

December 2, 2005

Ms. Michele Easley
BLM Kemmerer Field Office
312 Highway 189 North
Kemmerer, Wyoming 83101

Re: Moxa Arch Area Gas Development Project Scoping Comments

Dear Ms. Easley:

The following scoping comments are submitted on behalf of the Wyoming Outdoor Council, Trout Unlimited, and the Wyoming Wildlife Federation for consideration during the environmental review for the Moxa Arch Area Gas Development Project Environmental Impact Statement (“Moxa Arch Project”).

REQUIREMENTS THE BLM MUST COMPLY WITH DURING SCOPING

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

In determining the scope of this project, BLM must consider “connected actions,” “cumulative actions,” and “similar actions.” 40 C.F.R. § 1508.25. Connected actions are actions that are “closely related” to the Moxa Arch Project project. Certainly in that regard, the Moxa Arch Project environmental review must consider the actions occurring pursuant to the Green River, Pinedale, and Kemmerer Resource Management Plans (RMP) EISs and Records of Decision (ROD). At a minimum this includes oil and gas development occurring—much of it pursuant to already-approved projects or under currently pending NEPA analyses—throughout southwest Wyoming. Similar actions include authorizations for oil and gas development occurring on State and private lands in

or adjacent to the geographic area of the Moxa Arch Project project, Forest Service Forest Plans and other analyses authorizing oil and gas activities on nearby lands administered by the Forest Service, and RMPs for adjacent BLM Field Offices/Districts. The scope of the EIS should include a detailed analysis of these similar actions so as to foster informed public participation in the Moxa Arch Project and informed decision-making by BLM. Cumulative actions are actions that, incrementally, have cumulatively significant impacts, even if the individual impacts are minor. Thus, BLM should define the scope of the environmental analysis to include analysis of the cumulative effects of actions/projects that have impacts in common with those resulting from natural gas development. Actions that should be addressed in a cumulative fashion include, but are not limited to: other oil and gas development activities, road construction activities, activities leading to soil and vegetation disturbance, activities leading to changed habitat structure, activities leading to habitat fragmentation, and activities causing air or water pollution. These cumulative impacts result from a number of cumulative actions, including oil and gas development, and thus they must be addressed in a comprehensive manner. Similarly, the scope of the environmental analysis must include consideration of direct and indirect impacts of oil and gas development activities. 40 C.F.R. § 1508.25.¹ It is important that activities in the Pinedale and Rock Springs Field Office be considered, as well as those in the Kemmerer Field Office.

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

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

¹ In this regard we ask BLM to consider the report “Fragmenting Our Public Lands, The Ecological Footprint From Oil And Gas Development,” The Wilderness Society (C. Weller et al., authors), September 2002. In particular we ask BLM to utilize the methodology for cumulative effects assessment recommended in that report. We also ask the BLM to consider the report “Wildlife at a Crossroads, Energy Development in Western Wyoming,” The Wilderness Society (Janice L. Thomson et al., authors), February 2005 (also presenting a technique for the spatial analysis of impacts that we ask BLM to adopt here).

- Enhancing “the quality of renewable resources” and maximizing recycling of depletable resources.

42 U.S.C. §§ 4321-4331. Thus, the needs that BLM must identify for analysis in its environmental analysis include the above goals and policies, and we ask BLM to “insure” that these goals and policies are “infused” into the Moxa Arch Project environmental review and decision document. We would note that BLM “shall state how alternatives considered in [an environmental impact statement] and decisions based on [the environmental impact statement] will or will not achieve the requirements of sections 101 and 102(1) of [NEPA] and other environmental laws and policies.” 40 C.F.R. § 1502.2(d) (emphasis added). BLM must abide by this requirement.

NEPA requires BLM to make a number of considerations that we specifically urge BLM not to overlook. NEPA requires the BLM to “insure that presently un-quantified environmental amenities and values” are given consideration, “recognize the worldwide and long-range character of environmental problems and thus support international efforts to prevent declines in the world environment,” and “initiate and utilize ecological information in the planning and development of resource-oriented projects.” 42 U.S.C. § 4332, 40 C.F.R. § 1507.2. See also BLM Handbook H-1790-1.V.B.2.a.(3). Thus, in preparing the Moxa Arch Project environmental review, BLM should consider, analyze, and wherever appropriate facilitate, international efforts to prevent environmental decline. These include a number of international agreements and treaties for resource protection, such as United Nations biosphere reserves, migratory bird treaties, the Convention on International Trade in Endangered Species, and international efforts related to biological diversity preservation, among others. The environmental analysis supporting the Moxa Arch Project should also explicitly address un-quantified environmental values and ensure they are given equal emphasis relative to economic analyses, and ensure up-to-date ecological information is utilized in developing the environmental analysis and decision document. For example, the EIS must “insure” that the value of these and nearby lands for primitive and unconfined recreation and for simple open space values (i.e., un-quantified environmental amenities and values) are fully considered.

The BLM NEPA Handbook requires BLM to identify the purpose and need of the project being analyzed. BLM Handbook H-1790-1.V.B.e. BLM should give specific attention to the purposes and needs for oil and gas related activities that will be analyzed. The relative value of the Moxa Arch Project area for meeting energy needs versus supplying environmental amenities/needs should be considered in identifying the purpose(s) and need(s) for this project. Similarly, identification of where specifically gas development is appropriate and inappropriate in the Moxa Arch Project area, and why, should be addressed in the environmental analysis as part of the definition of the purpose and need for the Moxa Arch Project project.

BLM cannot claim the purpose and need for the Moxa Arch Project is essentially solely defined by, and constrained by, whatever rights and desires the lessees may have to explore for oil and gas. BLM retains discretion relative to oil and gas development

activities on public lands, even after a lease issues. Most if not all oil and gas leases provide that the lessee agrees that development and production “shall be subject to control in the public interest . . . and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and regulations issued thereunder”² Furthermore, BLM’s oil and gas leasing regulations provide that a lessee takes a federal oil and gas lease subject to stipulations in the lease, restrictions deriving from nondiscretionary statutes, and “such reasonable measures as may be required . . . to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time lease operations are proposed.” 43 C.F.R. § 3101.1-2. See also 30 U.S.C. §§ 226(f)-(g); 43 C.F.R. §§ 3162.3-1, 3162.5-1; Onshore Oil and Gas Order No. 1 (all authorizing continuing oversight so as to ensure environmental protection). The Kemmerer RMP ROD also provides that BLM retains substantial authority to regulate oil and gas development. Thus, BLM cannot define the purpose and need for the Moxa Arch Project as just to allow natural gas to be developed; it must also include strong environmental protections as at least a co-equal purpose and need (see discussion of preventing unnecessary and undue degradation, below). NEPA requires this: “The Congress . . . directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted in accordance with the policies set forth in this chapter” 42 U.S.C. § 4332(1).

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

² Section 6 of BLM’s standard lease form provides that the conduct of oil and gas operations on a lease shall be “in a manner that minimizes adverse impacts” natural resources and the environment. Under section 7 of the standard lease form BLM specifically has the “right to deny approval of [] operations” where impacts are greater than normal. And under section 4 of the standard lease form, “Lessor reserves the right to specify rates of development . . . in the public interest . . . if deemed necessary for proper . . . operation of . . . these leased lands.”

ALTERNATIVES

Council on Environmental Quality (CEQ) regulations require a reasonable range of alternatives to be presented and analyzed in an environmental review so that issues are “sharply defined” and there is “a clear basis for choice among options” 40 C.F.R. § 1502.14. BLM must consider a reasonable range of alternatives where there are unresolved conflicts over resources use. 42 U.S.C. § 4332(2)(E). CEQ regulations and court decisions make clear that the discussion of alternatives is “the heart” of the NEPA process. Environmental analysis must “[r]igorously explore and objectively evaluate all reasonable alternatives.” Such objective evaluation is gravely compromised when agency officials bind themselves to a particular outcome or foreclose certain alternatives at the outset.

Therefore, in the context of gas exploration in the Moxa Arch Project area BLM must use the scoping process to develop alternatives that emphasize needed environmental protection even if such alternatives limit and/or strongly regulate natural gas exploration and not dismiss such options without a thorough and careful analysis. We specifically ask BLM to consider an alternative that would require development to occur from existing oil and gas well pads to the maximum extent that is technologically feasible, with maximum use being made of directional drilling technologies. Similarly, we ask BLM to consider an alternative that would not allow for additional road construction unless there is no other option available that would allow extraction of natural gas. Included with these comments as Exhibit 1 is an alternative that we have asked the Pinedale Field Office to consider for drilling permit applications filed on the Pinedale Anticline Field. We request that the provisions of this alternative become the basis for an alternative considered in the Moxa Arch Project EIS and/or that the provisions of this alternative be required to the maximum extent possible in the processing of APDs under any alternative that is considered, and specifically the preferred alternative.

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

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

We urge BLM not to define “unnecessary or undue degradation” by default, in a negative fashion, in the Moxa Arch Project environmental analysis and decision

document. BLM must reject the position that because regulations provide that an oil and gas lease conveys the right to “use so much of the leased lands as is necessary to explore for, drill for . . . and dispose of all of the leased resource . . .” essentially anything an oil and gas lessee proposes to do to develop a lease is “necessary” or “due” and therefore any resulting degradation of the public lands is not “unnecessary” or “undue.” As noted above, BLM retains authority to condition oil and gas development despite issuance of a lease; issuance of a lease does not tie BLM hands to the extent it sometimes claims. Therefore, we urge BLM to require, in a direct and positive fashion, that development activities in the Moxa Arch Project area not cause unnecessary or undue degradation, and to ensure that this is the case. Given the direct, unambiguous command from Congress to do whatever is needed to prevent unnecessary or undue degradation, the Moxa Arch Project environmental analysis and decision document should define, and prevent, unnecessary or undue degradation in an equally direct, positive fashion. As noted by the court in Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003), this provision “vests the Secretary of the Interior with the authority—indeed the responsibility—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public lands.”

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

Under FLPMA, specific management actions like the Moxa Arch Project must be done pursuant to multiple use and sustained yield principles. 43 U.S.C. § 1732(a). The definition of multiple use in FLPMA is long, but key provisions include the following: (1) Public lands and their resource values must be managed so that they “best meet the present and future needs of the American people;” and (2) There must be harmonious and coordinated resource management that is done “without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or greatest unit output.” 43 U.S.C. § 1702(c). This definition gives substance to the requirement for management actions to be done pursuant to multiple use principles.

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

with reference to the needs of the American people as a whole, not a small subset of the American people.

Since the definition of multiple use specifically provides that it is appropriate to not provide all resources in all areas, even within the Moxa Arch Project area the environmental analysis should identify areas where development is inappropriate and the decision document should prohibit drilling in these areas. For example, wetland and riparian areas should not be subject to the direct impact from exploration. Areas where the impacts of development would be visible for long periods or from long distances should be avoided. BLM's authority to do this is bolstered by the requirement to prevent unnecessary or undue degradation, and in the vast majority of circumstances, if not all, the lessee would still be able to develop oil and gas.

It is also important to emphasize that under FLPMA the Moxa Arch Project environmental analysis and resulting decision document must consider and be based on the relative value of the resources involved. By this legally required measure, rare, unique, and sensitive native species have a relative value far in excess of more common or easily replaced public land resources, or resources that can be provided from other lands, such as oil and gas. The need to give emphasis to these relative values is heightened by the provision in NEPA that and EIS must considered un-quantified values and amenities. Accordingly, the alternatives considered by BLM, and particularly the preferred alternative, must give special emphasis to protecting and providing for relatively rare resources

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

**BLM CANNOT ALLOW PROHIBITED ACTIONS TO OCCUR UNTIL A
DECISION DOCUMENT IS FINALIZED AND ENDANGERED SPECIES ACT
CONSULTATION IS COMPLETE**

No new project area disturbance should commence prior to completion of formal consultation under Section 7 of the Endangered Species Act (ESA). In particular, Section 7(d) must be complied with. Section 7(d) of the ESA prohibits taking actions that may affect listed species until consultation is complete. CEQ NEPA regulations provide that "Until an agency issues a record of decision . . . no action concerning the proposal shall be taken which would: (1) have an adverse environmental impact; or (2) limit the choice of reasonable alternatives." 40 C.F.R. §§ 1506.1(a)(1)-(2). See also 40 C.F.R. § 1502.2(f) (stating agencies "shall not commit resources prejudicing selection of

alternatives before making a final decision.”) We note that impacts do not have to be “significant” for the prohibition on taking an action to apply; the action only needs to produce “adverse” environmental impacts to be barred.

WILDLIFE RESOURCES

The following concerns regarding wildlife touch on a number of issues. One common need, however, is the following. When considering impacts to wildlife, BLM must do more than consider just the area actually impacted by oil and gas exploration. In this regard, the reports “Fragmenting Our Lands, The Ecological Footprint From Oil And Gas Development” and “Wildlife at a Crossroads, Energy Development in Western Wyoming,” which deal with habitat fragmentation due to oil and gas development should be considered, and we ask that BLM do so.³ BLM must ensure its analysis of impacts to wildlife considers indirect, connected, related, long-term, and cumulative impacts in as quantitative, and scientifically supported, a manner as possible. BLM must also ensure that it fully complies with BLM Manual MS-6840 (Special Status Species Management).

General Issues Regarding Threatened and Endangered Species

BLM must comply with Section 7 of the ESA in undertaking the Moxa Arch Project project. This means that BLM must comply with its affirmative duty under Section 7(a)(1) to proactively implement programs for the conservation of listed species. Likewise it must meet the equally mandatory duty to ensure that the Moxa Arch Project does not jeopardize the continued existence of listed species or result in the destruction or adverse modification of their critical habitat. These requirements can be furthered if the decision document adopts strong provisions for the protection and conservation of listed species. For example, the decision document should comply with and seek to implement any recovery plans and/or biological opinions applicable to listed species that occur in the Moxa Arch Project action area.

More specifically, in this case, because the Moxa Arch Project is a major construction activity, BLM must prepare a Biological Assessment (BA) in order to meet its Section 7(a)(2) “duty to ensure” listed species are not harmed. It is critical that only credible and reputable scientists conduct the BA and other ESA-related analyses, and BLM must ensure that this is the case by establishing criteria for the quality of the BA and other ESA-related analyses. BLM should monitor and enforce these requirements. This is consistent with the requirement to use the best available science established by the ESA. See, also, BLM Manual MS-6840.2.E.2-5.

Additionally, BLM must ensure that it fully complies with the requirements to engage in early consultation with the Fish and Wildlife Service relative to the effects of this action on listed species in this action area. In all likelihood this will require formal consultation relative to all listed species that may be present in the action area. Consultation should be completed and any biological opinion(s) issued by the Fish and

³ The Wilderness Society (C. Weller et al., authors), September 2002.

Wildlife Service adopted by BLM and made a binding part of the decision document (and activities occurring under it) prior to approval of the Moxa Arch Project project. The decision document should establish criteria to ensure that the regulatory requirements for reinitiating consultation are complied with at the earliest possible time so as to ensure listed species are not jeopardized. See 50 C.F.R. § 402.16 (establishing reinitiation criteria). Moreover, the prohibition on foreclosing reasonable and prudent alternatives, as provided for in section 7(d) of the ESA, must be adhered to by BLM during the environmental analysis and enforced by the decision document. These recommendations are consistent with BLM’s Special Status Species Manual. See BLM Manual MS-6840.2.E.

ESA Candidate and BLM Sensitive Species

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

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

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

2. For candidate species [and sensitive species] where lands administered by the BLM or BLM authorized actions have a significant effect on their status, [the BLM shall] manage the habitat to conserve the species by:
 - a. Ensuring candidate [and BLM sensitive species] are appropriately considered in land use plans (BLM 1610 Planning Manual and Handbook, Appendix C).
 - b. Developing, cooperating with, and implementing range-wide or site-specific management plans, conservation strategies and assessments for candidate [and sensitive] species that include specific habitat and population management objectives designed for conservation, as well as

management strategies necessary to meet those objectives.

- c. Ensuring that BLM activities affecting the habitat of candidate [and sensitive] species are carried out in a manner that is consistent with the objectives for managing those species.
- d. Monitoring populations and habitats of candidate [and sensitive] species to determine whether management objectives are being met.

Ferruginous Hawks and Other Raptors

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

Sage Grouse

The sage grouse too usually receives special protective measures, particularly in the context of oil and gas development and exploration activities, and BLM must ensure full compliance with its Sensitive Species Manual relative to this species, as well as other BLM guidance and guidance from the Wyoming Game and Fish Department such as its “Minimum Recommendations to Sustain Important Wildlife Habitats Affected by Oil and Gas Development.” Typical stipulations limit oil and gas activities when sage grouse are utilizing known leks, and certainly BLM must prevent disturbance during the sage grouse courtship period and near sage grouse nests. However, focusing exclusively on limited elements of a species’ ecological needs (courtship and nesting) not only might fail to protect the species, it might also blind BLM to other critical factors affecting the species. For example, it is well known that sage grouse chicks need access to wet meadow areas so they can find high-protein insects to support early growth. Dense stands of sagebrush are critical winter habitat. Thus, these areas should be protected from disturbance. Due to the sage grouse’s status as a BLM sensitive species, BLM has heightened obligations to protect the species. Furthermore, the appropriate means to protect sage grouse is to not

only focus management efforts (and protective measures) on particular habitat needs (e.g., protecting leks), but also to ensure sagebrush habitats, an increasingly imperiled ecosystem, are protected.⁴ The same, of course, is true for many other species, including such sagebrush obligate species such as Brewer's sparrow, the sage sparrow, and sage thrashers; and of course the same is true for species dependent on other habitats and ecosystems. In this regard we request BLM to consider the following report: Knick, S.T., et al. 2003. Teetering On The Edge Or Too Late? Conservation And Research Issues For Avifauna Of Sagebrush Habitats. The Condor 105: 611-634 (documenting the importance of sagebrush habitats and threats to them, particularly with reference to sagebrush obligate bird species).

Mule Deer, Elk, and Pronghorn

In developing the Moxa Arch Project environmental analysis, BLM should consider and utilize data available from the Wyoming Game and Fish Department to determine protections for game species (and other species). We particularly direct BLM to the Wyoming Game and Fish Department's recent publication "Minimum Recommendations to Sustain Important Wildlife Habitats Affected by Oil and Gas Development," available at <http://gf.state.wy.us/habitat/HotTopics/index.asp>. BLM should also utilize the information regarding the needs of big game species available from other sources.⁵ Relative to big game, we urge the BLM to protect more than "critical" big game winter ranges. This approach is biologically and ecologically unsupportable and results in unnecessarily and unduly restricted protections. We therefore request that protective measures be considered not just for "critical" winter ranges, but also for all winter range areas in the Moxa Arch Project area. To the extent BLM excludes "general" winter range areas from the application of protective measures, it should provide a biologically defensible rationale for such a decision. Consideration of the above issues is necessary to prevent unnecessary or undue degradation of wildlife on the public lands.

Colorado River Fish Species

Several fish species that inhabit the Colorado River drainage have been listed as endangered under the Endangered Species Act. The continued existence of these species is jeopardized by water depletions in the watershed and impacts to water quality. BLM

⁴ See generally Braun, C. A Review of Sage Grouse Habitat Needs And Sage Grouse Management Issues For The Revision Of The BLM's Pinedale District Resource Management Plan, (Scoping comments submitted on the Pinedale RMP Revision), October, 2002.

⁵ We specifically request that BLM consider the following studies: Sawyer, H., et al. 2005. Sublette Mule Deer Study (Phase II): Long-term Monitoring Plan to Assess Potential Impacts of Energy Development on Mule Deer in the Pinedale Anticline Project Area. 2005 Annual Report (available at http://www.west-inc.com/big_game_reports.php); Sawyer, H., and F. Lindzey, Jackson Hole Pronghorn Study, Wyoming Cooperative Fish and Wildlife Research Unit, September, 2000; Sawyer, H., and F. Lindzey, Sublette Mule Deer Study, Wyoming Cooperative Fish and Wildlife Research Unit, March 2001; Western Ecosystems Technology, Inc., An Evaluation Of The 1988 BLM Pinedale Resource Management Plan, 2000 BLM Pinedale Anticline Final EIS, And Recommendations For The Current Revision Of The Pinedale Resource Management Plan, (Scoping comments submitted for the Pinedale RMP revision), January, 2003.

has identified issues with "impacts to surface and groundwater resources, including sedimentation/salinity to the Colorado River system" and "potential Colorado River depletion and effects of [sic] downstream listed species" as threats to these species. BLM must comply with all substantive and procedural obligations under the Endangered Species Act and agreements governing salt and sediment loads to, and depletions from, Colorado River watersheds, including the Little Snake River. Prior to authorizing the Moxa Arch Project project, BLM must conduct a detailed and scientifically-credible analysis of its effects on ground and surface water flows (including depletions due to project water use) and quality (project-related sedimentation and siltation) and the corresponding impacts to Colorado River listed species. BLM must ensure that provisions are in place to pay "depletion fees" and meet all other requirements for the protection and recovery of these species.

Wildlife Diversity Must Be Ensured

BLM has a duty to protect the diversity of all native wildlife on public lands by providing for ecosystem-based management. The FLPMA requires public land management to protect ecological and other values, and also requires that they be managed for multiple use and sustained yield. 43 U.S.C. §§ 1701(a)(7)-(8). The NEPA requires BLM to fulfill its trustee obligation for future generations, assure productive surroundings, avoid environmental degradation, preserve important natural aspects of our national heritage, and enhance the quality of renewable resources. 42 U.S.C. §§ 4331(b)(1)-(6). The Clean Water Act established the objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters, which of course includes the Moxa Arch Project area. 33 U.S.C. § 1251. The ESA establishes the purpose of conserving the ecosystems upon which threatened and endangered species depend on. 16 U.S.C. § 1531(b). BLM's livestock grazing standards and guidelines establish standards of ecological health applicable not only to livestock grazing, but to resource management generally. See 43 C.F.R. subpt. 4180. Read together, these and other legal standards establish that BLM must ensure the ecosystems it manages are fully protected so as to enhance biological diversity.

With this in mind, we ask that the Moxa Arch Project environmental analysis and decision document provide for the following steps to ensure that wildlife diversity is protected. Riparian areas must be given special consideration in the environmental analysis and protection in the decision document. It is widely recognized that (1) riparian areas in the west are crucial centers of biological diversity and (2) most BLM riparian areas are in unhealthy condition. Riparian area management is discussed in more detail below. The decision document must also ensure that other special habitats are protected and enhanced. Wintering areas, colonial or other concentrated avian nesting areas, spawning beds, and traditional birthing areas are examples of the special habitats the environmental analysis should consider and the decision document should protect these areas from seismic activities.

In addition to protecting special habitats, the decision document must provide for protecting certain species to ensure that biological diversity is protected. Certainly

species listed pursuant to the ESA and BLM and/or State sensitive species must receive species-specific attention, but other species should receive special emphasis as well. The environmental analysis should identify, and the decision document provide for the protection of, “keystone” species, which can be literally key to preventing undesirable, cascading ecological effects, such as widespread extinctions. Prairie dogs are an example of a keystone species that would demand special management efforts. The status of carnivores is often indicative of the overall environmental health of an area, and thus they warrant special management prescriptions, and in any event there is widespread public demand and support for protecting these magnificent creatures. It is also important to note that there are keystone resources that are critical for protecting a host of species. Springs or other water holes, deep pools in streams, and natural salt or mineral licks are examples. BLM should ensure that the decision document makes special provision for protecting keystone resources.

The environmental analysis must carefully evaluate problems resulting from habitat fragmentation and the need for maintaining the connectivity or linkage of habitats. This project will involve many thousands of surface disturbances, not to mention the miles of roads and well pads, all of which could fragment habitats. Again, the report “Fragmenting Our Lands, The Ecological Footprint from Oil And Gas Development,” which deals with habitat fragmentation due to oil and gas development should be considered, and we ask that BLM do so.⁶ More generally, the BLM should consider the principles of island biogeography so as to ensure that fragmentation does not degrade existing wildlife habitats. The decision document should ensure both that the total areas of important habitats are maintained and that these habitats are not further fragmented. Creating habitat fragments impedes dispersal, colonization, and foraging. Moreover, fragmented habitats can have altered environmental conditions and allow for intrusions of pests (weed invasions and cowbird nest parasitism are classical examples). We specifically request that BLM limit any further fragmentation of sagebrush communities, which are critical to many species and which is an increasingly imperiled ecosystem

The flip side of habitat fragmentation is maintaining migration corridors and other ecological linkages. The conservation biology literature indicates it is probably more effective to preserve existing corridors/linkages than to attempt to create new ones. It is crucial the environmental analysis identify all existing migration and other movement corridors. The decision document must ensure the ecological integrity of these corridors and linkages. Big game migration routes have been widely documented, but riparian areas, mountain ranges and ridges, and other areas serve as important linkages among habitats (and even eco-regions) that must be preserved. Ensuring that corridors remain as wide as possible is the best way to ensure that they are in fact effective. The EIS must consider and in fact protect these crucial ecological linkages.

Part and parcel of protecting biological diversity is a need to ensure that indirect and cumulative impacts of management actions are fully considered. As noted above, the NEPA regulations provide guidance in this regard. Cumulative impacts are the incremental impacts of actions, past, present and future, regardless of whom undertakes

⁶ The Wilderness Society (C. Weller et al., authors), September 2002.

them. See 40 C.F.R. §1508.7. Indirect effects of an action are further removed from the action itself, but still are reasonably foreseeable. See 40 C.F.R. §1508.8. See also 40 C.F.R. §1508.25(c). In this case, the possibility that future oil and gas development will be requested in the general area of the Moxa Arch Project area must be considered. As noted, there are a number of oil and gas development project occurring in the area. At a minimum, BLM should required that lessees in the area go on the record as to what they anticipate will be future seismic exploration needs in the general vicinity of the Moxa Arch Project area, and analyze the potential impacts of such projects

BLM Must Ensure And Provide For Compliance With Wyoming Game And Fish Guidance

The Wyoming Game and Fish Department (WGFD) has issued its “Minimum Recommendations to Sustain Important Wildlife Habitats Affected by Oil and Gas Development,” available at <http://gf.state.wy.us/habitat/HotTopics/index.asp>. We ask that BLM consider and in fact adopt the provisions of this report as binding provisions for oil and gas development in the Moxa Arch Project EIS and ROD. At a minimum BLM must explain why it fails to adopt these provisions or modifies these provisions. Furthermore, we ask BLM to consider the issues and arguments raised in Interior Board of Land Appeals docket number 2005-147, which is incorporated by this reference. This appeal presents reasons for why the BLM must adopt the provisions in the above WGFD report. We specifically ask BLM to consider and in fact adopt provisions that will address this key finding of the WGFD report: the standard limitation on drilling on crucial winter ranges during the winter is insufficient standing alone to protect big game crucial ranges; the impacts of ongoing operations must also be mitigated. A provision allowing regulation of ongoing activities should be made applicable to all crucial winter ranges in the Moxa Arch Project ROD in order to comply with Wyoming Game and Fish Department guidance.

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

The Clean Water Act and Water Quality Issues

The Clean Water Act (CWA) establishes many requirements that BLM must consider in the environmental analysis and adhere to in the decision document. It is imperative that BLM insure that waters in the Moxa Arch Project area comply with State water quality standards and that those standards are not violated by natural gas exploration activities. It is critical to recognize that State water quality standards “serve the purposes” of the CWA, which, among other things, is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. . .” 33 U.S.C. §§ 1313(c)(2)(A), §1251(a). That is, a purpose of water quality standards is to protect aquatic ecosystems, and BLM must ensure this comprehensive objective is met by ensuring water quality standards are complied with. Water quality standards are typically composed of numeric standards, narrative standards, designated uses, and an antidegradation policy. All too often, however, only numeric standards are viewed as

“water quality standards.” That narrow view is incorrect. The Supreme Court held in PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700 (1994), that all components of water quality standards are enforceable limits. Consequently, the decision document must ensure all components of State water quality standards are met, not just numeric standards. Specifically, seismic exploration activities, including especially blasting, cannot be allowed in or very near to streams, wetlands, and riparian areas.

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

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

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

Riparian Areas

The Moxa Arch Project area contains remarkable riparian areas that are vitally important to the ecological health of the region. Properly managing riparian areas is a critical component of managing for biological diversity and for meeting many other

needs. Only about 1% of the lands managed by the BLM are wetlands, yet these are some of the most ecologically important landscapes under BLM jurisdiction

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

CUMULATIVE IMPACTS

As indicated several times above, the Moxa Arch Project environmental analysis must consider, and the decision document must reduce to the extent possible, cumulative impacts resulting from this project. We want to emphasize that consideration of cumulative impacts is distinct from and in addition to the need to address cumulative actions for purposes of defining the scope of the analysis. Compare 40 C.F.R. §§ 1508.25(a)(2) and 1501.7 with 40 C.F.R. §§ 1502.16, 1508.7, 1508.27.

INVASIVE SPECIES, NOXIOUS WEEDS, AND MANAGEMENT OF NATIVE VEGETATION

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

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

Just as important, the Executive Order requires BLM to “not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the

benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.” The environmental analysis should fully analyze the extent of the invasive species problem in this area, the causes, and options for both restoration and prevention in the future. As noted, it appears that several thousand separate disturbances will occur, each creating a potential entry point for invasive weeds into the Moxa Arch Project area. This unduly degrading and permanently impairing result cannot be allowed to occur.

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

NOISE IMPACTS

The environmental analysis and the decision document should address issues related to noise created by drilling and other activities. These impacts must be evaluated in terms of the remoteness and quietness that so many seek on the public lands. Specifically, the impacts on hunting activities in the area, and on hunters who may use the area, must be considered. Whatever noise does occur due to oil and gas development should be minimized by requiring the maximum use of the best available mufflers. Under the Clean Air Act, BLM must consult with the EPA to determine possible means of abating noise that constitutes a public nuisance or is even simply “objectionable.” 42 U.S.C. § 7641(c). Drilling rigs and compressors certainly meet this standard, and thus consultation with the EPA is required.

CULTURAL AND PALEONTOLOGICAL RESOURCES

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

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

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

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

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

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

The Moxa Arch Project environmental analysis document should identify areas where cultural sites are at risk, and the decision document should employ measures to protect these resources. The areas designated should be of sufficient size to allow viable protection of the resources; designation of just the site itself may not allow for effective management. In recent lease sale notices, BLM has begun to include a “Special Lease Stipulation” on all leases that retains authority to BLM to regulate and even prohibit surface disturbing activities if necessary to protect cultural resources. BLM should ensure that all leases in the Moxa Arch Project area become subject to this limitation as a result of the ROD by adopting similar language as part of the ROD. The above laws are non-discretionary, so BLM can adopt these requirements even if the original lease did not contain the current Special Lease Stipulation.

THE CLEAN AIR ACT

We ask that the BLM ensure there is full compliance with the Clean Air Act. We specifically ask for assurance that the national goal of “the prevention of any future, and the remedying of any existing, impairment of visibility” in Class I areas be assured. 42 U.S.C. § 7491(a)(1). We ask that BLM consider the impact of its decisions on the ability of the State of Wyoming to develop an approvable State Implementation Plan pursuant to EPA’s regional haze rule, which requires that States to ensure improvement of visibility on the most impaired days and no degradation of visibility on the least impaired days. 40 C.F.R. § 51.308(d)(1). We also ask that BLM carefully consider the impact of this project on ozone concentrations and the applicable National Ambient Air Quality Standards. The recently released Draft EIS and Supplemental Air Quality Analysis for the Jonah Infill Project in the Pinedale Field Office showed that ozone levels would reach dangerously close to violating the National Ambient Air Quality Standards, and other recent NEPA documents, such as the Draft EIS for the Rawlins RMP revision, have also shown dangerously high ozone levels.

We specifically incorporate the following comments we have previously submitted to BLM into these comments and ask that they be considered as part of these scoping comments:

- Comments submitted by Robert Yuhnke on the draft Rawlins RMP EIS.
- Comments submitted by Vicki Stamper on the draft Rawlins RMP EIS.
- Comments submitted by Robert Yuhnke on the Jack Morrow Hills Supplemental Draft EIS.
- Comments submitted by Vicki Stamper on the Jack Morrow Hills Supplemental Draft EIS.
- Comments submitted by the Wyoming Outdoor Council et al. on September 26, 2005 to the Pinedale Field Office on the Jonah Infill Drilling Project DEIS Air Quality Impact Analysis Supplement.
- Comments submitted by Vicki Stamper on October 5, 2005 to the Pinedale Field Office on the Jonah Infill Drilling Project DEIS Air Quality Impact Analysis Supplement.

- Comments submitted by Robert Yuhnke on October 7, 2005 to the Pinedale Field Office on the Jonah Infill Drilling Project DEIS Air Quality Impact Analysis Supplement.

Overall, BLM must ensure that there is an adequate cumulative air quality impacts analysis in place to support its decisions related to the Moxa Arch project.

THE ENERGY POLICY ACT OF 2005

The Energy Policy Act of 2005 contains several provisions that BLM should consider in the Moxa Arch Project EIS. Section 366 establishes time restriction on how quickly BLM must process APDs. BLM should state in the EIS how it will process APDs in light of this guidance. It must ensure that legal standards continue to be met and that there is adequate opportunity for public participation in the APD process. Section 390 establishes a “rebuttable presumption” allowing categorical exclusion from NEPA compliance for some oil and gas development activities. BLM should state precisely in the Moxa Arch Project EIS how these provisions will be dealt with at the APD level. Or said differently, if BLM is going to attempt to take advantage of this opportunity to avoid NEPA at the APD stage, it must ensure there is adequate NEPA analysis in the Moxa Arch Project EIS. It must ensure there is very site-specific analysis of impacts in the current EIS if it is potentially not going to analyze those site-specific impacts in future EAs at the APD stage. Adequate NEPA analysis must be done at some point. Similarly, BLM must analyze and state specifically how it will comply with Instruction Memorandum 2005-247. BLM must establish tracking to ensure total surface disturbance on a lease does not exceed 150 acres. Surface disturbance must be calculated based on initial disturbance not reclaimed surface disturbance unless BLM can provide data that shows reclamation has actually led to restoration and elimination of impacts. If it is claimed that drilling has occurred from a specific site within the last 5 years, BLM must provide evidence that there is an existing NEPA document that provided an analysis of environmental impacts that are similar to the impacts now anticipated. If BLM claims the drilling will occur under an approved land use plan or a NEPA document prepared for the field, including the Moxa Arch Project EIS, then BLM must show that this document actually considered the impacts of the well under consideration if it is to meet the rebuttable presumption test. Attached as Appendix A is a letter that was sent to BLM State Director Robert Bennett, and we ask that these comments be considered.

Thank you for considering these comments, and we look forward to continuing involvement in the development of the Moxa Arch Project environmental analysis and decision document.

Sincerely,

Bruce Pendery,
Staff Attorney and Director of Public Lands
And on Behalf of

Cathy Purves,
Trout Unlimited

Ben Lamb,
Wyoming Wildlife Federation

APPENDIX A

November 4, 2005

Robert Bennett, State Director
Bureau of Land Management
5353 Yellowstone Road
P.O. Box 1828
Cheyenne, WY 82003

Dear Mr. Bennett:

The purpose of this letter is to point out several issues related to implementation of Section 390 of the Energy Policy Act of 2005 and BLM's related Instruction Memorandum (IM) 2005-247, which allow for the use of categorical exclusions from National Environmental Policy Act (NEPA) compliance in limited circumstances. We believe the issues addressed below show that the use of categorical exclusions to approve applications for permits to drill (APDs) oil and gas wells will be highly limited.

Our first concern is that Section 390 (codified at 42 U.S.C. § 15942) and the use of categorical exclusions that it provides for by its own terms applies "if the activity is conducted pursuant to the Mineral Leasing Act for the purpose of exploration or development of oil and gas." Thus, the provisions in Section 390 are specifically tied to continued compliance with the provisions of the Mineral Leasing Act. Sections 226(f) and (g) of the Mineral Leasing Act establish a number of requirements that BLM still must comply with even if a categorical exclusion from NEPA is invoked under Section 390. Under section 226(f) of the Mineral Leasing Act, BLM must still provide notice of the filing of any APDs, this being "in addition to any public notice required under other law," which clearly contemplates the continued applicability of the public notice provisions of NEPA. Under section 226(g) BLM must continue to abide by at least four requirements (several of which have sub-requirements) when an APD is filed: (1) it must "regulate all surface-disturbing activities conducted pursuant to any lease;" (2) it must "determine reclamation and other actions as required in the interest of conservation of surface resources;" (3) it must analyze and approve plans of operations for the proposed well; and (4) it must ensure there are adequate financial arrangements in place "to ensure the complete and timely reclamation of the lease tract, and the restoration of any lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations on the lease." (emphasis added). Even if BLM does not utilize NEPA as an aid to meeting these requirements because of categorically excluding an APD from NEPA compliance, these provisions of the Mineral Leasing Act still must be adhered to. We believe BLM will therefore still have to engage in the functional equivalent of NEPA analyses to meet these requirements when it pursues the Section 390 categorical exclusion option.

A second issue of concern relates to the commitments in many existing NEPA documents to engage in site-specific NEPA analyses when APDs are filed since the existing NEPA document (usually an RMP and/or project level EIS) specifically declined to analyze site-specific impacts—in fact, often claiming such is impossible until a specific well is proposed—and very specifically committed to doing further NEPA analyses at the APD stage. We would specifically note that the DNAs that are prepared by the various Field Offices to support the offering of lease tracts commit to and are based on future site-specific NEPA analyses at the APD stage. For example, the DNA prepared by the Newcastle Field Office as the basis for allowing the leases at the August 2005 competitive oil and gas lease sale to be offered states that “Site-specific impacts occur at the development stage which is analyzed under a separate NEPA review.” It goes on to state that “According to the Tenth Circuit Court of Appeals, site-specific NEPA analysis is not possible absent concrete proposals. Filing an Application for Permit to Drill is the first useful point at which a site specific environmental determination can be undertaken” (citing Park County Resource Council, Inc. v. U.S. Dep’t of Agriculture). The DNAs prepared by the other Field Offices make exactly the same statements or provide variations on these statements, and all show the lease parcel was offered on condition that there would be future NEPA analysis if wells were actually proposed for drilling and claims that no new NEPA analysis was even possible at the leasing stage.⁷

This issue points out several limitations to the use of the categorical exclusion option allowed under Section 390 and IM 2005-247. First, it well established that statutes are not to be given retroactive effect unless Congress expressed a clear intent for such effect. Thus, the provisions in existing NEPA documents and DNAs still apply and are binding on BLM despite the provisions in Section 390 and IM 2005-24. Moreover, at least with respect to RMPs, BLM must still abide by the “consistency requirement” of section 302(a) of FLPMA and BLM’s implementing regulations. As indicated, many RMPs commit BLM to future site specific NEPA and other analysis when APDs are filed. And last, where Records of Decision or Decision Records for project level oil and gas development activities (typically “full field” development activities) commit BLM to future site specific NEPA analyses, those commitments remain binding and enforceable.

Furthermore, by having previously committed to and recognized the need for additional future NEPA analysis, BLM itself has already provided the rebuttal to the presumption that a categorical exclusion may apply. Having already determined that additional future NEPA analysis will be required and will be undertaken, it would be arbitrary and capricious for BLM to claim no such analysis is now required, absent new NEPA analysis to support such a decision.

⁷ It is important to keep in mind that DNA’s are not NEPA documents so they cannot provide any level of compliance with NEPA, including support for the use of a categorical exclusion; they can only be used to determine if new NEPA documentation is required. Pennaco Energy, Inc. v. U.S. Dep’t of the Interior, 377 F.3D 1147, 1162 (10th Cir. 2004) (“DNAs, unlike EAs and FONSI’s, are not mentioned in the NEPA or in the regulations implementing NEPA.”).

Last, with respect to NEPA documents that are in the process of being prepared, such as the revisions of existing RMPs and the Creston/Blue Gap II Natural Gas Development Project, if the categorical exclusion that is available under Section 390 is to be invoked for individual well drilling projects proposed in the future, the current NEPA analysis will have to be site-specific in nature in order for the categorical exclusion to be appropriately invoked. Essentially, if BLM is not going to do a site specific NEPA analysis now it must do it later—Section 390 of the Energy Policy Act of 2005 does not absolve BLM from doing site specific NEPA, it only allows it to avoid the need for such an analysis if it has already been done. Similarly, as IM 2005-247 makes clear, there are a number of very specific requirements that must be met if the categorical exclusion option is to be appropriately invoked by BLM. BLM will have to ensure careful adherence to and documentation of compliance with these many requirements in order to appropriately invoke the categorical exclusion option, which may well exceed the workload that simple compliance with NEPA would require.

Thank you for considering these comments, and we look forward to working with BLM as it implements Section 390 of the Energy Policy Act of 2005 and IM 2005-147.

Sincerely,

Bruce Pendery

cc: Janet Kurman
Prill Mecham, Pinedale Field Office
Bill Lanning, Pinedale Field Office
Governor Dave Freudenthal