was specifically recognized by the Getty Oil Company court. 614 F.Supp. at 920.

And there is no doubt that the Council on Environmental Quality (CEQ) recognized the requirement to abide by the policies of NEPA and to seek to implement them through the process of preparation and adoption of an environmental impact

statement (EIS). Following is a partial list of mandatory obligations to implement, or at least recognize, the policies of NEPA that are established by the CEQ regulations:

- “Federal agencies shall to the fullest extent possible . . . Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.” 40 C.F.R. § 1500.2(f).
- “Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values” Id. 1501.2
- “The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal government.” Id. § 1502.1. And, “[a]n environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.” Id.
- “Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.” Id. § 1502.2(d) (emphasis added).

It seems clear to us that NEPA demands more than just process, even if only compliance with the “process” is specifically enforceable in court. In fact, the CEQ regulations are specific that an EIS is “more than a disclosure document.”

The objective of an EIS is to implement the policies underlying NEPA, even if such is not specifically stated in quite the unambiguous way as some of the provisions in the ESA are, for example. Consequently, the whole purpose of the Revised SEIS is to fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; to assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings; to attain the widest range of beneficial uses of the environment without degradation . . . or other undesirable or unintended consequences; to preserve important historic, cultural and natural aspects of our national heritage . . . ; to achieve a balance between population and resource use . . . ; and to enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources. That is what NEPA is all about—not EIS paperwork—and the Pinedale Anticline SEIS and decisions based on it must pursue these goals even if they are not specifically enforceable by a court. As an executive branch agency charged with faithfully executing the laws of this country, the BLM cannot ignore these requirements.

Given this, it is clear that NEPA demands many if not all of the changes in the Revised SEIS that we have asked for above. The NEPA demands that the flank areas be fully protected, that winter drilling stipulations be maintained, that areas not currently leased be withdrawn from leasing, and that modification of oil and gas operations be required (not as some extremely unlikely option) to protect wildlife and air quality,

among other things. These actions are needed to ensure safe, healthful, and productive surroundings; to allow for use of the environment without degradation; and to preserve important historic and natural aspects of our heritage. In other words, they are needed to effect the policy and end of NEPA. The approach we have proposed for oil and gas development on the Pinedale Anticline is far more in accordance with the policy and end of NEPA than Alternative D would be, and the means we have suggested would still allow for all of the oil and gas to be recovered.

D. The BLM’s Sensitive Species Manual Demands the Changes Requested Here, Especially In Order to Fully Protect the Pygmy Rabbit, Greater Sage Grouse, and Prairie Dogs.

The decision to not list the sage grouse has been remanded to the Fish and Wildlife Service, the pygmy rabbit has been found deserving of listing under the ESA, and the decision to not list the white-tailed prairie dog has also been remanded. The writing is on the wall: ESA listing of these species is imminent or at least far more than a speculative possibility. Given these events, the BLM is under an obligation to do far more to protect these species than is provided for in the Revised SEIS. And in addition, these species are recognized as sensitive species subject to the provisions in BLM’s special status species manual.

The BLM’s special status species manual provides that “[t]he protection provided by the policy for candidate species shall be used as the minimum level of protection for BLM sensitive species.” BLM Manual 6840 (emphasis added). For candidate species, among other things the BLM must develop plans and strategies that “include specific habitat and population management objectives designed for conservation” and “management strategies necessary to meet those objectives.” (emphasis added). The term “conservation” is defined in the BLM’s special status species manual and specifically with respect to special status species (as opposed to ESA listed species) it means “to use, and the use of, methods and procedures such that there is no longer any threat to their continued existence or need for continued listing as a special status species.” (emphasis added).

What this means is that at a minimum, the BLM must seek to “conserve” the pygmy rabbit, greater sage grouse, and white-tailed prairie dogs, all of which are sensitive species recognized by the BLM in Wyoming. That is, the requirement established by the BLM Manual is not only to prevent threats to the continued existence of these species or their listing under the ESA (which they may well be given the remand of adverse listing decisions for these species partly due to inappropriate interference in scientific decisions by political appointees in the Department of the Interior), but also to remove them from the BLM sensitive species list. This is an affirmative obligation established by the BLM manual—the BLM must put in place specific habitat and population management objectives designed to remove these species from the special status species list, that is, to conserve them.

In addition, the special status species manual requires that “BLM activities affecting the habitat of candidate species [and consequently sensitive species] [be] carried out in a manner that is consistent with the objectives for managing those species.” That is, the BLM must ensure that activities that affect the habitat of the pygmy rabbit, greater sage grouse and white-tailed prairie dog are done in a manner that is consistent with these species being removed from the sensitive species list, that is, with their conservation. To meet these obligations the BLM should adopt the provisions we have highlighted above so as to better conserve these species, and additional protections that are needed for these species will be addressed below.

E. State of Wyoming Policy and Public Opinion in Wyoming Demand that the BLM Make the Improvements in the Revised SEIS That We Have Suggested.

There is an increasing view in the state of Wyoming that there is a need to “go slow” and be thoughtful when it comes to oil and gas development. There is almost no support, in either official state policy or the opinion of Wyoming citizens, for the view that oil and gas development should proceed in as fast a manner as possible. Yet it is this view—maximization of oil and gas development in the fastest possible way—that the Revised SEIS seeks to advance and is built around. This view and related provisions in the Revised SEIS are totally out of sync with what the state of Wyoming wants.

The need for balanced energy development was reflected in the outcome of the Wildlife Heritage Summit held in Casper, Wyoming last summer. See Exhibit 6 (presenting the results of that meeting). There was a recognized “very high” need for “an effective paradigm for energy development that balances the needs for humans and wildlife.” Id. This view was also strongly expressed in Governor Freudenthal’s just-finished “Building the Wyoming We Want” conference, also held in Casper and attended by over 500 people. The dominant theme at the meeting was the need to be careful and thoughtful in the face of massive development pressures. The Western Governors’ Association adopted a resolution in February 2007 that called for the identification of key wildlife migration corridors and crucial wildlife habitats coupled with “recommendations on needed policy options and tools for preserving those landscapes.” Exhibit 7. The Western Governors’ Association is moving toward implementing this policy. Its Oil and Gas Working Group has submitted its report making recommendations for how this policy should be implemented. Exhibit 8. The Western Governors’ Association will finalize this guidance at its June 2008 meeting in Jackson and adopt it as the official policy of the governors. See <http://www.westgov.org/> (noting that the WGA meeting in Jackson will be held June 29-July 1). Given this widespread evolving recognition of the need to “go slow” in areas with high environmental values, especially wildlife values, the Revised SEIS should be built around and recognize such sentiments, and not be built on a philosophy of maximizing the pace of development at all costs.

In addition to these recent meetings and proceedings, there are other indications of a demand for proceeding carefully when it comes to oil and gas development. For one, the Wyoming Game and Fish Department, with the endorsement of the Wyoming Game and Fish Commission, has adopted its “Recommendations for Development of Oil and

Gas Resources within Crucial and Important Wildlife Habitats” policy. Available at <http://gf.state.wy.us/downloads/pdf/og.pdf>. In all cases, Wyoming’s mitigation policy recommends going beyond just the winter drilling timing limitations the BLM normally applies to lease parcels on crucial winter range, but is proposing to drop here, to also include a suite of additional protective practices. These additional practices include planning to regulate the pattern and rate of development, phased development, and cluster development, among many other provisions. Wyoming’s wildlife protection policy does not favor maximizing the rate of development by discarding wildlife protection stipulations.

Moreover, The State of Wyoming has a policy relative to disturbance of crucial habitats, including crucial winter ranges. Exhibit 9. Wyoming Mitigation Policy lists crucial habitats as “vital.” Vital habitat “directly limits a wildlife community, population, or subpopulation” and replacement of this habitat “may not be possible.” Crucial habitat is habitat “which is the determining factor in a population’s ability to maintain and reproduce itself . . .” The State of Wyoming’s policy is that there should be no significant decline in habitat function in these vital crucial habitats, and even though some modification may be allowed, the location, essential features, and species supported must remain “unchanged.” Abandoning winter drilling stipulations so as to allow the rate of development to be maximized is clearly not in conformance with official state policy.

Last, we would note two initiatives by the BLM that indicate an increasing need to “go slow” when it comes to oil and gas development. The first is the Wyoming Landscape Conservation Initiative. This landscape level initiative recognizes the connectedness and interrelatedness among populations of wildlife throughout southwest Wyoming, particularly big game and sage grouse. This initiative is in its infancy, and for it to fulfill its promise there is a need that activities on BLM lands not simply outstrip and make moot this effort. It needs to be given a chance to work, and the Revised SEIS should recognize that need and accommodate it, especially where there are large contiguous blocks of BLM land that could support the Initiative, such as on the flanks of the Pinedale Anticline. Within the last month, the BLM has announced its intention to manage all southwestern Wyoming Field Offices through a single district office, and deem this collective area the Wyoming High Desert District. This recognition of the interconnectedness of the Rawlins, Rock Springs, Pinedale and Kemmerer Field Offices reemphasizes the need to “go slow” with oil and gas development and the increasing recognition of the need for careful planning throughout this region before allowing for aggressive development.

When the direction of state policy and public opinion in Wyoming is considered, it is apparent that the provisions we have recommended above are closer to what the public wants to see on the Pinedale Anticline than the provisions in BLM’s preferred Alternative D.

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F. Provisions in the Pinedale RMP Will Be Violated if the BLM Adopts Alternative D.

The FLPMA of course requires that BLM management actions be done in “accordance” with the overarching Resource Management Plan (RMP). 43 U.S.C. § 1732(a). BLM regulations require that all future management actions “conform” with the RMP. 43 C.F.R. § 1610.5-3. It is apparent that Alternative D would not conform with several applicable land use plan provisions.

The Pinedale RMP Record of Decision (ROD) states that “Projects of all types within established VRM class areas will generally be required to conform with the objectives and characteristics of the classification, or the project will be modified in order to meet the VRM class objective.” RMP ROD at 33 (emphasis added). The Revised SEIS engages in no analysis of how BLM’s acknowledged failure to abide by this RMP direction can be excused; perhaps more importantly it engages in no analysis of why the Pinedale Anticline infill project is not being “modified in order to meet the VRM class objective,” (emphasis added), which is specifically the BLM’s obligation under the terms of the RMP. The Revised SEIS provides for modifications of projects that might affect visual quality but here there is no requirement that such modifications ensure that the activity will “meet” the established VRM objective after the modifications are in place. See Appendix 4 at 4-21 to 4-22. In fact, the BLM is clear that development will become a “locally dominant feature” of the landscape on 496 additional acres of VRM Class II landscape and 1,540 acres of VRM Class III landscape. Page 2-62. Yet to “meet” the VRM Class II objective (even with project modification) the BLM must “preserve the existing character of the landscape” and to meet the objective for VRM Class III landscapes the BLM must “partially retain the existing character of the landscape.” Allowing for substantial increases in the land where oil and gas industrialization becomes a “locally dominant feature” does not meet these obligations, and thus the Pinedale RMP requirements are not being met. BLM recognizes that the “level of development would exceed BLM’s management objective for VRM Class III, which allows for only moderate change in the character of the landscape,” page 4-56, and if this is true for VRM Class III areas, it is certainly even more true of Class II areas. This level of impact is impermissible under the Pinedale RMP.

With respect to wildlife, the RMP states that “Seasonal restrictions will be incorporated into all land use authorizations where appropriate.” RMP ROD at 9 (emphasis added). The fact that seasonal drilling limitations have been incorporated into virtually all leases on crucial winter ranges on the Pinedale Anticline establishes that the BLM has determined these restrictions are “appropriate,” and thus under the terms of the RMP they “will” be incorporated into land use authorizations. Certainly the BLM has never made a showing that continued application of these limitations is not “appropriate.” Unless it is appropriate to not require these stipulations, the BLM must do so under the terms of the RMP. Yet the Revised SEIS is built around only an assumption that abandoning these long-standing stipulations so that very intense, concentrated development can occur is appropriate. Nowhere so far as we know does the Revised SEIS present any objective or scientific analysis showing this abandonment is “appropriate.” There is no scientific support for this course of action, and as the comments of Dr.

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Allredge show there is no such support to be found in the scientific community, and thus this action is not appropriate. Exhibit 2 at 7-8. As will be discussed in section IX below, Dr. Allredge repeatedly points out in his comments why it is not appropriate to abandon the stipulations. Abandoning winter drilling limitations is what the operators and BLM want to do so they can maximize the rate of development, but wanting to do it does not make it necessarily appropriate.

In fact, the Revised SEIS makes it clear how tenuous it is to make any claim that abandonment of the RMP-required winter drilling restrictions is appropriate:

These elements of Alternative D [year round drilling in the core area and perhaps the PDA coupled with interim reclamation] would potentially lessen impacts to wintering big game, reducing fragmentation and edge length and leaving large areas without development while development is concentrated in other areas. However, with higher traffic volumes in winter during the development phase, mule deer avoidance behavior or roads and well pads may become more pronounced than avoidance behaviors described so far. Avoidance behavior would occur in the vicinity of year-round development pads and roads used to access those pads and would extend through the development phase [2025].

Page 4-160. Thus, at best the BLM does not know if abandoning winter drilling limitations is appropriate, and as this quote shows it is quite possible that this action will not be appropriate in terms of protecting big game populations. There certainly is no showing that it is appropriate to abandon these stipulations. Thus, the Pinedale RMP prohibits this course of action. While the BLM may be able to make exceptions to this overarching policy on a case-by-case basis, the RMP explicitly does not authorize wholesale abandonment of stipulations. Issues related to granting exceptions to stipulations will be discussed in more detail below.

Finally, the Pinedale RMP provides that “Air quality will be maintained within or above required standards” RMP ROD at 15. Yet as will be discussed below, not only does the Revised SEIS show that air quality legal standards are already being violated, it proposes to authorize continuing violations of the applicable “increments” for increased air pollution and to continue to violate the national goal of zero days of visibility impairment. Thus, again, pursuit of Alternative D would result in a violation of the Pinedale RMP, which is impermissible.

G. The Energy Policy Act of 2005 Is Not Contrary To And Does Not Prohibit the Needed Improvements in the Revised SEIS.

Increasingly the BLM seems to be invoking the Energy Policy Act of 2005 (EPAct) as demanding that BLM give priority to oil and gas development to the exclusion of other resources. The EPAct demands no such thing.

Section 361 of the EPAct requires no more than a review of current oil and gas leasing and permitting practices. Section 362 requires expeditious compliance with NEPA and other laws and timely action on leases and applications for permits to drill (APD) but it in no way modified the requirements of other laws, or their underlying policies and direction. Section 366 establishes deadlines for processing APDs, but

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specifically makes such “deadlines” subject to compliance with NEPA and other laws first. The categorical exclusions from NEPA compliance provided for under section 390 did little more than allow for NEPA compliance at a “higher altitude” than compliance at the APD level. NEPA was certainly not abandoned. Any claims that other laws have been repealed by implication by the EAct will not be well received by the courts—there is a long line of case law establishing that such arguments are “disfavored” by the courts. In sum, the EAct only sought to increase the rate of oil and gas development on the public lands, so long as other provisions of law and policy were still complied with. Consequently, the EAct in no way provides a barrier to needed improvements in the Revised SEIS.

H. BLM’s Plan to Provide Exceptions to Stipulations Fails To Meet Legal Requirements.

Of course, a prominent component of the preferred alternative for the Pinedale Anticline is exception from stipulations designed to protect big game on their crucial winter ranges and sage grouse seasonal (nesting) habitats in the core area, and possibly the PDA. Pages 2-43 to 2-45 (stating numerous times that exceptions to stipulations will be pursued). In our comments on the SEIS we discussed the legal requirements that apply before an exception, waiver, or modification can be granted, and those concerns still apply just as fully to the Revised SEIS (see pages 46-47 of our comments on the SEIS). Since issuing the SEIS, the BLM has issued an Instruction Memorandum (IM) that applies to granting exceptions, waivers, or modifications, IM 2008-032.

We would like to make several points regarding the inappropriateness of providing for exceptions to stipulations on the Pinedale Anticline. First, the BLM is planning to allow for yearlong drilling by granting exceptions to stipulations. Page 2-43 (“Year-round development with exception for seasonal restriction . . . would be allowed in the entire Alternative D Core Area.” (emphasis added)). See also page 2-15 (same). Yet an exception to a stipulation is a “case by case exemption.” Onshore Oil and Gas Order No. 1 § XI. Yet what BLM is planning is not case-by-case, it is uniformly applicable.⁷ The BLM has provided no “case-by-case” analysis of whether granting an exception to the stipulations will meet the requirements of 43. C.F.R. § 3101.1-4, and thus it cannot allow drilling to proceed absent stipulations until it conducts such a “case-by-case” analysis.

BLM’s IM reinforces the need for individualized consideration of the propriety of granting an exception, waiver, or modification. The IM provides discussion and example of how the two regulatory requirements for granting an exception (factors have changed or impacts will not be unacceptable) might be met. In both cases it is clear that an

⁷ What BLM is planning to allow is also clearly not a waiver or a modification, because under Onshore Oil and Gas Order No. 1, such changes are “permanent” by definition. Onshore Oil and Gas Order No. 1. § XI. Yet BLM is not planning to permanently waive the stipulations, it will only eliminate their application during the time when development is proceeding as provided for in the five Development Areas in the core area. That said, in a troubling change from the SEIS where the BLM referred to relaxation of the stipulations as “temporary”, the revised SEIS makes no such clear statement.

individualized analysis is required. With respect to factors leading to the requirement for the stipulation having changed, the IM indicates that granting an exception based on this consideration could be based on factors like a mild winter occurring, the animals no longer using the area, or a change in migration patterns. IM 2008-032, Attachment page 1-2. Clearly any such determination has to be quite site-specific and individualized. Likewise, an exception based on the impacts not being unacceptable can be based on factors such as the impacts being temporary, no unique species being implicated, and impacts only affecting a small number of animals. Id. Again, making decisions such as this cannot be done in some generalized fashion, the impacts of particular wells in particular places on particular species and populations needs to be considered.⁸ The Revised SEIS cannot provide this individualized, site specific analysis, and thus no generalized exception to stipulations can be granted. And moreover, what analysis does appear in the SEIS provides no support for any claim that impacts would not be unacceptable or that circumstances have changed making the stipulation no longer necessary. If anything, as noted at various points in these comments and in the comments on the SEIS last spring, both the SEIS and the Revised SEIS make it clear rather remarkable impacts to wildlife are likely if Alternative D is implemented as currently fashioned.

Last, any attempt to allow for exception must meet the requirements of the Pinedale RMP discussed above. As noted, the Pinedale RMP states that “Seasonal restrictions will be incorporated into all land use authorizations where appropriate.” RMP ROD at 9 (emphasis added). Because this is an RMP provision that BLM management actions must conform to or be in accordance with under the provisions of FLPMA, a BLM IM cannot modify this requirement, and it is not clear that even the 3101.1-4 regulation could have primacy over an RMP provision due to the underlying statutory basis and command. As discussed above, nowhere does the Revised DEIS provide any analysis showing that winter drilling or sage grouse nesting stipulations are no longer appropriate. The word appropriate means “suitable for a particular person, condition, occasion, or place; fitting.” Appropriate does not mean absolutely necessary or that something is even the best, it need only be suitable for a particular purpose. So far as we know, no one has denied that the stipulations provide some level of protection for the species they affect—even if they are arguably not the best protection—and given this, it is still appropriate to require them because they are suitable for advancing the protection of wildlife. Only if they are no longer suitable for protecting wildlife can the BLM drop them. The BLM has nowhere shown this or even come close to showing this. The only rationale that has been advanced for dropping these stipulations is that is what the operators and BLM want so as to maximize the rate of development, but nowhere has there been a showing they are no longer appropriate. Consequently, the BLM cannot grant exceptions to these stipulations.

⁸ And at a minimum, there is no doubt the sage grouse is a highly unique species, making exception to stipulations applicable to that bird highly suspect.

IV. DESPITE HAVING ANALYZED TWO NEW ALTERNATIVES, THE BLM STILL DOES NOT CONSIDER AN ADEQUATE RANGE OF REASONABLE ALTERNATIVES IN THE REVISED SEIS.

In our comments on the SEIS we discussed how the BLM had inappropriately declined to consider a conservation alternative (SEIS comments pages 26-27). This problem remains. The BLM still refuses to consider a conservation alternative and for the exact same reasons claimed in the SEIS. Page 2-59. Consequently, our comments on the SEIS remain valid. If nothing else, the BLM's high degree of retained rights in leased areas coupled with its legal obligations under numerous laws demands that the BLM consider a conservation alternative in the SEIS. Many other issues raised in these comments and in the comments on the SEIS also highlight why consideration of a conservation alternative is appropriate and indeed obligatory.

In this regard we should comment on the purpose and need stated for this project. The stated purpose and need for this project is "to act upon the Proponents proposal to revise the PAPA ROD to expand the level of development by drilling 4,399 new producing wells and to relax seasonal restrictions in certain areas." Page 1-9. This is a far too limited and constrained statement of the purpose and need. Apparently the BLM's only objective here is to accommodate the desires of industry. But as discussed at length in these comments and in the comments on the SEIS, not only does BLM have adequate retained rights in leased areas to pursue environmental protection, it in fact must do so. Certainly catering almost solely to industry's desires is not BLM's purpose, nor does industry solely define needs. BLM is in business to promote and protect the public interest, not industry's. That is BLM's job in light of the numerous legal obligations it operates under, many oriented toward environmental protection. By stating the purpose and need in such a crabbed manner, the BLM has ensured that it does not consider an appropriate range of alternatives, in particular a conservation alternative. The list of actions we detailed above (essentially a hybrid of Alternatives D and E) would serve as a conservation alternative, and is completely appropriate for the BLM to consider since it would allow for full development of the natural gas reserves on the Pinedale Anticline, albeit at a slower pace.

As courts have cautioned, "One obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence.)" Davis v. Mineta, 302 F.3d 1104, 1119 (10th Cir. 2002) (invalidating a NEPA analysis partially on this basis; quoting Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 669 (7th Cir. 1997)). Although the goals of a private party proponent are, to a limited extent, relevant in determining a project's purpose and need, "more importantly, an agency should always consider the views of Congress, expressed, to the extent that an agency can determine them, in the agency's statutory authorization to act, as well as in other Congressional directives." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991). As just one example, Congress was unwavering in its message when it passed NEPA: federal agencies are entrusted to act as trustees of the environment for present and future generations. 42 U.S.C. § 4331(b). And as discussed above, the EPA Act has certainly not fundamentally altered the underlying views of Congress expressed in many statutes. Given this, the purpose and need stated in the Revised SEIS is far too narrow,

consideration of a conservation alternative is demanded, and the hybrid of Alternatives D and E we have proposed above would meet this need.

V. THE BLM'S ANALYSIS OF AIR QUALITY ISSUES REMAINS INVALID.

Issues related to air quality were discussed at length in our prior comments, and in the expert comments prepared on our behalf that were submitted by Cindy Copeland and Megan Williams. Those issues remain valid and in need of consideration by the BLM, but here we want to highlight several issues.

A. Increment Violations.

First, based on the specific language and analysis in the Revised SEIS, the BLM is planning to violate the law, and in fact is already doing so. The BLM cannot do this. Increments for increased air pollution in attainment areas such as Wyoming are limited pursuant to the Clean Air Act's prevention of significant deterioration program. There are applicable restrictions on the increase in pollutants in Class I areas and Class II areas. These are legally binding restrictions, as binding and mandatory as the National Ambient Air Quality Standards. Thus, the BLM cannot violate the increments that have been established for Class I and Class II areas.

Yet the BLM already is violating the Class II increment for nitrogen dioxide (NO₂) and particulate matter (PM₁₀) and it will continue to do so as the Pinedale Anticline Project is implemented. Based on 2005 actual emissions, the NO₂ Class II annual increment is already being violated, as are the annual and 24-hour Class II increments for PM₁₀. Table 16.8. Upon implementation of the massive additional development on the Pinedale Anticline, at a minimum the NO₂ annual Class II increment will be violated for approximately the next 5 years (until approximately 2013) during Phase I mitigation. Table 18.15.⁹ Additionally, the PM₁₀ 24-hour Class II increment will

⁹ So far as we can determine, the BLM has not even modeled air quality impacts under Alternatives D and E (raising a significant question as to whether the BLM has really considered two new alternatives at all). This is apparent throughout Appendix 18. Apparently the BLM has concluded it need not do further modeling of Alternatives D and E because it claims the impacts of Alternative D are "similar" to Alternative C, page 4-83, and the impacts of Alternative E are "similar" to Alternative A (no action), page 4-87. Even if this is true—and we do not accept this claim as necessarily being true, it has no objective support anywhere in the Revised SEIS—the impacts of Alternative C standing in for Alternative D will be discussed throughout these comments as though they represent the impacts of Alternative D. The BLM has said as much.

And as to Alternative E, which BLM invariably claims has much greater impacts than Alternative D, we must note this is an entirely contrived situation. Basically the BLM would engage in no mitigation of air quality impacts under Alternative E, it would just go ahead with the situation that has already led to many violations of the law and policy, as shown by the 2005 actual emissions data and modeling. But if the BLM required at least the mitigation that would be required under Alternative D, there is no doubt the impacts under Alternative E could be greatly reduced below what is presented in the Revised SEIS. This is what we have asked the BLM to do above; we have asked it to apply the mitigation measures required under Alternative D to Alternative E as well. Moreover, Alternative E has at least one feature that could greatly reduce air quality impacts—a slower pace of development. See Appendix 3 at 3-2 to 3-3 (showing fewer drill rigs in operation greatly reduces visibility impacts). Thus, if the BLM were to apply the Alternative D mitigation measures coupled with the slower pace of development under Alternative E, it might well avoid the increment violations as well as violations of the visibility goals that the Revised SEIS predicts.

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all but be violated with predicted concentrations of 29.6 to 29.9 $\mu\text{g}/\text{m}^3$ and a permissible Class II incremental increase of 30 $\mu\text{g}/\text{m}^3$.¹⁰ Thus, based on actual 2005 data and the predicted future emissions from the Pinedale Anticline project, the BLM is stating unequivocally that it will violate the law.

We are well aware that the BLM has sprinkled statements throughout the Revised SEIS stating that its increment predictions do not have a regulatory function. Be that as it may, the BLM is nevertheless saying violations of the law will occur if it allows development to occur as it prefers. And when it comes to the 2005 analysis, this is based on actual emissions from actual existing development, not potential development in the future. Thus, these violations are especially real and concrete; there is nothing speculative about them. Violations of permissible increment increases can only be shown through modeling (not monitoring) and the BLM's modeling has shown existing violations and predicts ongoing violations. This is all that is needed to establish that the law is and will be violated. The Pinedale Field Office is currently violating the NO₂ Class II annual increment and the PM₁₀ Class II annual and 24-hour increments, and at a minimum according the Revised SEIS it will continue to violate the NO_x increment as the Pinedale Anticline infill project is built.

Yet relative to each land use authorization, the BLM must include terms and conditions that shall "[r]equire compliance with air and water quality standards established pursuant to applicable Federal or State law." 43 C.F.R. § 2920.7(b)(3). See also 43 U.S.C. § 1712(c)(8) (BLM RMPs must "provide for compliance" with clean air laws), Pinedale RMP ROD at 15 (air quality will be maintained within or above required standards). Thus, the BLM cannot allow development to proceed as Alternative D would allow for. It must adopt an approach that will not violate the law. The approach we have suggested above (a hybrid of Alternatives D and E) would probably meet this need. Even if the BLM cannot regulate others based on the analysis in Revised SEIS it can and must regulate itself; it need not wait on the Wyoming Department of Environmental Quality (DEQ) to step in and regulate the BLM, the BLM can and must regulate its own activities when it has concluded it is allowing violations of the law currently and would allow them to continue in the future.

B. Ozone.

The consideration of ozone impacts in the Revised SEIS is also inadequate. Ozone levels are predicted to reach 78.2 ppb initially under Phase I mitigation and to drop slightly to 76.5 ppb when Phase II mitigation is implemented. Page 4-77 (Table 4.9-2). The National and Wyoming Ambient Air Quality Standard (NAAQS) is 80 ppb, which brings up our first concern. Table 4.9-2 claims the NAAQS is 85 ppb. This is incorrect, the NAAQS is 80 ppb. Exhibit 10. See also Page 3-62 (Table 3.11-1) (stating the NAAQS is 157 $\mu\text{g}/\text{m}^3$, which converts to 80 ppb). We understand that formal

¹⁰ We find it difficult to believe that the BLM would claim that 29.9 $\mu\text{g}/\text{m}^3$ (or even 29.6 $\mu\text{g}/\text{m}^3$) differs significantly from 30 $\mu\text{g}/\text{m}^3$. No credible scientist would ever make such a claim unless they were working with the most "tight," non-variable data imaginable. We find it unbelievable that data related to air quality would have that little variation associated with it. Given even very limited variability, there is no way to claim with any scientific basis whatsoever that "differences" of this miniscule a level are in fact real differences. As Dr. Alldredge points out in his comments, when it comes to pronghorn survival rates, even a difference of 26 percent cannot be deemed statistically significant by the BLM. Exhibit 2 at 4.

violations of the NAAQS may not be judged to occur by the DEQ or the EPA until levels exceed 84 ppb due to rounding issues, Exhibit 10, but that does not change the fact the NAAQS is 80 ppb not 85 ppb.

There is at least one significant implication of this recognition. Based on the BLM's own modeling, ozone levels in the Pinedale area will virtually reach the NAAQS, they will initially reach nearly 98 percent of the NAAQS and even after further mitigation is implemented levels will still reach nearly 96 percent of the NAAQS. Page 4-77 (Table 4.9-2). This is a considerably different picture than is created by incorrectly claiming the NAAQS is 85 ppb, allowing the BLM to incorrectly imply that ozone levels will only reach 90 percent of the NAAQS. The BLM should correct this error and base its analysis on a recognition of the correct NAAQS.

And there is a further implication of the fact that the ozone NAAQS will virtually be exceeded under the BLM's own predictions. Exceeding the NAAQS has tremendous practical implications. Development can be stopped or need to be greatly modified and even day to day activities like driving and burning wood in a fireplace can be affected. Yet there is no recognition of the importance of nearly reaching this threshold in the Revised SEIS. This should be corrected and the EIS should provide a discussion of the implications of nearly reaching the NAAQS. Even if the NAAQS is not actually exceeded, "knocking on the door" of an exceedance is terribly significant, and this should be considered in the Revised SEIS, but it is not. BLM simply says the NAAQS will not be exceeded, end of discussion. But this is far too limited a consideration of a highly significant environmental issue to meet the requirements of NEPA. The need to consider the implications of these elevated ozone levels is especially important given the actual exceedances of the ozone standard that have been monitored in the area, which have already triggered a massive analytical effort on the part of DEQ. Pages 3-63 to 3-65 (Table 3.11-2).

Furthermore, as the BLM is aware, the EPA is reconsidering the current ozone NAAQS and will likely move to strengthen it in the very near future (by March 12, 2008). Exhibit 10. There is a very strong likelihood the standard will be reduced, likely to 70 or 75 ppb. Id. Given the likely strengthening of the ozone NAAQS, the BLM should acknowledge this and address it. The predicted ozone levels in the Revised SEIS would exceed even a 75 ppb standard, and would greatly exceed a 70 ppb standard. At a minimum, the BLM should not finalize approval of this project until the new standards are released so that BLM can ensure it complies with the standard (as it must), and public comment should be allowed when the new ozone standard is released. Ozone has extremely serious human health impacts, and the science has become overwhelming that the current standard is set too high to protect human health and welfare. Id.

Finally, the BLM should conduct a "sensitivity analysis" relative to ozone impacts by adding the predicted modeled ozone levels to actual monitored background levels. The BLM did exactly this in the Moxa Arch Infill Draft EIS. Moxa Arch Area Infill Gas Development Project Draft EIS at C-150. BLM cannot engage in this analysis in one Field Office while not doing so in an adjacent Field Office. If the current ozone background levels of approximately 70-75 ppb (see Table 3.11-1) were added to the predicted levels of approximately 76 ppb (see Table 4.9-2), clearly very high levels of ozone would be anticipated, there would be a likely violation of the NAAQS indicated,

and this would not be out of sync with what has actually been measured in the area. At a minimum, and as recognized in the Moxa Arch EIS, this would indicate an area “where ozone should be evaluated in more detail.” Id. In any event, it is arbitrary to engage in this analysis in one EIS while not doing so in another EIS, especially when the project areas are nearly contiguous.

C. Visibility.

As with increment violations, the BLM through its own modeling predicts that the national goal of zero days of visibility impairment in Class I areas will continue to be violated, even after Phase II mitigation is implemented. Tables 18.16, 18.30. There will still be 10 days per year of significant visibility impacts in the Bridger Wilderness Area due to direct project impacts and 25 days of impacts due to cumulative sources. Id. And as the Forest Service observed in its comments on the Revised SEIS, this is a tremendous underestimate of true impacts that would be predicted if the method adopted by the Federal Land Manager with affirmative responsibility to protect Class I airsheds (i.e., the Forest Service, not the BLM) was recognized and presented by the BLM. As discussed above with respect to increment violations, the BLM cannot permit this continued violation of national policy under the explicit terms of BLM regulations, FLPMA, and the Pinedale RMP. Consequently, the BLM must take stronger steps to reduce visibility impacts to zero days of visibility impairment as quickly as possible. Allowing significant visibility impacts to continue to occur until at least 2013 when significant impacts have already been occurring since at least 2005 (based on 2005 actual emissions levels), is simply not permissible. Under the terms of the Clean Air Act (section 169A), the BLM must prevent any future impairment and remedy the acknowledged existing impairment, and remedying a problem must certainly be done promptly, especially when BLM has the tools to remedy the problem readily at hand, such as by limiting the rate of drilling or limiting where or when drilling can occur in the project area.

Appendix D in the Air Quality Impact Analysis Technical Support Document presents some very interesting information relative to visibility impacts. As the BLM notes, the figures presented “indicate that the PAPA sources tend to have a larger impact at areas in the Bridger Wilderness that are northeast of the PAPA.” Page D-1. Quite simply, drill rigs operating in the northern and eastern part of the Pinedale Anticline have demonstrably larger impacts on visibility in the Bridger Wilderness Area than do drill rigs operating in the southern part of the project area, farther away from the wilderness. Figures D.1 to D.6. Given this clear differential, the BLM should use this information to reduce the rate of drilling in the northeastern part of the Pinedale Anticline relative to drilling in the southern part. This information makes it clear that limiting the rate of drilling, as Alternative E would do, at least in the northeast part of the project area, could demonstrably reduce the anticipated impacts on visibility. Thus, the BLM should fully consider reducing the rate of drilling to meet its obligations to protect visibility, at least in the northeastern part of the project area.

The Revised SEIS proposes a drastic and unfortunate limitation on the means that will be used to pursue the stated goal of zero days of visibility impairment over 1 dv. In the SEIS the BLM stated that “any and all available means” would be utilized to achieve the zero days of visibility impairment goal. SEIS page 4-75. Now that language has been substantially watered down, stating that if the goal cannot be met after Phase II

AQ-12

EG-1-29

AQ-13

EG-1-30

AQ-14

mitigation is implemented, “any and all practicable means with full consideration of all resources” will be used to meet the goal. Page 4-85. The BLM further explains that such means will be “technically and economically practicable” and that the chosen means will be selected “while avoiding adverse impacts to wildlife and other resources.” Page 4-86. This radical change fails to meet the BLM’s legal obligations.

In particular, economic practicality does not govern what means the BLM can require to protect visibility in Class I areas. This is especially true if the operators were to define what was practical, which no doubt would be the case since the operators are driving this whole process by BLM’s own admission (see, e.g., purpose and need statement on page 1-9). As discussed in detail in our comments on the SEIS and above, the BLM’s retained rights do not make it prisoner to the operators’ self-interested economic considerations, it has retained authority and indeed has obligations to require what is needed to protect the environment in the public interest even if such is not what the operators want. Furthermore, section 169A of the Clean Air Act creates unequivocal obligations, impairment of visibility in Class I areas is to be prevented and existing impairment is to be remedied. 42 U.S.C. § 7491(a)(1). This command is not made dependent on economic practicality. With respect to NAAQS, the Supreme Court has determined that the Clean Air Act does not permit consideration of costs that might be incurred when setting a NAAQS. Whitman v. American Trucking Ass’n, 531 U.S. 457, 471 (2001) (the Clean Air Act “unambiguously bars cost considerations from the NAAQS-setting process.”). We believe the same principal applies to protecting visibility in Class I areas given the Clean Air Act’s unequivocal command to prevent impairment of visibility in Class I areas or remedy it if it exists, with no mention or even an indication that economic considerations are appropriate, let alone determinative. Certainly economic practicability should not solely define what is practicable in terms of air pollution control.

Here and there we see the notion floated that if the rate of drilling were slowed down so as to protect air quality, wildlife would somehow be more greatly impacted. That is the unstated implication of the language noted above that control of air pollution might be limited to “avoid[] adverse impacts to wildlife and other resources.” As mentioned a couple of times above, this is nothing but supposition and seems to have no basis other than facilitating what the operators and the BLM want to do—permit drilling to occur at the maximum rate possible. There is no stated objective support for this contention presented anywhere in the Revised SEIS. And the expert comments of Dr. Alldredge make it clear that any such claim—that spreading development over a longer period of time is worse for wildlife than engaging in a massive intense burst of development—has no scientific support whatsoever. And as quoted at some length above, the Revised SEIS acknowledges that any such purported benefits are likely to be lost due to massively increased traffic levels during the winter with year-round drilling. Furthermore, Appendix 3 makes it clear there is no basis for claiming that reducing the rate of drilling (spreading development out over a longer period) will have greater impacts on wildlife than BLM’s proposed explosive development. BLM’s own analysis shows that the fewer the number of drill rigs operating, the less the impacts on wintering big game and sage grouse. Appendix 3 at 3-3 to 3-4. Thus, when “consideration of all resources” is made and “avoiding adverse impacts to wildlife” is considered, it is apparent that there are no clear benefits to be realized by not pursuing options that would

limit the rate of drilling. But the implications of BLM’s unstated but underlying supposition are that there are “benefits” for wildlife by drilling hard and fast that outweigh any “costs” to air quality incurred by this course of action, instead of going slower, which clearly would be an effective means of reducing impacts air quality, and which BLM has nowhere demonstrated has greater impacts on wildlife. There is no support whatsoever for this assumption, so it should be abandoned, and if reducing the rate of drilling would better protect air quality it should be pursued, because there is no objective evidence indicating there would be a negative impact to wildlife if this was done. Thus, the language quoted above regarding avoiding adverse impacts to wildlife as being a basis for not protecting air quality should be abandoned. This issue will be addressed further in section IX below

Given this, the BLM should re-adopt the “any and all available means” language that appeared in the SEIS. We would note that this language does not mandate any particular action, but it does not take options off the table either, as the new language would do. The BLM should retain all options for protecting air quality.

Last, to the list of possible actions that might be taken to protect air quality (see Page 4-85), the BLM should add the following. As discussed above, the BLM should consider limiting drilling more in the north part of the project area than in the south because drilling in the north clearly has greater impacts on the Bridger Wilderness Class I area. Second, the BLM should specifically consider limiting the times when drill rigs are active. While reducing the number of active drill rigs might partially affect when drill rigs are active, the BLM should retain authority to limit the seasons when drilling is occurring because atmospheric conditions can be greatly different in the summer versus the winter, and thus the impacts of drilling at different times can be greatly different. Last, the possibility of obtaining emissions offsets should be put on this list. This approach was of course used when the 2000 PAPA EIS/ROD was adopted.

We must also note the following. Appendix 3 makes it clear that a relatively minor reduction in the number of drill rigs operating might achieve the pollution control benefits needed to achieve zero days of visibility impairment. The BLM believes that it can get to 10 days of significant impairment in the Bridger Wilderness Area with 48 drill rigs operating and Phase II mitigation in place. Table 18.16. That leaves 10 days to go to get to the zero days goal. But as shown in the table on Appendix Page 3-2, if the number of drill rigs were reduced by a modest number of approximately 6, 10 days of visibility improvement could easily be achieved. This emphasizes how practical (effective) this means is for achieving visibility benefits and the BLM should not take this option off the table by essentially deeming it not practicable in the new language that appears in the Revised SEIS.

D. Climate Change.

The Revised SEIS has nothing to say about climate change issues or impacts. The extent of it seems to be that “although greenhouse gas emissions are a concern, they were not analyzed in this Revised Draft SEIS because they are outside the scope of this analysis.” Page 4-70. This is insufficient to meet legal requirements.

The courts are increasingly demanding that this issue be considered. See Massachusetts v. Environmental Protection Agency, 127 S.Ct. 1438 (2007) (U.S.

Supreme Court determines the harms associated with climate change are serious and well recognized and greenhouse gases fit well within the Clean Air Act’s capacious definition of an air pollutant). We would note that the BLM is under direction from the Secretary of the Interior to “consider and analyze potential climate change impacts” when making decisions regarding the potential utilization of resources on BLM lands. Exhibit11 (letter from the Secretary of the Interior regarding need to consider climate change issues). This directive applies specifically to oil and gas development activities. And of course, NEPA requires that BLM consider all environmentally significant issues in an EIS, and there is no doubt that global warming is such an issue.

AQ-21 | EG-1-35
 Not only will the carbon dioxide (CO₂) emissions generated by activities occurring on BLM lands contribute to global warming, the impacts of global warming are likely to affect management actions and options on the Pinedale Anticline. A generally drying climate with less winter snow may have profound implications for the environment on the Pinedale Anticline. We believe the BLM should consider likely climate impacts that will occur on the Pinedale Anticline. How will this effect reclamation potential, for example?

AQ-22 | EG-1-36
 Furthermore, at a minimum the BLM should provide an estimate of the quantity of CO₂ emissions that will be generated by activities on BLM lands and identify means to reduce those emissions. At least as importantly and perhaps more importantly, the BLM should identify the quantity of methane (CH₄) that will be emitted as a result of oil and gas development activities on the Pinedale Anticline and identify means to reduce those emissions. Methane of course is a far more “powerful” greenhouse gas than is carbon dioxide. Given that nearly 4,400 well will be drilled, many thousands (if not hundreds of thousands) of vehicle miles driven, and that the whole intent of this project is to produce methane, a very powerful greenhouse gas, it is clear that more than trivial amounts of these greenhouse gasses could be produced by this project. The failure to provide at least this level of analysis of climate change issues makes the Revised SEIS legally deficient. That these gases are not regulated pollutants under the Clean Air Act (yet) is irrelevant, this is clearly a significant environmental issue, and consequently under NEPA the BLM must consider it.

VI. THE BLM MUST PROVIDE ENHANCED PROTECTION FOR THE SAGE GROUSE, PYGMY RABBIT, AND WHITE-TAILED PRAIRIE DOG.

W-6 | EG-1-37
 As discussed above, the greater sage grouse, pygmy rabbit, and white-tailed prairie dog may all moving toward being listed under the ESA. Moreover, all of these species are recognized as BLM sensitive species, and consequently under the BLM special status species manual, the BLM must take actions to remove these species from the sensitive species list in order to meet its obligation to conserve them. In recognition of this, below we will highlight additional protections that are needed for these species, in addition to the “hybrid” of Alternatives D and E discussed above.

With respect to the greater sage grouse, the BLM must move to require greater protection for this species, not less. The need for greater protection of the sage grouse is firmly established by the following scientific reports, and we ask that the BLM fully consider the recommendations in each of them:

- Doherty, K.E., D.E. Naugle, B.L. Walker, and J.M. Graham. Greater sage-grouse winter habitat selection and energy development. *Journal of Wildlife Management*: In Press.
- Walker, B.L., D.E. Naugle, and K.E. Doherty. Greater sage-grouse population response to energy development and habitat loss. *Journal of Wildlife Management*: In Press.
- Walker, B.L., D.E. Naugle, K.E. Doherty, and T.E. Cornish. 2007. West Nile virus and greater sage-grouse: estimating infection rate in a wild bird population. *Avian Diseases* 51:In Press.
- Holloran, M. J. 2005. Greater sage-grouse (*Centrocercus urophasianus*) population response to natural gas field development in western Wyoming. Ph.D. Dissertation, University of Wyoming, Laramie, Wyoming.
- Holloran, M.J., R.Kaiser, and W. Hubert. Population response of yearling greater sage-grouse to the infrastructure of natural gas fields in southwestern Wyoming. Completion Report, August 2007, U.S. Geological Survey, Wyoming Cooperative Fish and Wildlife Research Unit, 34 pp.
- Holloran, M.J., B.J. Heath, A.G. Lyon, S.J. Slater, J.L. Kuipers, and S.H. Anderson. 2005. Greater sage-grouse nesting habitat selection and success in Wyoming. *J. Wildlife Management* 69: 638-649.
- Connelly, J.W., M.A. Schroeder, A.R. Sands, and C.E. Braun. 2000. Guidelines to manage sage grouse populations and their habitats. *Wildl. Soc. Bull.* 28:967-985.
- Braun, C.E. 2006. A Blueprint for Sage-grouse Conservation and Recovery. Unpublished report.
- Audubon Wyoming. Audubon Wyoming's Greater Sage-grouse Suggested Mineral Development Mitigation Measures. Unpublished report.

These reports are attached as Exhibits 12-19.¹¹

Furthermore, attached as Exhibit 20 is a report that shows the widespread acceptance and support for these reports and findings among State game and fish agency

¹¹ The Ph.D. Dissertation of Matthew Holloran is available at <http://www.voiceforthewild.org/general/pubs.html>.

biologists, including those in Wyoming. The report recognizes the three-fold nature of the problem of conserving sage grouse in the face of energy development: 1) the best available science shows that full field development has severe negative impacts on sage grouse populations under current lease stipulations; 2) most of the greater sage grouse habitat has already been leased; and 3) these leases contain stipulations that have been shown to be inadequate for protecting sage grouse populations. Id. at 2. The report outlines six key areas that need to be considered: core areas, no surface occupancy stipulations (“NSOs”), phased development, timing stipulations, well pad densities and restoration. Id. With respect to core or crucial areas, which are areas that the biologists authoring the report suggested should include leks, male display areas, sagebrush patch size, seasonal habitats, seasonal linkages or appropriate buffers, the conclusion was simple: “Because breeding, summer and winter habitats are essential to populations, development within these areas should be avoided. If development cannot be avoided within core areas, infrastructure should be minimized and the area should be managed in a manner that effectively conserves sagebrush habitats within that area.” Id. The report recommends “identifying and implementing greater protection within core areas from impacts of oil and gas development...[as] a high priority.” Id. The report also suggests that due to the current scale at which NSOs and timing stipulations are established, they alone will not conserve sage grouse populations without being used in combination with core areas.” Id. at 3, 6. On the other hand, phased development is a tool that depending on the design “may help maintain large, functional blocks of sage grouse habitat.” Id. at 6. Timing stipulations to protect nesting habitat should be in place March through June and where nesting habitat has not been mapped they should apply within four miles of active lek sites. Id. at 7.

Perhaps most importantly, this research shows that at a minimum the BLM should adopt a minimum of a three- to four-mile no surface occupancy and no surface disturbance/vegetation treatment buffer around sage grouse leks in order to protect the leks themselves as well as surrounding nesting habitat. BLM’s standard two-miles limitation, which the BLM plans to abandon in the core area and possibly the PDA in any event, has been shown to be insufficient by this research. Given the BLM’s obligations under its special status species manual, the National Sage-Grouse Conservation Strategy (the memorandum of understanding referenced in it is especially significant), the Wyoming Game and Fish Department’s Greater Sage Grouse Conservation Plan, and the Game and Fish Department’s Recommendations for Development of Oil and Gas Resources within Crucial and Important Wildlife Habitats report, and the far from speculative coming obligations it may have under the ESA, the BLM must adopt enhanced protections for the sage grouse on the Pinedale Anticline, not reduced protections.

With respect to pygmy rabbits, it would appear that little if any protection would be directly applied for the conservation of this species. In fact mostly the BLM just anticipates increased impacts. Pages 4-136, 4-139. Yet there is no doubt the pygmy rabbit inhabits the Pinedale Anticline and in fact the research done by Wyoming Wildlife Consultants, LLC (WWC) on the Pinedale Anticline has identified specific, high concentration areas, apparently mostly on the northeast part of the Pinedale Anticline.

W-8

EG-1-39

W-9

W-10
W-11
W-12
EG-1-40

We ask that the BLM get this information and data from WWC and factor it into its management decisions for the Pinedale Anticline.¹² At a minimum, the BLM should provide that pygmy rabbit habitat, especially occupied habitats identified by WWC, will be “avoided” and it should put in place requirements to survey for pygmy rabbit presence in areas that might support this species prior to allowing disturbance. It is generally recognized that this species frequents areas with sandy soils in areas of tall or dense sagebrush. As a BLM sensitive species, BLM must avoid impacts so as to meet its obligation to “include specific habitat and population management objectives designed for conservation” and “management strategies necessary to meet those objectives.”¹³ The BLM should especially avoid disturbance in sand dune areas because such disturbance, according to the recently released draft EIS for the Moxa Arch Infill in the Kemmerer Field Office, “may rarely be fully reclaimed to the original vegetative composition and structure.” An affirmative obligation to avoid impacting pygmy rabbit habitat coupled with surveys to determine if rabbits occupy an area will provide far greater conservation benefit to this species than what is currently provided (apparently there are no current conservation provisions aimed specifically at this species).

W-13
W-14
EG-1-41

With respect to prairie dogs, there is a very large area of colonies in the Pinedale Anticline Wildlife Study Area (11,622 acres). Page 4-136. And just as with the pygmy rabbit it is not apparent any specific conservation measures will be aimed at the conservation of this species as defined and required in BLM’s special status species manual. This is insufficient; the BLM has affirmative obligations to pursue concrete conservation steps aimed at removing this species from the sensitive species list, and again its potential listing under the ESA creates additional obligations, and of course obligations will really become cemented if the species is listed. Consequently, we believe the following requirements should be imposed in the SEIS. There should be no surface disturbing activities within 50 meters of white-tailed prairie dog colonies. In addition, above-ground facilities should not be permitted within one-quarter mile of prairie dog towns unless equipped with raptor anti-perch devices, and power poles should not be allowed in prairie dog towns. Given the possibility of listing of this species, the BLM should take strong proactive management steps to remove this species from its sensitive species list, not to mention preventing listing under the ESA. This is required by the BLM’s sensitive species manual and the other legal provisions discussed above,

VII. PERFORMANCE BASED MITIGATION AND RECLAMATION

RC-1
EG-1-42

Generally the provisions in Appendix 8D that will guide reclamation are satisfactory. Our only specific comment with regards to the mitigation plan in that appendix is that we think it is important to specify that restoration of sagebrush habitat must be required in many if not most instances. As currently worded, there is sometimes ambiguity in this regard with reference made to “habitat”, “plant community” and

¹² WWC is based in Pinedale and can be reached at (307)-367-2765.

¹³ The term “conservation” is defined in BLM’s special status species manual and specifically with respect to special status species (as opposed to ESA listed species) it means “to use, and the use of, methods and procedures such that there is no longer any threat to their continued existence or need for continued listing as a special status species.” (emphasis added).

RC-1
EG-1-43

“shrubs” but no specification of sagebrush particularly. Given the overwhelming importance of sagebrush to the ecological function on the Pinedale Anticline we think it is important for the reclamation plan to specify that sagebrush must be restored in all cases where that was the preexisting plant community. In that regard, attached as Exhibit 21 are the comments of Dr. Carl Wambolt, a recognized expert on sagebrush, which were submitted as comments on the Revised Pinedale RMP Draft EIS, and which we ask the BLM to also consider here because they outline a number of important issues relative to sagebrush ecology and management. These comments are especially relevant to any “habitat improvements” (onsite or offsite) the BLM may pursue as mitigation because they detail the lack of scientific support for such efforts. This issue will be touched on more below.

RC-2
RC-3
EG-1-44

In our prior comments we asked the BLM to consider the reclamation plans being developed for the Little Snake Field Office in Colorado and for the Otero Mesa area in New Mexico, and we ask again that those plans be considered. SEIS comments at pages 45 to 46. In addition, however, we ask the BLM to consider the reclamation provisions that apply to coal mining in Wyoming. The coal mining reclamation program is far better developed and more established than oil and gas reclamation is due to the commands of the Surface Mining Control and Reclamation Act. Consequently, we think there is much to be learned by considering those provisions. The Wyoming coal mining reclamation provisions can be found on the DEQ website at http://www.soswy.state.wy.us/Rule_Search_Main.asp.

AP-1
AP-2
EG-1-45

Last, a few words about accountability. BLM plans to pursue “performance-based management” and “adaptive management.” Page 2-19. This may be fine and it may be necessary given the undoubted uncertainty that exists with many things. But it is only OK if there is sufficient accountability and definition of responsibility. Quite simply whether it be deemed performance-based management or adaptive management, the BLM must specify the “who, what, when, and where” of how adaptive decision-making will be done. While BLM may not be able to prescribe every needed action in detail at this point in time, it should be able to state with particularity who will have responsibility for making decisions, when they will make decisions, and what criteria the decisions must meet. The funding that will be available to implement decisions must be specified and be sufficient to meet the needs. The Revised SEIS must specify these kinds of things in all instances and it is not clear it meets these needs at this time. We would especially like to note the importance of having overarching goals that all “adaptive management” must meet. For air, such a standard is specified; the objective is for zero days of significant visibility impairment in Class I areas. This is an important statement, and the BLM should carefully specify in the ROD that all future “adaptive management” must further and seek to achieve this overarching and binding criterion. All decisions must move in this direction. The same clarity of overarching goals that adaptive management must seek to achieve is needed for all resources. This will ensure accountability. In our comments on the SEIS we discussed in some detail the significance of providing for mitigation in an EIS, and we reiterate those concerns and points. SEIS comments at pages 42-44. Accountability must be an absolute bedrock principle on which

“performance-based mitigation” or “adaptive management” is built in order to ensure the record of decision for this project is implemented as envisioned.

VIII. REASONS WHY THE FLANKS MUST BE FULLY PROTECTED AND LEASE SUSPENSION PROVISIONS EXTENDED, THE PDA DROPPED, THE PROVISIONS IN THE WILDLIFE MONITORING AND MITIGATION MATRIX IMPROVED, AND CAREFUL PROVISION MADE FOR OTHER MITIGATION MEASURES.

In the above table we outlined a number of provisions we think should be adopted as the management plan for the Pinedale Anticline, largely a hybrid alternative incorporating elements of Alternatives D and E. As part of this alternative we are requesting that the flank areas receive full protection, including provision for extending the lease suspensions beyond five years and to more leases; that the PDA be dropped and that it be considered as part of the flank area; and that provisions in the wildlife mitigation matrix (Appendix 10) be modified. In addition, we believe it is important that the Pinedale Anticline development plan provide for lease buyouts and trades, habitat protection as a principal focus of offsite mitigation, and that the Pinedale Anticline Mitigation and Monitoring Fund have appropriate provisions. We have identified reasons throughout these comments and in our comments on the SEIS why we think these steps are required or in better accord with federal policy and public sentiment. Here we elaborate on a few additional reasons why we think these protections should be put in place.

A. Protection of the Flanks.

As things stand now, it is not clear that areas on the “flanks” will receive any protection except for the 49,903 acres that would be suspended or subject to no surface occupancy (NSO). Pages 2-50 and 2-51 (Map 2.4-9). This leads to substantial areas of the flanks remaining open to development, which could eliminate the potential benefits of not developing this area of the Pinedale Anticline at this time, a need which clearly guides the whole direction being pursued here. Consequently we think the following improvements are needed.

All leases in the flank areas should be suspended. See page 1-3 (Map 1.1-2) (presenting existing leases on the Pinedale Anticline). If Map 1.1-2 is overlaid with Map 2.4-9, it is apparent that quite a few leases on the flanks would not be subject to the suspension. This needs to be corrected. It appears to us that there are substantial leased areas held by Ultra, Shell, and Others on the west side of the Pinedale Anticline that would not be subject to suspension. On the east side substantial areas held by Yates, Shell, BP, and Anschutz would be free from suspension or NSO limitations. Yet the BLM is given authority to impose lease suspensions in the interest of conservation of natural resources. The Secretary of the Interior “is authorized” to suspend leases in the interest of conservation. 30 U.S.C. § 209. “A suspension of all operations and production may be directed or consented to by the authorized officer only in the interest of conservation of natural resources.” 43 C.F.R. § 3103.4-4 (emphasis added). There is

no requirement that suspensions be requested or agreed to by the operators, they can be put in place by BLM decision, and there is simply no truth in BLM’s claim that “producing leases cannot be suspended”, page 2-50. The regulations specifically states otherwise.

The courts have recognized the BLM’s broad authority to suspend leases. Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981) (determining that the “ordinary meaning” of the term “in the interest of conservation” in section 209 of the Mineral Leasing Act allows suspension of operations so as to protect the environment); Getty Oil Co. v. Clark, 614 F.Supp. 904 (D. Wyo. 1985) (holding sections 189 and 209 of the Mineral Leasing Act provide broad grants of authority allowing conditioning of development to protect the environment, even allowing denial of drilling operations to protect wilderness values when a suspension is requested by the lessee; also determining that NEPA imposes responsibility to consider environmental values in carrying out the Mineral Leasing Act). Suspending all leases on the flank areas is clearly within BLM’s authority, and moreover, this is more consistent with the direction the BLM is trying to pursue on the Pinedale Anticline. Allowing a patchy pattern of discontinuous suspensions that leave many areas of the flanks open to development while the core area also undergoes massive development is not the direction the BLM is seeking, which is to preserve large contiguous habitat patches. Consequently it should put in place requirements that help it achieve full protection of the flanks while development occurs in the core area. Our extensive discussion of BLM’s “retained rights” presented in our SEIS comments and the update to those comments presented above makes it clear that the BLM has such authority, and indeed obligations.

In addition, provision should be made that ensures that lease suspensions are in place for more than five years. Lease suspensions should be in place at least until drilling is complete in the core area and at a minimum until interim reclamation requirements have been met on all leases in the core area. Drilling would be complete in the core area by 2033 under the provisions we are advocating for and by 2025 under Alternative D. Page 2-16 (Table 2.4-2). The provisions in Appendix 8D relative to the criteria for demonstration of successful interim reclamation should be met before lease suspensions are lifted. We would note that BLM discusses when the proposed five year suspensions might be lifted on page 8D-5. This is a very important discussion and should made part of the text of the Revised SEIS and certainly part of the ROD. There must be stated criteria for when suspensions will be lifted and they must meet the mitigation accountability needs discussed above. With respect to the discussion on page 8D-5, we would note that there is one troubling provision. It is stated that habitat may qualify as restored when the land provides forage. This is far too narrow a view of what needs to be provided. In addition to providing forage, the plant community at a minimum should be providing the cover and shelter functions for wildlife of the pre-existing plant community. Habitat function must be demonstrated not just forage production potential.

Last, as noted above, rather large areas on the flanks are no longer under lease. Map 1.1-2. Given this, the BLM has a prime opportunity to fully protect large areas of the flanks. Consequently, the BLM should commit as part of the ROD to not leasing

EG-1-48
LS-6
LS-7
LS-8
LS-9
RC-4
LS-10
EG-1-50

LS-10

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these areas at least until the core area has been fully developed and habitat function restored (i.e., more than just interim reclamation should be in place before these areas are leased). Likewise, it is our understanding that there is contiguous unleased similar habitat to the west in the Ryegrass and Cottonwood (Bench Corral) areas and perhaps to the east in the Wind River Front Area. The BLM should also remove these contiguous areas from consideration for leasing for the life of the Pinedale Anticline project. This would be fully consistent with BLM's management direction it intends to pursue on the Pinedale Anticline, and help ensure this was actually achieved. It would also help to ensure important options for offsite mitigation were not lost.

B The PDA Should Be Dropped and Made Part of the Flank Area.

The BLM has added a very troubling provision to the preferred Alternative D, namely the half-mile wide expansion of the core area referred to as the Potential Development Area (PDA). Page 4-46 (Map 2.4-7). There is no need for this massive expansion of the area that will potentially be heavily developed. This provision would potentially add 24,875 acres to the 45,415 acres core area, potentially making the total area of intense disturbance 70,290 acres, thirty five percent of the Pinedale Anticline Project Area.

The core area under Alternative D is already 23 percent larger than was proposed in BLM's preferred alternative in the SEIS (45,415 acres versus 39,678 acres). Thus, any likely highly productive areas have already been incorporated into the heavy development area under Alternative D, making the PDA unnecessary. Furthermore, there is no technical need for this one-half mile expansion of the core area. Operators are already able to directionally drill approximately a one-half-mile offset from a well pad. Thus, they can access the PDA by directionally drilling from well pads in the core area. The implication of the PDA is that development will occur (via directional drilling) far to the west and east of the PDA, well out into the flanks. This essentially means that BLM is making provision for development of the low potential areas of the Pinedale Anticline. Page 2-38 (Map 2.4-4). This is utterly contrary to the whole direction of the Pinedale Anticline development, which is essentially to concentrate development in the high potential area while protecting low natural gas potential areas to the west and east of the Pinedale Anticline Crest for wildlife and other values.

In addition, when a number of resources are considered, it is apparent that by recognizing and potentially allowing for development in the PDA, the BLM is potentially allowing for intrusion on a number of areas with very high environmental values. This means the environmental impacts of this project could be unnecessarily increased.¹⁴ For example, if the PDA is made available to surface disturbance, more cropland and pasture would be disturbed (Map 3.7-1), more agricultural land would be disturbed (Map 3.7-2),

¹⁴ Nowhere as far as we know does the BLM provide any estimate of how much more natural gas could be acquired if the PDA is developed versus if it is not open to surface disturbance. Lacking any such objective presentation of what might be gained by opening the PDA, there is no objective basis for this opening. This seems to be yet another case of it just being what the operators and BLM want to do, with no real specification of why it is necessary or desirable.

more sensitive recreational resource management zones would be impacted (Map 3.7-3), more VRM Class II and Class III areas will be impacted (Map 3.9-1), more sensitive viewsheds will be harmed (Map 3.9-2), more of the Lander Trail buffer areas would be intruded on (Map 3.10-1), more sensitive soils, especially in the Blue Rim area, will be developed (Map 3.17-1), more mixed-grass prairie (a relatively rare vegetation type) will be graded (Map 3.18-1), more of the livestock grazing allotments will be intruded on (Map 3.19-1), more sensitive wetlands and floodplains will be subject to development (Maps 3.20-1 and 3.20-2), more pronghorn and mule deer crucial range will be disrupted (Maps 3.22-1 and 3.22-2), more moose crucial winter range will be harmed (Map 3.22-3), and more sage grouse leks will be impacted (Maps 3.22-4 and 3.22-5). Given this massive increase in environmental impacts, there is no good reason to allow for surface disturbance in the PDA, especially when the BLM has provided no indication of its likely relative contribution to natural gas production on the Pinedale Anticline. The BLM should eliminate the PDA and make it part of the flanks with corresponding lease suspensions put in place. This would be well within BLM's retained rights on leased areas, and ensure it meets its numerous legal obligations.

It appears that the only justification presented for creating the PDA is presented by the BLM on page 2-45. BLM claims there is "the intention of reducing the likelihood of a second development pass through caused by adherence to seasonal restrictions for wildlife." This is an entirely unpersuasive rationale. For one, all existing leases on the Pinedale Anticline, even those in the flanks, are possibly going to be subject to a "second development pass through" at some point. These areas are leased, so the BLM probably cannot prohibit development forever. That is as much true on the currently defined flanks as in the PDA. All that BLM can do anywhere is regulate the pace, timing, and nature of the development, it is not likely it can entirely prohibit it in most cases. But the BLM need not allow for a second pass through on anything but its terms. And given the purposes of the Pinedale Anticline project (allowance for intense development in the core area while protecting the flanks so as to protect wildlife) it makes far greater sense to make the PDA part of the flanks and suspend leases in those areas until drilling in the core area is complete and at least interim reclamation is in place. Then, at some point in the future (likely in about 2035), a second pass through might occur in the PDA, but at that point the core area would be well on its way to reclamation. And as noted above, if the PDA really is of interest to the operators, they can reach the vast majority of it anyway on their first pass through in the core area by the use of available and proven directional drilling techniques.

It is apparent there is little to be gained by adding the PDA, but potentially much to be lost. If Map 2.4-7 is overlaid with Map 2.3-1, it is apparent that almost all of the existing development is encompassed in the Alternative D core area, with very little existing development in the proposed PDA. It is well recognized at this point that the gas "play" on the Pinedale Anticline is reasonably well defined (See Map 2.4-4), so it is highly unlikely much of real significance is likely to be discovered by development in the PDA. Virtually all likely development will occur in the defined core area, so there is no need for the PDA. Yet development in the PDA could greatly harm the wildlife on the Pinedale Anticline and the many other resources discussed above. Similarly, as Map 2.4-

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4 shows, there are well-defined very high gas potential, high potential, moderate potential, and low potential areas on the Pinedale Anticline. The proposed Alternative D core area would encompass all of the very high potential area except for a very small area in the north and virtually all of the high potential areas. Compare Map 2.4-4 with Map 2.4-7. Given this there is no need to tack on the PDA, which is almost entirely located within only moderate potential areas. Unless the BLM can come forward with data showing that potential development focused in these moderate potential areas (with directional drilling likely reaching well out into the low potential areas) is likely to significantly increase gas production it simply cannot approve the development in the PDA at this time. Such a plan provides for no balance and ensures massive increases in environmental degradation, which BLM cannot allow. It insures undue degradation of the public lands. And as discussed, these areas would actually be subject to development at some point in the future after the core area has been developed and reclaimed, so not allowing them to be the focus of extremely intense development now costs little or nothing.

In the SEIS last spring the BLM presented what we think are very important maps that seem to have been eliminated from the current Revised SEIS. These were SEIS Maps 4.1-2 through -6. These maps showed the likely intensity of development under the various alternatives, the estimated distribution of wellfield disturbance. We think these maps emphasize the importance of much what we have said in this section, and more generally the validity of the direction we are asking BLM to take (adoption of a hybrid alternative incorporating elements of Alternatives D and E). If development were confined essentially to just the Alternative D core area, the core area would be very intensely developed while the flanks would be only lightly or not developed. See SEIS Map 4.1-6. If Revised SEIS Map 2.4-6 is compared to SEIS Map 4.1-6, it is apparent that the potential effect of the PDA is to dramatically expand the area of the Pinedale Anticline impacted by over fifty percent disturbance per quarter section, and other similar levels of development intensity. Certainly we should not allow for this to occur if the goal is to provide some hope of maintenance of the wildlife populations on the Pinedale Anticline. We would also note that the disturbance level associated with Alternative A in the SEIS maps is far, far less than that associated with the other alternatives, which emphasizes the validity of incorporating Alternative E (Alternative A in the SEIS probably most closely mimics the disturbance levels that would occur under Alternative E in the Revised SEIS) into Alternative D, as we have asked for here. This is clearly a way to greatly reduce the disturbance levels on the Pinedale Anticline while still allowing for full recovery of the gas resource. The maps provided in the SEIS, but eliminated from the Revised SEIS, make this clear.

C. The Provisions in the Wildlife Monitoring and Mitigation Matrix Must Be Improved.

In a significant improvement over the SEIS, the BLM has now provided in Appendix 10 a “Wildlife Monitoring and Mitigation Matrix” (Matrix) that would establish thresholds and management responses if impacts from development in the core

area are exceeding predictions. Despite the importance of this improvement, it suffers from a number of problems which we will address here.

Dr. Alldredge's expert comments submitted on our behalf (Exhibit 2) describe a number of the problems with the Matrix. For one, over-winter fawn survival should be the change that should be monitored, not overall population levels because of the inability of overall population numbers to indicate likely impending problems. Exhibit 2 at 4-5. In addition, as Dr. Alldredge points out, it is inappropriate to make adjustment of spatial arrangement and/or pace of ongoing development the last possible option for a mitigation response. Appendix Page 10-6. Since the direct causative factor of concern here would be the massive oil and gas development that would be occurring, the first response should be to address this causative factor. Exhibit 2 at 5.

We would like to address this last issue in more detail. We feel it is entirely inappropriate to make the fourth option for mitigation (adjustment of spatial arrangement and/or pace of development) such a poor cousin to the other mitigation options. See Appendix Page 10-6. Probably the most elaborate effort to justify this second class status for this mitigation option is found on pages 4-160 to 4-161. Option 4 would not be used until previous mitigation had proven ineffective and even then it would only be applied "taking into account the other resources." Page 4-161. The other resources that would affect this decision-making, and perhaps prevent the use of this option, are not specified, and certainly there are no specific considerations relative to these "other resources" that are specified. It may well be that if changing the pace or spatial arrangement of development would affect the operators' business plans or potential profits on the Anticline that would be good enough to limit the use of this option. The BLM cannot limit the applicability of this option to this degree. Discussed throughout these comments and our comments on the SEIS are many, many reasons why the BLM cannot take this circumscribed view of the potential application of this option. BLM simply cannot essentially eliminate a clearly useful option from any real possibility of being utilized. The BLM is biasing the decision-making process before it even has the facts in hand. It has provided no biological or other scientific rationale for making this option so unlikely of application, and we doubt that it can. If oil and gas development is triggering a threshold, then obviously that causative factor should receive substantial attention in crafting a solution to the identified problem. It makes no sense to focus first and almost exclusively on things that are not even causing the problem in the first place. We suspect that the BLM is so fearful to tread in this direction because that is not what the operators want—an aggressive pace of development is their only real priority—but that is not nearly good enough a reason.

Last, we must note that not only is Option 4 made virtually incapable of actual use, even if it were used it is so highly conditioned and uncertain as to be of little effect. Even if put in play, this option can only be "recommended" and then only "for consideration by the Operators." Page 4-161, Appendix Page 10-6 (emphasis added). This does not meet the BLM's legal obligations, nor does it meet the accountability requirements for adaptive management discussed above. The operators do not run this show, the BLM does (or should).

D. There Should Be Provisions for Lease Buyout and Trade, Offsite Mitigation Should Focus on Habitat Protection, and the Mitigation Fund Must Have Appropriate Provisions.

Related to the need for full protection of the flank areas is the possibility of pursuing lease buyouts and trades in the flank areas. This could be a tremendously important way to achieve real and lasting protection for the flank areas. It could eliminate a second “pass through.” Thus, lease buyout and trade should be pursued aggressively. It appears there may be some efforts made in this regard. See Appendix 9 at 9C-7 (offsite mitigation plans may include “acquisition of property rights (leasehold interest).” But this somewhat isolated and obscure mention is not enough. The pursuit of lease buyouts and trades in the flanks (or in nearby areas with comparable habitats) should be made a priority and clearly specified as a ROD component and priority.

We would note that courts have found fault with agencies for failing to consider alternatives in an EIS just because certain options were beyond the jurisdiction of the agency to complete, but were reasonable nevertheless. In Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999), the court addressed a situation in which the Forest Service initiated an EIS to address a land exchange with a timber company. The court found that the Forest Service violated NEPA by not considering an alternative that would have involved a purchase of the timber company’s inholding, rather than just an exchange. Id. at 814. The Forest Service argued that it was unclear whether funds would be available and for this reason it had no obligation to consider what in its estimation was a “remote and speculative alternative.” Id. The court disagreed and citing 40 C.F.R. § 1502.14(c), found that “the alternative clearly [fell] within the range of such reasonable alternatives, and should have been considered.” Id. In another case, National Wildlife Federation v. National Marine Fisheries Service, 235 F.Supp.2d 1143, 1154 (D. Wash. 2002), Plaintiffs argued that the Service and the U.S. Army Corps of Engineers should have considered an alternative that would have controlled sediment deposits into a reservoir by encouraging better upstream agricultural and forestry practices. The Corps responded that it did not have the authority to regulate land uses and practices within the vast majority of the affected basin and as such did not need to include the alternative in its analysis. Id. Again, the court disagreed finding the “agency’s refusal to consider an alternative that would require some action beyond that of its congressional authorization is counter to NEPA’s intent to provide options for both agencies and Congress.” Id. In a final example, Natural Resources Defense Council v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972), the Department of Interior posited that “the only alternatives required for discussion under NEPA are those which can be adopted and put into effect by the official or agency issuing the statement.” The court disagreed, responding that an EIS is not only a tool for the lead agency, but also a means by which “Congressional objectives of Government coordination [and] a comprehensive approach to environmental management” are implemented. Id. at 836. It instructed, “The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what it required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by decision-makers in the legislative as well as the executive branch.” Id. at 837. Moreover, the court stated

that an agency may not “disregard alternatives merely because they do not offer a complete solution to the problem.” *Id.* at 836. Clearly the BLM must give significant attention to lease buyouts and trades as an important possible option for protecting resources on the Pinedale Anticline while allowing for development.

It is critical that an important component of any offsite mitigation be habitat protection, not just habitat improvement. “Habitat improvement” (burning, seeding, water developments, etc.) in sagebrush habitats is largely unproven and problematic at best. We addressed this issue in our comments on the SEIS, and here we direct the BLM to Dr. Carl Wambolt’s comments included as Exhibit 21. Those comments make it clear that many of assumptions on which sagebrush habitat improvement schemes are built are without scientific support. As Dr. Alldredge noted in his comments, the “fix it and they will come” paradigm is problematic at best, especially when there is no identification of what habitats will be improved or an indication of whether they are capable being accessed and meeting the needs of impacted wildlife. Exhibit 2 at 6. Given this, it is important that habitat protection be an important feature of offsite mitigation. There is absolutely no question that making an area off-limits to future leasing, acquiring a conservation easement, buyout of existing leases and not re-leasing the area, etc. are activities that will have clear, immediate, and undeniable benefits for wildlife. It appears there may be some interest in pursuing habitat protection, at least among the operators. The proponents envision that the mitigation fund might be used for “protection of key migration routes and/or acreage that directly benefit wildlife.” Appendix 9 at 9C-7. This is restated in Appendix 11. Appendix 11 at 11-2. It is crucial that the BLM also recognize the importance of habitat protection and not become too swept up in the largely unsupported and unproven promise of “habitat improvements.” Habitat protection is where a substantial amount of the Pinedale Anticline Mitigation and Monitoring Fund monies should be spent, and the ROD should so provide.

We are of course pleased that some of the operators would agree to put \$ 36 million into a mitigation fund. Nevertheless, we must point out that this gesture is hardly a great burden to the operators. The operators would initially only contribute \$ 4.2 million of the total \$ 36 million. They anticipate that they would make average annual contributions of \$ 1.8 million. Appendix 11 at 11-2. But even this is “based on the pace of development.” *Id.* Frankly, it seems the operators are holding BLM and the public hostage: they will contribute money if they get to develop the Pinedale Anticline as fast as they want to. That of course is unacceptable. This money should be made available because it is necessary to mitigate the extreme impacts the operators are causing due to their actions. Moreover, this level of funding is hardly a great burden to the operators. Given that the Pinedale Anticline operators expect to spend \$3-8 million to construct each well but will likely gross approximately \$ 175 billion from their activities on the Anticline (assuming a \$ 7/mcf gas price—the Cheyenne Hub price on January 14, 2008—and given the Revised SEIS estimates there are 25TCF of gas recoverable), providing only \$ 36 million for the mitigation fund is a very modest requirement that the BLM should explore further with the operators. An assessment of how much mitigation of impacts on the Pinedale Anticline is going to actually cost needs to be made, and a budget for meeting those needs developed accordingly, and provided for with assurance

in the ROD. Moreover, funds must be available until habitat function is actually restored, which may well be beyond the life of the project (LOP)—approximately 60 years.

IX. THERE IS NO EVIDENCE SUPPORTING CLAIMS THAT INTENSE YEAR-ROUND DEVELOPMENT WITH FEW SEASONAL STIPULATIONS HAS FEWER IMPACTS THAN A SLOWER PACE OF DEVELOPMENT THAT INCLUDES SEASONAL LIMITATIONS.

The underlying supposition on which BLM’s preferred alternative is based and the driving force for all BLM decision-making in the Revised SEIS appears to be that intense, concentrated, year-round development will have fewer impacts than a more moderate, tempered pace of development that limits activities in wildlife crucial areas or during crucial periods of time for wildlife. This supposition drives and colors everything that is presented in the Revised SEIS, and it is entirely unsupported.

Dr. Alldredge’s comments address this assumption in some detail and conclude that it is unfounded. Exhibit 2. The approach used in Alternative D will “create more direct and indirect disturbance and thus continue to displace and impact mule deer and pronghorn antelope.” *Id.* at 2. The rapid pace of development under Alternative D “will not reduce impacts to wildlife populations but will, instead, result in more disturbance and habitat loss at crucial times of the year and in crucial habitats.” *Id.* “The approach suggested in Alternative D is contrary to the best available scientific evidence and in my opinion would only exacerbate an already serious situation for mule deer and pronghorn antelope that depend on the Mesa for crucial winter habitat.” *Id.* at 3. “My past experience with big game animals suggests that it is largely human disturbance that causes habitat avoidance.” *Id.* at 7. As Dr. Alldredge’s comments point out, the research of Hall Sawyer and others on mule deer on the Pinedale Anticline also does not support the underlying assumption on which Alternative D is based. Mr. Sawyer’s conclusion was that “[r]educing disturbance to wintering mule deer may require restrictions or approaches that minimize the level of human activity during both production and development phases of wells.” Sublette Mule Deer Study, 2005 Annual Report at 48 (emphasis added). His research provides no support for the assumption that rapid, intense development without stipulations in large defined areas will have less impact than development subject to stipulations.

Not only do Dr. Alldredge’s comments and Hall Sawyer’s research show that there is no support for the assumption that intense year-round development is preferable to moderation that includes continued use of the timing limitation stipulations, the Revised SEIS itself casts doubts on this assumption. Quite simply, the fewer the number of drill rigs that are in operation, the less the impacts on wildlife. The information in Appendix 3 shows that moderating the pace of development by using fewer drill rigs will reduce impacts, and that purported increased impacts to wildlife if development is done over a longer period (another underlying supposition driving BLM’s analysis) are unfounded. If only 20 drill rigs were in operation, “[t]here would be fewer noise sensitive receptors (greater sage-grouse leks) impacted at any give time”, and it “would allow for more functional habitat for use by big game when compared to expected effects

by of [sic] 48 rigs drilling year-round.” Appendix 3 at 3-3 to 3-4. But if 60 drill rigs were used, “there would be more noise sensitive receptors impacted at any given time.” Id. at 3-4. “The decline in greater sage-grouse lek attendance would be expected to accelerate. More numbers and subsequent locations of drilling rigs would result in less functional wintering habitat for use by big game when compared to expected effects by 48 rigs drilling year-round.” Id. Consequently, it is apparent that there is no basis for claims that highly intense development over a shorter period of time has fewer impacts on wildlife than does a more moderate pace of development. And as quoted above, the language on page 4-160 of the Revised SEIS brings into question whether allowing drilling during the winter will reduce impacts, even with the other mitigation in place.

Furthermore, there simply is no basis to claim that the existing limitations on winter drilling in crucial winter ranges and stipulations aimed at protecting sage grouse nesting habitat are not effective. About all we really know on the Pinedale Anticline is that these protections have never been given a full chance to succeed or to be demonstrated. As Appendix 1 makes clear, out of 315 requests for exceptions to the big game crucial winter range stipulation 277 have been granted or partially granted, or 88 percent. Appendix 1 at 1-3 (Table 3). And for sage grouse, out of 522 requests for exceptions to sage grouse protective stipulations, 449 or 86 percent have been granted or partially granted. Id. In addition to that, it is already unclear whether much of the drilling on the Pinedale Anticline is even occurring subject to stipulation. The BLM has granted Questar long-term exceptions to stipulations, and granted Anschutz, Shell and Ultra exceptions on their leaseholds. Appendix 1 at 1-4 to 1-7 (Table 4) (presenting several NEPA decisions where the BLM has allowed yearlong drilling to be pursued). Given the large number of specific exceptions being granted and the additional blanket decisions allowing winter-long drilling, it is not at all apparent that the utility of winter drilling limitations and other stipulations to protect wildlife have ever been afforded a reasonable chance for the demonstration of the efficacy of these provisions. Consequently, the BLM is in no position to say that the direction it intends to pursue with Alternative D is justified because there has never been a chance to determine if that is true. As noted above, Hall Sawyer determined from his research that there is likely a need for protections during both the production and development phases of well development, not abandonment of protections during the drilling phase. And there is also no doubt that the Wyoming Game and Fish Department’s Recommendations for Development of Oil and Gas Resources within Crucial & Important Wildlife Habitats report unequivocally recommends the application of these stipulations in all cases, as well as other protective measures.

Under Alternative D, development would actually still be subject to some stipulations. The stipulation protecting nesting raptors (and burrowing owls) would still apply, the limitation on development within a quarter-mile of sage grouse leks would still apply, and stipulations would still protect bald eagle nesting sites and winter use areas. Appendix 4 at 4-18 to 4-20. As noted above we strongly support these measures and urge that they be maintained.

The Wyoming Game and Fish Department is urging that exceptions to raptor stipulations be granted at a minimum. Exhibit 22. We do not believe the BLM should take this step. Under the obligations created by the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the Statewide Bald Eagle Programmatic Biological Opinion, not to mention the BLM's sensitive species manual, its National Sage Grouse Habitat Conservation Strategy, and Wyoming IM's directed at sage grouse conservation, it must maintain these protections otherwise there is a high probability it will be allowing a take of these species to occur, and not meeting other obligations. That is impermissible, so these protections must remain. And of course, there is an increasing likelihood of ESA protection for the sage grouse. We would note that when it comes to these migratory species and species subject to federal protection, it is not the Wyoming Game and Fish Department that is chiefly charged with their protection, but rather the U.S. Fish and Wildlife Service. Consequently, the recommendations of the Fish and Wildlife Service should be more determinative here than those of the Wyoming Game and Fish Department.

But this must be said: the Wyoming Game and Fish Department does have a point in its comment letter. If the raptor and some sage grouse protections are going to continue to apply, it does make it difficult to justify dropping other stipulations since many areas would be subject to timing limitation stipulations anyway. But unlike the Wyoming Game and Fish Department which remarkably views this as a good reason to drop some remaining protections for wildlife, we take a contrary view. The fact that some stipulations would remain just emphasizes the pointlessness of dropping the other stipulations. Thus as we have argued throughout these comments, those stipulations—principally big game crucial winter range stipulations and sage grouse nesting habitat stipulations—should remain in place and not be dropped in the SEIS ROD.

X. CONCLUSION

Fundamentally we are asking the BLM to take a more “go slow” approach to development on the Pinedale Anticline by adopting a hybrid of Alternatives D and E, while the BLM's current preferred approach (Alternative D) would allow development at an extremely fast pace. We have presented much argument and evidence both here and in our SEIS comments as to why we believe the approach we advocate is preferable from both a legal and policy perspective. But as one last consideration we offer this. It has become increasingly apparent that Wyoming is receiving very low prices for its natural gas because supply is greatly in excess of pipeline capacity to transport out of the state. Exhibit 23. This is greatly reducing the royalties the State of Wyoming is receiving for resources extracted from the state, and we would assume the same is true of federal royalties being received for federal minerals owned by the people of this country. While this situation may change (and fluctuate) in the future as new pipeline capacity is undoubtedly constructed, we think this situation raises important questions about the appropriateness of seeking to speed up natural gas development levels to the maximum extent possible. Why should we seek to increase supplies still further in the fastest possible way when the effect of that may well be to effectively short-change both state and federal royalty receipts? We ask the BLM to fully consider this issue before putting

in place an alternative that has as its fundamental driving premise a view that an increased rate of development is beneficial, as contemplated under Alternative D. This situation shows that it is not necessarily beneficial, even in economic terms.

Thank you for considering these comments.

Sincerely,

Bruce Pendery
Staff Attorney, Wyoming Outdoor Council
And on Behalf of:

Joy Owen,
Wyoming Wildlife Federation

Melanie Stein,
Wyoming Chapter of the Sierra Club

Johanna Wald,
Natural Resources Defense Council

Suzanne Lewis,
Biodiversity Conservation Alliance

Lloyd Dorsey
Greater Yellowstone Coalition

Cathy Purves,
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Stephanie Kessler,
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Upper Green River Valley Coalition

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Louise Lasley,
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Larry Svoboda and Joyel Dhieux, EPA
Dave Finley and John Corra, Wyoming DEQ
Terry Cleveland, Wyoming Game and Fish Department