

October 6, 2008

Messrs. Chris Hanson and Thomas Bills
BLM Buffalo Field Office
1425 Fort Street
Buffalo, Wyoming 82834

Re: Comments on the Fortification Creek Area Draft Resource Management Plan Amendment/ Environmental Assessment.

Dear Messrs. Hanson and Bills:

Please accept these comments from the Wyoming Outdoor Council regarding the above-referenced document and proposed land use plan amendment (hereinafter referred to as the “Fortification Creek EA” or “EA”).

I. The Purpose and Need for the Fortification Creek RMP Amendment Should Be Revised—BLM Should Adopt a “Vision” for the Fortification Creek Area.

The Bureau of Land Management (BLM) has long recognized the special values of the Fortification Creek area and the sensitive resources in this area. Fortification Creek EA at 3-50, A-1. We urge the BLM to retain and continue that recognition, in explicitly stated terms, in this resource management plan (RMP) amendment. There can be little doubt this area does in fact harbor unique wildlife (the isolated plains-dwelling elk herd); a high degree of visual quality; steep, erosive slopes; significant cultural, historical and paleontological resources; and wilderness quality lands. Recognizing and ensuring protection of these resources should form the core purpose and need of this amendment. As will be discussed below, the Federal Land Policy and Management Act’s (FLPMA) direction for RMPs and its definition of multiple use require the BLM to consider the relative scarcity of resources and seek to protect them.

Yet as currently stated the purpose and need for this amendment is stated essentially as meeting a need to balance protection of these resources with oil and gas development. See Fortification Creek EA at 1-1. We urge the BLM to revise the stated purpose and need for this project to encompass a specific recognition of the very significant values in this area and a stated

management desire to ensure protection of those resources in the long-term, to the maximum extent possible, with oil and gas development being a lesser management priority. As will be discussed below, there is little doubt that BLM can and should emphasize resource protection in this area relative to resource development.

Essentially what we are asking the BLM to do is to adopt a “vision” for the Fortification Creek area. We think a vision, an overarching statement of what is needed and what BLM is seeking to achieve or maintain in this area, is needed to guide management. We do not believe that “multiple use” or “balance” are nearly sufficient. Nor do we think the nitty-gritty specific management actions or limitations specified in the preferred alternative provide overall guidance; they are more akin to a to do list. Let us suggest this as a vision for the Fortification Creek area: “The BLM’s overall management goal in the Fortification Creek area is to preserve unimpaired for this and future generations the special values that characterize this area, including wilderness values, wildlife values (particularly the isolated elk herd), cultural values, and scenic values, and to accomplish this the BLM will minimize resource development activities in this area to the maximum extent possible, and condition resource development activities that do occur to the extent needed to preserve these values.” Whether the BLM were to adopt this specific suggestion or not, we believe that something akin to this “vision” statement is needed for this area given its widely recognized important values and its importance to the public. And we believe it will be impossible for the BLM to manage this area effectively in the absence of such an overall, clearly stated, vision (or plan, if you like). The BLM should develop a short, succinct “elevator speech” statement of what the management plan is for the Fortification Creek area because we believe such a statement would be useful to both the public and to the BLM.

II. The Fortification Creek Planning Area should not be Available for Future Oil and Gas Leasing and Lease Suspensions Should Be Put In Place.

With these thoughts in mind, we urge the BLM to consider two modifications to the currently stated preferred alternative. First, we urge the BLM to adopt a land use plan amendment that provides that the Fortification Creek Planning Area will not be available for future oil and gas leasing. As the EA makes clear, much of this area is already leased and oil and gas development is the greatest threat to resources and special values in this area, so limiting this threat as much as possible by not continuing to lease in this area would be very reasonable. In a related provision, the BLM should modify its proposed amendment to state that leases that expire in this area will not be available for re-leasing. Similarly, we urge the BLM to adopt a provision in this amendment that mirrors that made by the BLM in the Pinedale Field Office for the just-released final environmental impact statement (EIS) for the Pinedale Field Office RMP revision. Namely the Fortification Creek RMP amendment should also provide that management actions on existing leases in areas unavailable for future leasing “would be designed to protect important habitats by excluding surface occupancy and/or disturbance to the extent this restriction does not violate the leaseholder’s/operator’s lease rights” at least with respect to sage-grouse, big game, and sensitive species protection. See Pinedale RMP final EIS at 2-140, 2-142, and 2-144. If the Pinedale Field Office of the BLM can adopt a provision such as this for its land use plan certainly the Buffalo Field Office can as well, and at a minimum it should consider a provision such as this.

The second provision we urge the BLM to move toward is putting in place an agreement for lease suspension in the “tri-phased” development areas. Again, this model can be found in the Pinedale Field Office. There the BLM just put in place a requirement for placing in suspension 49,000 acres of leases on the “flank area” of the Pinedale Anticline Field. See Record of Decision (ROD) Final Supplemental Environmental Impact Statement for the Pinedale Anticline Oil and Gas Exploration and Development Project at 4, 6. The BLM should seek to take a similar action in the Fortification Creek area; such a provision or action would be fully consistent with maximizing protection for the significant resources in this area. Moreover, the Buffalo Field Office should put in place a requirement just as was done in Pinedale, that suspensions not be lifted until “a comparable acreage in [areas available for development] has been returned to functioning habitat through the completion of all development operations and successful reclamation of all portions of the well pads within the comparable area. Habitat will be considered functioning when the comparable area is providing sustainable forage (shrubs, forbs, grasses) for wildlife and livestock as determined by animal use and stable populations based on [monitoring and thresholds in the wildlife mitigation matrix].” Pinedale Anticline ROD at 6. Even if the Buffalo Field Office does not put in place lease suspensions as a supplement to its current “tri-phased” development plan, at a minimum it should require the levels and standards of reclamation stated in the Pinedale Anticline ROD rather than the very limited provisions made in the Fortification Creek EA for “tri-phased” development (under Alternative 3 only one-year of successful interim reclamation would be required prior to moving to another area). At a minimum the Buffalo Field Office must fully consider the reclamation standards and thresholds put in place by a sister BLM Field Office and offer a persuasive reason for not adopting equivalent provisions.

III. Reasons Why the BLM Must Adopt the Most Environmentally Protective Alternative Available.

Below and throughout these comments we make recommendations for increasing the degree of environmental protection afforded to the Fortification Creek Planning Area through this land use plan amendment. Following are several specific legal reasons why we think it is appropriate to increase the level of protection, or that such increased protection is required.

A. The BLM has Sufficient Retained Rights in Leased Areas to Require Substantial Environmental Protection.

In our view there is no question 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].”¹ The Council on Environmental Quality (CEQ) regulations implementing

¹ 42 U.S.C. § 4332(1). *See also id.* § 4331 (presenting the environmental protection policies of NEPA).

NEPA reinforce this obligation to protect the natural environment.² The courts too have recognized that the purposes and goals of NEPA control BLM's oil and gas development activities.³ Thus, the BLM must interpret, and implement, its obligations where leases have been issued in light of the policies established by NEPA.

In addition to NEPA, the FLPMA, BLM's organic law relative to its mission and purpose, establishes a requirement to fully protect the natural environment in areas 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"⁴ 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"⁵ Instruments allowing for the use, occupancy or development of the public lands must contain a provision authorizing revocation or suspension if any terms or conditions of the instrument are violated, including compliance with air and water quality standards.⁶ 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."⁷

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 *any action needed* to prevent *both* unnecessary degradation as well as undue degradation of the public lands.⁸ We would also note that this 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."⁹ 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,

² 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").

³ *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.").

⁴ 43 U.S.C. § 1701(a)(8).

⁵ *Id.* at § 1702(c).

⁶ *Id.* at § 1732(c).

⁷ *Id.* § 1732(b).

⁸ *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 42 (D.D.C. 2003).

⁹ *Id.*

“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.”¹⁰

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, 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.¹¹ 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.

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 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:

¹⁰ *Id.*

¹¹ 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.

- 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 legal obligations for the protection of the environment 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 moved off the leasehold.¹² This is an unduly limited view of this regulation, and other applicable provisions of law.

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.”¹³ 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 this degree. 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. In fact, the BLM acknowledged the potential for confusion and disagreement about how the 3101.1-2 regulation should affect lease rights and obligations. In an Instruction Memorandum issued in December 1991, the BLM explained the language of regulation 3101.1-2. Specifically, the 200 meter/60-day rule is not absolute. Rather, because all leases are subject to FLPMA, the “unnecessary and [sic] undue degradation” standard applies, as discussed above. The Instruction Memorandum states therefore that “mitigation required to protect public lands from unnecessary and [sic] undue degradation is consistent with the lease rights granted.”¹⁴ And, further, that “[u]sing a FLPMA standard to determine if an exception to the 200 meter/60 days is consistent with lease rights places the resolution of this issue clearly within the concept of striking the best

¹² 43 C.F.R. § 3101.1-2

¹³ Oil and Gas Leasing, Geothermal Resources Leasing, 53 Fed. Reg. 17,340, 17,341 (May 16, 1988).

¹⁴ Memorandum from the Director of the Bureau of Land Management to all state directors 1992-67 (Dec. 3, 1991).

multiple use balance.”¹⁵ That is to say that applying the FLPMA standard confirms that even under the 3101.1-2 regulation, the BLM is committed to conserving wildlife and preventing pollution, while still allowing the lessee access to oil and gas resources. Therefore, the 3101.1-2 regulation does not stand as the sole word on what constitutes “reasonable measures,” as the BLM sometimes claims, and in any event it too hardly constrains the BLM’s rights to condition development.

The final rulemaking promulgated on May 16, 1988 for the 3101.1-2 regulation, remarks that the intent of the rulemaking was to “resolve the uncertainty which has existed concerning the Bureau’s authority within the terms and conditions of the standard lease form to control site-specific environmental impacts.”¹⁶ The uncertainty stems from arguably ambiguous language in the 3101.1-2 regulations, which states:

A lessee shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold subject to: Stipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such *reasonable measures* as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed. To the extent consistent with lease rights granted, such *reasonable 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. *At a minimum*, measures shall be deemed consistent with lease rights granted provided that they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year.¹⁷

The final rulemaking, which addressed comments in response to the proposed rule about the definition of “reasonable measures,” clarifies the meaning of “reasonable” in the context of the final version of regulation 3101.1-2. The BLM first states that the “final rulemaking provides that the Bureau, *at a minimum*, can require relocation of proposed operations by 200 meters and can prohibit new surface disturbance for a period of 60 days, and that such requirements are consistent with the lease rights granted.”¹⁸ Therefore, the BLM intends the 200 meter/60 day rule as the smallest measure it may take to protect against environmental surface damage.

BLM commentary at 53 Fed. Reg. 17340 makes clear that the BLM has the authority to require environmental protection under the terms of the standard lease form to regulate environmental impacts on leaseholds, and that the specific minimum standards set out in the 3101.1-2 regulation does not greatly limit the BLM’s retained authority.¹⁹ Consequently, the

¹⁵ *Id.*

¹⁶ 53 FR 17340.

¹⁷ 43 CFR § 3101.1-2 (emphasis added).

¹⁸ *Id.* (emphasis added).

¹⁹ 53 FR 17340, “To resolve the uncertainty which has existed concerning the Bureau’s authority within the terms and conditions of the standard lease form to control site-specific environmental impacts, the proposed rulemaking was intended to establish the measures over which the Bureau has clear authority.” “[I]t is appropriate to establish

provisions in the 3101.1-2 regulation do not completely or unilaterally define the scope of BLM's retained rights, and the arguably broader reservation of authority evidenced in the standard lease form is still fully operable.

Furthermore, language in a revision of the BLM's Federal oil and gas leasing and operating regulations proposed at 63 Fed. Reg. 66840-01 includes discussion of 43 C.F.R. part 3100, subpart 3104 (Environment and Safety).²⁰ The proposed revision states that subpart 3104, which concerns environmental obligations of lessees, was intended to guide the well operator in environmental protection, though in general, not specific terms.²¹ Instead, "[t]he details of environmental protection are considered in several *other sections of these regulations* and in *lease terms and conditions* as well as orders and notices BLM may issue."²² This commentary from the proposed revision explained that the revision was intended to clarify and organize existing and new regulations that came out of the Federal Onshore Oil and Gas Leasing Reform Act of 1987, including the addition of environmental provisions. *Id.* at 66841. Therefore, since the environmental obligations are derived both from the language of the standard lease form and the regulations together, clearly the 3101.1-2 regulation cannot alone be considered the authority directing the BLM's ability to enforce environmental protection.

Consequently, 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.²³
- The right to "use" as much of the leasehold as "necessary" to recover all of the leased resource.²⁴
- The right to build and maintain "necessary" improvements to extract the leased resource.²⁵

minimum parameters within which the Bureau can specify site-specific mitigating measures which, by regulation, are consistent with the lease rights granted a lessee. The final rulemaking provides that the Bureau, at a minimum, can require relocation of proposed operations by 200 meters and can prohibit new surface disturbance for a period of 60 days, and that such requirements are consistent with the lease rights granted. The authorized officer may grant a lease suspension in appropriate cases if new surface disturbance is prohibited under this section. Similarly, the authority of the Bureau to prescribe "reasonable," but more stringent, protection measures is not affected by the final rulemaking."

²⁰ Environment and Safety regulations are now codified at 43 C.F.R. 3162.5, with Environmental Obligations, specifically, at 43 C.F.R. 3162.5-1. Though the rule was not finalized in the code where it was proposed (3104 now addresses bonding), the language in 3152.5-1 is sufficiently close to subpart 3104 proposed in the Federal Register document cited here (63 FR 66840) that one may infer that the intent made public in the quoted text applies to the Environment and Safety subpart as promulgated in 3152.5-1. (The intent as set out in 63 FR 66840 is to provide "an explanation of what an operator must do to protect the environment when conducting operations," while the current code at 3162.5-1 begins by explaining the conduct required of operators to preserve the environment: "The operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality." 63 FR 66840, 43 C.F.R. 3162.5-1.)

²¹ 63 FR 66840-01 at 66844.

²² *Id.* (emphasis added).

²³ Form 3100-11.

²⁴ 43 C.F.R. § 3101.1-2.

²⁵ 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 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.²⁶
- Terms, conditions, and stipulations in the lease.²⁷
- Regulations and formal orders in effect when the lease is issued.²⁸
- Regulations and orders issued afterward, if not inconsistent with lease rights and provisions in the lease.²⁹
- Specific, non-discretionary statutes.³⁰
- Reasonable measures.³¹

Special mention may be needed with respect to the first limitation on conveyed rights. The standard Offer to Lease and Lease for Oil and Gas (Form 3100-11) makes the removal of oil and gas “subject to applicable laws.”³² 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, and the Bald and Golden Eagle Protection Act 16.³³ And thus the lease—and the lessee—have specifically been made subject to the provisions of these 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 are stated in the standard lease form. That is, the rate of development can be specified as needed in the public interest, reasonable measures not necessarily limited to only the three mentioned in the 3101.1-2 regulation that are deemed necessary to minimize adverse impacts can be required, and if the impacts of the proposed operation are substantially greater than normal, operations can be denied.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ 43 C.F.R. § 3101.1-2.

³¹ *Id.*

³² Form 3100-11.

³³ 16 U.S.C. §§ 703-712, U.S.C. §§ 668-668c

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 fee patentee, nor does it convey an unencumbered estate in the minerals.³⁴

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.”³⁵

Clearly, the BLM has more than sufficient authority to regulate development of an oil and gas lease in order to meet its obligations under numerous applicable environmental laws and policies enacted to protect the natural environment.³⁶ Or said differently, it has more than sufficient authority to meet its legal obligations and management objectives 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” as discussed in *Boesche* above.³⁷

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 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, as provided for in the standard lease form.³⁸ Accordingly, they constitute additional retained rights.

³⁴ *Boesche v. Udall*, 373 U.S. 472, 477-78 (1963).

³⁵ *Id.* at 484.

³⁶ BLM sometimes attempts to invoke BLM Instruction Memorandum (IM) 92-67 (issued December 3, 1991) that was discussed above as limiting its ability to condition development on a lease. But construing the IM in such a way could be inconsistent with the decision in *Mineral Policy Center v. Norton* (also discussed above) if it is not recognized that a *dual* obligation is in operation and the undue degradation prong of that obligation requires the BLM “to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.” The IM must be interpreted in light of the holding in *Mineral Policy Center* and in light of the statements made by the BLM in the Federal Register in developing the 3101.1-2 regulation, also discussed above. And it should be pointed out that this IM expired on September 30, 1992.

³⁷ *Boesche v. Udall*, 373 U.S. 472, 477-78 (1963).

³⁸ Form 3100-11.

“Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and *care* in the operation of said property”³⁹ “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”⁴⁰ “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”⁴¹ “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*.”⁴² Clearly the Mineral Leasing Act gives the BLM broad authority to condition oil and gas development in the interest of conservation and this authority has been recognized by the courts.⁴³

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”⁴⁴ “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.”⁴⁵ All operations will be conducted in a manner “which protects other natural resources and environmental quality”⁴⁶ “The operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality.”⁴⁷ “The

³⁹ 30 U.S.C. §187 (emphasis added).

⁴⁰ *Id.* § 189.

⁴¹ *Id.* § 209 (emphasis added) *See also* 43 C.F.R. § 3103.4-4 (companion regulatory provision allowing suspension of leases).

⁴² *Id.* § 226(g) (emphasis added) (also requiring approval of a plan of operations and “complete and timely” reclamation and restoration of lease tracts).

⁴³ *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).

⁴⁴ 43 C.F.R. § 3161.2.

⁴⁵ *Id.*

⁴⁶ *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”).

⁴⁷ *Id.* § 3162.5-1(a) (also requiring compliance with orders, applicable laws, regulations, lease terms and the drilling/operations plan).

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.”⁴⁸

Furthermore, the BLM has separate regulations related to making authorizations of land use on the public lands. “Each land use authorization shall contain terms and conditions which shall” protect cultural resources, ensure compliance with pollution control laws, required compliance with state environmental standards, and otherwise protect Federal properties. 43 C.F.R. §§ 2920.7(b)(1)-(4) and (c)(1)-(5).

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 (1999), which formerly applied 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.’”⁴⁹

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, using no more of the leasehold than is “necessary” and building only “necessary” improvements, it has done so subject to any development occurring under a highly regulated, comprehensive framework administered by the federal agency, 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

⁴⁸ Id. § 3162.5-1(b).

⁴⁹ 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).

give the lessee anything approaching the full ownership of a fee patentee.”⁵⁰ Having given only a highly conditioned 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 discussed above it must in fact do so.⁵¹

Furthermore, besides the fact that the BLM has given only a significantly limited right, it is well established that a regulatory taking can *only* occur if an agency deprives the leaseholder of *all* economically viable uses of the leasehold.⁵² 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 they 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 Fortification Creek area even in areas that have been leased. And while not mentioned above, clearly the BLM has an even greater authority and greater legal obligation to protect the natural environment in areas that have not yet been leased. 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

⁵⁰ *Boesche* at 477-78.

⁵¹ In addition there also is little chance that there will be a breach of contract if the agencies carefully regulate 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 likely demanded of onshore leases.

⁵² *Lucas v South Carolina Coastal Council*, 505 U.S. 1003 (1992).

timing of lease activities, even if these requirements are imposed on leases issued long ago (1948).⁵³

b. Clustered Development and Directional Drilling

Another important means to achieve environmental protection is to require clustered development and the related technique of requiring directional drilling. Again, there is no doubt that imposing such requirements are well within the agency's retained rights under a federal oil and gas lease. Oil and gas lessees may have a right to retrieve all the oil and gas on a leasehold, but they do not have a right to do it exactly when, where, and how they choose; specifying the time, place and manner of oil and gas development is well within the agency's authority, and in fact in the words of the Mineral Leasing Act it has an obligation to "regulate" oil and gas development so as to conserve surface resources. That directional drilling might cost a leaseholder somewhat more than straight-hole drilling is not sufficient reason in and of itself for the BLM to not require directional drilling, if such would better protect the natural environment it has been charged with protecting. Only if all economically viable use of the leasehold would be precluded is the BLM barred from requiring directional drilling.

c. Lease Suspension

Lease suspension is another means at BLM's disposal to ensure full environmental protection is achieved in leased areas. As noted above, the Mineral Leasing Act gives the BLM authority to suspend leases "in the interest of conservation," a term that includes conservation of environmental values, and BLM's companion regulations reemphasize this power. The courts have also recognized this authority. Suspending leases so as to protect the natural environment is a well recognized means to protect the natural environment, having been used by the BLM in the Jack Morrow Hills and Pinedale Anticline areas in Wyoming, for example.

d. Unitization

Another mechanism that could be utilized to protect environmentally sensitive areas is unitization of leases. This could allow lease holders to enjoy the benefits of development of leases while protecting sensitive areas. While there may be some limits on the ability to require unitization, the agencies could certainly urge operators to enter into voluntary unitization agreements and use other mechanism (pooling orders) to pursue unified development in sensitive areas. Pursuing unitization would allow for orderly development with less infrastructure and disturbance, while helping to eliminate issues such as those related to drainage of oil and gas.

e. Conditions of Development

Other means to protect the natural environment that are well within the BLM's retained rights to require include limitations on well pad size, requiring closed-loop drilling fluid systems, the use of remote well monitoring and car pooling and other traffic reduction techniques, and requirements to bury utility lines. The agencies can require these and other techniques and provisions as prerequisites to development on existing leases due to their substantial retained rights.

⁵³ *National Wildlife Federation et al.*, 169 IBLA 146, 164 (2006).

f. *Retention and Enforcement of Lease Stipulations*

One of the most important means by which the agencies 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.

g. *Lease Buyout and Trade*

This is clearly a potentially important means to protect wildlife crucial habitats and migration corridors in areas that have already been leased. The land use plan applicable to the Fortification Creek area should fully explore and attempt to utilize this means to protect the environment.

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

As discussed above, under 43 U.S.C. § 1732(b) the BLM is required to take “any” “action” that is necessary to prevent unnecessary or undue degradation of the public lands. This is especially true since as discussed above in detail, the BLM has almost complete authority to specify the time, place, and manner of oil and gas development. We feel that few impacts resulting from oil and gas development are unavoidable, and consequently they are undue if they are permitted. This provision is a bedrock provision that applies to all BLM oil and gas actions and activities.

The Fortification Creek EA states that impacts under the BLM’s preferred alternative (Alternative III) to fish and wildlife resources will be moderate whereas they would be only minor under Alternative II. Fortification Creek EA at ES-3 to ES-4. It also states that impacts to recreation resources will be major. We feel that by any measure this level of impacts is a prohibited “undue” impact on the environment of the Buffalo Field Office. By definition the BLM has within its power the ability to require the provisions in Alternative II rather than those in Alternative III otherwise Alternative II would not even be presented in the EA, and thus the increased impacts under Alternative III are undue by definition. As noted above, the Mineral Policy Center court recognized that “FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.” 292 F.Supp.2d at 42 (emphasis added). Because the BLM has almost complete authority to regulate the time, place and manner of oil and gas development—and in fact an obligation to do so under many “applicable” laws and many other “non-discretionary” laws—none of these impacts have to be accepted by the BLM as inevitable, unavoidable or acceptable, and thus again by definition they are undue and prohibited. The Fortification Creek EA should be modified in a way to ensure these undue impacts do not occur.

C. BLM's Obligation to Manage the Public Lands for Multiple Use Demands that Resources in the Fortification Creek Area be Fully Protected.

The definition of multiple use in FLPMA is long, but key provisions include the following: (1) public lands and their resource values must be managed so that they “best meet the present and future needs of the American people;” (2) it is appropriate that some land be used “for less than all of the resources;” and (3) there must be harmonious and coordinated resource management that is done “without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or greatest unit output.” 43 U.S.C. § 1702(c). Of course, BLM land use planning must “use and observe the principles of multiple use,” and specific management actions must also be done “under principles of multiple use.” 43 U.S.C. §§ 1712(c)(1), 1732(a).

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

When the multiple use mandate as defined by FLPMA is considered, it is apparent that the BLM has an obligation to fully protect the resources on its lands in the Fortification Creek area. It must ensure the long-term needs of the American people are met, it need not provide for all resource uses on all areas of the public lands, and it must ensure there is no permanent impairment of the productivity of the land and quality of the environment. Under these obligations, we believe it is apparent that the BLM must provide for the improvements in the Fortification Creek EA that we ask for throughout these comments.

D. The FLPMA Requires RMPs to Protect Relatively Scarce Values.

In addition to the obligation to ensure that an RMP amendment is based on the need to use and observe the principles of multiple use management, as defined in FLPMA, the FLPMA established another significant obligation for BLM RMPs. In developing an RMP, the BLM “shall:”

- Consider the relative scarcity of the values involved and the availability of alternative means . . . and sites for realization of those values.

43 U.S.C. §§ 1712(c)(6)-(7). As discussed above, the definition of multiple use in FLPMA also requires consideration of the relative value of resources.

When this obligation is considered, it is apparent the BLM has significant obligations. The RMP must ensure that relatively scarce values are considered and ensure that both alternative means and sites are considered for the “realization” of those values (“realization” means to “obtain or achieve”). That is, the Fortification Creek RMP must attempt to realize

relatively scarce values through the provision of alternative means and sites for their protection. These values must be “achieved” by the RMP if they are to be realized. Given that coalbed methane is plentifully available throughout the Powder River Basin while resources like the isolated elk herd and the wilderness study area are uniquely located in the Fortification Creek area, it seems apparent to us that the BLM should minimize the emphasis on coalbed methane development and emphasize as much as possible the protection of these other values, given the relative scarcity of the values involved. The Fortification Creek area is the only alternative site available for the realization of these relatively scarce values. This is especially true given the high level of retained rights the BLM enjoys in leased areas, as discussed in detail above. To comply with FLPMA, the Fortification Creek EA should reflect this balancing to a much greater degree, as urged throughout these comments.

E. The National Environmental Policy Act Imposes Obligations on the BLM that must be Reflected in the Fortification Creek EA.

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

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

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

42 U.S.C. §§ 4331(b)(1)-(6). With that underlying policy and end established, the Congress went on to “direct[] that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies

set forth in this chapter” Id. § 4332(1). It is impossible to view these commandments as purely “procedural” even if they are not specifically enforceable by a court. Congress clearly wanted more than “procedure,” it wanted the policies of NEPA to be implemented through the NEPA process. As noted earlier, this was specifically recognized by the Getty Oil Company court. 614 F.Supp. at 920.

And there is no doubt that the CEQ recognized the requirement to abide by the policies of NEPA and sought to ensure that agencies implement them through the process of preparation and adoption of a NEPA document. Following is a partial list of mandatory obligations to implement, or at least recognize, the policies of NEPA that are established by the CEQ regulations:

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

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

The objective of a NEPA document is to implement the policies underlying NEPA, even if such is not specifically stated in quite the unambiguous way as some of the provisions in the Endangered Species Act (ESA) are, for example. Consequently, the whole purpose of the Buffalo Field Office RMP amendment applicable to the Fortification Creek area (more specifically the EA underlying it) is to fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; to assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings; to attain the widest range of beneficial uses of the environment without degradation . . . or other undesirable or unintended consequences; to preserve important historic, cultural and natural aspects of our national heritage . . . ; to achieve a balance between population and resource use . . . ; and to enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources. That is what NEPA is all about—not paperwork—and the Fortification Creek EA must pursue

these goals even if they are not specifically enforceable by a court.⁵⁴ As an executive branch agency charged with faithfully executing the laws, the BLM cannot ignore these requirements. Given this, it is clear that NEPA demands many if not all of the changes in the Fortification Creek EA that we ask for in these comments.

Finally, while here we have chosen to focus on the underlying policies of NEPA in hopes that this will assist the BLM in improving the Fortification Creek EA and resulting RMP amendment, there is little doubt in our view that the Fortification Creek EA suffers from numerous significant “procedural” defects relative to NEPA compliance—requirements the courts decidedly do enforce. The BLM has failed to take a “hard look” at many significant environmental issues in the Fortification Creek EA. It has not adequately considered mitigation measures to address the numerous significant environmental impacts that are revealed. It has not considered a full range of reasonable alternatives. For these reasons, in addition to the many “substantive” problems in the Fortification Creek EA that we address in these comments, there are also numerous “procedural” violations of the NEPA and FLPMA.

F. The BLM’s Sensitive Species Manual Demands the Changes Requested Here.

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

What this means is that at a minimum, the BLM must seek to “conserve” the BLM sensitive species that occur or potentially occur in the Fortification Creek area. That is, the requirement established by the BLM Manual is to not only to prevent these species from being listed under the ESA (several BLM sensitive species are being reconsidered for listing due to inappropriate interference in scientific decisions by political appointees in the Department of the Interior), but also to remove them from the BLM sensitive species list. This is an affirmative obligation established by the BLM manual—the BLM must put in place specific habitat and population management objectives designed to remove these species from the special status species list, that is, to conserve them. The Fortification Creek RMP amendment should ensure that this need is in fact pursued and implemented.

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

⁵⁴ Even though BLM may be pursuing an EA and not an EIS, an EA must nevertheless “Aid an agency’s compliance with the Act when no environmental impact statement is necessary.” 40 C.F.R. § 1508.9(a)(2).

with these species being removed from the sensitive species list. Last, we would note that the sensitive species manual requires that “[l]and use plans shall be sufficiently detailed to identify and resolve significant land use conflicts with special status species without deferring conflict resolution to implementation level planning.”

G. State of Wyoming Policy and Public Opinion in Wyoming Demand that the BLM Make the Improvements in the Fortification Creek RMP Amendment That We Have Asked For.

There is an increasing view in the state of Wyoming that there is a need to “go slow” and be thoughtful when it comes to oil and gas development. There is almost no support, in either official state policy or the opinion of Wyoming citizens, for the view that oil and gas development should proceed in as unfettered a manner as possible.

The need for balanced energy development was reflected in the outcome of the Wildlife Heritage Summit held in Casper, Wyoming in the summer of 2007. There was a recognized “very high” need for “an effective paradigm for energy development that balances the needs for humans and wildlife.” This view was also strongly expressed in Governor Freudenthal’s recently-finished “Building the Wyoming We Want” conference, also held in Casper and attended by over 500 people. The dominant theme at the meeting was the need to be careful and thoughtful in the face of massive development proposals. The Western Governors’ Association (WGA) adopted a resolution in February 2007 that called for the identification of key wildlife migration corridors and crucial wildlife habitats coupled with “recommendations on needed policy options and tools for preserving those landscapes.” This issue will be discussed in more detail below. Its Oil and Gas Working Group has submitted its report making recommendations for how this policy should be implemented, including recognition of a need for better understanding of the special needs of crucial wildlife habitat and wildlife corridors prior to leasing. Given this widespread evolving recognition of the need to “go slow” in areas with high environmental values, especially wildlife values, the Fortification Creek EA should be built around and recognize such sentiments.

In addition to these recent meetings and proceedings, there are other indications of a demand for proceeding carefully when it comes to oil and gas development. For one, the Wyoming Game and Fish Department, with the endorsement of the Wyoming Game and Fish Commission, has adopted its “Recommendations for Development of Oil and Gas Resources within Crucial and Important Wildlife Habitats” policy. Available at <http://gf.state.wy.us/downloads/pdf/og.pdf>. Among many other things, this policy recognizes the ineffectiveness of winter drilling timing limitation stipulations standing alone, although the state policy recommends retaining these stipulations, also. In all cases, Wyoming’s mitigation policy recommends going beyond just the winter drilling timing limitations BLM applies to lease parcels on crucial winter range, to also include a suite of additional standard management practices. These additional management practices include planning to regulate the pattern and rate of development, phased development, and cluster development, among many other provisions, few if any of which are ensured by the stipulation limiting wintertime drilling. But again, the policy also recommends at least retaining these stipulations at a minimum.

Moreover, The State of Wyoming has a policy relative to disturbance of crucial habitats, including crucial winter ranges. Exhibit 1. Wyoming Mitigation Policy lists crucial habitats as “vital.” Vital habitat “directly limits a wildlife community, population, or subpopulation” and replacement of this habitat “may not be possible.” Crucial habitat is habitat “which is the determining factor in a population’s ability to maintain and reproduce itself . . .” The State of Wyoming’s policy is that there should be no significant decline in habitat function in these vital crucial habitats, and even though some modification may be allowed, the location, essential features, and species supported must remain “unchanged.” As will be discussed below, there is no doubt that FLPMA requires the BLM when engaged land use planning to consider and implement state policies to the maximum extent possible, if not inconsistent with Federal policy. 43 U.S.C. § 1712(c)(9).

Again, it is possible to frame the issues discussed in this section as creating for BLM a need to recognize and to the extent possible comply with State policy. This need and obligation is certainly recognized in the FLPMA in the context of land use planning. 43 U.S.C. § 1712(c)(9). But we believe there is a considerably more significant need here. Namely, what the above activities signify is the increasing concern of the general public regarding the extremely rapid, aggressive oil and gas development occurring in Wyoming. The public wants a slower more thoughtful pace that fully considers other important values. This is reflected in activities and outcomes of meetings like the Wildlife Heritage Summit, but it is also reflected in broad-based concern over oil and gas development in the Wyoming Range in western Wyoming, leading to the introduction of legislation by Senator John Barrasso (S. 2229, the Wyoming Range Legacy Act of 2007) to designate much of the Wyoming Range off limits to future leasing. Such an action by a Republican in a conservative Republican State could only occur if a wide cross-section of society—labor, outfitters, livestock operators, hunters, some oil and gas workers, and many others—united in a concern over the pace and nature of oil and gas development in special places. That is what has happened in the Wyoming Range and the same is happening increasingly throughout Wyoming, as reflected by the above examples. The BLM should recognize this trend and ensure the Fortification Creek RMP amendment does not run counter to it.

H. The Energy Policy Act of 2005 Is Not Contrary to and does not Prohibit the Needed Improvements in the Fortification Creek RMP Amendment.

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

Section 361 of the EPAAct requires no more than a review of current oil and gas leasing and permitting practices. Section 362 requires expeditious compliance with NEPA and other laws and timely action on leases and applications for permits to drill (APD) but it in no way modified the requirements of other laws, or their underlying policies and direction. Section 366 establishes deadlines for processing APDs, but specifically makes such “deadlines” subject to compliance with NEPA and other laws first. The categorical exclusions from NEPA compliance provided for under section 390 did little more than allow for NEPA compliance at a “higher altitude” than compliance at the APD level. NEPA was certainly not abandoned. In sum, the EPAAct only sought to increase the rate of oil and gas development on the public lands, so long as

other provisions of law and policy were still complied with. Consequently, the EPAct in no way provides a barrier to the needed improvements in the Fortification Creek EA.

I. The Wyoming Governor's Executive Order Calling for Protection Of Sage-Grouse And The Western Governors' Association Wildlife Corridors Initiative are Two Other Policies the BLM Must Seek to Comply With.

On August 1, 2008 the Governor of Wyoming issued Executive Order (EO) 2008-2 outlining state policy and protective measures relative to the greater sage-grouse. At the WGA meeting in Jackson in late June and early July 2008 the western Governors, including Wyoming's Governor, adopted as official policy a Wildlife Corridors Initiative intended to implement the February 2007 resolution mentioned above. We believe both of these policies establish direction the BLM must adhere to to the extent possible. The Western Governors' Wildlife Corridors Initiative can be found at <http://www.westgov.org/wga/publicat/wildlife08.pdf>. The EO is attached as Exhibit 2.

The EO recognizes that the greater sage-grouse "is an iconic species" in Wyoming. The EO provides for an approach to sage-grouse conservation that differs markedly from BLM's classic approach. It is based on a recognition of large, contiguous Core Breeding Areas and calls for protection of these areas. In contrast, the BLM's standard and now largely scientifically discredited approach has been to attempt to prohibit or limit development within certain distances of individual leks during certain periods of time.⁵⁵

While we recognize that the EO did not recognize or designate core areas in the Fortification Creek Area, a review of the maps provided with the EO shows the Fortification Creek area has a rather large concentration of high sage-grouse use areas. And the EO does nevertheless call for ensuring that development "be designed and managed to maintain populations, habitats and essential migration routes outside of Core Population Areas." We believe the BLM must at a minimum agree to abide by this provision and adopt it.

As recognized in the EO, the U.S. Fish and Wildlife Service in commenting on the State's core area approach to sage-grouse management stated, the "core population area strategy . . . is a sound framework for a policy by which to conserve greater sage-grouse in Wyoming." The BLM Wyoming State Director followed suit:

I am aware of your Sage-Grouse Implementation Team's work to define "core areas" for sage-grouse within the Powder River Basin and across Wyoming. We have received maps of the core areas identified by the Team along with recommendations to you and understand that the U.S. Fish and Wildlife Service have provided an endorsement of both the areas and strategy. Consequently, it seems appropriate to base our management strategy on these "core areas."

⁵⁵ See Exhibit 3 for documentation that limiting development within a certain radius of a lek, at least as has been practiced, is scientifically discredited.

Letter from Donald A. Simpson, Acting State Director, Wyoming BLM, to Wyoming Governor Dave Freudenthal, dated June 12, 2008 (BLM State Office files) (emphasis added). Given this level of support, we believe the Fortification Creek EA should ensure compliance with the EO.

Moreover, in addition to the EO, the Wyoming Game and Fish Department has adopted specific mitigation measures that should be adopted to protect the sage-grouse, in compliance with the provisions in the EO. Those provisions are available at http://gf.state.wy.us/wildlife/wildlife_management/sagegrouse/index.asp. The BLM should also adopt these measures as a component of the Fortification Creek EA and RMP amendment.

Under the FLPMA, the BLM of course must coordinate planning and management activities with the land use planning and management programs of a State, including considering the policies of approved State resource management programs, if not inconsistent with the laws governing the public lands. 43 U.S.C. § 1712(c)(9). The BLM must keep apprised of state plans, assure consideration of those plans in BLM planning, and assist in “resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans” *Id.* “Land use plans of the [BLM] under this section shall be consistent with State and local plans to the maximum extent [the BLM] finds consistent with Federal law and the purposes of this Act.” *Id.* Consequently, there is little doubt the BLM is obligated to abide by the EO relative to sage-grouse conservation in the Fortification Creek area.

With respect to the Migration Corridors Initiative, the Fortification Creek EA as currently written raises concerns with BLM compliance with this official policy of the western Governors. In adopting the Initiative, the Governors called for identifying and preserving for future generations wildlife corridors and crucial wildlife habitats. According to the Governors, “[t]he West would not be the West” without the wide array of wildlife that characterizes the West “interacting in vast intact landscapes.” The Initiative focuses on ensuring migration corridors and crucial habitats are protected in the face of pressures from energy development, transportation, land use, climate change, and oil and gas development.

The Fortification Creek EA makes it clear that a number of wildlife crucial habitats are present in the area, especially for elk. In the recommendations made by the WGA’s Oil and Gas Working Group, which were adopted by the Governors as part of the Initiative, it is the policy of the Governors in these kinds of habitats to:

- Provide for mitigation in this sequence: avoidance, then minimization, and last compensation.
- Site-specific NEPA analysis should be conducted before offering lease parcels in crucial habitats.
- Consultation with the State should occur before issuing leases in crucial wildlife habitats and the Governors’ objective is to “ensure that leasing does not occur in either identified wildfire corridors or crucial habitats, or that appropriate protective stipulations, including NSO, are applied.”
- Before leasing is approved in an area, areas where there is a “heightened concern because of conflicts between leasing and/or development and crucial wildlife habitat or corridors”

should be identified and if this information is lacking “short-term postponement of leasing decisions affecting these areas” should be applied until the needed information is available.

Where there are existing leases in place, the western Governors have also established policy, including a need for annual meetings to ensure appropriate stipulations are in place, a need to include new science-based information in planning, and ensuring there is timely NEPA analysis of development proposals that includes consideration of impacts on crucial habitats, including consideration of off-site mitigation.

As discussed above, the FLPMA imposes strong requirements on the BLM to abide by state policy in its planning process with excuse from this only allowed if there is a clear and unavoidable conflict between State and Federal policy. And we would note that in the end the BLM must adopt the recommendations of a Governor so long as they “provide a reasonable balance between the national interest and the State’s interest,” which we feel the Wildlife Corridors Initiative, Wyoming Mitigation Policy, and the sage-grouse EO do. See 43 C.F.R. § 1610.3-2 (describing FLPMA consistency review process). If the provisions in the WGA policy and State policy were fully recognized and abided by, we feel it is very likely the BLM would move toward adopting many of the recommendations we make in these comments. Complementing and reinforcing the need to ensure consistency with state policy are the provisions in BLM’s regulations at 43 CFR 1610.3-1(a). This provision in BLM’s FLPMA planning regulations governs coordination in planning. It specifically applies to interactions with other Federal agencies and State and local governments. The BLM is under an obligation to ensure that the Fortification Creek RMP amendment is apprised of state policies and it must assure that it considers state policies, and most importantly the Fortification Creek EA must “assist in resolving, to the extent practicable, inconsistencies between . . . plans.” Id.

IV. The BLM Should Modify the Proposed Land Use Plan Amendment in Accordance with the Above Policies and Requirements.

Given the above legal rights, legal obligations, trends in public desires, and so forth, we believe the BLM should modify the proposed RMP as follows. In the following table we present provisions that we feel should be adopted as the RMP amendment, they include some provisions currently provided for in Alternative II and some provisions currently provided for in Alternative III. Essentially we are asking that BLM adopt as its final preferred RMP amendment a combination of provisions from Alternatives II and III. We recommend that BLM adopt:

Provisions from Alternative II	Provisions from Alternative III
Surface disturbance not allowed on highly erosive soils or slopes greater than or equal to 25 percent.	No discharges into ephemeral or intermittent drainages.
Reservoirs and ancillary facilities located outside of elk yearlong range	Well metering and POD visitations prohibited in elk crucial winter ranges and elk calving areas between November 15 and April 30 and May 1 to June 30, respectively.

Tri-phased development must show two years of successful intermittent reclamation—but see discussion above regarding Pinedale Anticline ROD and provisions for reclamation that must be demonstrated to lift lease suspensions—those provisions should be adopted as part of tri-phased development.	
Timing limitation stipulations for surface-disturbing activities between November 15 and April 30 retained.	
Secondary compressors located outside of elk yearlong range.	
No change from BLM base data permitted for elk security and road density standards.	
Designate the 52,069-acre ACEC.	
Designate a wildlife habitat management area that includes elk yearlong range as well as crucial ranges.	

Again, we feel that adoption of these provisions is either required by or strongly encouraged by the laws and policies discussed above. These recommended provisions are fully in accord with BLM’s retained rights in leased areas and the policies in the numerous underlying “applicable” laws that have been discussed; are either necessary to prevent unnecessary or undue degradation of the public lands or at a minimum result in less undue degradation than BLM’s current preferred alternative; are fully in compliance with NEPA’s policies; better meet the definition of multiple use stated in FLPMA especially the need to not allow for permanent impairment of resources; better reflect the relative scarcity of values and the need to realize those values as required by FLPMA; are more in compliance with the provisions of BLM’s Special Status Species Manual especially the requirement to take management actions that lead to the removal of species from the special status species list; and are more fully in compliance with the EO and the WGA Migrations Corridors Initiative. Consequently, the BLM should adopt these provisions in the Fortification Creek RMP amendment.

In addition to these changes to the preferred alternative we also ask the BLM to make the following changes to its preferred alternative, again for the reasons that have been discussed above.

- We ask the BLM to fully consider requiring the operators in the Fortification Creek area to install and use a liquids gathering system as a means to reduce traffic. The BLM has required this approach on the Pinedale Anticline in the recent Pinedale Anticline ROD, so this approach is clearly within the BLM’s authority.
- We ask the Buffalo Field Office to fully consider the wildlife protection measures specified by the BLM in both the Pinedale RMP final EIS and the Pinedale Anticline ROD. We believe many of these measures are just as applicable in the Buffalo Field Office as they were in Pinedale, especially given the BLM’s acknowledgement of the

significance and sensitivity of the elk herd in the area. We again especially ask the BLM to adopt the provision from the Pinedale RMP that states that BLM will seek to not allow surface disturbance on existing leases to the maximum extent it can when the lease falls in crucial wildlife habitat in areas that will be unavailable for future leasing.

- We urge the BLM to continue the current prohibition on the construction of overhead power lines in the Fortification Creek area. Overhead power lines even if constructed near roads have nothing but negative impacts on aesthetics and on wildlife. As discussed in great detail above, the BLM has both the authority to prevent such impacts and in fact a legal obligation to do so.
- We also urge the BLM to maintain at least the current VRM Class III designation for the Fortification Creek area, although we support designating the wilderness study area a more protective category.
- The Buffalo Field Office has recently been requiring greater protections for sage-grouse as part of its RMP revision relative to sage-grouse. We urge the BLM to make these protections applicable to the Fortification Creek Area in this RMP amendment.

V. Additional Issues and Concerns.

We would also like the BLM to consider the following additional issues and concerns that are applicable to the Fortification Creek EA.

A. Air Quality.

The BLM has done nothing more than a qualitative air quality analysis for this NEPA process. This is nothing more than an inventory of anticipated emissions; it is not an analysis of impacts. This fails to meet BLM's legal obligations. First, under FLPMA, the BLM must "provide for compliance" with clean air laws in an RMP. 43 C.F.R. § 1712(c)(8). The BLM cannot say with assurance it is meeting this requirement when all it does is inventory the level of emissions. Also, an EA must provide sufficient "evidence and analysis" to support a Finding of No Significant Impact (FONSI) and it must include a discussion of the "environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(a)(1) and (b). The BLM is not providing evidence, analysis or a discussion of impacts when all it does is present an inventory. To correct this problem the BLM must conduct a quantitative analysis of air quality impacts which would include appropriate dispersion modeling. Given the level of oil and gas development already present in the Fortification Creek area and the large increase in development that BLM is poised to permit, it cannot dismiss the need for a quantitative analysis by claiming air quality impacts are per se going to be minor. This is especially true since the overarching Powder River Basin Oil and Gas Project EIS recognized the possibility of significant air quality impacts and this Fortification Creek RMP amendment is a supplement to that document and analysis.

B. Elk.

BLM's proposed land use plan amendment would offer the elk using the Fortification Creek area substantially less protection than would be offered under Alternative II. For example,

the BLM's plan would lead to the loss of 18 percent of the elk security habitat in yearlong range and 12 percent of the security habitat in crucial range, while under Alternative II there would be no loss of security habitat. Fortification Creek EA at ES-3 to ES-4. BLM would allow for as much as 20 percent loss of this security habitat whereas Alternative II would not allow for this loss. *Id.* at 2-3.

BLM takes the view that as long as the elk population is not reduced twenty percent below 150 animals, the Wyoming Game and Fish Department's (WGFD) herd objective, then no significant impact would result. See Fortification Creek EA at A-3. We ask the BLM to reconsider the viability and plausibility of this significance level. Currently the herd is at 250 animals, if it were then reduced by twenty percent below 150 animals that would leave only 120 animals, a fifty two percent decline in the herd. We believe this is a significant drop by any measure. Before the BLM adopts its proposed significance level measure it must present a rational basis for its choice, and designating an apparently arbitrarily selected 20 percent drop below the WGFD's herd objective would not seem to meet that need. What will the loss of 52 percent of the herd mean in terms of aesthetic enjoyment of visitors to the area? What will a drop of 52 percent mean in terms of hunting opportunities and success? What will the loss of 52 percent of the animals mean in terms of ecological function in this area; will there be an explosion in pestilent species or perhaps desirable species (deer and pronghorn) when the elk are gone? Will predators be deprived of a food source (elk calves) that harms their populations or perhaps forces them to focus predation more on other species, including livestock? If species such as pronghorn or mule deer were to increase greatly as a result of the reduction in the elk herd, what would the impacts of that be? Until the BLM addresses and answers questions like these we do not feel there is any rational basis for deeming a 52 percent drop in the herd as acceptable and non-significant.

In addition, we urge the BLM to expand the Fortification Creek Planning Area to include all of the elk yearlong range. As currently structured the planning area eliminates at least thirty percent of the elk range from the plan's purview. Given that in many respects concerns about the elk herd are driving this whole process, it seems unwise to us to eliminate such a large area from the provisions of this plan. We realize that elk use in the excluded area appears to have been light in the past, but it is axiomatic in the field of wildlife biology that wildlife require all habitats and resources to persist. We do not think that past light use establishes in any biologically credible respect that these excluded areas are not significant to the persistence of the elk herd in this area. Furthermore, while elk use in this excluded area may be light at present, that could change as coalbed methane development proceeds in this area. Elk could be increasingly driven into or seek this excluded area out; they could come to require this area to persist. Things change, climate change could make this area increasingly desirable or needed by the elk. Therefore, the excluded areas of the elk yearlong range should be included in the Fortification Creek Planning Area.

Last, the BLM plans to eliminate the timing limitation stipulations that currently apply from November 15 to April 30. We ask the BLM to justify this proposed action in light of this statement in the Pinedale Anticline ROD: "The decision to grant relief [from timing limitation stipulations] is unique to the [Pinedale Anticline Project Area], specifically the Core Area and

the [Potential Development Areas] and will not likely be appropriate for other areas because of the level of existing development, the leasehold patterns, and unprecedented voluntary level of cooperation that the Operators have provide for this development plan.” Pinedale Anticline ROD at 24. Before the Buffalo Field Office eliminates the timing limitation stipulations in the Fortification Creek area it must show that these conditions are met. The level of development and leasehold pattern in Fortification Creek must be at least comparable to those on the Pinedale Anticline. In particular, the BLM must show that the operators in the Fortification Creek area are providing a level of cooperation similar to that seen on the Pinedale Anticline. Are the Fortification Creek operators willing to place leases in suspension? The Pinedale Anticline operators were. Are the Fortification Creek operators willing to install and use a liquids gathering system? The Pinedale Anticline operators were. Without a similar level of cooperation, relief from compliance with the stipulations cannot be granted under the clear terms of the Pinedale Anticline ROD. BLM Field Offices need to talk to each other and have some consistency in their decision-making, and we would note that the Pinedale Anticline ROD was signed by the Assistant Secretary of the Interior, so that decision has nationwide applicability; it was not just a local decision. We discussed above the WGFD’s continuing support for use of timing limitation stipulations expressed in its Minimum Recommendations Report and the BLM’s need to comply with state policy to the extent possible.

C. ACECs.

Under FLPMA, the BLM must “give priority to the designation and protection of areas of critical environmental concern” when it prepares a land use plan. 43 U.S.C. § 1712(c)(3). We believe the BLM must faithfully ensure compliance with this command. It must give priority to designating ACECs; it cannot just “consider” them or “analyze” them, it must designate them as a priority. We would note that no other obligation for planning under FLPMA states that priority must be given to that provision, but the designation of ACECs requires that level of compliance. See 43 U.S.C. 1712(c)(1)-(9). Designation of ACECs was singled out for priority by Congress. And in our view “priority” means what it means: “[p]recedence, especially established in order of importance or urgency.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1395 (4th ed. 2000). As the Supreme Court has stated, “[i]t is, of course, a basic canon of statutory construction that we will not interpret a congressional statute in such a manner as to effectively nullify an entire section. See, e.g., Duncan v. Walker, 533 U.S., 167, 174 (2001) (“[A] statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (citation omitted)). See also Dodd v. U.S., 545 U.S. 353, 370 (2005) (same). Thus, the BLM should ensure it gives “priority” to “designating” ACECs in the Fortification Creek RMP amendment.

BLM has not met this obligation. In fact it appears from the Finding of No Significant Impact & Decision Record that BLM does not intend to designate any ACECs. This is not giving priority to designation as FLPMA requires. BLM claims that “[a] special designation does not increase manageability of resource objectives in the Fortification Creek area.” This is completely beside the point and irrelevant, even if it is true, and BLM provides no evidence or analysis showing this contention is true. The FLPMA commands in no uncertain terms that BLM is to give priority to designating and protecting ACECs, not engage in some side considerations regarding increased manageability. The concept of manageability cannot be found in FLPMA.

Nor can it be found in the BLM regulations regarding ACECs. The only consideration is whether the area meets the BLM's relevance and importance criteria. 43 C.F.R. § 1610.7-2(a)(1)-(2). Since the BLM has already determined that the Fortification Creek ACEC meets the relevance and importance criteria it must give priority to designating this ACEC, as required by FLPMA. And as discussed above, the larger ACEC provided for under Alternative II should be designated because this better meets the numerous environmental protection standards that BLM operates under.

VI. The BLM Should Prepare an EIS for This Land Use Plan Amendment.

In its Finding of No Significant Impact & Decision Record the BLM claims that “[t]he selected management actions are expected to keep environmental impacts below these [elk-related] thresholds.” Thus, it appears that the sole basis for the decision to not prepare an EIS is that impacts to elk are not deemed to rise to the level of significance. As just described above in the section on Elk, these claims are not well founded.

But even aside from elk and the problems with BLM's definition of significance levels for that species that were discussed above, there are still many ways in which this project rises to the level of significance. For one, under the BLM's preferred alternative, there would be over 100 more coalbed methane wells in the area than under Alternative II, 574 wells versus 468. Fortification Creek EA at 4-125. We cannot see how an additional 100 wells can be deemed insignificant; at a minimum they represent a significantly increased visual intrusion to many. And the EA states that there will be moderate impacts to fish and wildlife resources, moderate impacts to visual resources, and major impacts to recreation and transportation resources. We do not see how this combination of impacts can be deemed collectively insignificant. The CEQ has of course defined the term “significantly” for purposes of NEPA. 40 C.F.R. § 1508.27. The context of this project is at least statewide and probably regional given the popularity of this area for hunting. The affected interests are also at least statewide and probably national given the large companies that operate in this area. This area has unique characteristics, the impacts of coalbed methane development are highly controversial, the impacts are uncertain as demonstrated by the need for ongoing studies and monitoring of the elk population, the oil and gas development in this area is part and parcel of the widespread coalbed methane development occurring in the Powder River Basin that is having tremendous cumulative impacts, and this area is significant for both historical/cultural resources and imperiled species. Given all of these factors this decision clearly rises to the level of having significant impacts. See id. To reach a FONSI, the BLM must be able to rationally conclude that the project “will not” have significant impacts, 40 C.F.R. § 1508.13; it is not sufficient to conclude that it probably will not, or for BLM to claim that it does not anticipate the action will have significant impacts, or that mostly impacts will not be significant, a FONSI can only be reached if the project will not have significant impacts. We do not believe the BLM can rationally reach such a conclusion or that the current Fortification Creek EA supports such a conclusion.

Thank you for considering these comments, and we look forward to remaining involved in the this RMP amendment process.

Sincerely,

Bruce Pendery
Wyoming Outdoor Council

cc: Governor Dave Freudenthal
Larry Svoboda, EPA
Brian Kelly, U.S Fish and Wildlife Service