

August 29, 2008

Mr. Curtiss Bryan
BLM Lander Field Office
1335 Main Street
Lander, Wyoming 82520

Re: Beaver Creek Coalbed Methane Environmental Impact Statement

Dear Mr. Bryan:

The following scoping comments are submitted on behalf of the Wyoming Outdoor Council for consideration during the environmental review for the Beaver Creek Coalbed Natural Gas Development Project Environmental Impact Statement (Beaver Creek EIS).

**THE BLM HAS ADEQUATE RETAINED RIGHTS THAT ALLOW IT TO
CONDITION THE BEAVER CREEK EIS IN A WAY THAT ENSURES
ENVIRONMENTAL PROTECTION**

It is our view that the Bureau of Land Management (BLM) has substantial retained rights even after an area has been leased and that pursuant to these retained rights it can fully protect the natural environment in leased areas. In fact, it is our view that not only does the BLM have the right to do this, it in fact has an obligation to ensure full protection of wildlife and other resources as a condition of development of existing leases. As stated in the BLM's Pinedale Resource Management Plan (RMP) final EIS currently out for public review, "Management actions on existing leases within the Unavailable Areas would be designed to protect important habitats by excluding surface occupancy and/or disturbance to the extent this restriction does not violate the lease holder's/operator's lease rights."

In our view there is no question that the BLM is legally empowered and in fact obligated to protect the natural environment even after a lease has been issued. The National Environmental Policy Act (NEPA) itself establishes important national policies for environmental protection and Congress "directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and

administered in accordance with the policies set forth in [NEPA].” 42 U.S.C. § 4332(1). See also id. § 4331 (presenting the environmental protection policies of NEPA). The Council on Environmental Quality (CEQ) regulations reinforce this obligation to protect the natural environment. See, e.g., 40 C.F.R. §§ 1500.2(f) (Federal agencies “shall to the fullest extent possible . . . use all practicable means . . . 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”); 1502.1 (“The primary purpose of an [EIS] is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government”). The courts too have recognized that the purposes and goals of NEPA control BLM’s oil and gas development activities. Getty Oil Co. v. Clark, 614 F.Supp. 904, 920 (D. Wyo. 1985) (“The Secretary is not only permitted, but is required, to take environmental values into account in carrying out his regulatory functions, unless there is a clear and unavoidable statutory authority prohibiting the Secretary from complying with NEPA’s mandate.”). Thus, in developing the Beaver Creek EIS environmental analysis and decision document, the BLM should interpret, and implement, its obligations in light of the policies established by NEPA.

In addition to NEPA, the Federal Land Policy and Management Act (FLPMA), BLM’s organic law relative to its mission and purpose, establishes a requirement to fully protect the natural environment in areas that that have been leased. “[I]t is the policy of the United States 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” 43 U.S.C. § 1701(a)(8). The BLM is required to manage the public lands under a multiple use mandate, which requires among other things the “harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment” Id. § 1702(c). And last, “[i]n managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the [public] lands.” Id. § 1732(b).

With respect to the BLM’s obligation to prevent unnecessary or undue degradation of the public lands, it is probably important to emphasize that the FLPMA’s mandate to prevent unnecessary or undue degradation imposes dual action requirements on the BLM; it must take action to prevent both unnecessary degradation as well as undue degradation of the public lands. Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003). We would also note that this court decision stands as the final word as to what the unnecessary or undue degradation clause means—the Department of the Interior did not appeal this decision, and thus it is the final word as to the Department’s responsibilities and has been accepted as binding by the Department. Addressing this dual requirement, the court made plain that “Congress’s intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary to mining, is undue or excessive.” Id. That is, while unnecessary degradation may only prevent activities that are not generally recognized or used to pursue mining operations, the undue degradation prohibition establishes a further requirement to prevent

activities that would unduly harm or degrade the public land. As stated by the court, “FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.” Id.

Despite this clearly established law, the BLM has often persisted in misstatements of the governing legal standard. It often continues to view its dual mandate under FLPMA as a unitary obligation (it still claims that unnecessary degradation and undue degradation are one and the same), and then incorrectly proceeds to claim that only things not necessary for mining are prohibited unnecessary and undue degradation. The BLM’s attempts to read the plain language of FLPMA in the conjunctive rather than the disjunctive were firmly rejected by the Mineral Policy Center court. The court clearly held that the undue degradation prohibition relates to degradation of the environment on the public lands, not what is or is not necessary for mining. It is impossible for the BLM to fully recognize let alone exert its retained rights if it persists in stating its legal obligations in an impermissibly constrained manner. The FLPMA, like NEPA, through its unnecessary or undue degradation clause and other provisions, provides the BLM with authority, and indeed an obligation, to protect the natural environment even in areas that have already been leased.

Furthermore, a host of other laws impose a requirement on the BLM to consider environmental conservation as a key component of oil and gas development.¹ Thus, we believe it is clear that the BLM is under an obligation to ensure environmental protection even in areas that have been leased. Unfortunately, it appears to us that very often the BLM does not fully recognize the rights it retains despite issuing a lease, or the obligations it operates under to protect the natural environment in areas that have been leased. We hope the BLM will not perpetuate this problem in the Beaver Creek EIS environmental analysis.

In addition to the legal obligations noted above, a host of BLM policies, regulations, and contractual provisions relative to oil and gas development allow and in fact demand protection of the natural environment in areas that have been leased. Quite

¹ For example, the purposes of the Endangered Species Act “are to provide a means whereby the ecosystems upon which [listed] species depend may be conserved and to provide a program for the conservation of such [species], and the Secretary of the Interior shall “utilize [programs administered by him] in furtherance of the purposes of this chapter.” 16 U.S.C. §§1531(b), 1536(a)(1). The objective of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The purposes of the Clean Air Act are “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare” 42 U.S.C. § 7401(b)(1). See also id. §§ 7470(2), 7491(a)(1) (directing that air quality in protected landscapes and airsheds be protected). Under the National Historic Preservation Act, prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as maybe necessary to minimize harm to such landmark” 16 U.S.C. 470h-2(f). This is a small sampling of the numerous environmental protection statutes BLM and the Forest Service operate under, and additional obligations will be mentioned as this discussion proceeds.

simply, the BLM has retained very substantial rights to condition development so as to protect the natural environment even though it has leased lands for oil and gas development. The BLM's standard lease form (form 3100-11) contains the following reservations of authority to BLM:

- Lease Terms Section 4: "Lessor reserves the right to specify rates of development and production in the public interest"
- Lease Terms Section 6: "Lessee must conduct operations in a manner that minimizes adverse impacts to the land, air, water, to cultural, biological, visual, and other resources Lessee must take reasonable measures deemed necessary by lessor to accomplish the intent of this section. To the extent consistent with lease rights granted, such measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures."
- Lease Terms Section 7: "To the extent that impacts from mining operations would be substantially different or greater than those associated with normal drilling operations, lessor reserves the right to deny approval of operations."

Clearly the BLM has retained very substantial rights under the standard lease contract, and under those retained rights the BLM has more than adequate authority to ensure that it fully complies with the laws and policies noted above by asserting these retained rights and the need to adhere to these legal obligations when development is proposed on a lease.

The BLM sometimes invokes its regulation at 43 C.F.R. § 3101.1-2 as imposing limits on its ability to condition development, claiming that (in the absence of a specific stipulation or non-discretionary statute) it can only impose "reasonable measures" demanding no more than that lease operations be moved by no more than 200 meters, leasehold operations be prohibited for no more than 60 days, or that operations not be require to be moved off the leasehold. This is an unduly foreshortened view of this regulation.

In adopting this regulation, BLM commented that "the authority of the Bureau to prescribe 'reasonable,' but more stringent, protection measures is not affected by the final rulemaking." Oil and Gas Leasing, Geothermal Resources Leasing, 53 Fed. Reg. 17,340, 17,341 (May 16, 1988). Quite simply, this regulation establishes a floor, not a ceiling as to the reasonable measures provided for in the lease contract that the BLM may require. As noted above, the specific terms of the standard lease certainly do not limit BLM's authority to the degree BLM sometimes claims. It may be worth noting that the standard lease form and the regulation were both adopted in 1988; BLM certainly developed one in full recognition of the other. Consequently, the standard lease and the 3101.1-2 regulation must be considered together to determine the BLM's retained rights. The 3101.1-2 regulation does not stand as the sole word as to what constitutes "reasonable measures," as the BLM sometimes claims, and in any event it too hardly constrains the BLM's rights to prescribe reasonable measures. By its own terms the regulation specifies reasonable measures "are not limited to" modifying siting or design of facilities, timing

of operations, and specification of reclamation, and the regulation then goes on to state the specific reasonable measures mentioned in the regulation are “at a minimum” of what is within BLM’s retained authority. 43 C.F.R. § 3101.1-2. Consequently, we do not believe the 3101.1-2 regulation greatly limits the BLM’s ability to define and prescribe reasonable measures beyond those specifically mentioned in the regulation.

It may be worth noting what rights BLM conveys when it issues a lease and what rights it retains. The BLM only conveys three rights when it issues a lease:

- An “exclusive right” to remove all of the oil and gas on the leasehold. Form 3100-11.
- The right to “use” as much of the leasehold as “necessary” to recover all of the leased resource. 43 C.F.R. § 3101.1-2.
- The right to build and maintain “necessary” improvements to extract the leased resource. Form 3100-11.

Thus, the only rights a lessee has are a right to exclude others from developing the lease, a right to use no more of the lease than is “necessary” to retrieve the leased oil and gas, and a right to build only “necessary” improvements. Operators have certainly not been conveyed a right to develop the oil and gas in exactly the manner they desire or on the exact timeline they desire. BLM has retained the right to condition those aspects of oil and gas development.

In contrast to the limited rights that have been conveyed, under the standard lease form and the 3101.1-2 regulation, the BLM has specifically retained the right to condition development based on the following:

- Applicable laws. Form 3100-11.
- Terms, conditions, and stipulations in the lease. Form 3100-11.
- Regulations and formal orders in effect when the lease is issued. Form 3100-11.
- Regulations and orders issued afterward, if not inconsistent with lease rights and provisions in the lease. Form 3100-11.
- Specific, non-discretionary statutes. 43 C.F.R. § 3101.1-2.
- Reasonable measures. 43 C.F.R. § 3101.1-2.

Special mention may be needed with respect to the first limitation on conveyed rights. The standard Offer to Lease and Lease for Oil and Gas (Form 3100-11) makes the removal of oil and gas “subject to applicable laws.” This is a considerably broader provision than the reference to non-discretionary statutes in the 3101.1-2 regulation. Many laws are applicable even if they are not strictly non-discretionary. A number of these laws, such as provisions in the Clean Air Act and the Clean Water Act were noted above. These provisions are certainly “applicable” even if they are not “non-discretionary,” and thus the leasehold—and the lessee—have been made “subject to” these laws under the explicit terms of the standard lease contract. Any number of other laws are also “applicable,” including the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712, and the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668c. And thus

the lease—and the lessee—have specifically been made subject to the provisions of these laws. And consequently, the BLM should hold the lessee accountable for (subject to) compliance with these applicable laws.

Before moving on, we would also note that the “terms, conditions, and stipulations of this lease,” to which the lease—and lessee—are also “subject to” under form 3100-11, specifically includes the three limitations noted above. That is, the rate of development can be specified as needed in the public interest (Lease Term 4), reasonable measures deemed necessary to minimize adverse impacts can be required (Lease Term 6), and if the impacts of the proposed operation are substantially greater than normal, operations can be denied (Lease Term 7).

This broad range of retained rights gives the BLM great authority to specify the time, place, and manner of oil and gas development. The limited conveyance of rights under a federal oil and gas lease and the government’s high degree of retained authority to condition development on leases was long ago recognized by the United States Supreme Court:

Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary. . . . In short, a mineral lease does not give the lessee anything approaching the full ownership of a patentee, nor does it convey an unencumbered estate in the minerals.

Boesche v. Udall, 373 U.S. 472, 477-78 (1963). In addition, the court noted that “[r]ecognition of the Secretary’s power here serves to protect the public interest in the administration of the public domain.” Id. at 484.

Clearly, the BLM has more than sufficient authority to regulate development of an oil and gas lease in order to meet its legal obligations under numerous applicable environmental laws and policies enacted to protect the natural environment.² Or said differently, it has more than sufficient authority to meet its legal obligations and management objectives established in the RMP despite leases being in place because what has been conveyed is an interest “subject[] . . . to exacting restrictions and continuing supervision,” not “an unencumbered estate in the minerals.”

In addition to the provisions in the standard lease contract, the Mineral Leasing Act itself and BLM’s regulations relative to the conditions under which oil and gas

² BLM sometimes attempts to invoke BLM Instruction Memorandum (IM) 92-67 (issued December 3, 1991) as limiting its ability to condition development on a lease. But this IM is of no moment. For one it expired on September 30, 1992. Moreover, it is totally inconsistent with the decision in Mineral Policy Center v. Norton (discussed above), a decision that BLM did not appeal and which therefore stands as the final legal authority as to what BLM’s obligations are under the FLPMA unnecessary or undue degradation clause. A BLM IM, of course, cannot stand in the way of a U.S. District Court decision, especially one issued in the District of Columbia where the BLM is headquartered.

development may be pursued are replete with retained authority to condition development of leases, and indeed a responsibility to do so in order to protect the natural environment. Many if not all of these provisions were “regulations and formal orders in effect” when many leases were issued, and they are not “inconsistent with lease rights and provisions in the lease” in any event.

“Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property” 30 U.S.C. §187 (emphasis added). “The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out the and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil and gas field” Id. § 189. “The Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of [leasable minerals], and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on the entire leasehold” Id. § 209 (emphasis added). See also 43 C.F.R. § 3103.4-4 (companion regulatory provision allowing suspension of leases). “The Secretary of the Interior . . . shall regulate all surface disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources.” Id. § 226(g) (emphasis added) (also requiring approval of a plan of operations and “complete and timely” reclamation and restoration of lease tracts).

Clearly the Mineral Leasing Act gives the agencies broad authority to condition oil and gas development in the interest of conservation, and this authority has been recognized by the courts. Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981) (determining that the “ordinary meaning” of the term “in the interest of conservation” in section 209 of the Mineral Leasing Act allows suspension of operations so as to protect the environment); Getty Oil Co. v. Clark, 614 F.Supp. 904 (D. Wyo. 1985) (holding sections 189 and 209 of the Mineral Leasing Act provide broad grants of authority allowing conditioning of development to protect the environment, even allowing denial of drilling operations to protect wilderness values when a suspension is requested by the lessee).

As noted, BLM regulations regarding the conditions under which oil and gas development can occur are also replete with provisions allowing the BLM to condition the time, place, and manner of oil and gas development. “The authorized officer is authorized and directed to “. . . require compliance with lease terms, with the regulations in this title and all other applicable regulations promulgated under the cited laws, and to require that all operations be conducted in a manner which protects other natural resources and the environmental quality” 43 C.F.R. § 3161.2. “Before approving operations on a leasehold, the authorized officer shall determine . . . that the proposed plan of operations is sound both from a technical and environmental standpoint.” Id. “All operations will be conducted in a manner “which protects other natural resources and environmental quality” Id. § 3162.1(a) (also requiring the operating rights owner to comply with all applicable laws, regulations, lease terms, Onshore Oil and Gas

Orders, Notices to Lessees, “and with other orders and instructions of the authorized officer”). “The operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality.” Id. § 3162.5-1(a) (also requiring compliance with orders, applicable laws, regulations, lease terms and the drilling/operations plan). “The operator shall exercise due care and diligence to assure that leasehold operations do not result in undue damage to surface or subsurface resources or surface improvements.” Id. § 3162.5-1(b).

And as also noted above, section 4 of the standard lease form clearly allows the BLM to regulate the pace of development. This authority is bolstered by many other provisions of law and policy noted above, and the courts have recognized that BLM has an obligation to consider regulating the pace of development in a NEPA analysis. In Northern Plains Resource Council v. BLM, No. CV 03-69-BLG-RWA (D. Mont. February 25, 2005) and Northern Cheyenne Tribe v. BLM, No. CV 03-78-BLG-RWA (D. Mont. February 25, 2005) the court held that the BLM violated NEPA by not considering alternatives for phased development in the context of a coalbed methane development project.

The BLM itself has also recognized the need to consider phased and/or paced development alternatives. In the Pinedale Anticline Draft Environmental Impact Statement (EIS) (1999), which is applicable to the Pinedale Anticline field outside of Pinedale, Wyoming, the BLM acknowledged that “BLM can regulate the manner and pace of development” and that pursuant to Interior Board of Land Appeals decisions, “consider[ing] staggering development over time [is] an “*obvious* alternative.”” Pinedale Anticline Draft EIS at 2-43 (citing Wyoming Outdoor Council, 147 IBLA 105 (1998) and Powder River Basin Resource Council, 120 IBLA 47 (1991)). See also Pinedale Anticline Draft EIS at 2-2 (paced development is consistent with lease rights granted and required to meet the requirement to prevent unnecessary or undue degradation).

At least one implication of the above review of the degree of retained rights enjoyed by the BLM is that “takings” concerns are not of such a certain, severe magnitude that the BLM must in essence capitulate to the development desires of industry. In our experience, the BLM often quickly invokes (or bows to) concerns about there being a “taking” if it were to strongly regulate oil and gas development. We believe such concerns are greatly overstated.

Before a taking can occur, a property right must have been given. While certainly the BLM has conveyed the right to extract oil and gas from a leasehold, it has done so subject to any development occurring under a comprehensive, highly regulated framework administered by the BLM, as discussed in detail above. Specifically, whatever property right has been “given” has been made “subject to” applicable laws; terms, conditions and stipulations in the lease itself; other regulations and orders in place when the lease was granted; later-issued regulations if not inconsistent with the lease; specific, non-discretionary statutes; and any reasonable measures that the BLM may require. To quote the Supreme Court again, a federal lease is “subjected [] to exacting restrictions and continuing supervision” and “does not give the lessee anything

approaching the full ownership of a fee patentee.” Boesche at 477-78. Having given only a highly conditional right to development, the BLM can fully regulate development of existing leases with little fear of there being a “taking,” and under the legal authorities for the protection of the environment discussed above it in fact must do so.³

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

We engage in this lengthy and somewhat detailed review of relevant law and policy so as to emphasize that the BLM certainly has the authority, and indeed an obligation, to fully protect the natural environment in the Beaver Creek EIS area. Specific means by which this retained authority could be exercised, such as by requiring the use of phased or paced development, will be discussed next.

a. Paced and Phased Development

One of the most important means by which environmental values can be protected is by adopting specific provisions requiring phased and/or paced development in environmentally sensitive areas. This is an “obvious” way to manage oil and gas development according to the IBLA. As noted above, section 4 of the standard lease form specifically allows regulation of the rate of development, and BLM has recognized the validity of this approach in the Pinedale Anticline EIS. The IBLA recently recognized that section 4 of the standard lease form allows the BLM to protect resources by regulating the manner and pace of development and the siting or timing of lease activities, even if these requirements are imposed on leases issued long ago, 1948 in this

³ In addition there also is little chance that there will be a breach of contract if the agencies carefully regulates development on a lease. We have not suggested that applicable laws enacted after lease issuance are necessarily enforceable, although it is not at all apparent that the conditions where the Supreme Court found a contract repudiation in the context of the Outer Continental Shelf Land Act and offshore leases is replicated in the language of the onshore standard lease form where the lease is made subject to applicable laws with no mention made of such a limitation only being applicable to laws existing at the time of entering the contract. See Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) (finding repudiation of offshore oil lease occurred where the government imposed restrictions established by a later-enacted law). As the court observed, “the need to obtain Government approvals so qualified the likely future enjoyment of the exploration and development rights that the contract, in practice, amounted primarily to an *opportunity* to try to obtain exploration and development rights in accordance with the procedures and under the standards specified in the cross-referenced statutes and regulations.” Id. at 2436. All that was bought was a promise that the government would not deviate significantly from the terms of the lease; that the “gateway” to enjoyment of the rights granted would not be significantly narrowed (which in Mobil Oil the government had done). Id. No more is demanded of onshore leases.

case. National Wildlife Federation et al., 169 IBLA 146, 164 (2006). Thus, the BLM should fully consider not allowing the Beaver Creek project to be done “all at once,” it should consider pacing or phasing the project over a period of time or with respect to sensitive areas so as to fully protect other resources.

b. Multiple Wells Per Pad

The BLM should also fully consider requiring multiple wells per pad as a means to reduce environmental impacts. BLM has said it is seeking to achieve a well density of one well per 160 acres, Scoping Notice at 2; but certainly this is a downhole density and it should not be assumed that one well per 160 acres needs to be drilled on the surface to achieve this downhole density.

c. Retention and Enforcement of Lease Stipulations

One of the most important means by which the agency can ensure that the natural environment is protected is to ensure that timing stipulations oriented toward the protection of wildlife crucial ranges are not abandoned and are in fact vigorously enforced. The BLM in Wyoming has shown increasing tendencies to abandon these protections and/or to grant exceptions and waivers to them. This is a dangerous trend that should not be perpetuated, if protection of other resources is desired.

REQUIREMENTS THE BLM MUST COMPLY WITH DURING SCOPING

The “scoping” stage requires the Bureau of Land Management (BLM) to make two determinations: (1) what is the scope of the project – in this case the Beaver Creek EIS– to be analyzed and (2) what are the issues that will be analyzed “in depth.” 40 C.F.R. § 1501.7(a). Other environmental reviews (such Biological Assessments and consultation for species listed pursuant to the ESA) should be identified so that they can be done concurrently and integrated with the environmental review. We believe the issues identified in these comments are within the legal scope of the Beaver Creek EIS, and therefore they should be analyzed in depth by the BLM.

In determining the scope of this project, BLM must consider “connected actions,” “cumulative actions,” and “similar actions.” 40 C.F.R. § 1508.25. Connected actions are actions that are “closely related” to the Beaver Creek EIS. Certainly in that regard, the Beaver Creek EIS environmental review must consider the actions occurring pursuant to the Lander RMP, and the numerous other oil and gas projects occurring in the area, such as the Gun Barrel, Madden Deep, Iron Horse project. Similar actions include authorizations for oil and gas development occurring on State and private lands in or adjacent to the geographic area of the Beaver Creek EIS area, and RMPs for adjacent BLM Field Offices/Districts. The scope of the EIS should include a detailed analysis of these similar actions so as to foster informed public participation in the Beaver Creek EIS and informed decision-making by BLM. Cumulative actions are actions that, incrementally, have cumulatively significant impacts, even if the individual impacts are minor. The BLM should define the scope of the environmental analysis to include

analysis of the cumulative effects of actions/projects that have impacts in common with those resulting from natural gas development. Actions that should be addressed in a cumulative fashion include, but are not limited to: road construction activities, activities leading to soil and vegetation disturbance, activities leading to changed habitat structure, activities leading to habitat fragmentation, and activities causing air or water pollution. These cumulative impacts result from a number of cumulative actions, including oil and gas development, and thus they must be addressed in a comprehensive manner. Similarly, the scope of the environmental analysis must include consideration of direct and indirect impacts of oil and gas development activities. 40 C.F.R. § 1508.25.

The BLM must bear in mind that the “primary purpose” of an environmental review is to “insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.” 40 C.F.R. § 1502.1. The policies and goals of NEPA include,

- Encouraging a “productive and enjoyable harmony between man and his environment”,
- Promoting “efforts which will prevent or eliminate damage to the environment and biosphere”,
- Using “all practicable means and measures . . .to create and maintain conditions under which man and nature can exist in productive harmony . . .”,
- Fulfilling “the responsibilities of each generation as trustee of the environment for succeeding generations”,
- Assuring “all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings”,
- Allowing beneficial use of the environment “without degradation . . . or other undesirable or unintended consequences”,
- Preserving “important historic, cultural and natural aspects of our national heritage . . .”,
- Achieving a “balance between population and resource use . . .”, and
- Enhancing “the quality of renewable resources” and maximizing recycling of depletable resources.

42 U.S.C. §§ 4321-4331. Thus, the needs that BLM must identify for analysis in its environmental analysis include the above goals and policies, and we ask BLM to “insure” that these goals and policies are “infused” into the Beaver Creek EIS environmental review and decision document, as required by NEPA and its implementing regulations. See generally 40 C.F.R. §§ 1500.2(f) (all possible means are to be used to protect the environment), 1502.1 (policies of NEPA are to be infused into the ongoing programs and actions of agencies).

NEPA requires BLM to make a number of considerations that we specifically urge BLM not to overlook. NEPA requires the BLM to “insure that presently unquantified environmental amenities and values” are given consideration, “recognize the worldwide and long-range character of environmental problems and thus support international efforts to prevent declines in the world environment,” and “initiate and

utilize ecological information in the planning and development of resource-oriented projects.” 42 U.S.C. § 4332, 40 C.F.R. § 1507.2. See also BLM Handbook H-1790-1.V.B.2.a.(3). Thus, in preparing the Beaver Creek EIS environmental review, BLM should consider, analyze, and wherever appropriate facilitate, international efforts to prevent environmental decline. This is especially true with respect to global warming and climate change issues. These also include a number of international agreements and treaties for resource protection, such as United Nations biosphere reserves, migratory bird treaties, the Convention on International Trade in Endangered Species, and international efforts related to biological diversity preservation, among others. The environmental analysis supporting the Beaver Creek EIS should also explicitly address unquantified environmental values—such as the value of this area to the hunting public—and ensure they are given equal emphasis relative to economic analyses, and ensure up-to-date ecological information is utilized in developing the environmental analysis and decision document. “

The BLM NEPA Handbook requires BLM to identify the purpose and need of the project being analyzed. BLM Handbook H-1790-1.V.B.e. BLM should give specific attention to the purposes and needs for oil and gas related activities that will be analyzed. The relative value of the Beaver Creek EIS area for meeting energy needs versus supplying environmental amenities/needs should be considered in identifying the purpose(s) and need(s) for this project. Similarly, identification of where specifically gas development is appropriate and inappropriate in the Beaver Creek EIS area, and why, should be addressed in the environmental analysis as part of the definition of the purpose and need for the Beaver Creek EIS. We think it is fundamentally inappropriate to define the purpose and need for this project in terms so narrow that the project is defined as only having the purpose of allowing lease rights to be pursued. “One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence.)” Davis v. Mineta, 302 F.3d 1104, 1119 (10th Cir. 2002) (invalidating a NEPA analysis partially on this basis) (quoting Simmons v. United States Army Corps of Eng’rs, 120 F.3d 664, 669 (7th Cir. 1997)).

BLM cannot claim the purpose and need for the Beaver Creek EIS is essentially solely defined by, and constrained by, whatever rights and desires the lessee may have to explore for oil and gas. As discussed in detail above, the BLM retains discretion relative to oil and gas development activities on public lands, even after a lease issues. Most if not all oil and gas leases provide that the lessee agrees that development and production “shall be subject to control in the public interest . . . and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and regulations issued thereunder” Furthermore, BLM’s oil and gas leasing regulations provide that a lessee takes a federal oil and gas lease subject to stipulations in the lease, restrictions deriving from nondiscretionary statutes, and “such reasonable measures as may be required . . . to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time lease operations are proposed.” 43 C.F.R. § 3101.1-2. See also 30 U.S.C. §§ 226(f)-(g); 43 C.F.R. §§ 3162.3-1, 3162.5-1; Onshore Oil and Gas Order No. 1 (all authorizing continuing

oversight so as to ensure environmental protection). The Lander RMP also provides that BLM retains substantial authority to regulate oil and gas development. Thus, BLM cannot define the purpose and need for the Beaver Creek EIS as just to allow natural gas to be developed; it must also include strong environmental protections as at least a co-equal purpose and need (see discussion of preventing unnecessary and undue degradation, below).

It is rarely possible for the BLM (or any other Federal agency) to obtain perfect amounts of information. However, BLM must not allow this fact to stymie environmentally informed decision-making by BLM. CEQ regulations essentially establish a presumption in favor of obtaining information that is essential to reasoned decision-making. See 40 C.F.R. § 1502.22. See also BLM Handbook H-1790-1.III.A.2.d. BLM should take steps to gather needed information in all but the narrow range of exceptions permitted by the CEQ regulations. But if BLM concludes information is not essential to reasoned consideration of alternatives, or the cost of obtaining the information is exorbitant, or the means for acquiring the information are unknown, the BLM must nevertheless abide by CEQ guidance in this regard, namely that “credible scientific evidence” be presented relative to reasonably foreseeable significant adverse impacts (including low likelihood but catastrophic impacts) so that the impacts can be assessed based on approaches that are “generally accepted in the scientific community.” See 40 C.F.R. § 1502.22(b). See also 40 C.F.R. § 1502.24 (requiring professional and scientific integrity in an EIS). Among other things, to meet these requirements, BLM must establish the baseline condition of all resources in the Beaver Creek EIS area in order to evaluate environmental conditions and impacts in an informed manner. Reinforcing these responsibilities are the requirements of the Data Quality Act, 44 U.S.C. § 3516, which require agencies to ensure the quality and reliability of data and information they rely on.

ALTERNATIVES

The CEQ regulations require a reasonable range of alternatives to be presented and analyzed in an environmental review so that issues are “sharply defined” and there is “a clear basis for choice among options” 40 C.F.R. § 1502.14. CEQ regulations and court decisions make clear that the discussion of alternatives is “the heart” of the NEPA process. Environmental analysis must “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a). Such objective evaluation is gravely compromised when agency officials bind themselves to a particular outcome or foreclose certain alternatives at the outset.

The BLM must evaluate a full range of alternatives to “insure a fully informed and well-considered decision.” Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). This means that consideration of alternatives that differ substantially from what the project proponent wants must be considered. The goals of a private party proponent are, to a limited extent, relevant in determining a project’s purpose and need, but “more importantly, an agency should always consider the views of Congress, expressed, to the extent that an agency can

determine them, in the agency's statutory authorization to act, as well as in other Congressional directives." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991). As just one example, Congress was unwavering in its message when it passed NEPA: federal agencies are entrusted to act as "trustees of the environment for present and future generations." 42 U.S.C. § 4331(b).

Therefore, in the context of development in the Beaver Creek EIS area the BLM must use the scoping process to develop alternatives that emphasize needed environmental protection even if such alternatives limit and/or strongly regulate natural gas exploration and not dismiss such options without a thorough and careful analysis. We recognize these alternatives may not be ideal from the lessee's perspective, but so long as these are alternatives that could help "[resolve] conflicts concerning alternative uses of available resources," the BLM must consider them. See 42 U.S.C. § 4332(2)(E).

We specifically request that the BLM consider alternatives that would phase or pace the development of the wells over time and not allow it to be done "all at once" as one reasonable means to help ensure environmental protection. We also specifically request that the BLM fully consider requiring that multiple wells be drilled from a single well pad as one way to reduce impacts. If the density of wells downhole can reach the specified density of one well per 40 acres, then this is an entirely reasonable option; there is no clear reason that a surface well density of one well per 40 acres is needed to allow Devon to enjoy its lease rights. Similarly, the BLM should consider options that allow for fewer than 228 wells to be drilled. Other options that should be fully considered include adopting clear thresholds that will trigger a clearly specified management response in exceeded, providing for offsite mitigation, and ensuring compliance with the Wyoming Game and Fish Department's mitigation guidelines (discussed in more detail below).

"IN MANAGING THE PUBLIC LANDS THE SECRETARY SHALL, BY REGULATION OR OTHERWISE, TAKE ANY ACTION NECESSARY TO PREVENT UNNECESSARY OR UNDUE DEGRADATION OF THE LANDS"

This provision from FLPMA is a mandatory requirement applicable to all resource uses and decisions affecting BLM lands. 43 U.S.C. § 1732(b). Consequently, it must serve as a bedrock for all analyses in the Beaver Creek EIS environmental analysis, and activities undertaken pursuant to the decision document. It is crucial to recognize that unnecessary or undue degradation must be prevented; the Puma environmental analysis and decision document must provide that both prongs of this standard are met. Clearly, the BLM bears a heavy responsibility before it can authorize activities that may degrade the public lands.

Recognizing the dual obligation imposed by FLPMA's unnecessary or undue degradation clause, the court in Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003) held that "Congress's intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary to mining, is undue or excessive." Id. That is, while unnecessary degradation may only prevent activities that are not generally recognized or used to pursue mining operations, the undue

degradation prohibition establishes a further requirement to prevent activities that would unduly harm or degrade the public land. As stated by the court, “FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.” Id.

Despite this clearly established law, the BLM has often persisted in misstatements of the governing legal standard. It often continues to view its dual mandate under FLPMA as a unitary obligation (it still claims that unnecessary degradation and undue degradation are one and the same), and then incorrectly proceeds to claim that only things not necessary for mining are prohibited unnecessary and undue degradation. The BLM’s attempts to read the plain language of FLPMA in the conjunctive rather than the disjunctive were firmly rejected by the Mineral Policy Center court. The court clearly held that the undue degradation prohibition relates to degradation of the environment on the public lands, not what is or is not necessary for mining. It is impossible for the BLM to fully recognize let alone exert its retained rights if it persists in stating its legal obligations in an impermissibly constrained manner.

We urge BLM not to define “unnecessary or undue degradation” by default, in a negative fashion, in the Beaver Creek EIS environmental analysis and decision document. BLM must reject the position that because regulations provide that an oil and gas lease conveys the right to “use so much of the leased lands as is necessary to explore for, drill for . . . and dispose of all of the leased resource . . .” essentially anything an oil and gas lessee proposes to do to develop a lease is “necessary” or “due” and therefore any resulting degradation of the public lands is not “unnecessary” or “undue.” As noted above, the BLM retains authority to condition oil and gas development despite issuance of a lease; issuance of a lease does not tie BLM hands to the extent it sometimes claims.

Therefore, we urge BLM to require, in a direct and positive fashion, that exploration activities in the Beaver Creek EIS area not cause unnecessary or undue degradation, and to ensure that this is the case. Given the direct, unambiguous command from Congress to do whatever is needed to prevent unnecessary or undue degradation, the Beaver Creek EIS environmental analysis and decision document should define, and prevent, unnecessary or undue degradation in an equally direct, positive fashion. See also Kendall’s Concerned Area Residents, 129 IBLA 130, 138 (1994) (“If there is unnecessary or undue degradation, it must be mitigated” and “[i]f unnecessary or undue degradation cannot be prevented by mitigation measures, BLM is required to deny approval of the plan.”).

**THE REQUIRMENT TO MANAGE THE PUBLIC LANDS FOR MULTIPLE
USE AND SUSTAINED YEILD HAS SUBSTANTIVE COMPONENTS THAT
BLM MUST ABIDE BY**

Under FLPMA, specific management actions like the Beaver Creek project must be done pursuant to multiple use and sustained yield principles. 43 U.S.C. § 1732(a). The definition of multiple use in FLPMA is long, but key provisions include the

following: (1) Public lands and their resource values must be managed so that they “best meet the present and future needs of the American people;” and (2) There must be harmonious and coordinated resource management that is done “without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or greatest unit output.” 43 U.S.C. § 1702(c). This definition gives substance to the requirement for management actions to be done pursuant to multiple use principles.

The Beaver Creek project must “best” meet the present and future needs of the American people. The Beaver Creek project cannot adequately meet these needs, or generally meet these needs, or largely meet these needs, it must “best” meet them. FLPMA explicitly requires that what is “best” must be viewed from the perspective of the present and the future and all alternatives, including the proposed action, must be designed to satisfy this requirement. What is best now may not meet future needs, and since future needs may be unknown in some respects, the only way to “best” insure that future needs are met is to develop and select alternatives that have a large built in margin of safety. To achieve a large built in margin of safety the environmental analysis and decision document should emphasize resource and ecosystem protection, which will best ensure that future options are retained. Furthermore, what is “best” must be determined with reference to the needs of the American people as a whole, not a small subset of the American people, including the needs solely of Devon.

Since the definition of multiple use specifically provides that it is appropriate to not provide all resources in all areas, even within the Beaver Creek EIS area the environmental analysis should identify areas where development is inappropriate and the decision document should prohibit development in these areas. Areas where the impacts of development would be visible for long periods or from long distances should be avoided. Areas with historical values that could be compromised by oil and gas exploration should not be available for such activities, unless surface impacts are greatly reduced or eliminated. BLM’s authority to protect these areas is bolstered by the requirement to prevent unnecessary or undue degradation, and in the vast majority of circumstances, if not all, the lessee would still be able to develop oil and gas at some level.

It is also important to emphasize that under FLPMA the Beaver Creek EIS environmental analysis and resulting decision document must consider and be based on the relative value of the resources involved. By this legally required measure, rare, unique, and sensitive native species have a relative value far in excess of more common or easily replaced public land resources, or resources that can be provided from other lands. There seems to be little doubt but that oil and especially natural gas is widely available in great quantities on many BLM lands in Wyoming, so this resource may well have little relative value. Accordingly, the alternatives considered by BLM, and particularly the preferred alternative, must give special emphasis to protecting and providing for relatively rare resources

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

WILDLIFE RESOURCES

The following concerns regarding wildlife touch on a number of issues. One common need, however, is the following. When considering impacts to wildlife, BLM must do more than consider just the area actually impacted by oil and gas development. BLM must ensure its analysis of impacts to wildlife considers indirect, connected, related, long-term, and cumulative impacts in as quantitative, and scientifically supported, a manner as possible. BLM must also ensure that it fully complies with BLM Manual MS-6840 (Special Status Species Management).

ESA Candidate and BLM Sensitive Species

BLM must ensure full compliance with BLM Manual MS-6840.06.E (Special Status Species Management). BLM Manual MS-6840.06.E requires that “protection provided by the policy for candidate species shall be used as the minimum level of protection for BLM sensitive species”—that is:

Consistent with existing laws, the BLM shall implement management plans that conserve candidate species and their habitats and shall ensure that actions authorized, funded, or carried out by the BLM do not contribute to the need for the species to become listed.

BLM Manual MS-6840.06.C & .06.E. See BLM Manual MS-6840.06.C (1&3) (discussing BLM’s responsibility to confer with U.S. Fish & Wildlife Service regarding individual species’ needs). BLM Manual MS-6840.06.C.2 imposes a series of additional substantive obligations on the BLM regarding candidate [and therefore sensitive] species management:

2. For candidate species [and sensitive species] where lands administered by the BLM or BLM authorized actions have a significant effect on their status, [the BLM shall] manage the habitat to conserve the species by:
 - a. Ensuring candidate [and BLM sensitive species] are appropriately considered in land use plans (BLM 1610 Planning Manual and Handbook, Appendix C).

- b. Developing, cooperating with, and implementing range-wide or site-specific management plans, conservation strategies and assessments for candidate [and sensitive] species that include specific habitat and population management objectives designed for conservation, as well as management strategies necessary to meet those objectives.
- c. Ensuring that BLM activities affecting the habitat of candidate [and sensitive] species are carried out in a manner that is consistent with the objectives for managing those species.
- d. Monitoring populations and habitats of candidate [and sensitive] species to determine whether management objectives are being met.

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

What this means is that at a minimum, the BLM must seek to “conserve” sensitive species that occur in the Beaver Creek EIS area in a manner which contributes to their removal from BLM’s sensitive species list. That is, the requirement established by the BLM Manual is not only to prevent threats to the continued existence of these species or their listing under the ESA, but also to remove them from the BLM sensitive species list. This is an affirmative obligation established by the BLM manual—the BLM must put in place specific habitat and population management objectives designed to remove these species from the special status species list, that is, to conserve them.

In addition, the special status species manual requires that “BLM activities affecting the habitat of candidate species [and consequently sensitive species] [be] carried out in a manner that is consistent with the objectives for managing those species.” That is, the BLM must ensure that activities that affect sensitive species are done in a manner that is consistent with these species being removed from the sensitive species list, that is, with their conservation.

The need to adhere to these requirements certainly applies to the sage-grouse, and could well also apply to the pygmy rabbit, and white-tailed prairie dog, all of which are BLM sensitive species also now being reconsidered for listing under the ESA. The burrowing owl may also occur in this area.

Ferruginous Hawks and Other Raptors

The environmental analysis should determine whether these species are or could be using the Beaver Creek EIS area and ensure that BLM meets its duties to provide management protections for these species that meets the requirements of the Sensitive Species Manual, and the Lander RMP. BLM must ensure that no extreme noise occurs during nesting season or near to occupied nests. The environmental analysis should examine whether habitat that could potentially be occupied by raptors, such as previously utilized nests, should receive protection so as to ensure the continued viability of raptors in the area. It should consider all biological needs of raptors and develop suitable protections for all significant life-stages of the various raptors, all of which should be included in the decision document. For BLM sensitive species, pursuant to the provisions in the BLM sensitive species manual, the BLM's management actions must be directed at removing these species from the sensitive species list. Additionally, the environmental analysis should address compliance with the Bald Eagle Protection Act and Migratory Bird Treaty Act and the decision document should specify the means by which BLM will ensure compliance with these laws as well as pursue (or facilitate) enforcement of them, relative to raptors as well as other bird species protected by these laws.

Sage-grouse

The sage-grouse too usually receives special protective measures, particularly in the context of oil and gas development and exploration activities, and BLM must ensure full compliance with its Sensitive Species Manual relative to this species, as well as other BLM guidance and guidance from the Wyoming Game and Fish Department such as its "Recommendations for Development of Oil & Gas Resources within Crucial & Important Wildlife Habitats ." Typical stipulations limit oil and gas activities when sage-grouse are utilizing known leks, and certainly BLM must prevent disturbance during the sage-grouse courtship period and near sage-grouse nests. However, focusing exclusively on limited elements of a species' ecological needs (courtship and nesting) not only might fail to protect the species, it might also blind BLM to other critical factors affecting the species.

For example, it is well known that sage-grouse chicks need access to wet meadow areas so they can find high-protein insects to support early growth. Dense stands of sagebrush are critical winter habitat. Thus, these areas should be protected from disturbance. It is also well known that the sage-grouse may qualify for listing as a threatened or endangered species, so BLM has heightened obligations to protect the species. Furthermore, the appropriate means to protect sage-grouse is to not only focus management efforts (and protective measures) on particular habitat needs (e.g., protecting leks), but also to ensure sagebrush habitats, an increasingly imperiled ecosystem, are protected. The same, of course, is true for many other species, including such sagebrush obligate species as Brewer's sparrow, sage sparrow's, and sage thrashers; and of course the same is true for species dependent on other habitats and ecosystems. In this regard we request BLM to consider the following report: Knick, S.T., et al. 2003. Teetering On The Edge Or Too Late? Conservation And Research Issues For Avifauna Of Sagebrush

Habitats. The Condor 105: 611-634 (documenting the importance of sagebrush habitats and threats to them, particularly with reference to sagebrush obligate bird species). We also request that the BLM ensure that it complies with its evolving and developing Wyoming Landscape Conservation Initiative.

The sage-grouse is of course a special case at this point. As the Lander Field Office no doubt knows, the BLM in the Powder River Basin is actively taking steps to increase protections for sage-grouse beyond the “classic” and “standard” stipulations that have been used because it has become apparent these protection are simply not enough to protect the bird. The Lander Field Office should fully consider the actions being considered in the Powder River Basin (Buffalo Field) office in the Beaver Creek EIS environmental analysis. It should fully consider whether the protections specified in the Lander RMP are sufficient to protect the sage-grouse and help prevent its listing under the ESA. It specifically should consider whether well density should be limited to one well per section, as is being required in the Buffalo Field Office.

The BLM should reject requiring only the standard, classic and now scientifically discredited stipulations for the protection of the sage grouse (¼-mile limitation around leks during the breeding season and 2-mile limitation around leks during chick rearing). As shown in the literature that will be referenced below, these limitations no longer have scientific credibility and are simply not enough to protect the sage-grouse. At a minimum, in addition to consideration of the protections being considered by the Buffalo Field Office, we ask the BLM to fully consider requiring the protections required by the Jack Morrow Hills Coordinated Activity Plan ROD relative to sage grouse. These include, for example, protections that also extend to winter concentration areas. Jack Morrow Hills ROD at 45.

Furthermore, as the BLM knows there is an increasing effort to ensure the protection of sage-grouse on a “landscape scale,” with this being done through the protection of large “core area.” As the BLM knows, the State of Wyoming just issued an Executive Order, Order No. 2008-2, that outlines needed protections for the sage-grouse, focusing on core areas. We ask the BLM to fully consider and abide by this Executive Order, at a minimum, as it develops the Beaver Creek project. We also ask the BLM to fully consider the memorandum issued by the Wyoming Game and Fish Department on January 29, 2008 entitled “Multi-state Sage-grouse Coordination and Research-based Recommendations.

Mule Deer, Elk, and Pronghorn

In developing the Beaver Creek EIS environmental analysis, BLM should consider and utilize data available from the Wyoming Game and Fish Department to determine protections for game species (and other species). We particularly direct BLM to the Wyoming Game and Fish Department’s publication “Recommendations for Development of Oil & Gas Resources within Crucial & Important Wildlife Habitats .” BLM should also utilize the information regarding the needs of big game species

available from other sources.⁴ Relative to big game, we urge the BLM to protect more than “critical” big game winter ranges. This approach is biologically and ecologically unsupportable and results in unnecessarily and unduly restricted protections. We therefore request that protective measures be considered not just for “critical” winter ranges, but also for all winter range areas in the Beaver Creek EIS area. To the extent BLM excludes “general” winter range areas from the application of protective measures, it should provide a biologically defensible rationale for such a decision. Consideration of the above issues is necessary to prevent unnecessary or undue degradation of wildlife on the public lands. At a minimum the BLM should fully implement the protective provisions specified in the Lander RMP, and the BLM should take steps to ensure that noise does not disturb big game, especially during critical periods such as parturition. Stipulations such as the prohibition on drilling in crucial winter ranges from November 15 through April 1 should be maintained and enforced. The impact of noise on hunters and the hunting experience must also be fully considered and mitigated.

RIPARIAN HABITAT ISSUES, WATER QUALITY, AND COMPLIANCE WITH THE CLEAN WATER ACT

The Clean Water Act and Water Quality Issues

The Clean Water Act (CWA) establishes many requirements that BLM must consider in the environmental analysis and adhere to in the decision document. It is imperative that BLM insure that waters in the Beaver Creek EIS area comply with State water quality standards and that those standards are not violated by natural gas exploration activities. It is critical to recognize that State water quality standards “serve the purposes” of the CWA, which, among other things, is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. . .” 33 U.S.C. §§ 1313(c)(2)(A), §1251(a). That is, a purpose of water quality standards is to protect aquatic ecosystems, and BLM must ensure this comprehensive objective is met by ensuring water quality standards are complied with. Water quality standards are typically composed of numeric standards, narrative standards, designated uses, and an antidegradation policy. All too often, however, only numeric standards are viewed as “water quality standards.” That narrow view is incorrect. The Supreme Court held in PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700 (1994), that all components of water quality standards are enforceable limits. Consequently, the decision document must ensure all components of State water quality standards are met, not just numeric standards. Specifically, oil and gas development must not be allowed in or very near to streams, wetlands, and riparian areas.

⁴ We specifically request that BLM consider the following studies: Sawyer, H., and F. Lindzey, Jackson Hole Pronghorn Study, Wyoming Cooperative Fish and Wildlife Research Unit, September, 2000; Sawyer, H., and F. Lindzey, Sublette Mule Deer Study, Wyoming Cooperative Fish and Wildlife Research Unit, March 2001; Western Ecosystems Technology, Inc., An Evaluation Of The 1988 BLM Pinedale Resource Management Plan, 2000 BLM Pinedale Anticline Final EIS, And Recommendations For The Current Revision Of The Pinedale Resource Management Plan, (Scoping comments submitted for the Pinedale RMP revision), January, 2003.

The State's antidegradation policy is also a critical component of water quality standards. See 40 C.F.R. § 131.12 and applicable State regulations. The environmental analysis should consider the requirements of the antidegradation policy and the decision document should assure these requirements are met.

In addition to the antidegradation policy's protections for waters that are meeting water quality standards, where State water quality standards have not been achieved despite implementation of point source pollution controls, section 303(d) of the CWA requires a State to develop a list of those still-impaired waters, with a priority ranking, and to set total maximum daily loads (TMDLs) of pollutants for the stream "at a level necessary to implement the applicable water quality standards. . . ." 33 U.S.C. §1313(d)(1)(C). Consequently, to the extent waters within the BLM's jurisdiction have been identified as water quality impaired segments, or contribute stream flow to such segments, the Beaver Creek EIS decision document should require affirmative steps toward reducing that impaired status, regardless of whether the State has made a specific allocation of pollutant load to BLM lands at the time the ROD is adopted. If any specific load allocation has been made by the State of Wyoming for activities on BLM lands, BLM should obviously ensure that these are complied with.

The Beaver Creek EIS environmental analysis should consider the requirements of sections 401 and 404 of the CWA and the decision document should ensure full compliance with these requirements. Section 401 requires State certification of compliance with State water quality standards prior to authorization of actions on BLM lands. 33 U.S.C. § 1341. The decision document should fully implement this requirement. Section 404 requires permits before discharges of dredged or fill material can be made into navigable waters, and BLM, through the decision document, should assist the EPA and Army Corps of Engineers with implementation and enforcement of this requirement, which, of course, is a powerful means for the protection of wetlands. See 33 U.S.C. § 1344.

Riparian Areas

The Beaver Creek EIS area likely contains remarkable riparian areas that are vitally important to the ecological health of the region. Properly managing riparian areas is a critical component of managing for biological diversity and for meeting many other needs. Only about 1% of the lands managed by the BLM are wetlands, yet these are some of the most ecologically important landscapes under BLM jurisdiction

Because of the critical importance of these areas, two Executive Orders require their protection. Executive Order 11988 (1977) requires federal agencies to avoid adverse impacts associated with the occupancy of floodplains. Executive Order 11990 (1977) requires federal agencies to minimize the destruction, loss, or degradation of wetlands, and to preserve and enhance the natural and beneficial value of wetlands. Further, all federally approved activities must include all practical measures to minimize adverse impacts to wetlands and riparian areas. As noted several times above, the

decision document must prohibit disturbance in riparian areas and wetlands to ensure these critical resources are fully protected.

INVASIVE SPECIES, NOXIOUS WEEDS, AND MANAGEMENT OF NATIVE VEGETATION

We ask that BLM ensure the decision document provides for compliance with Executive Order 13112, which established requirements and procedures Federal agencies are to adhere to relative to invasive species. Section 2 of the Executive Order requires BLM to identify actions that may affect the status of invasive species and to then:

Use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv) provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them

Just as important, the Executive Order requires BLM to “not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.” The environmental analysis should fully analyze the extent of the invasive species problem in this area, the causes, and options for both restoration and prevention in the future.

The flip side of preventing invasive species from becoming established is protecting native plant species and communities, especially rare and special status species. The BLM should conduct surveys to determine the location and characteristics of native plant communities and rare or special status species. The survey results should be presented in the environmental analysis, and the decision document should establish standards for protecting native plant communities and rare or special status species. It should seek to protect dense stands of sagebrush that could serve as sage-grouse wintering habitat, and recognize the special value of these stands. BLM’s grazing regulations and the Public Rangelands Improvement Act establish that native species and plant communities are to be given preference over non-native species and communities (whether invasive or intentionally created), so the decision document should establish standards to ensure these requirements are met, particularly relative to any reclamation requirements (i.e., introduced species should not be permitted for reclamation purposes).

NOISE IMPACTS

The environmental analysis and the decision document should fully address issues related to noise. These impacts must be evaluated in terms of the remoteness and quietness that so many seek on the public lands. Impacts on hunting should be considered, and mitigation that prohibits noisy activities during the hunting season should be required. Sage-grouse and big game must be protected from the impacts of noise. In addition to eliminating these impacts, efforts should be made to alert hunters that their hunting experience and activities may be disrupted if noisy activities could occur during the hunting season.

CULTURAL AND PALEONTOLOGICAL RESOURCES

Most if not all historical, archeological, and paleontological resources (hereinafter, “cultural resources”) are strictly non-renewable: once marred or destroyed, they are forever lost to future generations. Such fragility demands utmost care and humility from BLM managers and planners. The Beaver Creek EIS environmental analysis should reflect—and the decision document should require—this conservative approach to managing these priceless and irreplaceable resources.

BLM’s multiple-use mandate requires land managers to consider the value of cultural resources in their decision-making process. Unfortunately, these resources are frequently given short shrift in this calculus. Their value is not easily measured, and as a result they are sacrificed in pursuit of more obviously economically profitable resources. The Beaver Creek EIS environmental analysis should ensure this problem is avoided. BLM’s preparation of the Beaver Creek EIS environmental analysis provides an excellent opportunity for the agency to address concerns about these resources and to implement policies that will protect and preserve cultural resources.

The BLM’s management of cultural resources is governed and guided by a host of laws, orders, and regulations. These include, but are not limited to, the Antiquities Act of 1906, the National Historic Preservation Act (NHPA), Executive Order 11593, the Archaeological Resources Protection Act (ARPA), and the Native American Graves Protection and Repatriation Act (NAGPRA). BLM’s decisions regarding cultural resource management are also governed by the FLPMA and NEPA. The BLM must adhere to these and other laws when preparing and implementing the Beaver Creek EIS environmental analysis and decision documents, and must provide evidence of cultural resource consideration as part of this process.

As noted above, the BLM’s multiple-use mandate requires managers to balance resource use and resource preservation. But not only must the BLM examine the effects of the Beaver Creek EIS on cultural resources, it must evaluate whether or not it possesses sufficient information to assess these potential resource conflicts. If the agency lacks enough information to make informed decisions, it must collect data according to a plan and schedule established at the outset of this environmental review process.

The Beaver Creek EIS environmental analysis must ensure there is a sufficient inventory of cultural resources and their values prior to authorizing ground-disturbing activities and it should be used proactively by the BLM in its management in order to avoid resource conflicts. Clearly BLM must fully comply with the need to consult with the State Historic Preservation Office prior to authorizing activities that may harm resources eligible for the National Register of Historic Places, and ensure full compliance with the National Historic Preservation Act. As noted in Southern Utah Wilderness Alliance et al., 164 IBLA 1, 24 (2004), “BLM cannot avoid the consultation requirement by simply stating that it has determined that there is “No Potential to Effect,” and therefore nothing more is required.”

Another concern is consultation with Native American tribes during the Beaver Creek EIS environmental review process. BLM is required to consult with tribes under FLPMA, NEPA, American Indian Religious Freedom Act, NAGPRA, and Executive Order 13007, in order to learn of tribal concerns and places of traditional religious or cultural importance to the tribe. The BLM must specifically request the views of tribal officials, and must solicit the views of traditional leaders or religious leaders. BLM must be diligent in its pursuit of this information.

The Beaver Creek EIS environmental analysis document should identify areas where cultural sites are at risk, and the decision document should employ measures to protect these resources. The areas designated should be of sufficient size to allow viable protection of the resources; designation of just the site itself may not allow for effective management.

CONCLUSION

Thank you for considering these comments, and we look forward to continuing involvement in the development of the Beaver Creek EIS environmental analysis and decision document.

Sincerely,

Bruce Pendery,
Staff Attorney and Director of Public Lands