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INTERIOR BOARD OF LAND APPEALS
OFFICE OF HEARINGS AND APPEALS

National Wildlife Federation and Wyoming)
Wildlife Federation)
)
Appellants,)
v.)
)
Bureau of Land Management,)
Appellee)
State of Wyoming and Double Eagle)
Petroleum Company)

Applicant-Intervenors)

IBLA 2007 - 227

**Atlantic Rim Natural Gas Field
Development Project Record of Decision**
BLM Wyoming State Office
May 21, 2007

NATIONAL AND WYOMING WILDLIFE FEDERATIONS

STATEMENT OF REASONS

INTRODUCTION

In June of 2001, BLM's Rawlins District Office published a Federal Register notice that pursuant to the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* ("NEPA"), it intended to prepare an Environmental Impact Statement ("EIS") and to conduct scoping for the Atlantic Rim Coalbed Methane Project in Carbon County, Wyoming. 66 Fed. Reg. 33,975 (June 26, 2001). The BLM explained the catalyst for announcing this EIS was that several oil and gas operators proposed drilling a maximum of 3,880 coalbed methane ("CBM") wells and constructing associated roads, well pads, pipelines, and compressor stations within a 310,000 acre project area. The Atlantic Rim Coalbed Methane Project area, as now defined in the Final Environmental Impact Statement and Record of Decision, encompasses approximately 270,000 acres in the southeast corner of Wyoming's Red Desert, between interstate 80 on the north, the Colorado border on the south, and beginning about 6 miles southwest of Rawlins.

In 2002, the BLM developed an Interim Drilling Policy for the Atlantic Rim Area to permit drilling of coalbed methane wells within the project area. Final Environmental Impact Statement for the Atlantic Rim Natural Gas Field Development Project (November 2006) ("Atlantic Rim FEIS") at 1-4 to 1-8 (attached as Exh. 1). 151 wells have been drilled within seven Plan of Development ("POD") areas under the Interim Drilling Policy. *Id.* at 1-8. Conservation Appellants appealed the approval of six of the Interim Drilling Policy PODs, challenging the compliance of the decisions with the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* ("NEPA") and Federal Land Policy and Management Act (43 U.S.C. § 1701 *et seq.*) ("FLPMA"), but this Board affirmed the POD Records of Decision. *See, e.g., National Wildlife Federation*, 169 IBLA 146 (2006).

In December 2005, the Rawlins Field Office issued a Draft Environmental Impact Statement for the Atlantic Rim Natural Gas Field Development Project (excerpts attached as Exh. 2). The DEIS contained four alternatives, all of which, apart from the No-Action Alternative mandated by NEPA regulations, 40 C.F.R. § 1502.14(d), each contemplated the development of approximately 2,000 new natural gas wells within the project area. The National Wildlife Federation and Wyoming Wildlife Federation submitted comments on the DEIS. Comments of the National and Wyoming Wildlife Federations on the Atlantic Rim Natural Gas Development Project Draft Environmental Impact Statement (Feb. 17, 2006) (NWF DEIS Comments) (attached as Exh. 3).

In May 2006, the BLM issued a Final Environmental Impact Statement for the Atlantic Rim Project (Exh. 1). In the FEIS, Alternative B from the DEIS, which contemplated a phased development approach, was dropped from further consideration. FEIS at 2-1 (Exh. 1). The FEIS therefore considered three alternatives: No Action, Alternative C (described by the BLM as having a goal “to protect wildlife and other natural resources while allowing for the extraction of natural gas resources”), and Alternative D (described as allowing all proposed wells while emphasizing “annual planning” and attempting to limit surface disturbance by establishing an “average short term surface disturbance goal”). FEIS at 2-3 to 2-8 (Exh. 1). The National Wildlife Federation and Wyoming Wildlife Federation submitted comments on the FEIS. Comments of the National and Wyoming Wildlife Federations on the Atlantic Rim Natural Gas Development Project Final Environmental Impact Statement (Jan. 4, 2007) (NWF FEIS Comments) (attached as Exh. 4).

On June 19, 2007 the National and Wyoming Wildlife Federations (“Conservation Appellants”) served a Notice of Appeal (pursuant to 43 C.F.R. §§ 3165.4(a) and 4.411) of the final decision of the Bureau of Land Management’s (“BLM”) Wyoming State Office. That decision was the Record of Decision, Environmental Impact Statement for the Atlantic Rim Natural Gas Field Development Project, Carbon County, Wyoming (May 21, 2007) (“Atlantic Rim ROD”) (attached as Exh. 5); *see* Notice of Availability of the Record of Decision for the Final Environmental Impact Statement, Atlantic Rim Natural Gas Field Development Project, Carbon County, WY, 72 Fed. Reg. 28,518 (May 21, 2007). Because the Record of Decision was signed by the Wyoming State Director, it is the final decision of the Wyoming State Office and no Request for State Director review is available or required. The Atlantic Rim ROD selected Alternative D, with some modifications, from the FEIS. Alternative D approves the drilling of approximately 2,000 new natural gas wells within some of the most productive big game habitat in Wyoming, and, according to the FEIS and ROD “may result in adverse effects to pronghorn antelope, mule deer, elk, sage-grouse, Columbian sharp-tailed grouse, sagebrush-obligate songbirds, roundtail chub, bluehead suckers, and flannelmouth suckers.” ROD at 7 (Exh. 5).

STANDING

A party may appeal a BLM decision, and will have standing before the IBLA, if they are a “party to a case” and are “adversely affected by a decision”. 43 C.F.R. § 4.410; *Coalition of Concerned National Park Retirees*, 165 IBLA 79, 81 (2005). A party to a case “is one who has taken action that is the subject of the decision on appeal, is the object of that decision, or has otherwise participated in the process leading to the decision under appeal, e.g., . . . by commenting on an environmental document. . . .” 43 C.F.R. § 4.410(b). A party is adversely affected by a decision “when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.” *Id.* at § 4.410(d). In *Coalition of Concerned National Park Retirees*, the IBLA stated that a party’s demonstration of their use of the land in question “would be the most direct way to show a connection between a legally cognizable interest and injury to that interest as a result of a decision.” 165 IBLA at 83-84.

Conservation Appellants have standing to appeal the BLM decision to the IBLA because they are a party to the case and they are adversely affected by the BLM’s decision. The Federations are a party to the case because they have participated in the NEPA process for the Atlantic Rim project and have commented on the DEIS and FEIS. See NWF DEIS Comments (Exh. 3), NWF FEIS Comments (Exh. 4). As demonstrated by the attached declaration of Craig D. Thompson, a member of WWF and member of the Board of Directors of NWF, the National and Wyoming Wildlife Federations’ members’ interests will be adversely affected by decision. *See* Declaration of Craig D. Thompson (Exh. 6). In the declaration, Mr. Thompson explains that he has used federal lands on and adjacent to the Atlantic Rim project area, and that his continued use of these federal lands will be adversely affected by the BLM’s decision. *Id.*

ISSUES PRESENTED

The BLM's authorizations to allow development of 2,000 natural gas (primarily coalbed methane wells) within the Atlantic Rim Project Area violate both NEPA and FLPMA for three reasons.

1. The Atlantic Rim FEIS and ROD violate NEPA because they fail to take a hard look at the project's impacts on mule deer. The FEIS and ROD violate NEPA's "hard look" requirement, and regulations requiring use of the best available scientific data, by failing to address available and relevant data from a newly-completed first phase of a scientific study of mule deer ecology in the Atlantic Rim Area. *See* Hall Sawyer, Final Report for the Atlantic Rim Mule Deer Study (April 2007) (attached as Exh. 7). The FEIS acknowledged both a need for information on mule deer migration routes and habitat (and the ongoing study) and the possibility for significant adverse impacts to mule deer migration and population if development proceeds while information is lacking. FEIS at 5-17 (Exh. 1). Between the December 2006 issuance of the FEIS and the May 2007 ROD, Western Ecosystems Technology, Inc., completed its Final Report for Phase I of the Atlantic Rim Mule Deer Study (Exh. 7). Nevertheless, the BLM, which had the Final Report available to it prior to issuance of the ROD (and knew of the data at an even earlier date), fails, in the ROD to acknowledge the findings of the Mule Deer Study. These findings clearly demonstrates the presence of mule deer migration routes through specific segments of the project area, and warns that "the recent BLM approval to develop 2,000 gas wells at a spacing of 8 per section and improve or construct approximately 1,000 miles of road and pipeline . . . will result in large-scale habitat changes that could potentially impact the effectiveness of migration routes." Atlantic Rim Mule Deer Study at 26 (Exh. 7). The BLM has failed to adequately address this new and relevant information in violation of NEPA.

2. BLM's decision poses a significant threat to the survival of greater sage-grouse within the project area, violates its obligation to conserve sensitive species, and is not in conformity with the governing Resource Management Plan. FLPMA requires 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, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.” 43 U.S.C. § 1701 (a)(8) (1976). The greater-sage grouse is a bird species that is abundant within the Atlantic Rim Project area, due to a high amount and diversity of suitable habitat and (at present) lack of habitat fragmentation, FEIS at 4-75 to 4-76 (Exh. 1), but faces significant challenges throughout the West and is included on the Wyoming Sensitive Species List of the BLM State Director, *id.* at 3-94. BLM's policies on management of sensitive species require “the use of all methods and procedures which are necessary to improve the condition of special status species and their habitats to a point where their special status recognition is no longer warranted.” BLM Manual 6840.01 (attached as Exh. 8). Contrary to this obligation, and to provisions in the 1990 Great Divide Resource Management Plan governing management of sage-grouse, the BLM has approved a density of development and suite of management measures that current scientific research have shown to be inconsistent with maintaining sage-grouse populations.

3. The FEIS and ROD violate NEPA by failing to consider a reasonable range of alternatives. NEPA requires that an EIS include a detailed statement of alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii). This consideration and evaluation of all reasonable alternatives is considered the “heart” of an EIS. 40 C.F.R. § 1502.14. The Atlantic Rim FEIS and ROD fail to consider reasonable alternatives to the proposed

action. BLM improperly dismissed from consideration either DEIS Alternative C or the additional conservation measures proposed by Conservation Appellants and others in public comment based on an impermissibly narrow interpretation of the project's Purpose and Need and BLM's statutory obligations. BLM may not exclude from consideration reasonable alternatives simply by elevating "maximum recovery of natural gas resources," ROD at 16 (Exh. 5), in importance above all the other components of its FLPMA multiple-use mission.

ARGUMENT

1. The Atlantic Rim FEIS and ROD violate NEPA because they fail to take a hard look at the project's impacts on mule deer, omitting relevant new information on migration routes within the project area.

NEPA requires agencies to include and consider the best available scientific data in an EIS. 40 C.F.R. § 1500.1; *see Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704-05 (9th Cir. 1993) (holding that an EIS was invalid for resting on "stale scientific evidence"). Here, BLM violated NEPA when it failed to include the detailed data that was available in the April 2007 Final Report for Atlantic Rim Mule Deer Study (Exh. 7) in the ROD, and failed to supplement the FEIS to take into account this highly-relevant information. This omission violates the Council on Environmental Quality ("CEQ") regulations implementing NEPA, the case law applying NEPA, and the intent of NEPA to prevent environmentally "uninformed" agency action. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

In furtherance of the proposed Atlantic Rim Project; the BLM, Wyoming Game and Fish Department ("WGFD"), Anadarko Petroleum Company, and Warren E&P, Inc. commissioned a study of mule deer ecology (including mapping of migration routes) in the Atlantic Rim Project Area. Atlantic Rim Mule Deer Study (Exh. 7). While the final report of the Sawyer Atlantic Rim Mule Deer Study was completed in April of 2007, it is

clear from the record that data from the study was provided to the BLM prior to the release of the FEIS in November of 2006. *See* FEIS at 5-17 (Exh. 1). However, the study data was not utilized in either the FEIS or ROD, and the FEIS in fact at one point specifically notes the relevance and unavailability of the information:

Several mule deer migration routes transverse the ARPA [Atlantic Rim Project Area]. A research project initiated by the BLM and WGFD in February 2005, funded by two of the operators, should help delineate the migration routes used by mule deer on the ARPA. When information is available from this research, additional mitigation would be placed on development for the protection of mule deer migration corridors. Meanwhile, this project could alter or block mule deer movements along existing migration routes.

FEIS at 4-74 (Exh. 1). In addition, the FEIS contains maps of mule deer migration routes that are inaccurate and misleading in light of the data from the Mule Deer Study.

Compare FEIS at 3-89 (Exh. 1) *with* Atlantic Rim Mule Deer Study at 19 (Exh. 7).¹

More importantly, the ROD not only fails to account for the results of the April 2007 report, but it fails to ensure that additional necessary information will be obtained to prevent impairment of mule deer migration routes

The Sawyer Atlantic Rim Mule Deer Study provided detailed data on mule deer migration routes and seasonal ranges in the project area that was necessary to partially mitigate the adverse effects of coalbed methane and natural gas development on mule deer. Comments submitted by wildlife biologist A. William Alldredge stressed that a lack of detailed data on mule deer migration routes in the project area—the very data the Atlantic Rim Mule Deer Study was designed to generate—would likely lead to interference with mule deer migration routes. *See* Letter from A. William Alldredge, Ph. D. to David Simons 3 (Feb. 3, 2006) (“Alldredge Comments”) (attached as Exh. 10). *See also* NWF FEIS Comments at 17 (Exh. 4) (“Without information regarding migration

¹ Exhibit 9 provides a side-by-side comparison of the migration route maps in the FEIS and the Mule Deer Study.

routes, the BLM has not, and cannot, analyze the impact of development in the project area in terms of fragmentation, access to migration corridors, and options for coping with environmental factors.”). Alldredge explained that interference with mule deer migration routes will have adverse effects on mule deer in the project area because these migration routes provide corridors between critical habitats and mule deer illustrate strong fidelity to migration routes. Alldredge Comment at 3 (Exh. 10). “Limiting the ability of migrating big game animals to access critical habitats reduces their options for coping with environmental conditions such as forage availability, snow depth, wind and human disturbances and can lead to increased mortality and subsequent reductions in populations.” *Id.* (citations omitted). Dr. Alldredge further recommended that development should be delayed until further information on mule deer migration routes was obtained.

The extent of development projected for the Atlantic Rim Project Area has, in my opinion, an extremely high probability of fragmenting habitats both from surface disturbance and impacts to migration areas. The lack of information regarding migration areas and the emphasis of their importance by the BLM would suggest that additional energy development projects should not be approved until both the location and importance of migration areas are ascertained.

Id.

The Atlantic Rim Mule Deer study, completed prior to the issuance of the ROD, confirms the relevance of this migration route data, the need for additional information, and the possibility of large-scale habitat changes and effects on migration routes from the Atlantic Rim gas development project. The Atlantic Rim Mule Deer Study explicitly states that “accurately delineating migration routes prior to gas development in the ARPA provide the necessary tools” for developing mule deer management and mitigation strategies to sustain the mule deer population in the Atlantic Rim during the planned coalbed methane extraction. Atlantic Rim Mule Deer Study at 26 (Exh. 7). The study

noted that sustaining the mule deer population levels in the Atlantic Rim “will require that functional seasonal ranges and migration routes be maintained. Our study provides the baseline data necessary to accurately identify seasonal ranges and migration routes, both of which will be key components for successful mule deer management and mitigation as energy resources are developed in the ARPA.” *Id.* at 24. In addition, the study stated that

[w]ithout migratory routes, many of the seasonal ranges in the [Baggs Herd Unit (BHU)] would be inaccessible to mule deer, and it is unlikely current populations could be maintained. . . . [I]dentifying and conserving migration routes to and from seasonal ranges will be a key component to successful mule deer management in the BHU. . . . Until recently, conserving migration routes has not been a top management concern for agencies because there have been no large-scale habitat alterations in the ARPA or BHU and the landscape has remained relatively unchanged. However, the recent BLM approval [of the Atlantic Rim Project] will result in large-scale habitat changes that could potentially impact the effectiveness of migration routes. While disturbances associated with gas development may alter habitat selection and distribution patterns of wintering mule deer, it is unclear how or if gas development affects migration routes and migratory behavior. Nonetheless, accurately delineating migration routes prior to gas development in the ARPA provide the necessary tools to develop proactive measures to protect routes or minimize impacts to routes. . . .

Id. at 25-26 (citations omitted). Unfortunately, the BLM has not utilized these “necessary tools,” and the FEIS and ROD do not prescribe or even contemplate any specific “proactive measures to protect routes or minimize impacts to routes.”

Conservation Appellants note that BLM has acknowledged, in the FEIS, the findings of another study by Dr. Sawyer, commissioned by the BLM, of mule deer habitat selection and distribution in areas affected by natural gas development. FEIS at 4-74 (Exh. 1). The FEIS acknowledges that effects to mule deer are not limited to actual habitat physically destroyed (which is what the ROD’s “disturbance cap” addresses), but also include behavioral effects due to disturbance.

In addition to the direct removal of habitat due to the development of pads and associated ancillary facilities, disturbances from drilling activities and traffic would affect the use of the habitat immediately adjacent to these areas. Mule deer, however, are adaptable and may adjust to non-threatening, predictable human activity (Irby et al. 1988 and Gusey 1986). However, the Sublette Mule Deer Study, which used Global Positioning System (GPS) collars, found that winter mule deer habitat selection and distribution patterns have been affected by development, specifically road networks and well pads. Sawyer found no evidence of acclimation behavior. During 3 years of study, mule deer had higher probability of use in areas farther away from well pads as development progressed. Predictive maps also suggest that some habitats considered “high probability of use” areas prior to development, changed to “low probability of use” areas as development progressed, and visa versa.

FEIS at 4-74 (Exh. 1). Indeed, the Sublette study found that with only 2% direct habitat loss (comparable to the Modified Alternative D proposal), 41% of areas seeing high deer use prior to development changed to medium-low or low-use areas. Atlantic Rim Mule Deer Study at 25 (Exh. 7).

A. BLM acknowledged that it had received the data from the Atlantic Rim Mule Deer study prior to completion of the FEIS, but did not present, analyze, or take into account this data in the FEIS or ROD.

The BLM acknowledged at one point in the FEIS that it had received initial data from the Atlantic Rim Mule Deer Study prior to completion of the FEIS. “Cumulative impacts upon mule deer migration routes within the Baggs Herd Unit are unknown. Currently, an industry sponsored mule deer study is ongoing. Completion of the first phase² of the study has provided BLM and WGFD better information on migration

² The April 2007 Final Report for Atlantic Rim Mule Deer Study represents Phase I of the study as originally conceived. “This study was designed to have two phases. The first phase of the study was intended to identify seasonal ranges, document migration routes, and estimate survival rates prior to development of the proposed 2,000 natural gas wells. . . . Once Phase I was completed, study cooperators were to determine if Phase II was warranted. If conducted, Phase II was envisioned as a long term (> 3 years) study that would occur during or after development to determine if impacts to mule deer from natural gas development occur, including changes in migration routes, habitat use patterns, and survival.” Atlantic Rim Mule Deer Study at 2 (Exh. 7). Based on Conservation Appellants’ review of the ROD, there appears to be no commitment from BLM or the operators that Phase II will be implemented; the Atlantic Rim “Wildlife Monitoring and Protection Plan” contains no reference to any long-term mule deer study. FEIS Appendix E (Exh. 1).

routes.” FEIS at 5-17 (Exh. 1). However, this “better information” on mule deer migration routes was not represented or assessed in the FEIS or ROD. At other points in the FEIS, the BLM asserts that it cannot offer more specific analysis and mitigation measures because the study was not yet completed and it did not have sufficient data. *See* FEIS at 4-74 (Exh. 1) (“When information is available from [the mule deer study], additional mitigation would be placed on development for the protection of mule deer migration corridors. Meanwhile, this project could alter or block mule deer movements along existing migration routes.”). Moreover, in the DEIS, BLM originally stated, in a list of Best Management Practices, that once the results from the Sawyer Mule Deer Study were available, the BLM would place a no surface occupancy restriction on narrow migration corridors, and avoid surface disturbances within all identified migration routes. DEIS at H-9 (Exh.2).

The difference between the mule deer migration route data that the BLM used in the FEIS and the data that the Sawyer Atlantic Rim Mule Deer Study provided is illustrated by comparing the respective migration route maps of each, as shown in Exhibit 9. This difference is significant because the Sawyer Atlantic Rim Mule Deer Study and the Alldredge Comment explicitly state that maintaining mule deer migration routes is critical to sustaining the mule deer population in the Atlantic Rim. *See* Atlantic Rim Mule Deer Study at 25 (Exh. 7) (“[I]dentifying and conserving migration routes to and from seasonal ranges will be a key component to successful mule deer management in the BHU.”); Alldredge Comment at 3 (Exh. 10) (“Limiting the ability of migrating big game animals to access critical habitats . . . can lead to increased mortality and subsequent reductions in population”). BLM admits that by not utilizing detailed migration route data, as provided by the Sawyer Atlantic Rim Mule Deer Study, coalbed methane and natural gas development in the project area would likely block mule deer migration routes. *See* FEIS at 4-74 (Exh. 1) (“When information is available from this research,

additional mitigation would be placed on development for the protection of mule deer migration corridors. Meanwhile, this project could alter or block mule deer movements along existing migration routes.”). Clearly, if the BLM were to implement mitigation measures to avoid blocking mule deer migration routes that utilized the Sawyer Atlantic Rim Mule Deer Study data, it would likely lead to much greater restrictions on coalbed methane development in the Atlantic Rim than if the BLM used the FEIS data, which happened to omit the majority of the mule deer migration routes crossing the project area.

NEPA is a procedural statute intended to require agencies to take a “hard look” at the environmental impacts of proposed actions, by mandating that agencies utilize public comments and consider the best available scientific information when making decisions. *Colorado Env'tl. Coalition v. Dombeck*, 185 F.3d 1162, 1171 (10th Cir. 1999). The CEQ regulations implementing NEPA state that “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). To ensure that this “essential” scientific analysis is included, CEQ regulations require that an EIS contain complete information when it is essential to a reasoned choice among alternatives, unless the cost of obtaining the complete information is exorbitant. 40 C.F.R. § 1502.22(a). If an EIS contains incomplete information, then the agency must “always make clear that such information is lacking.” 40 C.F.R. § 1502.22.

Here, the BLM’s failure to include the Atlantic Rim Mule Deer Study data in both the FEIS and the ROD³ analysis violates the CEQ regulations implementing NEPA. The

³ The ROD responded to comments to the FEIS that requested that BLM include the Sawyer Atlantic Rim Mule Deer Study data in the ROD by stating: “Data collection from wildlife studies in areas near the ARPA may prove useful in determining mitigation needs for the ARPA. This information will be evaluated and incorporated , as appropriate, into the wildlife monitoring and mitigation process described in appendix E of the FEIS.” ROD at E-2 (Exh. 5). This brief and generalized reference to the mule deer study does not satisfy NEPA because the data was not utilized or analyzed in the ROD. An agency cannot evade the

text of 40 C.F.R. § 1500.1(b) plainly states that accurate scientific analysis is essential to the implementation of NEPA, and that this environmental information must be made available to the public and agency decision-makers before decisions are made and action is taken. Here, the BLM had detailed and accurate scientific analysis of mule deer in the project area but did not include this data in either the FEIS or ROD. As a result of this omission, this detailed environmental information was not available to either the agency decision-makers or the public.

In addition, 40 C.F.R. § 1502.22 plainly states that any information that is essential to a reasoned decision must be complete information, unless the costs of obtaining complete information is exorbitant. A study that depicts the project's likely interference with mule deer migration routes across the Atlantic Rim should be considered essential information for a reasoned decision because hunting is the main recreational activity in the Atlantic Rim, and the Atlantic Rim provides some of the most productive mule deer hunting in the state. *See*, FEIS at 3-115, 3-116 (Exh. 1) ("Hunting is the main recreation use in the ARPA. The Baggs Herd Unit of mule deer, in the southern half of the ARPA, is one of the most heavily hunted in the state. . . . The ARPA attracts hunters for mule deer in particular."). The costs of obtaining this detailed mule deer data were certainly not exorbitant. The study had already been commissioned and completed, and the BLM had obtained the data from the study prior to completion of the FEIS.

Finally, 40 C.F.R. § 1502.22 also states that if there is incomplete or unavailable information, "the agency shall always make clear that such information is lacking." BLM certainly seemed to have complied with this requirement, as the FEIS made several comments on the lack of detailed mule deer information when discussing the minimal mitigation measures to protect mule deer and their migration routes. However, despite

NEPA requirements of including relevant and available scientific analysis in the FEIS and ROD by stating that such data will be considered at a later date. More importantly, Appendix E to the FEIS contains no protective measures for, or even discussion of, minimizing impacts to migration routes and migratory behavior.

BLM's apparent admissions that it did not have complete information, these statements were incorrect because the BLM did have the detailed data from the Atlantic Rim Mule Deer Study. This detailed scientific information was not in fact lacking, but was simply not included in the FEIS or ROD analysis. The CEQ regulations undoubtedly do not contemplate that an agency may withhold detailed and relevant scientific analysis, so long as the agency fully admits that the deficient scientific information it is utilizing in the EIS is incomplete. Although the Mule Deer Study makes clear that it simply provides information regarding distribution of mule deer, and acknowledges uncertainty regarding how oil and gas development may change this, Mule Deer Study at 26 (Exh. 7), this residual uncertainty is not an excuse to ignore the information that is available.

The fact that the Mule Deer Study Final Report was issued between the FEIS and ROD does not exclude it from consideration. The courts have interpreted NEPA to require agencies to include recently available scientific data in the EIS and its analysis. In *Seattle Audubon Society*, the Ninth Circuit held that the Forest Service violated NEPA by issuing an EIS for a timber sale that adopted a two-year old management strategy for spotted owls without considering a more recent report on spotted owl habitat destruction. 998 F.2d at 703-05. This intervening report stated that the spotted owl population was declining more substantially and more quickly than previously thought, and this raised "serious questions" about the adequacy of the older management plan that the Forest Service adopted. *Id.* at 704. Among the reasons that the court found a NEPA violation was that the EIS rested on "stale scientific evidence." *Id.* at 704-05. Here, the BLM did not include a recent study of mule deer in the project area; which is similar to the exclusion of the spotted owl data in *Seattle Audubon Society*. Similarly to the circumstances in *Seattle Audubon Society*; here, the BLM violated NEPA for relying upon "stale scientific evidence" when it did not include the available data from the Sawyer Atlantic Rim Mule Deer Study.

In *Northwest Ecosystem Alliance v. Rey*, 380 F. Supp. 2d 1175 (W.D. Wash. 2005), the court found a NEPA violation, in part, because the agency did not include recent data in a Supplemental Environmental Impact Statement (“SEIS”) and it did not discuss why it did not incorporate this recent data into the SEIS. 380 F. Supp. 2d at 1196. The Forest Service and BLM prepared a SEIS and ROD that eliminated a “Survey and Manage” standard designed to protect sensitive species. *Id.* at 1182-83. One of the reasons the agencies wished to eliminate this standard was because it limited their ability to apply hazardous fuel treatments that would reduce the risk of catastrophic wildfires. *Id.* at 1194. The challengers argued that in the SEIS analysis the agencies underestimated the acreage that burns naturally each year, and hence overestimated the acreage in need of hazardous fuel treatments, because they relied upon older data from a decade when fires occurred less frequently and ignored recent data from a time period when fires occurred more often. *Id.* at 1196. The court accepted this argument that the SEIS violated NEPA because it relied upon outdated data without a sufficient explanation. *Id.* “[T]he Agencies should have disclosed potential bias due to the reliance on a particular decade of data regarding the frequency of wildfires and discussed why the Agencies chose not to incorporate more recent data. . . . Absent such disclosures, the public and the decision-makers were deprived of important information. . . .” *Id.* Here, the public and decision-makers were also deprived of important information on mule deer in the project area. As the two different mule deer migration route maps in Exhibit 9 demonstrate, the failure to include the detailed data of the Sawyer Atlantic Rim Mule Deer Study in the FEIS and ROD led to potential bias by not fully informing the public and decision-makers of the project’s likely impact and potential interference with mule deer migration routes.

Last year, in *Sierra Nevada Forest Protection Campaign v. Tippin*, No. Civ. S. 06-00351, 2006 U.S. Dist. LEXIS 57832 (E.D. Cal. Aug. 16, 2006), the court found a NEPA violation when the Forest Service did not include recent research on the American

marten in an EIS for a timber fire management project. 2006 U.S. Dist. LEXIS 57832 at *29-*36. The EIS relied upon an older study, and implied that the marten was not imperiled in the Sierra Nevada. *Id.* at *31. However, the EIS did not mention or include a recent study, conducted by the same scientist who authored the older study, which raised serious questions about the viability of the marten in the project area. *Id.* at *29-*32. First, the court found that the Forest Service violated NEPA by not including the recent research that indicated the marten population in the project area was more imperiled than the EIS suggested. “[B]ecause defendants failed to address the most recent research regarding the viability of the marten and because the exclusion of such reference is misleading, defendants failed to take a hard look at the impact of the project on the American marten and its habitat.” *Id.* at *32. Next, the court found that the Forest Service failed to adequately analyze the impact of the project on marten habitat connectivity, as the recent research included a map that illustrated that the proposed project would interfere with corridors connecting important marten habitat.

Because the Forest Service failed to analyze and evaluate the most recent scientific information on the marten, which was prepared by a leading Forest Service expert and that offered more detailed information relating to habitat connectivity issues implicated by the Project, . . . the court finds that the Forest Service abused its discretion in failing to disclose and analyze this information and thus, failed to take a hard look at the impact of the Project on marten habitat connectivity as required by NEPA.

Id. at *35-*36. In addition, the court rejected the Forest Service’s suggestion that it did not have time to include the recent research in the EIS because the report was only published a month before the EIS was issued. “The implication that the agency does not have to consider ‘eleventh-hour’ research to comply with NEPA is without merit.” *Id.* at *31 n.14.

The court’s opinion in *Sierra Nevada Forest Protection Campaign* is particularly relevant and applicable to the facts of this case. The court found a NEPA violation, in

part, because the agency failed to adequately analyze the project's impact upon American marten habitat connectivity. 2006 U.S. Dist. LEXIS 57832 at *35-*36. The court noted that the recent research that the agency failed to utilize in the EIS included maps “demonstrating that most of the treatments in the Project area overlap with areas determined to have moderate habitat suitability for marten”, and that the maps illustrated important habitat connectivity corridors. *Id.* at *34. Here, the Sawyer Atlantic Rim Mule Deer Study includes detailed maps of mule deer migration routes and seasonal ranges in and near the project area. *See* Atlantic Rim Mule Deer Study (Exh. 7). Similar to *Sierra Nevada Forest Protection Campaign*, these maps clearly illustrate the impacts that the Atlantic Rim project may have upon mule deer migration routes and crucial seasonal ranges; and the study, along with comments from biologists, explicitly stated that it was likely that development would adversely affect these mule deer migration routes. As the court found in *Sierra Nevada Forest Protection Campaign*, the BLM's failure to include and analyze this recent scientific information should be considered a violation of NEPA because the FEIS and ROD did not sufficiently evaluate the effects of the Atlantic Rim project on mule deer migration routes.

In addition, the court's observation in *Sierra Nevada Forest Protection Campaign* that “eleventh-hour” research does not excuse the agency's obligation to include such data in its analysis should also apply here. *See* 2006 U.S. Dist. LEXIS 57832 at *31 n.14. Given NEPA's mandate that detailed and accurate scientific analysis be included in an EIS, *see* 40 C.F.R. § 1500.1(b), and NEPA's focus on informed decision-making, *see Methow Valley*, 490 U.S. at 351, relevant “eleventh-hour” research should be included in the NEPA process. Here, BLM acknowledged that it had the data from the Sawyer Atlantic Rim Mule Deer Study prior to the release of the FEIS. *See* FEIS at 5-17 (Exh. 1). In addition, the final report of the Sawyer Atlantic Rim Mule Deer Study was published in April 2007, one month prior to the publication of the ROD in the Federal Register on

May 21, 2007. While this data may have become available relatively late into the EIS and NEPA process for the Atlantic Rim project, this data was available to BLM and published in time to be included in both the FEIS and ROD analysis.

As a result of the data provided by the Sawyer Atlantic Rim Mule Deer Study, the BLM had in its possession relevant scientific data specific to the project's likely effects on mule deer. In addition, this data was essential to a reasoned decision on coalbed methane development in the Atlantic Rim because the mule deer in the Atlantic Rim are among the most heavily hunted in the state. *See* FEIS at 3-115, 3-116 (Exh. 1). This distinguishes this case from other cases where courts have rejected arguments that an agency should have included more detailed or accurate scientific data in an EIS. *See Colorado Env'tl. Coalition*, 185 F.3d at 1169-72 (holding that an EIS that utilized only general data on lynx habitat used the best available scientific data because the fact that no lynx had been observed in the project area in twenty-five years precluded more detailed site-specific lynx data); *Trout Unlimited v. United States Dep't of Agric.*, 320 F. Supp. 2d 1090, 1010-11 (D. Colo. 2004) (finding that more detailed and complete scientific information did not have to be included in an EIS because the plaintiffs failed to show that such information was essential to a reasoned decision).

In *Habitat Education Center, Inc. v. Bosworth*, 381 F. Supp. 2d 842 (E.D. Wis. 2005), the court rejected the plaintiffs claim that studies showing adverse effects of logging on goshawk should have been included in the EIS. 381 F. Supp. 2d at 855-56. The court found that the studies the plaintiffs referenced were only general studies and did not directly consider whether the specific project in question would threaten goshawk. *Id.* Here, in contrast, the Sawyer Atlantic Rim Mule Deer Study was not a general mule deer study, but was specific to mule deer in the Atlantic Rim project area. In addition, this study explicitly stated that sustaining mule deer populations in the project area during coalbed methane and natural gas development would require specific

mitigation measures by the BLM. Sawyer Atlantic Rim Mule Deer Study at 26 (Exh. 7) (“Sustaining migratory mule deer populations in the BHU will require that suitable seasonal ranges (i.e., winter, transition, summer) be maintained and migration routes remain functional”). Therefore, the court’s reasoning in *Habitat Education Center* does not apply here and the data from the study should have been included in the FEIS and ROD.

B. BLM omitted mitigation measures to protect migration routes or minimize impacts based on an asserted lack of detailed data, even though the Atlantic Rim Mule Deer Study provided this detailed data.

BLM’s insistence in the FEIS that it could not proscribe more effective mitigation measures to protect mule deer and their migration routes because of a lack of sufficient data, FEIS at 4-74 (Exh. 1), was not true, because BLM did have the necessary data. Such erroneous assertions, coupled with the omission of important scientific data, are contrary to the intent of NEPA to provide for environmentally-informed decision-making. The BLM did, in fact, have the necessary information to identify mule deer migration routes and at least potentially mitigate the adverse effects of coalbed methane development on mule deer. This important information was provided by the Atlantic Rim Mule Deer Study. However, the BLM did not include this data in the FEIS and ROD, and this was an arbitrary and capricious action that circumvented the purpose of NEPA.

NEPA requires agencies to complete an EIS for major federal actions that significantly affect the environment as part of a “broad national commitment to protecting and promoting environmental quality.” *Methow Valley*, 490 U.S. at 348. The purpose and objective of NEPA is to encourage informed decision-making and public comment, and “to require agencies to consider environmentally significant aspects of a proposed action, and, in so doing, let the public know that the agency’s decision-making process includes environmental concerns.” *Utahns for Better Transp. v. United States*

Dep't of Transp., 305 F.3d 1152, 1162 (10th Cir. 2002). When courts review an agency's compliance with NEPA, they consider whether the agency adequately considered the environmental impact of its actions to determine if an agency's actions were arbitrary or capricious, *id.* at 1163, or were instead a "reasonable, good faith, objective presentation" of the environmental impacts of the project, *Colorado Envtl. Coalition*, 185 F.3d at 1172.

Here, the DEIS initially stated that BLM would avoid surface occupancy and surface disturbances for mule deer migration routes when the results of the Sawyer Atlantic Rim Mule Deer Study were available. DEIS at H-9 (Exh. 2). The FEIS further stated that "[w]hen information is available from [the Sawyer Atlantic Rim Mule Deer Study], additional mitigation would be placed on development for the protection of mule deer migration corridors. Meanwhile, this project could alter or block mule deer movements along existing migration routes." FEIS at 4-74 (Exh. 1). The issuance of the Mule Deer Study Final report in April 2007, prior to the issuance of the ROD, plainly indicates that the information was in fact available, yet the BLM has plainly adopted no "additional mitigation" to protect movements along existing migration routes from being blocked. *See* FEIS at E-2 (Exh. 1) (noting generally that "[d]ata collected from wildlife studies in areas near the ARPA may prove useful in determining mitigation needs for the ARPA").

It is not a reasonable, good faith, objective presentation of the environmental impacts of the Atlantic Rim project when the BLM implies that they cannot place additional mitigation measures on the project at the time of the FEIS because the necessary information is not available; when in fact this information was available at the time the FEIS was completed and the ROD issued. It is arbitrary and capricious, and prohibitive of informed and public decision-making, for the BLM to present data in the FEIS that depicted relatively few mule deer migration routes crossing the project area, *see* FEIS at 3-89 (Exh.1), when the BLM possessed, but withheld, detailed data that

illustrated a much greater number of mule deer migration routes that crossed the project area, *see* Atlantic Rim Mule Deer Study at 19 (Exh. 7); *see also* Atlantic Rim Mule Deer Migration Route Map Comparison (Exh. 9).

In addition, the ROD stated that one performance goal for the project is to “maintain functional migration routes through or around development areas.” ROD at 19 (Exh. 5). Despite the fact that the ROD was published six months after the FEIS and a month after the Final Report for the Mule Deer Study, there is still no mention of the data from the Atlantic Rim Mule Deer Study in the ROD. The ROD does not offer any specific performance requirements that would avoid interference with the mule deer migration routes depicted in the Sawyer Atlantic Rim Mule Deer Study, as the DEIS initially claimed BLM would do once the study results were available. *See* ROD at B-17 (Exh. 5); DEIS at H-9 (Exh. 2). Instead, the ROD only prescribes generally-applicable requirements for right-of-way fencing construction and length of snow fences. *See* ROD at B-17 (Exh. 5). While these measures are certainly useful for reducing direct blocking of animal movements by fences, they fail to take into account the management implications of the Atlantic Rim Mule Deer study, including uncertainties regarding the effect of gas development on migration routes and migratory behavior. Atlantic Rim Mule Deer Study 26 (Exh. 7). Again, it is arbitrary and capricious to withhold detailed scientific data that is necessary to implement the BLM’s performance goal of maintaining migration routes through the Atlantic Rim project area.

Omitting the Atlantic Rim Mule Deer Study data in the FEIS and ROD, but including the data in any later site-specific approvals for drilling permits⁴ contravenes

⁴ The ROD states that “[t]his decision is not the final review or approval for actions associated with ARNG development. The [BLM Authorized Officer (AO)] will review and consider each component of the project that involves federal lands or minerals on a site-specific basis.” ROD at 3 (Exh. 5). “The approval process will be conducted consistent with NEPA. . . . The AO, in consultation with Operators, will determine the manner in which the BLM meets its NEPA obligations including determining whether a categorical exclusion pursuant to Section 390 of the Energy Policy Act of 2005 applies.” ROD at 19 (Exh.5).

NEPA's aim of making possible informed public decision-making. *See, e.g., Methow Valley*, 490 U.S. at 349 (stating that NEPA guarantees that the relevant environmental information will be made available to the public, and that EISs inform the public and act as a "springboard for public comment"). Because BLM asserts that later site-specific approvals may be subject to the categorical exclusion of Section 390 of the Energy Policy Act of 2005,⁵ *see* ROD at 19 (Exh. 5), it is possible that this FEIS and ROD represent the only opportunity for public input and decision-making regarding coalbed methane development in the Atlantic Rim. As a result, it would be contrary to the intent of NEPA to withhold relevant and available scientific data from the public decision-making process.

2. BLM's decision poses a significant threat to the survival of greater sage-grouse within the project area, violates its obligation to conserve sensitive species, and is not in conformity with the governing Resource Management Plan.

In comments on both the DEIS and FEIS, Conservation Appellants raised the issue of the impacts to greater sage-grouse populations from the Atlantic Rim Project and cited current research, as well as comments from wildlife agencies, regarding the ineffectiveness of the BLM's proposed mitigation methods. NWF DEIS Comments at 23-33 (Exh. 3); NWF FEIS Comments at 24-35 (Exh. 4). The Atlantic Rim ROD, which continues to rely on demonstrably ineffective measures to stem development-related sage-grouse decline, is inconsistent with BLM's sage-grouse conservation obligations under FLPMA, BLM policy, and the Great Divide Resource Management Plan.

⁵ Section 390 of the Energy Policy Act of 2005 states that the Secretary of the Interior's management of the public lands with respect to enumerated activities "shall be subject to a rebuttable presumption that the use of a categorical exclusion under [NEPA] would apply" if the activities are conducted in furtherance of the exploration or development of oil or gas. 42 U.S.C. § 15942(a). Among the five enumerated activities subject to the categorical exclusion are: "Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 years prior to the date of spudding the well." *Id.* at § 15942(b)(3). Should BLM attempt to apply this categorical exclusion to the Atlantic Rim project, it is possible that site-specific approvals within the next five years would evade NEPA review.

A. The Atlantic Rim Project Area contains large amounts of high-quality habitat for greater sage-grouse, a BLM Sensitive Species undergoing substantial habitat loss and population decline.

The greater-sage grouse is a bird species that is relatively abundant within the Atlantic Rim Project area, due to a high amount and diversity of suitable habitat and (at present) lack of habitat fragmentation, FEIS at 4-75 to 4-76 (Exh. 1), but faces significant challenges throughout the West and is included on the Wyoming Sensitive Species List of the BLM State Director, *id.* at 3-94. The greater sage-grouse has lost its foothold in most of the country; the state of Wyoming contains some of the last areas of healthy and functional sagebrush habitat that the sage-grouse needs to survive. *See* Wyoming Game & Fish Dept., Recommendations for Dev. of Oil and Gas Res. within Crucial and Important Wildlife Habitats at 1 (2004) (“WGFD Recommendations”) (attached as Exh. 11). The sage-grouse has a complex life history that requires a wide variety of sagebrush habitats. Big sagebrush is the primary habitat for the sage-grouse, although Wyoming sagebrush also provides for the sage-grouse’s forage, nesting, mating, brood-rearing, and winter cover needs. *Id.*; Matthew J. Holloran, Greater Sage-Grouse Population Response to Natural Gas Field Development in Western Wyoming at 73 (2005) (attached as Exh. 12). The sage-grouse’s various life stages take place in different, although usually adjacent, types of habitat. *Id.* The proximity of these areas to each other and the ease with which the sage-grouse can move from one to another is an indicator of the quality of the habitat. *Id.* Fragmentation of its habitat is one of the principal reasons why a wildlife population declines. WGFD Recommendations at 1 (Exh. 11). Thus, it is important that the quality and diversity of sagebrush habitat in Wyoming be preserved in order to secure the future of the sage-grouse. This is necessary because, even in Wyoming where the species appears plentiful, the sage-grouse has experienced a steady decline in the last 35 years. Holloran at 6 (Exh. 12).

Against this background of range-wide decline, the Atlantic Rim area at present continues to support substantial sage-grouse populations. “Greater sage-grouse are abundant within the ARPA, due to a high amount and density of suitable habitat, lack of habitat fragmentation, and the close proximity of upland and riparian habitats.” FEIS at 4-75 (Exh. 1). “There are few locations elsewhere in Wyoming that support a higher density of greater sage-grouse.” Atlantic Rim DEIS at 3-119. The FEIS acknowledges the importance of the Atlantic Rim area for the bird:

Wyoming is one of the last strongholds for greater sage-grouse in the western United States, and contains more grouse than all other states combined. Greater sage-grouse are common throughout Wyoming because their habitat remains relatively intact compared to other states. In south-central Wyoming, this is even more accentuated due to the harsh climate that has limited past habitat loss or conversion to settlements and agricultural development along river bottoms. In the past, disturbance to upland habitats was restricted to livestock grazing and vegetation treatments (primarily at higher elevations). More recent disturbance to grouse habitat has come with development of energy resources.

Greater sage-grouse lek locations were obtained from the WGFD and the BLM RFO. There are 88 leks located in and within 2 miles of the ARPA (map M-26). Leks are often in grassy areas or in more open canopy sagebrush/grass habitat. Greater sage-grouse are dependent on sagebrush environments for their year-round survival, and in particular on ATVII and ATW, which occupy an estimated 85 percent of the ARPA. This dependency includes using sagebrush as forage, nesting, brood-rearing habitat, and winter thermal cover. In addition, grouse require a variety of sagebrush habitat types to meet their life history requirements. The sagebrush habitat types in the ARPA are diverse and provide a high quality environment for greater sage-grouse that is reflected in their abundance in this area. Riparian habitats are also important for brood-rearing habitat during the summer and fall months. The proximity of these two habitats to each other increases their value.

FEIS at 3-94 (Exh. 1). Despite the importance of the area for the species, and its various legal obligations discussed below, BLM continues to rely on a series of mitigation measures proven to be ineffective to prevent the decline and eventual extirpation of sage-grouse within gas fields.

B. FLPMA, BLM policies, and the governing Resource Management Plan require that BLM conserve sage-grouse population and habitat within the Resource Area.

FLPMA requires 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, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.” 43 U.S.C. § 1701 (a)(8); *see also* 43 U.S.C. § 1732(b) (requiring BLM to “take any action necessary to prevent unnecessary or undue degradation of the [public] lands”).

BLM’s policies on management of sensitive species such as the greater sage-grouse, FEIS at 3-94 (Exh. 1), require “the use of all methods and procedures which are necessary to improve the condition of special status species and their habitats to a point where their special status recognition is no longer warranted.” BLM Manual 6840.01 (Exh. 8). Contrary to this obligation, and to provisions in the 1990 Great Divide Resource Management Plan governing management of sage-grouse, the BLM has approved a density of development and suite of management measures that current scientific research have shown to be inconsistent with maintaining sage-grouse populations. The FEIS notes that the sage-grouse has been petitioned for listing under the Endangered Species Act, and, that, although not currently listed, “the status review clearly illustrates the need for continued efforts to conserve sage-grouse and sagebrush habitats on a long-term basis.” FEIS at 3-94 (Exh. 1) (quoting USFWS Director Steve Williams).

The BLM Manual 6840 (“Manual”), governing Special Status Species Management, sets heightened internal BLM management requirements for special status

species, which include those species, such as the greater sage-grouse designated by BLM State Directors as “sensitive species.” The Manual requires “conservation” of sensitive species, where “conservation” is defined as “the use of all methods and procedures which are necessary to improve the condition of special status species and their habitats to a point where their special status recognition is no longer warranted.” Manual at 6840.01 (Exh. 8). Based on current sage-grouse research and the FEIS’s own conclusions, the Atlantic Rim ROD fails to use all such methods and procedures.

Although sensitive species do not receive the statutory protections of the Endangered Species Act due listed threatened and endangered species, the Manual sets the minimum level of protection for BLM sensitive species at that of candidate species. To protect candidate species, the BLM is required to implement management plans that conserve candidate species and their habitats and to ensure that actions authorized, funded, or carried out by the BLM do not contribute to the need for the species to become listed. Manual at .12 (Exh. 8). Therefore, the minimum requirement for the greater sage-grouse is to ensure that they do not become listed under the ESA. Furthermore, the BLM’s goal is to improve the status of such species to the point where their special status recognition is no longer warranted. Taking conservation actions before listing is warranted or designation of critical habitat is necessary is considered to be “in the interest of the public.” Manual at 6840.22 (Exh. 8).

Moffat County Road Department, 158 IBLA 221 (2003), is instructive, addressing the BLM’s authority to adopt a range of measures to conserve sensitive species. The BLM is authorized under FLPMA to exercise their discretion in applying a multiple use strategy to public lands. However, when special status species are involved the BLM must meet heightened conservation requirements.

In *Moffat County Road Department*, the BLM placed both operational and timing restrictions on a mining authorization in order to protect a western burrowing owl nesting

site. Moffat County objected to the restrictions because the burrowing owl was not listed under the ESA, but merely designated by the BLM as a sensitive species. However, the BLM argued that on the basis of multiple use principles they were required to maintain the habitat of sensitive species and that a failure to protect burrowing owl habitat would result in a prohibited taking of a protected species. Moreover, the BLM argued that their internal policy, as set forth in section 6840 of the BLM Manual, required such habitat protection. *Moffat County Road Department*, 158 IBLA at 224-25.

The IBLA concluded that BLM properly exercised its discretion regarding sensitive species conservation and its FLPMA mandate to manage the public lands under multiple use principles. *See* 43 U.S.C. §§ 1701 (a)(7) and (b) (1994); *Moffat County Road Department*, 158 IBLA at 231. In demonstrating the BLM's authority to protect species outside the ESA, the court stated "There is no requirement that wildlife protection afforded in the context of a resource management plan be limited to protections afforded by the ESA...There is, however, the requirement that the resource management plan be applied consistently." *Moffat County Road Department* at 231. Therefore, regarding the greater sage-grouse population in the ARPA, it is clear that the BLM has not only the obligation, but also the authority, to base its management decision on conservation requirements of a sensitive species.

In addition, the applicable Resource Management Plan for the Rawlins Resource Management Area requires protection of sage-grouse populations and, in particular, leks and breeding habitat. Bureau of Land Management, Great Divide Resource Area Record of Decision and Approved Resource Management Plan at 45 (1990) ("GDRMP") (attached as Exh. 13) The Federal Land Policy and Management Act of 1976 ("FLPMA") requires that decisions, permits, and other authorizations conform to the approved resource management plan ("RMP"). Specifically, FLPMA provides that "[t]he

Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title.” 43 U.S.C. § 1732(a). After the development of an RMP, “[a]ll future resource management authorizations and actions . . . shall conform to the approved plan.” 43 C.F.R. § 1610.5-3(a). “Conformity” means “that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment.” 43 C.F.R. § 1601.0-5(b).⁶

Although the Great Divide RMP is currently under revision, FLPMA directs the BLM to develop and maintain comprehensive Resource Management Plans (RMPs) that govern all aspects of land management, and any land use decisions must be consistent with RMPs. 43 U.S.C. § 1712(a) and 43 U.S.C. § 1732(a) (2000). The pendency of a revision process cannot authorize disregard of the requirement that specific actions must conform to the existing plan. 43 C.F.R. § 1610.5-3(a) provides that “[a]ll future resource management authorizations and actions . . . shall conform to the approved plan.” Nothing either in that section or in 43 C.F.R. § 1610.5-6, addressing plan revisions, can possibly suggest that this rule becomes inapplicable prior to the approval of a new plan, simply by virtue of the fact that revision is “in process.” The mere fact that a plan revision is “in

⁶ These conformity requirements have been confirmed by the courts. See *National Parks and Conservation Assoc. v. FAA*, 998 F.2d 1523, 1526 (10th Cir. 1993) (nonconforming land use required RMP amendment); *Marvin Hutchings v. BLM*, 116 IBLA 55, 61-62 (1990); *Southern Utah Wilderness Alliance*, 111 IBLA 207, 212 (1989) (striking down BLM approval of application for jeep trip where proposal was not properly analyzed under NEPA and “was contrary to existing MFP”) and *Uintah Mountain Club*, 112 IBLA 287 (1990) (striking down BLM off-road vehicle route designation which did not conform to the approved RMP).

process,” a process which may take many years, should not authorize the BLM to disregard its obligations under the existing plan. Until such time as a final record of decision is issued revising or amending the RMP, BLM actions within the resource area must still be consistent with the plan now in place.

In 2005, the first U.S. District Court to address the issue squarely confirmed the enforceability of RMP mandates for sensitive species conservation. The court in *Western Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217 (D. Idaho 2005) granted an injunction and partial summary judgment against the BLM for renewing ten-year grazing permits without taking a “hard look” at the impact on the sage-grouse population. Moreover, the court pointed out that the governing RMP directed that “priority for habitat management will be given to habitat for listed, candidate, and sensitive species.” *Id.* at 1227. The court found that the RMP “clearly placed wildlife interests ahead of grazing increases,” which effectively mandated the BLM to protect sage-grouse habitat. *Id.* The court further reaffirmed that “agency action inconsistent with the [RMP] ‘can be set be set aside as contrary to law pursuant to 5 U.S.C. § 706(2).’” *Id.*, quoting *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 at 65 (2004).

Similarly, the ARPA FEIS has failed to meet clear mandates set forth in the 1990 Great Divide RMP. Although the RMP does not afford either oil and gas development or habitat protection an explicitly higher or lower priority, it plainly sets forth an obligation to conserve sensitive species habitat in its Wildlife Habitat Management Objective, which is “[t]o provide habitat quality (food, cover, space, and water) adequate to support natural diversity of wildlife and fisheries, including big game, upland game, waterfowl, non-game species game fish, sensitive, threatened, and endangered species, species of special

management interest in Wyoming, as well as to assist in meeting the goals of recovery plans.” GDRMP at 41 (Exh. 13) (emphasis added). The Final RMP decision also states, in its Management Actions in Other Areas Important to Wildlife, that “[s]age grouse and sharp-tailed grouse strutting/dancing grounds and nesting habitat will be protected.” *Id.* at 45 (emphasis added). As the *Western Watersheds* court explained, interpreting a similar RMP mandate: “[t]he plain language of the provisions speaks in terms of requirements, not suggestions. For example, the JRA RMP-DEIS does not suggest that priority for habitat management ‘may’ be given to habitat for Sensitive species – rather, it requires that such priority ‘will’ be given.” *Western Watersheds* at 25-26. This mirrors closely the requirement language in the 1990 RMP: “[s]age grouse and sharp-tailed grouse strutting/dancing grounds and nesting will be protected.” GDRMP at 45 (Exh. 13). As discussed below, a decision that employs insufficient mitigation measures — clearly linked to loss of breeding populations in other areas of coalbed methane development—cannot be seen as meeting the RMP requirement.

The FEIS fails to make the necessary analysis required under its sensitive species rules: what does this habitat loss and behavioral disturbance, combined with other factors affecting the species, mean for its long-term outlook and prospects for avoiding listing as threatened or endangered? The FEIS’s analysis is deficient. Section 4.8.3, purportedly dealing with effects to sensitive species, limits its discussion to a cursory acknowledgment that “impacts would exceed the significance criteria” under all alternatives. FEIS at 4-79 (Section 4.7.3.2) (Exh. 1). In effect, the FEIS acknowledges that the Atlantic Rim project will cause substantial loss of habitat function for a sensitive species, but fails to either analyze (or compensate for) the effect this will have on the

species' prospects for avoiding loss of viability. BLM's response to this concern is to state that "[n]o 'action' alternatives were identified by the BLM or its cooperating agencies that would not have significant effects on the sage-grouse." FEIS Appendix O at 275. We believe that this is an inadequate response, and a mischaracterization of the position of USFWS, which in its comments proposed minimum measures that could possibly avoid the worst consequences of gas development. *See* Comments of the United States Fish and Wildlife Service on the Atlantic Rim DEIS, FEIS Appendix N, Comment 384, at 3 (attached as Exh. 14) (recommending greater protection measures⁷ for sage-grouse and noting conclusions of Holloran research that "stipulations placed on oil and gas development in the Pinedale Anticline, which are identical to those proposed for the Atlantic Rim development, were insufficient to maintain sage-grouse breeding populations in natural gas fields."⁸).

C. Results of current scientific research suggests that the management measures in the Atlantic Rim ROD will be insufficient to prevent the decline or extirpation of greater sage-grouse populations.

The Manual clearly sets forth the minimum treatment of sensitive species at that of a candidate species. Manual at 6840.12 (Exh. 8). However, FEIS Appendix G – Biological Assessment, which discusses potential effects on all threatened, endangered, and candidate species, does not make any mention of the greater sage-grouse population.

⁷ USFWS "recommends minimum protection measures as described by Connelly *et al.* (2000)," USFWS Comments 3 (Exh. 14). Connelly recommends protecting suitable habitat within a 5km perimeter of occupied leks during the breeding season. John W. Connelly et al, Guidelines to Manage Sage-grouse Populations and their Habitats in 28 *Wildlife Society Bulletin* 967, 978 (2000).

⁸ Conservation Appellants note that the ROD does contemplate the possibility, on a "case-by-case basis," of a larger buffer around leks (potentially up to one mile) for certain "permanent and high-profile structures" such as buildings and powerlines. ROD at B-16 (Exh. 5). While this could be a salutary development in certain situations, the FEIS and ROD provide no information whatsoever about how and when this "case-by-case" buffer will be applied and what its consequences may be.

FEIS at G-1. Considering that greater sage-grouse populations are in decline throughout the country and that this area is considered one of the last strongholds for the population, BLM should have conducted an equivalent analysis for greater sage-grouse. The result of this analysis would certainly indicate the potential for severe impacts: noise disruption to breeding, nesting, brood-rearing, and foraging; increased nest abandonment; loss and fragmentation of habitat, all leading to lower productivity and long-term decline in the population of the species. See FEIS at 4-79 to 4-83 (Exh. 1). In addition, of even “greater concern” is indirect loss of nesting and early brood-rearing habitat, resulting from dust on vegetation from project activities and over-browsing by antelope and mule deer themselves displaced by the project. *Id.* “[T]he long-term loss of shrubs combined with the indirect impacts on the habitat, such as dust, noise, and continued human presence during the drilling and production phase, would result in habitat loss and disturbance levels exceeding the significance criteria.” FEIS at 4-79 (Exh. 1). Some 92% of the entire project area is potential sage-grouse nesting habitat, meaning that, under all alternatives, some 250,000 acres or more of this dwindling species’ remaining habitat will be adversely affected. In addition, the FEIS acknowledges that employing only seasonal protection (ineffective for production-phase activities) for wintering habitat would result in habitat loss as well as potential displacement of wintering birds, leading to “lower productivity and long-term decline in the population of [upland game bird] species.” *Id.* This habitat loss is acknowledged as significant and adverse under modified Alternative D, the selected alternative. ROD at 9 (Exh. 5).

Naugle et al. (2006) found that leks along the edge of CBNG development had higher lek attendance than leks within the developed area. The hypothesis that sage-grouse avoid developed areas is supported by the finding that active leks and leks with moderate to large numbers of males were often found adjacent to CBNG fields but rarely within CBNG. In contrast, inactive leks and leks with few males were often found within CBNG fields. One of the most striking patterns discovered was that, of leks counted in either 2004 or 2005, no medium or large-sized leks

occurred within CBNG development; all remaining leks in CBNG have 20 or fewer males. Summary statistics for well and power line variables calculated from GIS layers around active and inactive leks indicate that active leks typically are twice as far from wells, one-half times as far from power lines, have one-third the density of wells, one-half the density of power lines, and generally have less development (wells and power lines) within 3.2 kilometers (km) of the lek complex. In addition, a significantly higher proportion of lek complexes are inactive in CBNG areas compared to areas on the edge of or outside CBNG (excluding lek complexes of unknown status and those destroyed by agriculture or mining).

FEIS at 4-76 (Exh. 1); *see also* David E. Naugle *et al.*, Sage-grouse Population Response to Coal-bed Natural Gas Development in the Powder River Basin: Interim Progress Report on Region-wide Lek-count Analyses 8-9 (2006) (attached as Exh. 15).

Further analysis of the Powder River Basin sage-grouse study acknowledged in the FEIS, accepted for publication in a forthcoming issue of the *Journal of Wildlife Management*, makes clear that the standard BLM sage-grouse measures (prohibiting surface infrastructure within 0.25 miles of leks, timing restrictions on drilling during the breeding season) adopted in the Atlantic Rim ROD are insufficient to protect breeding populations. Brett L. Walker *et al.*, Greater sage-grouse population response to energy development and habitat loss, *Journal of Wildlife Management* (In Press) at 18 (attached as Exh. 16).

The Fish and Wildlife Service asserted in its comments on the DEIS:

The Service is very concerned that authorization of this project, as proposed, will significantly affect the population of greater sage-grouse that occurs in this area of Wyoming. Adverse affects to sage-grouse may occur through the long-term loss of sagebrush habitat, fragmentation of habitat, and noise associated with project activities. The Services does not support a 0.25-mile protection buffer around sage-grouse leks as a mitigation measure, nor do we support a 2-mile buffer to protect nesting habitat. As you know, Lyon et al. (2003) found that disturbance can increase the distance from leks to nest sites and that the majority of hens from disturbed leks (as may be the case here), nested greater than 2-miles from the lek, while the majority of hens from undisturbed leks nested within 2-miles of the lek.

Additionally, recent information from a doctoral dissertation on the

impacts of oil and gas to greater sage-grouse in the Pinedale Anticline found that as development increased, lek activity declined up to 100 percent (Holloran 2005). . . . His conclusions suggest that natural gas field development contributes to local sage-grouse extirpations. Additionally, Holloran concluded that stipulations placed on oil and gas development in the Pinedale Anticline, which are identical to those proposed for the Atlantic Rim development, were insufficient to maintain sage-grouse breeding populations in natural gas fields.

USFWS Comments at 3 (Exh. 14) (emphasis added). BLM's response to this comment does not attempt to refute USFWS's concerns, FEIS Appendix O at 8 to 9, but proposes no change in mitigation measures, noting that "Literature reviews show that requirements for no surface disturbance (NSD) from a lek generally run in the quarter-mile to 2-mile range. The quarter-mile NSD mitigation is generally a minimum distance." FEIS Appendix O at 9. Tellingly, BLM makes no assertion that literature suggests the quarter-mile distance is effective. The fact that it's a minimum does not mean it works, and BLM's response does not appear to meaningfully contest this. From this, it is not difficult to conclude that the predictable consequence – local extirpation – will be squarely inconsistent with BLM's RMP and sensitive species obligations. Unfortunately, the quarter-mile buffer around "known leks" currently employed by BLM oil and gas projects is unsupported by any evidence suggesting it is effective to meet BLM's multiple statutory, regulatory, and planning obligations to protect sage-grouse habitat. USFWS comments at 3 (Exh.14); Holloran at 56-57 (Exh. 12) Naugle at 8-9 (Exh. 15); Walker at 18, 20-21 (Exh. 16).

This Board last addressed the adequacy of BLM's standard 0.25-mile buffer for sage grouse leks in 2000 in *Wyoming Audubon*, 151 IBLA 42 (2000), prior to the publication of Dr. Holloran's research from the Upper Green River Valley Basin and Drs. Naugle, Walker, and Doherty's research from the Powder River Basin. In *Wyoming Audubon*, the appellants challenged the adequacy of the FEIS for the Jonah II Natural Gas Development Project. Specifically, the appellants argued, citing a number of earlier

reports, studies, and agency documents, that “BLM has not provided sufficient scientific evidence to support quarter-mile (0.25 mile) buffer zones around sage grouse leks or strutting grounds that will remain free from surface disturbance,” *id.* at 46. The BLM’s proffered justifications, and the Board’s reasoning, are quoted here at length:

BLM urges that its adoption of the 1/4 mile buffer zone was based on consultation between wildlife biologists based on scientifically sound considerations, and that appellants have cited no scientific studies to the contrary. In his affidavit, BLM Biologist David A. Roberts admits that he has no personal knowledge of the basis for establishing the 1/4-mile buffer, and that he was able to locate only one draft edition of sagebrush management guidelines from about 1965 which contained the 1/4-mile limit. The limit was omitted from the final guidelines, however. His consultations with biologists in neighboring states revealed nothing further regarding the 1/4-mile limit. (BLM Answer at 9; BLM Answer, Ex. N at 2.) Roberts surmises that the 1/4-mile standard evolved initially because in the 1959’s and 1960’s BLM and the Forest Service were engaged in sagebrush eradication as a form of range impoundment, a practice of recognized as “quite detrimental” to sage grouse. See BLM Answer at 10 and Ex. N at 2. Addressing more recent studies however, Roberts states:

While there is very little or no empirical, scientific data out there to either support or refute the 1/4 mile no surface disturbance standard, there does seem to be an increasingly large “pile” of anecdotal data accumulating to suggest a 1/4 mile may not be adequate. Some more recent (within the last 5-8 years) studies and anecdotal observations would suggest that a greater distance (possibly 1/2 mile) would be a more appropriate protective offer around sage grouse leks. Even these more recent studies, however, have not really been designed to empirically ascertain an appropriate setback distance.

(BLM Answer at 10, Ex. N at 3.) BLM in the ROD considered whether current knowledge required that the buffer be changed and concluded:

BLM has only somewhat recently been requiring the 1/4 mile buffer. While there are some with concerns that the current 1/4 mile buffer is not enough, there is no evidence that the 1/4 mile buffer is not sufficient, nor are there any studies to support the need for a .05 mile buffer.

* * * *

We further find that BLM has provided sufficient rationale for adopting a 1/4-mile surface avoidance area. The record shows that there is no concrete scientific evidence in the record which proves or disproves the adequacy of a 0.25 mile buffer zone. At best, the record suggests that a 0.50 mile buffer zone as urged by appellants may be preferable. In the absence of more definitive scientific evidence or conclusions, however, we find that the annual surveys of leks and triennial monitoring to determine lek attendance, and the resulting collection of data, coupled with BLM's representations that additional mitigation measures may be required as necessary before any surface-disturbing activity is permitted, demonstrates that BLM took the requisite hard look at the environmental consequences of the proposed action and that the decision reflects a reasoned analysis.

Wyoming Audubon, 151 IBLA 49, 51.

Given the research from the Upper Green River Valley Basin and the Powder River Basin in recent years, the factual predicate for the holding in *Wyoming Audubon* can simply no longer hold. Although there are no new studies that affirmatively demonstrate the effectiveness of a 0.5-mile, 2-mile, or other No Surface Occupancy buffer zone (presumably because the BLM has not employed such larger and potentially more effective buffers), research subsequent to the *Wyoming Audubon* decision has conclusively demonstrated that the 0.25-mile buffer is not sufficient to protect active leks and breeding populations of sage-grouse. In the Upper Green River Valley Basin, Holloran's study found that, with (exactly as is approved in the Atlantic Rim ROD, *see* ROD B-16 (Exh. 5)), 0.25-mile No Surface Occupancy around leks, March 1-May 15 surface use restrictions within 0.5 mile, and 2-mile buffers on new construction around leks from March through July, the number of displaying male sage-grouse declined as distances from leks to gas-field disturbance sources decreased and traffic volumes increased. Holloran at 56-57 (Exh. 12). Holloran states: "My results suggest that current

development stipulations are inadequate to maintain greater sage-grouse breeding populations in natural gas fields.” *Id.* at 57. The consequences are stark: number of males “displaying” for breeding declines with increasing proximity to gas-field disturbances, and this displacement contributes to population declines and eventual extirpation. *Id.* at 56-57. Holloran provides specific recommendations, based on his lek and habitat selection data analysis, which could be more effective in maintaining breeding populations:

Maintaining well densities of ≤ 1 well per 283 ha (approximately 1 well per section) within 3 km of a lek could reduce the negative consequences of gas field development. . . . Declines in lek attendance were positively correlated with vehicle traffic levels, and vehicular activity during the daily strutting period on roads within 1.3km of a lek intensified the negative influence of traffic. Reducing overall traffic volumes (i.e., offsite condensate collection facilities, car-pooling) and isolating traffic disturbance (i.e., restricting travel to and from the gas field to 1 major artery) within gas fields could reduce road effects.

Holloran at 57-58 (Exh.12). BLM can no longer argue that there is “little or no empirical, scientific data out there to either support or refute the ¼ mile no surface disturbance standard,” *Wyoming Audubon*, 151 IBLA at 49; there is now actual data demonstrating that the 0.25-mile buffer is ineffective at maintaining breeding populations, and supporting specific measures (i.e., density of 1 well/section within 3km of leks).

Additional research from the Powder River Basin further confirms Holloran’s results. *See* Naugle at 8-9 (Exh. 15), Walker at 17-22 (Exh. 16). Naugle’s analysis of lek status and size relative to coalbed natural gas wells confirms that:

CBNG is having negative impacts on sage-grouse populations over and above long-term declines seen across the entire region. First, our findings are consistent with the hypothesis that male sage-grouse avoid areas with CBNG development. Trends in population indices for leks on the edge of

development are higher than those of leks outside of CBNG development or leks within CBNG. Remaining leks within CBNG are either small (<20 males) or inactive, whereas leks along the edge of development and outside development have larger counts of males on average (i.e., >20 males).

Naugle at 8-9 (Exh. 15). Walker's soon-to-be-published analysis from the Powder River Basin, exploring various mathematical models for the observed relationship between sage-grouse males and leks and gas development, confirms Holloran's findings: the BLM's standard 0.25-mile buffer is insufficient. Walker's study finds that "[s]trong support for models with negative effects of CBNG at both the 0.8-km and 3.2-km scales indicate that the current restriction on surface infrastructure within 0.4 km [0.25 miles] is insufficient to protect breeding populations." Walker at 18 (Exh. 16). Walker concludes:

Accumulated evidence across studies suggests that sage-grouse populations typically decline following energy development (Braun 1986, Remington and Braun 1991, Braun et al. 2002, Holloran 2005), but our study is the first to quantify and separate effects of energy development from those of habitat loss. Our results are similar to those of Holloran (2005:49), who found that "natural gas field development within 3-5 km of an active greater sage-grouse lek will lead to dramatic declines in breeding populations," leks heavily impacted by development typically became inactive within 3-4 years, and energy development within 6.2 km of leks decreased male attendance. As in other parts of their range, sage-grouse populations in the PRB likely have declined due to cumulative impacts of habitat loss combined with numerous other known and unknown stressors. New threats, such as WNV [West Nile Virus], have also emerged (Naugle et al. 2004, Walker et al. 2007). Nonetheless, our analysis indicates that energy development has contributed to recent localized population declines in the PRB. More importantly, the scale of future development in the PRB suggests that, without more effective mitigation, CBNG will continue to impact populations over an even larger area.

Walker at 20 (Exh. 16).

In 2007, the justification for a 0.25-mile buffer that availed in *Wyoming Audubon*—that there is no empirical data to support or refute the effectiveness of the

measure, and BLM's methodology is therefore due deference—can no longer hold. Multiple, rigorous empirical studies demonstrate that the 0.25-mile buffer, and the associated standard timing measures employed in Pinedale and the Atlantic Rim ROD, are ineffective at stemming lek attendance declines and ensuing population declines associated with proximity to gas development activity.

Thus, it is clear that the ROD's prescriptions for sage-grouse fail to meet the BLM sensitive species obligation to ensure that the species does not become listed, because the ROD will predictably result in a decline of the greater sage-grouse population across a significant area of southern Wyoming. BLM admits that Alternative D would all exceed the criteria for significant impact on the greater sage-grouse. FEIS at 4-79 to 4-84 (Exh. 1). "Significant impact" means that the species would experience both direct loss of habitat and the indirect effects of other disturbances related to the project. Potential impacts to greater sage-grouse from all alternatives: "loss of nesting or early brood-rearing habitat; decreased population productivity caused by loss of nesting or early brood-rearing habitat; reduced utilization of suitable habitats due to indirect disturbance; loss of winter habitat; and displacement of birds into lower quality habitats." FEIS at 4-76 (Exh. 1). Although Alternative C was expected to reduce the predicted impact by sixty-four percent on public lands, BLM rejected that alternative. Alternative D would result in direct loss of 8.1% of all available nesting habitat, with "high impact" to the species. FEIS at 4-83 (Exh. 1). BLM concedes that of even "greater concern" is "the indirect loss of habitat resulting from bird displacement and fragmentation of nesting and early brood-rearing habitat. At eight locations per section, impact zones surrounding each well pad, facility, and road corridor begin to overlap, thereby reducing habitat

effectiveness over much larger, contiguous areas.” FEIS at 4-83 (Exh. 1) (emphasis added). BLM’s selected alternative leads directly to both severe loss of habitat and declines in lek, with, as the empirical research demonstrates, a predictable consequence of population decline and eventual extirpation. Given the available information, it is impossible to see how the ROD is consistent with BLM’s duty to conserve a sensitive species and its commitment under the RMP that “[s]age grouse and sharp-tailed grouse strutting/dancing grounds and nesting habitat will be protected.” GDRMP at 45 (Exh. 13).

3. The FEIS and ROD violate NEPA by failing to consider a reasonable range of alternatives.

NEPA requires that an EIS include a detailed statement of alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii). This consideration and evaluation of all reasonable alternatives is considered the “heart” of an EIS. 40 C.F.R. § 1502.14. When determining whether an agency has adequately considered all reasonable alternatives, the courts “look closely at the objectives identified in an EIS’s purpose and needs statement.” *Citizens’ Comm. To Save Our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002). The agency does not have to analyze alternatives “it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective.” *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992) (quoting *City of Aurora v. Hunt*, 749 F.2d 1457, 1467 (10th Cir. 1984)).

Here, the FEIS and ROD failed to adequately consider alternatives to the proposed action. Alternative C was improperly dismissed in the ROD as not being responsive to the project’s purpose of maximum natural gas extraction, which should be considered an impermissibly narrow purpose. In addition, the BLM should have provided data and analysis in support of the ROD’s claim that coalbed methane and natural gas

extraction under Alternative C would be inefficient and uneconomical. Finally, phased development under Alternative B was a reasonable alternative that should have been analyzed in the FEIS because it is not remote, speculative, impractical, or ineffective.

A. BLM improperly characterized Alternative C as not being responsive to the purpose and need of the project.

Alternative C (Special Protection of Sensitive Resources) would allow Operators to develop natural gas resources throughout the Atlantic Rim project area, but areas with sensitive or crucial resources would be subject to more stringent Development Protection Measures. ROD at 12 (Exh. 5). Under Alternative C, approximately 95% of federal lands in the Atlantic Rim project area would be assigned one or more resource protection measures. FEIS at 2-4 (Exh. 1). Examples of areas where these additional protective measures would be applied are wildlife and fish habitat, and areas with sensitive soils. ROD at 12 (Exh. 5). Alternative C, in comparison to other alternatives, would likely result in fewer acres of disturbance and reduced road density in the project area because surface occupancy would be prohibited in some areas. *Id.*

Alternative C was subject to detailed analysis in the FEIS, but was dismissed in the ROD as not being responsive to the purpose and need of the project. ROD at 16 (Exh. 5). BLM determined that aggressively mitigating impacts to sensitive resources would not achieve maximum recovery of the coalbed methane and natural gas, was likely not economically feasible, and would likely be an inefficient method to recover the gas resources. ROD at 11 (Exh. 5). Comments from gas development companies and BLM's Reservoir Management Group "indicated that maximum recovery of the natural gas resources was not feasible under Alternative C, resulting in the alternative not being responsive to the Purpose and Need for Action for this project." ROD at 16 (Exh. 5) (emphasis added).

- i. The Purpose and Need of the Atlantic Rim project is impermissibly narrow.

The Circuit Courts of Appeals take varied approaches when determining whether a stated purpose and need for a project is impermissibly narrow. The Seventh Circuit requires agencies to state a sufficiently broad project purpose, which does not unduly narrow the range of reasonable alternatives. *See Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) (“[T]he evaluation of ‘alternatives’ mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals.”).

The Seventh Circuit has observed that

[t]he “purpose” of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing “reasonable alternatives” out of consideration (and even out of existence). The federal courts cannot condone an agency’s frustration of Congressional will.

Simmons v. United States Army Corps of Eng’rs, 120 F.3d 664, 666 (7th Cir. 1997).

In contrast, the D.C. Circuit has held that a narrow purpose is sufficient and agencies should not redefine the purpose of an application. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (“An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process.”). The Ninth Circuit has cautioned against a narrow statement of purpose. *See City of Carmel-by-the-Sea v. United States Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (“The stated goal of a project necessarily dictates the range of ‘reasonable alternatives’ and an agency cannot define its objectives in unreasonably narrow terms.”). However, the Ninth Circuit routinely rejects the argument that a stated purpose is too narrow. *See, e.g., Friends of Southeast’s Future v. Morrison*,

153 F.3d 1059 (9th Cir. 1998) (upholding a stated purpose of providing 89 million board feet of timber to meet market demand, even though it eliminated alternatives that would provide a lesser amount of timber).

The Tenth Circuit has acknowledged the different approaches to determining whether a statement of purpose is too narrow, and stated that they are not mutually exclusive and that “there are no hard and fast rules to guide the alternative analysis.” *Colorado Env'tl. Coalition*, 185 F.3d at 1175. In *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002), the court upheld a statement of purpose for an Environmental Assessment⁹ (EA) that contemplated additional road capacity across the Jordan River. 302 F.3d at 1119. The court rejected the challengers’ argument that the project’s statement of purpose was so narrow that the only way the need could be met was by extending a specific road. *Id.* However, the court, in dicta, stated that if they had agreed with this argument, they “would conclude that such a narrow definition of Project needs would violate NEPA. . . .” *Id.* The court next quoted the Seventh Circuit’s language from *Simmons*, quoted above, cautioning that allowing too narrow of a purpose would allow agencies to frustrate the intent of NEPA. *Id.* The court then stated that “if the purposes and needs of the Project were so narrowly construed as to mandate the extra capacity only at [the specified road], we would conclude that such a narrow definition would be contrary to the mandates of NEPA.” *Id.* at 1119-20.

Despite the Tenth Circuit’s dicta in *Davis* that they would be willing to striking down a narrow project purpose, the courts in the Tenth Circuit tend to uphold arguably narrow statements of purpose and need. In *Colorado Environmental Coalition*, the court upheld a project purpose that was to enhance the quality of skiing opportunities at a ski resort by adding ski terrain. 185 F.3d at 1175 n.15, 1176. In *Fuel Safe Washington v.*

⁹ An Environmental Assessment (EA) may be prepared if “an agency is uncertain whether the proposed action will significantly affect the environment”, and hence whether a full EIS is required. *Utah Env'tl. Congress v. Troyer*, 479 F.3d 1269, 1274 (10th Cir. 2007). An EA is “considerably less detailed” than an EIS. *Id.*

Federal Energy Regulatory Commission, 389 F.3d 1313 (10th Cir. 2004), the court upheld a project purpose that was to supply the growing demand for natural gas on Vancouver Island by transporting natural gas to two new electric-generation facilities. 389 F.3d at 1324. The court stated that “[w]here the action subject to NEPA review is triggered by a proposal or application from a private party, it is appropriate for the agency to give substantial weight to the goals and objectives of that private actor.” *Id.* (quoting *Citizens’ Comm. to Save Our Canyons*, 297 F.3d at 1030).

Here, the FEIS states that “[t]he purpose of, and need for, this proposed natural gas development is to develop, produce, and market natural gas products. This natural gas is needed to meet the national domestic energy demand.” FEIS at 1-9 (Exh. 1). This statement of purpose and need for the project is undoubtedly appropriately broad and permissible. However, explicit among the reasons for dismissing Alternative C is that the purpose of the project is not simply to “develop, produce, and market natural gas products”; but instead, the controlling purpose of the project is maximum recovery of the coalbed methane and natural gas resources. *See* ROD at 16 (Exh. 5) (“[M]aximum recovery of natural gas resources was not feasible under Alternative C, resulting in the alternative not being responsive to the Purpose and Need for Action for this project.”).

A project purpose of maximum coalbed methane and natural gas recovery should be considered impermissibly narrow, as it precludes consideration of reasonable alternatives. The alternative analysis that is the “heart” of NEPA, *see* 40 C.F.R. § 1502.14, is not served in the manner intended by NEPA when the only alternatives that need be considered and analyzed are those that result in full and maximum extraction of coalbed methane and natural gas. Clearly, an EIS that could dismiss from any consideration an alternative that might, for example, provide 95% of maximum extraction of coalbed methane and natural gas while providing increased protection of other natural resources, is not the environmentally-informed decision-making that NEPA intended.

See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978).

In addition, this case is distinguishable from the Tenth Circuit cases upholding quite narrow project purposes. A project purpose of maximum coalbed methane and natural gas recovery is so narrow that it will foreclose consideration of reasonable alternatives to a greater extent than the narrow project purposes that have been upheld. For example, in *Colorado Environmental Coalition*, alternatives that present varying degrees of expansion of the ski area would still be considered, despite the arguably narrow project purpose. Similarly, in *Fuel Safe Washington*, alternatives that differed in the total amount of natural gas that was to be transported to Vancouver Island could still be considered. Here, however, any alternative that does not extract the maximum possible amount of coalbed methane and natural gas, even if it is a fraction less than maximum extraction, does not have to be considered because it is not responsive to the project's purpose. The Tenth Circuit's language in *Davis* indicated that they would be willing to hold a project purpose as too narrow, 302 F.3d at 1119-20, and the purpose here should be considered impermissibly narrow. A project purpose of maximum extraction of coalbed methane and natural gas represents the impermissibly narrow purpose and need that the Circuit Courts of Appeals have warned would lead to the "frustration of Congressional will" by defining "competing reasonable alternatives out of consideration." *Id.* at 1119 (quoting *Simmons*, 120 F.3d at 666).

- ii. The FEIS and ROD did not present any analysis to support the claim that coalbed methane and natural gas extraction under Alternative C would be inefficient and uneconomical.

The primary function of an EIS is "to insure a fully informed and well-considered decision." *Vermont Yankee*, 435 U.S. at 558. The CEQ regulations implementing NEPA

state that an agency must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14(a). While NEPA is considered an “essentially procedural” statute that does not require an agency to take an environmentally-preferable action, *Vermont Yankee*, 435 U.S. at 558, courts have interpreted NEPA to require a minimal and informal cost-benefit analysis for weighing the benefits of a project and the alternatives against the environmental risks. *See, e.g., Sierra Club v. Morton*, 379 F. Supp. 1254, 1258 (D. Colo. 1974) (“Generally, the environmental impact statement is intended to provide a basis for weighing the benefits of the proposed Project against its expected environmental risks.”); *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908, 933-34 (D. Or. 1977) (“Essentially, the EIS must balance the benefits and environmental costs of the proposed action and each reasonable alternative and then determine which course of action has the best net balance. A formal, mathematical cost-benefit analysis is not necessary, however.”). Many courts require an agency to provide a minimal level of data and analysis in order to weigh the benefits and costs of alternatives and to make a fully informed and reasoned decision. *See, e.g., Utahns for Better Transp.*, 305 F.3d at 1166 n.6 (“We do not imply that an extraordinarily detailed cost estimate is necessary; however, given the importance of the relative costs to the alternative analysis in the EIS, more than nothing was required.”); *Sierra Nev. Forest Prot. Campaign*, 2006 U.S. Dist. LEXIS 57832 at *24 (finding that an agency did not take a hard look at reasonable alternatives when they dismissed an alternative without a reasoned explanation or any analysis of the cost-effectiveness of each alternative).

In *Davis*, the Tenth Circuit held that an EA for a highway construction project in Salt Lake County, Utah violated NEPA. 302 F.3d at 1110. The court noted that there were no cost studies or cost-benefit analysis to support a conclusion that a mass transit

alternative to a proposed highway project was unreasonable. *Id.* at 1122. In addition, the court found that the EA did not contain an adequate discussion of alternatives because “[a]lternatives were dismissed in a conclusory and perfunctory manner that do not support a conclusion that it was unreasonable to consider them as viable alternatives in the EA.” *Id.* The court held that one of the reasons that the EA violated NEPA was because the “[EA] is fatally flawed by its use of vague, unsupported conclusions and inadequate, incomplete analysis.” *Id.* at 1110.

In *Utahns for Better Transportation*, the Tenth Circuit held that an EIS for a transportation expansion plan in the Great Salt Lake region violated NEPA, in part, because the agencies eliminated an alternative based upon inadequate cost estimates. 305 F.3d at 1192. The EIS rejected an environmentally-preferable alternative because of its high cost relative to the chosen alternative. *Id.* at 1164. However, the agencies did not verify the costs that were provided by the applicant for the chosen alternative. *Id.* at 1165. The court found that when accurate cost estimates were considered, the costs of the two alternatives were significantly closer than the EIS stated. *Id.* The court held that the EIS was invalid and “inadequate to meet the NEPA goals of informed decision-making and public comment.” *Id.* at 1166.

Although the Tenth Circuit has not required explicit quantitative cost-benefit analysis of alternatives, an agency cannot reject an alternative for an invalid or nonexistent reason. In *All Indian Pueblo Council*, the court upheld an agency dismissal of several alternatives to building a major electrical transmission line, despite relatively little analysis, because “the discussion was adequate to demonstrate that the decision maker considered the alternatives and gave plausible reasons why they were rejected.” 975 F.2d at 1446. Similarly, in *Fuel Safe Washington*, the court rejected the challengers’ argument that the agency did not sufficiently explain or analyze why alternatives to building a natural gas pipeline were not viable, 389 F.3d at 1326, because “FERC’s discussion of

the various alternatives explained why they were not reasonable viable alternatives.” *Id.*

Here, Alternative C was dismissed with conclusory language that it may be uneconomical and inefficient, which was not supported by any data or analysis. For example, the ROD stated:

Public comments received on the DEIS, results of interim exploration, and technical evaluations by the BLM Reservoir Management Group all indicated drilling on 160-acre spacing would not achieve maximum recovery of natural gas resources, was likely not economically feasible, and was likely an inefficient recovery of the natural gas resource in the ARPA.

ROD at 11 (Exh. 5) (emphasis added). At a later point in the ROD, the BLM stated that “[c]omments from gas development companies suggest that the effect of Alternative C was the same as the No Action Alternative”, and that “[c]omments from gas development companies highlighted the cost of implementing resource protection measures and the infeasibility of recovering natural gas resources at four well sites per section.” ROD at 16 (Exh. 5).

Absolutely no data or analysis was provided to substantiate the claims that under Alternative C, coalbed methane and natural gas extraction would likely be uneconomical and inefficient. In order to balance the benefits of Alternative C’s greater protection of natural resources against its costs, the FEIS and ROD should include at least some data to quantify, if even on a very crude basis, the claims of the alternative’s infeasibility and inefficiency. It is simply not possible to reach an objective and rational decision among the alternatives without at least a rough estimate of the degree and scope of the limitations that Alternative C would place upon the recovery of the coalbed methane and natural gas resources. As the decision stands, it is impossible to know whether a reasonable level of wildlife protection is to be foregone because of an alleged 100%, 10%, or 1% decrease in the efficiency of gas extraction. Surely, at least some data and analysis is necessary for a “fully informed and well-considered decision”, *see Vermont*

Yankee, 435 U.S. at 558, because the general magnitude of the comparative impacts is of relevance both to the public and the decision-maker.

Case law provides that at least a minimal level of data and analysis should be provided in an EIS's discussion and dismissal of alternatives. This is in accord with the CEQ regulations requiring agencies to "rigorously explore and objectively evaluate" the alternatives. 40 C.F.R. § 1502.14(a). Here, as in *Utahns for Better Transportation*, the BLM's elimination of an alternative with inadequate data and analysis violates "NEPA goals of informed decision-making and public comment." 305 F.3d at 1166. Similar to *Davis*, the BLM here provided no data or analysis to support the conclusion that an alternative was unreasonable, and dismissed Alternative C in a "conclusory and perfunctory manner." *See* 302 F.3d at 1112. Because the court in *Davis* stated that alternatives cannot be dismissed in such a manner in an EA; then, a fortiori, alternatives in an EIS should not be dismissed with conclusory statements supported by no analysis.

B. Alternative B was a reasonable alternative to the proposed action that should have been analyzed in the FEIS.

Alternative B (Phased Production) would divide the Atlantic Rim project area into three zones and would restrict coalbed methane and natural gas development activities to one zone at a time. ROD at 14 (Exh. 5). Construction and development of production facilities would initially only be allowed in one zone for a period of seven years, after which operational activities would continue while construction and development activities would move to another zone. *Id.* As a result, Alternative B would focus the greatest disturbance activities associated with coalbed methane and natural gas production into one portion of the Atlantic Rim project area at a time, avoiding wider disruption to other natural resources across the project area. *Id.* The BLM dismissed this alternative from detailed analysis in the FEIS because the gas development companies objected to a seven to fourteen year delay in developing their leases. *Id.* Another reason

for dismissing Alternative B was the implication that BLM would not approve ROW proposals for coalbed methane and natural gas development on non-federal lands in the project area, which is contrary to the BLM policy of allowing owners of non-federal lands surrounded by public lands reasonable access to their property. *Id.*

The objective and rigorous evaluation of all reasonable alternatives to meeting a project's purpose and need is considered the "heart" of an EIS. 40 C.F.R. § 1502.14. An agency only has to consider alternatives that would achieve a project's purpose and need, and does not have to analyze alternatives "it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective." *All Indian Pueblo Council*, 975 F.2d at 1444 (quoting *City of Aurora*, 749 F.2d at 1467).

A court recently considered an EIS for coalbed methane development in Wyoming and Montana, and required the agencies to include phased development as a reasonable alternative to full-field development in *Northern Plains Resource Council v. United States Bureau of Land Management*, No. CV 03-69-BLG-RWA, No. CV 03-78-BLG-RWA, 2005 U.S. Dist. LEXIS 4678 (D. Mont. Feb. 25, 2005). In *Northern Plains Resource Council*, a programmatic EIS was prepared to analyze the impacts of coalbed methane development in the Powder River Basin of Wyoming and Montana. 2005 U.S. Dist. LEXIS 4678 at *6. The plaintiffs argued that the EIS was inadequate because it did not consider any alternatives to full-field development. *Id.* at *11-*12. First, the court found that a phased development alternative should have been considered because it would meet the project's stated purpose and need. *Id.* at *21-*22. Next, the court rejected the BLM's argument that it did not have to analyze phased production because it would violate the BLM's duty to prevent drainage of leased federal minerals and would interfere with property rights of the lessees. *Id.* at *24. The court stated that "[b]oth premises rest on the erroneous assumption that, having leased the mineral rights, BLM could not control the pace of production." *Id.* Regarding the property rights of lessees, the court

stated that “the ‘investment-backed rights’ of holders of oil and gas leases are not absolute.” *Id.* at *25. The court noted that the lessees did not have any investment-backed expectation for large-scale coalbed methane production because such production was not contemplated in the controlling RMP. *Id.* at *25-*26. The court held that the BLM’s failure to consider and analyze a phased production alternative “render[ed] the EIS inadequate.” *Id.* at *29.

Here, the phased production of Alternative B would meet the stated purpose and need of the project. Assuming arguendo that the extremely narrow project purpose of maximum coalbed methane and natural gas extraction is valid, phased development would nonetheless meet this purpose. The 2,000 wells that will be drilled under Alternative D, *see* ROD at 1 (Exh. 5), would still be drilled under Alternative B; and the same amount of coalbed methane and natural gas resources would be produced. Alternative B would simply subject the coalbed methane and natural gas development in the Atlantic Rim project area to restrictions on when drilling activities could commence. ROD at 14 (Exh. 5).

Because phased development would meet the purpose and need of the project, the BLM must consider the alternative unless it has in good faith rejected it as too remote, speculative, impractical, or ineffective. *See All Indian Pueblo Council*, 975 F.3d at 1444. One reason given by the BLM for excluding Alternative B from detailed analysis was BLM’s concern over the effects of long delays on lessees’ ability to develop their leases. ROD at 14 (Exh. 5) (“Comments received from the companies objected to the extended delay on their ability to develop their leases in those areas not open to development activities for 7 to 14 years.”). There is a fine distinction between the BLM’s reason for dismissing phased production here and in *Northern Plains Resource Council*. In *Northern Plains Resource Council*, the BLM argued they could not delay development because the lessees had an investment-backed property right that APDs would be considered in a

timely manner and approved unless there were specific adverse impacts. 2005 U.S. Dist. LEXIS 4678 at *23. Here, in contrast, the BLM did not state that they could not implement phased development because of the property rights of the lessees, but instead chose not to consider phased development in part because of “the effects of long delays to allowable oil and gas development on leaseholders and mineral rights. . . .” ROD at 14 (Exh. 5). Industry dissatisfaction with possible delays on their ability to develop federal leases is not a sufficient reason under NEPA for the BLM to exclude a reasonable alternative that meets the project’s purpose and need.

The FEIS and ROD also stated that Alternative B was dismissed from detailed analysis because comments pointed out the implication that the BLM would not approve ROW proposals for natural gas development on private and state lands within the project area. ROD at 14 (Exh. 5). However, Alternative B did not state that BLM would exclude such ROW access, so the alternative is being excluded from analysis based on an assumption. 64% of the Atlantic Rim project area is federal land, ROD at 1 (Exh. 5), and the checkerboard pattern of public/private ownership predominates the northern portion of the project area, *see* FEIS at 1-4 (Exh. 1). As a result of this ownership pattern, the BLM could implement phased production while allowing full ROW access to private and state lands, and still retain many of the environmental benefits of phased production across a substantial portion of the Atlantic Rim. Because phased production on BLM lands would not require a limit on ROW access to private and state lands to be environmentally beneficial, Alternative B does not necessarily imply that such ROW access would be limited.

Neither industry concerns over delays on development, nor assumptions that ROW access to non-federal lands would be limited are sufficient reasons to exclude phased production from detailed analysis. Phased development is not remote, speculative, or impractical; and Alternative B should have been analyzed in detail in the FEIS.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

For the reasons set forth above, Conservation Appellants request that the Interior Board of Land Appeals reverse the decision of the Wyoming State Office of the Bureau of Land Management approving the Atlantic Rim Natural Gas Field Development Project. Pursuant to 43 C.F.R. § 4.25, Conservation Appellants request an opportunity for oral argument if, in their discretion, the Board concludes that oral argument could assist in resolving the issues in this appeal.

Date: July 20, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael Saul, certify that on July 20, 2007, I served the following individuals and entities with a copy of the Environmental Appellants' STATEMENT OF REASONS by placing a copy in the United States mail, First Class, Certified Mail, Return Receipt Requested.

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