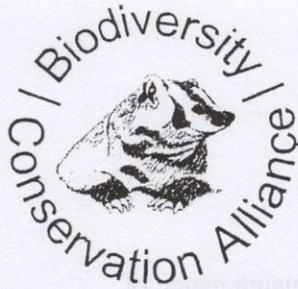


EXHIBIT 1



Working to Protect Native Species and Their Habitats

P.O. Box 1512, Laramie, WY 82073 (307) 742-7978 fax: 742-7989

February 1, 2008

Director Jim Caswell
Attn: Brenda Hudgens-Williams
P.O. Box 66538
Washington, D.C. 20035

Via email and first-class mail

Protest of the Rawlins Resource Management Plan FEIS

Dear Director Caswell:

Pursuant to 43 CFR § 1610, Biodiversity Conservation Alliance, Wyoming Outdoor Council, Wyoming Wilderness Association, The Wilderness Society, Natural Resources Defense Council, Center for Native Ecosystems, Wild Utah Project, Western Watersheds Project, Californians for Western Wilderness, Great Old Broads for Wilderness, and WildEarth Guardians protest the Final Environmental Impact Statement ("FEIS") for the Rawlins Resource Management Plan ("RMP"). We also incorporate by reference the protests of Dr. Clait Braun, Dr. Jason Lillegraven, and Hollis Marriott on the Rawlins RMP FEIS into this protest by reference.

Protestors consist of conservation advocacy groups representing the public interest, who each and in severalty have members who have used the lands and enjoyed the wildlife to be administered under the proposed Rawlins RMP in the past, and who plan future use of these lands. Degradation of lands and the scenic qualities, extirpation or depletion of sensitive wildlife species, and degradation in the health of the ecosystems managed under the Rawlins RMP would significantly impair the future use and enjoyment of these lands by the members of these protesting groups.

Overall, the proposed RMP does not reflect the multiple-use mandate of FLPMA, prioritizing oil and gas development over all other land uses to the detriment of sensitive landscapes and wildlife. The analysis of impacts, both direct and cumulative, presented in the EIS is deficient on a number of different fronts, failing to provide an adequate level of analysis to support leasing for oil and gas, wind energy development, uranium mining and milling, and other industrial uses of the land. Furthermore, the BLM has failed to present a range of reasonable alternatives in the EIS, failing to provide even a single alternative that balances oil and gas development with conservation needs, and provides an ecologically sustainable context for industrial uses in the Rawlins Resource Management Plan Planning Area ("RMPPA").

The proposed plan does not contain adequately protective measures to ensure the maintenance of ecosystem health and multiple uses on the sensitive public lands of the Red Desert and other parts of the Rawlins Resource Management Plan Planning Area (hereinafter "RMPPA"). According to the Wyoming Game and Fish Department ("WGFD"),

Although this planning document includes broad objectives and concepts for managing public lands, it lacks sufficient, programmatic detail and direction to assure appropriate resource protection, monitoring and mitigation practices for activity level planning and permitting decisions. The RMP needs to provide substantially more detailed programmatic guidance in the form of measurable, quantifiable objectives and adequately defined management actions in order to function as an effective planning document and realistically, to achieve FLPMA and NEPA objectives for managing multiple-use public lands.

DEIS Comments and Responses at Row 1899. It is notable that BLM chose not to correct this deficiency, instead providing general rationalizations as to why specific direction was not provided. It is notable that for years the Forest Service has had land-use plans that have standards with a high degree of specificity covering large land areas comparable to (and neighboring) the Rawlins Field Office. *See, e.g.,* USFS (2003).

The Wyoming Game and Fish Department has provided a synopsis of the salient points of BLM's land stewardship responsibilities:

NEPA requires BLM to view its traditional management missions and environmental protection procedures in light of national environmental protection objectives. 40 CFR 1500.2 (f) states, "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." By definition, "To the fullest extent possible means ... unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible" [40 CFR 1500.6]. This is our basic, national environmental charter. It is not a legitimate NEPA exercise to define alternatives that effectively constitute varying degrees of compliance with an agency's foundational, management mission. Each alternative, even the "development of resources" alternative, must contain adequate environmental protection procedures to comply with the requirements of FLPMA set forth at 43 CFR 1701(a)(8) and 1702(c)(1), (2) (protection of ecological and environmental values including fish and wildlife habitat, and principals of multiple use and sustained yield, respectively).

DEIS Comments and Responses at Row 1900. The proposed Rawlins RMP falls woefully short of these mandates.

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 "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 through the planning process for these public assets. The EIS fails to follow this Congressional guidance, especially in the preferred alternative.

The Red Desert area, comprising the westernmost quarter of the Rawlins Field Office, is an area of particularly high conservation concern due to its outstanding wilderness resources, important assemblages of rare sagebrush wildlife, and importance for public recreation. The proposed plan does not deal adequately with industrial development, which as a result of inadequate protective measures continues to be a major and increasing threat to the wildlife and recreation values of this area.

Particularly lacking in the EIS is adequate protection for Adobe Town, the most outstanding recreation and scenic resource in the RMPPA, and the Powder Rim and Ferris Dunes, two of the most important and sensitive wildlife areas in the planning area. Many cutting edge methods for managing oil and gas development, including directional drilling, well clustering, limits on well densities, and phased development, are not implemented or even considered for mandatory implementation under any alternative, even though these measures have been required in programmatic land-use decisions in other BLM jurisdictions. Finally, the BLM's failure to strengthen wildlife protective measures in the face of scientific evidence that current measures are failing is simply appalling. This is particularly true for sage grouse breeding and nesting areas, other BLM Sensitive Species habitats, and big game winter ranges. BLM's failure to make a course correction on wildlife conservation measures in the context of oil and gas development is likely to be a prime driver for Endangered Species listing for the sage grouse, Wyoming pocket gopher, white-tailed prairie dog, and pygmy rabbit.

LEGAL STANDARDS

The following is a brief synopsis of the legal standards which apply to the claims brought forward in this Protest. Detailed descriptions of individual violations follow.

National Environmental Policy Act

The National Environmental Policy Act ("NEPA") requires agencies to conduct environmental analysis of the direct and cumulative impacts of proposed projects, consider a range of reasonable alternatives (including an alternative that minimizes environmental impacts), solicit and respond to public comments.

Range of Alternatives Requirements

The range of alternatives is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. NEPA requires BLM to "rigorously explore and objectively evaluate" a range of alternatives to proposed federal actions. *See* 40 C.F.R. §§ 1502.14(a) and 1508.25(c). Formulation of alternatives during the NEPA disclosure and study process is at the heart of

Congress' choice of NEPA as the procedural method that guides federal agencies' management of the public lands. See *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976)). In fact, NEPA requirements state that "no action concerning the proposal should be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a). *Catron County v. U.S Fish and Wildlife Service*, 75 F.2d 1429 (10th Cir. 1996)(partial NEPA compliance is not enough.) NEPA regulations also require agencies to address appropriate alternatives in Environmental Assessments. 40 C.F.R. § 1508.9, with specific reference to section 102(2)E of NEPA. In addition, the law requires consideration of a range of mitigation measures. See *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1122-1123 (9th Cir. 2002) (and cases cited therein) (stating that agencies must develop and analyze environmentally protective alternatives in order to comply with NEPA).

Section 102(2)(C) of NEPA requires an agency to present alternatives to the proposed action, and Section 102(2)(E) requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(C) and (E) (1994); see 40 C.F.R. § 1501.2(c); *Biodiversity Associates*, IBLA 2001-166 at 6; *Wyoming Outdoor Council*, 151 IBLA 260, 272 (1999); *Howard B. Keck, Jr.*, 124 IBLA 44, 53 (1982); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. Denied, 489 U.S. 1066 (1989).

The fact that this basic, fundamental requirement that is the touchstone of every NEPA document has not gone unnoticed on the federal judiciary in sending back environmental studies that fail to meet this requirement, is noteworthy. See e.g., *Calvert Cliffs Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (detailed EIS required to ensure that each agency decision maker has before him and takes into account all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit balance); *Natural Resource Defense Council v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975); ("The duty to consider reasonable alternatives is independent from and of wider scope than the duty to file an environmental statement."); *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664, 660 (7th Cir. 1997) ("The highly restricted range of alternatives evaluated and considered violates the very purpose of NEPA's alternative analysis requirement: to foster informed decision making and full public involvement."); *Alaska Wilderness Recreation & Tourism v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) ("The existence of a viable but unexamined alternative renders an environmental impact statement inadequate."); *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1288 (1st Cir. 1996) (EIS invalid because agency did not consider alternative of using artificial water storage units instead of a natural pond as a source of snowmaking for a ski resort); *Libby Rod & Gun Club v. Poteat*, 457 F. Supp. 1177, 1187-88 (D. Mont. 1978), *rev'd in part on other grounds*, 594 F.2d 742 (9th Cir. 1979) (Army Corps of Engineers violated NEPA in an EIS for a hydroelectric dam by only cursorily addressing the alternatives of meeting the Northwest's energy needs through other sources or conservation.); *Northwest Env't'l Defense Center v. Bonneville Power Admin.*, 117 F.3d 1520, 1538 (9th Cir. 1997) ("An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action.")

The failure to look at the full range of reasonable alternatives is related to BLM's duty in any environmental analysis to develop, study, analyze and adopt mitigation measures to protect other resources. The ability to adopt post-leasing mitigation measures – see 43 C.F.R. § 3101.1-2 – is quite broad, as all reasonable measures not inconsistent with a given lease may be imposed by BLM. This is particularly true given that BLM, pursuant to FLPMA, must manage public lands in a manner that does not cause either “undue” or “unnecessary” degradation. 43 U.S.C. § 1732(b). Put simply, the failure of BLM to study and adopt these types of mitigation measures – especially when feasible and economic – means that the agency is proposing to allow this project to go forward with unnecessary impacts to public lands, in violation of FLPMA.

The Tenth Circuit examined NEPA's alternatives requirement and agreed with other courts that “have interpreted NEPA to preclude agencies from defining the objectives of their actions in terms so unreasonably narrow that they can be accomplished by only one alternative (i.e. the applicant's proposed project).” *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1165 (10th Cir. 1999), at 1174 (citing *Simmons v. United States Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997)). At the same time, an agency may not completely ignore an applicant's objectives. See *id.* at 1174-75. Taken together, these directives “instruct agencies to take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes.” *Id.* at 1175. See *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992) (a thorough discussion of alternatives is “imperative”). Accordingly:

Agency compliance *vel non* with the requirement to consider alternatives is evaluated under the “rule of reason,” meaning that “the concept of alternatives must be bounded by some notion of feasibility,” and that agencies are required to deal with circumstances “as they exist and are likely to exist,” but are not required to consider alternatives that are “remote and speculative.” *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 294095 (D.C. Cir. 1988) (internal citations omitted). However, in examining alternatives to the proposed action, an agency's consideration of environmental concerns must be more than a *pro forma* ritual. Considering environmental costs means seriously considering alternative actions to avoid them.

Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm., 449 F.2d 1109, 1128 (D.C. Cir. 1971); see also *Southern Utah Wilderness Alliance*, 237 F.Supp.2d 48, 51; see also *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 51 (D. D.C. 2003) (agency “not entitled to deference” where agency operates under erroneous assumption).

The failure to look at the full range of reasonable alternatives is related to BLM's duty in any environmental analysis to develop, study, analyze and adopt mitigation measures to protect other resources. The ability to adopt post-leasing mitigation measures – see 43 C.F.R. § 3101.1-2 – is quite broad, as all reasonable measures not inconsistent with a given lease may be imposed by BLM. This is particularly true given that BLM, pursuant to FLPMA, must manage public lands in a manner that does not cause either “undue” or “unnecessary” degradation. 43 U.S.C. § 1732(b). Put simply, the failure of BLM to study and adopt these types of mitigation measures –

especially when feasible and economic – means that the agency is proposing to allow this project to go forward with unnecessary impacts to public lands, in violation of FLPMA.

Simply listing and not analyzing the effectiveness of these measures also results in violation of NEPA. See *Northwest Indian Cemetery Protective Association v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), *rev'd on other grounds*, 485 U.S. 439 (1988) (where the court determined that NEPA requires agencies to "analyze the mitigation measures in detail [and] explain how effective the measure would be. ... A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA."). In a case where the Corps of Engineers attempted to rely on untested mitigation measures, the Wyoming District Court ruled, "the Court holds that the Corps' reliance on mitigation measures that were unsupported by any evidence in the record cannot be given deference under NEPA. The Court remands to the Corps for further findings on cumulative impacts, impacts to ranchlands, and the efficacy of mitigation measures." *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*, 351 F.Supp.2d 1232, 1238. (D. Wyoming 2005).

Second, the mitigation measures relied upon must "constitute an adequate buffer' ...so as to 'render such impacts so minor as to not warrant an EIS.'" *Greater Yellowstone Coalition*, 359 F.3d at 1276 (quoting *Wetlands Action Network*, 222 F.3d 1105, 1121 (9th Cir. 2000)). In other words, "When the adequacy of proposed mitigation measures is supported by substantial evidence, the agency may use those measures as a mechanism to reduce environmental impacts below the level of significance that would require an EIS." *National Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997). "In practice, mitigation measures have been found to be sufficiently supported when based on studies conducted by the agency, ...or when they are likely to be adequately policed." *Id.*

The courts have had little patience with agencies' failure to provide sound scientific evidence to support the efficacy of their mitigation measures. In *Wyoming Outdoor Council*, the Court ruled:

In short, the mitigation measures relied upon by the Corps, while mandatory, are not supported by a single scientific study, paper, or even a comment. This Court does not expect the Corps to conduct extensive research on the efficacy of wetland replacement. Neither can the Court defer to the Corps' bald assertions that mitigation will be successful. ... As such, the Corps was arbitrary and capricious in relying on mitigation to conclude that there would be no significant impact to wetlands. The Court remands to the Corps to support its reliance on mitigation.

351 F.Supp.2d 1232, 1252, footnote omitted. The court concluded, "This Court will not rubberstamp an agency determination that ... relies on unsupported, unmonitored mitigation measures. NEPA and the CWA require more." 351 F.Supp. 2d 1232, 1252. In particular, federal agencies must explore alternatives to proposed actions that will avoid or minimize adverse effects on the environment, 40 C.F.R. § 1500.2(3), alternative kinds of mitigation measures, 40 C.F.R. § 1508.25(c)(3), alternatives that would help address unresolved conflicts over the use of available resources (e.g. roadless areas and/or potential wilderness), 40 C.F.R. § 1501.2(c), and other reasonable courses of action, 40 C.F.R. § 1508.25(c)(2). The requirement to consider such

less damaging alternatives helps agencies meet NEPA's primary purpose of promoting "efforts which will prevent or eliminate damage to the environment and biosphere..." 42 U.S.C. § 4321. These requirements are affirmed in BLM policy: "BLM officials may not so narrow the scope of a planning/NEPA document as to exclude a reasonable range of alternatives to the proposed action..." USDI Instruction Memorandum No. 2001-075. The IBLA has established that the elimination of reasonable alternatives without sufficient analysis does not satisfy NEPA, and noted that "While we could speculate about the BLM's rationale for dismissing... alternatives, we should not be required to fill in the blanks for BLM. The record should speak for itself." *Biodiversity Associates*, IBLA 2001-166, at 7 (2001). Such objective evaluation is gravely compromised when agency officials bind themselves to a particular outcome or foreclose certain alternatives at the outset. Importantly, BLM's decision to approve a high-impact project in sensitive and undeveloped lands when lower-impact alternatives and mitigation measures were readily available has resulted in a project that wreaks unnecessary impacts on the public lands.

Hard Look Requirements

NEPA's purpose is to maintain a national "look before you leap" policy in regard to all major federal actions. Congress' intent in establishing this objective was to avoid uninformed agency decisions that could have serious environmental consequences. Thus, NEPA's mandate is that all federal agencies analyze the likely effects of their actions, as well as address the potential alternatives. "Agencies are to perform this hard look *before* committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values. NEPA § 102(2)(c) requires the agency to consider numerous factors [including] irreversible commitments of resources called for by the proposal." *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) (rev'd on other grounds)(emphasis added). NEPA provides procedural protections for resources at risk by requiring analysis of impacts *before* substantial decisions are made that set development in motion. *See Conservation Law Foundation v. Watt*, 560 F. Supp. 561, 581 (D. Mass. 1983), *aff'd by Massachusetts v. Watt*, 716 F. 2d 946 (1st Cir. 1983).

Section 102(2)(C) of NEPA requires that the responsible federal agency prepare a detailed statement on the environmental impacts of the proposed action and any adverse environmental effects which cannot be avoided should the proposal be implemented. The regulations implementing NEPA provide that "[t]o determine the scope of environmental impact statements, agencies shall consider . . . (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. . . . (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement. . . . [and] (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." 40 C.F.R. § 1508.25. A cumulative impact is defined as "the impact on the environment which results from the incremental impact of the actions when added to other past, present, and foreseeable future actions regardless of what agency ...or person undertakes such actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. Because of the importance of cumulative impacts, "the consistent position of the case law is that ... the agency's EA must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a

vacuum.” *Grand Canyon Trust*, 290 F.3d 339, 342 (citations omitted). To satisfy NEPA’s hard look requirement, the cumulative impacts assessment must do two things. First, BLM must catalogue the past, present and reasonably foreseeable projects in the area that might impact the environment. *Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800, 809-810 (9th Cir. 1999). Second, BLM must analyze these impacts in light of the proposed action. *Id.* If BLM determines that certain actions are not relevant to the cumulative impacts analysis, it must “demonstrat[e] the scientific basis for this assertion.” *Sierra Club v. Bosworth*, 199 F.Supp.2d 971, 983 (N.D. Ca. 2002). In *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*, the court ruled,

The Court cannot defer to an EA/FONSI which has neglected, by its own terms, to even attempt to assess the extent of cumulative impacts that might be attributed to the agency action....The Corps must assess cumulative impacts to such a degree as to assure this Court that its issuance of a FONSI was not arbitrary and capricious.

351 F.Supp.2d 1232, 1243 (D. Wyoming 2005). The standard for an Environmental Impact Statement is even higher.

It is important to note that the 10th Circuit Court of Appeals decided that the critical stage for analysis of environmental impacts is the leasing stage rather than the APD stage. *Pennaco Energy v. United States Department of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004). The court, quoting BLM’s own Handbook for Planning of Fluid Mineral Resources, held that the environmental impacts of oil and gas leasing must be analyzed before the agency makes an irreversible commitment, and that “[i]n the fluid minerals program, this commitment occurs at the point of lease issuance.” *Id.* Because the Rawlins RMP EIS constitutes the only stage at which the environmental impacts of leasing decisions will be analyzed, it becomes critically important that this analysis of impacts be complete and legally sufficient.

Baseline Information Requirements

Importantly, 40 C.F.R. §1502.15 requires agencies to “describe the environment of the areas to be affected or created by the alternatives under consideration.” Establishment of baseline conditions is a requirement of NEPA. In *Half Moon Bay Fisherman’s Marketing Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988), the Ninth Circuit states that “without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.” The court further held that, “The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process.”

Response to Public Comment Requirements

Under the National Environmental Policy Act, agencies have a responsibility to respond to comments submitted by the public or cooperating agencies:

An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

1. Modify alternatives including the proposed action.
2. Develop and evaluate alternatives not previously given serious consideration by the agency.
3. Supplement, improve, or modify its analyses.
4. Make factual corrections.
5. Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

40 C.F.R. § 1503.4(a). Importantly, while agencies must attach comments considered “substantive” to the EIS (40 C.F.R. § 1503.4(b)), a comment need not be substantive to trigger the agency’s response requirement.

Administrative Procedures Act

In the review of Federal agency action, courts apply the standard of review set forth in the Administrative Procedures Act (“APA”): “The reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, or conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...[or] (D) without observance of procedure required by law.” 5 U.S.C. § 706. *See also Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997) (Court reiterated that under the APA, it must set aside agency action that is “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law”). In *Friends of the Bow*, the Tenth Circuit explained what constitutes arbitrary and capricious agency action:

Generally, an agency decision will be considered arbitrary and capricious if “the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Friends of the Bow, 124 F.3d at 1215 (internal citations omitted).

BLM Sensitive Species Policy

Instruction Memorandum (IM) 97-118 governs BLM Special Status Species management and requires that actions authorized, funded, or carried out by the BLM do not contribute to the need for any species to become listed as a candidate, or for any candidate species to become listed as threatened or endangered. It recognizes that early identification of BLM sensitive species is advised in efforts to prevent species endangerment, and encourages state directors to collect information on species of concern to determine if BLM sensitive species designation and

special management are needed. In addition, for special status species, including sensitive species, BLM must:

Identify strategies and decisions to conserve and recover special status species. Given the legal mandate to conserve threatened or endangered species and BLM's policy to conserve all Special Status Species, land use planning strategies and decisions should result in a reasonable conservation strategy for these species. Land use plan decisions should be clear and sufficiently detailed to enhance habitat or prevent avoidable loss of habitat pending the development and implementation of implementation-level plans. This may include identifying stipulations or criteria that would be applied to implementation actions. Land use plan decisions should be consistent with BLM's mandate to recover listed species and should be consistent with objectives and recommended actions in approved recovery plans, conservation agreements and strategies, MOUs, and applicable biological opinions for threatened and endangered species.

BLM Land Use Planning Handbook H-1601-1, Appendix C at 5, emphasis added. Additionally, if Sensitive Species are designated by a State Director, the protection provided by the policy for candidate species shall be used as the minimum level of protection. BLM Manual 6840.06. The policy for candidate species states that the "BLM shall carry out management, consistent with the principles of multiple use, for the conservation of candidate species and their habitats and **shall ensure that actions authorized, funded, or carried out do not contribute to the need to list any of these species** as threatened/endangered." BLM Manual 6840.06, emphasis added. Specifically, BLM shall:

- (1) Determine the distribution, abundance, reasons for the current status, and habitat needs for candidate species occurring on lands administered by BLM, and evaluate the significance of lands administered by BLM or actions in maintaining those species.
- (2) For those species where lands administered by BLM or actions have a significant affect on their status, manage the habitat to conserve the species by:
 - a. Including candidate species as priority species in land use plans.
 - b. Developing and implementing rangewide and/or site-specific management plans for candidate species that include specific habitat and population management objectives designed for recovery, as well as the management strategies necessary to meet those objectives.
 - c. Ensuring that BLM activities affecting the habitat of candidate species are carried out in a manner that is consistent with the objectives for those species.
 - d. Monitoring populations and habitats of candidate species to determine whether management objectives are being met.
- (3) Request any technical assistance from FWS/NMFS, and any other qualified source, on any planned action that may contribute to the need to list a candidate species as threatened/endangered.

BLM Manual 6840.06. These obligations went completely unmet in the Rawlins RMP EIS and proposed plan. Clearly, the BLM must survey for special status species before allowing any ground disturbance in lease parcels, must develop site-specific management plans for these species, and must monitor special status species populations within the lease parcels to ensure that the agency is promoting their recovery. The BLM must acquire baseline data and analyze the impacts of the alternatives on these species. In cases where special status species obligations are flouted, this safety net becomes less meaningful and increases the need for Endangered Species Act protection.

National Historic Preservation Act

Federal agencies have special stewardship responsibilities with respect to historic resources on land that is under the agency's "jurisdiction or control." Section 110(a) of the National Historic Preservation Act ("NHPA") requires that federal agencies "shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency." 16 U.S.C. § 470h-2(a)(1). All historic properties under federal jurisdiction or control must be "managed and maintained in a way that considers the preservation of their historic, archaeological, . . . and cultural values. . ." 16 U.S.C. § 470h-2(a)(2)(B), and those properties must be "identified, evaluated, and nominated to the National Register." *Id.* § 470h-2(a)(2)(A); *see id.* §470h-2(a)(2)(E)(ii).

Failure to adequately protect identified cultural and historic properties, and traditional religious and cultural properties results in a violation of the NHPA. In 1992, Congress specifically amended Section 110 to increase Federal agencies' proactive, ongoing responsibility to locate, inventory, and nominate properties to the National Register, as well as assume the responsibilities for preserving historic properties. *See* 16 U.S.C. § 470h-2(a) (as amended 1992). Section 110 requires Federal agencies to adopt and utilize cultural resource management programs. *Id.* BLM adopted an agency-wide Cultural Resource Management Program (CRMP), which includes four manuals. The CRMP has three main components – identification, protection, and utilization. *See* BLM Manuals 8100 – Cultural Resource Management Plan; 8110 – Identifying Cultural Resources; 8120 – Protecting Cultural Resources; and 8130 – Utilizing Cultural Resources for Public Benefit. These four manuals direct BLM field offices to carry out their responsibilities under Section 110 of the NHPA.

The National Historic Preservation Act requires consultation for all projects that would have an adverse effect on properties eligible for the National Register of Historic Places. Federal regulation provides that,

[a]n adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.

36 CFR § 800.5(a)(1). The Section 106 regulations also confirm that the "[p]hysical destruction of or damage to all or part of the Property," "[a]lteration of a property, including restoration,

rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines" or the "[c]hange of the character of the property's use or of physical features within the property's setting that contribute to its historic significance" results in an "adverse effect" on historic properties. 36 C.F.R. § 800.5(a)(2)(i-ii, iv). The regulations, with respect to timing of Section 106 consultation, state:

[Completion of a Section 106 review] does not prohibit agency officials from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties.

36 C.F.R. §800.1(c) (emphasis added). These regulations clearly communicate that avoid, minimize, or mitigate impacts to eligible properties be considered. Furthermore, the regulations instruct Federal agencies to initiate Section 106 early in an undertaking's planning to ensure that "a broad range of alternatives may be considered during the planning process for the undertaking." *Id.* (emphasis added).

FLPMA Unnecessary or Undue Degradation Requirements

By law, the BLM must "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). BLM's Unnecessary or Undue Degradation ("UUD") responsibilities are intertwined with the agency's NEPA duties. Under NEPA, BLM must identify impacts a proposed action will have to the environment; married to this obligation are the duties imposed by FLPMA to identify the thresholds of acceptable impact and then determine whether the impacts are unnecessary or undue. If the impacts are determined to be necessary and unavoidable, BLM must then analyze whether the impacts are undue. NEPA then reasserts itself in the process by mandating that alternatives be considered to ensure that unnecessary or undue actions are not undertaken and to ensure that methodologies used to prevent UUD are supported and verified. *Ecology Center, Inc. v. Austin*, 430 F.3d 1057, 1065 (9th Cir. 2005).

In the context of hard-rock mining, "[a] reasonable interpretation of the word 'unnecessary' is that which is not necessary for mining. 'Undue' is that which is excessive, improper, immoderate, or unwarranted." *Utah v. Andrus*, 486 F.Supp.995, 1005 n.13 (Dist. Utah 1979). FLPMA requires that,

the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; . . . that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

43 U.S.C. § 1701(a)(8). At the same time, FLPMA directs that these uses be balanced with mineral extraction by requiring that,

the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals . . . from the public lands including implementation of the Mining and Minerals Policy Act of 1970 . . .

43 U.S.C. § 1701(a)(12). The key here is for BLM to balance these opposing needs.

The original hardrock mining regulations finalized in 1980 (1980 Regulations) defined unnecessary and undue degradation pursuant to FLPMA as “impacts greater than those that would normally be expected from an activity being accomplished in compliance with current standards and regulations and based on sound practices, including use of the best reasonably available technology.” 43 C.F.R. § 3802.0-5(l). These regulations, which became known as the “prudent operator standard,” were re-written in 2000, and the “prudent operator” standard was replaced by the “substantial irreparable harm” standard. The current mining regulations defining “unnecessary or undue degradation,” adopted in 2001, reflect a “return to the prudent operator standard.” *Mineral Policy Center* at 8. Because of significant factual and regulatory differences between oil and gas development and hardrock mining, the regulations are of only limited use, but that limited use is here somewhat helpful to understanding what BLM did wrong in the Jonah Field. In *Mineral Policy Center* at 22, the District Court held that, “[I]n enacting FLPMA, Congress’s intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary to mining, is undue or excessive.”

According to the original mining regulations, “Unnecessary or undue degradation means impacts greater than those that would normally be expected from an activity being accomplished in compliance with current standards and regulations and based on sound practices, **including use of the best reasonably available technology.**” 43 C.F.R. § 3802.0-5(l) (emphasis added).

CONSISTENCY WITH LOCAL AND STATE PLANS AND POLICIES

According to FLPMA, “Land use plans of the Secretary under this section will be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.” 43 U.S.C. § 1712(c)(9). There are a number of specific conflicts between state and local plans and the proposed RMP, outlined below. In the absence of a finding that the state or local plans in question are inconsistent with federal law or the purposes of FLPMA, the BLM needs to alter the final RMP to be in conformity with these plans.

Adobe Town Very Rare or Uncommon Designation

In November of 2007, the Wyoming Environmental Quality Council designated all of Adobe Town – Wilderness Study Area plus all of the citizens’ proposed wilderness area lands excluding private inholdings – as Very Rare or Uncommon pursuant to the Wyoming Environmental Quality Act to protect the scenic, wildlife, cultural/historical, geological, and fossil features of the area. Attachment 1. This designation prevents non-coal surface mining in all cases where such mining would degrade the resources for which the area was established as Very Rare or Uncommon. Chapter VII, Designation of Areas Pursuant to W.S. §35-11-112 and W.S. §16-3-103. This area should be closed to locatable mineral entry, mineral materials extraction, oil shale and all other forms of non-coal surface mining in the RMP in order to maintain consistency with the state designation.

WGFD Mitigation Policy

The Wyoming Game and Fish Department Mitigation Policy sets thresholds that prevent the loss of habitat function for key habitats. *See* Attachment 2. Federal Candidate Species and Native Species Status 1 and 2 receive a mitigation category of "Vital," for which habitat directly limits populations and restoration may be impossible; habitat function must be maintained if habitat modification is allowed to occur. *Id.* at 4, 6. In the RMPPA, species in this category likely to be impacted by the project include mountain plover, bald eagle, Townsend's big-eared bat, roundtail chub, bluehead sucker, and flannelmouth sucker. *See* Attachment 3. Habitats such as Crucial Winter and Crucial Winter Relief Ranges also receive a mitigation category of "Vital," regardless of whether or not the crucial ranges of two or more species overlap. Attachment 2 at 5.

Native Species Status 3 receive a mitigation category of "High," for which WGFD recommend no net loss of habitat function through enhancement of degraded habitat when a habitat disturbing project is proposed. *Id.* at 4, 6, emphasis added. In the RMPPA, species in this category likely to be impacted by the project include the merlin, peregrine falcon, long-billed curlew, western scrub-jay, juniper titmouse, bushtit, Scott's oriole, dwarf shrew, white-tailed prairie dog, Great Basin pocket mouse, silky pocket mouse, and swift fox. *See* Attachment 3. Big game winter-yearlong ranges and parturition areas also fall under the "High" reclamation category, demanding no net loss of habitat function. Attachment 2 at 5. For these species and habitats,

The Commission recognizes that some wildlife or wildlife habitats are so rare, complex and/or fragile that mitigation options are not available. Total exclusion of adverse impacts is all that will ensure preservation of these irreplaceable habitats.

Ibid., p. 4. We concur wholeheartedly, and point out that FLPMA carries a legal requirement for the BLM to manage its lands in accord with state directives such as the WGFD Mitigation Policy.

It is important to note that the level of impact and development for each of the four plan alternatives exceed important thresholds set forth under the Wyoming Game and Fish Department's *Recommendations for Oil and Gas Development in Crucial and Important Wildlife Habitats*. Attachment 4. Exceedence of these thresholds denotes a net loss of habitat function. For mule deer and pronghorn winter ranges and sage grouse nesting and brood-rearing habitats, the 8 wells per section fall under the "high" impact category, as do treatments that call for 20 acres or more of surface disturbance. Attachment 4 at 14, 20. In addition, WGFD recommends zero surface occupancy within migration corridors less than ½ mile in width. *Id.* at 23. There are a number of migration corridors identified by WGFD and other researchers within the ARPA that fit this category. *See, e.g.*, Attachment 5. For elk crucial winter range, levels of development requiring 8 wells per section fall into the "extreme" impact category. Attachment 4 at 23. These impact levels denote a net loss of habitat function, and when they occur, WGFD recommends that off-site mitigation funds be emplaced. Attachment 4 at 15, 21-22. Yet no off-site mitigation fund is established under the FEIS.

It is important to note that FLPMA requires the RMP to conform to established state policies and laws, including the Wyoming Game and Fish Department's Mitigation Policy. The WGFD *Recommendations for Oil and Gas Development* set forth the thresholds that determine the level at which there is a net loss of habitat function. The proposed plan exceeds these thresholds. In the Wild Cow WHMA, an area established by WGFD for its exceptional values to wintering big game, BLM states,

Surface disturbance would be restricted or prohibited within mountain shrub and aspen plant communities which provide important wildlife seasonal and crucial winter range habitats. However, there would still be a loss of habitat effectiveness, creating stress to wildlife from operational aspects of CBNG [coalbed methane] development.

FEIS at 4-339, emphasis added. Under all alternatives, BLM predicts

The total percentage of crucial winter range that would be directly and indirectly impacted by oil and gas and CBNG development include approximately 33 percent of the available elk crucial winter range, 44% of the available mule deer crucial winter range and 63 percent of the available pronghorn crucial winter range.

FEIS at 4-456. In the FEIS's 'Unavoidable Adverse Impacts' section, BLM states, "Because large areas of crucial big game habitat coincide with known areas of high and moderate oil and gas potential, impacts to crucial habitats would be unavoidable under current BLM policy to foster oil and gas development." FEIS at 4-534. This statement is bitterly ironic because, far from being "unavoidable," impacts to crucial winter ranges could be avoided readily by simply placing these ranges off-limits to surface-disturbing activities.

Mitigation measures in the FEIS are therefore not sufficient to prevent a net loss of habitat function for big game crucial ranges, prairie dog colonies, and key habitats for other State Sensitive species. The Rawlins RMP EIS therefore violates FLPMA's requirements to maintain consistency with established state policies.

WGFD plans for Protecting Powder Rim

According to the Wyoming Game and Fish Department's Strategic Habitat Plan, portions of the Powder Rim within Sweetwater County are identified as a Nongame habitat priority:

Key Habitat Number and Name: 14. Powder Rim

Uniqueness: Provides primary habitat for 5 species of Juniper obligates. SGCN list includes 8 bird and 16 mammal species. WY Gap classifies a large portion of the area as a high ranking for species diversity.

Habitat quality ranking 5.69-6.66 **Protective status ranking** 2.94-5.69

Total Area: 200,488 acres

Ecological Systems and Area of Each:

Ecological System ACRES

Herbaceous Planted/Cultivated 540

Inter-Mountain Basins Active and Stabilized Dune 953

Inter-Mountain Basins Big Sagebrush Shrubland 138713

Inter-Mountain Basins Big Sagebrush Steppe 320

Inter-Mountain Basins Cliff and Canyon 4503

Inter-Mountain Basins Greasewood Flat 10

Inter-Mountain Basins Mixed Salt Desert Scrub 17307

Rocky Mountain Foothill Limber Pine - Juniper Woodland 37855

Rocky Mountain Lower Montane Foothill Riparian Woodland and Shrubland
4208

These ecological system statistics have been computed for Key Habitat Area 14 as defined by 5th level HUCs.

Land Ownership ACRES

State 2128

Private 1885

Bureau of Land Management 200488

These figures represent Land Ownership within each key habitat area as defined by the 5th Level HUCs.

SGCN Birds and Mammals:

Species with Greatest Conservation Need

Birds:

Ash-throated Flycatcher (2B) Ferruginous Hawk (3A) Scott's Oriole (2B)

Brewer's Sparrow (2C) Greater Sage-Grouse Western Scrub Jay (2B)

Bushtit (2B) Juniper Titmouse (2B)

Mammals:

Big Brown Bat (3A) Long-eared Myotis (2A) Silver-haired Bat (3B)

Canyon Mouse (2B) Long-legged Myotis (2A) Spotted Bat (2A)

Cliff Chipmunk (2B) Pallid Bat (2A) Townsend's Big-eared Bat (2A)

Great Basin Pocket Mouse (2B) Pinyon Mouse (2B) Vagrant Shrew (2B)

Hoary Bat (3B) Silky Pocket Mouse (2B) Western Small-footed Myotis (3A)

Little Brown Myotis (3A)

See <http://gf.state.wy.us/downloads/pdf/AllKHA.pdf>, site last visited January 14, 2008. In addition, portions of the Powder Rim falling within Carbon County are within the area ranked as the #2 strategic priority for the Green River WGFD office under the Atlantic Rim habitat unit. See <http://gf.state.wy.us/downloads/pdf/habplan-GR.pdf>, site last visited January 14, 2008. This plan has three goals:

- 1) Manage, preserve and restore habitat for long term sustainable management of wildlife populations.
- 2) Increase wildlife based recreation through habitat enhancements that increase productivity of wildlife.
- 3) Increase or maintain wildlife habitat and associated recreation on Commission lands.

http://gf.state.wv.us/downloads/pdf/rpt_01_strategicplan.pdf, site last visited January 14, 2008. In failing to provide conservation measures that protect the wildlife values of the Powder Rim, particularly Goal 1, the proposed RMP is not in conformance with the WGFD Strategic Habitat Plan.

Tribal Resolutions

Although BLM argues that it has adequately offered opportunities for consultation with Native American tribes and governments regarding Traditional Cultural Properties and other historic and cultural sites, it is clear that such consultation has not occurred. The tribes themselves have stated, "Therefore be it resolved, the MT WY Tribal Leaders Council deems that the BLM consultation with the Tribes and tribal elders is and has been inadequate." DEIS Comments and Responses at Row 450.

Policies and Plans of County and Municipal Governments

Albany County is one of the four counties that fall within the Rawlins RMPPA. The Albany County Commission passed a resolution that the Rawlins RMP adopt many of the recommendations found within The Western Heritage Alternative into the final Plan. The provisions of this resolution include:

- Placing all lands in citizens' wilderness proposals off-limits to future oil and gas leasing (specifically, the commission recommended expanding WSAs to encompass Adobe Town expansions, Wild Cow Creek, and the Pedro Mountains);
- Placing crucial big game winter ranges and sage grouse leks and nesting areas under NSO stipulations;
- Requiring underground injection of CBM produced water throughout the planning area;
- Utilizing directional drilling and well clustering; and
- Establishing ACECs for Powder Rim, Ferris Dunes, Bates Hole/Chalk Mountain, Chain Lakes, current ACECs, and plover nesting areas, and placing these ACECs under NSO stipulations.

Attachment 6. Not only were these provisions not adopted in the proposed plan for the most part, but also (with a few exceptions outlined as follows), **most of these provisions were not even considered for implementation under any alternative.** The exceptions were that the Ferris Dunes is established as an ACEC in the proposed plan (but not placed under NSO stipulations), and Chain Lakes was at least considered for ACEC designation (but not placed under NSO stipulations in the proposed plan). The other provisions were ignored outright by BLM in the context of the EIS.

In addition, the BLM has yet to resolve issues surrounding leasing for oil and gas in the upper North Platte Valley. Leases were withdrawn from the December 2007 lease sale due to concerns raised by local governments and conservation groups that BLM had not adequately studied the implications of oil and gas development in this area, heretofore believed to have no oil and gas potential. BLM needs to ensure that the Final RMP is consistent with local government resolutions concerning oil and gas leasing in this and other areas in the RMPPA.

Recommendations of Sage Grouse Local Working Groups and Governor's Working Group
Maintaining consistency with the WGFD Greater Sage-Grouse Conservation Plan (2004; see FEIS at ES-15) does not constitute appropriate management because this document is obsolete and has been superseded by stronger policies and plans put forward by local and state working groups. Indeed, at the governor's Sage Grouse Summit in May of 2007, Director Cleveland of the WGFD publicly criticized the timing stipulations recommended by the old WGFD Conservation Plan and carried forward in the Preferred Alternative of the Rawlins RMP FEIS as being ineffective. Among the recommendations of the Sage Grouse Implementation Team explicitly directed as responsibilities of the BLM are the following:

- Identify undeveloped lands that have high biological value for sage grouse. Protect identified areas through repurchase of valid existing rights, use of No Surface Occupancy lease stipulations, preclusion of leasing, or other appropriate measures as a means to insure high quality habitat retention in the short term, until reclamation or mitigation within the home range of the affected population is able to meet the needs of sage grouse in the immediate area.
Attachment 7 at unnumbered 6.
- Identify, develop, and utilize proven and reproducible mitigation measures for all impacts on Sage grouse and their habitats, using the best available science and information. *Id.* at unnumbered 10.
- Implement water management strategies that limit the potential of West Nile virus infections, and otherwise benefit sage grouse on all lands in Wyoming. *Id.* (It is notable that requirement of underground injection largely solves this problem for the Colorado River watershed under the proposed plan, but this area represents a small proportion of the RMPPA and would leave most of the sage grouse habitats vulnerable to West Nile outbreaks, which are tied to CBM produced water standing in reservoirs. Attachments 8 and 9.

Yet not one of these recommendations is represented in the range of alternatives in terms of the mitigation measures or land use zoning provided under the various alternatives.

Partners in Flight Wyoming Bird Conservation Plan

BLM is a participant in the Wyoming Partners in Flight Bird Conservation Plan, and specific biological objectives and recommendations for land birds are presented in the "Wyoming Bird Conservation Plan." DEIS at 3-128. "This Plan identifies priority species and habitats, and establishes objectives for bird populations and habitats in Wyoming." Attachment 10 at iii. Importantly, "The Wyoming Bird Conservation Plan, Version 1.0 can and should be applied to other conservation planning efforts taking place in Wyoming and regionally." *Id.* at I-1, emphasis added. While the RMP Appendices seem to indicate that the Partners in Flight objectives and recommendations will be adopted into the Rawlins RMP, these need to be explicitly carried into the plan formally as nondiscretionary standards in order to comply with FLPMA's conformity standards for local and state plans and policies. The direction in the

proposed Rawlins RMP runs contrary to the following recommendations in the Partners in Flight plan:

- Limit the amount of oil and gas development, mining, and habitat fragmentation in areas where Ferruginous Hawks occur. Attachment 10 at F-123.
- Protect nesting areas traditionally used by Ferruginous Hawks, as some individuals return to the same territory year after year. *Id.*; *see, esp.*, section on Shamrock Hills ACEC below in this Protest.
- Maintain habitat conditions within ¼ to ½ mile (0.4 to 0.8 km) of known Burrowing Owl nest sites in an undisturbed manner. *Id.* at F-131.
- Discourage road construction and other developments where it would reduce sagebrush habitat patch size to less than 50 acres (130 ha) [Brewer's sparrow, sage thrasher]. *Id.* at F-210, F-219.

BLM indicates that it intends to adhere to this plan only when "feasible and applicable" (DEIS Comments and Responses at Row 3040), making this a discretionary standard that could be flouted by the agency. This is not sufficient; the RMP must according to FLPMA maintain a nondiscretionary conformity to this plan, as it does not violate any other federal law or regulation.

SPECIAL MANAGEMENT AREAS

Because many (but not all) areas of elevated conservation concern Special Management Areas, the BLM's management of these areas attains elevated importance. Many Special Management Areas are slated for "intensive management," which is defined in the FEIS Glossary as:

Management that includes the use of proper distance restrictions, mitigation stipulations, seasonal or timing restrictions, rehabilitation standards, reclamation measures, use of best management practices (Appendices 13, 14, and 15), and the application of the Wyoming Mitigation Guidelines for Surface Disturbing and Disruptive Activities (Appendix 1) to adequately protect the resources for which the intensive management is applied. Intensive management actions would be applied with the goal of maintaining or enhancing sensitive resources (i.e., plant communities, wildlife habitat, soils, water, archeological or paleontological resources, etc.). Management may include attaching conditions of approval to specific projects or additional planning recognizing the unique resources for which the area is managed; typically these would be more restrictive than standard management and would be designed for specific projects and locations.

This definition is so vague as to be free from any informational utility, and does not constitute a standard that provides any accountability whatsoever. It has been criticized by Governor Freudenthal, and the problems that the Governor brought to light were not addressed in the FEIS. *See* DEIS Comments and Responses at Row 1938. It basically leaves the management of such areas up to the unlimited discretion of the authorizing official as to what measures are "proper," applying measures to "adequately protect" resources, with the "goal" (not "requirement" or "mandate") of maintaining or enhancing sensitive resources. Our experience with BLM follow-

through on empty promises such as this one is that when it comes right down to it, the agency errs (frequently, and with major negative consequence) on the side of the preference of the industrial applicant, to the detriment of the sensitive resource.

Because there is no hard and fast commitment expressed or implied by this definition of intensive management, but rather a vacuous goal statement devoid of any hard and fast commitments, it renders this category of land management no different from unprotected lands which enjoy no special designation. For each ACEC, SRMA, or other designated land area slated for "intensive management," the intensive management actions and BMP that will be applied for that particular area, and under what particular circumstances (if any) should be fully spelled out in the final RMP and expressed clearly so that the public has an adequate basis for expectations. At present, BLM's description is too vague to allow the public to adequately evaluate or comment on it.

This problem was brought to BLM's attention at the DEIS stage. See DEIS Comments and Responses at Row 71. Yet the agency did not provide additional information to clarify what management actions would be required for each SMA, and in so doing, it failed NEPA's obligation to respond to public comment.

Beyond the reliance on ambiguous "intensive management," optional Best Management Practices, and adaptive management strategies that (in too many cases) reduce the provisions of the proposed plan to an empty exercise in providing infinite discretion for BLM to fail to protect the resources for which these Special Management Areas are established, there are many specific problems with the BLM's handling of Special Management Areas under the EIS and proposed plan as outlined below.

Potential Wilderness

Despite the fact that BLM has acknowledged the presence of lands with wilderness character in the RMPPA that are outside existing WSAs, the agency does not consider protecting such lands in any alternative considered in the FEIS. Potential wilderness is a key issue in this RMP revision, based on the overwhelming majority of public comments directed to this issue. Yet it is essentially ignored in the EIS.

Lands with wilderness qualities in the RMPPA also qualify as roadless. BLM argues, "BLM has no mandate to manage for roadlessness." DEIS Comments and Responses at Row 3112. However, under FLPMA, BLM is required to keep an ongoing inventory of resources on its lands. These resources include roadless lands, defined under BLM policy as follows:

roadless: for the purpose of the wilderness review program, this refers to the absence of roads which have been improved and maintained by mechanical means to ensure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

BLM Manual H-8550-1 at Glossary, page 3. In the Final EIS, management actions related to the Ferris Mountains addition and Adobe Town Fringe Areas were removed from all alternatives.

FEIS at 2-3. After recognizing that these areas possessed wilderness characteristics it is reasonable to expect BLM to at least consider managing these lands to maintain wilderness character in at least one alternative.

A. The Proposed Plan should consider designation of new Wilderness Study Areas.

At the outset, we want to emphasize our belief that BLM's abandonment of its authority to designate any additional Wilderness Study Areas ("WSAs") is invalid and will ultimately be overturned in pending litigation; and, therefore, does not prevent BLM from designating new WSAs. We are aware of the April 2003 settlement agreement (Utah Settlement) between Secretary of the Interior Norton and the State of Utah (in which BLM abdicated its authority to designate any additional Wilderness Study Areas), and we maintain that this agreement is invalid and will ultimately be overturned in pending litigation.

Because the courts have withdrawn their consent decree, there is currently a private settlement, which is not enforceable against the BLM, and the agency has not even issued any updated guidance seeking to continue applying this misguided, and illegal, policy.

Even if the Utah Settlement is reinstated, not as a consent decree, it is illegal. The Utah Settlement is based on an interpretation of FLPMA §§ 201, 202, and 603 that is contrary to FLPMA's plain language. Section 603 did not supersede or limit BLM's authority under § 201 to undertake wilderness inventories, but rather relies explicitly on BLM having exactly that authority under § 201. Nor did § 603 in any way limit BLM's discretion under § 202 to protect its lands as it sees fit, including managing areas as § 202 WSAs in accordance with the Interim Management Policy (IMP). Every prior administration has created WSAs under § 202 and they plainly had authority to do so. This administration has such authority as well, making this a reasonable alternative deserving of consideration in this NEPA process.

Requested Remedy: The BLM can and should consider designating new WSAs in the Rawlins RMP, including for the Adobe Town, Ferris Mountains, Kinney Rim, and Wild Cow areas, which have been shown to meet the criteria for designation.

B. The BLM must consider management of lands to protect their wilderness characteristics.

The BLM should also consider other management alternatives for protecting lands with wilderness characteristics. **The Utah Settlement does not affect BLM's obligation to value wilderness character or, according to BLM directives, the agency's ability to protect that character, including in the development of management alternatives.** In fact, BLM has not only claimed that it can continue to protect wilderness values, but has also committed to doing so. In an April 11, 2003 letter from the Secretary of Interior to Senator Bob Bennett regarding the *Utah v. Norton* settlement forbidding creation of new WSAs, the Secretary stated, "The Department is committed to listening to public input through the land use planning process and, where appropriate, managing specified areas of land for wilderness values." Attachment 11 at unnumbered 3. On September 29, 2003, BLM issued IMs 2003-274 and 2003-275, formalizing its policies concerning wilderness study and consideration of wilderness characteristics in the

wake of the Utah Settlement. In the IMs and subsequent public statements, BLM has claimed that its abandonment of previous policy on WSAs would not prevent protection of lands with wilderness characteristics. The IMs contemplate that BLM can continue to inventory for and protect land "with wilderness characteristics," such as naturalness or providing opportunities for solitude or primitive recreation, through the planning process. The IMs further provide for management that emphasizes "the protection of some or all of the wilderness characteristics as a priority," even if this means prioritizing wilderness over other multiple uses. (emphasis added). This guidance does not limit its application to lands suitable for designation of WSAs; for instance, the guidance does not include a requirement for the lands at issue to generally comprise 5,000-acre parcels or a requirement that the lands have all of the potential wilderness characteristics in order to merit protection.

The guidance issued by the BLM's Arizona State Office serves to elaborate upon this guidance by providing for identification of lands with wilderness characteristics and development of management prescriptions to protect and enhance these values (See IM No. AZ-2005-007). The Proposed Resource Management Plan (RMP) for the Arizona Strip, which applies the Arizona guidance, includes land use allocations for lands with wilderness characteristics in every alternative and sets out protective management prescriptions. Table 2.10, p. 2-131, available on-line at: http://www.blm.gov/az/lup/strip/docs/FEIS/CHAPTER_2.pdf. The Arizona Strip Proposed RMP also includes a detailed discussion of how BLM identified and assessed wilderness characteristics, including on lands proposed for protection by the Arizona Wilderness Coalition, and the need for protective management. Appendix 3.D, available on-line at: http://www.blm.gov/az/lup/strip/docs/FEIS/CHAPTER_2.pdf. This process is consistent with BLM's obligation under the Federal Land Policy and Management Act (FLPMA) to inventory for the many values of the public lands and consider ways to protect them (i.e., not all uses are appropriate in all places) in a resource management plan. 43 U.S.C. §§ 1711, 1712. In addition, it is consistent with the applicable BLM guidance discussed above. The process for inventory and protection of wilderness characteristics as set out in Appendix 3.D of the Arizona Proposed RMP also acknowledges that an area can be protected for some or all of the wilderness characteristics identified in IM Nos. 2003-274 and 2002-275, providing for protection of an area if it contains two of the three wilderness characteristics ("Naturalness, Solitude, or Primitive/Unconfined Recreation"). **However, based on the language of the guidance discussed above, it is appropriate for BLM to evaluate lands for and consider protection of areas with one, two, or all three of these characteristics.**

Courts have also confirmed the BLM's obligations to consider the value of wilderness characteristics and the potential impacts of decisions on this resource when making land use planning decisions. In a recent decision, a federal court found that BLM's failure to re-inventory lands for wilderness values and to consider the potential impact of decisions regarding management of a grazing allotment violated its obligations under NEPA and FLPMA, then enjoined any implementation of the decision until the agency reinventoried the lands at issue and prepared an environmental document taking into account the impacts of its decisions on wilderness values. In *Oregon Natural Desert Association v. Rasmussen*, CV 05-1616-AS, Findings and Recommendations (D.Or. April 20, 2006 – Attachment 12); Order (D.Or. December 12, 2006 – Attachment 13), the Oregon Natural Desert Association (ONDA) had

considered “protection and management for the special values” (i.e., their wilderness characteristics) in the alternatives. Draft RMP, p. 2-5. In the Proposed RMP, the agency acknowledges the submission of proposals for protection of certain areas and claims that it responded by conducting inventories “to determine whether they did indeed possess the wilderness characteristics of size, naturalness, or outstanding opportunities for primitive, unconfined recreation or solitude.” Proposed RMP, p. 2-11. These inventories “determined that some of these lands did indeed possess one or more of the above wilderness characteristics.” *Id.* However, the BLM then assessed whether or not these lands “were manageable as wilderness” and concluded that they were not due to the presence of oil and gas leases, so the RMP no longer considers protection of wilderness characteristics in any alternative. *Id.* Accordingly, in the Proposed RMP, “[a]ll management actions related to management of the West Ferris Mountains and Adobe Town Wilderness Study Area (WSA) fringe areas were removed.” Proposed RMP, p. 2-3. This conclusion fails to consider the option to manage the wilderness characteristics of these areas, incorrectly requiring that the lands be able to be managed “as wilderness” in order to protect any of their irreplaceable values. Further, the mere presence of oil and gas leases does not prevent the agency from managing these areas to protect their wilderness characteristics.

Requested Remedy: The BLM’s approach to inventory and management of wilderness characteristics in the Proposed RMP is inconsistent with the agency’s own policy and guidance. The Proposed RMP must consider protection of lands with wilderness characteristics. The Proposed RMP must also consider protection of the wilderness characteristics of the lands based on one or more of the wilderness characteristics that they contain.

- C. The Proposed Plan should manage the Adobe Town, Ferris Mountains, Kinney Rim and Wild Cow areas for their wilderness characteristics; the criteria applied by BCA are more stringent than those that the BLM is required to apply.

As discussed above, the applicable standards for assessing wilderness characteristics set out in BLM’s national guidance (IM Nos. 2003-274 and 2003-275) are less stringent than those applicable under the Wilderness Act and under the now-revoked Wilderness Inventory Handbook, providing for management that emphasizes “the protection of some or all of the wilderness characteristics as a priority” over other multiple uses and not including a requirement for areas to comprise 5000-acre parcels. (emphasis added). The Proposed Plan adopts a more restrictive standard, identifying distinct wilderness characteristics, but then requiring that the lands at issue be manageable as wilderness. Regardless, the inventory conducted by BCA shows that these areas meet both the applicable criteria and the more stringent standards applied in the Proposed RMP.

BCA conducted its wilderness inventory in accordance with the more stringent standards of the Wilderness Act and the Wilderness Inventory Handbook. The Adobe Town, Ferris Mountains, Kinney Rim and Wild Cow areas met these criteria and, as a result, certainly meet both those applied in the Proposed Plan and the applicable criteria set out in IM Nos. 2003-274 and 2003-275.

Requested Remedy: The criteria used by BCA to inventory the Adobe Town, Ferris Mountains, Kinney Rim and Wild Cow areas under the Wilderness Inventory Handbook are more stringent than those that should be applied by the BLM (per IM Nos. 2003-274 and 2003-275, one or more of naturalness, outstanding opportunities for solitude, or outstanding opportunities for primitive, unconfined recreation) ; these areas unquestionably have wilderness characteristics that can and should be protected in the Rawlins RMP.

D. The Proposed RMP does not sufficiently disclose the BLM's analysis of lands with wilderness characteristics.

NEPA requires that the information provided to the public be accurate and sufficient to permit analysis of the data provided and the methods used to analyze it. *See, e.g.*, 40 C.F.R. § 1500.1(b); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The agencies must “insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.” 40 C.F.R. § 1502.24. Information regarding “reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives” and must be included in an EIS, if the “costs of obtaining it are not exorbitant.” 40 C.F.R. § 1502.22(a). In addition, regarding the content of an environmental analysis, “The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). The Proposed RMP does not meet basic standards for disclosure and accuracy, and is impermissibly preventing meaningful public comment.

While the Draft RMP referenced acreage of the Adobe Town and Ferris Mountains areas that would be considered for management to protect its wilderness characteristics, neither the Draft nor the Proposed RMP set out the standards that were used to determine whether or not an area had wilderness characteristics or how those standards were applied to the citizen proposals for Adobe Town, Ferris Mountains, Kinney Rim and Wild Cow areas. This glaring lack of information violates NEPA's requirement to provide sufficient information regarding the basis of the agency's decision-making.

As noted in the BLM's Land Use Planning Handbook, it is critical that the agency make data available electronically or, at a minimum, widely distribute the information to the public:

With the increased emphasis on collaborative planning, there is an additional need to make data available to interested publics, both during and upon completion of a plan or plan amendment. Under the Bureau-wide e-Planning Initiative, continued efforts will help bring the BLM land use planning process into an electronic business climate, reduce planning costs, and allow better public access to decision making. In the interim, access to planning data may be made available through BLM's state websites or through distribution by CDs or hard copies of a planning document.

H-1601-1, Appendix G, p. 2.

Courts have confirmed the BLM's obligations to consider the value of wilderness characteristics and the potential impacts of decisions on this resource when making land use planning decisions. One recent federal court decision held that the Utah BLM arbitrarily ignored new information, its own wilderness inventory, in approving oil and gas leasing. Southern Utah Wilderness Alliance v. Norton, 457 F.Supp.2d 1253, 1264-69 (D.Utah 2006). The court reasoned that the BLM could not take the requisite "hard look" required under NEPA if the land use plan was not supplemented with the significant information from a wilderness inventory. Id. BLM must show that it fully considered the information submitted regarding wilderness characteristics, which necessarily includes disclosure of its methodology and analysis of each unit. Currently, the actual details of the review conducted for each proposal and the results of the evaluation are not presented. Accordingly, BLM has not demonstrated compliance with this burden.

Requested Remedy: The BLM must show that it has completed a thorough evaluation of the proposals. An explanation of the analysis, as well as the data generated, must be made available and widely distributed for public review and comment *prior* to the issuance of a Record of Decision.

- E. The Proposed Plan does not include management prescriptions which sufficiently protect wilderness characteristics.

Both IM No. 2003-274 and IM No. 2003-275 clarify that the BLM can manage lands to "protect" wilderness characteristics, including by prioritizing the protection of these characteristics over other uses. The Proposed Plan not only fails to consider protection of wilderness characteristics, but also fails to provide management prescriptions that will adequately protect those characteristics and, therefore, does not comport with BLM's guidance. When the agency corrects the failure by considering management of lands with wilderness characteristics, the BLM must also include appropriate management prescriptions to ensure the protection and/or enhancement of these values.

In the most recent ruling on the Utah Settlement challenge (*State of Utah v. Norton*, Case No. 2:96-CV-0870, Order and Opinion (D.Utah September 20, 2006)), Judge Benson found against the Conservation Groups for a number of reasons, including agreeing with the legal interpretation of FLPMA put forth by the State of Utah and the BLM (a finding we continue to dispute). However, the ruling also justifies the court's interpretation by finding that the agency can provide virtually the same protection for lands with wilderness characteristics through administrative decisions as it can through designation of new WSAs, with the only material difference being that, while the agency can alter its own management decisions, only Congress can change a WSA designation. The court stated: "Both Utah and the BLM acknowledge that the BLM has the discretion to manage lands in a manner that is **similar to the non-impairment standard** by emphasizing the protection of wilderness characteristics as a priority over other potential uses." Order and Opinion, p. 41 (emphasis added – see excerpt, Attachment 14).

In subsequent briefing to the U.S. Court of Appeals for the 10th Circuit, the Department of the Interior and the BLM reiterated that "the settlement does not preclude BLM from **inventorying public lands for wilderness-associated characteristics**" and that "the land management

decision obtained through FLPMA § 202 process may **resemble management under FLPMA § 603's non-impairment standard.**" In discussing how BLM will manage lands with wilderness characteristics, the brief refers to the "BLM's discretion under FLPMA § 202 to **preserve their wilderness-associated characteristics.**" Brief of the Federal Appellees, *State of Utah v. Kempthorne*, Case No. 06-4240 (February 26, 2007), pp. 40, 43 (emphases added - excerpt Attachment 15).

Accordingly, the BLM has significant flexibility to manage these lands to actually protect the wilderness values of these areas. The Draft RMP proposed certain prescriptions, such as closure to mineral material disposal, locatable mineral entry, oil and gas leasing, and off-road vehicle use, but the Proposed RMP does not consider any of these. *See*, Draft RMP, pp. 2-32 – 2-34. Suitable management prescriptions are identified below:

With limited exceptions, surface-disturbing activities or activities that involve the permanent placement of structures are not consistent with protection of wilderness characteristics. Specifically, the following activities should not occur within lands having wilderness characteristics:

- Permanent or temporary roads
- Use of motorized equipment or motorized vehicles
- Landing of aircraft
- Mechanical transport
- Structures, developments, or installations
- Commercial enterprises

Specific exemptions/allowances are made for:

- Valid Existing Rights. Prior-existing rights may continue. New discretionary uses that create valid existing rights are not allowed if they would detract from the wilderness values.
- Administrative Activities. New commercial activities or new permanent roads will not be authorized. BLM may authorize any of the other prohibitions if it is necessary to meet the minimum requirements to administer and protect the lands with wilderness character (called the "minimum requirement exception") and to protect the health and safety of persons within the area.

Allowed activities include (subject to limitations determined by the State Director):

- Managing fire, insects, weeds, and diseases;
- Completing recurring Federal mineral surveys;
- Continuing established livestock grazing;
- Allowing for commercial services to the extent necessary to provide for activities which are proper for realizing the recreational or other wilderness character purposes and are compatible with the defined values;
- Allowing for adequate access to inholdings.

Specific Guidance:

- (1) Emergencies. The use of motor vehicles and mechanical transport, and the construction of temporary roads, structures, and installations is allowed for emergency purposes and when consistent with the "minimum requirement exceptions."
- (2) Land Disposals, Rights-of-Ways (ROWs), and Use Authorizations. Lands to manage for wilderness characteristics will be retained in public ownership. They will not be disposed through any means, including public sales, exchanges, patents under the Recreation and Public Purposes Act, State selections or other actions (except where a vested right was established prior to October 21, 1976).

Prior existing rights, such as leases under the Recreation and Public Purposes Act, leases/permits under 43 CFR 2920, and ROWs may continue. These also could be renewed if they are still being used for their authorized purpose.

The BLM will acquire State and private inholdings when practicable. In unique situations and subject to public review, exchanges may be made involving Federal and non-Federal lands when such action would significantly benefit that area's wilderness characteristics.

New authorizations, leases, permits, and ROWs will not be authorized since they are considered new valid rights.

- (3) Routes of Travel. The construction of new permanent or temporary routes or roads will not be allowed.

No cross country motorized or mechanized travel will be allowed within areas managed to maintain wilderness characteristics. However, motorized or mechanized use of preexisting travel routes that are necessary for transportation and designated in the plan will be allowed subject to applicable prescriptions or stipulations. Motorized and mechanized routes must be minimized, and closure and restoration of unnecessary routes will be prioritized to enhance and protect wilderness characteristics. Any motorized or mechanized use off designated routes will not be allowed.

- (4) Locatable Minerals. Existing and new mining operations will be regulated using the 43 CFR 3809 regulations to prevent unnecessary and undue degradation of the lands.
- (5) Leasable Minerals. Existing mineral leases represent a valid existing right. These rights are dependent upon the specific terms and conditions of each lease. Existing leases will be regulated to prevent unnecessary or undue degradation. No new leases will be issued.

- (6) Grazing. Existing livestock grazing, and the activities and facilities that support a grazing program are permitted to continue.

Adjustments in the numbers and kind of livestock permitted to graze would be made as a result of revisions in the land use plan. Consideration is given to range condition, the protection of the range resource from deterioration.

The construction of new grazing facilities would be permitted if they are primarily for the purpose of protecting wilderness characteristics and more effective management of resources, rather than to accommodate increased numbers of livestock.

The use of motorized equipment for emergency purposes is allowed.

- (7) Fire Management. Fire management will be consistent with BLM policy. It may be appropriate to allow natural fires to burn in conformity with a fire management plan, and Wildland Fire Use is to be encouraged. Prescribed fires are allowed in conformity with a fire management plan so long as it is consistent in improving or maintaining the area's wilderness character.

Minimum impact suppression techniques will be applied.

- (8) Forest/Vegetation Health. Insects, disease, and invasive species may be controlled if it is determined that it is necessary to meet the minimum requirements to administer and protect these lands.

Insect and disease outbreaks must not be artificially controlled, except to protect timber or other valuable resources outside the land with wilderness characteristics, or in special instances when the loss to resources may cause adverse impacts to wilderness characteristics.

Vegetative manipulation to control noxious, exotic, or invasive species is allowed when there is no effective alternative and when the control is necessary to maintain the natural ecological balances within the area. Control may include manual, chemical, and biological treatment provided it will not cause adverse impacts to the wilderness characteristics.

- (9) Recreation. Primitive and unconfined recreational uses such as hiking, camping, rock climbing, caving, fishing, hunting, trapping etc. are allowed on these lands.

Recreational uses will not be allowed if they require:

- Motor vehicles or mechanical transport (e.g., mountain bikes) off routes designated as open or limited through the route designation process;
- Permanent structures or installations (other than tents, tarpaulins, temporary corrals, and similar devices for overnight camping).

New commercial services will not be allowed unless they are necessary for realizing the primitive and unconfined recreational values. An example of an allowed commercial service would be an outfitting and guide service. Existing commercial recreational authorizations may be allowed to continue under its terms and conditions to their expiration date.

Recreational or hobby collecting of mineral specimens when conducted without location of a mining claim may be allowed. This use will be limited to hand collection and detection equipment.

- (10) Cultural and Paleontological Resources. Cultural and paleontological resources are recognized as unique and valuable. They are also important supplemental values to an area's wilderness characteristics.

Resource inventories, studies, and research involving surface examination may be permitted if it benefits wilderness values. This same standard applies for the salvage of archeological and paleontological sites. Rehabilitation, stabilization, reconstruction, and restoration work on historic structures; excavations; and extensive surface collection may also be permitted if they maintain the area's wilderness character.

Permanent physical protection, such as fences, will be limited to those measures needed to protect resources eligible for the National Register of Historic Places and will be constructed so as to minimize impacts on apparent naturalness.

- (11) Wildlife Management. Fish and wildlife resources are a special feature that contributes to an area's wilderness character. Whenever possible, these resources should be managed to maintain that character. Fish and wildlife resources are part of the ecological supplemental values of wilderness, and should be managed to further their protection.

Nothing will be construed as affecting the jurisdiction or responsibilities of the State agencies with respect to fish and wildlife management on these lands. Fishing, hunting and trapping are allowable activities on these lands. The State establishes regulations and enforcement for these uses.

Stocking of wildlife and fish species native to the area may be permitted. Introduction of threatened, endangered, or other special-status species native to North America may be allowed. Management activities on these lands will emphasize the protection of natural processes. Management activities will be guided by the principle of doing the minimum necessary to manage the area to preserve its natural character.

Requested Remedy: In order to fulfill the obligation to consider management of lands to protect and/or enhance wilderness characteristics, and the guidance regarding protection of wilderness

characteristics in the national BLM instruction memoranda, the management prescriptions set out above should be applied to lands managed for wilderness characteristics in the Rawlins RMP.

Adobe Town

Adjacent to the Adobe Town Wilderness Study Area are approximately 95,200 acres of land, predominantly under BLM management, that possess wilderness character as defined under the Wilderness Act. In response to an intensive field inventory by Biodiversity Conservation Alliance, BLM conducted its own inventory of the area and identified approximately 47,539 acres that the agency concluded met all the wilderness criteria for WSA designation. See Attachment 16. These lands are important for recreation and wildlife not only for their own intrinsic wilderness qualities, but also because the protection of many of these lands protects the viewshed for many important and popular overlook points within the present Wilderness Study Area. The protection of these wilderness-quality lands is therefore critical to maintaining the availability of a wilderness experience to visitors in the Wilderness Study Area. This is particularly true for the Skull Creek Rim, a palisade of cliffs that rises 1,000 feet above the surrounding plain, much of which is currently pristine but enjoys no protection from industrial degradation under either the present Great Divide RMP or the proposed Rawlins RMP.

Adobe Town is widely regarded as the crown jewel of Wyoming's desert wilderness areas, and is unquestionably the highest-profile recreation landscape in the Rawlins Field Office. See Attachments 17 and 18. The area has been featured in numerous magazine stories and books. Attachments 19, 20, 21, 22, and 23. It has been covered extensively in feature stories in newspapers, some of which have run nationwide in major newspapers. See, e.g., Attachments 100, 101, 102, and 103. This area has important spiritual significance for Native Americans. Attachment 24. The area is recognized as a nationally significant scenic resource by professional photographers. Attachment 25. Wyoming newspapers have repeatedly called for protection of Adobe Town lands within the citizens' wilderness proposal that lie outside the current WSA in their editorials. Attachments 26, 27, 28, 29, 30, 31, 113, 114. The protections of all of Adobe Town has been called for by a wide range of interest groups throughout Wyoming, including the Wyoming Association of Churches (Attachment 32), the over 19,000 union members of the Wyoming AFL-CIO (Attachment 33), the Wyoming Backcountry Horsemen (Attachment 34), Former BLM employees (Attachment 35) and the Albany County Commission (Attachment 6). In a summit held in Rock Springs in 2006, there was broad consensus concerning the need to protect all of Adobe Town, not just the Wilderness Study Area. Attachment 36. The overwhelming majority of comments received over the comment periods for the Rawlins RMP EIS explicitly called for the withdrawal of all of Adobe Town – both WSA and citizens' proposed additions – from future oil and gas development. Some commentators even recommended that Adobe Town become a National Park. See, e.g., DEIS Comments and Responses at Row 980. Clearly, the need to protect this special landscape was the issue that resonated with greatest importance to the public, both in Wyoming and nationally, of all issues addressed by the Rawlins RMP EIS. Yet the BLM declined to protect lands beyond the WSA boundaries in its proposed Rawlins RMP, a monumental failure to respond to the public interest which should be corrected prior to issuance of the ROD for the plan.

BLM asserts that "Under the current criteria for wilderness characteristics, found in Instruction Memorandum No. 2003-275-Change 1, Consideration of Wilderness Characteristics in Land Use Planning, Attachment 1, the Adobe Town fringe areas included in the Citizens' Proposal for Wilderness, regardless of boundaries, do not possess wilderness characteristics." DEIS Comments and Responses at Row 3112. This finding is unsupported by any information as to why these areas would not qualify under the IM, and conflicts directly with the BLM's earlier findings that these areas do in fact possess wilderness qualities. See, e.g., BLM's Adobe Town Citizens' Wilderness Proposal Inventory Area Evaluation, Attachment 16; indeed, the wilderness criteria evaluated by BLM in their wilderness inventory evaluation are exactly identical to the wilderness characteristics as outlined in IM 2003-275-Change 1. BLM's assertion that these areas lack wilderness characteristics is therefore unsupported by the records and is arbitrary and capricious and an abuse of discretion.

The provisions of the Adobe Town Dispersed Recreation Use Area ("DRUA") (FEIS at A37-1) are quite confusing. It is puzzling why BLM would establish this area as a priority recreation area, but not restrict future mineral leasing, and manage permitted activities that are incompatible with recreation in a way that causes "severe deviation from the desired ROS over an extended period of time." *Id.* The issuance of "Special Recreation Permits" for activities consistent with the ROS class is also puzzling. FEIS at A37-3. Will all visitors to the area (hunters, hikers, wildlife watchers, campers) be required to possess a permit, or does this apply only to commercial operations? This point needs to be clarified in the final plan.

The ROS mapping for the Adobe Town DRUA contains a significant error. It is clear from the map that "frontcountry" ROS areas are determined by buffering existing vehicle routes. See FEIS at Map 2-58. This route was inventoried by BCA as Route AT-19 in the Citizens' Wilderness Inventory of Adobe Town (BCA 2001); we incorporate this inventory document, submitted to Rawlins BLM in 2001, into this protest by reference. A frontcountry area is designated along the southeast boundary of the WSA in T14N R96W, but the vehicle route along this boundary is no longer passable to motor vehicles. At one point it runs through the middle of a wetland. Attachment 37 at 165. Designating this route as a "frontcountry" area would be irresponsible because it would attract vehicle use to a route that is impassable, resulting in resource damage and unnecessary and undue degradation to the area. Similarly, the route along the southeast boundary of the WSA in T13N R96W has been washed out, and presently a 6-foot sheer embankment at Skull Creek Wash prevents further access to the old Coastal Haystack #4 well site; portions of this route north of the washout also no longer exist and should not be designated as frontcountry areas for the same reason. *Id.* at 163.

The closure of the Adobe Town WSA to all motorized use, if enforced effectively, should address the current low level of ORV use off designated vehicle routes. There are several spots where current public use along designated routes within the WSA is significant, and very clear signage will need to be provided to educate the public that several dead-end spurs are closed to vehicles. The spur jeep trail to East Fork Point and the spur to the southern Skull Creek Rim from the old Alberta Energy Corporation wellsite are likely to be the most salient examples of vehicle routes that current receive substantial traffic from visitors but are slated for closure. It appears that the semi-loop route along the Skull Creek Rim and the rim route along the Adobe

Town Rim are boundary routes that will remain open to vehicle travel, and if so, this should be made clear to the public in the ROD.

According to the FEIS, "Visual resource management class designations will be analyzed and modified to reflect present conditions and future needs." FEIS at 1-12. BLM talks about "VRM adjustments to WSAs;" apparently these apply to Bennett Mountains and Ferris Mountains WSAs, but not Adobe Town. FEIS at 4-513. However, in the case of the Adobe Town citizens' proposed wilderness lands lying outside the WSA, the designation of VRM Class III (which allows full-field oil and gas development with essentially no safeguards for visual resources) reflects neither existing conditions nor future needs. See FEIS at Map 2-50. BLM notes that "VRM Class III and IV areas allow much more modification of the natural environment" and "[m]itigation associated with VRM Class III and IV would allow more scenic contrasts, which would detract from the recreational setting (Appendix 2-25). Altering the recreational setting would influence recreational activities, which would displace some recreationists seeking back country to middle country recreational settings." FEIS at 4-144. BLM also notes, "Visual impairments outside and adjacent to WSAs would be allowed if they are in conformance with the appropriate VRM classification of the adjoining area." FEIS at 4-205. Indeed, BLM has in the past approved full-field gas development in areas of Adobe Town classified as VRM Class II and III at densities of 160-acre spacing, or 4 wells per square mile (BLM 2003: 2-3; 3-77). Roads, oil and gas facilities, and related traffic would have significant impact on visual resources in VRM Class II, III, and IV areas; "This would alter the landscape from a predominantly natural setting to a more industrialized setting." FEIS at 4-393. In the end, "Oil and gas development would result in long-term reduction of recreation use in areas of high or moderate oil and gas potential, which would have significant impacts on recreation." FEIS at 4-157, and see 4-512. These areas include areas of the Adobe Town Very Rare or Uncommon area designated by the state of Wyoming to protect scenic, fossil, wildlife, historic/cultural, and geological features, areas which BLM has determined possess wilderness character, and areas important to the viewshed of the Adobe Town Wilderness Study Area.

Almost all of these lands are essentially pristine at the present time, and there is a strong need to keep them that way in order to maintain wilderness characteristics, primitive recreation experiences, and/or viewsheds of important overlooks and recreation areas within the WSA. For two WSAs, BLM provided VRM Class II areas for surrounding lands "to preserve the visual quality of landscapes by requiring application of BMPs or mitigation on any surface disturbing activity or new facility...." FEIS at 4-208. This will "potentially reduce the noise, surface disturbance, and visible facilities, which would reduce the amount of development impacting the solitude of WSAs." Id. Indeed, the effect of the Desolation Flats project and other full-field development projects thus far has been to

...destroy the natural character of the landscape, resulting in displacing recreationists to alternative areas. These areas are no longer desirable for dispersed primitive to semi-primitive recreational activities, such as hiking, camping, backpacking, viewing wildlife, or hunting because of the long-term industrial setting.

FEIS at 4-505. In addition, the entire Adobe Town Very Rare or Uncommon area designated by the State of Wyoming would be open to wind energy development, including important viewshed areas visible from prominent overlooks within the WSA, despite the state's recognition of the need to protect the scenic resources of this area. See FEIS at Maps 2-30 through 2-33. BLM's failure to even consider such measures under any alternative for the viewshed of Adobe Town (*see* FEIS at Maps 2-49 through 2-52; note inconsistency with text at 4-403) is both arbitrary and capricious and an abuse of discretion pursuant to the APA and a violation of NEPA's range of alternatives requirements. A VRM Class I should be applied to all of the Adobe Town citizens' proposed wilderness/Very Rare or Uncommon state designation that remains essentially pristine, while VRM Class II may be appropriate in a few areas where some intrusions presently occur.

BCA recommended that the BLM consider ACEC status for Adobe Town (Attachment 38), but the agency refused on the basis that it did not meet 'relevance and importance' criteria. DEIS Comments and Responses at Row 72. Under relevance, BLM addressed cultural values but not the significant scenic values. Attachment 39 at 54. These scenic values are outlined in this Protest, and explicitly recognized by the State of Wyoming, which designated all of the Fringe areas (plus additional citizens' proposed wilderness lands) as Very Rare or Uncommon. Attachment 40, *and see* Attachment 41. The Very Rare or Uncommon designation also recognizes the rarity of these scenic resources as well as the fragile nature of the lands, thereby meeting importance criteria. The state's designation of the area in question as Very Rare or uncommon thereby falsifies BLM's flawed analysis of relevance and importance criteria for Adobe Town. BLM must therefore recognize that Adobe Town meets ACEC criteria and consider an ACEC designation for the area in supplemental NEPA.

BLM notes that of the Wilderness Study Area, only 10,920 acres were recommended to Congress for wilderness designation. This recommendation was based on the fact that the rest of the newly created WSA was under lease for oil and gas development at the time (BLM 1981, *and see* Attachment 105). Now, these leases have expired, and the rationale for not recommending these areas for Congressional wilderness designation has disappeared. The new RMP should incorporate a new recommendation to Congress to designate 100% of the WSA as wilderness.

Requested Remedy: BLM should withdraw the Very Rare or Uncommon area from future oil and gas leasing. These lands could be titled "Lands with Wilderness Character" or "Backcountry Area." In addition, the following Conditions of Approval should attach Because most of the area is presently leased for oil and gas development, well-defined intensive management through the following Best Management Practices are required in the Plan (not discretionary to be determined at some later date), and include the following:

- Maximum surface density of 1 wellpad per square mile;
- Mat drilling required (no bulldozing);
- Separators, condensate tanks, and other non-wellhead facilities sited outside the proposed wilderness lands;
- Closed-loop drilling required (no reserve pits);

- Sub-grade wellheads countersunk below ground level;
- Pipeline rights-of-way can be brush-hogged but not bladed;
- Two-track vehicle access only to wellheads;
- Green completions (no flaring);
- Abandoned well markers placed at grade level.

The Very Rare or Uncommon area (180,910 acres) should be closed to other forms of mineral entry to maintain consistency with the state Very Rare or Uncommon designation. This area should be managed as VRM Class II to protect the scenic resources recognized by the state in its Very Rare or Uncommon designation.

Ferris Mountains

Under the Proposed Action, BLM states that all WSAs will be closed to motorized use, except for the Ferris Mountains, where motor vehicle use will be allowed on designated routes. FEIS at 4-155. We are unaware of any existing routes within the WSA that are currently open to motor vehicle use. Is BLM intending to opening this area to new motor vehicle roads and trails which are currently not in existence? BLM notes that "Allowing vehicle travel on designated roads and vehicle routes within the Ferris Mountains WSA would potentially increase the amount of erosion, and increase the potential for establishment or spread of weed species, potentially impairing the wilderness suitability of the WSA." FEIS at 4-208. This violates the non-impairment criteria of BLM Handbook H-8550-1; BLM must therefore alter management of motor vehicles within the WSA to conform with non-impairment criteria under BLM regulations.

Having determined that some 5,300 acres of the Ferris Mountains outside the WSA on the western flank of the range possess wilderness characteristics, the BLM is proposing to leave these lands open to oil and gas leasing and other industrial use. BLM does not consider the multitude of options for protecting this area's wilderness character (beyond expanding the present WSA) that have been presented to it in public comment. This failure to examine a range of reasonable alternatives, including those that would minimize impacts, for the protection of this area's wilderness qualities violates NEPA's requirements.

Requested Remedy: BLM should withdraw the area recognized as possessing wilderness character from future oil and gas leasing. These lands could be titled "Lands with Wilderness Character" or "Backcountry Area." In addition, the following Conditions of Approval should attach. Because some of the area is presently leased for oil and gas development, well-defined intensive management through the following Best Management Practices are required in the Plan (not discretionary to be determined at some later date), and include the following:

- Maximum surface density of 1 wellpad per square mile;
- Mat drilling required (no bulldozing);
- Separators, condensate tanks, and other non-wellhead facilities sited outside the proposed wilderness lands;
- Closed-loop drilling required (no reserve pits);
- Sub-grade wellheads countersunk below ground level;

- Pipeline rights-of-way can be brush-hogged but not bladed;
- Two-track vehicle access only to wellheads;
- Green completions (no flaring);
- Abandoned well markers placed at grade level.

This area should be closed to other forms of mineral entry to maintain consistency with the state Very Rare or Uncommon designation. This area should be managed as VRM Class II to protect its scenic resources.

ACECs

The designation of Areas of Critical Environmental Concern (“ACECs”) is a key requirement in BLM land-use planning. FLPMA repeatedly emphasizes the importance of ACECs in managing BLM lands:

The Congress declares that it is the policy of the United States that - ...
 11. regulations and plans for the protection of public land areas of critical environmental concern be promptly developed...FLPMA Title I Sec.102(a)
 [43 USC § 1701]

The Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. FLPMA Title II Sec. 201(a) [43 USC § 1711]

In the development and revision of land use plans, the Secretary shall - ...
 1. give priority to the **designation and protection** of areas of critical environmental concern....

FLPMA Title II Sec. 202(c) [43 USC § 1712], emphasis added. The BLM must furthermore “give priority to designation and protection of areas of critical environmental concern...” 43 U.S.C. § 1712(c). Finally, BLM is directed to “consider the relative scarcity of the values involved...” FLPMA Title II Sec. 202(c)(6) [43 U.S.C. § 1712].

ACECs are areas “where special management is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes.” 43 U.S.C. § 1702(a).

BLM’s ACEC Manual (1613) provides additional detail on the criteria to be considered in ACEC designation, as discussed in the applicable regulations, as well. See, Manual 1613, Section .1 (Characteristics of ACECs); 43 C.F.R. § 8200. An area must possess relevance (such that it has significant value(s) in historic, cultural or scenic values, fish & wildlife resources, other natural systems/processes, or natural hazards) and importance (such that it has special significance and distinctiveness by being more than locally significant or especially rare, fragile or vulnerable).

In addition, the area must require special management attention to protect the relevant and important values (where current management is not sufficient to protect these values or where the needed management action is considered unusual or unique), which is addressed in special protective management prescriptions. An ACEC is to be as large as is necessary to protect the important and relevant values. Manual 1613, Section .22.B.2 (Size of area to receive special management attention). For potential ACECs, management prescriptions are to be “fully developed” in the RMP. Manual 1613, Section .22 (Develop Management Prescriptions for Potential ACECs).

The Manual also sets out more specific requirements for how consideration of ACECs should be conducted during the land use planning process. Manual 1613 specifically requires that each area recommended for consideration as an ACEC, including from external nominations, be considered by BLM, through collection of data on relevance and importance, evaluation by an interdisciplinary team and then, if they are not to be designated, the analysis supporting the conclusion “must be incorporated into the plan and associated environmental document.” Manual 1613, Section .21 (Identifying Potential ACECs). However, the treatment of proposed ACECs in the Draft RMP/EIS does not comply with BLM’s obligations.

To meet importance criteria “generally requires qualities of more than local significance and special worth, consequence, meaning, distinctiveness, or cause for concern, especially compared to any similar resource, or qualities or circumstances that make it fragile, sensitive, rare, irreplaceable, exemplary, unique, endangered, threatened, or vulnerable to adverse change.” BLM Manual 1613.1. BLM Manual 1613 further clarifies the disjunctive nature, by stating “one or more of the following” for the various categories of importance criteria. BLM Manual 1613.1. However, in its analysis of relevance and importance for ACECs, BLM has systematically ignored the disjunctive nature of this statement, and disqualifies a number of strong candidates for ACEC status for failure to meet one of the criteria for “importance,” when these areas clearly meet other importance criteria.

It is clear that BLM has failed its duty to identify, designate, and protect the most important and sensitive areas in the RMPPA as ACECs. WGFD raised the following questions at the Draft EIS stage:

Why is the Stratton Sagebrush Steppe Research ACEC withdrawn for oil and gas leasing, but areas more significant to wildlife, such as the Sand Hills, Powder Rim, Red Rim and Atlantic Rim are not? Is this simply because there is low potential for oil and gas on the Stratton area? Are we to assume oil and gas withdrawals will only be pursued where there is little or no potential for oil and gas development?

DEIS Comments and Responses at Row 1289. These questions remain unanswered by BLM. We, too, are mystified by the BLM’s apparent inability to protect high-priority landscapes through the ACEC designation process.

BLM repeatedly protests that its management of ACECs for Jep Canyon, Shamrock Hills, and Como Bluffs have been ineffective due to checkerboard land ownership patterns. (see, e.g., DEIS Comments and responses at Row 12). However, BLM maintains authority to manage projects which require participation of federal parcels within checkerboard ACECs. According to BLM,

The Bureau of Land Management must comply with law, regulation, and policy regardless of land ownership or land pattern (e.g. checkerboard land pattern). For example, the Endangered Species Act (ESA) and the National Historic Preservation Act (NHPA) require federal agencies to identify and mitigate potential impacts to threatened and endangered wildlife and plant species and significant cultural resources regardless of land ownership or land pattern. The BLM cannot make management decisions on non-federally administered lands. However, the BLM cannot legally authorize an action that is not in compliance with these laws and their implementing regulations. If a project could not occur on non-federally administered lands without federal involvement, the federal agency is required to gather the information necessary to determine if adverse effects would occur for the entire project.

DEIS Comments and Responses at Row 1097. The same management requirements apply to requirements imposed under the Resource Management Plan, such as ACEC requirements, for checkerboard lands.

In justifying the removal of ACEC status for the Shamrock Hills and other checkerboard ACECs designated under the 1990 Great Divide RMP, BLM argues:

The BLM has determined that special management is not effective in these areas because of the checkerboard land pattern. As special management is not practical, no special designation for the areas is warranted.

See, e.g., DEIS Comments and Responses at Row 15. This statement is completely incorrect, demonstrably so in the case of the Shamrock Hills. A proposal for a coal gasification plant was advanced for the checkerboard lands of the Shamrock Hills ACEC in the late 1980s. See FEIS at 3-128. This proposal would have degraded the raptor habitat for which the ACEC was designated, and as a result, BLM ultimately denied permits to undertake this activity. As a result, the coal gasification effort did not move forward, either on public or on private checkerboard lands within the ACEC. As a direct result of BLM checkerboard holdings being designated as ACEC lands, the special values were protected. This proves beyond any doubt that ACEC designations in checkerboard lands are "practical," and special management in such areas is "effective." BLM itself touts its ability to successfully manage checkerboard ACECs for maintenance of relevant and important features. For the Shamrock Hills ACEC under Alternative 1:

Exclusion of wind power facilities or avoidance of linear transportation facilities would retain the relevant and important values for which the ACEC was designated.

FEIS at 4-239. BLM's assertion that managing checkerboard ACECs is not practical or effective is therefore arbitrary and capricious and an abuse of discretion pursuant to the APA, and cannot be used as a justification to remove ACEC status from checkerboard ACECs. BLM must therefore reconsider its ACEC decisions for Jep Canyon, Shamrock Hills, and Como Bluff in light of these facts.

Powder Rim Proposed ACEC

The Powder Rim was proposed as an ACEC in the *Western Heritage Alternative*, and also was recommended as an ACEC by the Wyoming Game and Fish Department and the Albany County Commission. See Attachment 42, Attachment 6 and DEIS Comments and Responses at Row 1289. BLM's "importance" analysis contains several important mistakes which invalidate the analysis. There are several juniper obligate songbirds found in this potential ACEC rated "S1" (critically imperiled statewide) including the western scrub jay, juniper titmouse, bushtit, and Scott's oriole (Keinath et al. 2003).¹ Plants rated as 'S1' present in the Powder Rim proposed ACEC include *Penstemon gibbensii*, *Androstaphium breviflorum*, *Atriplex wolfii*, *Boechera selbyi*, *Erigeron compactus* var. *consimilis*, and *Populus deltoides* var. *wislizenii*. Scoping Comments of Hollis Marriott on the Rawlins RMP, Cherokee/Powder Rim appendix. The presence of these species in the juniper woodlands of the Powder Rim gives the area statewide importance (which is more than local importance), meaning that the Powder Rim absolutely meets the "importance" criteria for juniper obligate songbirds, even though juniper habitats may be abundant outside Wyoming. Secondly, the Powder Rim contains 2 of only 3 known Gibben's penstemon populations in the state. Attachment 43. This plant is rated G1/S1 (critically imperiled at the global and state levels, Keinath et al. 2003), making this sensitive resource a globally important one, absolutely meeting the "importance" criteria for ACEC designation. Of note, all species rated 'G1,' including Gibben's penstemon, were recently petitioned for listing under the ESA.² Third, the presence of one of only two desert elk herds in Wyoming, which spend all year in desert environments without migrating to conifer-dominated montane habitats (the other being the Steamboat Mountain herd), makes the Powder Rim meet the "importance" criteria for ACEC designation.

The Powder Rim contains late prehistoric or early historic Native American pictographs which are comparable to features that met Relevance and Importance criteria for the Red Rim-Daley unit. See Attachment 39 at 10-11. BLM failed to consider the pictograph site in the Powder Rim proposed ACEC in its ACEC analysis, even after Protestors clearly brought these features to the agency's attention. Attachment 38 at 5, and see Attachment 39 at 47. For Red Rim, under "A significant historic, cultural, or scenic value (including but not limited to rare or sensitive archeological resources and religious or cultural resources important to Native Americans)" criteria, BLM states "This area has scenic values within the Red Sandstone Uplift, which also contains historic carvings. The historic carvings, located at the southern end of the rock uplift,

¹ Keinath, D, B. Heidel, and G. Beauvais. 2003. Wyoming plant and animal species of concern. Laramie: Wyoming Natural Diversity Database.

² See http://www.denverpost.com/headlines/ci_6521226, site last checked 8/3/07.

include the names and dates of people that have traveled through the area.” Attachment 39 at 10. For Importance, under “Has qualities or circumstances that make it fragile, sensitive, rare, irreplaceable, exemplary, unique, endangered, threatened, or vulnerable to adverse change,” BLM recognizes, “The Red Sandstone Uplift contains unique and fragile historic carvings.” Attachment 39 at 11. The Powder Rim’s Native American pictographs are just as important as the historic carvings at Red Rim (and indeed, are regarded as more significant by archaeologists), and pictographs (being painted onto the surface of the rock with paints or dyes) are even more fragile and vulnerable to adverse change than rock carvings. It is therefore arbitrary and capricious and an abuse of discretion pursuant to the APA for BLM to rule that Powder Rim does not meet relevance and importance criteria for its archaeologically important pictographs while simultaneously ruling that Red Rim meets these criteria for comparable features.

For Jep Canyon, BLM found that the current ACEC meets Relevance and Importance criteria solely on the basis of “The area contains crucial winter habitat for elk and habitat for nesting pairs of raptors.” Attachment 39 at 6, 7. For Powder Rim, under the Relevance criteria for “A fish or wildlife resource,” BLM acknowledged that the area met the criteria due in part to “numerous raptors, including the ferruginous hawk (a BLM-Wyoming State Sensitive Species) nest in the area. Finally, mule deer, antelope, and elk use the Powder Rim junipers for crucial winter range.” Attachment 39 at 47. But the agency concluded that the area failed to meet Importance criteria because it contained only a small proportion of ferruginous hawk nests located in the entire 94.6 million acre) planning area, and big game crucial habitats were also located outside the Powder Rim proposed ACEC. In its ACEC evaluation, BLM concedes that Powder Rim contains both elk winter range and habitat for nesting raptors, the identical criteria that were the sole justification for Jep Canyon meeting Relevance and Importance criteria. BLM does not state in its justification for Jep Canyon that the area contains a large number of nest sites for ferruginous hawks (or any other raptor) as a proportion of the overall nest sites in the entire Field Office. Nor does BLM assert that in the case of Jep Canyon, elk crucial winter range is not found elsewhere in abundance in the general vicinity of the ACEC. Indeed, crucial elk winter range extends the length of the north-south Atlantic Rim uplift, stretching for miles beyond the boundaries of the Jep Canyon ACEC. For Powder Rim, BLM has concocted an artificial threshold to deny ACEC status which was never applied to the Jep Canyon in the context of ACEC eligibility. Indeed, on the sole basis of the wildlife Relevance and Importance criteria outlined above, the Jep Canyon area has been designated an ACEC for the past 18 years, since the adoption of the 1990 Great Divide RMP; clearly, these criteria are sufficient to manage the area for the protection of ‘a wildlife resource.’ It is arbitrary and capricious and an abuse of discretion pursuant to the APA for the BLM to deny consideration of the Powder Rim for ACEC status when it has already designated an area (Jep Canyon) that possesses identical criteria for ACEC status.

WGFD recommended Powder Rim as an ACEC for Alternatives 3 and 4. DEIS Comments and Responses, Row 10. According to the Wyoming Game and Fish Department, “However, crucial and other priority wildlife habitats are not mentioned either among the potential ACECs identified for consideration, or the areas eliminated from further analysis. Habitats that meet the relevance and importance criteria, such as big game crucial winter ranges, sage grouse breeding complexes, raptor nest concentrations, and priority habitats of NSS species,

should be analyzed and considered for designation as ACECs.” DEIS Comments and Responses (<http://www.blm.gov/rmp/wy/rawlins/documents.html>), Row 8, emphasis added. WGFD further recommended that areas with overlapping crucial ranges become Special Management Areas: “We recommend at least one of the alternatives in this plan evaluate establishing SMAs for other, publicly owned habitats within the RFO, particularly any with overlapping crucial habitats.” DEIS Comments and Responses, Row 9. Powder Rim contains triple-overlapping crucial winter ranges for elk, mule deer, and pronghorn, the largest such triple-overlap in the RMPPA. Yet BLM ignored this request as well, continuing to insist that the area does not meet relevance and importance criteria. Id.

Como Bluff ACEC

Como Bluff is an important dinosaur dig site, the site of the famous 1800s “Bone Wars” between paleontologists Othniel C. Marsh and Edward Drinker Cope. The current ACEC was established in part to protect the Como Bluffs Historic District, which is listed on the National Register of Historic Places. See FEIS at 3-88. It is also a National Natural Landmark. Id. BLM proposes to eliminate not only the ACEC in this area, but to manage mineral and wind energy development in such a way that fails to protect the setting of the Historic District, in violation of the NHPA.

For oil and gas development, only Alternative 3 provides for an NSO stipulation to be applied to all future leases, the level of protection required to assure the prevention of impacts to the historic district and its setting. FEIS at 2-56.

This area has been designated an avoidance area for wind energy development. However, it is not an exclusion area under any alternative, and

because of the nature of these types of developments, significant impacts would be anticipated to the setting of the historic district. Large-scale projects such as these dominate the landscape, compromising the integrity of the setting and feeling of the historic district – values that make these resources eligible for the NRHP.

FEIS at 4-209. This level of impact is expressly prohibited by the NHPA, which directs agencies to protect historic sites and their settings. In addition, it is inconsistent with proposed management goals and objectives to “Protect the integrity of unique resource values, preserve historic significance, and provide opportunity for other uses where appropriate” and to “protect the historical significance of the site” that apply to all alternatives. FEIS at 2-55. The fact that an alternative that prevents significant impacts to the setting of the Historic District also comprises a violation of NEPA’s range of alternatives requirements. The final RMP must include increased protections from both minerals and wind energy development to entirely prevent significant impacts to the setting of this area.

Sand Hills/JO Ranch ACEC

We approve of the expansion of the Sand Hills ACEC to include newly acquired federal property encompassing the JO Ranch site. This area was originally designated an ACEC to protect a unique vegetation community and sand dunes complex that supports an abundance of wildlife.

FEIS at 4-215. This vegetation complex is unique in Wyoming. FEIS at 3-88. The extreme road density in this area (FEIS at 4-215) is inconsistent with the need to protect vegetative communities and wildlife populations for which the ACEC was designated, so we concur with the need to undertake a vehicle management plan for this area, and the BLM should establish special standards for road density (not to exceed 1 mile per square mile of open routes) in the forthcoming RMP.

This is an area that is highly prone to severe impacts from surface-disturbing activities. Directly threatened are the very features for which the ACEC was originally established: "Much of the unique bitterbrush complex is within the loosely compacted sand dunes that are highly erosive." FEIS at 4-216. But the proposed management of this area to protect this unique vegetation complex appears to be weakened, not strengthened, under the Proposed Alternative. *See* FEIS at 2-58, provisions for vegetation complex.

As BLM notes, potential for very intensive coalbed methane development is high, and the entire ACEC is presently leased for oil and gas development. FEIS at 4-217. BLM states that the impacts under the proposed plan would be similar to Alternative 3 (FEIS at 4-225), however, this does not appear to be the case, as the area would be closed to future leasing under Alternative 3 but open under the proposed plan. FEIS at 2-57. Impacts to currently leased lands (which comprise 100% of the ACEC) would result in impacts to the resources for which the ACEC was established. ("Intensive management... would provide some protection to the unique vegetation complex; however, there would still be impacts...;" FEIS at 4-223). This demonstrates definitively that, even under the current most-protective alternative, BLM is not emplacing standards sufficient to provide the "establishment and protection" of this ACEC, in violation of FLPMA. It is clear that the BLM has failed to provide for the level of protection required by FLPMA for this ACEC under the current Great Divide RMP, and is poised to carry this inadequate level of protection forward in even weaker form into the new Rawlins RMP.

Jep Canyon ACEC

We find BLM's argument that Jep Canyon cannot be managed as an ACEC due to checkerboard ownership unconvincing and not dispositive of the issue. It is clear that BLM has extremely little influence over activities that occur on private checkerboard holdings within the ACEC. It is equally clear that BLM has complete control over activities proposed on the federal sections, as well as activities that must be federally permitted that extend over both public and private estates. Certainly, it is preferable, once an area has sufficiently outstanding values to be identified as meeting the relevance and importance criteria for ACEC designation, that BLM provide the maximum possible protection for the lands within its control. Failure to do so amounts to an irresponsible lack of land stewardship.

The fact that winter range habitat capability is already being lost in the current ACEC, and this loss is projected to accelerate in the future (FEIS at 4-227), is already inconsistent with the management Goals and Objectives presented for this area across all alternatives. FEIS at 2-59. It is clear that FLPMA's requirements for "establishment and protection" of ACECs is already being violated under the current RMP. Clearly, stronger management direction regarding oil and gas activities is required in the final Plan to meet these objectives. At minimum, the provisions of

Alternative 3, paired with phased development and the requirement for directional drilling and clustered development as approved under the Roan Plateau ROD (BLM 2007) are warranted here. We concur with the need to make this area a wind power exclusion area (*see* FEIS at Map 2-33) to protect nesting and foraging birds of prey.

Shamrock Hills ACEC/Raptor Concentration Area

According to BLM, "Shamrock Hills ACEC is recognized as a Raptor Concentration Area, with one of the highest known nesting populations of ferruginous hawk in the United States." FEIS at 3-89. However, while the Jep Canyon ACEC area (also protected for nesting raptors) is proposed as a wind energy exclusion area, the proposed plan would make this area an 'avoidance area' rather than an exclusion area for wind energy development. FEIS at Map 2-33. According to BLM, this provision

would limit, but not preclude, placement of these facilities, which would potentially result in trampling, disturbance, or loss of wildlife habitat. It would also displace, disturb, or cause stress, energy loss, injury or mortality to wildlife.

FEIS at 4-339. In addition, BLM notes that this area has potential for coalbed methane drilling at very high (80-acre spacing) densities (FEIS at 4-238), which would also be incompatible with maintaining the viability of breeding populations of ferruginous hawk. The ferruginous hawk is a BLM Sensitive Species and is a likely candidate to be petitioned for Endangered Species listing in the near future. Leaving "one of the highest known nesting populations of ferruginous hawk in the United States" open to wind farm and coalbed methane development in its key nesting area is recklessly irresponsible and will contribute to a trend toward listing for this species, in violation of BLM Sensitive Species policy. The policy for candidate species, which also applies to all BLM Sensitive Species, states that the "BLM shall carry out management, consistent with the principles of multiple use, for the conservation of candidate species and their habitats and shall ensure that actions authorized, funded, or carried out do not contribute to the need to list any of these species as threatened/endangered." BLM Manual 6840.06. In land-use planning, BLM must operate under the following obligation:

Land use plan decisions should be clear and sufficiently detailed to enhance habitat or prevent avoidable loss of habitat pending the development and implementation of implementation-level plans.

BLM Land Use Planning Handbook H-1601-1, Appendix C at 5. The Rawlins RMP fails this obligation by allowing wind farm development in the Shamrock Hills Raptor Concentration Area, which would allow the avoidable loss of habitat for BLM Sensitive Species, contributing to the need to list the ferruginous hawk under the ESA. The Shamrock Hills (and all recognized Raptor Concentration Areas) should be designated as exclusion areas for wind energy development under the new plan, and should be withdrawn from future oil and gas leasing in order to protect this important wildlife resource.

Chain Lakes Proposed ACEC

The Chain Lakes area contains unique wetlands of high importance to shorebirds and waterfowl. According to Knight et al. (1976: 167),

The greasewood communities are as diverse in species composition as we've seen for this vegetation type, and the ponds provide a rare habitat in the area for avocets, ducks, killdeer, willets, and other waterfowl. Red-winged blackbirds were seen in the rushes, and gray-fish were observed in the water. This whole area is truly unique and should be studied as a possible representative of the alkaline depression – alkaline pond natural history theme.

BLM states that this area has fair potential for wind energy development, yet Chapter 4 of the FEIS states that under all alternatives, the area would only be an "avoidance area," not an "exclusion area" for wind energy development. FEIS at 4-248. By contrast, maps of wind energy development by alternative would make it an "exclusion area" under Alternative 3 but an "avoidance area" under no alternative. See FEIS at Maps 2-30 through 33. These inconsistencies render it impossible for the reader to determine how the BLM intends to manage wind energy development in this area. BLM notes that wind energy development would displace wildlife, and associated surface disturbance could lead to the degradation of the wetland systems found here. FEIS at 4-248 and 249. Clearly, this area should be an exclusion area for wind energy under the final Plan.

Mineral development impacts in this area are expected to be substantial. Under current management,

Wildlife species would be displaced and habitat would be lost, degraded, or fragmented. Continuous noise from oil and gas development activities would reduce the reproductive success of female greater sage-grouse and interfere with their ability to locate leks (Holloran 2005).

FEIS at 4-250. BLM also notes that "Mineral development activity that modifies the unique alkali wetlands would potentially alter water quality and quantity sufficiently to reduce the ability of the system to support the unique plant community." FEIS at 2-249, emphasis added. CBM development could also impact the aquifer recharge to wetlands. Id. Surface discharge of wastewater could change the chemistry of the wetlands and contribute to sediment loading. FEIS at 4-251. Only Alternative 3 provides adequate protection for the sensitive wildlife resources in this area, and regardless of whether BLM ultimately chooses to manage this area as an ACEC or a WHMA, the oil and gas provisions of Alternative 3 should be applied.

Mountain Plover ACECs

BLM erroneously concluded that mountain plover proposed ACECs in the Western Heritage Alternative do not meet relevance and importance criteria. BLM argues that mountain plover nesting concentration areas nominated for ACEC status do not meet the relevance criteria for designation, arguing that they do not constitute a "fish and wildlife resource." ACEC Report at 37. BLM states that these areas are not essential for maintaining species diversity, that plover nesting habitat is abundant elsewhere in the planning area, and that current management

protection measures in the planning area are adequate to protect mountain plover nesting habitat. BLM's assertion that plover nesting habitat is widespread is unsupported. According to plover expert Dr. Stephen Dinsmore, "There have been no detailed surveys of Mountain Plover habitat within this region, and specific factors that contribute to quality nesting habitat for this species are unknown." Comments of S. Dinsmore on the Great Divide RMP revision, Feb. 3, 2003. Indeed, these nesting concentration areas meet relevance criteria precisely because they represent the best plover nesting habitat in a field office dominated by shrubsteppe vegetation types unsuitable for nesting plover due to this bird's preference for very low vegetation or even bare ground as a prerequisite for nesting.

Subsequently, Regan Plumb of the University of Wyoming Cooperative Fish and Wildlife Research Unit undertook a survey of mountain plover breeding habitat in the region (Plumb 2004),³ and found plover nesting concentration areas with substantial numbers of breeding plovers to be limited to a handful of localities (which were subsequently nominated for ACEC status under the Western Heritage Alternative). This study shows that the nesting concentration areas subsequently nominated for ACEC status have special worth in terms of containing the largest concentrations of nesting plovers in the region, thereby satisfying importance criteria for ACEC designation. In addition, the scientific importance of the Mexican Flats nesting concentration area for repeated scientific study by Fritz Knopf, Plumb, and others is well-known and further contributes to the importance of this proposed ACEC.

In addition, BLM never disputes that plover nesting areas are not fragile or sensitive, merely noting that they are no more fragile or sensitive than other mountain plover nesting habitat. ACEC Report at 38. Here, BLM applies a false standard; if all plover nesting areas are fragile or sensitive, then all plover nesting habitat necessarily meets importance criteria for ACEC designation.

Current management protection measures are not adequate to protect mountain plover habitat. While it was once believed that the roads and wellpads inherent to oil and gas production were compatible with maintaining nesting habitat for mountain plovers because plovers were found to nest in close proximity to these features (Ellison-Manning and White 2001a,b),⁴ the nesting population of plovers in Utah (which exclusively occupied an area that was subjected to full-field development) was subsequently extirpated. Thus, in the final analysis, nesting in close proximity to oil and gas development is correlated with loss of the breeding population. Proposed protection measures in the Rawlins RMP Draft EIS (particularly no surface occupancy for plover nesting areas) should provide the level of protection needed to maintain mountain plover populations if (and only if) these measures are approved in the ROD for the Rawlins RMP. Thus,

³ Plumb, R.E. 2004. Minimum population size and concentration areas of mountain plovers breeding in Wyoming. M.S. Thesis, Univ. of Wyoming, 56 pp.

⁴ Ellison-Manning, A.E., and C.M. White. 2001a. Breeding biology of mountain plovers (*Charadrius montanus*) in the Uinta Basin. West. N. Am. Nat. 61:223-228.
Ellison-Manning, A.E., and C.M. White. 2001b. Nest site selection by mountain plovers (*Charadrius montanus*) in a shrub-steppe habitat. West. N. Am. Nat. 61:229-235.

ACEC measures should incorporate the recommendations of Dinsmore and BCA et al. in Rawlins RMP NEPA comments to put plover nesting concentration areas under NSO stipulations.

Red Rim WHMA

This area contains critically important pronghorn winter range, BLM Sensitive bird habitat, and historic rock carvings. We do not believe that the "intensive management" provided in the proposed plan will constitute adequate protection of these important resources, particularly given the heavy coalbed methane drilling activity predicted for this area. See FEIS at 4-262. Provisions for wind energy development and oil and gas leasing from Alternative 3 should be applied in the final plan regardless of whether this area is designated as an ACEC or remains managed as a WHMA.

This area should have been designated as "unsuitable" for coal leasing under Criterion 15 (see FEIS at A2-13); BLM admits that ¼ of the pronghorn crucial winter range in the RMPPA is found here. BLM states that it would allow "mining in these areas under a concept of maintaining a long-term balance between habitat and coal development." Id. Given the strong likelihood of concurrent pressures on big game winter range from oil and gas development on a much more widespread basis, it would be inappropriate to simply balance big game habitats with coal mining without considering the impacts of oil and gas development and other permitted activities at the same time.

Laramie Plains Lakes Proposed ACEC/WHMA

Management actions proposed under the plan are generally adequate for minerals management. NSO stipulations may possibly displace drilling and construction activities into wetland areas on adjacent private lands; this is the one local area where displacement through NSO stipulations might negate the benefits of the stipulation. For this reason, closure to future mineral leasing in the new Plan (as under Alternative 3) would be the preferable course of action. See FEIS at 4-287. The area should also be managed as an exclusion area for wind energy development; status of win energy management under the proposed plan is not mentioned one way or another in the FEIS. FEIS at 4-288. Also, BLM should pursue the acquisition of additional wetland areas under the new plan, as projected for Alternative 3. FEIS at 4-286. It is unclear whether or not this would take place under the proposed plan, as the FEIS is silent on this point. See FEIS at 4-288. Land and realty actions also should preclude disposal of BLM lands in this area.

Blowout Penstemon ACEC

We applaud BLM's intention to designate the Blowout Penstemon ACEC and to expand its boundaries to account for the need to protect habitat for expansion of the population of blowout penstemon, listed under the Endangered Species Act. We also concur with the need to make realty adjustments to acquire private holdings within the ACEC. However, the BLM's failure to provide protection within the ACEC from the greatest threats to the blowout penstemon (oil and gas development, mining, and livestock grazing) is inexplicable. The recommendation for withdrawal of this area from locatable mineral entry was removed in the Final EIS. FEIS at 2-5. This closure should be reinstated, and should be bolstered with either withdrawal from future oil and gas leasing or (at minimum) the imposition of NSO stipulations for all future oil and gas

leases in order to comply with FLPMA's directive to "designate **and protect**" Areas of Critical Environmental Concern..

The BLM has also not considered an appropriate range of reasonable alternatives for livestock grazing in the proposed ACEC. According to the FEIS, under all alternatives,

Livestock grazing would potentially result in trampling of blowout penstemon plants, grazed, and in some cases uprooted. This would primarily occur when grazing coincides with the primary growing season for the plant....grazing of blowout penstemon plants during extended periods of drought or during the plant's reproductive period would potentially reduce the viability of blowout penstemon populations.

FEIS at 4-306. These impacts appear to be unnecessary: If the ACEC designation includes a provision restricting livestock on/off dates to ensure that grazing does not occur during the primary growing and reproductive season of blowout penstemon and is removed during extended droughts, then most of these impacts would implicitly be avoided. This appears to be a reasonable alternative, yet not considered in any alternative, even though the blowout penstemon is listed under the Endangered Species Act.

In addition, "minerals management actions of permitting surface disturbing activities such as well pads, roads, and associated facilities would potentially increase traffic and the spread of weeds by vehicles and equipment, thus limiting the potential expansion of blowout penstemon." FEIS at 4-306. It is important to note that the Endangered Species Act mandates the protection and recovery of listed species; in cases like the blowout penstemon where populations are restricted to a very small range, recovery means providing for geographic expansion. BLM demurs that the proposed ACEC has "low potential" for oil and gas development as well as "limited mineral potential" and "therefore there is little potential for such development to impact the blowout penstemon in the area." FEIS at 4-306. Attachment 44 shows a small oilfield which has been built in the area within the ruins of the mining town of Ferris, established in the 1920s. As for mining, the Spanish Mines once produced commercial quantities of silver, lead, talc, and tungsten in this area, and claim patents were still valid as of 1999. Attachment 45 at 277. Uranium mining potential of this area remains completely unevaluated by the EIS. Clearly, there is significant potential for surface disturbance from both oil and gas development and mining in this area.

Oil and gas leasing within the ACEC would remain open, with NSO stipulations applied only to known occupied blowout penstemon habitat, but not to potential habitat into which the species could otherwise expand. FEIS at 4-313. The agency does admit that all alternatives

allow for surface disturbing activities within potential habitat, which would potentially reduce habitat capable of supporting expansion of plant populations. This would limit the opportunity for expansion beyond occupied habitat because of the constant disturbance from vehicles and equipment. In addition, this would increase the risk of weeds spreading and out-competing the blowout penstemon.

The objectives within the Recovery Plan would be more difficult to achieve, reducing the likelihood of the plant to be down-listed or de-listed.

FEIS at 4-307. In addition, "Impact to Special Status Species Plants and unique plant communities are potentially more harmful than impacts on overall vegetation, because they have narrow habitat parameters, and losses of individual plants or communities might affect the survival of the species." FEIS at 4-370. Allowing this level of impact runs contrary to FLPMA's directive to "designate and protect" Areas of Critical Environmental Concern as a priority for land-use planning.

Finally, there appears to be no prohibition on wind energy facility construction will be applied to the ACEC under any alternative. Wind energy development entails a high amount of surface disturbance, which would be expected to impact the blowout penstemon populations directly, and the operation of wind energy facilities within the ACEC or upwind of it would likely cause changes in local wind patterns, potentially causing the stabilization of dunes that form the requisite habitat for the blowout penstemon. This shortcoming is fully discussed on Page 103 of this Protest.

In the end, proposed management direction for the newly established ACEC does not protect the relevant and important values for which the area is designated. This violates FLPMA's substantive directive to protect ACECs once they are designated. In many cases, adequately protective measures, applied elsewhere in the proposed RMP, are not even considered for this area under any alternative, in violation of NEPA's range of alternatives requirements. Measures within the new ACEC must therefore be strengthened to comply with federal law and policy.

Upper Muddy Creek/Grizzly WHMA

We applaud BLM's commitment to provide additional protections and habitat improvements in this important wildlife habitat area, but are concerned that the BLM has failed to take advantage of the opportunity to improve conditions (or at least prevent them from getting worse) for rare native fishes, big game, and other wildlife species. The removal of barriers to fish passage needs to be a priority, as does removal of dams that interfere with the natural flow regime of Muddy Creek and preventing the construction of new impoundments that will alter the flow regime. The closure of the area to future oil and gas leasing in the proposed plan (FEIS at 2-79) is a commendable action that will ultimately provide for a strong level of habitat protection.

WGFD points out the critical relationship between groundwater flows and sensitive fish populations in the Upper Muddy Creek watershed, and outlines concerns that groundwater withdrawals related to coalbed methane development will jeopardize these fish populations. DEIS Comments and Responses at 2642. BLM's response to these concerns is very confusing (id.), seeming to indicate that a change in management for this SMA is warranted. It does not appear that an appropriate change, outlined in BLM's response to comments, was implemented in the proposed plan under the FEIS. The language of the final Plan should be checked to ensure the anticipated changes to CBM management are incorporated.

Cow Butte/Wild Cow WHMA

We commend the BLM for its proposal to establish the Cow Butte/Wild Cow WHMA and manage this area for no future oil and gas leasing. FEIS at 2-83. This area contains the roadless Wild Cow Creek Citizens' Proposed Wilderness (approximately 33,000 acres) as well as many important wildlife habitats, and withdrawal from future leasing paired with requirements for intensive management could provide the appropriate level of protection for these important wildlife and recreational lands.

Under the proposed plan, this area would be an 'avoidance area' for wind power development. This provision

would limit, but not preclude, placement of these facilities, which would potentially result in trampling, disturbance, or loss of wildlife habitat. It would also displace, disturb, or cause stress, energy loss, injury or mortality to wildlife.

FEIS at 4-339. This is not an adequate level of protection for an area so important to wildlife and recreation, and a wind power "exclusion" designation is clearly warranted given the high wildlife, wilderness, and recreation qualities present in this area.

Shirley Mountains SRMA and Cave Creek Cave ACEC

We support the proposed expansion of the Shirley Mountains SRMA and designation of Cave Creek Cave ACEC, management of vehicle traffic on designated roads and trails, and its management under NSO stipulations for oil and gas development. However, there are some legal and management issues with other provisions of the SRMA that require adjustment prior to issuance of the final Plan.

The Shirley Mountains SRMA is proposed to be managed for VRM Class III (FEIS at 2-126), which allows substantial modification of the landscape. BLM itself notes that wind power development in the area has the potential to "significantly detract" from recreational settings in the area. FEIS at 4-507. Class III VRM is the only VRM classification considered for this area (id.), an arbitrary and capricious restriction of reasonable alternatives. In order to maintain management consistency with the objectives for the area, VRM should be changed to Class II for this area. BLM's failure to considering the management of this area for Class II VRM, which is not only reasonable but also the obvious and commonsense choice because this VRM Class is most consistent with management objectives for the SRMA (see FEIS at 2-51, 2-52), is a violation of NEPA's range of alternatives requirements.

The Shirley Mountains SRMA should also be withdrawn from consideration for withdrawal from designation of ROW corridors. However, no such withdrawal is considered under any alternative (See FEIS at 2-113), in violation of NEPA's range of alternatives requirements. Withdrawal from ROW designations should be implemented for reasons of consistency with the goals and objectives for the Shirley Mountains SRMA as outlined above.

The Shirley Mountains SRMA should be managed as an "exclusion area" for wind energy development, rather than an "avoidance area" as proposed under the new plan. FEIS at 4-188. According to BLM, this provision

would limit, but not preclude, placement of these facilities, which would potentially result in trampling, disturbance, or loss of wildlife habitat. It would also displace, disturb, or cause stress, energy loss, injury or mortality to wildlife.

FEIS at 4-339, emphasis added. BLM notes that this area has high potential for wind energy development, rating potential as "outstanding to superb" in the area. FEIS at 4-507. But "the potential exists for birds and bats to collide with operating wind turbine towers and blades, meteorological towers, and guy wires." FEIS at 4-185. If anything, the FEIS understates the risk. Indeed, "ROW-approved actions for power lines, communication sites, and wind turbines would increase the potential of injury or death to bats, raptors, and other migratory birds as a result of collisions." FEIS at 4-453. According to bird and bat mortality studies conducted for BLM by WEST, Inc. at the Foote Creek Rim wind power site within the RMPPA,

Using corrections for searcher and scavenger bias, the estimated total number of turbine-related casualties for 1999 [Nov 3, 1998 - Oct 31, 1999] for FCR I was 141 birds and 165 bats; for 2000 [Nov 1, 1999 - Dec 31, 2000] the estimate was 100 birds and 40 bats; and for 2001-2002 [June 1, 2001 - June 5, 2002] the estimate was 80 birds and 90 bats (Tables 3 and 4). Combining all years of data, the estimated total annual turbine related casualties was 103 birds (90% CI= 67 - 140) and 90 bats (90% CI = 30-150). The estimated mortality rate per year was estimated to be 2.04 birds/turbine and 2.38 bats/turbine for 1999; 1.45 birds/turbine and 0.63 bats/turbine for 2000; and 1.16 birds/turbine and 0.94 bats/turbine for 2001-2002 (Tables 3 and 4). For all years combined, the annual estimated mortality per turbine is 1.50 birds/turbine (90% CI = 0.93 - 2.08) and 1.34 bats/turbine (90% CI = 0.20- 2.43). The total number of avian casualties associated with the five met towers within FCR I was estimated to be 63 birds in 1999; 13 birds in 2000; and 46 birds in 2001-2002. Combining all years, the total annual estimate is 40 birds (90% CI = 20 - 55) (Table 3). The estimated avian mortality rate per met tower per year was 12.50 birds/tower in 1999; 2.53 birds/tower in 2000; and 9.23 birds/tower in 2001-2002. For all years combined, the annual estimate was 8.09 birds/tower (90% CI = 5.03 - 11.14) (Table 3).

Attachment 46 at 12. This is a substantial amount of annual mortality for both birds and bats. Given the fact that the Cave Creek Cave ACEC is largely being designated as a bat hibernaculum, and provides habitat for many bat species, including BLM Sensitive Species (FEIS at 3-91), allowing wind power facilities to be placed in the Shirley Mountains SRMA, within the foraging or movement radius of bats using the Cave Creek Cave ACEC, would violate the intent of the ACEC designation. Yet the BLM did not even consider this area as an "exclusion" area for wind energy development under any alternative. See FEIS at Maps 2-30 through 2-33. This violates NEPA's range of alternatives requirements.

In response to comments by WGFD that actions well beyond the ¼ mile buffer for the Cave Creek Cave entrance, particularly logging, are likely to affect the hydrology of the cave system in negative ways, BLM states "Actions that may affect the hydrology of the cave would be

mitigated to ensure that the cave's dynamics are not adversely effected (sic)." DEIS Comments and Responses at Row 50. This statement should be carried into the Final RMP as a standard governing management of the ACEC. In addition, BLM notes that past clearcutting on private lands upstream of the cave have had significant impacts. FEIS at 4-515. However, the agency has not specifically committed to a moratorium on clearcutting of the public lands in the Cave Creek Cave watershed. This, too, needs to be added to the management direction for the ACEC/SRMA.

Pedro Mountains Special Recreation Management Area

The BLM has done a good job of protecting this potential wilderness area by proposing to designate it as a SRMA which will be managed under NSO stipulations for oil and gas leasing. FEIS at 2-49. However, it is troubling that the BLM proposes to allow this area to remain open to locatable mineral entry. Id. This is an area that has had past uranium prospecting activity from Conoco-Phillips. Attachment 47 at 170. Given the increase in uranium prospecting and mining in recent years in response to rising prices, this area should be placed off-limits before a resource conflict arises that could lead to the degradation of the recreation resources for which the area is established. BLM should retain the existing proposed management for oil and gas leasing and strengthen it with a withdrawal from locatable mineral entry as under Alternative 3.

Laramie Plains Lakes SRMA

We support proposed management direction for this SRMA.

Prairie Dog ACEC

In order to fulfill the requirements of BLM Handbook H-6840, the BLM needs to implement the provisions of Alternative 3, designating white-tailed prairie dog complexes eligible for black-footed ferret reintroduction as an ACEC. The provisions of this alternative, including a moratorium on surface disturbance within colonies, is needed to prevent contributing to the need to list the species under the Endangered Species Act.

The adequacy of anti-perch devices on tall structures is questionable. According to Pacific Power Corp., "Anti-perch devices do not prevent raptors from perching on power poles in areas with a high prey base, such as prairie dog towns." DEIS Comments and Responses at Row 2671. If this is the case, then tall structures should simply be eliminated from areas within 1 mile of prairie dog colonies, rather than relying on perch inhibitors of dubious effectiveness. Instead of "avoiding" areas within ¼ mile of prairie dog towns (which indicates that placement of tall structure may still occur under some circumstances – and contribute to impacts that contribute to a trend toward ESA listing in violations of BLM Sensitive Species policy), BLM should "prohibit placement" of tall structures within ½ mile of colony boundaries.

Provisions to have prairie dog colonies become "avoidance" or "exclusion" areas for wind energy development as under Alternative 3 may be unnecessary. Monitoring data from the Foote Creek Rim wind power facility indicate that there was no decline in white-tailed prairie dog burrow density (indeed, there was an increase) during the initial years of the facility's operation. Attachment 48 at pp. v, 34.

Black-footed Ferret Recovery Area

The Black-footed ferret recovery area has been proposed as an Area of Critical Environmental Concern to exclude industrial uses and close the area to recreational prairie dog shooting. The importance of this area has been ignored by BLM. According to WGFD,

Especially troubling is the complete lack of any discussion of the designated black-footed ferret experimental population area, the Federal Register delineating this area, or The Shirley Basin/Medicine Bow Black-footed Ferret Management Plan. The designated experimental population area covers over 25% of the area addressed by the RMP and management actions were cooperatively developed with Federal agencies, including the BLM.

DEIS Comments and Responses at Row 2638. While BLM assigns "higher priority" to "white-tailed prairie dogs (because of BFF concerns)" (*id.*), the agency claims that there is no need to protect the black-footed ferret population because it has Experimental Nonessential status under USFWS classifications. See DEIS Comments and Responses at Row 3042.

However, the experimental nonessential designation does not absolve agencies of the need to protect ferret habitat; it merely allows the species to be treated as proposed for listing rather than Endangered pursuant to the ESA, and in fact requires federal agencies to develop conservation plans for such populations, plans which could (and indeed should, in this case) include ACEC designation. See Attachment 49 at 41473. Indeed, specific benchmarks are required by the USFWS's 10(j) Rule for establishing the experimental, nonessential population that require a maintenance of prairie dog colonies (the obligate habitat for ferrets) at 90% the 1990 levels. Attachment 49 at 41479. This requirement is eminently suitable for inclusion as a management provision of an ACEC. There is nothing in the ferret's experimental, nonessential population direction that prevents BLM from establishing an ACEC for the Recovery Area and managing it to prevent future oil and gas surface disturbance and/or hard rock mineral location in potential ferret habitats within the area. The agency's inconsistent management direction is arbitrary and capricious and an abuse of discretion.

BLM notes that prairie dog shooting at certain times of year could have population-level effects that could harm ferrets. FEIS at BA-34.

Wild and Scenic Rivers

Under the Proposed Plan, only a short stretch of the Encampment River that lies within Encampment Canyon WSA would be recommended for Wild and Scenic River status. FEIS at 4-357. We find that the BLM's suitability analysis must be deeply flawed for only that short (already protected) river segment to be recommended for protection of the large number of stream segments deemed eligible for designation; the proposed alternative appears to be a significant step backward from the existing RMP, in which no suitability determinations are made. BLM should implement Wild and Scenic River management under Alternative 3 instead.

THE EIS FAILS TO PRESENT A RANGE OF REASONABLE ALTERNATIVES

Consideration of a broad range of reasonable alternatives, including alternatives that minimize environmental impacts, is at the core of NEPA's legal obligations. However, all of BLM's

alternatives proposed industrial-scale oil and gas leasing and development equal to or greater than the current plan's heavy development level, which has turned oil and gas development from a noncontroversial land use to one of (if not the single) most controversial issues in Wyoming today. The proposed plan utterly fails to balance oil and gas development with other land uses. It would be reasonable for BLM to have considered a much lower level of development, and the protection of the most environmentally sensitive subset of the planning area from industrial use. Numerous members of the public called for no oil and gas drilling at all. See, e.g., DEIS Comments and Responses at Rows 1008, 1017, 1040, 1402, 1480, 1870. Their preferences are not represented in the range of alternatives. Most commentors advocated adoption of the Western Heritage Alternative, which provides a balance of environmentally responsible drilling with the protection of the most sensitive wildlife habitats and recreation landscapes. Indeed, closure of lands to certain resource uses, such as oil and gas development, is specifically provided for as a means to achieve desired outcomes. BLM Handbook H-1601-1.II.B.2. The preferences of these members of the public also are not represented in the range of alternatives in the EIS. Multiple use law and regulation makes clear that not every use need be provided on every acre, and by extension, not every use need be provided in every BLM Field Office (nor is it – there are many Field Offices where various multiple uses are not even possible).

Each of the alternatives outlined below meets the BLM's legal and regulatory requirements, and would also be reasonable in terms of creating a balance of resource uses on the public lands. FLPMA requires these resources to be managed in a way that "best meets present and future needs of the American people" (including not only needs for oil and gas but also needs for wildlife habitat, watersheds, and recreation opportunities), that some land will be used "for less than all the resources," and also requires that this management be done in a harmonious manner "without permanent impairment of the productivity 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). Thus, FLPMA's multiple-use mandate embraces a balance between resource uses that leaves the land and wildlife unimpaired as a legacy to the future, and does not authorize a mania to direct management goals at production of a single resource (such as oil and gas, which dominates the four alternatives presented in the DEIS). See, e.g., 42 U.S.C. §§ 4331(b)(1)-(6). The following reasonable alternatives recommended in public comments are not represented among the BLM's four proposed alternatives in the EIS process:

- Alternatives providing greater acreage of wind avoidance areas to protect wildlife, scenic, and wilderness resources. DEIS Comments and Responses at Row 977.
- Alternatives for consolidating land ownership in checkerboard railroad lands. DEIS Comments and Responses at Rows 1097, 1101, 1107. Governor Freudenthal even recommended a Special Management Area designation for the checkerboard, to assist with management, but this alternative also was not considered. DEIS Comments and Responses at Row 1937.
- Requiring no net loss of public lands in the context of land exchange, sale, and disposal packages. DEIS Comments and Responses at 1107.
- A phased leasing alternative, or leasing only in proven fields, in which only a fraction of the field office is available for leasing and development at any one time (See, e.g., DEIS

Comments and Responses at Rows 1268, 1308, 1362, 1491, 1512, 1848). BLM states, "The pace and timing of mineral development activities depend on various factors beyond the management decisions of BLM." FEIS at 4-189. This is because BLM has neglected to even consider phased leasing and development alternatives that would allow BLM to exercise its moral responsibility to control of the pace of development on federal lands. This is an alternative that BLM has adopted in its Roan Plateau programmatic decision (BLM 2007: ROD-39). In the context of the Powder River Basin coalbed methane programmatic analysis, the courts have observed that a phased development alternative, even when opposed by lessees and BLM, "fits hand-in-hand with the 'adaptive management approach' BLM subscribes to throughout the FEIS." *Northern Plains Resource Council v. U.S. Bureau of Land Management*, No. CV 03-69-BLG-RWA, slip op. at 19 (D. Mont. Feb. 24, 2005). State agencies have recommended phased development as a sage grouse conservation strategy. Attachment 107 at 6. BLM's failure to consider this alternative in this programmatic document, given its approval of this alternative in another programmatic document, is arbitrary and capricious and an abuse of discretion pursuant to the APA.

- Requiring directional drilling and well clustering through the imposition of limitations on well densities (*See, e.g.*, DEIS Comments and Responses at Rows 1269, 1363, 1391, 1473, 1489, 1831, 1845). This is an alternative that BLM has adopted in its Roan Plateau programmatic decision (BLM 2007: ROD-39). BLM's failure to consider this alternative in this programmatic document, given its approval of this alternative in another programmatic document, is arbitrary and capricious and an abuse of discretion pursuant to the APA. By failing to limit the surface density of well sites, the proposed plan permits both unnecessary and undue degradation pursuant to FLPMA by allowing well densities to exceed standard levels (160-acre spacing for natural gas or oil) while degrading other resource values.
- No Surface occupancy requirements for lands within 3 miles of sage grouse leks, big game crucial ranges, and lands surrounding raptor nests (DEIS Comments and Responses at Row 1779, 1828, 1851).
- Requiring Best Management Practices and setting terms for their implementation in the plan, rather than leaving them as possibilities that might (or might not) be applied at the project level (*see, e.g.*, DEIS Comments and responses at 1830).
- Withdrawing all areas with wilderness qualities, including those outside current Wilderness Study Areas, from future oil and gas leasing (DEIS Comments and Responses at Rows 1850).
- Block-clearing areas for fossil and archaeological resources prior to approval of surface-disturbing projects (DEIS Comments and Responses at Row 1897).
- Alternatives that would maintain the discharge of airborne pollutants at or below current levels. DEIS Comments and Responses at 1975. Currently, each alternative under consideration would entail significant increases in each type of airborne pollutant measured. FEIS at 4-7, *and see* Figures 4-21 through 4-24. Increases in tons of pollutants range from a 68% increase under Alternative 3 to a 121% increase under Alternative 2, with a 102% increase in tons of airborne pollutants under the proposed plan. FEIS at 4-10. It is reasonable for BLM to impose additional mitigation measures in at least one

alternative that would hold the production of airborne pollutants at least to current levels, if not reduce them.

- Preventing the construction of communication sites in sensitive habitats and unimpacted areas, and instead requiring the co-location of new communication facilities with existing sites. DEIS Comments and Responses at Row 3115.
- Preventing wind energy construction activities on mountain plover nesting areas, along raptor migration routes, and in localities with high bat concentrations. DEIS Comments and Responses at Row 3129.

The Western Heritage Alternative

This alternative was supported by the overwhelming majority of citizens who comments on the Rawlins RMP in both oral testimony at public hearings and in written comments. While some felt the Western Heritage Alternative was too restrictive (*see, e.g.*, DEIS Comments and Responses at Row 1044), others felt the Western Heritage Alternative was too permissive and did not go far enough to protect sensitive lands and wildlife (*see, e.g.*, DEIS Comments and Responses at Rows 965, 967). Cooperating agencies expressed the legal need to consider the Western Heritage Alternative. According to Governor Freudenthal,

“I was disappointed that the BLM did not consider the Western Heritage Alternative in the DEIS. This Alternative was an example of a grassroots effort to participate in the planning process. The BLM might not have like the proposed direction of the Western Heritage Alternative – I have my own concerns about it and do not advocate for it to be the preferred alternative – but the National Environmental Policy Act is not about what we do or do not like. Rather it is about displaying a true range of alternatives to address the issues raised during the planning process. The Western Heritage alternative should be included in the final analysis to broaden the full range of alternatives.”

DEIS Comments and Responses at Row 963, *and see* Attachment 104. Certainly, BLM has not made the case that this is not a reasonable alternative worthy of detailed consideration in the EIS.

BLM asserts that the Western Heritage Alternative would place 91% of the planning area under NSO stipulations (FEIS at 2-9), and argues that such a total represents an unreasonable restriction on oil and gas development that renders this alternative incompatible with multiple-use mandates (2-10). BCA’s own GIS analysis indicates that only 66% of the planning area would fall under NSO stipulations. Attachment 50. Yet the FEIS provides no analysis regarding why their acreage total was so much higher for NSO than the BCA analysis.

It is important to note that the comments of BCA and co-signatories recommended adoption of the Western Heritage Alternative plus some additional protective measures, including all big game crucial ranges (instead of limiting NSO to areas of overlap between two or more crucial ranges). Does BLM’s analysis use the Western Heritage Alternative values for their analysis of NSO, or the more extensive NSO figures that would be produced by the BCA comments?

Also, it appears that the BLM may have mischaracterized the Western Heritage Alternative in its analysis, resulting in inflated NSO figures. It is unclear whether BLM buffered all sage grouse leks with NSO for their analysis of the Western Heritage Alternative, or merely the active leks. GIS data for sage grouse leks by activity status is readily available from WGFD, and the analysis should have buffered only the active leks (as this is the provision of the Western Heritage Alternative) and not the inactive and historic leks. It is also unclear whether the BLM's NSO total for the Western Heritage Alternative was mistakenly inflated through inappropriate application of NSO buffers to inactive and historic leks. The same applies to raptor nests; the Western Heritage Alternative provides for buffers only for active nests. BLM needs to provide a transparent explanation, categorically (and with maps) showing how it arrived at the figure of 91% NSO for the Western Heritage Alternative. Because this is the sole basis provided for failing to consider this alternative in detail, errors in calculations are critically important, and all discrepancies between BCA's analysis of NSO acreage and BLM's analysis of the same totals need to be explained.

BLM also asserts that more than 90% of BLM minerals would be accessed from private lands (FEIS at 2-9); this is a false statement and needs to be amended to indicate (if BLM spatial analysis is accurate) that more than 90% of the minerals would be accessed from either public lands not subjected to NSO limitations or from private lands. As BLM correctly notes, the vast majority of NSO lands under the Western Heritage Alternative are within 1 mile of lands where surface siting of facilities would be allowable, and the vast majority of the federal Red Desert lands outside of the checkerboard are not within 1 mile of private lands (rendering it impossible to displace drilling activity off federal surface). Even if one accepts BLM figures for NSO under the Western Heritage Alternative, a 90% NSO total, or even a 100% ban on future leasing (which commentors expressly requested the BLM analyze as a baseline for comparison, DEIS Comments and Responses at Row 807, an alternative which is not addressed in the DEIS or FEIS), is still compatible with multiple use requirements due to the vast acreage currently under lease in the field office, which would be open to future development and could be extended indefinitely if held by production directly or through unit production. In fact, BLM was presented with this analysis in DEIS comments, but failed to respond to the comment, in violation of NEPA's response to comments requirements. DEIS Comments and Responses at Row 808.

In many cases, commentors recommended that portions of the Western Heritage Alternative be implemented to protect specific resources, and in these cases, the BLM replied that in the agency's opinion this alternative was unreasonable and therefore the component part in question would not be considered. See, e.g., DEIS Comments and Responses at Row 519. But, because the BLM rejected consideration of the Western Heritage Alternative because it believed 91% of the field office would be managed for NSO leasing in the future, it is arbitrary and capricious for BLM to fail to consider a component part of this alternative that would result in less than 91% of the Field Office being placed under NSO. NEPA requires the agency to consider a broad range of alternatives, and even if the agency fails to consider the Western Heritage Alternative as a package, the component measures in this alternative should be considered for implementation in at least one alternative.

Expanded Wilderness Protection Alternatives

Given that BLM has formally recognized that wilderness-quality lands exist outside Wilderness Study Areas in the Ferris Mountains and Adobe Town (*see, e.g.*, Attachment 16), a reasonable alternative recommended for consideration through public comment was for BLM to protect these wilderness characteristics. Yet BLM rejected consideration of an alternative protecting wilderness characteristics in these areas. FEIS at 2-11.

First of all, NEPA requires federal agencies to consider a range of reasonable alternatives, including those that are beyond the agency's authority to implement. Even if the *State of Utah v. Norton* settlement is valid (which it is not in this case), BLM has the obligation to analyze the expansion of Wilderness Study Areas as an alternative.

BLM cites a settlement in the case of *State of Utah v. Norton* as justification for the notion that it cannot expand wilderness Study Areas under the Rawlins RMP. This argument is legally invalid. In 2005, the U.S. District Court of Utah withdrew its imprimatur from this settlement, leaving it a private agreement between two parties with no force of law. The State of Utah has no standing to enforce this settlement agreement on lands beyond its borders, and as the State of Wyoming is not party to this agreement, it is of little consequence in Wyoming from a legal standpoint, as there is no party to the settlement with standing to enforce it here. Therefore, the BLM could establish new WSA lands in Wyoming, and the State of Utah would have no legal interest in Wyoming land-use matters, a prerequisite to establish standing to sue. Therefore, there is no legal authority absent a Consent Decree preventing the BLM from establishing new WSA lands within the Rawlins Field Office.

BLM also argues that some lands were "unmanageable as wilderness because of preexisting oil and gas leases," and uses this as a pretext for dropping consideration of such an alternative. FEIS at 2-11. The presence of valid oil and gas leases is irrelevant to manageability for wilderness qualities; it is not until valid leases are developed that wilderness qualities are impaired. BLM's argument is arbitrary and capricious and an abuse of discretion pursuant to the Administrative Procedures Act because it directly conflicts with agency experience with just this issue within the RMPPA. Virtually the entire Adobe Town WSA was encumbered by preexisting leases (and even oil and gas units) upon establishment in 1980, yet the BLM saw no obstacle to managing these lands for wilderness characteristics while allowing the valid existing lease rights to remain in force (BLM 1981, BLM 1991: 187, 190). Indeed, these leases were allowed to run their course, having been grandfathered in at the time of WSA designation, and today the Adobe Town WSA is no longer encumbered by oil and gas leases.

Alternatives Requiring Directional Drilling

Directional drilling should be required in all cases where it reduces environmental impacts. BLM concedes that "Mitigation measures that reduce surface disturbance such as drilling of multiple well bores from a single well pad would reduce the number of surface locations and, therefore, retain larger blocks of unfragmented, undisturbed habitat." FEIS at 4-456, *and see* Attachment 99.

There has already been some success with directional drilling in the RRMPA including for horizontal wells in the basin-centered play of the Continental Divide – Wamsutter project, which features thick, continuous beds of reservoir rock. For a well in the Echo Springs field, Iverson et al. (1995)⁵ reported,

The Amoco B-1 (vertical) well was drilled in 1981, hydraulically fractured, and put on line for an average of 1 mmscf of gas per day in the first year. To date, about 2 bscf has been produced, and the B-1 well is probably an economic success, especially if the low decline rate continues for the next 30 years. The 254B-2H (horizontal [not hydraulically fractured]) well has not been producing on-line long enough to determine an accurate decline, but production appears to be about the same as from the B-1 well. Considering the additional cost of horizontal drilling, the economics likely favor vertical or slant hole completions. The horizontal well probably will recover gas more efficiently from the single Almond Formation bar sand.

As early as 1995, Stewart reported, “Recent developments in the gas play in the Green River Basin, particularly the Mulligan Draw, Echo Springs, and Stagecoach fields, indicate favorable exploitation by horizontal drilling.”⁶ These fields are within the RRMPA. Dunn et al. (1995) stated, “horizontal well completions may provide an efficient method to access the enormous natural gas resource present in Mesaverde group of the Greater Green River Basin.”⁷

In its response to comments, BLM argued that the operational limits of s-turn directional drilling in the Wamsutter field are a 6,200-foot vertical displacement before equipment limits are reached. DEIS Comments and Responses at Row 1492. We assume the BLM meant “horizontal displacement” rather than “vertical displacement,” as “vertical displacement” is not a commonly used term in the context of directional drilling. BLM uses this limitation to argue that the proposal in the Western Heritage Alternative of spacing wellpads 3 miles apart is not feasible to allow maximal extraction of oil and gas resources. However, using BLM’s figure of 6,200 feet of horizontal displacement, wells could be spaced 2.35 miles apart (with wellbores from adjacent pads able to touch each other – which of course one would never want to have happen from a safety perspective). According to BLM’s own analysis, it would be reasonable and feasible to impose such a surface spacing limitation. The agency should therefore have made a good faith effort to consider such a well-spacing limitation in at least one alternative, yet it failed to do so.

BP has used directional drilling to fully exploit 1 square mile from a single drilling pad in the Wamsutter Field, and has been successful in this effort. Attachment 51 at Slides 23, 25. The feasibility of drilling at 10-acre downhole spacing from one pad per square mile on the surface is considered to “likely not present a serious problem” with horizontal displacements at or below

⁵ Iverson, W.P., T.L. Dunn, and R.C. Surdam. 1995. Improvements to formation evaluation, Almond Formation, Green River Basin, Wyoming. Wyo. Geol. Assoc. Guidebook 46:271-280.

⁶ Stewart, W.W. 1995. Horizontal wells in Wyoming through 1994. Wyo. Geol. Assoc. Guidebook 46:283-295.

⁷ Dunn, T.L., B. Aguado, J. Himphreys, and R.C. Surdam. 1995. Cements and in-situ widths of natural fractures, Almond Formation, Green River Basin, Wyoming. Wyo. Geol. Assoc. Guidebook 46:255-269.

2,500 feet. Attachment 52 at 21-22. It would certainly be reasonable for BLM to consider a 640-acre well-spacing limit on wellpad density on the basis of this success.

The incremental costs of drilling directionally range from 4-16% based on published information in western tight gas sands deposits. Attachment 52 at 27. In Wyoming, average incremental costs range from 11% at the Jonah Field to 12.5% in the Pinedale Anticline. *Id.* These cost premiums do not include cost savings for reduced construction of pipelines, roads, and wellpads, and efficiencies gained from clustering facilities. *Id.* at 28. Indeed, according to the Garfield County (Colorado) Oil and Gas Liaison, "Although directional drilling increases the cost of a well, much of this cost is recouped through reduced pad construction and co-locating facilities on one pad" (Dennison 2005). Overall, finding and development ("F&D") costs per thousand cubic feet of gas make drilling economic if F&D costs remain below 30% of the market price of natural gas; for directional wells in the Piceance Basin and Pinedale Anticline, F&D costs of \$1.00/Mcf are reported. Attachment 52 at 29, 30. This would make directional drilling in this play economic at gas market prices down to \$3/mcf. Kreckel concludes, "Directional drilling, even when relatively costly, need not negatively impact the economics." *Id.* at 30.

In order to adequately analyze the economic feasibility of requiring directional drilling, the BLM needs to document the operators' projected costs in the EIS. BP, Anadarko, CDX Gas, and probably other operators are currently drilling directionally within the Rawlins Field Office, so comparative costs for drilling and completion, as well as F&D costs, should be available to the BLM for the purposes of analyzing economic feasibility. The commonplace application of directional drilling within the field office boundaries already illustrates that directional drilling is technically feasible.

BLM SENSITIVE SPECIES

The FEIS provides woefully inadequate baseline information and analysis of impacts for many BLM Sensitive species. Many of these species are very rare, occupy habitat which is zoned for activities likely to impact them under the various alternatives, and face potential extirpation in the RMPPA without specific, targeted conservation measures in the new RMP. While the Biological Assessment provides at least some baseline information and analysis of impacts for Threatened, Endangered, or Candidate species under the ESA, it does not address BLM Sensitive Species at all. Many BLM Sensitive Species found in the Rawlins Field Office (including Baird's sparrow, black-tailed prairie dog, boreal toad, Brewer's sparrow, ferruginous hawk, Great Basin spadefoot, long-billed curlew, mountain plover, sage sparrow, sage thrasher, pygmy rabbit, swift fox, white-tailed prairie dog, and several bat species) have species assessments compiled by Wyoming Natural Diversity Database and listed on the BLM statewide website,⁸ but the information in these assessments, although clearly available to BLM, inform neither the baseline information nor impacts analysis in the Rawlins RMP EIS. They are not even cited in the EIS. *See* FEIS at L-1 et seq. The FEIS ultimately fails to present adequate baseline information, readily available to BLM, for many sensitive species, and also fails to present a legally adequate analysis of impacts (indeed, for many BLM Sensitive Species, fails to provide any analysis of impacts at all) to satisfy NEPA's 'hard look' requirements. The lack of baseline information and

⁸ <http://www.blm.gov/wy/st/en/programs/Wildlife/species-assessments.html>, site last visited 1/25/08.

'hard look' at impacts is chronic for BLM Sensitive Species under the RMP; below some of the most egregious examples are outlined.

Wyoming Pocket Gopher

For the Wyoming pocket gopher, baseline information is limited to four words, which do not even provide an accurate characterization of its habitat: "Meadows with loose soil." FEIS at 3-159. In fact, the species is known from gravelly ridgetops; in meadows with loose soil, the sympatric northern pocket gopher dominates through competitive exclusion. Attachment 53 at 13. BLM was presented with this document in the context of the Atlantic Rim project several years ago, and thus should have been aware of the scientific information contained therein. Through this document, available to BLM on the internet at <http://www.fs.fed.us/r2/projects/scp/assessments/wyomingpocketgopher.pdf>, BLM would have been able to present baseline information on the known range of the species (Attachment 53 at 12), disappearance from areas of past occurrence (Attachment 53 at 21), threats – which include oil and gas development (Attachment 53 at 22) and management recommendations, none of which are presented in the FEIS (Attachment 53 at 24).

This species has been petitioned for listing under the Endangered Species Act. Attachment 54. Virtually its entire worldwide range falls within the RMPPA. Attachment 53 at 12. Indeed, much (if not all) of this range is in areas of high or moderate potential for oil and gas development. See FEIS at Map 4-7; and see Attachment 55. New information is being developed by the Wyoming Natural Diversity Database, and this information is reasonably available to BLM. See Attachment 56. Given the fact that experts have stated that compaction and fragmentation from oil and gas operations are one of the primary threats to the species, its entire worldwide range is within the RMPPA and under threat of development, the RMP FEIS should have included a very detailed analysis of potential impacts by alternative, as well as specific conservation measures to be applied that would mitigate these impacts. Instead, the Wyoming pocket gopher is not even mentioned in the BLM's analysis of impacts (FEIS at 4-450), and no conservation measures are provided for this species. In failing to do so, BLM not only violates NEPA's baseline information, hard look, and range of alternatives requirements, but also violates the agency's own Sensitive Species direction, which precludes management that contributes to the need to list BLM Sensitive Species under the ESA. A sampling of some of the most egregious examples follows.

Pygmy Rabbit

The pygmy rabbit has also been petitioned for listing under the Endangered Species Act. Attachment 57. As a result of ongoing litigation over this species, the U.S. Fish and Wildlife Service has issued a positive 90-day finding for this species, indicating that there is "substantial biological information" that listing under the ESA is warranted. Attachment 58. For baseline information in the FEIS, BLM provides three words: "Basin-prairie and riparian shrub." FEIS at 3-159. This is not even a correct description of the appropriate habitat, which is dense, old sagebrush stands, and sagebrush stands on stabilized sand dunes. Attachments 59 at 6, Attachment 60 at 62, M. Purcell, *pers. comm.* The pygmy rabbit was not known from the Rawlins Field Office until recent field studies located it here; the known range of this species was recently expanded eastward significantly by new field studies, and now ranges as far east as

the land at the foot of the Atlantic Rim, and possibly as far east as the upper North Platte Valley. Attachment 60 at 38. This is significant new information that came to light between Draft EIS and Final EIS and which was presented to the Rawlins BLM in the context of the Atlantic Rim CBM project in January, 2007. Attachment 61 at 27. This study clearly places the pygmy rabbit within the RMPPA, and should have triggered additional analysis of impacts. The pygmy rabbit should have been addressed in the FEIS with a full impacts analysis by alternative, this was not done. See FEIS at 4-450.

A literature review of pygmy rabbit habitat requirements and potential impacts, which BLM should have undertaken in fulfillment of its NEPA baseline information requirements, would have revealed some very salient information. Pygmy rabbits are obligate residents of sagebrush stands that are tall with dense canopy cover (Green and Flinders 1980, Katzner 1994).⁹ Fragmentation of tall sage habitats can reduce the size, stability and success of pygmy rabbit populations because these animals are reluctant to cross open habitats (Katzner 1994).

Indeed, the Wyoming Natural Diversity Database compiled a comprehensive literature review of pygmy rabbit science specifically for the Wyoming BLM, filled with a wealth of baseline information. Attachment 59. Loss and fragmentation of sagebrush steppe and petroleum development are specifically listed as major threats for this species. Attachment 59 at 23-24. Given all of the detailed information and analysis already provided for BLM on this species, it is inexcusable that the FEIS should be so bereft of baseline data and impacts analysis. BLM could readily have mapped tall sage habitats in the RMPPA as baseline information, overlaid oil and gas management to obtain at least an index of impacts under each alternative, and come up with a range of reasonable alternatives for mitigation measures to minimize impacts. Indeed, the Species Assessment notes, "A conservation plan with a clear implementation strategy could avert USFWS listing action." Attachment 59 at 31. The Rawlins RMP is the ideal vehicle for such a strategy, because pygmy rabbit habitat coincides closely with BLM-managed lands. These researchers further recommended to BLM, "Since pygmy rabbits depend on specific habitat conditions for their survival, it is important to identify and protect habitat that meets these ecological needs." Id. Threats, including oil and gas development, should be mitigated. Id at 32. In failing to do so, BLM not only violates NEPA's baseline information, hard look, and range of alternatives requirements, but also violates the agency's own Sensitive Species direction, which precludes management that contributes to the need to list BLM Sensitive Species under the ESA.

Northern Goshawk

For the northern goshawk, BLM's baseline information on habitat is limited to four words: "Conifers and deciduous forests." FEIS at 3-159. This description is completely inadequate and misleading; indeed, many types of coniferous and deciduous forest are unsuitable for northern goshawk habitat, as this species has very specific habitat requirements. The BLM should have

⁹ Green, J.S., and J.T. Flinders. 1980. Habitat and dietary relationships of the pygmy rabbit. *J. Range Manage.* 33:136-142.

Katzner, T.E. 1994. Winter ecology of the pygmy rabbit (*Brachylagus idahoensis*) in Wyoming. M.S. Thesis, Univ. of Wyoming, 125 pp.

undertaken a thorough review of the scientific literature for this species, as concerns about its viability were raised in comments on the Draft EIS. Attachment 62 at 119, 132.

The following literature review for the Medicine Bow National Forest, within the RMPPA, is and has been available to BLM on the internet at http://www.voiceforthewild.org/mbnf/pubs/mb_cit_alt.pdf. The northern goshawk is a large accipiter that inhabits large tracts of mature forest. In Wyoming, Partners in Flight identified the goshawk under the heading of "Species clearly needs conservation action" (Cerovski et al. 2001, p. D-4). Reynolds and Meslow (1984) found that goshawk diets consisted of 55% birds and 45% small mammals, and that prey size tended to be larger than for other accipiters. Foraging sites are characterized by higher canopy closure, greater tree density, and greater density of large, old trees higher canopy closure, greater tree density, and greater density of trees (Beier and Drennan 1997).

On the Medicine Bow N.F. (within the RMPPA), Good (1998) found that foraging sites were characterized by gentler slopes, greater conifer density, and little understory growth. On a landscape scale, Good found that goshawks tended to hunt in forested areas with many small meadows and aspen groves. Goshawk nesting home ranges are quite large in North America, ranging from 1,200 to 10,000 acres each (USFWS 1998). Goshawks nest in dense, mature to old-growth forest with little understory vegetation (Moore and Henny 1983). The requirement for mature, closed-canopy forest for goshawk nesting has been noted in many other studies as well (e.g., Reynolds et al. 1982, Patla 1997). Patla (1997) also found that nest sites averaged over 1 km from the nearest road, and a disproportionate number were in trees with mistletoe, brooms, or broken tops. Goshawks on the Medicine Bow N.F. are migratory, wintering 70-185 km to the south of nesting areas (Squires and Ruggiero 1995).

Patla (1997) noted that nest success was positively correlated with basal area. Preferred forest types for nesting vary by region and available cover types: Lodgepole and aspen in Utah (Graham et al. 1999); Douglas fir in Idaho (Patla 1997); and spruce-fir and aspen forests on the White River National Forest of Colorado (USDA 1999). On the Medicine Bow National Forest, Squires and Ruggiero (1996) found that goshawks nested preferentially in mature, even-aged stands, with high canopy closure and little understory. In this study, nest trees tended to be taller, larger diameter, and on gentler slopes in this study, and lodgepole stands were used in proportion to their availability while fir was avoided as nesting habitat. These habitat requirements make the goshawk a good indicator for mature to older single-story stands (but not necessarily old growth according to the old-growth scorecard).

The negative effects of logging on northern goshawk nesting and foraging habitat is well-documented. On the Kaibab Plateau, Crocker-Bedford (1990) found that logging reduced nest site occupancy and nest success, and concluded that goshawks may persist for 1 to 5 years following logging, but with reduced reproductive success. These reductions in goshawk nest success have been attributed to the disappearance of stands with 60% canopy closure on the Kaibab. On the Black Hills, where selective harvest is the rule, Dykstra (1996) found goshawks only on unharvested plots. On the Olympic Peninsula of Washington, Finn (2000) found that goshawks were unlikely to occupy a nest site if clearcuts exceeded 20% of the overall home

range and 15% of the Post-fledging Family Area. Moore and Henny (1983) hypothesized that logging could reduce breeding populations in locales where nesting habitat is limited. Reynolds (1983) stated that uncut nest buffers of at least 8 ha should be preserved around goshawk nest sites. For this reason, the limitations on human activities within ¼ mile of any goshawk nest will be retained in this alternative, and expanded to year-round prohibitions for activities such as logging and road-building that might influence future nest site use.

Clearly, there is a great deal of scientific information on goshawk habitat requirements and the potential impacts of forest management to support thorough baseline information and hard look at impacts to the species. Yet none was attempted in the Rawlins RMP EIS. Because the RMP zones forested areas that offer potentially suitable northern goshawk habitat for logging and other activities disruptive to the species, the BLM should have undertaken a detailed direct and cumulative impacts analysis for this species by alternative. This analysis for goshawks is limited to one non-specific sentence in common for all alternatives: "Those species that require late-seral stages would lose habitat and would be displaced." FEIS at 4-453. Impacts from forest management were not even discussed by alternative, even though different alternatives prescribed different forest management practices. Id. Nowhere does the EIS analyze or even venture a guess as to where displaced goshawks would go, whether displacement would result in population-level declines, and what the overall cumulative effect would be on the viability of goshawk populations in the RMPPA. These failings represent a clear violation of NEPA's hard look requirements.

White-tailed Prairie Dog

In its comments on the Draft EIS, WGFD states, "The current no action policy by BLM likely resulted in the WTPD being petitioned for listing under the ESA" and further recommends that BLM establish ACECs offering strong protection for 8 white-tailed prairie dog complexes. DEIS Comments and Responses, Row 37. However, BLM has declined to establish such ACECs, and furthermore is continuing to follow the current policy under the Preferred Alternative that has led to a trend toward ESA listing, as recognized by WGFD officials. Instead, the agency responds that its current management direction is adequate (despite the clear indications to the contrary), and states that no special protection is needed, even for complexes supporting the Endangered black-footed ferret. Id. Indeed, the Biological Evaluation prepared for the Wyoming BLM for the white-tailed prairie dog states:

Implementation of energy and mineral resource management actions **may impact and is likely to contribute to the need for Federal listing** of the WTPD for the Great Divide (Rawlins FO), Green River (Rock Springs FO), Kemmerer, and Pinedale RMPs. This determination is based on the limited ability for the BLM to provide minimization of direct effects of oil and gas development to the WTPD through implementation of the conservation strategies (section 4.0) and the potential to damage or destroy suitable occupied and unoccupied WTPD habitat on split estates. In addition, each of these FOs have WTPD complexes located in areas of potential mineral development.

Attachment 63 at 3-14, emphasis in original. This conclusion indicates that present management for this species (based on discretionary avoidance of colonies during oil and gas development) is insufficient to preclude major impacts inconsistent with BLM Sensitive Species policy. BLM Handbook H-6840.06. In order to prevent these unacceptable adverse impacts, BLM should establish Prairie Dog ACECs as proposed in Alternative 3 (this implements BMP 27 of the Statewide Biological Evaluation, Attachment 63 at 4-3), ensure that all active colonies are excluded (not avoided) from surface-disturbing activities by ¼ mile, and disallow geophysical source points (shot-hole or vibroseis) within ¼ mile of active colonies.

BLM outlines its responsibilities to monitor and collect baseline data on BLM surface as follows:

Conduct data gathering, avoid or reduce impacts as appropriate, and monitor.
Early coordination and consultation with the Service to benefit the species will be conducted on a case-by-case basis.

Rawlins RMP Biological Assessment (BA) at 24 (BA-24). For BLM minerals, the responsibilities are similar, but landowner permission is sought:

Request landowner permission to access lands for inventory and, if granted, conduct data gathering on affected areas and require avoidance or reduction of impacts, and monitor as appropriate. If permission is not granted, the Bureau will require project proponents to obtain access through appropriate legal action and, if obtained, conduct data gathering on affected areas and avoid or reduce impacts, and monitor as appropriate.

Id.

THREATENED AND ENDANGERED SPECIES

The Biological Assessment suffers from a lack of current data. For black-footed ferret, the BA states that the last reintroduction of black-footed ferrets occurred in 1994. FEIS at BA-35. However, the WGFD reintroduced approximately 85 ferrets into the Shirley Basin in 2005 and 2006 (BCA 2006). In addition, the distribution data for lynx in the RMPPA does provide a thorough accounting for lynx occurrences since the Colorado Division of Wildlife reintroduced lynx to the Southern Rockies Ecosystem. FEIS at BA-46. Since that time, lynx have been reported in Cheyenne,¹⁰ and lynx successfully denned on the Medicine Bow National Forest¹¹ (but were subsequently shot illegally).

BLM has committed itself to several important binding measures to maintain lynx connectivity:

¹⁰ http://gf.state.wy.us/services/news/pressreleases/07/01/24/070124_1.asp, last visited 1/23/08.

¹¹ <http://www.casperstartribune.net/articles/2004/02/21/news/wyoming/a75ca6cdf539057f87256e4100662104.txt>, last visited 1/23/08.

2. BLM shall ensure that key linkage areas that may be important in providing landscape connectivity within and between geographic areas across all ownerships are identified, using best available science.
3. BLM shall ensure that habitat connectivity within and between LAUs is maintained.

FEIS at BA-48. These measures will apply in Lynx Analysis Units, but it is unclear that all important lynx connectivity habitat which involves BLM lands will be included in these LAUs. And additional commitments and mitigation measures in the BA also depend on identification of lynx connectivity corridors. FEIS at BA-49, BA-52. However, lynx linkages are not identified in the FEIS, nor have any protective stipulations been provided in the FEIS. The Heart of the West Wildland Network report, submitted to BLM by BCA at the Draft EIS comment stage (Attachment 28 to DEIS Comments of BCA), used lynx as one of the focal species in modeling the most important connections on an ecoregional scale. On this basis, the linkages between Green Mountain, Ferris Mountains and the Laramie Range represent an important connectivity area between Northern Rockies and Southern Rockies lynx populations. However, outside the BA, there appears to be no reference in the FEIS to baseline lynx linkages (despite the BLM being presented with same by BCA and others), and no mitigation measures specific to maintaining lynx dispersal corridors.

Wyoming toad

The Wyoming toad is one of the most endangered animals in the world, being confined to an extremely narrow geographic range in the Laramie Basin, including some BLM lands. According to BLM,

The decline of the Wyoming toad can be attributed to a number of significant events, including habitat loss or degradation, predation, drought cycles, chytrid fungus, and pesticides....Pesticides are believed to be one of the primary factors contributing to the decline of the species.... Widespread aerial spraying of fenthion (commercially known as Baytex) for mosquito control occurred around the time the toad numbers started to fall.

FEIS at BA-60. Furthermore,

It is interesting to note that the last wild toad population, found in 1987, was on lands of the future Mortenson National Wildlife Refuge, where mosquito spraying was not allowed. This could be an indication that insecticide spraying and reduced mosquito populations may be a direct affect on populations. Pesticides may also contribute to the increase in fungal outbreaks that have caused significant population declines. This may be due to pesticides causing a reduction in immunity factors that would normally protect the species.

FEIS at BA-61. No Surface Occupancy management for new toad release sites (FEIS at BA-61) is clearly warranted and a wise management action; this should extend to the current range of the toad as well. However, provisions for pesticide use are clearly inappropriate:

Pesticide applications and biological control agents will be allowed within known Wyoming toad habitat on a case-by-case basis. Where possible, biological control of pests would be used rather than chemical control. Where needed, pesticide use will be applied by hand within ¼-mile of habitat and only in cases where insect or weed outbreaks have the potential to degrade area ecological health. Outside the ¼-mile buffer, aerial application of pesticides will be carefully planned to prevent drift. The BLM will work with the Animal and Plant Health Inspection Service (APHIS) and the USFWS to select a pesticide and method of application that will most effectively manage the infestation and least affect the species.

FEIS at BA-62. BLM does not possess detailed knowledge about the direct and cumulative effects of pesticides on Wyoming toads, and there are far too few individuals in existence to waste them, on lab trials. Clearly, it would be reasonable and prudent to simply ban the use of all pesticides in Wyoming toad habitats to avoid a repeat of the declines in the 1970s through 1990s. See FEIS at BA-60. These concerns are echoed by the WGFD:

Herbicides should not be employed to control invasive plants in Wyoming Toad habitat under any alternative. These chemicals may impact the toad. Anurans are highly susceptible to chemicals such as herbicides and pesticides.

DEIS Comments and Responses at Row 51. The USFWS also raised concerns:

The Service is concerned that the use of insecticides could reduce the availability of prey for insectivorous fish, birds (young sage grouse), mammals (bats), amphibians (Wyoming toads), and/or reptiles.

DEIS Comments and Responses at Row 2278. Also, according to USFWS,

Malathion could reduce the insect food source needed for survival of Wyoming toads and may also be toxic to the toads themselves.

DEIS Comments and Responses at Row 2676. BCA raised similar concerns at the DEIS stage. DEIS Comments and Responses at Row 3053. Given the widespread opposition to pesticide use in Wyoming toad habitat, the history of Wyoming toad declines specifically related to pesticides, and the perilously small worldwide populations of Wyoming toad, BLM needs to provide greater protection by forbidding pesticide use.

THE RMP PROPOSES NUMEROUS MITIGATION MEASURES OF UNKNOWN OR DISCREDITED EFFECTIVENESS

The BLM has proposed a number of mitigation measures that have been shown to be invalid through rigorous scientific hypothesis testing. Chief among these are the seasonal stipulations governing drilling and construction activities in important big game, sage grouse, sharp-tailed grouse, and raptor habitats. These measures don't work because they address a comparatively minor part of the problem – disturbance and displacement of wildlife due to drilling and

construction related activities – while leaving the much more substantial and longer lasting problem – disturbance of wildlife from production-related activities – completely unaddressed. Compounding the problem is that exceptions and waivers can be granted to seasonal stipulations. FEIS at A9-1. And the record shows that the Rawlins Field Office has a rather dismal track record of granting the majority of waivers or exceptions sought by industry. Attachment 64 at 31.

Surface disturbing activities have a multitude of impacts, including displacement of wildlife and population declines resulting from a reduction in carrying capacity. FEIS at 4-532. In addition,

Irretrievable losses of wildlife habitat indirectly reduce the amount of suitable Special Status Species habitat. However, management prescriptions and mitigation measures prescribed under the Proposed Plan and alternatives are intended to reduce the magnitude of these impacts and would restore some of the soil, vegetation, and habitat lost.”

FEIS at 4-533. Essentially, these mitigation measures are all that is standing between sensitive species and irretrievable habitat loss, likely resulting in extirpation on the population (and possibly regional) level, so the effectiveness of the mitigation measures must be demonstrated with a high degree of certitude. BLM states, “The BLM applies mitigation measures (including timing stipulations) that are founded on the best scientific information available in coordination with other agencies to protect a diversity of resources.” DEIS Comments and Responses at Row 2645. BLM asserts, “BLM mitigation measures are generally well known, commonly accepted, and historically effective activities that reduce or eliminate adverse effects from multiple use resource management and have been developed in support of BLM’s multiple use mandate.” DEIS Comments and Responses at Row 1965. If these assertions are correct, then mitigation measures that are found to be scientifically unsound and are shown to be ineffective activities that do not reduce or eliminate adverse effects should be discarded in favor of scientifically supported, stronger measures.

However, in the FEIS, BLM implements several mitigation measures that have been proven ineffective by rigorous scientific hypothesis testing (notably sage grouse ¼ mile NSO plus timing stipulations as well as timing stipulations for mule deer winter range) and implements others that the best available science suggests will be ineffective (e.g., timing stipulations for other big game crucial winter ranges). At the same time, BLM ignores stronger mitigation measures, often proposed by experts in their field, which are well-supported by the scientific literature. See, e.g., DEIS Comments and Responses at 2615. In the end, BLM characterizes its standard suite of wildlife timing limitations as follows: “These measures prevent disturbance to critical time periods but afford no protection to the habitat.” FEIS at 4-68. But even this statement overstates the effectiveness of mitigation measures; they prevent disturbance from construction and drilling activities, but do nothing to limit disturbance from vehicle traffic and human presence during the production phase of development, which typically outlasts the drilling/construction phase by a factor of 30 to 100.

BLM claims, “The hard look at the effectiveness of mitigation measures, BMPs, and management actions is included in the impact analysis in the RMP FEIS.” DEIS Comments and

Responses at Row 3001. We were unable to locate a 'hard look' at the effectiveness of mitigation measures.

BLM declined to respond to the inadequacy of its mitigation measures, asserting that it was unaware of which mitigation measures BCA and others were referencing. DEIS Comments and Responses at Row 1965. The inadequate mitigation measures are these:

- Quarter-mile No Surface Occupancy buffers for sage grouse leks paired with larger buffers with seasonal limitations for drilling and construction activity;
- Timing limitation buffers for Columbian sharp-tailed grouse;
- The application of timing limitations on drilling and construction activity on big game (elk, mule deer, pronghorn, bighorn sheep) crucial winter ranges and/or parturition areas;
- The application of timing limitation buffers for known raptor nests.

WGFD remarked upon this shortcoming: "The standard stipulations pertain mostly to the development phase and not to the operational phase of permitted activities." DEIS Comments and Responses at Row 2637.

The RMP Proposes Inadequate Sage and Columbian Sharp-tailed Grouse Stipulations

The current Great Divide RMP requires a ¼ mile NSO buffer around sage grouse leks with an additional 2-mile buffer subjected to timing stipulations that limit drilling and construction activities (but not production-related activities) to times outside the breeding and nesting season. FEIS at 3-157. In the end result, surface-disturbing activities, including the drilling of oil, gas and coalbed methane wells and the construction of roads, compressor stations, and other facilities are allowed to occur within the timing limitation buffer as long as the construction and drilling activities do not take place during the breeding and nesting season.

Both the sage grouse and the Columbian sharp-tailed grouse are BLM Sensitive Species in Wyoming. Wyoming sage grouse populations are some of the largest left in the nation and are relatively stable (showing a 17% decline from 1985-1994); nonetheless, sage grouse populations have experienced major declines rangewide in recent decades.¹² The Wyoming Game and Fish Department ("WGFD") reported that since 1952, there has been a 20% decline in the overall Wyoming sage grouse population, with some fragmented populations declining more than 80%;¹³ one of WGFD's biologists reported a 40% statewide decline over the last 20 years.¹⁴ These declines are attributable at least in part to habitat loss due to mining and energy development and associated roads, and habitat fragmentation due to roads and well fields.¹⁵

¹² Connelly, J.W., and C.E. Braun. 1997. Long-term changes in sage grouse *Centrocercus urophasianus* populations in western North America. *Wildl. Biol.* 3(3/4):229-234.

¹³ WGFD. 2000. Minutes of the Sage Grouse Conservation Plan meeting, June 21, 2000, Casper, WY. Cheyenne: Wyoming Game and Fish Department.

¹⁴ Christiansen, T. 2000. Sage grouse in Wyoming: What happened to all the sage grouse? *Wyoming Wildlife News* 9(5), Cheyenne: Wyoming Game and Fish Department.

¹⁵ Braun, C.E. 1998. Sage grouse declines in western North America: What are the problems? *Proc. Western Assoc. State Fish and Wildl. Agencies* 78:139-156.

Oil and gas development poses perhaps the greatest threat to sage grouse viability in the region. In a study near Pinedale, sage grouse from disturbed leks where gas development occurred within 3 km of the lek site showed lower nesting rates (and hence lower reproduction), traveled farther to nest, and selected greater shrub cover than grouse from undisturbed leks.¹⁶ According to this study, impacts of oil and gas development to sage grouse include (1) direct habitat loss from new construction, (2) increased human activity and pumping noise causing displacement, (3) increased legal and illegal harvest, (4) direct mortality associated with reserve pits, and (5) lowered water tables resulting in herbaceous vegetation loss. Pump noise from oil and gas development may reduce the effective range of grouse vocalizations.¹⁷ Thus, lek buffers are needed to ensure that booming sage grouse are audible to conspecifics during the breeding season. A consortium of eminent sage grouse biologists recommended, "Energy-related facilities should be located >3.2 km from active leks."¹⁸ And Dr. Clait Braun, the world's most eminent expert on sage grouse, has recommended even larger NSO buffers of 3 miles from lek sites, based on the uncertainty of protecting sage grouse nesting habitat with smaller buffers. Attachment 65 at 15.

The area within 2 or 3 miles of a sage grouse lek is crucial to both the breeding activities and nesting success of local sage grouse populations. One scientist described the lek site as "the hub from which nesting occurs."¹⁹ Grouse exhibit strong fidelity to individual lek sites from year to year.²⁰ During the spring period, male habitat use is concentrated within 2 km of lek site.²¹ A Montana study found that no male sage grouse traveled farther than 1.8 km from a lek during the breeding season.²² Other researchers found that 10 of 13 hens nested within 1.9 miles of the lek site during the first year of their southern Idaho study, with an average distance of 1.7 miles from the lek site; 100% of hens nested within 2 miles of the lek site during the second year of this study, with an average distance from lek of 0.5 mile.²³ In Montana, Wallestad and Pyrah found that 73% of nests were built within 2 miles of the lek, but only one nest occurred within 0.5 mile of the lek site.²⁴ Because leks sites are used traditionally year after year and represent selection

¹⁶ Lyon, A.G. 2000. The potential effects of natural gas development on sage grouse (*Centrocercus urophasianus*) near Pinedale, Wyoming. M.S. Thesis, Univ. of Wyoming, 121 pp.

¹⁷ Klott, J.H. 1987. Use of habitat by sympatrically occurring sage grouse and sharp-tailed grouse with broods. M.S. Thesis, Univ. of Wyoming, 82 pp.

¹⁸ 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, p. 978.

¹⁹ Autenreith, R. 1985. Sage grouse life history and habitat management. P. 52 in Rangeland fire effects: A symposium. Boise, ID: Bureau of Land Management.

²⁰ Dunn, P.O., and C.E. Braun. 1986. Summer habitat use by adult female and juvenile sage grouse. J. Wildl. Manage. 50:228-235.

²¹ Benson, L.A., C.E. Braun, and W.C. Leininger. 1991. Proc. Issues and Technology in the Management of Impacted Wildlife, Thorne Ecol. Inst. 5:97-104.

²² Wallestad, R., and P. Schladweiler. 1974. Breeding season movements and habitat selection of male sage grouse. J. Wildl. Manage. 38:634-637.

²³ Hulet, B.V., J.T. Flinders, J.S. Green, and R.B. Murray. 1986. Seasonal movements and habitat selection of sage grouse in southern Idaho. Pp. 168-175 in Proceedings--Symposium on the biology of *Artemisia* and *Chrysothamnus*, USDA Gen. Tech. Rept. INT-200.

²⁴ Wallestad, R., and D. Pyrah. 1974. Movement and nesting of sage grouse hens in Montana. J. Wildl. Manage. 38:630-633.

for optimal breeding and nesting habitat, it is crucially important to protect the area surrounding lek sites from impacts.

Under the Rawlins RMP FEIS, each alternative would apply mitigation measures of no surface occupancy within ¼ mile of sage grouse leks, with an additional measure presenting human activity during certain hours of the day within this buffer. FEIS at 3-157. This is supplemented with the standard seasonal restriction of drilling and construction activities within 2 miles of the lek site for sage grouse or within 1 mile of the lek site for sharp-tailed grouse (and even these provisions are subject to waiver). *Id.* This identical suite of mitigation measures was applied to all alternatives. FEIS at 3-157. While these measures provide protection from drilling and construction activities, they do not prevent the industrialization of key sage grouse nesting habitats within 3 miles of the lek site, nor do they prevent human disturbance related to industrial activity during the post-construction, production phase of operations, often slated to last 30 to 50 years. *See* BLM (2006) at ES-1.

Sage grouse mitigation measures have been demonstrated to be ineffective at maintaining this species at pre-development levels in the face of oil and gas development by Holloran (2005) and Naugle et al. (2006). *See* Attachments 66 and 67. In both of these studies, comparable levels of development led to significant declines in sage grouse populations. Holloran found that, for the Pinedale Anticline and Jonah Fields of western Wyoming, current population trends predicted extirpation of sage grouse in developed areas within 19 years of the date of the study. Walker et al. found an 85% decline of sage grouse populations in the Powder River Basin of northeastern Wyoming since the onset of coalbed methane development there, under well densities and mitigation measures approved under the Atlantic Rim project. Under both studies, the BLM had implemented and required mitigation measures identical to those that would apply under the action alternatives proposed for the Rawlins RMP. Walker et al. concluded:

Seasonal restrictions on drilling and construction do not address impacts caused by loss of sagebrush and incursion of infrastructure that can affect populations over long periods of time. Regulatory agencies may need to increase spatial restrictions on development, industry may need to rapidly implement more effective mitigation measures, or both, to reduce impacts of CBNG development on sage-grouse populations in the PRB.

Attachment 67 at 2. There is no scientifically valid reason to expect the results to be any different in the RMPPA. Furthermore,

Strong support for models with negative effects of CBNG at both the 0.8-km and 3.2-km scales indicate that the current restriction on surface infrastructure within 0.4 km is insufficient to protect breeding populations.

Id. at 18. In the end,

Our analysis indicates that maintaining extensive stands of sagebrush habitat over large areas (6.4 km or more) around leks is required for sage-grouse breeding