

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

Protesting Parties:

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

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

The Wilderness Society,
c/o Nada Culver, Senior Counsel
BLM Action Center
1660 Wynkoop Street, Suite 850
Denver, CO 80202
(303)-650-5818 Ext. 117

Audubon Wyoming
c/o Brian Rutledge, Executive Director
358 North 5th Street, Unit A
Laramie, WY 82072
(307)-745-3025

February 1, 2008

VIA e-mail and U.S Mail

Mr. Jim Caswell, Director (210)
Bureau of Land Management
U.S. Department of the Interior
Attn: Ms. Brenda Hudgens-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 RAWLINS 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 and Final Environmental Impact Statement for the Rawlins Field Office (hereinafter, "Rawlins 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 Rawlins Field Office planning area that will be negatively affected by the BLM's proposed Rawlins RMP. All of the protesting parties have been intimately involved throughout the BLM's planning process for the Rawlins 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 Rawlins 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 Rawlins Field Office, including the following:

- Extensive written comments submitted by the Wyoming Outdoor Council, Defenders of Wildlife and The Wilderness Society on the Draft Environmental Impact Statement for the Rawlins Resource Management Plan dated March 17, 2005.

- The Wyoming Outdoor Council made remarks at the public meeting the BLM held regarding the Draft Environmental Impact Statement for the Rawlins Resource Management Plan on February 9, 2005 in Rawlins, Wyoming.
- The Wyoming Outdoor Council, Biodiversity Conservation Alliance, and many other organizations submitted the Western Heritage Alternative to the BLM as part of the NEPA process related to this RMP revision on April 7, 2003 with their scoping comments. The BLM recognizes the comprehensiveness of this proposal in the Rawlins RMP, stating that it “did provide or develop issues and concerns regarding management recommendations for many of the resource issues it presented and assisted BLM in alternative formulation for many of the resources in the [Rawlins RMP].” Page 2-9.
- Biodiversity Conservation Alliance submitted extensive written comments on the Draft Environmental Impact Statement for the Rawlins Resource Management Plan on March 18, 2005.
- Attached to the comments of the Wyoming Outdoor Council and/or Biodiversity Conservation Alliance regarding the Draft Environmental Impact Statement for the Rawlins Resource Management Plan, or incorporated by reference into those comments, were the comments of several experts who were under contract to these organizations, including: comments of Dr. William Alldredge (big game), comments of Kenneth Kreckel (oil and gas operations), comments of Vicki Stamper (air quality), comments of Robert Yuhnke (air quality), comments of Hollis Marriott (sensitive plants), comments of Clait Braun (sage grouse), and comments of Harold Tyus (produced water and water quality).

These comments and proposed plans 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 Rawlins RMP is wrong (43 C.F.R. § 1610.5-2(a)(2)(ii), (iii), (v)) follows.

I. THE BLM MUST INCREASE THE LEVEL OF PROTECTION PROVIDED FOR IN THE RAWLINS RMP.

We request that the BLM Director exercise his supervisory authority to improve the Rawlins RMP. Exercise of this authority is crucial so as to fully recognize and protect many important environmental features and multiple use values in the Rawlins Field Office area, and so as to meet the BLM’s legal obligations. In the following discussion we will first highlight the provisions of the land use plan that are in need of improvement, following that we will address why these improvements are needed and/or required, and then last we will propose improvements in the Rawlins RMP that are needed in order to meet these legal obligations and policy directions.

A. Areas of Improvement That Are Needed in the Rawlins RMP.

Probably the most important improvement needed in the Rawlins RMP is for the BLM to provide a rational, cohesive plan for future oil and gas leasing. As currently proposed, BLM's "oil and gas classifications" designations are a scattering of varying classifications with little or no apparent cohesiveness, overarching purpose, or most importantly, vision. Map 2-38, pages 2-36 to 2-37. For example, if Map 2-38 is considered, it is not unusual to see that protected areas are often interspersed with and intermingled with areas open to leasing with minimal protections; these contrary (and competing) designations often shift and change repeatedly within a matter of only a few miles. Yet the BLM recognizes repeatedly throughout the Rawlins RMP that oil and gas development is likely to be the most environmentally significant development activity that will occur in the Field Office over the next 20 years. See, e.g., 4-290, 4-393, 4-456 (noting substantial impacts of oil and gas development to historic trails, high quality visual environments, and wildlife). Given this overarching significance, the BLM must provide a rational, cohesive plan—in fact, a vision—for future oil and gas leasing in the Rawlins Field Office. That is currently lacking in the proposed Rawlins RMP, and we will return to this issue in more detail below.

Secondly, the BLM must commit to pursuing "intensive management" in all areas subject to oil and gas development, and especially in special management areas such as wildlife habitat management areas and special recreation areas. In addition the BLM's definition of intensive management must be improved in order for it to meet its legal obligations. It is possible that the BLM does plan to require "intensive management" anywhere that oil and gas development activities occur. See page 2-36 ("Surface disturbing activities would be intensively managed (as defined in the Glossary) and would be subject to reclamation practices (Appendix 36).") But this one-time mention seems to be isolated; we see no further discussion of this potential requirement as a generally required provision of the Rawlins RMP. In fact, what we see is mention of the fact that intensive management will be required in various special management areas, see pages 4-107 to 4-109, but no mention that this will be generally required, the implication being in our view that it will not be. This needs to be corrected, and intensive management must be required of all oil and gas development. In our comments on the Rawlins RMP draft environmental impact statement we discussed the need for improving the definition of "intensive management" in some detail (see pages 5-6 of the Wyoming Outdoor Council's March 17, 2005 comments). This definition does not appear to have been modified, with the exception that two additional appendices are referenced, as we requested, which we appreciate. Again, we will return this issue below.

The third needed area of improvement is to increase the level of protection that is applied to various recognized special management areas, particularly wildlife habitat management areas (WHMA) and special recreation management areas (SRMA). Areas of Critical Environmental Concern (ACEC) and National Natural Landmarks (NNL) also are included here. Many of these areas remain open to future oil and gas leasing, and this needs to be corrected. Pages 4-107 to 4-109. The particular areas we are concerned about include the Continental Divide National Scenic Trail, North Platte SRMA, Jelm

Mountain SRMA, Pedro Mountain SRMA, Laramie Plains Lakes SRMA, Rawlins Fishing SRMA, Shirley Mountain SRMA, Como Bluff NNL, Sand Hills ACEC, Jep Canyon WHMA, Shamrock Hills WHMA (raptor concentration area), Stratton Sagebrush Steppe research area, Chain Lakes WHMA, Laramie Peak WHMA, Red Rim-Daley WHMA, Pennock Mountain WHMA, Wick-Beumee WHMA, Cave Creek ACEC, Laramie Plains WHMA, Upper Muddy Creek-Grizzly WHMA, Cow Butte-Wild Cow WHMA, and the Overland and Cherokee National Historic Trails. As will be discussed below, all of these areas should not be open to future oil and gas leasing, and all of these areas should be subject to intensive management of existing oil and gas leases.

The proposed Adobe Town Dispersed Recreation Area calls for special mention. As currently proposed, this area would remain open for oil and gas leasing, a considerable portion of it subject to nothing more than standard stipulations. Maps 2-38, 2-58, and 2-59. It is not clear that disturbance in this area would be “intensively managed.” It appears that little more than passive, limited efforts would be made to maintain the wildness of this incredible area. This is insufficient and a far greater level of protection is required.

Last, greater protection must be provided for the pygmy rabbit, greater sage grouse, and for prairie dogs (white-tailed and black-tailed).¹ Among other things, inappropriate political influence in recent decisions not to pursue listing of these species under the Endangered Species Act (ESA) is being used as a basis by the courts to remand these foreshortened decisions to the Fish and Wildlife Service for reconsideration. The writing is on the wall: listing of all of these species has either been proposed (pygmy rabbit) or is quite likely in the foreseeable future. Given this, the BLM has a heightened obligation to increase the level of protection provided for these species in the Rawlins RMP. Furthermore, it is our understanding that the BLM Wyoming State Office is poised to announce far greater protections that would be applicable to sage grouse. We are not privy to any details, but if this is true the Rawlins RMP should incorporate any such new provisions before the RMP is finalized.

B Reasons Why Improvement in the Rawlins RMP is Needed or is Required.

There are a number of reasons why the above areas of concern demand to be improved in the Rawlins RMP, and in most instances such improvements are legally required. We will discuss a number of these reasons below. Among other things, improvement is demanded because of the high degree of retained rights (and related legal obligations) that BLM enjoys even in areas that have been leased for oil and gas development; the requirement to prevent unnecessary or undue degradation of the public lands established by FLPMA; the definition of multiple use in FLPMA; other substantive obligations BLM RMPs must observe that are imposed by FLPMA; obligations imposed by NEPA and its implementing regulations; obligations under the BLM’s sensitive species manual; and the direction being set by Wyoming State policy and public opinion in the state of Wyoming. These issues will be addressed in turn below. And with respect

¹ This concern applies as well to the Columbian sharp-tailed grouse and the Wyoming pocket gopher which has been petitioned for listing under the Endangered Species Act.

to the need for a “vision” for future oil and gas leasing in the Rawlins Field Office, which as discussed above is currently lacking, there are several reasons why such direction is needed, and they will also be discussed below. The need to make these improvements is in no way contrary to the provisions in the Energy Policy Act of 2005, an issue which will also be discussed below.

1. The BLM Has Adequate Retained Rights And Indeed Legal Obligations That Allow For And Require It To Substantially Regulate Oil And Gas Leasing and Development.

It is our view that BLM has substantial retained rights even after an area has been leased and that pursuant to these retained rights the BLM has the ability to fully protect the natural environment in leased areas. In fact, it is our view that not only does BLM have the right to do this, it in fact has an obligation to ensure full environmental protection as a condition of development of existing leases.

There is no question that the BLM is legally empowered and in fact obligated to protect the natural environment even after a lease has been issued. The NEPA itself establishes important national policies for environmental protection and Congress “directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA].” 42 U.S.C. § 4332(1). See also id. § 4331 (presenting the environmental protection policies of NEPA). The Council on Environmental Quality (CEQ) regulations reinforce this obligation to protect the natural environment. See, e.g., 40 C.F.R. §§ 1500.2(f) (Federal agencies “shall to the fullest extent possible . . . use all practicable means . . . to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment”); 1502.1 (“The primary purpose of an [EIS] is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government”). The courts too have recognized that the purposes and goals of NEPA control BLM’s oil and gas development activities. Getty Oil Co. v. Clark, 614 F.Supp. 904, 920 (D. Wyo. 1985) (“The Secretary is not only permitted, but is required, to take environmental values into account in carrying out his regulatory functions, unless there is a clear and unavoidable statutory authority prohibiting the Secretary from complying with NEPA’s mandate.”). Thus, the BLM must interpret, and implement, its obligations where leases have been issued in light of the policies established by NEPA.

In addition to NEPA, the FLPMA, BLM’s organic law relative to its mission and purpose, establishes a requirement to fully protect the natural environment in areas that that have been leased. “[I]t is the policy of the United States that—the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; . . . that will provide food and habitat for fish and wildlife and domestic animals” 43 U.S.C. § 1701(a)(8). The BLM is required to manage the public lands under a multiple use mandate, which requires among other things the “harmonious and coordinated

management of the various resources without permanent impairment of the productivity of the land and the quality of the environment” Id. § 1702(c). And last, “[i]n managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the [public] lands.” Id. § 1732(b).

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

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

Furthermore, a host of other laws impose a requirement on the BLM to consider environmental conservation as a key component of oil and gas development in the Rawlins Field Office.² Thus, it is clear that the BLM is under an obligation to ensure

² For example, the purposes of the Endangered Species Act “are to provide a means whereby the ecosystems upon which [listed] species depend may be conserved and to provide a program for the conservation of such [species], and the Secretary of the Interior shall “utilize [programs administered by him] in furtherance of the purposes of this chapter.” 16 U.S.C. §§1531(b), 1536(a)(1). The objective of the

environmental protection even in areas that have been leased. Unfortunately, and as indicated above, it is not clear the BLM fully recognizes the rights it retains despite issuing a lease, or the obligations it operates under to protect the natural environment in areas that have been leased.

In addition to the legal obligations noted above, a host of BLM policies, regulations, and contractual provisions relative to oil and gas development allow and in fact demand protection of the natural environment in areas that have been leased. Quite simply, the BLM has retained very substantial rights to condition development so as to protect the natural environment even though it has leased lands for oil and gas development. The BLM's standard lease form (form 3100-11) contains the following reservations of authority to BLM:

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

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

The BLM sometimes invokes its regulation at 43 C.F.R. § 3101.1-2 as imposing limits on its ability to condition development, claiming that (in the absence of a specific stipulation or non-discretionary statute) it can only impose "reasonable measures" demanding no more than that lease operations be moved by no more than 200 meters,

Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The purposes of the Clean Air Act are "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare" 42 U.S.C. § 7401(b)(1). See also id. §§ 7470(2), 7491(a)(1) (directing that air quality in protected landscapes and airsheds be protected). Under the National Historic Preservation Act, prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as maybe necessary to minimize harm to such landmark" 16 U.S.C. 470h-2(f). This is a small sampling of the numerous environmental protection statutes BLM operates under, and additional obligations will be mentioned as this discussion proceeds.

leasehold operations be prohibited for no more than 60 days, or that operations not be moved off the leasehold. This is an incorrect view of this regulation.

In adopting this regulation, BLM commented that “the authority of the Bureau to prescribe ‘reasonable,’ but more stringent, protection measures is not affected by the final rulemaking.” Oil and Gas Leasing, Geothermal Resources Leasing, 53 Fed. Reg. 17,340, 17,341 (May 16, 1988). Quite simply, this regulation establishes a floor, not a ceiling as to the reasonable measures provided for in the lease contract that the BLM may require. As noted above, the specific terms of the standard lease certainly do not limit BLM’s authority to this degree. It may be worth noting that the standard lease form and the regulation were both adopted in 1988; BLM certainly developed one in full recognition of the other. Consequently, the standard lease and the 3101.1-2 regulation must be considered together to determine the BLM’s retained rights. The 3101.1-2 regulation does not stand as the sole word as to what constitutes “reasonable measures,” as the BLM sometimes claims, and in any event it too hardly constrains the BLM’s rights to condition development. By its own terms the regulation specifies reasonable measures “are not limited to” modifying siting or design of facilities, timing of operations, and specification of reclamation, and the regulation then goes on to state the specific reasonable measures mentioned in the regulation are “at a minimum” of what is within BLM’s retained authority. 43 C.F.R. § 3101.1-2.

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

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

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

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

- Applicable laws. Form 3100-11.
- Terms, conditions, and stipulations in the lease. Form 3100-11.
- Regulations and formal orders in effect when the lease is issued. Form 3100-11.

- Regulations and orders issued afterward, if not inconsistent with lease rights and provisions in the lease. Form 3100-11.
- Specific, non-discretionary statutes. 43 C.F.R. § 3101.1-2.
- Reasonable measures. 43 C.F.R. § 3101.1-2.

Special mention may be needed with respect to the first limitation on conveyed rights. The standard Offer to Lease and Lease for Oil and Gas (Form 3100-11) makes the removal of oil and gas “subject to applicable laws.” This is a considerably broader provision than the reference to non-discretionary statutes in the 3101.1-2 regulation. Many laws are applicable even if they are not strictly non-discretionary. A number of these laws, such as provisions in the Clean Air Act and the Clean Water Act were noted above. These provisions are certainly “applicable” even if they are not “non-discretionary,” and thus the leasehold—and the lessee—have been made “subject to” these laws under the explicit terms of the standard lease contract. Any number of other laws are also “applicable,” even if they are less well known. For example, the Neotropical Bird Conservation Act requires the Secretary of the Interior to coordinate activities and projects “to enhance conservation of neotropical migratory bird species.” 16 U.S.C. § 6106. Many neotropical migrant bird species inhabit BLM lands (and some of them are BLM sensitive species), so this law and policy is certainly applicable.³ The Rawlins RMP lists many more “applicable” laws. Appendix 39.

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

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

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

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

³ As is the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712.

Clearly, the BLM has more than sufficient authority to regulate development of an oil and gas lease in order to meet its legal obligations under numerous environmental laws and policies enacted to protect the natural environment.⁴ Or said differently, the BLM has more than sufficient authority to meet its legal obligations and management objectives despite leases being in place because what has been conveyed is an interest “subject[] . . . to exacting restrictions and continuing supervision,” not “an unencumbered estate in the minerals.”

In addition to the provisions in the standard lease contract, the Mineral Leasing Act itself and BLM’s regulations relative to the conditions under which oil and gas development may be pursued are replete with retained authority to condition development of leases, and indeed a responsibility to do so in order to protect the natural environment. Many if not all of these provisions were “regulations and formal orders in effect” when many if not most of the leases in the Rawlins Field Office were issued, and they are not “inconsistent with lease rights and provisions in the lease” in any event.

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

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

⁴ BLM sometimes attempts to invoke BLM Instruction Memorandum (IM) 92-67 (issued December 3, 1991) as limiting its ability to condition development on a lease. But this IM is of no moment. For one it expired on September 30, 1992. Moreover, it is totally inconsistent with the decision in Mineral Policy Center v. Norton (discussed above), a decision that BLM did not appeal and which therefore stands as the final legal authority as to what BLM’s obligations are under the FLPMA unnecessary or undue degradation clause. A BLM IM, of course, cannot stand in the way of a U.S. District Court decision, especially one issued in the District of Columbia where the BLM is headquartered.

authority allowing conditioning of development to protect the environment, even allowing denial of drilling operations to protect wilderness values when a suspension is requested by the lessee; also determining that NEPA imposes responsibility to consider environmental values in carrying out the Mineral Leasing Act).

As noted, BLM regulations regarding the conditions under which oil and gas development can occur are also replete with provisions allowing the BLM to condition the time, place, and manner of oil and gas development. “The authorized officer is authorized and directed to “. . . require compliance with lease terms, with the regulations in this title and all other applicable regulations promulgated under the cited laws, and to require that all operations be conducted in a manner which protects other natural resources and the environmental quality” 43 C.F.R. § 3161.2. “Before approving operations on a leasehold, the authorized officer shall determine . . . that the proposed plan of operations is sound both from a technical and environmental standpoint.” *Id.* “All operations will be conducted in a manner “which protects other natural resources and environmental quality” *Id.* § 3162.1(a) (also requiring the operating rights owner to comply with all applicable laws, regulations, lease terms, Onshore Oil and Gas Orders, Notices to Lessees, “and with other orders and instructions of the authorized officer”). “The operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality.” *Id.* § 3162.5-1(a) (also requiring compliance with orders, applicable laws, regulations, lease terms and the drilling/operations plan). “The operator shall exercise due care and diligence to assure that leasehold operations do not result in undue damage to surface or subsurface resources or surface improvements.” *Id.* § 3162.5-1(b).

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

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

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

Before a taking can occur, a property right must have been given. While certainly the BLM has conveyed the right to extract oil and gas from a leasehold, it has done so subject to any development occurring under a highly regulated, comprehensive framework, as discussed in detail above. Specifically, whatever property right has been “given” has been made “subject to” applicable laws; terms, conditions and stipulations in the lease itself; other regulations and orders in place when the lease was granted; later-issued regulations if not inconsistent with the lease; specific, non-discretionary statutes; and any reasonable measures that the BLM may require. To quote the Supreme Court again, a federal lease is “subjected [] to exacting restrictions and continuing supervision” and “does not give the lessee anything approaching the full ownership of a fee patentee.” Boesche at 477-78. Having given only a highly conditional right to development, the BLM can fully regulate development of existing leases with little fear of there being a “taking,” and under the legal authorities discussed above it in fact must do so.⁵

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

⁵ In addition there also is little chance that there will be a breach of contract if the BLM carefully regulates development on a lease. We have not suggested that applicable laws enacted after lease issuance are necessarily enforceable, although it is not at all apparent that the conditions where the Supreme Court found a contract repudiation in the context of the Outer Continental Shelf Land Act and offshore leases is replicated in the language of the onshore standard lease form where the lease is made subject to applicable laws with no mention made of such a limitation only being applicable to laws existing at the time of entering the contract. See Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) (finding repudiation of offshore oil lease occurred where the government imposed restrictions established by a later-enacted law). As the court observed, “the need to obtain Government approvals so qualified the likely future enjoyment of the exploration and development rights that the contract, in practice, amounted primarily to an *opportunity* to try to obtain exploration and development rights in accordance with the procedures and under the standards specified in the cross-referenced statutes and regulations.” Id. at 2436. All that was bought was a promise that the government would not deviate significantly from the terms of the lease; that the “gateway” to enjoyment of the rights granted would not be significantly narrowed (which in Mobil Oil the government had done). Id. No more is demanded of onshore leases.

We engage in this lengthy and somewhat detailed review of relevant law and policy so as to emphasize that the BLM certainly has the authority, and indeed an obligation, to fully protect the natural environment in the Rawlins Field Office even in areas that have been leased. The BLM should provide a clear, unequivocal statement in the Rawlins RMP of the degree to which it has retained rights under the standard lease form and specify precisely the means by which it will exercise those retained rights so as to meet management objectives and legal obligations, not to mention its obligation to “protect the public interest in the administration of the public domain” recognized by the Supreme Court in Boesche. And while not mentioned above, clearly the BLM has even greater authority and greater legal obligations to protect the natural environment in areas that have not yet been leased. Specific means by which this retained authority should be exercised, such as by requiring the use of phased or paced development, will be discussed next.

a. Paced and Phased Development

One of the most important means by which environmental values can be protected is by adopting specific provisions requiring phased and/or paced development in environmentally sensitive areas. This is an “obvious” way to manage oil and gas development according to the IBLA. As noted above, section 4 of the standard lease form specifically allows regulation of the rate of development, and BLM has recognized the validity of this approach in the Pinedale Anticline EIS. The BLM should make specific provision for phased and paced development in the Rawlins RMP as a requirement for development of existing leases where this can help protect environmental values, particularly in large contiguous block areas of BLM lands and in special management areas. The IBLA recently recognized that section 4 of the standard lease form allows the BLM to protect resources by regulating the manner and pace of development and the siting or timing of lease activities, even if these requirements are put in place on leases issued long ago, 1948 in this case. National Wildlife Federation et al., 169 IBLA 146, 164 (2006).

b. Clustered Development and Directional Drilling

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

drilling. Consequently, the BLM should recognize and assert its rights in the Rawlins RMP and require clustered development and the use of directional drilling.

c. Lease Suspension

Lease suspension is another means at BLM's disposal to ensure full environmental protection is achieved in leased areas. As noted above, the Mineral Leasing Act gives the BLM authority to suspend leases "in the interest of conservation," a term that includes conservation of environmental values. The BLM should utilize this authority to fully protect the large contiguous BLM land holdings in the Rawlins Field Office so as to protect the substantial ecological and recreational/cultural resource values in these areas. Special management areas should also be protected in this fashion, particularly the Adobe Town area. The BLM has exercised this authority in other areas, such as during development of the Jack Morrow Hill Coordinated Activity Plan, and is contemplating using it in the Pinedale Anticline Supplemental EIS for interim protection of some Pinedale Anticline flank areas that are leased.

d. Unitization

Another mechanism that could be utilized to protect environmentally sensitive areas in the Rawlins Field Office is unitization of leases. This would allow lease holders to enjoy the benefits of development of leases while protecting sensitive areas. While there may be some limits on the ability to require unitization, the BLM could certainly urge operators to enter into voluntary unitization agreements and use other mechanism (pooling orders) to pursue unified development in sensitive areas. Unitization is a key component of the BLM's development plan on the Roan Plateau in Colorado which seeks also to protect the natural environment in that area, and BLM should thoroughly consider that model here. Pursuing unitization would allow for orderly development with less infrastructure and disturbance, while helping to eliminate issues such as those related to drainage.

e. Additional Conditions of Development

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

f. Retention and Enforcement of Lease Stipulations

One of the most important means by which the BLM can ensure that the natural environment is protected is to ensure that timing stipulations oriented toward the protection of wildlife crucial ranges are not abandoned and are in fact vigorously enforced. The Wyoming Game and Fish Department (WGFD) recognizes the importance

of these stipulations in its report Recommendations for Development of Oil & Gas Resources within Crucial & Important Wildlife Habitats, available at <http://gf.state.wy.us/downloads/pdf/og.pdf>. The BLM should expressly state in the Rawlins RMP the extremely limited and carefully specified conditions under which these exceptions could occur, as well as how the WGFD and the general public will be able to participate in the decision-making. Requiring these stipulations as provisions on any new leases that are issued in the Rawlins Field Office should be maintained in all crucial wildlife habitats wherever they may be located.⁶

g. Lease Buyout and Trade

Last, the BLM should fully consider and make provision for lease buyout and trades. The BLM has specifically made provision for doing just this in the Jack Morrow Hills Record of Decision, so it is clearly within the BLM's authority. While we realize that lease buyouts might require Congressional authorization or that means to acquire or provide these monies might be beyond what the Rawlins RMP can specifically require, the BLM certainly at a minimum can provide in the Rawlins RMP that lease buyout will always be considered and explored when development is proposed in sensitive areas. And pursuing trades of leases from willing traders is certainly well within the BLM's authority without additional Congressional authorization, and BLM should make provision in the Rawlins RMP to fully explore and utilize this obvious means of environmental protection to the maximum extent possible, especially in the areas with large contiguous BLM land holdings, and in recognized sensitive areas.

The implications of the above lengthy discussion have a great deal of relevance to the areas of improvement we highlighted in the first section above. Perhaps most importantly this discussion emphasizes the level of "intensive management" that BLM can require and in fact is obligated to provide for. As mentioned above, the current definition and application of the concept of "intensive management" in the Rawlins RMP fails to meet these obligations, and falls far short of the rights that BLM has retained. Below when we outline the specific improvements in the concept of "intensive management" that we think are needed, this discussion should be borne in mind as providing the basis for taking those steps.

⁶ On pages 23-24 of the Wyoming Outdoor Council's comments on the Rawlins RMP draft EIS we urged the BLM to retain the following stipulation which has been made operable to leases in overlapping crucial winter ranges under the current Great Divide RMP:

CSU (1) Surface occupancy or use within the overlapping big game crucial winter ranges will be restricted or prohibited unless the operator and surface managing agency arrive at an acceptable plan for mitigation of anticipated impacts. This may include development, operations and maintenance of facilities; (2) as mapped on the Rawlins Field Office GIS database; (3) protecting habitat quality and preventing loss of overlapping big game crucial winter ranges.

We again urge the BLM to maintain this stipulation (which apparently would be abandoned in the proposed Rawlins RMP), and it is our view that BLM is required to maintain this stipulation under the numerous legal requirements discussed in this protest.

Similarly, the above discussion clarifies the basis we have for demanding a greater degree of protection for the various special management areas. It also emphasizes the authority and indeed obligation that the BLM has to fully protect the Adobe Town area. This authority also makes it clear that the BLM can fully protect the sensitive species that occupy its lands, specifically the pygmy rabbit, greater sage grouse, and black- and white-tailed prairie dogs. And last, the above discussion emphasizes the right, and indeed the obligation, that BLM has to specify a vision for future oil and gas leasing classifications in the Rawlins Field Office.

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

The Rawlins RMP makes it clear that implementation of the plan will lead to a number of severe environmental impacts. The BLM likes to refer to these as “significant” impacts, but by any measure they are prohibited “undue” impacts under the terms the FLPMA. 43 U.S.C. § 1732(b) (BLM is required to take “any” “action” that is necessary to prevent unnecessary or undue degradation of the public lands). This is especially true since as discussed above in detail, the BLM has almost complete authority to specify the time, place, and manner of oil and gas development. Almost none of these impacts are unavoidable, and consequently they are undue.

According to the Rawlins RMP, oil and gas development will disturb 1,657 cultural properties and significant impacts would occur due to unanticipated discoveries, page 2-116; oil and gas development would result in reduction of recreation use, page 2-121; there may be significant impacts on water quality and watersheds in the Colorado River Basin and North Platte River basin, page 2-141. There can be little doubt that wildlife will suffer significant impacts from oil and gas development. Despite any attempts to minimize impacts to wildlife, page 4-485, in fact 33 percent of crucial elk habitats, 44 percent of crucial mule deer habitats, and 63 percent of crucial pronghorn habitats will be “directly or indirectly impacted by oil and gas and [coalbed methane] development”, page 4-456. As shown by the research of Hall Sawyer done on the Pinedale Anticline, drastic reductions in mule deer populations occur in the face of oil and gas development even where seasonal stipulations are in place, making the attempts on page 4-485 to ignore impacts unavailing and in fact disingenuous—Mr. Sawyer’s research is cited on page L-14. And, “55 percent of the currently identified sage-grouse nesting habitat within the [Rawlins Field Office] would be potentially affected by oil and gas development.” Page 4-456. Clearly there will be a number of highly significant impacts if the Rawlins RMP is implemented as currently envisioned.

By any measure this level of impacts is a prohibited “undue” impact on the environment of the Rawlins Field Office. As noted above, the Mineral Policy Center court recognized that “FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.” 292 F.Supp.2d at 42 (emphasis added). Because the BLM has almost complete authority to regulate the time, place and manner of oil and gas

development—and in fact an obligation to do so under many “applicable” laws and many other “non-discretionary” laws—none of these impacts have to be accepted by the BLM as inevitable, unavoidable or acceptable, and thus by definition they are undue and prohibited.

Again, the implications of this requirement relate back to the areas of needed improvement we highlighted above. The obligation to prevent undue degradation of the public lands allows the BLM to develop a rational policy regarding what lands will be open to oil and gas leasing and under what terms, and in fact demands such a “vision.” This obligation demands that BLM exercise “intensive management” to the maximum extent possible. It requires the BLM to fully protect the various special management areas, especially the Adobe Town area. And last, it allows for and demands full protect for the pygmy rabbit, greater sage grouse, and black- and white-tailed prairie dogs. The specific means by which the management of these various resources can be improved based partly on the obligation to prevent undue degradation of the public lands will be returned to below.

3. BLM’s Obligation to Manage the Public Lands for Multiple Use Demands That Resources in the Rawlins Field Office be Fully Protected.

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

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

When the multiple use mandate as defined by FLPMA is considered, it is apparent that the BLM has an obligation to fully protect the resources on its lands in the Rawlins Field Office. It must ensure the long-term needs of the American people are met, it need not provide for all resource uses on all areas of the public lands, and it must ensure there is no permanent impairment of the productivity of the land and quality of the

environment. Under these obligations, we believe it is apparent that the BLM must provide for the improvements in the Rawlins RMP that we have asked for above: provision for a cohesive vision of the role of future oil and gas leasing in this Field Office; assurance that all lands that are subject to an oil and gas lease be intensively managed if development is proposed; assurance that special management areas not be subject to oil and gas leasing and be subject to intensive management of oil and gas development in all cases; that increased protection for the Adobe Town area be provided for; and that the pygmy rabbit, greater sage grouse, and prairie dogs receive the maximum protection possible.

4. The FLPMA Requires RMPs to Protect Relatively Scarce Values and Ensure Long-term Benefits are Maintained.

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

- Consider the relative scarcity of the values involved and the availability of alternative means . . . and sites for realization of those values, and
- Weigh long-term benefits to the public against short-term benefits.

43 U.S.C. §§ 1712(c)(6)-(7).

Again, when these obligations are considered, it is apparent the BLM has several significant obligations. The RMP must ensure that relatively scarce values are considered and ensure that both alternative means and sites are considered for the “realization” of those values (“realization” means to “obtain or achieve”). That is, the RMP must attempt to realize relatively scarce values through the provision of alternative means and sites for their protection. These values must be “achieved” by the RMP. The RMP must also weigh potential long-term benefits versus short-term benefits, and the implications of this language are clear: the maintenance of long-term benefits is not to be sacrificed casually for the provision of short-term benefits.

When these obligations are considered, it is apparent that the BLM must provide a vision for future oil and gas leasing and development, must provide for intensive management of oil and gas development in all cases, must fully protect special areas, must fully protect the Adobe Town area, and must fully protect the pygmy rabbit, sage grouse, and prairie dogs. These needs viewed in the context of these provisions will be elaborated on below.

5. The National Environmental Policy Act Imposes Obligations on the BLM That Must Be Reflected in the Rawlins RMP.

We are of course well aware of the standard mantra that the NEPA is a procedural statute, not substantive. But things are not nearly that simple. Even if the NEPA does not

impose specific standards that the courts will enforce, there is also no doubt that it does in fact demand that the BLM make a real effort to comply with its policy and stated ends. NEPA demands that the BLM actively pursue environmental protection.

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

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

42 U.S.C. §§ 4331(b)(1)-(6). With that underlying policy and end established, the Congress went on to "direct[] that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter" *Id.* § 4332(1). It is impossible to view these commandments as purely "procedural" even if they are not specifically enforceable by a court. Congress clearly wanted more than "procedure," it wanted the policies of NEPA to be implemented through the NEPA process. As noted earlier, this was specifically recognized by the Getty Oil Company court. 614 F.Supp. at 920.

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

- "Federal agencies shall to the fullest extent possible . . . Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." 40 C.F.R. § 1500.2(f).

- “Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values” Id. 1501.2
- “The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal government.” Id. § 1502.1. And, “[a]n environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.” Id.
- “Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.” Id. § 1502.2(d).

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

The objective of an EIS is to implement the policies underlying NEPA, even if such is not specifically stated in quite the unambiguous way as some of the provisions in the ESA are, for example. Consequently, the whole purpose of the Rawlins RMP (more specifically the EIS underlying it) is to fulfill the responsibilities of each generation as trustee of the environment for succeeding generations, to assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings, to attain the widest range of beneficial uses of the environment without degradation . . . or other undesirable or unintended consequences, to preserve important historic, cultural and natural aspects of our national heritage . . . , to achieve a balance between population and resource use . . . , and to enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources. That is what NEPA is all about—not paperwork—and the Rawlins RMP must pursue these goals even if they are not specifically enforceable by a court. As an executive branch agency charged with faithfully executing the laws, the BLM cannot ignore these requirements.

Given this, it is clear that NEPA demands many if not all of the changes in the Rawlins RMP that we have asked for above. NEPA demands a unified vision for future oil and gas leasing, not a scattering of different leasing classifications, it demands the utmost use of the requirement for intensive management, it requires full and complete protection of the environmental and recreational values in the many recognized special management areas, it demands greater protection for the Adobe Town area, and it demands full protection for the sensitive species that occupy the Rawlins Field Office area. Because of these requirements and demands of NEPA, the specific changes that will be outlined below are fully supported if not absolutely required by NEPA. Anything less would be to take advantage of the “procedural” aspects of NEPA dwelled on by the courts as a way to avoid the underlying direction and purpose established by our national environmental charter.

Finally, while here we have chosen to focus on the underlying policies of NEPA in hopes that this will assist the BLM in improving the Rawlins RMP, there is little doubt in our view that the Rawlins RMP suffers from numerous significant “procedural” defects relative to NEPA compliance—requirements the courts decidedly do enforce. As the discussion in this protest highlights, the BLM has failed to take a “hard look” at many significant environmental issues in the Rawlins RMP. It has not adequately considered mitigation measures to address the numerous significant environmental impacts that are anticipated. It has not considered a full range of reasonable alternatives, most notably by failing to fully consider the Western Heritage Alternative. For these reasons, in addition to the many “substantive” problems in the Rawlins RMP that we address in this protest (in hopes of improving it), there are also numerous “procedural” violations of the NEPA and FLPMA.

6. The BLM’s Sensitive Species Manual Demands the Changes Requested Here, Especially In Order to Fully Protect the Pygmy Rabbit, Greater Sage Grouse, and Prairie Dogs.

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

What this means is that at a minimum, the BLM must seek to “conserve” the pygmy rabbit, greater sage grouse, and white-tailed prairie dogs, all of which are sensitive species recognized by the BLM in Wyoming.⁷ That is, the requirement established by the BLM Manual is to not only to prevent these species from being listed under the ESA (which they may well be given the remand of adverse listing decisions for these species due to inappropriate interference in scientific decisions by political appointees in the Department of the Interior), but also to remove them from the BLM sensitive species list. This is an affirmative obligation established by the BLM manual—the BLM must put in place specific habitat and population management objectives designed to remove these species from the special status species list, that is, to conserve them.

In addition, the special status species manual requires that “BLM activities affecting the habitat of candidate species [and consequently sensitive species] [be] carried

⁷ These concerns apply as well to the Columbian sharp-tailed grouse and the Wyoming pocket gopher which has been petitioned for listing under the Endangered Species Act.

out in a manner that is consistent with the objectives for managing those species.” That is, the BLM must ensure that activities that affect the habitat of the pygmy rabbit, greater sage grouse and white-tailed prairie dog are done in a manner that is consistent with these species being removed from the sensitive species list. Last, we would note that the sensitive species manual requires that “[I]and use plans shall be sufficiently detailed to identify and resolve significant land use conflicts with special status species without deferring conflict resolution to implementation level planning.”

The implications of these provisions and requirements primarily relate to the need for enhanced protection of the pygmy rabbit, white-tailed prairie dog, and greater sage grouse. The specifics of needed enhanced protective measures for these species will be discussed below.

7. State of Wyoming Policy and Public Opinion in Wyoming Demand that the BLM Make the Improvements in the Rawlins RMP That We Have Asked For.

There is an increasing view in the state of Wyoming that there is a need to “go slow” and be thoughtful when it comes to oil and gas development. There is almost no support, in either official state policy or the opinion of Wyoming citizens, for the view that oil and gas development should proceed in as unfettered a manner as possible. Yet it is this view—maximization of oil and gas development with the fewest possible constraints—that the Rawlins RMP seeks to advance and is built around. This view and related provisions in the RMP are totally out of sync with what the state of Wyoming wants.

The need for balanced energy development was reflected in the outcome of the Wildlife Heritage Summit held in Casper, Wyoming last summer. See Exhibit 1 (presenting the results of that meeting). There was a recognized “very high” need for “an effective paradigm for energy development that balances the needs for humans and wildlife.” Id. This view was also strongly expressed in Governor Fruedenthal’s just-finished “Building the Wyoming We Want” conference, also held in Casper and attended by over 500 people. The dominant theme at the meeting was the need to be careful and thoughtful in the face of massive development proposals. The Western Governors’ Association adopted a resolution in February 2007 that called for the identification of key wildlife migration corridors and crucial wildlife habitats coupled with “recommendations on needed policy options and tools for preserving those landscapes.” Exhibit 2. The Western Governors’ Association is moving toward implementing this policy. Its Oil and Gas Working Group has submitted its report making recommendations for how this policy should be implemented, including recognition of a need for better understanding of the special needs of crucial wildlife habitat and wildlife corridors prior to leasing. Exhibit 3. The Western Governors’ Association will finalize this guidance at its June 2008 meeting in Jackson and adopt it as the official policy of the governors. See <http://www.westgov.org/> (noting that the WGA meeting in Jackson will be held June 29-July 1). Given this widespread evolving recognition of the need to “go slow” in areas

with high environmental values, especially wildlife values, the Rawlins RMP should be built around and recognize such sentiments.

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

Moreover, The State of Wyoming has a policy relative to disturbance of crucial habitats, including crucial winter ranges. Exhibit 4. Wyoming Mitigation Policy lists crucial habitats as “vital.” Vital habitat “directly limits a wildlife community, population, or subpopulation” and replacement of this habitat “may not be possible.” Crucial habitat is habitat “which is the determining factor in a population’s ability to maintain and reproduce itself . . .” The State of Wyoming’s policy is that there should be no significant decline in habitat function in these vital crucial habitats, and even though some modification may be allowed, the location, essential features, and species supported must remain “unchanged.” Clearly the standard stipulation that limits the period of time when wells in crucial winter range can be drilled is not in compliance with the State of Wyoming’s policies and plans regarding the protection of wildlife. The stipulation does not ensure there is no significant decline in habitat function—there is no guarantee that the location, essential features, and/or species supported on a crucial winter range will remain “unchanged.” The winter drilling timing limitation stipulation standing alone also is contrary to the policies in the Recommendation Report. In fact, the scientific literature—especially the reports of Hall Sawyer from the Pinedale Anticline which are cited in the Rawlins RMP-- makes it clear that it is all but guaranteed that there will be significant loss of habitat function if significant exploration or development occurs on leaseholds subject just to the winter drilling limitation.

The study by Hall Sawyer prepared for the BLM that shows the devastating impacts that oil and gas development is having on mule deer herds on the Pinedale Anticline despite the use of the standard winter drilling prohibition stipulation stands as proof that BLM’s policy for protecting wildlife crucial winter ranges does not meet the State of Wyoming’s policy of ensuring no significant decline in habitat function of

crucial winter ranges, as well as the enhanced suite of protections in the Recommendations Report.⁸

Last, we would note two initiatives by the BLM that indicate an increasing need to “go slow” when it comes to oil and gas development. The first is the Wyoming Landscape Conservation Initiative. This landscape level initiative recognizes the connectedness and interrelatedness among populations of wildlife throughout southwest Wyoming, particularly big game and sage grouse. This initiative is in its infancy, and for it to fulfill its promise there is a need that activities on BLM lands not simply outstrip and make moot this effort. It needs to be given a chance to work, and the Rawlins RMP should recognize that need and accommodate it, particularly with respect to future leasing decisions, especially where there are large contiguous blocks of BLM land that could support the Initiative. Last, within the last month, the BLM has announced its intention to manage all southwestern Wyoming Field Office through a single district office, and deem this collective area the Wyoming High Desert District. This recognition of the interconnectedness of the Rawlins, Rock Springs, Pinedale and Kemmerer Field Offices reemphasizes the need to “go slow” with oil and gas development and the increasing recognition of the need for careful planning throughout this region before allowing for aggressive development.

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

⁸ Sawyer, H, R. Nielson, D. Strickland, and L. McDonald. 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. Prepared for Questar Exploration and Production Co., TRC Mariah Assoc., BLM, and the Wyoming Game and Fish Dep’t. 52 pp. The 2006 report is also available on line at http://www.west-inc.com/big_game_reports.php and reaches the same conclusions. See also Sawyer, H., et al. 2007. Habitat Selection of Rocky Mountain Elk in a Nonforested Environment. *J. Wildl. Manage.* 71(3): 868-874. Most of these reports are cited in the Rawlins RMP. Page L-14.

8. Reasons Why A “Vision” for Future Leasing Classifications Is Needed In the Rawlins Field Office.

As mentioned above, there are several additional reasons besides those mentioned that demand that BLM develop and provide for a unified, cohesive, rational plan for future oil and gas leasing in the Rawlins Field Office. As noted, the proposed plan does not do this, instead it provides for uncoordinated and widely (and wildly) varying leasing classifications (closed to future leasing, open to leasing with “major constraints” such as a no surface occupancy (NSO) stipulation, open to leasing with “minor constraints” such as timing limitation stipulations, and open to leasing with only standard stipulations), many of them applied over very small, discontinuous areas. Map 2-38.

This situation must be compared to what has been proposed in the Pinedale Field Office, which is also revising its RMP. In the Pinedale Field Office, the preferred alternative provides for large, contiguous areas with a unified vision for what oil and gas development should “look like” in various portions of the Field Office. Exhibit 5. The draft RMP provides for large blocks of areas that will be intensively developed for oil and gas, areas that will be only minimally developed, areas unavailable for oil and gas development, and areas that will be open for development but only under NSO stipulations. *Id.* The oil and gas leasing categories largely track the management designations for the various areas. *Id.* Moreover, the preferred alternative provides a detailed description of the “vision” for each of the management designations, with the emphasis in intensively developed oil and gas fields being placed on “efficient and complete development and production of the oil and gas resource” and in large block NSO areas the emphasis would be on “providing contiguous wildlife habitat, wildlife refuge areas and migration routes, public land recreation opportunities, opportunities for non-surface disturbing activities, and maintenance and improvement of current resource conditions while allowing leasing of the area for oil and gas production.” Draft Environmental Impact Statement for the Pinedale Resource Management Plan at pages 2-47 to 2-48.

The difference between what is proposed in Rawlins and what is proposed in Pinedale is striking. In Rawlins as best we can discern there is no overarching guidance relative to future oil and gas leasing. There is no vision. The situation in Pinedale is decidedly more cohesive and rational, there is a clear and unambiguous vision for the direction of future oil and gas leasing, and in fact future oil and gas development in general.

The BLM should not allow for this inherent irrationality to persist. It makes little sense to have one Field Office providing clear direction and a clear framework for future oil and gas development while a virtually adjacent Field Office only provides a scattering of disconnected leasing provisions with no apparent overarching vision. This is especially true since as mentioned above the BLM is moving toward managing the Pinedale and Rawlins Field Offices in unison, as the Wyoming High Desert District. Some cohesiveness and comparability between RMPs is demanded.

This problem also translates into many provisions “internal” to the Rawlins RMP where the oil and gas leasing classification designations have little apparent relationship to or recognition of other provisions for management direction. For example, there is

essentially a block of special management areas south of Rawlins and east of Wyoming Route 789 (the Red Rim Daley, Jep Canyon, Upper Muddy Creek/Grizzly, and Cow Butte/Wild Cow WHMAs, as well as the Sand Hills ACEC, High Savery Dam Management Area, and Stratton Sagebrush Steppe research area). Maps 2-9 and 2-13. Yet despite this clear concentration of areas with special management direction, future leasing in the area could be subject to a wide range of leasing restrictions, ranging from only standard stipulations to closure to leasing. Map 2-38. There seems to be little relationship of the leasing classifications to the special area management directions. The same can be said regarding the Adobe Town area in the southwest part of the Field Office. Maps 2-17, 2-38, 2-58, and 2-59. Much of the area is subject to only “minor constraints” on future oil and gas development, despite the nominal designation of the area for protection of wildland recreation opportunities.

Much the same can be said about many other resource classifications and management direction. Many areas designated as Class II visual resource management (VRM) have no unified direction (vision) regarding future oil and gas leasing classifications. Compare Map 2-38 with Map 2-50. The same is true of Class III areas. Clearly, designating an area VRM Class II without complementary future leasing provisions is irrational.⁹

Perhaps most significantly, there seems to be little recognition of what is likely the most significant aspect of land ownership in the Rawlins Field Office, the railroad checkerboard. Map 1-2. Map 2-38 provides no indication that this most dominant of features in the Rawlins Field Office guided the direction for future oil and gas leasing in any way.¹⁰ Quite simply, the Rawlins Field Office is essentially divided into two distinct segments with radically different management possibilities and limitations. There is the railroad checkerboard area in the central part of the Field Office, and large contiguous blocks of public land north and south of the checkerboard at least in the western part of the Field Office. Yet there is no reflection of this in the leasing classification designations.

There is no apparent recognition of the large blocks of public land starting about 25 miles north and south of Rawlins and running west from approximately Wyoming Routes 77 and 130. The large blocks of public land west of U.S. Highway 287 and Wyoming Route 789 are especially large and contiguous. It would seem that these areas should be subject to more restrictive future leasing provisions since they provide BLM with a much greater opportunity to protect resources than it has in the railroad checkerboard, but no such recognition is apparent.

We will return to this issue below, and propose what we think is the required “vision” for future oil and gas leasing and development in the Rawlins Field Office, a

⁹ In a separate note, we feel it is entirely inconsistent with the management direction for the Adobe Town area to designate most of this area VRM Class III. The Adobe Town area should be VRM Class II in order to comply with the stated management direction for this area.

¹⁰ Map 2-38 is likely even less representative of what will occur relative to leasing in the future than it appears. It appears that Map 2-38 does not reflect the railroad checkerboard at all. The alternating sections in the checkerboard are mostly privately owned, and as far as we know no stipulations necessarily apply to those lands. Thus, the future leasing classifications presented in Map 2-38 may be even more scattered and disconnected than it initially appears, and even less protective.

vision which is sorely needed but which is currently lacking in the proposed Rawlins RMP.

9. The Energy Policy Act of 2005 Is Not Contrary To And Does Not Prohibit the Needed Improvements in the Rawlins RMP.

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

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

C. Improvements and Changes Needed in the Rawlins RMP.

To address the areas of improvement that are needed and which were identified above, and to ensure compliance with the legal requirements and policy direction also highlighted above, the BLM should adopt the following changes to the Rawlins RMP before approving the RMP.

1. A Vision Is Needed For Future Oil and Gas Leasing and Development.

The above discussion of BLM’s substantial retained rights in leased areas and obligations under many applicable laws, the prohibition on allowing undue degradation of the public lands, the definition of what multiple use management means as provided in the FLPMA, other substantive planning obligations created by the FLPMA, the environmental protection obligations created by NEPA and the related CEQ regulations, provisions in BLM’s Sensitive Species Manual, the direction of public policy and public opinion in Wyoming demanding balance and a slower pace of development, and the direction being provided relative to oil and gas development and leasing in other BLM lands use plans (Pinedale) all demand that the BLM provide a cohesive, rational vision for future oil and gas leasing and development in the Rawlins RMP. The composite weight of these authorities is that an overarching vision for oil and gas development must be provided. That vision is currently lacking and the BLM Director should ensure that it is provided before the RMP is approved.

In our view, a vision for future oil and gas leasing and development in the Rawlins Field Office could and should include the following. Considering Maps 3-5 and 4-7 it is apparent that intense oil and gas development is anticipated in relatively limited

portions of the Rawlins Field Office, generally in the Atlantic Rim project area and the Creston-Continental Divide project area, both of which have or are undergoing NEPA analyses in anticipation of the development. It is also possible that the Seminole Road area and an area near Medicine Bow may see development. Given these relatively clear likely future areas of development, the BLM should make provisions for oil and gas leasing and potential future development accordingly. These areas might be designated Intensively Developed Fields, with corresponding management direction, as has been done in the Pinedale Field Office.

Other areas, most particularly the large blocks of contiguous public lands north and south of the railroad checkerboard and the large grouping of special management areas south of Rawlins (see Maps 2-9, 2-13, 2-17) should be declared unavailable for future leasing or at a minimum made “large block NSO” areas, again as is being done with the Pinedale RMP. Appropriate management direction for these areas should also be specified, with any leasing classifications made accordingly. Thus, the large contiguous blocks of BLM land north and south of the railroad checkerboard should have a specified management direction oriented toward resource protection, with stipulation classifications established in accordance with this management vision. In fact, it is our view that all special management areas should be made off limits to future leasing. Such direction would do very little to negatively affect future oil and gas development. Compare Maps 2-9, 2-13, and 2-17 with Maps 3-5 and 4-7.

In addition, we think that the provisions for future oil and gas leasing classifications, and allowance for oil and gas development, should also be developed with full recognition of the VRM classifications created by the Rawlins RMP. Map 2-50. We believe that VRM classifications and future oil and gas leasing and development provisions need to be closely linked. Consequently, we believe the current VRM classifications should be modified as follows. The large block of VRM Class IV that extends south along the west side of Wyoming Route 789 should be restricted to an area no more than approximately 20 miles south of I-80. This is where the high development potential lies, not 30-40 miles south of I-80 as the VRM classifications currently allow. See Maps 3-5 and 4-7. This also confines this designation to the checkerboard area where the BLM has less ability to guide future land use in any event, while better protecting large contiguous public land blocks. Moreover, the area surrounding Adobe Town, the Adobe Town Dispersed Recreation Area, should be designated VRM Class II. Map 2-17. This will be discussed more fully below. And last, the entire block of land containing the numerous special management areas south of Rawlins should also all be designated VRM Class II. See Maps 2-9, 2-13, and 2-17. We believe that making these VRM classifications more consistent with a rational direction for oil and gas development would improve the Rawlins RMP greatly, and have minimal impacts on likely future oil and gas development.

As discussed above, we believe that these changes or something akin to them are needed to meet the numerous legal obligations that have been discussed at length herein, but more importantly are needed to create a land use plan that meaningfully guides land

management in this area for the next 20 years in the way being demanded by Wyoming citizens.

2. The Requirement for Intensive Management Needs to Be Applied Uniformly to All Oil and Gas Development and the Definition of Intensive Management Needs to Be Strengthened.

As noted above, on page 2-36 of the Rawlins RMP it is indicated that the requirement for “intensive management” would be applied uniformly to oil and gas development throughout the Field Office, but this one-time mention seems buried in the RMP and consequently it is far from certain that it will be uniformly applied to all oil and gas leases. It is our view based on the discussion above—particularly the discussion of the BLM’s extensive retained rights in areas that have been leased and the numerous applicable environmental protection laws to which these leases have been made “subject to”—that this requirement must be made applicable to all leases in the Rawlins Field Office uniformly, and aggressively implemented so as to meet the BLM’s legal responsibilities. At a minimum we certainly think this requirement must be uniformly required in all special management areas, perhaps first and foremost in the Adobe Town Dispersed Recreation Area, which does not currently seem to be subject to this requirement. Again, we believe this must be corrected to meet a number of the legal obligations discussed in detail herein.

Just as importantly, the definition of “intensively managed” needs to be strengthened so as to ensure that it effectively protects the areas to which it applies. The Wyoming Outdoor Council discussed this need extensively in its comments on the draft EIS for the Rawlins RMP revision (see pages 5-6 of those comments). As currently written, the definition of “intensive management” is notable for the discretionary, non-mandatory way in which it is written. Page G-10. “Proper” restrictions of various sorts may be used. The various protections that are referenced in the definition are to be applied so as to “adequately” protect the resource. Furthermore, intensive management would only be applied with the “goal” of maintaining sensitive resources and management “may” include certain conditions or additional planning. These non-binding provisions offer no certain protection, they are at most hortatory, and may not even rise to that level. It is our view that this definition as currently written fails to meet the numerous legal obligations outlined in detail above.

As requested in our 2005 comments, we ask that the BLM adopt the following definition of “intensive management” which we believe meets BLM’s legal obligations, unlike the current definition:

Intensive management means that the protective measures and stipulations shown in Appendices 1, 5, 8, 13, 14, 15, 16, 18, 24, 26, 31, and 32 of this RMP shall be required before an activity will be approved. All provisions in these appendices and as otherwise established in this RMP shall be presumed to be applicable unless a site specific analysis, accompanied by opportunities for public comment, documents that there is no need for a

particular provision. In addition, intensive management means that BLM shall require distance restrictions, pace of development or phased development requirements, mitigation stipulations or conditions of approval, seasonal or timing restrictions, rehabilitation standards, and reclamation measures that ensure protection of resources. Appendix 9 shall not be applicable except in compliance with this definition.

We believe a provision such as this is required under the numerous legal requirements discussed above, not the flexible, discretionary and largely uncertain current definition. Applying “intensive management” to oil and gas leases is potentially a very important provision of the Rawlins RMP that is totally in alignment with the direction for oil and gas development that Wyoming citizens are demanding, and the BLM should not let the opportunity to define this term in a meaningful and useful way escape it.

3. All Special Management Areas Must Be Fully Protected.

Above we outlined the special management areas that we are concerned about and which we believe need further enhanced protection beyond what the proposed Rawlins RMP provides for. As noted, the areas we are concerned about are: the Continental Divide National Scenic Trail, North Platte SRMA, Jelm Mountain SRMA, Pedro Mountain SRMA, Laramie Plains Lakes SRMA, Rawlins Fishing SRMA, Shirley Mountain SRMA, Como Bluff NNL, Sand Hills ACEC, Jep Canyon WHMA, Shamrock Hills WHMA (raptor concentration area), Stratton Sagebrush Steppe research area, Chain Lakes WHMA, Laramie Peak WHMA, Red Rim-Daley WHMA, Pennock Mountain WHMA, Wick-Beumee WHMA, Cave Creek ACEC, Laramie Plains WHMA, Upper Muddy Creek-Grizzly WHMA, Cow Butte-Wild Cow WHMA, and the Overland and Cherokee National Historic Trails.

As we have indicated, we believe all of these areas should be entirely off-limits to future oil and gas leasing and that in all cases existing oil and gas leases should receive intensive management (as redefined). Quite simply, we believe that BLM should aggressively assert its extensive retained rights in leased areas to carefully regulate the time, place and manner of any development on existing leases in these areas. The BLM has recognized the special values of these areas and its management of oil and gas should reflect this. It should use those retained rights to require or at least actively pursue the numerous protective options outlined above, including lease suspension, unitization of leases, requiring clustered development and directional drilling, requiring paced development, and pursuit of lease buyouts and trades. Such is necessary to meet the BLM’s legal obligations. These special places demand no less. In addition, we believe all of these areas should be designated VRM Class II, which is in full compliance with their recognized special values.

4. The Adobe Town Dispersed Recreation Area Must Be Fully Protected.

As currently specified, it is very difficult to say whether the management that will apply to the Adobe Town Dispersed Recreation Area will really protect this wild heart of

the Red Desert. Its designation “would not limit mineral leasing or development.” Page A37-1. Development of existing leases in some cases would cause “severe deviation from the desired [recreation opportunity spectrum] over an extended period of time.” Id. While the BLM would seek to create and maintain an undeveloped recreation setting, it would seem that management direction is far from certain of being realized given the limited effort to guide oil and gas development. It is not clear that intensive management of oil and gas leases would apply to this area.

Yet there is no doubt this area is special. It is of course, anchored by the Adobe Town Wilderness Study Area. The area is dominated by striking and intricate badlands that provide National Park quality views. Spectacular cliffs, spires, and arches in an array of earth tones enrich the landscape. Adobe Town is a haven for wildlife and has a rich history of human occupation and use. Recognizing these special values, in November 2007 the Wyoming Environmental Quality Council designated 180,000 acres of this area—an area much larger than the WSA—a Very Rare or Uncommon Area under Wyoming State law. So there can be little doubt this is a special area and that consequently the BLM has a special obligation to adequately protect it.

Given these special qualities, the BLM should deem the entire Adobe Town Dispersed Recreation Area off limits to future oil and gas leasing. In addition, the entire area should be designated VRM Class II. Existing leases in the area should be deemed to be subject to intensive management (as redefined). The Rawlins RMP should recognize the State of Wyoming’s designation of this area as a Rare or Uncommon Area, and approach and require management in this area accordingly. This is official policy of the State of Wyoming and the BLM has an obligation to adhere to it unless such direction is contrary to Federal policy. The above discussion of BLM’s substantial retained rights in leased areas and obligations under many applicable laws, the prohibition on allowing undue degradation of the public lands, the definition of what multiple use management means provided in the FLPMA, requirements in FLPMA to protect relatively scarce values and ensure long-term benefits, the obligations created by NEPA policies and direction and the related CEQ regulations, provisions in BLM’s Sensitive Species Manual, the direction of public policy and public opinion in Wyoming demanding balance and a slower pace of development, and the direction being provided relative to oil and gas development and leasing in other BLM lands use plans (Pinedale) all demand that the BLM move toward providing greater, more certain protection for the Adobe Town Dispersed Recreation Area.

5. The Pygmy Rabbit, Greater Sage Grouse, and Prairie Dogs Must Receive Heightened Protection Under the Rawlins RMP.

It is important to reemphasize again that the requirement under the BLM sensitive species manual is to provide management direction for sensitive species that leads to them being removed from the BLM sensitive species list, not to merely keep them from being listed under the ESA, or even simply just kept on the sensitive species list at their current status. And, all three of these species are having their status reviewed (again) by the Fish and Wildlife Service to determine if they should be listed under the ESA.

Consequently, there is an even greater need to ensure these species are adequately protected. And as noted above, it appears that the BLM Wyoming State Office is poised to adopt much stronger protective mitigation measures for the greater sage grouse. Given these trends and requirements, it is apparent that the Rawlins RMP as currently written does not provide sufficient protection for these species. At a minimum, we believe the BLM should consider making the following protections applicable to these species.¹¹

With respect to sage grouse, the provisions of Alternative 3 should be made applicable to the Rawlins RMP. Map 2-57, pages 2-110 to 2-112. These provisions, which currently only provide enhanced protection to sage grouse populations east of Wyoming Route 789 under the provisions of Alternative 3, should be made applicable throughout the Field Office and made part of the Rawlins RMP. The BLM sensitive species manual requires no less. Furthermore, the scientific literature has made it very clear that the existing standard suite of protections (which are generally all that would apply under the proposed Rawlins RMP) are insufficient to ensure conservation of the sage grouse. If the BLM considers the following literature (not all of which is recognized in the Rawlins RMP currently) it would conclude that greater protections are needed:

- Doherty, K.E., D.E. Naugle, B.L. Walker, and J.M. Graham. Greater sage-grouse winter habitat selection and energy development. *Journal of Wildlife Management*: In Press.
- Walker, B.L., D.E. Naugle, and K.E. Doherty. Greater sage-grouse population response to energy development and habitat loss. *Journal of Wildlife Management*: In Press.
- Walker, B.L., D.E. Naugle, K.E. Doherty, and T.E. Cornish. 2007. West Nile virus and greater sage-grouse: estimating infection rate in a wild bird population. *Avian Diseases* 51:In Press.
- Holloran, M. J. 2005. Greater sage-grouse (*Centrocercus urophasianus*) population response to natural gas field development in western Wyoming. Ph.D. Dissertation, University of Wyoming, Laramie, Wyoming.
- Holloran, M.J., R.Kaiser, and W. Hubert. Population response of yearling greater sage-grouse to the infrastructure of natural gas fields in southwestern Wyoming. Completion Report, August 2007, U.S. Geological Survey, Wyoming Cooperative Fish and Wildlife Research Unit, 34 pp.
- Holloran, M.J., B.J. Heath, A.G. Lyon, S.J. Slater, J.L. Kuipers, and S.H. Anderson. 2005. Greater sage-grouse nesting habitat selection and success in Wyoming. *J. Wildlife Management* 69: 638-649.

¹¹ These recommendations generally apply as well to the Columbian sharp-tailed grouse and the Wyoming pocket gopher which has been petitioned for listing under the Endangered Species Act.

- Connelly, J.W., M.A. Schroeder, A.R. Sands, and C.E. Braun. 2000. Guidelines to manage sage grouse populations and their habitats. *Wildl. Soc. Bull.* 28:967-985.
- Braun, C.E. 2006. A Blueprint for Sage-grouse Conservation and Recovery. Unpublished report.

These reports are attached as Exhibits 6-12.¹²

Most importantly, this research shows that at a minimum the BLM should adopt a minimum of a three-miles no surface occupancy and no surface disturbance/vegetation treatment buffer around sage grouse leks in order to protect the leks themselves as well as surrounding nesting habitat. BLM's standard two-miles limitation has been shown to be insufficient by this research. If the Wyoming BLM State Office is prepared to adopt greater protective measures for the sage grouse, as we have heard, any such measures should be incorporated into the Rawlins RMP before it is finalized.

With respect to pygmy rabbits, it would appear that the only protection that currently applies is a requirement for intensive management in identified crucial habitat. Page 2-109. Greater, more proactive management is needed. At a minimum, the BLM should provide that pygmy rabbit habitat (not "crucial" habitat) will be "avoided" and it should put in place requirements to survey for pygmy rabbit presence in areas likely to contain this species prior to allowing disturbance. It is generally recognized that this species frequents areas with sandy soils in areas of tall or dense sagebrush. As a BLM sensitive species, BLM must avoid impacts so as to meet its obligation to "include specific habitat and population management objectives designed for conservation" and "management strategies necessary to meet those objectives."¹³ The BLM should especially avoid disturbance in sand dune areas because such disturbance, according to the recently released draft EIS for the Moxa Arch Infill in the Kemmerer Field Office, "may rarely be fully reclaimed to the original vegetative composition and structure." An affirmative obligation to avoid impacting pygmy rabbit habitat coupled with surveys to determine if rabbits occupy an area will provide far greater conservation benefit to this species than intensive management required only in "identified crucial habitat," a designation which may not even exist or be defined so far as we know, and which has no existing data base or other repository so far as we know. See Exhibit 13 (BLM report on the status of the pygmy rabbit noting the lack of information on habitat for this species).

With respect to prairie dogs, the ACEC proposed under Alternative 3 should be adopted in the Rawlins RMP. More importantly, the requirement that surface disturbing activities be prohibited within 50 meters of white-tailed prairie dog areas should be

¹² The Ph.D. Dissertation of Matthew Holloran is available at <http://www.voiceforthewild.org/general/pubs.html>.

¹³ The term "conservation" is defined in BLM's special status species manual and specifically with respect to special status species (as opposed to ESA listed species) it means "to use, and the use of, methods and procedures such that there is no longer any threat to their continued existence or need for continued listing as a special status species." (emphasis added).

adopted in the Rawlins RMP, even if the ACEC is not designated. See page 2-84. In addition, above-ground facilities should not be permitted within one-quarter mile of prairie dog towns unless equipped with raptor anti-perch devices, and power poles should not be allowed in prairie dog towns. Page 4-481. Given the possibility of listing of this species, the BLM should take strong proactive management steps to remove this species from its sensitive species list, not to mention preventing listing under the ESA. This is required by the BLM's sensitive species manual and the other legal provisions discussed above,

II. THE BLM MUST IMPROVE THE AIR QUALITY ANALYSIS IN THE RAWLINS RMP.

The Rawlins RMP suffers from several significant shortcomings with respect to its consideration of issues related to air quality and climate change. These include a need for a quantitative analysis of air quality impacts rather than a qualitative analysis, the need for a specific consideration of the impacts of implementation of the Rawlins RMP on climate change and the likely implications of climate change for the Rawlins RMP, 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 Rawlins 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 Rawlins RMP did not provide a quantitative analysis of air quality impacts, rather it only provided a qualitative analysis. Pages 4-5, A4-11, A4-27. In essence all that was presented was an inventory of likely future increases in emissions of criteria air pollutants. Page F-44 (Figure 4-24). It is anticipated that emissions of air pollutants will increase from 20,960 tons per year to 42,305 tons per year by 2023. Page 4-11.

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 from 20,960 tons per year to 42,305 tons per year. Page 4-11. See also page 2-116 (presenting contrary data).

BLM unequivocally states that based on its “RMP-specific air quality analysis” the impacts on ambient criteria pollutant concentrations, visibility, atmospheric

deposition, or ozone “are not known, it is not possible to draw any conclusions to potential expected impacts on these air quality values.” Page A4-27. On a cumulative basis it states that impacts on these air quality values “are not known, [and therefore] it is not possible to quantify potential impacts on these air quality values from sources in the [region of influence]”, although it does then go on to say that based on analyses done for the Desolation Flats project and the Atlantic Rim project the “possibility” that emissions may significantly impact visibility “must be considered.” *Id.* See also page 4-94 to 4-96. In any event, the BLM downplays the utility of the analyses done for these two projects even further: “It would be inappropriate to infer [resource management plan planning area] impacts directly from impacts estimated for the Desolation Flats or Atlantic Rim projects as a result of differences in such components as emissions inventories.”¹⁴ Page 4-496. In other words, the air quality analyses for these projects specifically do not fill the gaps in the analysis for the Rawlins RMP.

This is not 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).

The BLM offers up several reasons for why its qualitative analysis is appropriate. All of these reasons are completely unavailing. The BLM claims that there was insufficient specific data on future projects, “there was limited time available to complete the analysis, quantitative analysis will be required as development projects are defined, and the Wyoming Department of Environmental Quality will ensure compliance with air quality standards. Page A4-27. See also pages 4-5 and A4-11 to A4-12.

BLM anticipates that 8,822 wells will be drilled under this RMP. Page ES-7. BLM already know where at least 12,190 of those wells will be drilled (this number is correct); its scoping notice for the Continental Divide-Creston Project states that 8,950 wells will be drilled in that project area, BLM just approved drilling 2000 wells in the Atlantic Rim project area, and the draft EIS for the Seminole Road project stated that 1,240 well would be drilled in that area. Quite simply, quite a bit is known about where development is likely to occur. See Maps 3-5 and 4-7 (presenting existing fields and likely areas of future development). BLM has a very good idea about where development is going to occur. Moreover, in fields like the Creston-Blue Gap field and

¹⁴ At a minimum the following should be noted. The Desolation Flats project allows for approximately 350 wells to be drilled and the Atlantic Rim project allows for 2000 wells. Yet the Reasonably Foreseeable Development Scenario under the Rawlins RMP is that 8,822 wells are anticipated to be drilled. Page ES-7. Clearly the analysis done for the limited number of wells in these two projects can say little about the much greater number of wells that are likely to be drilled in the Rawlins Field Office under the auspices of the RMP. Furthermore, many of these wells will be drilled in the Continental Divide-Creston project area, which is much closer to the Bridger Wilderness Class I area than either Desolation Flats or the Atlantic Rim.

the Atlantic Rim where there has been extensive prior development or extensive developmental drilling (on PODs), the BLM knows many more details—like how deep wells will likely be, the likely spacing of wells, and so on. Claimed lack of knowledge about where future projects will be is not a convincing reason for not preparing a quantitative analysis of air quality impacts. 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).

Likewise, “limited time” being available to prepare a quantitative analysis is not persuasive. This RMP revision process has been going on for at least six years. See Page 5-6 (noting that the notice of intent to prepare this EIS was published on February 25, 2002). Clearly “limited time” has not been an issue here. It does not take 6 or more years to develop a quantitative analysis, which is the implication of BLM’s claim that there was not enough time to develop a quantitative analysis. In any event, an agency’s self imposed time deadlines do not excuse it from preparing a legally sufficient EIS.

That quantitative analyses may be prepared for future projects is also of no moment. The BLM’s obligation is prepare an adequate NEPA analysis for this proposed federal action potentially significantly affecting the quality of the human environment, that is, the Rawlins RMP, not some unknown and unspecified future projects. 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 in protected Class I areas, at least on a cumulative basis, 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.

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. The Little Snake Field Office shares approximately a 130-miles border with the Rawlins Field Office. It is utterly arbitrary to have one Field Office engaging in a quantitative analysis while an immediately 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. Given that the

reasons offered up by the Rawlins Field Office for not doing a quantitative analysis are entirely unpersuasive, the BLM should not approve the proposed Rawlins RMP until a far more useful and informative quantitative air quality impacts analysis is completed so as to allow for fully informed, as opposed to benighted, land management.

B. The BLM Must Consider the Impacts of Implementation of the Rawlins RMP on Climate Change and Global Warming and Must Consider the Implications of Climate Change on the Environment in the Rawlins Field Office that will be Subject to the RMP.

The Rawlins RMP currently has almost nothing to say about climate change. This is insufficient to meet the requirements of NEPA given the increasing and almost universal recognition of the significance of this issue. The courts are increasingly demanding that this issue be considered. See Massachusetts v. Environmental Protection Agency, 127 S.Ct. 1438 (2007) (U.S. Supreme Court determines the harms associated with climate change are serious and well recognized and greenhouse gases fit well within the Clean Air Act's definition of an air pollutant). We would note that BLM is under direction from the Secretary of the Interior to "consider and analyze potential climate change impacts" when developing RMPs. Exhibit 14 (letter from the Secretary of the Interior regarding need to consider climate change). This directive applies specifically to oil and gas development activities. And of course, NEPA requires that BLM consider all environmentally significant issues in its RMP EIS, and there is no doubt that global warming is such an issue.

Not only will the CO₂ emissions generated by activities occurring on BLM lands contribute to global warming, the impacts of global warming are likely to affect management actions and options in the Rawlins Field Office. For example, there is increasing evidence of earlier and drier springtime conditions in the Rocky Mountain West (in effect summer is coming at earlier and earlier dates), which is having profound effects on wildfire occurrence and size. Exhibit 15. We believe the BLM should consider likely climate impacts that will occur in the Rawlins Field Office and make provision for addressing them. Furthermore, at a minimum the BLM should provide an estimate of the quantity of CO₂ emissions that will be generated by activities on BLM lands and identify means to reduce those emissions. At least as importantly and perhaps more importantly, the BLM should identify the quantity of methane (CH₄) that will be emitted as a result of oil and gas development activities and identify means to reduce those emissions. Methane of course is a far more "powerful" greenhouse gas than is carbon dioxide. The failure to provide at least this level of analysis of climate change issues makes the Rawlins RMP legally deficient.

C. The BLM Must Consider Ozone Pollution Impacts in the Rawlins RMP.

As currently written, the Rawlins RMP provides no analysis of potential impacts from ozone pollution. The emissions of particulate matter (PM₁₀ and PM_{2.5}), nitrogen oxides (NOX), 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.

The Rawlins Field Office is currently at 94 percent of the national ambient air quality standard for ozone. Page 3-4 (Table 3-1). Ozone “is a strong oxidizing chemical that can burn lungs and eyes and damage plants at high concentrations.” Page A4-2. In fact, the EPA is poised to lower the National Ambient Air Quality Standard for ozone, likely in March 2008. Exhibit 16. Given this, the Rawlins RMP EIS cannot simply ignore this highly significant pollutant that can have severe impacts on human health, especially among vulnerable populations such as the very young and old and those with respiratory problems. The Rawlins RMP predicts dramatic increases in “ozone precursors” (primarily VOC and NOX, but also carbon monoxide) so clearly there is a strong likelihood for an increase in the ozone concentration in the area. Given that the national ambient air quality standard is almost exceeded already and given that EPA is poised to lower the standard even farther so as to fully protect human health and welfare, the BLM cannot just ignore this issue in the Rawlins RMP.

D. 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 National Ambient Air Quality Standards; it applies as well to other standards and implementation plans.

As currently fashioned, the Rawlins RMP does not meet this requirement. At a minimum, the BLM acknowledges that there may be significant impacts on visibility in protected Class I areas and that there may be significant impacts on nitrogen deposition, affecting air quality related values on Forest Service lands. Pages A4-27 to A4-28. See also pages 4-494 to 4-496. 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. Moreover, framed in the negative, the BLM cannot possibly claim that the Rawlins 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 Rawlins RMP will “provide for compliance” with clean air protection requirements.

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

The Rawlins RMP is virtually silent 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. Pages 2-20 to 2-21. Certain measures might be “considered” although even that is far from certain. Page A4-28. 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 Rawlins Field Office (the Atlantic Rim and Continental Divide-Creston fields, and perhaps in the future the Seminoe Road field). 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.¹⁵ 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 Rawlins 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. Consequently, if the BLM were to approach the DEQ and ask that these requirements be extended to concentrated development areas in the Rawlins Field Office, there is a significant possibility that it would agree to do so. Given the BLM’s obligation to provide for compliance with clean air requirements in the Rawlins RMP, this is a very reasonable and practical mitigation measure that the BLM should commit to pursuing in the Rawlins 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. Specifically, the Pinedale Anticline revised draft supplemental EIS provides that the “ultimate goal of air quality mitigation . . . is to ensure that emissions . . . result in zero days of visibility impairment over 1 dv” in Class I areas. Revised Draft Supplemental EIS for the Pinedale Anticline Oil and Gas Exploration and Development Project at 4-84. The Rawlins RMP should adopt a like goal, which is in compliance with the national goal established by the Clean Air Act of no impairment of visibility in Class I areas. Moreover, in the initial draft supplemental EIS for the Pinedale Anticline project, the BLM stated that this goal would be met by using “any and all available means” to achieve the goal. The BLM should adopt like mitigations measures for implementation in the Rawlins RMP. This is

¹⁵ 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 Rawlins Field Office as well.

necessary to ensure that BLM meets its obligation to “provide for compliance” with clean air law and policy.

III. THE DISCUSSION OF UNAVOIDABLE ADVERSE IMPACTS AND THE RELATIONSHIP BETWEEN LOCAL SHORT-TERM USES AND LONG-TERM PRODUCTIVITY PRESENTED IN THE RAWLINS RMP IS INSUFFICIENT.

In addition to requiring an analysis of the environmental impacts of a proposed Federal action, the NEPA also requires a “detailed statement” regarding the “relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity” and “any adverse environmental effects which cannot be avoided should the proposal be implemented.” 42 U.S.C. §§ 4332(2)(C)(ii) and (iv). The BLM presents these required considerations on pages 4-534 and 4-536 of the Rawlins RMP, although these statements of little more than a page each hardly qualify as being “detailed.”

Both of these discussions suffer from a similar and fundamental flaw that makes them insufficient because they are simply incorrect. The underlying problem is that the BLM does not seem to fully recognize or embrace the high degree of retained rights that it enjoys in areas where oil and gas leases have been issued. The level of these rights has been discussed in some detail above. If the BLM were to fully acknowledge and pursue with enthusiasm its retained rights, many “unavoidable adverse impacts” would not be unavoidable at all and many short-term uses would not have nearly so many consequences for long-term productivity.

For example, with respect to big game crucial winter ranges and impacts thereto, the BLM claims that “impacts to crucial habitats would be unavoidable under current BLM policy to foster oil and gas development.” Page 4-534. This is simply a misstatement of what national policy is. National policy is to foster oil and gas development in full recognition of and implementation of many equally relevant and binding environmental protection laws and policies. Pursuing oil and gas development does not stand alone as some separate overriding goal. If the BLM claims otherwise, it is simply wrong. Such a claim would be a complete mischaracterization of the law, and a result of it would be the BLM would overstate what adverse impacts are “unavoidable.” Deeming these impacts “unavoidable” allows the BLM to justify and permit these impacts when in fact it need not do so and cannot do so. As discussed above, the BLM has almost complete authority to regulate the time, place, and manner of oil and gas development, and in fact an obligation to do so. Operators’ economic considerations and desires are not binding on the BLM except at some outer limits (i.e., if the regulation allows for no economically viable use of the leasehold). Using its retained authority the BLM has many, many options at its disposal to prevent “unavoidable” impacts—lease suspension, requiring directional drilling and other development techniques, pursuing lease trades, etc. Many “unavoidable” impacts of oil and gas development are in fact avoidable if the BLM would fully recognize and exert its retained rights. Because this is

not recognized, the discussion of unavailable adverse impacts in the Rawlins RMP is insufficient and incorrect.

The discussion of short-term use versus long-term productivity suffers from similar problems. If BLM recognized its right to require a paced form of oil and gas development, short-term uses could be tempered with resultant benefits to long-term productivity. If the BLM were to adopt a “vision” for future oil and gas leasing and adopt oil and gas leasing categories accordingly many inappropriate and unneeded short-term uses could be avoided, protecting long-term productivity.

The BLM should revise these discussions in full recognition of its retained rights in areas that have been leased for oil and gas development so that it fully understands what impacts are unavoidable and can fully recognize the degree to which long-term productivity might be impacted. Absent such, the Rawlins RMP does not fully educate either the BLM or the public on these important issues.

IV. CONCLUSION

For the foregoing reasons, the protesting parties protest the following provisions in the Rawlins 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
Provisions for leasing classifications made in Map 2-38, on pages 2-36 and 2-37, and related references in Chapter 4, and Table 2-4.	Decisions related to leasing classifications fail to fully recognize BLM’s retained rights in leased areas; would fail to prevent unnecessary or undue degradation of the public lands; fail to meet the obligation to engage in multiple use management as defined in FLPMA; fail to abide by FLPMA’s requirement to protect relatively scarce values and ensure long-term benefits are maintained; fail to meet the environmental protection obligations established by NEPA; fail to meet the requirements of the BLM’s sensitive species manual for BLM sensitive species and recognize the likely ESA listing of the sage grouse, pygmy rabbit, and prairie dogs; are contrary to the policies of the State of Wyoming and public opinion in Wyoming; and fail to provide a vision for future oil and gas leasing as is being developed in the Pinedale Field Office and

	recognize the implications of the railroad checkerboard for future leasing decisions.
Provisions for “intensive management” in Tables 2-1 and 2-4 and related references in Chapter 4 and the definition of intensive management on page G-10.	Decisions related to intensive management fail to fully recognize BLM’s retained rights in leased areas; would fail to prevent unnecessary or undue degradation of the public lands; fail to meet the obligation to engage in multiple use management as defined in FLPMA; fail to abide by FLPMA’s requirement to protect relatively scarce values and ensure long-term benefits are maintained; fail to meet the environmental protection obligations established by NEPA; fail to meet the requirements of the BLM’s sensitive species manual for BLM sensitive species and recognize the likely ESA listing of the sage grouse, pygmy rabbit, and prairie dogs; and are contrary to the policies of the State of Wyoming and public opinion in Wyoming.
Provisions related to special designations and management areas and recreation and visitor services presented in Tables 2-1 and 2-4 and related references in Chapter 4.	Decisions related to special area management fail to fully recognize BLM’s retained rights in leased areas; would fail to prevent unnecessary or undue degradation of the public lands; fail to meet the obligation to engage in multiple use management as defined in FLPMA; fail to abide by FLPMA’s requirement to protect relatively scarce values and ensure long-term benefits are maintained; fail to meet the environmental protection obligations established by NEPA; fail to meet the requirements of the BLM’s sensitive species manual for BLM sensitive species and recognize the likely ESA listing of the sage grouse, pygmy rabbit, and prairie dogs; are contrary to the policies of the State of Wyoming and public opinion in Wyoming; and fail to provide a vision for future oil and gas leasing as is being developed in the Pinedale Field Office and recognize the implications of the railroad checkerboard and special management areas for future leasing decisions.
Provisions for the Adobe Town Dispersed	Decisions related to the Adobe Town

<p>Recreation Area on page 2-42, related provisions in Chapter 4, and Appendix 37, as well as Table 2-4.</p>	<p>Dispersed Recreation Area fail to fully recognize BLM’s retained rights in leased areas; would fail to prevent unnecessary or undue degradation of the public lands; fail to meet the obligation to engage in multiple use management as defined in FLPMA; fail to abide by FLPMA’s requirement to protect relatively scarce values and ensure long-term benefits are maintained; fail to meet the environmental protection obligations established by NEPA; fail to meet the requirements of the BLM’s sensitive species manual for BLM sensitive species and recognize the likely ESA listing of the sage grouse, pygmy rabbit, and prairie dogs; are contrary to the policies of the State of Wyoming and public opinion in Wyoming; and fail to provide a vision for future oil and gas leasing as is being developed in the Pinedale Field Office and recognize the implications of the railroad checkerboard and special management areas for future leasing decisions.</p>
<p>Provisions for BLM sensitive species (sage grouse, pygmy rabbit, and prairie dogs) in Tables 2-1 and 2-4 and related references in Chapter 4, as well as Appendices 1 and 13.</p>	<p>Decisions related to the identified sensitive species fail to fully recognize BLM’s retained rights in leased areas; would fail to prevent unnecessary or undue degradation of the public lands; fail to meet the obligation to engage in multiple use management as defined in FLPMA; fail to abide by FLPMA’s requirement to protect relatively scarce values and ensure long-term benefits are maintained; fail to meet the environmental protection obligations established by NEPA; fail to meet the requirements of the BLM’s sensitive species manual for BLM sensitive species and recognize the likely ESA listing of the sage grouse, pygmy rabbit, and prairie dogs; and are contrary to the policies of the State of Wyoming and public opinion in Wyoming.</p>
<p>Provisions related to air quality in Tables 2-1 and 2-4 and related references in Chapter 4, as well as Appendix 4.</p>	<p>Failure to present a quantitative analysis, failure to consider global warming impacts and issues, failure to consider ozone</p>

	impacts, and a failure to “provide for compliance” with air pollution control laws and policy.
The discussion of Unavoidable Adverse Consequences and Short-term versus Long-term Use on pages 4-534 and 4-536.	These discussions fail to recognize the extent of BLM’s retained rights in leased areas, and thus improperly overestimate the degree of impacts that must be tolerated and the affects on long-term productivity of the environment that must be endured.

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 Rawlins RMP, the entire Rawlins 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 Rawlins Field Office and supplement the Rawlins 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 Rawlins RMP.

Sincerely,

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