

**PROTEST OF THE PROPOSED RESOURCE MANAGEMENT
PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT FOR
THE KEMMERER FIELD OFFICE**

Protesting Parties:

Bruce Pendery
Wyoming Outdoor Council
444 East 800 North
Logan, Utah 84321
(435)-752-2111

Erik Molvar
Biodiversity Conservation Alliance
P.O. Box 1512
Laramie, WY 82073
(307) 742-7978

Kathleen C. Zimmerman
Senior Land Stewardship Policy Specialist
National Wildlife Federation
2260 Baseline Road, Suite 100
Boulder, Colorado 80302
(303)-786-8001

Lloyd Dorsey
Greater Yellowstone Coalition
POB 4857 Jackson, WY 83001
330 E. Snow King Ave.
(307)-734-6004

Brian Rutledge
Executive Director
Audubon Wyoming
And on Behalf of the National Audubon Society
358 North 5th St., Unit A
Laramie, Wyoming 82072
(307)-745-4877

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VIA e-mail and U.S Mail

Mr. Jim Caswell, Director (210)
Bureau of Land Management
U.S. Department of the Interior
Attn: Brenda Williams, Protest Coordinator
P.O. Box 66538
Washington, D.C. 20035

**Re: PROTEST OF THE PROPOSED RESOURCE MANAGEMENT
PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT
FOR THE KEMMERER FIELD OFFICE**

Dear Director Caswell:

Pursuant to 43 C.F.R. § 1610.5-2, the Wyoming Outdoor Council, joined by the other groups named on the cover, hereby protests the Proposed Resource Management Plan (RMP) and Final Environmental Impact Statement (EIS) for the Kemmerer Field Office (hereinafter, "Kemmerer RMP").

The names, mailing addresses and telephone numbers of the protesting parties are shown on the cover page of this protest. 43 C.F.R. § 1610.5-2(a)(2)(i). The interest of all protesting parties relates to proper compliance by the Bureau of Land Management (BLM) with the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), and other law, as well as the impacts to public and private lands and resources in the Kemmerer Field Office planning area that will be negatively affected by the BLM's proposed Kemmerer RMP. All of the protesting parties have been intimately involved throughout the BLM's planning process for the Kemmerer Field Office, by, among other things, submitting comments and attending public meetings during the planning process. The protesting organizations use the Field Office area heavily for activities such as field trips, and many of the members of the respective protesting parties have hunted, hiked, fished, camped in and otherwise used and enjoyed the area affected by the Kemmerer RMP. This use and enjoyment extends over many years.

The protesting parties have submitted comments for the record and otherwise been involved throughout the BLM's planning process for the Kemmerer Field Office, including the following:

- Scoping comments submitted to the BLM by the Wyoming Outdoor Council and many of the other parties to this protest on November 25, 2003.
- Scoping comments submitted by Biodiversity Conservation Alliance on August 8, 2003.

- Extensive comments from the Wyoming Outdoor Council and many of the other parties to this protest submitted on the Kemmerer RMP draft EIS on October 11, 2007.
- The National Wildlife Federation and Wyoming Wildlife Federation submitted detailed comments on the RMP draft EIS on October 11, 2007.

These comments and other participation in this planning process discussed or raised for the record all issues protested here. 43 C.F.R. § 1610.5-2(a)(2)(iv).

The issues, parts of the Plan under protest and a statement of why the State Director's proposed approval of the Kemmerer RMP is wrong (43 C.F.R. § 1610.5-2(a)(2)(ii), (iii), (v)) follows. Generally, the issues under protest are a failure of the Kemmerer RMP to adequately reflect and adopt the State of Wyoming's Executive Order addressing the greater sage-grouse, the inconsistency between the Kemmerer RMP and the Pinedale RMP in terms of the amount of land made unavailable for oil and gas leasing, and a failure to adequately address air quality issues. 43 C.F.R. § 1610.5-2(a)(2)(ii).

I. Proposed Protections For The Greater Sage-Grouse Do Not Meet The Requirements Of The State of Wyoming's Executive Order Regarding Sage-Grouse Management.

A. General Elements.

The BLM outlines the management that would be applied to the greater sage-grouse on pages 2-64 to 2-65 of the Kemmerer RMP. The provisions include:

- Prohibit or restrict surface disturbance and occupancy within 0.6 miles of an occupied lek and no human activity from one hour before sunset and one hour after sunrise from March 1-May 15 within 0.6 miles of a lek.
- Prohibit or restrict surface disturbing or disruptive activities in sage-grouse nesting or early brood-rearing habitat within 3 miles of an occupied lek from March 15-July 15.
- Prohibit or restrict surface disturbing or disruptive activities in delineated sage-grouse winter concentration areas from November 15-March 14.
- Avoid permanent high-profile structures (higher than 12 feet) within 1 mile of sagebrush obligate species' habitats unless an anti-perching device is installed. Prohibit high profile structures with guy wires.

While we appreciate that these protections exceed those proposed in the Pinedale RMP where only a 0.25 mile radius around leks and 2 mile radius to protect nesting and early brood-rearing habitat would be required, and thus strongly urge the BLM to at least maintain these provisions, we do not feel these provisions are sufficient to comply with

Executive Order (EO) 2008-2, Greater Sage-Grouse Core Area Protection, issued by the Governor of Wyoming on August 1, 2008.¹ Attached as Exhibit 1.

The EO recognizes that the greater sage-grouse “is an iconic species” in Wyoming. To preserve this iconic species and to attempt to prevent its listing under the Endangered Species Act (ESA), the EO is based on managing to protect recognized sage-grouse core breeding areas. Those core areas are mapped in the EO and at least 5 and possibly 6 of them occur in the Kemmerer Field Office. Exhibit 1. 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.”

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).

With respect to core areas, the EO provides that the policy of the State of Wyoming is, among other things, to:

- Ensure that management is “to the greatest extent possible, focus[ed] on the maintenance and enhancement of . . . Core Population Areas identified by the Sage Grouse Implementation Team”
- Provide that “[n]ew development or land uses within Core Population Areas should be authorized or conducted only when it can be demonstrated by the state agency that the activity will not cause declines in Greater Sage-Grouse populations.”
- Emphasizing fire suppression in core areas.
- Ensuring that the collaboration necessary “to ensure, to the greatest extent possible, a uniform and consistent application of this Executive Order” is carried out.

¹ We also feel there is a significant deficiency in the Kemmerer RMP in terms of analyzing the effectiveness of these mitigation measures. Without such an analysis, which seems to be completely lacking, there can be little assurance of their efficacy, and as will be pointed out, the scientific literature has made it increasingly clear these measures are not effective. Given this level of uncertainty, it is crucial that the effectiveness of these measures be disclosed as part of the NEPA analysis.

While the provisions in the Kemmerer RMP may not be contrary to these provisions, and should at least be maintained, we believe the existing provisions standing alone do not recognize or attempt to implement the state policy.

The EO is based on attempting to manage sage-grouse based on a landscape-scale perspective. In contrast, the provisions in the Kemmerer RMP are focused on preventing disturbance around individual leks, but do not take a landscape-scale perspective. In particular, prohibiting disturbance within specified distances of leks or in nesting or early brood-rearing habitat does not ensure that there will not be “declines in Greater Sage-Grouse Populations” as called for by the EO. The use of the kinds of buffers around leks proposed in the Kemmerer RMP, at least unless the buffer is roughly 4 miles, has been discredited in the scientific community. See Exhibit 2 (Memorandum from the Wyoming Game and Fish Department containing recommendations for sage-grouse conservation). It is perhaps assumed in the Kemmerer RMP that if leks are protected the population will be protected, but population level protection is not specifically provided for in the Kemmerer RMP, which we believe is contrary to the EO.

The EO makes it clear that there are at least 5 significant sage-grouse core breeding areas in the Kemmerer Field Office. A very large one to the west and southwest of Kemmerer, a smaller one to the northeast of Kemmerer, two in the vicinity of Evanston, and one near the intersection of U.S. Highway 30 and Interstate 80. The core area south of I-80 near Little America may also be in the Kemmerer Field Office, at least partially. Under the EO, efforts would be made to ensure any new development in these areas must be demonstrated to not cause declines in sage-grouse populations. Under the Kemmerer RMP, a large number of leks are portrayed with 0.6 mile and 3 mile buffers (See Map 26), but under the terms of the RMP, new development could occur in these areas, even if they are in a core area, regardless of impacts on sage-grouse populations. So long as the development does not occur within 0.6 miles of an occupied lek during the evening and morning hours from March 1 to May 15 or in nesting or early brood-rearing habitat within 3 miles of an occupied lek from March 15 to July 15, there is no limitation on the development regardless of the potential impacts on sage-grouse populations.

We believe this is a severe shortcoming in the Kemmerer RMP and it should be rectified before the Record of Decision (ROD) is adopted. The Kemmerer RMP should explicitly adopt the terms of the EO and agree to abide by them. As quoted above, the Wyoming State Director has said that this would be done. That is not to say that the existing sage-grouse protective provisions in the RMP should be dropped—they should be retained but better yet improved in accordance with the scientific information presented in Exhibit 2—but in addition to these, the RMP should ensure compliance with the EO. As the Fish and Wildlife Service observed, this is “a sound framework for a policy by which to conserve greater sage-grouse in Wyoming.” We are unaware of any like statement by the Fish and Wildlife Service or any other scientific organization regarding BLM’s traditional management actions based on protections within a certain radius of a lek during certain periods, and if anything these measures have been determined to be scientifically unfounded. Exhibit 2. These kinds of protections are outdated, in addition to not being in 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 and are attached hereto as Exhibit 3. The BLM should also adopt these measures as a component of State sage-grouse policy in the Kemmerer RMP for the reasons discussed herein.

We would also note that the Kemmerer RMP calls for the protection of “large, contiguous blocks” of sagebrush and other plant communities. This might be a means to help ensure sage-grouse conservation that could compliment the provisions in the EO. We would note, however, that BLM would only seek to protect these large contiguous blocks in the areas west of Kemmerer and north of U.S. Highway 189 (See Map 21). Thus, these specified large block management areas only encompass two of the core areas mapped in the EO, and in fact this area only includes part of the large core area west of Kemmerer (the areas east of U.S. highway 189 south of Kemmerer are excluded). The other three or four core areas present in the Kemmerer Field Office are entirely excluded from management for protection of large contiguous blocks of sagebrush habitat. To better compliment and abide by the EO, the large, contiguous vegetation blocks that are managed for should also include areas in the core areas that are currently excluded. Map 21 should be revised to include contiguous vegetation blocks that encompass the currently excluded core areas. Extending the requirement to “manag[e] projects to minimize construction disturbance to the smallest acreage possible,” Kemmerer RMP at 2-56, would compliment and help implement the provisions in the EO to “focus on the maintenance and enhancement” of sage-grouse habitats and populations in core areas and ensure that new development is only done when it is demonstrated that “the activity will not cause declines” in sage-grouse populations.² We would also note that the large contiguous blocks identified in Map 21 are mostly available for oil and gas leasing, an issue which will be addressed below.

Under the Federal Land Policy and Management Act (FLPMA), the BLM of course must coordinate planning and management activities with the land use planning and management programs of the 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.*

So far as we can determine, the Kemmerer RMP does not consider the EO or the state stipulations presented in Exhibit 3 at all. It seems to be completely silent on whether

² Protecting these large contiguous blocks would also help protect other sagebrush obligate species such as the Brewer’s sparrow, and this would help meet the BLM’s obligations under its special status species manual. These provisions might also help protect the white-tailed prairie dog.

compliance with the EO and Wyoming Game and Fish Department stipulations can be achieved consistent with Federal laws. Absent this consideration, the Kemmerer RMP does not meet the requirements of FLPMA. As noted above, the BLM Wyoming State Director seems to have determined that the EO is not at odds with Federal policy, and should be implemented by the BLM. The BLM should explicitly consider the EO and state stipulations, and unless they are inconsistent with Federal law, the RMP should adopt and abide by these provisions. We think it is highly unlikely the EO is contrary to Federal law. See, e.g., 43 U.S.C. § 1701(a)(8) (a policy of FLMPA is to protect environmental quality including ecological attributes, preserving and protecting some lands in their natural condition, and providing food and habitat for wildlife); 43 C.F.R. pt. 24 (U.S. Department of the Interior policy on state-federal relationships in wildlife policy, including a recognition that “[i]n general the States possess broad trustee and police powers over fish and wildlife within their borders.”). BLM’s special status species manual will be discussed below, but we believe it too shows there would be no conflict between Federal Policy and abiding by the EO. We feel it is clear the Kemmerer RMP must explicitly adopt and abide by the State of Wyoming’s sage-grouse EO and the State’s specific stipulations unless the BLM can come forward with strong contrary Federal law or policy that clearly and unequivocally prohibits adoption of this policy.

We believe that BLM’s 6840 Manual Section—Special Status Species Management—makes it clear that abiding by the EO would not be contrary to Federal policy. The manual makes a number of relevant provisions. Special status species must be “appropriately considered in land use plans.” BLM Manual § 6840.06.C.2.a. BLM must develop “specific habitat and population management objectives designed for conservation” and “management strategies necessary to meet those objectives.” Id. § 6840.06.C.2.b. As recognized in the Pinedale RMP, “[c]onservation of Special Status Species means using all methods and procedures that are necessary to improve the condition of Special Status Species and their habitats to a point where their special status recognition is no longer warranted.” Pinedale RMP at 2-15 (emphasis added).

The provisions in the EO to focus to the extent possible on maintenance and enhancement of sage-grouse populations and habitats in core areas and to not allow new activities that would cause population declines certainly meet these requirements. Furthermore, we think the following is noteworthy. The term “conservation” is defined in the Special Status Species Manual, and with respect to special status species like the sage-grouse (as opposed to listed species) it means the use and 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.” BLM Manual § 6840 at Glossary of Terms. The specific terms of the EO make it clear this management framework is oriented toward eliminating any threat to the continued existence of the species (sage grouse populations and habitats are to be maintained and enhanced and activities prohibited that might “cause declines in Greater Sage-Grouse populations.”) and these provisions would likely also help remove the “need for continued listing as a special status species.” Thus, compliance with the EO is at a minimum consistent with the Special Status Species Manual, and, we would argue, mandated by it.

B. Cumulative Impacts.

Sage-grouse face a complex array of direct and cumulative threats³ to their continued survival. Housing developments, fossil fuels and alternative energy production, surface and underground mining, improper livestock grazing, habitat alteration and fragmentation, disease, predation, transportation and energy transmissions facilities, drought, climate change, and myriad other activities impact the sage grouse. See, e.g., USFWS 12-month finding, 70 Fed. Reg. 2244 (January 12, 2004). Indeed, the Federal Court that struck down the decision by USFWS to not list the species as threatened or endangered determined that, based on the extensive record in the case, ***“It is the cumulative impacts of the disturbances, rather than any single source, [that] may be the most significant influence on the trajectory of sagebrush ecosystems.”*** Western Watersheds, 535 F.Supp.2d. at 1186 (emphasis added).

We find the discussion of cumulative impacts in the Kemmerer RMP lacking in several important respects. First, the one-page discussion of cumulative impacts (at 4-275) appears to be limited to a review of the impacts of habitat fragmentation in the planning area. Although fragmentation of habitat is arguably the most significant threat to the continued viability of the species, indirect and secondary threats must also be considered. Since most of the recent habitat fragmentation in the Kemmerer planning area is related to oil and gas development, particularly roads and well-pads, indirect impacts such as “road kill” and poaching should be considered as these impacts are the unfortunate result of increased access into and use of the area.

Second, although extremely important in terms of the relative quality of sage-grouse habitat, the Kemmerer planning area represents a relatively small portion of the species overall range. This BLM-designated sensitive species is declining throughout its range and attention needs to be given to pressures and threats that exist outside the politically delineated planning area, including, for example, energy development in the Powder River Basin which has had a devastating impact on the bird, Wyoming’s Atlantic Rim area, and of course in the Greater Green River Basin. Clearly, a more appropriate cumulative impacts assessment area for properly assessing cumulative impacts to sage-grouse would be WAFWA Sage-Grouse Management Zone 2 (MZ II). See Exhibit 4.

A careful examination of impacts in a larger CIAA delineated on the basis of well-established principles of conservation biology – i.e., MZ 2, an area that includes all of Wyoming and portions of Montana and Colorado, would reveal that threats to the biological viability of Greater sage-grouse are varied and substantial and have the potential to cause a dramatic and perhaps irreparable impact on the population of this species. For example, the State of Wyoming is experiencing a significant surge in both

³ Cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 CFR 1508.7 The “hard look” requirement mandated by NEPA includes an appropriate examination and disclosure of cumulative impacts.

the scale and pace of energy development activities, with all the major natural gas producing basins undergoing dramatic landscape-scale alterations caused by extensive industrial developments, many of which have been authorized by the BLM itself. The change is not limited to fossil fuels development; the BLM's LR2000 database shows that BLM has approved or is presently reviewing right-of-way applications for as many as 20 major wind power projects, each consisting of between 3000 – 5000 turbines, which collectively will impact close to one million acres of land in Wyoming, much of it providing habitat for sage grouse. In addition, due to a significant increase in the price of yellowcake, uranium mining is also enjoying a dramatic surge in activity. Several large interstate energy transmission facilities are proposed; and several new coal plants are proposed, all of which add to the cumulative impacts not discussed in the proposed RMP.

Third, the discussion of cumulative impacts (Kemmerer RMP at 4-275) ignores the significant and growing threat of West Nile Virus, a relatively new and insidious threat to sage-grouse that has potential to significantly impact the species across its range. A recent peer-reviewed study indicates that:

West Nile virus (WNV) resulted in a 25% decline in survival in four populations of radiomarked greater sage-grouse (*Centrocercus urophasianus*) across Alberta, Wyoming and Montana in 2003. Unexpected impacts of WNV are disturbing because range-wide habitat loss and degradation already threaten sage-grouse populations. In the Powder River Basin of Wyoming and Montana, late-summer survival of sage-grouse was lower at a site with confirmed WNV mortalities (20%) than at two sites without (76%). Dramatic declines in both male and female lek attendance at the WNV site the following spring suggest that outbreaks may threaten some local populations with extirpation.

See Walker et al., *Outbreak of West Nile Virus in greater sage grouse and guidelines for monitoring, handling and submitting dead birds; Wildlife Society Bulletin 2004, 32(3):1000-1006.*

Continued research through 2006 on West Nile virus identified coalbed methane ponds as a primary vector for harboring West Nile mosquitoes. The report noted, “construction of ponds associated with coal-bed natural gas development increased larval mosquito habitat by 75% from 1999 to 2004 over a 21,000-km² area of the PRB (40). Coal-bed natural gas development is anticipated to continue in the PRB for the next 10–15 yr in occupied sage-grouse habitats.” See *West Nile Virus and Greater Sage-Grouse: Estimating Infection Rate in a Wild Bird Population, Avian Diseases 51:691-696 (2007)*

The Kemmerer planning area has Coal Bed Natural Gas Development potential, albeit judged to be “relatively low.” Kemmerer RMP at 3-24. As documented by Walker, produced water associated with this type of development may be a factor in the prevalence of the disease: “Surface water that persists into late summer in an otherwise xeric landscape may exacerbate propensity of an exotic virus-vector complex among naïve native wildlife species.” Walker at 1003.

It is important to recognize, however, that the threat of WNV is not limited to areas experiencing coal bed methane development; the disease has been found in areas of the state currently lacking any significant coal bed methane development such as Fremont County, and has been detected in Lincoln County. <http://www.badskeeter.org/> Conventional and tight sand gas development also results in substantial amounts of produced water, which can increase the prevalence of mosquitoes. The disease is also present in areas of Wyoming where no oil and gas development is occurring (*id.*) and in 48 of the 50 United States. See Centers for Disease Control at: <http://www.cdc.gov/ncidod/dvbid/westnile/index.htm>.

The Kemmerer RMP fails to analyze or discuss the West Nile virus threat to sage-grouse combined with all the other stressors identified by USFWS. We hope that the BLM can prepare a more thorough review of cumulative impacts prior to the approval of the Kemmerer RMP ROD. As the Federal District Court in Idaho noted, *“It is the cumulative impacts of the disturbances, rather than any single source, [that] may be the most significant influence on the trajectory of sagebrush ecosystems.”* Western Watersheds, 535 F.Supp.2d. at 1186 (emphasis added). To ensure compliance with the EO and the Wyoming Game and Fish Department stipulations, not to mention NEPA, this more comprehensive cumulative impacts analysis is required.

II. The Inconsistency Of The Oil And Gas Leasing Classifications With Those In The Adjacent Pinedale Field Office Need To Be Addressed And Consistency Among RMPs Should Be Ensured. The Kemmerer RMP Should Adopt A Level Of Unavailable For Leasing Designations Equivalent To The Pinedale Field Office.

Pursuant to the Kemmerer RMP 182,481 acres would be deemed administratively unavailable for oil and gas leasing. Kemmerer RMP at 2-31, 2-46, and 4-31. In contrast, in the adjacent Pinedale Field Office which released its proposed RMP on the same day as Kemmerer, the BLM would designate 439,470 acres as unavailable for leasing. This difference is made even more striking by the fact that in the Kemmerer Field Office the BLM manages approximately 1.4 million surface acres and 1.6 million acres of minerals estate, while in Pinedale the BLM manages only 922,880 surface acres and 1,199,280 acres of mineral estate. That equates to 13 percent of the surface estate in the Kemmerer Field Office being unavailable for oil and gas leasing versus nearly 48 percent in the Pinedale Field Office. This striking disparity between adjacent field offices represents inherently irrational decision-making that should be made consistent by increasing the amount of land made unavailable for leasing in the Kemmerer Field Office.

It is very difficult to see any rational basis for this disparity. The EISs for the two RMPs provide no indication of a significant difference in resource values that might justify this disparity in leasing provisions. If anything both the EISs show relatively equivalent wildlife values, relatively similar historical values (historical trails) and so forth. Both of these areas have very valuable and widespread habitat for pronghorn, mule deer, elk, and sage-grouse. They provide very high quality remnants of the Lander and Sublette Cutoff historical trails. Both Field Offices are essentially expansive sagebrush

plains that are adjacent to and sweep into adjacent mountain ranges, with all that implies in terms visual appeal and resources, ecological status including plant communities, watersheds, and so on. It does not seem possible to us to justify this differential in leasing decisions based on differences in resource values or resource conditions.

Furthermore, both Field Offices have very clearly defined, large and well developed natural gas fields—Moxa Arch and Fontenelle in Kemmerer and the Pinedale Anticline and Jonah fields in Pinedale—so it would not seem possible to justify this differential based on strikingly different oil and gas development plans or needs. Both plans recognize that the vast majority of future oil and gas development will be focused in the existing well-established fields. “The majority of federal mineral estate in the planning area [71%] is considered by the BLM to have low development potential for oil and gas resources.” Kemmerer RMP at 3-24. Moreover, the two EISs do not provide any indication of significantly different direct, indirect, or cumulative impacts so that would not seem to provide any basis for this differential. Given all of this, the BLM should move to ensure consistency between the two plans. If designating 48 percent of the Pinedale Field Office unavailable for leasing is necessary to meet the purpose and need of that plan we do not see how a far lesser level of protection can meet the stated purposes and needs of the Kemmerer RMP. The stated Purposes and Needs for revision of the two plans are not so different—in fact they are very similar—that this extremely different provision for leasing categories can be justified. Compare Kemmerer RMP at 1-4 to 1-4 with Pinedale RMP at 1-2 to 1-3 (presenting the purposes and needs for the RMP revisions).

We feel this differential approach is especially contrary to and will make hard to implement and fulfill two overarching actions the BLM is taking. The first of these is that the BLM has moved to consolidate the Pinedale, Kemmerer, Rock Springs, and Rawlins Field Offices. It is creating the Wyoming High Desert District that is composed of these four Field Offices. This reorganization will be effective on October 1, 2008. It seems to us that it will be very difficult for this new structure for BLM management to meet its promise of ensuring consistent and effective management in widespread areas with similar conditions when the underlying RMPs the new District will have to abide by make fundamentally different provisions with no apparent underlying basis for this differential treatment. The second widespread effort the BLM is engaging in is the Wyoming Landscape Conservation Initiative, an effort to ensure or provide for maintenance of effective wildlife habitat across all of southwestern Wyoming in the face of widespread oil and gas development. It will be virtually impossible to meet the promise of this effort if in one Field Office large areas are protected pursuant to the RMP while in an adjacent field office that is ecologically similar and even equivalent large areas are made subject to the potential for additional oil and gas development. This inconsistency will either defeat or at least make more difficult achieving the goals of the Wyoming Landscape Conservation Initiative, and the BLM should not approve an RMP that builds this problem into future decision-making for probably the next 20 years. The provision to not make large areas of the Kemmerer Field Office unavailable to future leasing, like is being done in the Pinedale Field Office, will defeat broader management objectives the BLM has established.

This differential also raises concerns with BLM compliance with the Western Governors' Association's (WGA) recently adopted Wildlife Corridors Initiative. This official policy of the Western Governors, including the Governor of Wyoming who was a principal proponent of this initiative during his tenure as Chairman of the WGA, is available at <http://www.westgov.org/wga/publicat/wildife08.pdf>. 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 Kemmerer RMP demonstrates that a number of crucial wildlife habitats are present in the Kemmerer Field Office. At a minimum, these include the extensive big game crucial winter ranges portrayed in Map 22 and the widespread crucial sage-grouse habitats shown in Map 26. A comparison of these maps with the leasing categories provided for in Map 11 shows that only a small fraction of the crucial ranges are unavailable for future leasing. This is inconsistent with the WGA policy, which as noted calls for the preservation of crucial wildlife habitats.

More specifically, in the recommendations made by the Oil and Gas Working Group, which were adopted by the Governors as part of the Initiative, it is the policy of the Governors to:

- Provide for mitigation in this sequence: avoidance, then minimization, and last compensation. Making the crucial habitats portrayed in the Kemmerer RMP unavailable for future leasing is clearly in line with the Governors' policy to first avoid potential impacts to crucial habitats.
- Site-specific NEPA analysis should be conducted before offering lease parcels in crucial habitats. The Kemmerer RMP makes no site-specific evaluations so making areas in crucial habitats available for leasing without this detailed analysis first occurring is contrary to the Governors' policy.
- 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." It is not clear that any site-specific consultation with the State has occurred prior to the BLM opening many of these crucial habitats to leasing, which is contrary to the Governors' policy.
- 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. Again, the Kemmerer RMP provides no analysis of whether areas it would open to leasing in recognized crucial ranges

raise heightened concerns, it simply makes many of these areas available for leasing.

Thus it is apparent to us that opening many of the areas made available for leasing in the Kemmerer RMP is not consistent with the Governors' policy and that many of these areas should be made unavailable to leasing in order to comply with this state policy.

The decision to not make large areas of crucial wildlife habitat unavailable for future leasing also conflicts with Wyoming's wildlife Mitigation Policy. Exhibit 5. The State of Wyoming feels that the mitigation sequence mentioned above should be used, and that "it is better to maintain wildlife resources than to compensate for adverse impacts." Exhibit 5 at 2. Other than avoiding impacts in the first place, as making an area unavailable for leasing does, mitigation does not assure no impacts will occur to crucial habitats, and "acceptance of mitigation is normally equivalent to accepting a degree of wildlife or habitat loss." *Id.* Big game crucial habitats are considered "vital" by the State of Wyoming, and modification of habitat can only be accepted "provided habitat function is maintained." *Id.* at 5. The policy calls for "no significant declines in species distribution or abundance or loss of habitat function." *Id.* The work of Hall Sawyer on the Pinedale Anticline, which BLM has sponsored and thus is well aware of and has in hand, has shown that habitat function is not maintained in the face of oil and gas development where only the standard/classic timing limitations are applied. Making areas unavailable for leasing is the means to meet the Wyoming Mitigation Policy, not attempting to limit the impacts of development when it occurs. Thus, in addition to not being in line with the WGA Wildlife Migration Corridors Initiative, the decision to make far more of the Kemmerer Field Office open to leasing than would be done in the Pinedale Field Office is also not consistent with the State of Wyoming's wildlife Mitigation Policy. Furthermore, as discussed in section one above, making these expansive areas, many of which are in sage-grouse core areas, available for leasing is also inconsistent with Wyoming's sage-grouse EO.

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 that designation of areas unavailable for leasing in the Kemmerer Field Office would mirror more closely those in the Pinedale Field Office.

A corollary of this concern regarding not designating crucial wildlife habitats and sage-grouse core areas unavailable for future leasing relates to the provision in the Kemmerer RMP to protect large contiguous blocks of sagebrush and other shrub habitat that was discussed above. A significant portion of these areas nominally designated for maintaining connections among habitats with minimization of the size of construction

impacts are available for leasing. Compare Maps 11, 11A, and 21. In order to fully “[m]anage large, contiguous blocks of federal land by maintaining or enhancing sagebrush, aspen, and mountain shrub communities” these areas should be designated as unavailable for future leasing. Putting in place new leases in these areas will create built-in management conflicts that will likely make it impossible to achieve the stated management direction—these areas will be less likely to retain either large or contiguous shrub plant communities if the property right represented by an oil and gas lease is superimposed over these areas. These large contiguous blocks contain large areas of crucial big game habitat as well as crucial sage-grouse habitat. Compare Maps 21, 22 and 26. As just discussed, it will be impossible to meet the WGA policy regarding crucial wildlife habitats and the Wyoming sage-grouse EO if these areas are open to leasing before much more rigorous analysis has been completed and effort made to “preserve” these crucial habitats as recognized in the Governors’ policy. In essence these “contiguous vegetation blocks” are another way of saying “crucial wildlife habitat,” and a comparison of Maps 22 and 26 with Map 21 confirms that this is largely true. The BLM recognizes the significance of these habitats in preventing habitat fragmentation. See Kemmerer RMP at 3-45 to -46. Given this, these large contiguous habitat blocks should be unavailable for leasing so as protect the crucial wildlife habitats they contain. This would ensure compliance with State wildlife policy.

Fundamentally what is needed, but which is currently lacking, in the Kemmerer RMP is a “vision” for future oil and gas leasing and development like is presented in the Pinedale RMP. As currently structured, the Kemmerer RMP provides for scattered, disconnected leasing categories with no apparent guiding framework. See Maps 11 and 11A. In contrast, in the Pinedale RMP a clearly articulated cohesive vision is presented of the desired direction for oil and gas leasing and development. See Pinedale RMP Map 2-9. The Kemmerer RMP should not be approved until it contains a like “vision” for the desired future direction of oil and gas management. We would note that the Pinedale RMP too presents oil and gas leasing categories that are similar to what is provided in the Kemmerer RMP, but in addition to providing for leasing categories it also establishes oil and gas management areas—that is, it establishes a vision. Compare Pinedale RMP Map 2-4 with Map 2-9. This should be replicated in the Kemmerer RMP before it is approved, and we feel that if such a vision were developed a considerably greater portion of the Field Office would be made unavailable for future leasing, as occurred in the Pinedale Field Office.⁴

⁴ We would note that Alternative B1 presented in Appendix Q of the Kemmerer RMP is no substitute for what we are requesting. Alternative B1 is based on designating large areas as No Surface Occupancy (NSO). But designating areas NSO rather than simply making them unavailable for leasing is in many respects just a way to create conflict when the NSO areas are large. We would note that the Pinedale Field Office abandoned the large NSO areas proposed in its original RMP draft EIS and instead moved to designate many of these areas as unavailable for leasing, which helps prevent future conflicts. As recognized in the Kemmerer RMP, creating these large areas of NSO as a means to protect the large contiguous blocks of habitat would be ineffective or create conflict for several reasons, Kemmerer RMP at Q-7 to Q-8, but designating these areas unavailable for leasing would not create these problems or dilemmas and would more certainly protect the large block habitats, many of which as noted are coextensive with wildlife crucial habitats.

The difference in the two RMPs is made even more apparent when the language in the Pinedale RMP is considered. The Pinedale RMP establishes an overall objective relative to wildlife (“Maintain sufficient undisturbed or minimally disturbed habitats to maintain persistent, well-distributed, self-sustaining, and productive populations of all native and desirable non-native fish . . . and wildlife species within the planning area.”) and to achieve this objective it divides the planning area into “three distinct, noncontiguous wildlife management zones for the purpose of oil and gas activities,” which are the three designations mentioned above: Intensely Developed Fields, Traditional Leasing Areas, and Unavailable Areas. Pinedale RMP at 2-139. The Pinedale RMP then goes on to provide in great detail what management actions will apply to sage-grouse, big game habitats, and sensitive species habitats in each of these different oil and gas management areas. In other words, a vision is provided. In contrast the Kemmerer RMP is essentially silent and certainly provides no equivalent vision or big picture perspective. In the Kemmerer RMP there is little or no differential in how areas unavailable and available for oil and gas leasing will be managed to protect wildlife, they are all treated the same, there is no vision.

In terms of developing a “vision” for future oil and gas leasing and development we feel a crucial consideration is the “railroad checkerboard” land ownership pattern that dominates much of the Kemmerer Field Office. We commented on this issue extensively in our comments on the RMP draft EIS. Essentially we feel that it is impossible to develop a rational plan for the Kemmerer Field Office unless it explicitly acknowledges and provides management guidance for the railroad checkerboard. There is probably no more dominant reality in the Kemmerer Field Office in terms of both the legal and physical environment, and the plan should be developed and implemented in recognition of this. Yet the Kemmerer RMP is essentially silent on the checkerboard, at least in terms of making specific provisions for dealing with it, particularly in the context of oil and gas development. Until this underlying dominant fact of life in the Kemmerer Field Office is specifically provided for in the Kemmerer RMP, the RMP will be severely deficient. With respect to oil and gas development, in the checkerboard BLM’s management prescriptions may be of little effect because development may be moved to intervening private lands but in the large contiguous blocks of BLM land to the north and south of the checkerboard BLM management prescriptions can be far more effective. The RMP repeatedly acknowledges this differential. The Kemmerer RMP should adopt a “vision” (and specifically provide for) this striking difference in management constraints and opportunities in the area, particularly with respect to oil and gas leasing, development and management. For example, it would likely be far more appropriate to have large areas made unavailable for leasing in the contiguous BLM lands where BLM can more fully direct outcomes and provide for resource conditions and make areas in the checkerboard more fully available to oil and gas leasing and development because the course of development will be far harder to guide in any event. Yet in the current RMP the largest area unavailable for oil and gas leasing is in the checkerboard, near the trona mines. Map 11.

Complementing and reinforcing the need to ensure consistency between the Pinedale RMP and the Kemmerer RMP relative to oil and gas leasing categories and

management designations 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. While it specifically applies to interactions with other Federal agencies and State and local governments, it seems clear to us it just as assuredly applies to BLM's interactions with itself—to coordination among Field Offices, especially when they are adjacent and doing the same thing, namely revising their RMPs. If BLM need not ensure a level of coordination with itself that is equivalent to the coordination prescribed for other entities, that would defy understanding. Consequently, the BLM is under an obligation to ensure that the Kemmerer and Pinedale RMPs are apprised of one another and assure that they consider one another, and most importantly that they "assist in resolving, to the extent practicable, inconsistencies between . . . plans." *Id.* The Kemmerer RMP should not be adopted until consideration has been provided fully to the fact that the Kemmerer RMP would designate only 13 percent of the Field Office unavailable for oil and gas development while the Pinedale RMP designates nearly 48 percent of that Field Office unavailable. This inconsistency needs to be resolved to the extent practicable in recognition of the provisions in BLM's planning regulations.

In addition to the above considerations relative to the amount of land unavailable for future leasing, we urge the BLM to not approve the Kemmerer RMP until two related problems are resolved. First, in addition to the limited designation of areas as unavailable for oil and gas development discussed above, the Kemmerer RMP also designates areas as being administratively available for leasing subject to "moderate constraints" in one category and subject to "major constraints" in another category. *See, e.g.,* Kemmerer RMP at 2-46. We find these categories confusing and not self-explanatory. So far as we can determine, nowhere in the RMP is it stated what exactly major and moderate constraints are or what they will mean in terms of management. Absent a careful—and prominent—explanation of what exactly these limits are this plan is flawed and in need of correction. Understanding what these provisions mean in simple, clear, and unambiguous language is crucial to full public understanding of this plan and an ability to meaningfully participate in and comment on this process and its implementation. This clarity is probably also needed if the BLM is going to rationally and consistently apply and fully understand this terminology. These are probably crucial provisions in the RMP yet they are unexplained, undefined and the reasons for their establishment in various areas far from clear, with some exceptions like the cushion plant and sensitive plant species habitats. "Major" and "moderate" constraints are not self-explanatory nor as far as we know do they have any widely understood common meaning or understanding. This problem is a component of the need for a "vision" relative to oil and gas management to be clearly defined and expressed in the Kemmerer RMP.

A second need for improvement in the oil and gas provisions applicable to the Kemmerer RMP before it is adopted is a need to adopt a provision like is made in the Rawlins RMP for the application of "intensive management" to certain oil and gas leasing and development activities. To ensure consistency between nearby Field Offices, the provision for intensive management should be provided for in all plans under revision. To have this provision applicable in one nearly-adjacent Field Office but not in another is not rational. As discussed in our protest of the Rawlins RMP, which is

pending before the BLM, the application of intensive management should be made to all oil and gas development activities, not just those in “special places,” and the definition of intensive management should be modified as specified in the Rawlins RMP protest.

The need to provide for “intensive management” in a clear and specific way raises two related matters. First, the Kemmerer RMP states that an objective for reaching its goals is to “[e]nsure that no greater than 12.5 percent net loss of crucial habitat acres occurs in the planning area over the life of the plan in the absence of voluntary offsite mitigation.” Kemmerer RMP at 2-52. This is a significant and important provision that is needed to ensure compliance with the WGA Initiative, Wyoming’s Mitigation Policy, and the sage-grouse EO. This provision could go far toward meeting the WGA goal of “preserving” crucial wildlife habitats and the Wyoming Mitigation Policy of not allowing disturbance in vital habitats that causes significant declines in distribution, abundance, or habitat function. Yet this provision seems to have no certain and positive application in the provisions in the plan. It is said to be provided for in a number of specific management actions (there are many references to “BR 3-5.2” with respect to various management actions), but many of these actions are at least somewhat tangential to the stated objective and they certainly do not positively and affirmatively require that this needed assurance for meeting the overall goals of the plan be specifically abided by. Consequently we ask that this objective be converted into a clear and positive specified management action that will be specifically implemented. One way to do this would be to do as discussed at length above, and designate far more of the planning areas as unavailable for future leasing, as has been done in Pinedale. If 48 percent of the Kemmerer Field Office were designated as unavailable for future leasing it is almost certain that it could be assured there will be no more than 12.5 percent net loss of crucial habitat, while if only 13 percent of the planning area is unavailable for future leasing, there is little assurance that disturbance can be limited to this degree. Providing direct and positive commitments to not exceed 12.5 percent crucial habitat loss could compliment and support a requirement to provide for “intensive management,” and be a component of that provision.

In a similar vein, there is a need for the following change in the Kemmerer RMP before it is approved. Repeatedly in the RMP for many different resources or resource concerns it is stated that various activities will be “avoided” or that BLM must “avoid” taking the action. As we discussed on pages 8-9 of our comments on the RMP draft EIS, this term must be defined. “Avoid” is an inherently vague term. The use of this term if it is undefined will assure future delay, uncertainty and conflict. The objective of BLM land use planning is to provide for a “rational, consistently applied set of regulations and procedures which promote the concept of multiple use management” 43 C.F.R. § 1601.0-2 (emphasis added). There is no guarantee that the term “avoid” will be “consistently applied” if it is undefined, rather it is all but certain there will be great inconsistency and variability in its application. As we stated in our comments, this provision should be defined to mean that an activity will not be permitted unless there is “no practicable alternative available.” This or a similar definition would ensure consistency in application as required by BLM’s planning regulations, but which assurance is currently lacking when the term “avoid” remains undefined. Providing this

definition could also be a part of assuring that “intensive management” is applied to oil and gas activities in the Kemmerer Field Office, as will be required in Rawlins.

To summarize, the BLM must resolve the striking inconsistency in the size of the areas proposed to be unavailable for oil and gas development in the Kemmerer RMP versus the Pinedale RMP, and resolution of this conflict in a way that is consistent with State policies will demand that the area unavailable for leasing in the Kemmerer Field Office be greatly increased to a level more like that in Pinedale. This change must be made to meet BLM’s obligation to ensure its land use plans are as consistent with state policy as possible. It is also needed to ensure that BLM plans are consistent with one another and with overarching BLM management direction, such as the creation of the BLM High Desert District and the Wyoming Landscape Conservation Initiative, especially when there are few apparent strong differences in resource conditions and needs in Kemmerer versus Pinedale. In a related consideration, the Kemmerer RMP is deficient because unlike the Pinedale RMP it contains no overarching vision for oil and gas management, which means the plan cannot provide a rational framework for land management. Correction of this problem will likely lead to less land being available for leasing, as is provided for in the Pinedale vision, and it will demand correction of several other problems such as the lack of definition of what moderate and major constraints are, what the term “avoid” means, and the lack of a provision for application of “intensive management,” such as is provided in the Rawlins RMP.

III. The BLM Must Improve The Air Quality Analysis And Mitigation Measures In The Kemmerer RMP.

The Kemmerer RMP suffers from several significant shortcomings with respect to its consideration of issues related to air quality. These include a need for a quantitative analysis of air quality impacts rather than a qualitative analysis, a need for a careful consideration of potential impacts from ozone pollution, and a need for BLM to ensure that it “provides for compliance” with the Clean Air Act and other air quality regulations, standards, and plans. Furthermore, the mitigation for air quality impacts specified in the Kemmerer RMP is insufficient, and below we will recommend specific improvements with respect to mitigation measures. Each of these issues will be considered in turn.

A. The BLM Must Do a Quantitative Analysis of Air Quality Impacts.

The Kemmerer RMP did not provide a quantitative analysis of air quality impacts, rather it only provided a qualitative analysis. In essence all that was presented was an inventory of likely future increases in emissions of criteria air pollutants. See Figures 4-1 and 4-2.. It is anticipated that emissions of air pollutants will increase from 39,553 tons per year in 2001 to 41,550 tons per year by 2020. See Table 4-2. Cumulative emissions would be even greater. See Tables 4-23 and 4-27.

This “analysis” is insufficient to meet the requirements of NEPA. An EIS must consider the environmental impacts of a federal action, it must consider the effects of the action. A consideration of the environmental effects of an action requires a consideration

of both the direct and indirect effects. 40 C.F.R. § 1508.8. Here the BLM has provided no such analysis, it has presented an inventory of the likely increase in pollutants but it has made no attempt to consider the direct effects that “are caused by the action and occur at the same time and place” nor has it made any attempt to consider indirect effects “that are caused by the action and are later in time or farther removed in distance.” Id. All that BLM does is state that the tonnage of pollutants will increase and it anticipates that air quality will remain within legal standards. Yet it also states that there is the “potential” for significant impacts relative to Prevention of Significant Deterioration (PSD) increments, visibility impacts in Class I areas, and deposition levels exceeding thresholds. Table 2-4. There is even some potential for violation of Wyoming and National Ambient Air Quality Standards (NAAQS). Id. Given these potential impacts far more was required to meet the requirements of NEPA than a simple inventory of anticipated pollution emission levels.

The Kemmerer RMP does not present the “detailed statement” on the “environmental impact of the proposed action” or the “adverse environmental effects which cannot be avoided should the proposal be implemented” that NEPA requires. 42 U.S.C. §§ 4332(2)(C)(i)-(ii). It is nothing more than an inventory of emissions with no concrete conclusions whatsoever regarding potential impacts of the emissions. This is a violation of NEPA. The BLM is required to “consider every significant aspect of the environmental impact of a proposed action.” Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 98 S.Ct. 1197, 1216 (1978). As recognized by the courts,

An agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an RMP merely by saying that the consequences are unclear or will be analyzed later when an [environmental assessment] is prepared for a site-specific program proposed pursuant to the RMP. “[T]he purpose of an [EIS] is to evaluate the possibilities in light of current *and contemplated* plans and to produce an informed estimate of the environmental consequences Drafting an [EIS] necessarily involves some degree of forecasting.”

Kern v. United States Bureau of Land Management, 284 F.3d 1062, 1072 (9th Cir. 2002) (underlines added).

That quantitative analyses may be prepared for future projects is also of no moment. The BLM’s obligation is to prepare an adequate NEPA analysis for this proposed federal action potentially significantly affecting the quality of the human environment, that is, the Kemmerer RMP, not some unknown and unspecified future projects that likely only impact a portion of the planning area. And that the Wyoming Department of Environmental Quality may ensure compliance with the Clean Air Act also does not excuse the BLM from fully disclosing what the environmental impacts of its actions will be, regardless of whether legal standards will or will not be violated. The BLM acknowledges that implementation of the RMP may at a minimum cause significant impacts to visibility, PSD increments and deposition threshold, which is more than

enough to trigger a requirement for a full and complete analysis regardless of what DEQ may require or do at some point in the future. And as will be discussed below, the Kemmerer Field Office already exceeds the NAAQS for ozone, which emphasizes the need for a quantitative analysis.

We must note that this situation stands in inexplicable contrast to what is going on just across the border in Colorado. In the Little Snake Field Office the BLM is conducting a quantitative air quality impacts analysis as part of that RMP revision. It is utterly arbitrary to have one Field Office engaging in a quantitative analysis while a nearly-adjacent Field Office engages in a qualitative analysis. The two analyses are entirely incomparable and therefore of greatly reduced utility. This is totally contrary to rational land use planning and management, as well as NEPA. This raises many of the consistency and coordination issues discussed above. The BLM should not approve the proposed Kemmerer RMP until a far more useful and informative quantitative air quality impacts analysis is completed so as to allow for fully informed land management.

B. The BLM Must Consider Ozone Pollution Impacts in the Kemmerer RMP.

As currently written, the Kemmerer RMP provides no analysis of potential impacts from ozone pollution. The emissions of particulate matter (PM₁₀ and PM_{2.5}), nitrogen oxides (NO_x), sulfur dioxide, volatile organic compounds (VOC) and hazardous air pollutants are specified, but ozone formation and pollution is not addressed, even though it is a criteria pollutant under the Clean Air Act. This is unacceptable and does not meet the requirements of NEPA.

Based on data presented in the Kemmerer RMP, the background concentration of ozone in the Kemmerer Field Office is 75 parts per billion (ppb), which equals the NAAQS. See Table J-3.⁵ Thus, the Kemmerer Field Office is already in violation of the ozone NAAQS, which is 75 ppb. This clearly means a careful analysis of ozone issues is required before the Kemmerer RMP is approved and it heightens the need for a quantitative analysis of air quality issues, as discussed above. When BLM's own cited data show it is already violating a legal standard this issue cannot be passed over. As discussed in the Kemmerer RMP, just to the north of the Kemmerer Field Office in the Pinedale Field Office, greatly elevated ozone levels are being monitored. Clearly ozone pollution is a significant issue in western Wyoming. And certainly large gas fields like the Moxa Arch field are likely contributing ozone precursors that drift to the northwest into the Pinedale Field Office on the prevailing winds. Ozone "is a strong oxidizing chemical that can burn lungs and eyes and damage plants at high concentrations." Rawlins RMP at Page A4-2. And thus, the BLM must carefully analyze impacts from this pollutant to meet the requirements of NEPA. And as will be discussed below, this analysis is need to "provide for compliance" with the Clean Air Act, as required by FLPMA.

⁵ This Table in the RMP continues to present the old, no-longer-applicable NAAQS for ozone. BLM seems to not acknowledge or consider the fact that the NAAQS has been changed by EPA and that BLM's own data presented in the Table shows that the new NAAQS is violated in the Kemmerer Field Office.

C. The BLM Must “Provide for Compliance” with the Clean Air Act and Related Regulations, Standards, and Plans.

The FLPMA requires that BLM land use plans shall “provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans.” 43 U.S.C. § 1712(c)(8). It might be worth noting that this requirement extends farther than just ensuring compliance with NAAQS; it applies as well to other standards and implementation plans.

As currently fashioned, the Kemmerer RMP does not meet this requirement. At a minimum, the BLM acknowledges that there may be significant impacts on visibility, PSD increments, and depositing thresholds. Kemmerer RMP at Table 2-4.. A failure to meet the national goal of the “prevention of any future and the remedying of any existing impairment of visibility in mandatory class I Federal areas,” 42 U.S.C. § 7491(a)(1), is not providing for compliance with a relevant standard or plan, as required by the FLPMA. Likewise the failure to ensure compliance with the standards adopted by the relevant Federal Land Manager for the protection of air quality related values on protected Federal lands is a failure to meet the obligation established by FLPMA. And a potential violation of PSD increments is clearly not providing for compliance with an applicable pollution control law. And as just discussed, based on BLM’s own data presented in the RMP, the Kemmerer Field Office is already out of compliance with the NAAQS for ozone. Moreover, framed in the negative, the BLM cannot possibly claim that the Kemmerer RMP will “provide for compliance” with the Clean Air Act and other air quality standards and plans because it affirmatively states in the RMP that it has almost no idea of what impacts will result as a consequence of implementation of the RMP due to the fact it has only engaged in a qualitative analysis. Ignorance does not allow the BLM to find—as it must under the explicit terms of FLPMA—that the Kemmerer RMP will “provide for compliance” with clean air protection requirements.

D. Mitigation that Would Help Ensure That the BLM “Provides for Compliance” with Applicable Clean Air Laws.

The Kemmerer RMP is remarkably silent, ambiguous, or passive regarding any protections that would be applied to protect air quality. Generally, the BLM would do little more than leave protection of air quality to the State of Wyoming and assist in monitoring efforts. Kemmerer RMP at 2-37. To a large extent it would “cooperate” in efforts not affirmatively “provide for compliance” with clean air law. Id. Things that should be done as part of this RMP revision such as defining a strategy to define background pollution levels associated with approved activities, estimation of impacts from emissions reductions, adoption of measures to reduce emissions, and performing dispersion modeling would be pursued later. Id. We believe the BLM can do much better than this and we would like to make the following recommendations.

First, the BLM should commit to asking and encouraging the DEQ to apply the air pollution control standards currently applicable in the Jonah and Pinedale Anticline

fields on BLM lands in the Pinedale Field Office to concentrated development areas in the Kemmerer Field Office (Moxa Arch and Fontenelle). As the BLM is aware, the DEQ requires best available control technology (BACT) to be applied to emissions from oil and gas development throughout the state, but it has stricter requirements that apply to the Jonah and Pinedale Anticline fields.⁶ See <http://deq.state.wy.us/aqd/oilgas.asp>. In developing the new guidance for BACT applicable to oil and gas development, which was adopted by the DEQ in September 2007, the DEQ initially planned to require the provisions applicable to Jonah and the Pinedale Anticline in all “concentrated development areas” in the state, which certainly would have included the above-mentioned fields in the Kemmerer Field Office. In the end, the DEQ decided not to extend the heightened requirements beyond the Jonah and Pinedale Anticline Fields at this time, but it also made it clear that it intended to move in this direction in the future, the option definitely was not taken off the table. And in that regard the DEQ has recently announced that it intends to move in this direction soon due to the elevated ozone levels in the Pinedale area. Thus, the BLM has an opportunity to move air quality protection efforts forward by assisting in moving the air quality protections applicable to the Jonah and Pinedale Anticline fields to fields like Moxa Arch and Fontenelle, and it should commit to doing so in the Kemmerer RMP. Given the BLM’s obligation to provide for compliance with clean air requirements in the Kemmerer RMP and the already excessive ozone levels, this is a very reasonable and practical mitigation measure that the BLM should commit to pursuing in the Kemmerer RMP.

Second, the BLM should adopt the language and policy being adopted by the BLM with regard to the Pinedale Anticline project in western Wyoming. The BLM has just released the ROD for the Pinedale Anticline infill project (4,400 wells) and it makes many provisions for air quality protection, especially related to visibility protection and reducing ozone pollution. The BLM should fully consider these measures and implement as many of them as possible in the Kemmerer RMP. This would ensure that the BLM “provides for compliance” with clean air laws, as it must. If these policies and measures can be implemented by the Pinedale BLM there certainly is no bar to the Kemmerer BLM implementing them, and as discussed above several times, this would help ensure cohesiveness and coordination among RMPs rather than disparity.

Additionally we ask the BLM to fully consider this provision from the Pinedale RMP and ask that it adopt it as part of the Kemmerer RMP. The Pinedale RMP provides that, “BLM would work cooperatively with WDEQ-AQD to develop a memorandum of understanding (MOU) on lease stipulations and [conditions of approval], with respect to air quality emissions.” Pinedale RMP at 2-110. We see no reason why an equivalent measure should not be made part of the Kemmerer RMP. This is a potentially very important provision (and step forward compared to past and current BLM practice) that would help allow the BLM to more fully recognize and regulate air emissions at both the leasing stage and the Application for Permit to Drill (APD) stage. As things stand now, the BLM rarely if ever attaches any stipulations to a lease for the protection of air quality, and usually feels powerless to adopt measures at the APD stage. Besides the provision in

⁶ The DEQ is also moving toward regulation of emissions from drill rigs in the Pinedale and Jonah fields, and this could be an option in the Kemmerer Field Office as well.

FLPMA requiring the BLM to provide for compliance with clean air law, BLM regulations also require that each land use authorization “shall contain” terms and conditions that “[r]equire compliance with air and water quality standards established pursuant to applicable Federal or State law.” 43 C.F.R. § 2920.7(b)(3). And the Mineral Leasing Act itself provides that the BLM shall “regulate all surface-disturbing activities conducted pursuant to any lease . . . as required in the interest of conservation of surface resources.” 30 U.S.C. § 226(g). So arguably not only is adoption of the provision in the Pinedale RMP desirable, it is in fact required.

IV. CONCLUSION

For the foregoing reasons, the protesting parties protest the following provisions in the Kemmerer RMP on the bases stated above:

| Parts of Plan Protested | Brief Non-exclusive Statement Of Reasons Why Decision Is Wrong. For Complete Reasons And Issues See The Full Text Of The Protest |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Lack of adequate protection for the sage-grouse and recognition and compliance with the State of Wyoming’s EO regarding sage-grouse. Failure to abide by the BLM’s special status species manual. | Kemmerer RMP at 2-64 to 2-65 and numerous equivalent or related provisions and statements regarding sage-grouse management made throughout the plan. Also Kemmerer RMP at 2-56 and Map 26. |
| The inconsistency between the lands made unavailable for leasing in the Kemmerer RMP versus the Pinedale RMP, and the need for compliance with various overarching state and federal policies that would be achieved by increasing the amount of land unavailable for leasing. | Kemmerer RMP at 2-31, 2-46, 4-31 and Maps 11 and 11A and the other related provisions of the Kemmerer RMP cited above. <u>See also</u> Pinedale RMP at 2-117 to 2-120 and 2-139 to 2-147 and Map 2-9. |
| Air Quality Issues | Kemmerer RMP at 2-37 to 2-38 and other provisions in the RMP cited above. Kemmerer RMP at Table 2-4. Pinedale RMP at 2-110. |

Moreover, the portions of the plan identified by page number throughout the text of this protest are also protested.

As indicated, these decisions are wrong for the reasons stated in the full text of this protest, generally because the decisions would be based on the faulty NEPA and FLPMA compliance noted, and because the decisions would be based on analyses and actions that violate the other legal requirements identified above in the full text of the protest. Because of the flaws identified above, these provisions contrary to the law and public policy cannot be adopted. The recommended improvements we have suggested would correct these problems.

Furthermore, while the specific provisions noted in the table above are protested, these do not represent a complete list of the issues being protested or of the parts of the plan protested. For a complete list of the issues protested, the parts of the plan protested, and the reasons why decisions in the RMP are wrong, reference must be made to the entire text of this protest. Since the specifically protested provisions noted in the table above are based on and depend on the faulty analyses and conclusions identified throughout the Kemmerer RMP, the entire Kemmerer RMP is subject to protest pursuant to 43 C.F.R. § 1610.5-2, and is in fact protested by the parties.

To correct these problems the parties request that the BLM Director exercise his supervisory authority over the Kemmerer Field Office and supplement the Kemmerer RMP and/or issue a notice of significant change, with modifications adopted as indicated in this protest. Thank you for considering the points in this protest, and we look forward to improvement of the Kemmerer RMP.

Sincerely,

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

cc: Governor Dave Freudenthal