

*Director's Protest Resolution Report*

**Lander  
Resource Management Plan**

June 26, 2014



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## Reader's Guide

### *How do I read the Report?*

The Director's Protest Resolution Report is divided into sections, each with a topic heading, excerpts from individual protest letters, a summary statement (as necessary), and the Bureau of Land Management's (BLM) response to the summary statement.

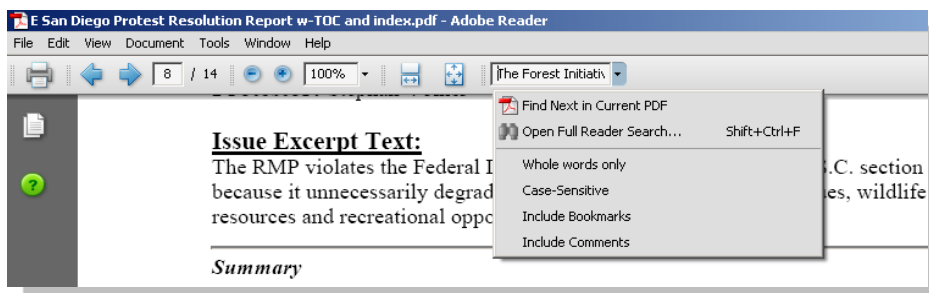
### **Report Snapshot**

The diagram shows a report page with several sections and callouts:

- Topic heading:** *Issue Topics and Responses*
- Submission number:** NEPA
- Issue Number:** PP-CA-ESD-08-0020-10 (highlighted in red)
- Protest issue number:** 10
- Organization:** The Forest Initiative
- Protesting organization:** The Forest Initiative
- Protester:** John Smith
- Protester's name:** John Smith
- Issue Excerpt Text:** Rather than analyze these potential impacts, as required by NEPA, BLM postpones analysis of renewable energy development projects to a future case-by-case analysis. (Callout: Direct quote taken from the submission)
- Summary:** General statement summarizing the issue excerpts (optional).  
There is inadequate NEPA analysis in the PRMP/FEIS for renewable energy projects.
- Response:** BLM's response to the summary statement or issue excerpt if there is no summary.  
Specific renewable energy projects are implementation-level decisions rather than RMP-level decisions. Upon receipt of an application for a renewable energy project, the BLM would require a

### *How do I find my Protest Issues and Responses?*

1. Find your submission number on the protesting party index which is organized alphabetically by protester's last name.
2. In Adobe Reader search the report for your name, organization or submission number (do not include the protest issue number). Key word or topic searches may also be useful.



## List of Commonly Used Acronyms

ACEC	Area of Critical Environmental Concern	MA	Management Action
AMS	Analysis of the Management Situation	MLP	Master Leasing Plan
APD	Application for Permit to Drill	MOU	Memorandum of Understanding
BA	Biological Assessment	NEPA	National Environmental Policy Act of 1969
BLM	Bureau of Land Management	NHPA	National Historic Preservation Act of 1966, as amended
BMP	Best Management Practice	NOA	Notice of Availability
BO	Biological Opinion	NOI	Notice of Intent
CAA	Clean Air Act	NRHP	National Register of Historic Places
CDNST	Continental Divide National Scenic Trail	NSHT	National Scenic and Historic Trails
CEQ	Council on Environmental Quality	NTSA	National Trails Systems Act of 1968
CFR	Code of Federal Regulations	NSO	No Surface Occupancy
CGS	Comprehensive Grazing Strategies	OHV	Off-Highway Vehicle (has also been referred to as ORV, Off Road Vehicles)
COA	Condition of Approval	RDF	Required Design Features
CSU	Controlled Surface Use	RFDS	Reasonably Foreseeable Development Scenario
CWA	Clean Water Act	RMP	Resource Management Plan
DDCT	Density Disturbance Calculation Tool	RMZ	Resource Management Zone
DM	Departmental Manual (Department of the Interior)	ROD	Record of Decision
DOI	Department of the Interior	ROW	Right-of-Way
EA	Environmental Assessment	SHPO	State Historic Preservation Officer
EIS	Environmental Impact Statement	SO	State Office
EO	Executive Order	T&E	Threatened and Endangered
EPA	Environmental Protection Agency	USC	United States Code
ESA	Endangered Species Act	USGS	U.S. Geological Survey
FEIS	Final Environmental Impact Statement	VRM	Visual Resource Management
FLPMA	Federal Land Policy and Management Act of 1976	WA	Wilderness Area
FO	Field Office (BLM)	WAQSR	Wyoming Air Quality Standards and Regulations
FWS	U.S. Fish and Wildlife Service	WDEQ	Wyoming Department of Environmental Quality
GIS	Geographic Information Systems	WGFD	Wyoming Game and Fish Department
GMCA	Green Mountain Common Allotment	WSA	Wilderness Study Area
IB	Information Bulletin	WSR	Wild and Scenic River(s)
IM	Instruction Memorandum		
INNS	Invasive Nonnative Species		

*Protesting Party Index*

<b>Protester</b>	<b>Organization</b>	<b>Submission Number</b>	<b>Determination</b>
Molvar, Erik	Biodiversity Conservation Alliance and Western Watersheds Project	PP-WY-Lander-13-01	Denied – Issues, Comments
Bolles, Randy	Devon Energy Corporation	PP-WY-Lander-13-02	Denied – Issues, Comments
Jordan, John	Encana Oil and Gas Inc.	PP-WY-Lander-13-03	Denied – Issues, Comments
Loper, Dick	Wyoming State Grazing Board	PP-WY-Lander-13-04	Denied – Issues, Comments
Paulson, Oscar	Kennecott Uranium Company	PP-WY-Lander-13-05	Denied – Issues, Comments
Thompson, Douglas	Fremont County Board of County Commissioners	PP-WY-Lander-13-07	Denied – Issues, Comments
Woody, Gavin	Lower Wind River Conservation District	PP-WY-Lander-13-08	Denied – Issues, Comments
Chiropolos, Mike	Western Resource Advocates on behalf of National Audubon Society, Audubon Rockies, and Audubon Wyoming ( <i>Audubon</i> )	PP-WY-Lander-13-09	Denied – Issues, Comments
Stuble, Julia	Wyoming Outdoor Council and Wyoming Wilderness Association	PP-WY-Lander-13-10	Denied – Issues, Comments
Wolf, James	Continental Divide Trail Society	PP-WY-Lander-13-11	Denied – Issues, Comments
Herbst, Lois	Herbst Lazy TY Cattle Co.	PP-WY-Lander-13-12	Denied – Issues, Comments
Ratner, Jonathon	Western Watersheds Project	PP-WY-Lander-13-13	Granted in Part
Trefren, Jennie	Wyoming Wilderness Association	PP-WY-Lander-13-14	Dismissed – Comments Only

## Issue Topics and Responses

### NEPA

#### *Public Participation*

**Issue Number:** PP-WY-Lander-13-01-2  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**

Importantly, while agencies must attach comments considered "substantive" to the EIS (40 C.F.R. § 1503.4(b)), a comment need not be substantive to trigger the agency's response requirement. In this case, BCA and USFWS comments should have triggered additional alternatives regarding sage grouse protections within Core Areas as well as the potential designation of new ACECs for fens discovered to the north of Crooks Mountain, but additional analysis and/or response to these comments was not forthcoming in the FEIS.

**Issue Number:** PP-WY-Lander-13-01-64  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**

In response to comments seeking stronger protective measures for desert yellowhead from oil and gas development, BLM responded only with, "The BLM already has management in place that addresses the protection of desert yellowhead." FEIS at 1853. This statement is unresponsive to the public comment offered, which is that a greater level of protection is needed, and is also unresponsive to the discovery of a new population of the species, which is unprotected by current BLM management.

#### **Summary:**

Public comments regarding Greater Sage-Grouse protections in Core Areas and designation of new Areas of Critical Environmental Concern (ACEC) for fens discovered north of Crooks Mountain should have triggered additional alternatives.

The response to comments seeking stronger protective measures for desert yellowhead from oil and gas development did not adequately respond to the comment.

#### **Response:**

Pursuant to 40 C.F.R. § 1503.4(b), all substantive comments (or summaries) received on the draft statement were attached to the final statement (see Appendix X, Comment Analysis Report Attachment A, and Comment Analysis Report Attachment B).

The BLM analyzed a reasonable range of alternatives for Sage-Grouse protections in Core Areas; thus additional alternative development was not necessary, as suggested by the protestor. Public comments were addressed through factual corrections and clarifications to the Final Environmental Impact Statement (FEIS) document, as well as modifications to existing alternatives. These changes are expressed in Summary Number 2012-3, "the BLM updated text to ensure consistency with the Wyoming Governor's Greater Sage-Grouse Core Area Protection

Executive Order 2011-5, include additional scientific citations, clarify restrictions associated with wind-energy development in Core Area, and require anti-perching and predation deterrents, and made other revisions, as appropriate.” Lander PRMP/FEIS, page 1850. For more information on protections for Sage-Grouse Core Areas, please see the Sage-Grouse section on consistency with state and local plans on page 25 of this protest report.

In regards to consideration of new ACECs north of Crooks Mountain, the Lander Field Office (LFO) determined that the existing research provided in the comment to the Draft Resource Management Plan/Draft Environmental Impact Statement (RMP/DEIS) did not provide sufficient information regarding the fens/sloughs to make a determination as to relevance or importance under 43 CFR 1610.7-2. The information provided to the BLM indicated that the sloughs, fens, and/or wetlands were found throughout a 500,000 acre allotment, but that their specific locations or extent were unknown and that further research was required to better understand the system. “Sedge-dominated wet meadows, or ‘sloughs,’ are common throughout the Wyoming Basin Physiographic and are found throughout the Green Mountain Common Allotment (GMCA), especially towards the western side of the area.” Western Watersheds Project Comment to the Draft RMP/DEIS, Comment Document Number 10174c, page 366 of 706. “Until recently, the slough systems of the Wyoming Basins physiographic province did not receive much scientific attention. Consequently, there is uncertainty associated with the sloughs as ecological and hydrologic systems, and further research is needed before restoration strategies can be recommended. Studies of the hummocks are needed to determine preventative measures and wet meadow restoration techniques. Continued studies of the wet meadows are needed to determine the extent of organic soils and to verify if peat layers are present in the sloughs. The studies should include permanent vegetation transects, soil coring, piezometer arrays, and Geographic Information Systems (GIS) mapping of sloughs to determine geographic extent of the wet meadows.” *Ibid* at pages 370 and 371 of 706. The LFO determined that this information was not sufficient to establish either relevance or importance under 43 CFR 1610.7-2. The BLM will, however, continue to authorize Dr. Van Haveren’s research of the fens.

In regards to comments seeking stronger protective measures for desert yellowhead from oil and gas development, the BLM addressed these comments by explaining why they do not warrant further agency response. As stated in Summary Number 2018-4, “The BLM already has management in place that addresses the protection of desert yellowhead.” Lander PRMP/FEIS, page 1853. On March 16, 2004, the U.S. Fish and Wildlife Service (FWS) designated critical habitat for the desert yellowhead in Fremont County, Wyoming, within the planning area. The designated critical habitat encompasses approximately 360 acres of Federal lands managed by the BLM in the Beaver Rim area. Conservation measures for the desert yellowhead critical habitat have been approved by the FWS and are described on page 10-17 of the final Biological Assessment (BA) for the Lander PRMP/FEIS. The newly discovered Cedar Rim population is not designated as critical habitat, and thus not subject to the conservation measures developed specifically to apply to critical habitat. The protestor is incorrect, however, that there are no protective measures applied to this population under current BLM management. The BLM and FWS have agreed to the following management actions for the new subpopulation: (1) surface disturbance is prohibited (MA 4077, Lander PRMP/FEIS, page 124); (2) a no surface occupancy (NSO) restriction for mineral leasing on the 85 acres surrounding the Cedar Rim population (Management Action (MA) 4077, Lander PRMP/FEIS, page 124); and (3) the designated corridor

for Right-of-Ways (ROW) is adjusted so that it falls outside the population and the area covered by the NSO restriction (Map 108; MA 6020, Lander PRMP/FEIS, pages 154 to 157). See also Lander BA, pages 4-23 and 7-69.

The MA 4077 has been clarified in the Record of Decision (ROD) to state that the NSO restriction for mineral leasing includes the 85 acres surrounding the Cedar Rim population, as previously stated on page 4-23 of the Lander BA.

## *Baseline Information*

**Issue Number:** PP-WY-Lander-13-01-36

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

Based on Map 33 in the FEIS, it appears that a significant quantity of Core Area is already leased. Yet the BLM in its Affected Environment section has failed to analyze the amount of acreage leased currently within Core Areas, and in its impacts analyses has not determined what acreage of Core Areas would be ineligible for withdrawal from future leasing under the 11-square-mile exception in Alternative D. It is reasonable to expect BLM to perform this analysis in the EIS, due to the ready availability of the GIS data to support it and the fact that BLM performs exactly such an analysis for each lease parcel for every quarterly lease sale Environmental Assessment; failure to present this analysis represents a critical failure to take the 'hard look' required by NEPA.

**Issue Number:** PP-WY-Lander-13-08-10

**Organization:** Lower Wind River Conservation District

**Protestor:** Gavin Woody

**Issue Excerpt Text:**

Chapter 3 Table 3.8 (page 301). Poison Creek is listed from the “confluence with Boysen Reservoir upstream 2.1 miles” not an undetermined distance upstream.

**Issue Number:** PP-WY-Lander-13-08-11

**Organization:** Lower Wind River Conservation District

**Protestor:** Gavin Woody

**Issue Excerpt Text:**

Chapter 3 Page 303 – The added text implies that the fecal coliform contamination is due to ranchers and homeowners with septic systems. While this may be the case sometimes, it is not always true. We suggest the sentence read “...local conservation districts who work with ranchers and homeowners to implement BMPs to reduce E.coli contamination” to make this correct on the role of conservation districts.

**Issue Number:** PP-WY-Lander-13-08-13

**Organization:** Lower Wind River Conservation District

**Protestor:** Gavin Woody

**Issue Excerpt Text:**

Map 49 – Fish Bearing Streams

We pointed out in our cooperating agency meetings that the map is not indicative of the resource. Not all of the streams indicated on the map are fish bearing and, therefore, the map is inaccurate and misleading. For example, Poison Creek does not run water unless there is a significant snow or rainfall event. The same is true of Muskrat and Kirby.



**Issue Number:** PP-WY-Lander-13-08-9  
**Organization:** Lower Wind River Conservation District  
**Protestor:** Gavin Woody

**Issue Excerpt Text:**

Chapter 3 Table 3.7 (page 298). This table uses data from 2006. The most recent information from the Wyoming Department of Environmental Quality is the Wyoming Water Quality Assessment and Impaired Waters List (2012 Integrated 305(b) and 303(d) Report). The updated information needs to be included. For Muskrat Creek, there has been no monitoring due to lack of flow.

**Summary:**

The FEIS contains the following mistakes:

- The FEIS did not account for existing leases within core areas in the Affected Environment section, nor did it provide the acreage of Core Areas ineligible for withdrawal from future leasing under Alternative D;
- In Table 3.8, Poison Creek should be from the “confluence with Boysen Reservoir upstream 2.1 miles” not “an undetermined distance upstream” (page 301);
- The added text on page 303 incorrectly implies that fecal coliform contamination is always due to ranchers and homeowners with septic systems; and
- Map 49 is inaccurate because not all of the streams indicated on the map are fish bearing. Table 3.7 does not use the best available data (page 298).

**Response:**

The Lander PRMP/FEIS analyzed the reasonably foreseeable oil and gas development scenario (RFDS) under each alternative so as to provide a method of comparing the potential economic consequences, air impacts, surface disturbance and other factors; see for example Table 4.47 at page 1258. In order to project the RFDS, the BLM made certain reasonable assumptions (FEIS page 1251 *et seq.*); the FEIS provided an extensive explanation of the limits of these assumptions and the limited use of the RFDS (FEIS at page 1252-1253).

One of the assumptions that was utilized was that all of Core Area would be closed to leasing under Alternative B, although some of the almost 2.3 million acres are currently leased. The amount of leased lands within Core Area varies over time as new leases are issued and existing leases expire if not held by protection. As of January, 2013, the last time the data were examined prior to the publication of the PRMP/FEIS, 24 percent of Core Area was leased.

Some of the existing leases in Core Area are held by production which means that they likely will not expire at the end of the 10-year lease term and would not be subject to Alternative B’s closure. This assumption overstates the economic adverse impacts of Alternative B because the economic benefit of existing leases was not considered. However, it also understates other impacts under Alternative B including the amount of surface disturbance and criteria air pollutants that would result from development of the existing oil and gas leases; see, for

example, Table 4.7 at page 612. (The same results of the assumptions occurred for all alternatives; because Alternative B has the most acres closed of all alternatives, the impacts are the greatest under Alternative B.) The overstatement of the reduction in economic benefit from oil and gas development under Alternative B was to some extent offset by the resulting overstatement of economic benefit from recreation and livestock grazing that would result from closing all of Core Area to leasing.

A comparable type of assumption overstated the economic impact of other Greater Sage-Grouse conservation. For example, in Alternative D, the 1.336 million acres open to oil and gas leasing subject to major constraints also did not take into account existing leases, and thus overstated the resulting loss of oil and gas revenue, but understated the pollution and surface disturbance that would likely occur. Beneficial economic impacts from recreation and livestock grazing were overstated.

Acres that are leased, those that are leased and held by production, and those where operations may not continue into the future because of declining prices or other reasons is a dynamic data set changing over time and in response to market conditions. The BLM theoretically could, with a significant amount of effort, identify leases held by production at any particular moment in time, but such a calculation would have little predictive value when projected across the 20-year analysis period of the RFDS (FEIS at page 1253).

The RFDS clearly identifies the limits of the RFDS and the assumptions that were utilized (Lander PRMP/FEIS at page 1252). Moreover, the selection of Alternative D's oil and gas management in Core Area, rather than the closure of Alternative B, was a function of implementing the Core Area Strategy (Lander PRMP/FEIS page 699), a conservation approach approved by the FWS, rather than the economic differences among the alternatives. Had economic impact been the primary consideration, Alternative A or C would have been selected as having the most beneficial economic impacts.

In response to the concern that the BLM has not taken a 'hard look' at impacts from oil and gas leasing, Appendix T lists the projected acres of surface disturbance by resource in detail. Lander PRMP/FEIS, pages 1641 to 1650. These estimates are derived from a 2009 report on oil and gas forecasts. The PRMP/FEIS also states that conflicts of overlapping resource use will be resolved on a case-by-case basis, and leases are subject to standard lease stipulations and could have additional stipulations added at the time of leasing. Lander PRMP/FEIS, page 702.

During the initiation and development of the Lander DRMP/DEIS, the best available data for the water issues related to Muskrat Creek, Poison Creek, and the Kirby area were pulled from the 2006 Wyoming DEQ report; (Page 93 uses the specific language "From Boysen Reservoir upstream from an undetermined distance," see [http://deq.state.wy.us/wqd/watershed/Downloads/305b/2006/2006\\_305b\\_.pdf](http://deq.state.wy.us/wqd/watershed/Downloads/305b/2006/2006_305b_.pdf)). Land use planning-level decisions are broad in scope, and therefore, do not require an exhaustive gathering and monitoring of baseline data. The BLM realizes that more data could always be gathered; however, the baseline data used in preparing the PRMP/FEIS provide the necessary basis to make informed land use plan-level decisions and make a reasoned choice between alternatives. Land use plan-level analyses are typically broad and qualitative rather than quantitative or

focused on site-specific actions. The BLM will conduct subsequent National Environmental Policy Act of 1969 (NEPA) analysis for projects proposed for implementation under the approved Lander RMP. The subsequent NEPA analysis will evaluate project impacts at the site-specific level.

The BLM utilized data from the Wyoming Game and Fish Department (WGFD) to create Map 49 Analysis of the Management Situation (AMS) at 2-144). These data change over time as additional information is obtained. The BLM's memorandum of understanding with the WGFD provides that the data remain the property of the WGFD and may not be changed by the BLM. On a site-specific basis, as opposed to the land use plan-level, the BLM works with local cooperators such as the Lower Wind River Conservation District to provide any changes that WGFD might consider. Reliance on the data of the State agency charged with wildlife management is reasonable and appropriate.

In regards to the implication that fecal coliform contamination is always due to ranchers and homeowners with septic systems, this was not the intended meaning of the added text on page 303. The BLM agrees with the protestor, that while contamination may be due to ranchers and homeowners, it is not always the case. The revised text provided by the protestor has been noted in Section 1.4.1 of the ROD.

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### *Areas of Critical Environmental Concern (ACEC)*

**Issue Number:** PP- WY-Lander-13-05-2

**Organization:** Kennecott

**Protestor:** Oscar Paulson

**Issue Excerpt Text:**

Green Mountain is a large area with substantial winter range at lower elevations that does not have heavy snow depths and which provides better forage for elk similar to the habitat in the currently designated ACEC area. There does not appear to be any documented basis for the ACEC Report prediction that potential activities on the expanded ACEC area would cause the elk to move all way to the private lands along the Sweetwater River, resulting in unnecessary resource conflict.

**Issue Number:** PP- WY-Lander-13-05-4

**Organization:** Kennecott

**Protestor:** Oscar Paulson

**Issue Excerpt Text:**

In essence, the BLM response concerning the scientific basis or rationale for the expansion of the Green Mountain ACEC refers to the ACEC report. The ACEC report provides that the Kennecott Uranium Company relevant expansion is intended to encompass the "only [Wyoming Fish & Game Department] WFGD identified parturition habitat for the Green Mountain elk herd (except for the very small portion in the existing ACEC)." The ACEC report does not appear to cite any references for the WFGD identification of the area. Likewise, "Chapter 6 References" of the Final LRMP EIS does not appear to list any applicable references or studies to support this identification of elk parturition habitat for the Green Mountain elk herd. The U.S. Fish & Wildlife Biological Assessment (BA) only acknowledges that there is year-round habitat for the non-migratory elk heard at Green Mountain and states that there "are designated calving areas on top of Green Mountain." BA at 7-63. The BA further

states that the proposed expansion contains wildlife resources. In addition, the expansion area includes an elk parturition area near the top of Green Mountain. This portion of Green Mountain consists of open sagebrush surrounded by forested areas." BA at 7-122. However, there appears to be no clear reference to any scientific studies documenting observed elk parturition in this area or documenting that the expansion is the only such area in the Green Mountain region that provides parturition habitat.

**Issue Number:** PP-WY-Lander-13-01-66

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

Failure to consider designating one or more ACECs to protect fens in our comments on the Draft EIS, BCA nominated for Area of Critical Environmental Concern status Ice Slough, PB Slough, and Middle Fork Sulfur Creek for their rare peat-forming fen properties, and also noted that Long Slough, Bare Ring Slough, Haypress Slough, PB Slough, Middle Fork of Sulfur Creek, and North Fork of Sulfur Creek have the potential for wetland and/or peat-forming fen presence (Van Haveren 2011). We attached the study by Van Haveren (2011) that documents the presence of peat-forming fens in the Lander Field Office to our DEIS comments. See Attachment 2 to this Protest. Yet an examination of the ACEC report shows that these fens were not considered for ACEC status, nor does the word "fen" appear anywhere in the report. These fens meet the relevance criteria for ACEC designation because they represent "a natural process or system," namely fen wetlands that exhibit the process of peat formation, which is a rare wetland process, which includes "rare, endemic plants or plant communities" including soligenous stream or valley fens and graminoid fens and which are riparian/aquatic in nature. See Attachment 2 at 3 and Lander ACEC report at 2. These areas meet Importance criteria for ACEC designation because they are of more than local significance because they represent "some of the most productive sites in this sagebrush-steppe region," (Attachment 2 at 1) and because peat-forming fens are rare and of limited areal extent in Wyoming. See ACEC Report at 2. They are sensitive, also satisfying Importance criteria, and there is a Need for Special Management because "about the deterioration of the meadows, citing excessive livestock grazing, hummocking and compaction of the meadow bottoms, and loss of

organic matter by erosion." Attachment 2 at 1. In addition to its fen properties, Ice Slough is also a "highly significant historical site," that is "nationally significant" according to BLM, enhancing its relevance and importance. ACEC Report at 43 and 44. In failing to consider these fens for ACEC status, BLM has violated its own FLPMA direction to prioritize the designation of ACECs, and has violated NEPA's range of alternatives requirement by failing to consider ACEC designation, an eminently reasonable management action, in any alternative.

**Issue Number:** PP-WY-Lander-13-07-2

**Organization:** Fremont County Board of County Commissioners

**Protestor:** Douglas Thompson

**Issue Excerpt Text:**

Designating an ACEC for the purpose of protecting high density sage-grouse leks is inconsistent with the State of Wyoming's Greater Sage-Grouse Executive Order 2011-5 (Wyoming Sage-Grouse EO). A copy of the Wyoming Sage-Grouse EO is attached. The Wyoming Sage-Grouse EO has been recognized by the FWS as a "sound framework for a policy by which to conserve greater sage grouse in Wyoming." This EO was developed in partnership with key stakeholders, including the BLM, and represents an agreement made by all parties to implement and abide by the core area strategy which has been acknowledged by the BLM in its Greater Sage-Grouse Instructional Memorandum 2012-043. Actions which require core area protections outside of core areas, or actions which add additional protective stipulations inside of core areas, are inconsistent with the EO and therefore are contrary to the agreement that the stakeholders reached.

The Wyoming Sage-Grouse Executive Order, through its Development Density Calculation Tool (DDCT) limits surface occupancy to a maximum amount of 5% per section. The locatable mineral withdrawal contained within the proposed Twin Creek ACEC is therefore unnecessary as any surface disturbing activity in core sage-grouse areas, which is the entirety of the proposed Twin Creek ACEC is, is capped at a maximum of 5% per the Wyoming Sage-Grouse EO.

**Issue Number:** PP-WY-Lander-13-10-13

**Organization:** Wyoming Outdoor Council

**Protestor:** Julia Stuble

**Issue Excerpt Text:**

We believe the decision to shrink the Twin Creek ACEC and not institute Category 6 restrictions across the Hudson-Atlantic City area was wrong because wildlife values in the area need greater protection

from oil and gas development, and the FEIS provides no basis for reducing the size of this ACEC or reducing its protective provisions, in particular this entire area meets the relevance and importance criteria required for ACEC designation, and thus the larger area should be fully protected.

**Summary:**

The FEIS does not provide adequate documentation to support:

- the prediction that activities on the expanded Green Mountain ACEC would cause elk to move to private lands along the Sweetwater River; and
- the presence of elk parturition habitat in the green mountain ACEC.

The FEIS failed to consider the designation of one or more ACECs that were nominated to protect fens.

The locatable mineral withdrawal within the Twin Creek ACEC to protect high-density sage-grouse leks is inconsistent with WY EO-2011-5, which already limits surface occupancy to a maximum amount of five percent per section.

The FEIS provides no explanation for reducing the size and protective provisions of the Twin Creek ACEC.

**Response:**

In regards to the expansion of the Green Mountain ACEC, the BLM regularly consults with the WGFD, the agency responsible for management of elk populations in the State of Wyoming. Lander PRMP/FEIS, page 397. All data regarding the Green Mountain elk herd were provided to the BLM by the WGFD and represent the best available data for this herd. The Lander PRMP/FEIS and DRMP/DEIS references to the elk habitat refer to the 2009 Lander AMS which in turn referenced data from the WGFD. Lander AMS, pages 2-151 to 2-152.

In regards to consideration of new ACECs north of Crooks Mountain, the LFO determined that the existing research provided in the comment to the Draft RMP/DEIS did not provide sufficient information regarding the fens/sloughs to make a determination as to relevance or importance under 43 CFR 1610.7-2. For more information on this issue, please see the “NEPA – Public Participation” section on page 7 of this protest resolution report.

In regards to the Twin Creek ACEC, the Federal Land Policy and Management Act of 1976 (FLPMA) directs the BLM to “give priority to the designation and protection of areas of critical environmental concern” through the land use planning process. Section 202(b)(3). The BLM

has the authority to designate an ACEC when both the relevance and importance criteria are met. 43 CFR 1610.7-2. The Twin Creek ACEC was found to meet both the relevance and importance criteria for wildlife, historic and visual resources, as explained and documented in the Lander Field Office RMP Revision ACEC report. ACEC report, pages 87 to 91. Although BLM State Directors and Field Managers have an obligation, to the extent possible, to assist with resolving “inconsistencies between Federal and non-Federal government plans” (43 CFR 1610.3), this obligation does not supersede compliance with other statutory obligations, such as FLPMA. For more information on this topic, please see the Sage-Grouse section on “Consistency with State and Local Plans” on page 25 of this Protest Report.

Regarding the size reduction of the Twin Creek ACEC, the boundaries and acreage of the Twin Creek ACEC and the adjacent Johnny-Behind-the Rock (JBR) RMZ (resource management zone) were modified since publication of the draft RMP. In the proposed RMP, the JBR RMZ was extended to the east because of better mapping of recreation use along Blue Ridge. The JBR RMZ was also reduced slightly along its southern border to keep it north of Highway 287 as that is where the recreation occurs. When this change was made, one 40-acre parcel located north of Highway 287 was removed from the Twin Creek ACEC, but mistakenly not included within the JBR RMZ. This 40-acre parcel (legal: NENE of Section 5, Township 31N, Range 98 West) has been added to the JBR RMZ and this change will be made in the ROD.

In reviewing the detailed map to address this protest issue, another 40-acre parcel (legal: SENE of Section 24, Township 32 N Range 99W) was identified within the Twin Creek ACEC that would more appropriately be included within the JBR RMZ. This parcel is isolated from other BLM surface land but contiguous to the JBR RMZ. Since the JBR RMZ is identified for non-motorized recreation and management includes pursuit of mineral withdrawal, adding the parcel to the JBR RMZ will protect the relevant and important values. This change will be made in the ROD.

The Twin Creek ACEC in the PRMP/FEIS was 35,102 acres. In the ROD, the Twin Creek ACEC will be 35,065 acres, a reduction of 37 acres. While the full 40 acres of the parcel in the SENE was transferred to JBR, the more detailed mapping picked up an additional three acres. These acreages are approximate and subject to on the ground verification. The JBR RMZ accordingly went from 4828 acres in the PRMP/FEIS to 4908 acres in the ROD, reflecting the additional 80 acres from the Twin Creek ACEC.

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### *Special Status Species*

**Issue Number:** PP-WY-Lander-13-01-58  
**Organization:** Biodiversity Conservation Alliance  
and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**  
Under the BLM Sensitive Species policy, "[t]he BLM shall not allow actions that result in take of

endangered animals or threatened animals that have take prohibitions established under Section 4(d) of the Act, or the removal or possession of endangered plants, except as provided for under Section 7(0) or Section 10(a) of the ESA. BLM Manual 6840.1 (G). It appears from the description in the Lander RMP FEIS that take of desert yellowhead as a result of locatable mineral exploration and/or off-road vehicle use will be permitted under the Lander RMP as a result of the failure of the land-managing agency to emplace suitable regulations preventing activities that can result in the death of this Threatened Species. The Lander RMP thereby violates Manual 6840 policy, and arbitrary and capricious outcome that need to be remedied prior to the issuance of a Record of Decision.

**Issue Number:** PP-WY-Lander-13-01-60  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**  
According to the FEIS, "Also common to all alternatives is the withdrawal for the protection of desert yellowhead (Yermo) habitat which is a threatened and endangered species found only in the planning area." FEIS at 674, and see 680. However, it does not appear that the newly discovered Cedar Rim population is included in this mineral withdrawal. The new Cedar Rim population exists across a limited areal extent (a 20 acre area) and this Threatened Species is highly sensitive to destruction from either surface mining or off-road vehicle use. With regard to locatable minerals, BLM states, "Such activity could jeopardize the known populations of desert yellowhead." Lander RMP Biological Assessment at 4-24.

### **Summary:**

The PRMP/FEIS violates Manual 6840 and FLPMA because it does not adequately protect the Cedar Rim population of desert yellowhead from locatable mineral exploration and off-road vehicle use.

The protective buffers for Golden Eagle nests are inadequate and will likely result in disturbance.

**Issue Number:** PP-WY-Lander-13-01-62  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**  
USFWS has reached a "may affect, but not likely to adversely affect" determination for this activity on this yellowhead population. Id. BLM's decision not to protect the non-critical-habitat yellowhead population discovered in 2010 exposes this population of a Threatened Species to unnecessary and undue degradation as a result of off-road vehicle use and/or locatable mineral exploration and extraction.

**Issue Number:** PP-WY-Lander-13-09-29  
**Organization:** Audubon  
**Protestor:** Mike Chiropolos

**Issue Excerpt Text:**  
Golden eagles are protected under two major federal laws -- the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act (MBTA). Alternative D's raptor nest protective buffers (surface-disturbing and disruptive activities subject to seasonal limitations) are inadequate. Any activity that disrupts breeding, feeding, sheltering, and roosting behavior and causes, or is likely to cause, nest abandonment or reduced productivity is considered disturbance and is a violation of the Eagle Protection Act. Alternative D's raptor nest protective buffers (surface-disturbing and disruptive activities subject to seasonal limitations) are inadequate. Alternative D proposes prohibiting surface-disturbing activities within 1 mile of Bald Eagle nests, 3/4 mile of all active raptor nests, and 1 mile for Ferruginous Hawk nests.

**Response:**

The PRMP/FEIS is consistent with BLM's policy in Manual 6840 in regards to "take" of desert yellowhead. Manual 6840 clearly states "Section 9 of the Endangered Species Act (ESA) prohibits take of all individuals of listed fish or wildlife. For plants, there is no "take" prohibition, but Section 9 makes it unlawful for anyone to remove and reduce to possession any endangered plant species; maliciously damage or destroy any endangered plant species on Federal lands; remove, cut, dig up, or damage or destroy any such species from any other area in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law; or violate any regulations pertaining to threatened plants." Manual 6840.06.1.11 F. The PRMP/FEIS does not authorize any of these prohibited actions for desert yellowhead.

Similarly, the PRMP/FEIS does not violate FLPMA by causing unnecessary or undue degradation to the Cedar Rim population of desert yellowhead. The BLM worked with the FWS to develop agreed upon management actions in the Lander PRMP/FEIS to protect the newly discovered Cedar Rim population of desert yellowhead. Lander BA, pages 4-23 and 7-69. These include: (1) surface disturbance is prohibited (MA 4077, Lander PRMP/FEIS, p.124); (2) a no surface occupancy (NSO) restriction for mineral leasing on the 85 acres surrounding the Cedar Rim population (MA 4077, Lander PRMP/FEIS, page124); and (3) the designated corridor for ROWs is adjusted so that it falls outside the population and the area covered by the NSO restriction (Map 108; MA 6020, Lander PRMP/FEIS, pages 154 to 157). The MA 4077 has been clarified in the ROD to state that the NSO restriction for mineral leasing includes the 85 acres surrounding the Cedar Rim population, as previously stated on page 4-23 of the Lander BA.

The protester is correct that the FWS has not designated the Cedar Rim population as critical habitat. Because the FWS did not designate the Cedar Rim population as critical habitat, the BLM in coordination with the FWS, determined not to pursue a locatable mineral withdrawal or a closure to motorized vehicle use at this time. New roads, however, are prohibited (MA 4077, Lander PRMP/FEIS, p.124). The travel decision will be revisited during travel management implementation. As discussed below and in the Lander BA, the impacts from locatable mineral entry and motorized vehicle use on existing roads are not likely to adversely affect the desert yellowhead.

The impacts to the Cedar Rim population from locatable mineral activities are discussed in detail on page 7-22 of the Lander BA. As stated in the BA, "implementation of locatable mineral management actions may affect, but is not likely to adversely affect the desert yellowhead or designated critical habitat due to discountable effects (N LAA-d). This determination is based on designated critical habitat being withdrawn from locatable mineral activity, exploration activities being subject to ESA, and the requirement of a mineral development plan to be completed within the Cedar Rim population of desert yellowhead." Lander BA, page 7-22.

The impacts to the Cedar Rim population from motorized vehicle use are discussed on page 7-109 of the Lander BA. As stated in the BA, "there are currently no ROWs authorized in the Cedar Rim population...there are 2 two-track trails that are south and west of the ridge where the Cedar Rim population is located... These trails do not intersect any of the 7 subpopulations of



desert yellowhead; therefore the potential for vehicles crushing is minimal. These trails will be evaluated in the travel management plan for the area and closed if determined to be a threat to the population. Implementation of comprehensive trails and travel management activities may affect, but is not likely to adversely affect the desert yellowhead or designated critical habitat due to discountable effects (NLAA-d)." Lander BA, page 7-109. The FWS has indicated in a draft Biological Opinion (BO) that they concur with the determinations made for the Cedar Rim population related to the locatable mineral and travel management programs. The final BO will be included in the ROD.

Raptor nest protective measures for each alternative are described in MA 4066 (Lander PRMP/FEIS, page 120). The BLM analyzed a range of alternatives, including prohibiting surface-disturbing and disruptive activities within 1½ miles of active raptor nests (Alternative B), within three-fourth mile of active raptor nests (Alternative D, preferred alternative), and within ½ mile of active raptor nests (Alternative C). For golden eagles, the FWS recommends applying a protective buffer for construction projects within one-half mile of active nests ([http://www.fws.gov/wyominges/Pages/Species/Species\\_SpeciesConcern/Raptors.html](http://www.fws.gov/wyominges/Pages/Species/Species_SpeciesConcern/Raptors.html)). The BLM has historically applied a ¾ mile buffer around raptor nests in the planning area (see Alternative A, Lander PRMP/FEIS, page 120). Based on the analysis of the alternatives, the BLM did not find any basis for applying a larger buffer than three-fourth mile. The BLM has, however, retained flexibility for site-specific decisions: "Distances and dates may vary based on raptor species, chick fledging, topography, and other pertinent factors." MA 4066, Lander PRMP/FEIS, page 121.

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## Sage-Grouse

### *General Sage-Grouse*

**Issue Number:** PP-WY-Lander-13-01-4

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

For Sensitive Species, "On BLM-administered lands, the BLM shall manage Bureau sensitive species and their habitats to minimize or eliminate threats affecting the status of the species or to improve the condition of the species habitat," by implementing a number of measures. BLM Manual 6840.2(C). These include: "Prioritizing Bureau sensitive species and their habitats for conservation action based on considerations such as human and financial resource availability, immediacy of threats, and relationship to

other BLM priority programs and activities." BLM Manual 6840.2(C)(5). For BLM Sensitive Species, BLM Field Managers are charged with furthering the conservation and/or recovery of sensitive species (BLM Manual 6840.06), which is defined "as applied to Bureau sensitive species, the use of programs, plans, and management practices to reduce or eliminate threats affecting the status of the species, or improve the condition of the species' habitat on BLM-administered lands." BLM Manual 6840, Glossary.

We are concerned that Alternative D will not uphold BLM's obligation to manage Sensitive Species to "minimize or eliminate threats," either within or outside of Core Area habitats. Under BLM's

proposed plan, "most development is expected to occur in areas with high and moderate potential for mineral resources that contain habitat for numerous special status wildlife species; mineral leasing would adversely impacted special status wildlife through habitat loss and fragmentation." FEIS at 967. As detailed elsewhere in these comments, mitigation measures applied under Alternative D (and the even less-protective Alternatives A and C) will inevitably lead to serious impacts to sage grouse populations within Core Areas.

**Issue Number:** PP-WY-Lander-13-01-43  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**  
BLM does not define "disruptive" rigorously, and we are concerned that as a result of this lack of rigor that activities that have been proven to be disruptive to sage grouse based on thresholds of significant impact, such as vehicle traffic associated with oil and gas operations (see, e.g., Holloran 2005), will in fact not be precluded by the RMP.

**Issue Number:** PP-WY-Lander-13-09-22  
**Organization:** Audubon  
**Protestor:** Mike Chiropolos

**Issue Excerpt Text:**  
The FEIS notes that grouse populations in areas of extensive energy development, including fields near Lysite, Moneta, and below Beaver Rim in the Wind River Basin, did not experience the same resurgence

that other areas did in the 2000s, following plummeting populations throughout the planning area in the 1990s. FEIS at 417. BLM recognizes that the 0.25 protective buffer does not provide adequate protection for nesting greater sage-grouse. DEIS at 370 and FEIS at 418. Therefore, Audubon protests BLM's proposal to use a 0.25 mile no surface occupancy buffer around greater sage-grouse leks in non-core areas in its preferred alternative. Record #4094, FEIS at 126. The goal in non-core areas is to sustain lek persistence over the long term, with sufficient proportions of sage-grouse populations to maintain connectivity and movements. The 0.25 mile buffer is an inadequate protective measure to maintain lek activity (Holloran 2005, Walker *et al.* 2007).

**Issue Number:** PP-WY-Lander-13-09-24  
**Organization:** Audubon  
**Protestor:** Mike Chiropolos

**Issue Excerpt Text:**  
New Record #4096, for Alternative D, only prohibits disruptive activities between 6 p.m. and 8 a.m. from March 1 to May 15. FEIS at 127. It is our understanding that the purpose is to protect nesting females and early brood rearing, both of which are critical periods for sage-grouse. However, most hens are still sitting on nests on May 15, which is the last day of recommended protections from disruptive activities. In fact, peak hatch generally occurs in early June and is followed by early brood rearing, which also occurs near nesting habitat. Therefore, seasonal protections should be extended until July 15 to be meaningful and maintain healthy future populations.

## Summary:

The Lander PRMP/FEIS fails to:

- comply with Special Status Species Manual 6840.2 which directs the BLM to "minimize or eliminate threats" to sensitive species habitats (within or outside of sage-grouse Core Area Habitats),
- adequately define "disruptive" activities,
- meet its goal to sustain lek persistence over the long term with only a .25 mile no surface occupancy buffer around Greater Sage-Grouse leks in non-Core Areas, and

- adequately protect nesting females and early brood rearing by only prohibiting surface disturbing activities between March 1 through May 15 and not from March 1 through July 15.

**Response:**

The BLM has complied with the policy, goals, and objectives set forth in BLM Manual 6840 (Special Status Species Management). Conservation measures in the form of goals, objectives, and management actions for regulated special status species are provided in Table 2.22 of the Lander PRMP/FEIS. Required design features and Best Management Practices (BMP) (as presented in Appendix H of the PRMP/FEIS), as well as mitigation guidelines for special status species (as presented in Appendix M of the PRMP/FEIS) will also be implemented if warranted by environmental analysis when specific projects are proposed. These required design features (RDF), BMPs, and mitigation guidelines (as well as those determined during lease-specific NEPA evaluations) will be implemented for each surface disturbing activity authorized under this RMP. New or revised mitigation measures may be determined during specific NEPA evaluations and consultations with the FWS and other State and Federal resource agencies. These changes could include but are not limited to changes to the list of species, buffer or setback distances around known locations for protected species, and measures to avoid or minimize impacts on particular habitats. The specific measures outlined in this PRMP/FEIS are anticipated to provide the necessary protections of special status species habitat, including habitat within or outside of sage-grouse Core Areas. As analyzed in section 4.4.9, threats to Greater Sage-Grouse are substantially reduced in relation to the current management situation.

The PRMP/FEIS adequately defines “disruptive activities” within the glossary of the PRMP/FEIS, and provides examples as to what constitutes a disruptive activity. Disruptive activities “are likely to alter the behavior, displace, or cause excessive stress to existing animal or human populations occurring at a specific location and/or time. In this context, disruptive activities refer to those actions that alter behavior or cause the displacement of individuals such that reproductive success is adversely affected, or an individual’s physical ability to cope with environmental stress is compromised. This term does not apply to the physical disturbance of the land surface, vegetation, or features. Examples of disruptive activities may include noise, human foot or vehicle traffic, domestic animal roundups, or other human presence regardless of the activity. When administered as a land use restriction (e.g., No Disruptive Activities), this term may prohibit or limit the physical presence of sound above ambient levels, light beyond background levels, and/or the nearness of people and their activities. The term is commonly used in conjunction with protecting wildlife during crucial life stages (e.g., breeding, nesting, birthing, etc.), although it could apply to any resource value on the public lands. The use of this land use restriction is not intended to prohibit all activity or authorized uses.” This definition is sufficiently clear to support the imposition of Condition of Approval (COA).

The protester also claims that the 0.25 mile radius perimeter - surface disturbance prohibition around occupied Greater Sage-Grouse leks (outside of Core Areas) does not meet the PRMP goal to “sustain lek persistence over the long term, with sufficient proportions of sage-grouse

populations to maintain connectivity and movements.” It is first important to note that this goal is not a land use plan goal presented in this PRMP/FEIS, but rather the State of Wyoming’s Core Area Strategy’s goal, only for connectivity areas, not for all non-Core Area habitats. While the Lander PRMP/FEIS complements this Core Area Strategy, the PRMP goal to which the 0.25 mile radius buffer management prescription is directed is Goal BR: 11, which states “Manage for the biological integrity and habitat function to facilitate the conservation, recovery and maintenance of populations of fish, wildlife, and plant special status species.” As analyzed in section 4.4.9, threats to Greater Sage-Grouse are substantially reduced in relation to the current management situation, thus meeting the intent of the land use plan goal. Alternative D prohibits surface-disturbing and disruptive activities on or within 0.6 mile of the perimeter of occupied Greater Sage-Grouse leks in the Core Area and on or within one-fourth mile outside the Core Area. Alternative D protects 102,212 acres of breeding habitat on public surface lands for the long term, which represents a 3.6 percent increase in habitat protected for the long term over Alternative A, a 3.6 percent increase over Alternative C, and a 0.4 percent increase over Alternative B. The differences reflect that a one-fourth mile buffer was used around a single point in alternatives A, B, and C whereas the buffer in Alternative D was calculated around the newly mapped perimeter of the lek. It is also important to note that Alternative B analyzed closing all Core Area to fluid and solid mineral leasing, mineral material sales, and major rights-of-way outside of designated corridors and 70 percent of Core Area was analyzed for withdrawal from locatable mineral entry. As the protester points out, the BLM has noted in the PRMP/FEIS that the individual 0.25 protective buffer outside of Core Areas does not provide adequate protection for nesting Greater Sage-Grouse. This decision (as depicted in the No Action Alternative) currently applies to any lek that is found in the planning area. In the Proposed Plan, a 0.6 protective buffer around leks will be applied to 70 percent of the planning area (within Core Areas) and the 0.25 protective buffer will only be applied to leks in Non-Core Areas. The BLM’s Proposed Plan is a landscape-wide approach that includes conservation measures within and outside of Core Areas, with the intent of protecting the GRSG, as well as meeting the BLM’s multiple-use mandate. When all of the conservation measures are collectively applied to the planning area, threats to Greater Sage-Grouse are substantially reduced in relation to the current management situation, as outlined in Section 4.4.9 of the FEIS.

The protester also claims that the seasonal restrictions on surface-disturbing and disruptive activities are inadequate. In suitable Greater Sage-Grouse habitat in the Core Area, Alternative D prohibits surface-disturbing and disruptive activities between March 15 and June 30 and extends those protections to locatable mineral exploration under a Notice to protect nesting activities. Outside the Core Area, Alternative D prohibits surface-disturbing and disruptive activities between March 15 and June 30 within two miles of the perimeter of occupied greater sage-grouse leks. These seasonal restrictions may be extended by two weeks earlier in the spring and two weeks later in the summer after site specific analysis is conducted for a specific authorization. For example, extensions could be applied as a stipulation to a ROW grant or as a COA for a lease if the NEPA analysis conducted before the authorization justifies this extension. The protester is correct that Alternative D shortens the nesting protection period by four weeks at the beginning of the period and by two weeks on the end of the period over the February 1 to July 31 dates under alternatives A, B, and C. These seasonal dates were recommended by the State of Wyoming’s Game and Fish Department (WGFD) as appropriate. As in other seasonal

timing restrictions, the BLM as a land manager defers to the recommendations of the WGFD's expertise.

### *Compliance with IM 2012-044*

**Issue Number:** PP-WY-Lander-13-01-10  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**

Likewise, for vegetation treatments (particularly prescribed fire) BLM claims that the RMP addresses the recommendations, but in fact it does not, as BLM never considers a moratorium on sagebrush burning in areas with less than 12 inches annual rainfall. NTT Conformance review at 26. This is therefore rated as "partially" addressed in the RMP. Id. BLM's rationale clings to the artifice that burning in sagebrush is necessary and must be retained as an option in cases of fuel buildup or to introduce structural diversity (id.);

**Issue Number:** PP-WY-Lander-13-01-12  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**

There is no scientific support for the "necessity" of prescribed fire in Wyoming big sagebrush systems.

**Issue Number:** PP-WY-Lander-13-01-13  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**

The NTT Report recommends withdrawal of Core Areas from mineral entry; no alternative withdrew all Core Areas from mineral entry. NTT Conformance Review at 22. It is unclear whether Alternative B proposes withdrawal of all Core Area lands from

mineral entry but apparently only 72% of Core Area was considered for withdrawal under this alternative, and the BLM analysis concludes that this was addressed in the RMP only "partially." Id.

**Issue Number:** PP-WY-Lander-13-01-14  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**

The NTT Report recommends that all electrical distribution lines be buried within Core Areas, period; BLM does not evaluate this in any alternative and lists this item as "partially" addressed in the RMP. NTT Conformance Review at 34. Indeed, BLM would allow a loophole permitting new overhead distribution lines in cases where the project proponent asserts that burial is "unfeasible." Id BLM's rationale for not implementing this measure is as follows:

In LFO, burying PL could have adverse consequences that are not offset by the benefits of reducing predator perches. Increased INNS [invasive, non-native species] and reduced native vegetation could result.

Id. This statement is not only counter to the best available science (overhead powerlines are a major and immediate problem in sage grouse habitat, while invasive weeds are a secondary and long-term problem), but BLM's reliance on this rationale for powerlines yet failure to apply this rationale by prohibiting in Core Areas the burial of pipelines and all other surface-disturbing activity that also increases the potential for invasive weed proliferation (with no offsetting benefits for sage grouse) exhibits a serious level of hypocrisy. If the BLM cannot require powerlines to be buried in Core Areas, then

the agency also cannot permit buried pipelines, or surface-disturbing activities that result in interim or final reclamation, which offer an identical (or potentially greater) opportunity to facilitate the spread of noxious weeds within Core Areas.

**Issue Number:** PP-WY-Lander-13-01-7

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

According to BLM IM 2012-44, "The conservation measures developed by the NIT and contained in Attachment 1 must be considered and analyzed, as appropriate, through the land use planning process by all BLM State and Field Offices that contain occupied Greater Sage-Grouse habitat." This was not done in the Lander RMP EIS. In fact, BLM states, "The NTT report conservation measures were put into a table which identified the measures analyzed in the EIS and, where appropriate, why some were not analyzed." FEIS at 34. But IM 2012-44 does not provide an option not to analyze these measures in at least one alternative unless a clear finding is provided that the measure is not appropriate, and BLM has provided no such findings in the context of the Lander RMP. In some cases BLM provides rationales for why NTT recommendations are not feasible, and some are convincing while others are not; for other NTT recommendations not considered, no rationale at all is given. See FEIS at 36.

For example, the NTT recommendations and the USFWS comments on the Lander RMP both recommend a 4-mile-buffer around leks with no surface disturbance allowed; the BLM reported this to be only "partially" addressed in the FEIS. NTT Conformance Review at 17. The BLM considered only an 0.6-mile NSO buffer in both Alternatives D and B, and no alternative considered in detail applied

a 4-mile NSO buffer to sage grouse leks within Core Areas. The Conformance Review presented by BLM sidesteps this important issue and leaves it unaddressed. NTT Conformance Review at 17. For another example, the NTT Report calls for an unambiguous requirement that closed-loop drilling with no reserve pits be required within Core Areas, while BLM evaluated only a watered-down measure that added the loophole language "unless technically unfeasible [sic]." NTT Conformance Review at 19.

**Issue Number:** PP-WY-Lander-13-01-9

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

The same type of adverse modification of the NTT recommendations has occurred under the recommendation that compressor stations be excluded from Core, and again BLM has evaluated the recommended measures only "partially." NTT Conformance Review at 20. BLM states: At its widest point, Core Area in the planning area is 70 by 60 miles in size. Depending on the development, requiring that a needed compressor be located outside of Core Area would have had the effect of precluding the development of that oil and gas lease because engineering might not support a location 30 or 40 miles distant.

FEIS at 36. It is important to note that under the Mineral Leasing Act, there is no explicit right to the siting of a compressor station. BLM fails to make the case that it is unreasonable to deny development on Core Area leaseholds for lack of a suitable location for a compressor station. BLM also fails to make the case that a compressor station could not be sited 40 miles distant from the lease and still fulfill its purpose.

**Summary:**

The Lander PRMP/FEIS fails to comply with the BLM's National GRSG Planning Strategy (IM-2012-044) because it did not analyze the following National Technical Team (NTT) Report conservation measures or provide clear and adequate findings as to why these measures are not appropriate for consideration:

- a moratorium on sagebrush burning in areas with less than 12 inches of annual rainfall,
- a recommended withdrawal of all Core Areas from mineral entry,
- electrical distribution lines to be buried within Core Areas,
- closed-loop drilling with no reserve pits be required within Core Areas,
- exclusion of all compressor stations in Core Areas, and
- a four-mile-buffer around leks with no surface disturbance allowed.

**Response:**

The BLM alternatives, analyses, and other applicable sections related to Greater Sage-Grouse within the Lander PRMP/FEIS are consistent with BLM’s National GRSG Planning Strategy (IM-2012-044). The BLM revised Appendix H (page 1521) to include additional BMPs and Required Design Features for Greater Sage-Grouse protections that were identified in the NTT Report. While the BLM did not incorporate all conservation measures recommended in the NTT Report into the Proposed RMP, the BLM believes all applicable and appropriate conservation measures were considered in one or more of the alternatives analyzed. The NTT Conformance Table, available on the Lander RMP website (<http://www.blm.gov/wy/st/en/programs/Planning/rmps/lander.html>), provides additional information about how the BLM incorporated the NTT conservation measures into the PRMP/FEIS and rationale as to why certain measures were not appropriate, consistent with IM-2012-044.

Specifically, protesters claim that the NTT measure for a moratorium on sagebrush burning in areas with less than 12 inches of annual rainfall was not analyzed in the PRMP/FEIS. The protesters mischaracterize the NTT measure as a flat prohibition. The NTT Report states at page 26 “Prescribed fire is a tool that can assist in the recovery of sagebrush habitat in some vegetation types (Davies *et al.* 2011).” The Report further states: “Do not use fire to treat sagebrush in less than 12-inch precipitation zones (e.g., Wyoming big sagebrush or other xeric sagebrush species; Connelly *et al.* 2000, Hagen *et al.* 2007, Beck *et al.* 2009). However, if as a last resort and after all other treatment opportunities have been explored and site specific variables allow, the use of prescribed fire for fuel breaks that would disrupt the fuel continuity across the landscape could be considered, in stands where cheatgrass is a very minor component in the understory (Brown 1982).” The rationale for why the BLM choose to analyze only a limit to the use of fire in sagebrush, rather than prohibit it all together, is because the NTT recommendation, quoted above, is only limited to sagebrush habitat; the report did not extend to other types of habitat. By addressing only sagebrush habitat, the management action restricts the use of prescribed fire in 70 percent of the planning area and 76 percent of Core Area (PRMP/FEIS at page 742) which receive less than 12 inches of rain a year. In some circumstances, prescribed fire may be the best and most suitable method to reduce hazardous fuels and enhance land health. Having implemented the State of Wyoming Core Area strategy, the Lander PRMP/FEIS has also adopted the State’s guidance for treating sagebrush; see Wyoming Game and Fish Department Protocols for Treating Sagebrush to Be Consistent with Wyoming Executive Order 2011-5; Greater Sage-Grouse Core Area Protections (7/8/2011).

The protester is correct that only 73 percent of Core Area in the planning area was recommended for locatable mineral withdrawal in Alternative B. The withdrawal analysis coincided with the greater sage-grouse Core Area that met the relevance and importance criteria for ACEC designation. Much of the ACEC, like the rest of Core Area, has extremely low potential for bentonite and uranium, the only locatable minerals thought to be available in the planning area. Areas that had commercially significant mineral potential have been heavily mined in the past. Core Area, and thus the ACEC, which contained only lands in Core Area, excluded areas that had been profoundly disturbed during hard rock mining generations ago including the Copper Mountain and Gas Hills area (see Figure 3-11 in the Mineral Occurrence and Development Potential Report) but included the South Pass-Lewiston District, Tin Cup and the portions of the Crooks Gap Uranium District located in Core Area. None of the 27 percent of Core Area not analyzed for an ACEC, and thus not recommended for withdrawal, contains commercial quantities of locatable minerals. Had Alternative B's sage-grouse ACEC been adopted in the proposed plan, the workload to pursue a mineral withdrawal of almost 1,250,000 acres as well as areas being withdrawn for the benefit of other resources would have been huge and perhaps insurmountable. In restricting the proposed conservation measure to the ACEC, the BLM determined that there was no benefit to Greater Sage-Grouse by pursuing withdrawal of an additional 475,000 acres (the 27 percent not analyzed) that were not under threat of development and which had not been determined to have met the relevance and importance criteria of the ACEC. Limiting withdrawals to areas where mineral development has some reasonable likelihood of occurring is a reasonable approach to workload. For example, in the proposed plan, only the South Pass-Lewiston District section of the National Trails Management Corridor was proposed for withdrawal because that was the only area identified as threatened by locatable mineral development. The entire Corridor, in contrast, is entirely restricted in its mineral leasing management. Pursuing an area for withdrawal is an extremely expensive and time consuming process, as opposed to restrictions on other types of mineral development, and can reasonably be undertaken only when the workload is justified by important resource benefits to be achieved.

The protester also claims that the BLM did not analyze the requirement that all electrical distribution lines would be buried within Core Areas in any of the alternatives within the PRMP/FEIS. The protester is partially correct that the BLM did not analyze an alternative that would require all electrical lines to be buried in Core Areas; however, there is a mandatory required design feature which states that the BLM will "evaluate whether the benefits to Greater Sage-Grouse from burying powerlines would outweigh the potential loss of habitat from the disturbance associated with burying the line, considering the potential threat from invasive nonnative species (INNS), low reclamation potential, and other factors." During site specific analysis, the BLM will determine if the benefits of burying the electrical line outweigh potential adverse impacts. If they do, then the line will be required to be buried, unless the applicant establishes that burying the lines is not technically feasible. Similarly, the prohibition of reserve pits for closed-loop systems for drilling operations and the development of compressor stations within Core Areas are carried forward as required design features within Appendix H of the PRMP/FEIS. For the planning area, burying all power lines in Core Area could have adverse consequences that are not offset by the benefits of reducing predator perches. Increased INNS and reduced native vegetation could result if this measure was carried forward.



The analysis of the recommendations of the NTT report include BMPs such as locating compressor stations used in connection with oil and gas development outside of Core Area and closed-loop drilling with no reserve pits would be required within Core Areas when technically feasible. At its widest point, Core Area in the planning area is 70 by 60 miles in size. Requiring compressor stations be located outside of Core Area, as recommended in the NTT Report, could have the effect of making the piping of product unfeasible if the compressor is too far away to achieve the needed pressure in the pipeline. The BLM determined that in the absence of the data that would allow the BLM to evaluate the impacts from the proposed management, it would be arbitrary to require them without analysis. Consequently, deferring the analysis to a site-specific basis and requiring that they be analyzed in a project-level NEPA review as the proposed plan does, is a reasonable approach to addressing the conservation measure.

The protester is correct that the Lander PRMP/FEIS did not analyze the NTT Report's recommendation to prohibit surface-disturbing and disruptive activities within four miles of a lek. However, because of the large concentration of leks in the planning area, the Core Area presented in the PRMP/FEIS includes approximately 85,000 acres more than what would have been included if the Core Area was based on the four-mile buffer. While some areas within the four-mile lek buffer are not included, the Core Area presented in the PRMP/FEIS protects the more lek concentrated habitats. It is important to also note that a four-mile buffer is used in the Density Disturbance Calculation Tool or DDCT. The DDCT analyzes what leks are in a four-mile wide area around a project's boundary. If an occupied lek is in that area, the DDCT analysis area is extended by an additional four miles. The amount of existing surface disturbance in this area is added to the proposed disturbance and divided by the area's total acreage to determine the percent disturbance subject to the disturbance cap of five percent.

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### *Consistency with State and Local Plans*

**Issue Number:** PP-WY-Lander-13-02-36

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

Devon protests the BLM's proposed mitigation measure to limit noise sources to 10 decibels above natural ambient noise. Proposed Lander RMP, Record No. 4013, pg. 130. Such a restriction is inconsistent with the State of Wyoming's Sage-Grouse Core Area Policy as expressed in Executive Order 2011-5 and Wyoming BLM Instruction Memorandum 2012-019 (02/15/12) and is otherwise impractical. Devon previously objected to the noise restriction in its comments on the Draft Lander EIS. Devon Comments, pg. 28; see also PLNPAW

Comments, pg. 19; State of Wyoming Comments, Attachment A, pgs. 10 -11.

The BLM's proposed restriction on noise in the Proposed Lander RMP is inconsistent with the State of Wyoming Executive Order regarding Greater Sage-Grouse Core Area Protections because it does not limit noise restrictions seasonally or daily. Wyoming Executive Order 2011-5, pg. 9 (limiting noise restrictions from 6:00 p.m. to 8:00 a.m. from March 1 to May 15). The purpose of the noise restriction is to minimize potential disturbances to lekking and breeding activities. The BLM has not justified the need to make the noise restrictions year-round in direct violation of the Executive Order, which was specifically identified by the United States

Fish and Wildlife Service as excellent protection for sage-grouse. Further, the proposal is not consistent with the BLM Wyoming Instruction Memorandum that indicates sound limitations should not be imposed year-round, but should only be considered on a case-by-case basis when appropriate. BLM Wyoming Instruction Memorandum 2012-19, pg. 11. Because the noise limitations in the Proposed Lander RMP are not consistent with the State of Wyoming Executive Order or BLM State Policy, it should be eliminated from the Proposed RMP.

**Issue Number:** PP-WY-Lander-13-03-44

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Encana protests the BLM's proposed mitigation measure to limit noise sources to 10 decibels above natural ambient noise. Proposed Lander RMP, Record No. 4013, pg. 130. Such a restriction is inconsistent with the State of Wyoming's Sage-Grouse Core Area Policy as expressed in Executive Order 2011-5 and Wyoming BLM Instruction Memorandum 2012-019 (02/15/12) and is otherwise impractical. Encana previously objected to the noise restriction in its comments on the Draft Lander EIS. Encana Comments, pg. 31; see also PLAIPAW Comments, pg. 19; State of Wyoming Comments, Attachment A, pgs. 10 -11.

The BLM's proposed restriction on noise in the Proposed Lander RMP is inconsistent with the State of Wyoming Executive Order regarding Greater Sage-Grouse Core Area Protections because it does not limit noise restrictions seasonally or daily. Wyoming Executive Order 2011-5, pg. 9 (limiting noise restrictions from 6:00 p.m. to 8:00 a.m. from March 1 to May 15). The purpose of the noise restriction is to minimize potential disturbances to lekking and breeding activities. The BLM has not justified the need to make the noise restrictions year-round in direct violation of the Executive Order which was specifically approved by the U.S. Fish and Wildlife Service as excellent protection for sage-grouse. Further, the proposal is not consistent with the BLM Wyoming Instruction Memorandum that indicates sound limitations should not be imposed year-round, but should only be considered on a case-by-case basis when appropriate. BLM Wyoming Instruction Memorandum 2012-19, pg. 11. Because the noise limitations in the Proposed Lander RMP are not consistent with the State of Wyoming Executive

Order or BLM State Policy, it should be eliminated from the Proposed RMP.

**Issue Number:** PP-WY-Lander-13-09-13

**Organization:** Audubon

**Protestor:** Mike Chiropolos

**Issue Excerpt Text:**

Wyoming Executive Order 2011-5 states: "Wind development is not recommended in sage-grouse core areas, but will be reevaluated on a continuous basis as new science, information and data emerges." Second, in a July 2009 letter to WGFD officials, USFWS stated that wind energy development in Wyoming's core sage grouse habitat areas, even for research purposes, would "negate the usefulness of the core area concept" and would bring into question whether adequate regulatory mechanisms are in place in the state to protect the species. Third, the January 18, 2012 USFWS letter to BLM on the Lander DEIS "recommends that the Bureau follow the Wyoming governor's core area strategy with no wind development in areas designated as core sage-grouse habitat, unless studies conducted outside of core area conclusively demonstrate that wind development is compatible with persistence of sage-grouse populations." [Emphasis added]. Fourth, the FEIS acknowledges that, even with protections, "large-scale wind-energy development would adversely impact the suitability of adjacent and connectivity lands for greater sage-grouse unless they are developed on lands far away from the Core Area." FEIS at 1291.

Therefore, contrary to Record # 4060, wind development must not be permitted in sage-grouse Core Area. The RMP needs to reflect available science and the opinions of the agency experts and researchers Research related to wind development must be conducted far enough outside core habitat to avoid adversely impacting populations. This clarification is also needed for Record #4100. Existing science and biological recommendations establish that considering wind development in core areas could threaten recovery goals and increase the chances of a full ESA listing.

**Issue Number:** PP-WY-Lander-13-09-27

**Organization:** Audubon

**Protestor:** Mike Chiropolos

**Issue Excerpt Text:**

BLM needs to review and apply existing research regarding noise impacts on grouse, as these are suggesting threats to sage-grouse population viability through abundance, stress levels, and behavior (Blickley et al. 2012, Blickley and Patricelli 2012). In a recent review prepared for the BLM Lander Field office and the Wyoming Game and Fish Department, they researchers note that "there is little scientific basis for the 10 dB over ambient" threshold. Further research may find this threshold insufficient to protect sage-grouse-or too stringent. Further, these stipulations apply only within the lek perimeter, potentially allowing disturbance to foraging, nesting and brood-rearing habitat" (O.L. Patricelli et al. 2012).

BLM should review the following scientific literature:

-Blickley, J.L., D. Blackwood, and G.L. Patricelli. 2012. Experimental evidence for the effects of chronic anthropogenic noise on abundance of greater sage-grouse at leks. *Conservation Biology* 26(3):461-471.

-Blickley, J.L. and G.L. Patricelli. 2012. Chapter 3: potential acoustic masking of greater sage-grouse (*Centrocercus urophasianus*) display components by chronic industrial noise. *Ornithological Monographs* 74: 23-35.

-G.L. Patricelli, G.L., J.L. Blickley, and S.L. Hooper. 2012. The impacts of noise on greater sage-grouse: A discussion of current management strategies in Wyoming with recommendations for further research and interim protections. Prepared for: The Bureau of Land Management, Lander Field Office and Wyoming State Office, Cheyenne and Wyoming Game and Fish Department. Department of Evolution and Ecology, University of California, Davis, CA.

**Summary:**

The Lander PRMP/FEIS is inconsistent with the Wyoming Core Area Strategy (EO-2011-5) because it:

- allows large-scale wind energy development within Core Areas,
- limits noise sources to 10 dBA above natural ambient noise measured at the perimeter of occupied Greater Sage-Grouse leks year-round.

**Response:**

The BLM has an obligation to ensure that all "resource management plans and amendments to management framework plans shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands, including Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise, and other pollution standards or implementation plans." (43 CFR 1610.3-2). The State of Wyoming's Executive Order 2011-5 Core Area Strategy constitutes a state resource related plan as defined in 43 CFR 1601.0-5(j). The BLM has worked closely with State and local governments during the preparation of the Lander PRMP/FEIS. The BLM works to find a balance among uses and needs as reflected in State government plans, as well as recommendations provided to the BLM from other cooperating agencies such as the FWS. The BLM worked closely with the State of Wyoming during the development of the range of alternatives included in the PRMP/FEIS. The Wyoming Game and

Fish Department (WGFD) also helped verify the analysis and assisted the BLM with incorporating the latest Greater Sage-Grouse Core Area data into the PRMP/FEIS.

The BLM must also comply with obligations mandated under the NEPA and FLPMA. The NEPA directs the BLM to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;...” (NEPA Sec. 102(2)(E)). In the case of wind energy development, the Lander PRMP/FEIS analyzed opening 2.11 million BLM administered surface acres under Alternative A, to closing 2.32 million acres under Alternative C (in accordance with the IM-2012-044). Under Alternative D, 954,322 acres are designated as a wind-energy exclusion area, while 1.21 million acres are designated as a wind-energy avoidance area. The management actions also preclude wind development in Core Areas until research identifies suitable sage-grouse conservation mitigation (record# 4100). This is consistent with the Core Area Strategy, which does not prohibit wind development in Core Areas; rather, it states that “wind development is not recommended in sage-grouse Core Areas, but will be reevaluated on a continuous basis as new science, information and data emerges.” Moreover, the impacts from these alternatives are described in section 4.4 and have indicated that the management actions under Alternative D (along with the required design features in Appendix H) meet the overall goals of the Wyoming Core Area Strategy, while also allowing wind energy development to occur in less resource rich areas.

There is a correction that will be made in the ROD to rectify inconsistencies regarding wind energy development management actions that currently exist in the PRMP/FEIS. The PRMP/FEIS’s record #4060 for the proposed RMP states: “limit wind-energy development in greater sage-grouse Core Area to no more than one location per 640 acres and require that the cumulative disturbance from all sources is no more than 5 percent of sagebrush habitat within the project area.” The PRMP/FEIS then goes on to state in record #4100 for the proposed RMP: “until research on impacts of wind energy to greater sage-grouse is completed and adequate mitigation can be developed, exclude wind-energy development in Core Area.” Record #4060 will be removed in the ROD and record #4100 is the correct management action that will be carried forward.

The protester is incorrect in their claim that the PRMP/FEIS is inconsistent with EO-2011-05 in regards to noise restrictions. Record #4104 for the Proposed Plan states that noise sources are limited to “10 dBA above natural ambient noise measured at the perimeter of occupied greater sage-grouse leks from March 1 to May 15, unless scientific findings indicate a different noise level is appropriate.” As this management action points out, this is not a year round restriction, but a seasonal restriction which is consistent with EO-2011-05. As previously stated, 43 CFR 1601.0-5(j) requires BLM plans to be consistent with officially approved or adopted State resource related plans, as long as they “are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands, including Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise, and other pollution standards or implementation plans.” (43 CFR 1610.3-2). As directed by NEPA’s “best available science” standard, the BLM is required to consider the best available information/science when considering a range of alternatives, which is why the following language was added to this management action: “unless scientific findings indicate a different

noise level is appropriate.” After consultation with the Wyoming Governor’s Office during consistency review, the BLM agreed to remove the word “natural” from the management action in the ROD.

### *Best Available Information*

**Issue Number:** PP-WY-Lander-13-01-20

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

BLM makes the explicit assumption that the state Core Area policy will be successful at protecting 83% of the statewide sage grouse population estimated to occur within Core Areas. FEIS at 1283. This assumption is undermined by the performance to date of sage grouse Core Area protections under state Executive Orders and Wyoming BLM Instruction Memoranda and their failure to prevent significant impacts to sage grouse populations in Core Areas. In many cases, the BLM appears to have limited its own conservation measures for sage grouse under the Lander RMP to those included in state Executive Order 2011-5 ("EO 201 J-5"). BLM states,

The Proposed RMP and Final EIS maintains overall consistency with the Core Area strategy; outlined in the Wyoming Governor's Greater Sage-Grouse Core Area Protection Executive Order 2011-5, and includes additional conservation measures recommended in the NTT Report. FEIS at 1848. However, it excludes many of the most important conservation measures recommended by the NTT. Importantly, EO 2011-5 was promulgated in the absence of a NEPA process, and this lack of NEPA foundation has undermined its effectiveness. Because there was no "hard look" at potential impacts to sage grouse in Core Areas under EO 2011-5, and no requirement of scientific integrity as imposed under NEPA, many of the measures included in EO 2011-5 do not reflect the best available science and their implementation in the face of industrial uses of the land to which the Order applies will in fact result in significant impacts to the viability of sage grouse populations in Core Areas.

**Issue Number:** PP-WY-Lander-13-01-24

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

The five percent disturbance threshold is not known to conserve sage-grouse long-term and is only a guess by agencies and others seeking to accommodate development in sage-grouse habitat. Past projects approved prior to implementation of the Wyoming Core Area strategies indicate that sage-grouse are adversely affected at lower levels of disturbance. For example, for the Continental Divide/Wamsutter II Natural Gas Project approved in 2000, 3,000 wells were proposed with 22,400 acres of new surface disturbance, representing 2.1 percent of the planning area (with an average well density of 4 wellsites per square mile) (BLM 2000); today, sage-grouse are declining in this area. In the Rim coalbed methane field, 2,000 wells were permitted at a density of eight wells per square mile, far above the threshold known to cause sage grouse declines. Today, sage grouse are essentially extirpated in developed portions of this field. The projected surface disturbance for this project is 15,800 acres, or 5.85 percent of the project area (BLM 2005). Clearly, a threshold of five percent is too high to sustain sage grouse.

**Issue Number:** PP-WY-Lander-13-01-27

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

Scientific research has determined that one energy

site per square mile is the density threshold at which significant impacts to sage-grouse populations begin to occur. In accordance with these findings, the Wyoming Core Area strategies set a limit of one energy development site per square mile in core habitat. The same DDCT area used to determine a project's disturbance limit is also used to calculate the density of sites (e.g., number of wellsites) that may be developed per square mile. But the DDCT only calculates site density per square mile, rather than capping density at one site per square-mile of land. In cases where the DDCT area is very large, the Core Area strategies may allow more than one well or mine site to be developed in a given square mile as long as the surrounding Core Area lands are relatively free from other development disturbance. This can result in a density of wellsites that exceeds science-based thresholds at which significant impacts to sage grouse inhabiting the habitat in question begin to occur.

**Issue Number:** PP-WY-Lander-13-01-31

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

Protecting sage-grouse leks and associated nesting and brood-rearing habitat are key to conserving the species. The best available science has recorded significant negative impacts from individual producing (post-drilling) oil and gas wells drilled within 1.9 miles from active leks (Holloran 2005), measureable impacts from coalbed methane fields extend out to 4 miles (Walker 2008), and new research has recorded effects as far away as 12.4 miles from leks (Taylor et al. 2012). WGFD, using lek buffers of 0.25 mile, 0.5 mile, 0.6 mile, 1.0 mile, and 2.0 mile, estimated lek persistence of 4, 5, 6, 10, and 28 percent, respectively (Christiansen and Bohne 2008, memorandum, Attachment 4). Unfortunately, both the State and Wyoming BLM Core Area strategies (and strongest Lander RMP alternatives) only require protective buffers of 0.6 miles around leks in designated core habitat; this corresponds to a 6% probability of lek persistence. By comparison, the NTT report recommends a 4-mile lek buffer for siting industrial development in sage-grouse habitat (SGNTT 20 II), a prescription in greater accord with the science, and which was recommended for the Lander RMP by the USFWS.

**Issue Number:** PP-WY-Lander-13-01-32

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

Buffers prescribed for leks outside Core Areas are even smaller. Both Wyoming strategies call for buffers of only 0.25 miles. The WGFD's stated position is for 50 percent probability of lek persistence outside Core Areas (WGFD 2010 at 31). But this is the same level protection criticized by former Governor Freudenthal and former WGFD Director Cleveland as grossly inadequate in 2007, and which were found to be inadequate by State fish and game biologists in 2008 (Christiansen and Bohne 2008, Attachment 4). The BLM has implemented the 0.25-mile lek buffer, paired with a 2-mile seasonal restriction on development activities around sage-grouse leks for years in Wyoming (as prescribed in Instruction Memorandum WY-2012-019), and significant impacts to sage-grouse populations have been documented where these stipulations have been applied (Holloran 2005, Walker 2008, Holloran et al. 2008).

**Issue Number:** PP-WY-Lander-13-01-39

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

The new Sage-Grouse Conservation Objectives Draft Report (COT), an accompaniment to the NTT report prepared by a team of federal and state sage-grouse scientists, recommends conserving all sage-grouse populations and avoiding anthropogenic disturbances in key sage grouse habitat (COT 2012, draft: 29, 33, 35). This report is not referenced in the Lander RMP FEIS (see Chapter 6 -References), in violation of BLM's 2004 Strategy.

**Issue Number:** PP-WY-Lander-13-01-47

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

The Lander RMP EIS fails NEPA baseline

information and hard look standards by failing to identify sage grouse wintering habitats and evaluate impacts to them under the various alternatives. Maps 63 through 65 display breeding and (to a limited extent) nesting habitat for sage grouse, but do not address winter habitat. Winter habitats for sage grouse are mentioned in passing for a portion of the planning area in the Affected Environment section (FEIS at 416), but nowhere does BLM assess the spatial distribution, acreage, or quality of current winter habitat for sage grouse. This omission is curious because in *WWP v. Salazar*, Judge Winmill specifically ruled that the failure of the Wyoming BLM to present sage grouse winter habitat in the Pinedale RMP was grounds for its remand.

**Issue Number:** PP-WY-Lander-13-01-6  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**

In 2004, BLM published its National Sage-Grouse Habitat Conservation Strategy ("Strategy"). Among other commitments, this policy binds the BLM to "use the best available science and other relevant information to develop conservation efforts for sage-grouse and sagebrush habitats." Strategy at 7. This policy required BLM to complete an Ecoregional Assessment for the Wyoming Basins Ecoregion, which includes the Lander RMP Planning area. *Id.* at II. This Wyoming Basins Ecoregional Assessment publication ("WBEN") was completed in 2011, yet is not referenced in the Lander RMP FEIS (see FEIS at Chapter 6 -References), indicating that the BLM has not met its obligation to "use the best available science" including publications specifically mandated under the Strategy. This study included a complete land cover mapping exercise including analysis of human footprint which would have been useful to include in the Affected Environment section of the FEIS. Chapter 5 of this publication (WBEA at 112) specifically addresses sage grouse avoidance of oil and gas developments and other permitted facilities. This analysis found that sage grouse density was negatively correlated with major highways, powerlines, and the presence of oil and gas wells. WBEA at 124. These researchers pointed out, "Any drilling <6.5 [approximately 4 miles] from a sage-grouse lek could have indirect (noise disturbance) or direct (mortality) negative effects on sage-grouse populations." WBEA at 131. This finding supports the NTT recommendation of a 4.0-

mile no-surface-disturbance buffer, but not the application of an 0.6-mile buffer as in the proposed Lander RMP plan. Model results (WBEA at 134) could have been used to examine what proportion of high abundance roost sites and general use areas were encompassed by the Core Area and non-Core mitigation measures applied under each alternative. These researchers concluded,

This spatially explicit knowledge of existing sage-grouse distribution can help inform and prioritize areas for application of future conservation and management actions in the region (Aldridge et al. 2008, Meinke et al. 2009) and thus maximize the effectiveness of limited but precious conservation resources.

WBEA at 135. Unfortunately, for the Lander RMP, this readily-available knowledge was apparently ignored.

**Issue Number:** PP-WY-Lander-13-09-11  
**Organization:** Audubon  
**Protestor:** Mike Chiropolos

**Issue Excerpt Text:**

In the Lander RMP, BLM appears to assume that State and private landowners will fully implement the Wyoming Core Area Strategy in Wyoming, and that adjacent states will adopt and implement strategies at least as protective. BLM does not analyze these apparent assumptions. Current indications are that adjacent states including Colorado and Utah are pursuing strategies significantly less protective than Wyoming.

**Issue Number:** PP-WY-Lander-13-09-15  
**Organization:** Audubon  
**Protestor:** Mike Chiropolos

**Issue Excerpt Text:**

The leading federal court decision on sage-grouse standards in recent RMPs establishes the compelling need for BLM to identify and consider adequate protections for special sage-grouse habitat types. Biodiversity Conservation Alliance and Western Watersheds Project v. Salazar, Case No. 4:08-CV-516-BLW (D. Idaho 2011).

Similarly, the Lander RMP must be informed by BLM's National Sage-Grouse Habitat Conservation Strategy. According to the court:

The BLM adopted this National Strategy to respond to the potential listing of the sage grouse and demonstrate its commitment to protecting sage grouse habitat. The BLM proposed to do this by using the "land use planning process as the primary mechanism to assure that conservation strategies are implemented and further refined to address local variations and issues ...." Slip Op. at 6.

The court emphasized the importance of special habitat types.

- Land use planning process would include "sagebrush habitat assessments that provide[] a biological basis for identifying and managing priority sage-grouse habitats (e.g., large intact native sagebrush stands, moist riparian brood-rearing site, or crucial winter ranges)." Id.
- "Dr. Braun, in comments to the BLM during the RMP revision process, demonstrated the importance of locating and mapping winter use areas throughout the RMP .area for the sage grouse." Id. at 31.

**Issue Number:** PP-WY-Lander-13-09-17  
**Organization:** Audubon  
**Protestor:** Mike Chiropoulos

**Issue Excerpt Text:**  
Designated Development Areas (DDA), established for purpose of facilitating intensive oil and gas exploration, development, and production, are proposed to allow for clear future management in these areas. DDAs must fully avoid Core Areas: maps leave some uncertainty about overlap.

**Issue Number:** PP-WY-Lander-13-09-20  
**Organization:** Audubon  
**Protestor:** Mike Chiropoulos

## Summary:

### **Issue Excerpt Text:**

The westernmost DDA overlaps the important Ninemile Important Bird Area described in Audubon's DEIS comments, which was designated an IBA specifically because of the significant concentration of sage-grouse breeding and nesting sites. A large number of sage-grouse from central Wyoming have been documented migrating to this IBA in mid-October.

**Issue Number:** PP-WY-Lander-13-09-7  
**Organization:** Audubon  
**Protestor:** Mike Chiropoulos

### **Issue Excerpt Text:**

Instead of imposing adequate sage-grouse protections, BLM appears to hope that NSO provisions developed for other resource values might provide indirect benefits to sage grouse. NTT Conformance Review at 16, No. 57. However, stipulations developed to protect other resources cannot be relied on to protect priority sage-grouse habitat. BLM failed to provide a rational explanation for deferring to the State of Wyoming's recommendation on disturbance levels, and rejecting that of the Service. Nor did BLM take a hard look at acceptable disturbance levels. BLM defends its Plan by asserting that Core Area surface disturbance caps are consistent with the Wyoming EO. BLM NTT Conformance Review at 14. But USFWS has emphasized the importance of updating implementation strategies based on the best available science.

**Issue Number:** PP-WY-Lander-13-13-4  
**Organization:** Western Watersheds Project  
**Protestor:** Jonathan Ratner

### **Issue Excerpt Text:**

We could find no monitoring and evaluation plan as required under 43 CFR 1610.



The Lander PRMP/FEIS has failed to conduct the required “hard look” analysis that is mandated through NEPA by:

- failing to identify Greater Sage-Grouse wintering habitats and impacts to these habitats from the various alternatives;
- failing to identify whether Core Areas overlap with Designated Development Areas (DDAs);
- failing to recognize the Ninemile Important Bird Area (IBA), which currently lies partially within a DDA;
- failing to reference the Wyoming Basin’s Ecoregional Assessment, thus also failing to comply with the 2004 National Sage-Grouse Habitat Conservation Strategy’s policy to use the best available science related to the development of conservation efforts for sage-grouse and sagebrush habitat;
- failing to reference the FWS’s Greater Sage-Grouse Conservation Objectives Draft Report (COT);
- limiting the conservation measures (such as disturbance thresholds and lek buffer distances) for Greater Sage-Grouse to those included in the State of Wyoming’s Core Area Strategy (Executive Order 2011-5);
- wrongfully assuming that State and private landowners will fully implement the Wyoming Core Area Strategy in Wyoming and that adjacent states will adopt and implement strategies at least as protective; and;
- failing to provide for a monitoring and evaluation plan.

**Response:**

The requisite level of information necessary to make a reasoned choice among the alternatives in an EIS is based on the scope and nature of the proposed decision. The baseline data provided in Chapter 3 and various appendices in the Lander PRMP/FEIS is sufficient to support, at the general land use planning-level of analysis, the environmental impact analysis resulting from the management actions presented in the PRMP/FEIS.

A land use planning-level decision is broad in scope and, therefore, does not require an exhaustive gathering and monitoring of baseline data. Although the BLM realizes that more data could always be gathered, the baseline data provides the necessary basis to make informed land use plan-level decisions. Land use plan-level analyses are typically broad and qualitative rather than quantitative or focused on site-specific actions (BLM Land Use Planning Handbook H-1601-1, Chapter II, A-B at 11-13 and Chapter IV, B at 29). The BLM will conduct subsequent project-specific NEPA analyses for projects proposed for implementation under the land use plan. The subsequent NEPA analyses for project-specific actions will tier to the land use planning analysis and evaluate project impacts at the appropriate site-specific level (40 CFR 1502.20, 40 CFR 1508.28). The public will have the opportunity to participate in the NEPA process for site-specific actions.

The BLM used the most recent and best information available that was relevant to a land use planning-level of analysis. During preparation of the PRMP/FEIS, the BLM conferred with and used data from other agencies and sources, including but not limited to the FWS and the State of Wyoming. The BLM worked on the analysis and incorporated available data into the PRMP/FEIS with its cooperating agencies and other agencies with jurisdiction or expertise. Considerations included but were not limited to threatened and endangered and other sensitive species and their habitats, deer and elk herd management areas, invasive plants, and uses on State lands. The BLM considered and used public input to refine its analytical approaches to planning. The Interdisciplinary Team used a systematic process to evaluate public input and comment during the planning process. As a result of these actions, the Lander RMP revision team gathered the necessary data essential to make a reasoned choice among the alternatives analyzed in detail in the PRMP/FEIS. The BLM utilized the available data to provide an analysis that led to an adequate disclosure of the potential environmental consequences of the alternatives. As a result, the BLM has taken a sufficiently “hard look,” as required by the NEPA, at the environmental consequences of the alternatives in the Lander PRMP/FEIS to enable the decision maker to make an informed decision.

While the Lander PRMP/FEIS does not separately map GRSG winter concentration areas, these areas are included within the Core habitat areas identified on Map 65 of the PRMP/FEIS. Seasonal protection areas will be added to these maps as the WGFD identifies these areas. Winter concentration areas are not considered to be a limiting factor for Greater Sage-Grouse in the Lander planning area. It is important to note that migratory routes for sage-grouse were taken into consideration when designating the Twin Creek ACEC. Management prescriptions associated with the Twin Creek ACEC would protect areas that are important for sage-grouse as they migrate to wintering habitats in the Government Draw area (see page 68 and 89 of the November 2011 ACEC Report).

The protester is correct that a portion of the Ninemile Draw Important Bird Area (IBA) does lie within the Beaver Creek Designated Development Area (DDA) identified on Map 134; however, no Core Area lies within the DDA. The PRMP/FEIS states that “the Lysite and Beaver Creek areas are outside the greater sage-grouse Core Area (page 930).” Approximately 13 percent of the IBA overlaps with the DDA. Within this 13 percent, there are no known sage-grouse leks. The majority of the Beaver Creek DDA (including the 13 percent that overlaps with the IBA) contains active oil and gas leases, some dating back to 1938 (Wyoming Geological Association, 1989). In accordance with the Mineral Leasing Act of 1920, the BLM is mandated to honor all valid existing rights associated with these leases. During the preparation of the RMP, Devon Energy submitted to the BLM a plan of development for new activities in the area and the BLM is currently preparing an Environmental Impact Statement analyzing the impacts proposed for the Beaver Creek area including that portion that is within the Ninemile IBA. The proposed plan of development would limit development in the portion of the DDA and project area that is part of the IBA and also contains other important resources. The high level of existing development and leases in the DDA (see Map 33) as well as the absence of leks were cause for not including all of the IBA in Core Area. The Core Area Strategy emphasizes habitat protections for Greater Sage-Grouse in areas where industrial development can be appropriately managed.

The protesters also allege that the BLM failed to comply with its own 2004 National Sage-Grouse Habitat Conservation Strategy by not referencing the *Sagebrush Ecosystem Conservation and Management: Ecoregional Assessment Tools and Models for the Wyoming Basins (Wyoming Basin Ecoregional Assessment)*. One of the guiding principles under this strategy is to “use the best available science and other relevant information to develop conservation efforts for sage-grouse and sagebrush habitats.” At the time the range of alternatives presented in this PRMP/FEIS was being developed, the ecoregional assessment was not yet completed. However, the BLM continued to utilize the best available science at the time to develop the alternatives. The Ecoregional Assessment consolidated data for a larger study area in the Wyoming Basin, including the Lander planning area. The data referenced in the assessment that is applicable to the Lander planning was collected from the BLM Lander FO and is the same data that was used in this planning effort. While not explicitly cited in the PRMP/FEIS, much of the data and conclusions from this assessment were used to formulate the alternatives and analysis presented in the PRMP/FEIS. The project file for this planning effort does contain and reference the data that was used in the ecoregional assessment.

A similar circumstance exists for the FWS Greater sage-grouse Conservation Objectives Team (COT) Report, which was finalized on March 25, 2013, over a month after the Lander PRMP/FEIS was published. While this report was also not explicitly referenced in the Lander PRMP/FEIS, the intent and context of the document is already incorporated within the PRMP/FEIS. According to the FWS, the 2013 Conservation Objectives Team (COT) Report was designed “to help guide the efforts of the States and other partners to conserve the Greater sage-grouse with a landscape level strategy that will benefit the species while maintaining a robust economy in the West.” Appendix X of the Lander ROD and Approved Resource Management Plan identifies the conservation options and measures relevant to the Lander planning area from the COT Report and then provides the management action numbers in the PRMP where the BLM addressed the measure.

In response to limiting conservation measures for greater sage-grouse to those included in the State of Wyoming’s Core Area Strategy (Executive Order 2011-5), it is first important to note that the BLM has an obligation to maintain consistency with other local government resource related plans, as “resource management plans and amendments to management framework plans shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands, including Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise, and other pollution standards or implementation plans.” (43 CFR 1610.3-2). The State of Wyoming’s Executive Order 2011-5 Core Area Strategy constitutes a state resource related plan as defined in 43 CFR 1601.0-5(j). As mentioned above, the FWS stated: “The Service believes the Executive Order can result in the long-term conservation of the Greater sage-grouse and thus reduce the need to list the species under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.); FWS letter of June 24, 2011, ref. ES-6141 1/WYI 1TA0313.” While the proposed plan’s conservation measures match up with those presented in Wyoming’s Core Area Strategy, the EIS also analyzed an adequate range of alternatives to conserve sage-grouse habitat. For example, Alternative B analyzed a 2.5 percent

disturbance threshold within identified greater sage-grouse breeding, nesting, and brood-rearing habitat (density of disturbances limited to 1 per 640 acres and cumulative surface disturbance limited to less than or equal to 2.5 percent of the sagebrush habitat in the same 640 acres) - with the assumption that these measures would only be applied to BLM managed public lands. As indicated in the impact analyses for special status species (section 4.4.9), Alternatives B and D would “result in greater beneficial impacts to greater sage-grouse breeding and nesting habitats than under the current management situation.”

Protesters also claim that the BLM has wrongfully assumed that State and private landowners will fully implement the Wyoming Core Area Strategy in Wyoming and that adjacent states will adopt and implement strategies at least as protective. The cumulative impacts analysis to sage-grouse presented in section 4.10.1 of the PRMP/FEIS states that “future Governors of Wyoming will comply with Executive Order 2011-5 and State of Wyoming lands will continue to be managed in accordance with the Executive Order...Private lands with high potential for oil and gas and wind-energy development are likely to be developed with no specific emphasis on protecting greater sage-grouse habitat...private lands are not subject to Core Area or non-Core Area stipulations and it is likely that protective measures for greater sage-grouse would not be implemented on private lands unless the private landowner voluntarily agrees to protective measures or enters into a Candidate Conservation Agreement with Assurances.” The protester correctly quotes the FEIS but that statement is in error and should have said that private lands with high potential for oil and gas and wind energy development will be subject to the Executive Order’s protections since State of Wyoming approval (through the Oil and Gas Commission, State Engineer, and Industrial Siting Authority) would be required for development. See the Lander PRMP/FEIS at pages 1234, 1235, 1237, 1291, etc. In light of the national BLM effort to implement conservation strategies, the assumptions made in the Lander PRMP/FEIS are reasonable.

Finally, the protester is correct that the PRMP/FEIS did not include a monitoring and evaluation plan, as required by 43 CFR 1610.4-9. The BLM is aware of this and will ensure that this plan is attached as an appendix in the ROD and public comment and input will be taken during implementation. This protest issue is partially granted.

### *Cooperation among Agencies*

**Issue Number:** PP-WY-Lander-13-01-18

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

BLM has stated relative to the state Sage Grouse Implementation Team and the Governors' Executive

Orders on Core area protection, "the results of the effort directly address USFWS concerns related to its listing decision." Lander RMP Biological Assessment at 4-13. These statements misrepresent the USFWS position significantly based on what USFWS has stated in letters to BLM specifically addressing the Lander RMP, and is indicative of a misapprehension on BLM's part of what USFWS

considers adequate in terms of its Policy on Effective Conservation Efforts. The Lander RMP should include sage grouse protection measures that USFWS considers adequate in the context of this particular RMP. For example, USFWS states,

The NTT Report states "Close priority sage-grouse habitat areas to fluid mineral leasing. Upon expiration or termination of existing leases, do not accept expressions of interest for parcels within priority areas." This management action was evaluated in the Lander RMP as part of the Conservation Alternative; however, it was not selected as part of the proposed plan. Because of the very high value of the sage-grouse priority areas within the Lander resource area to sage-grouse conservation and because this area has relatively little resource development potential, the Service strongly recommends the BLM to adopt this conservation measure from the NTT Report, in full, and incorporate it into the Proposed Plan. Attachment 3 at 2. Alternative B would close Core Areas to future oil and gas leasing. FEIS at 126,945. BLM further states, "Alternative B closes the greater sage-grouse Core Area to oil and gas and geothermal leasing, which would result in long-term beneficial impacts to greater sage-grouse in most of the planning area." FEIS at 948. By contrast, "Alternative D [the agency Proposed RMP] opens the greater sage-grouse Core Area to oil and gas and geothermal leasing." FEIS at 962, and see 126.

With regard to disturbance percentage, the proposed Lander RMP sets a 5% disturbance threshold for Core Areas (FEIS at 962), but USFWS recommends: Because of the very high value of the priority habitat areas in the BLM's Lander resource area to sage-grouse conservation and because this area has relatively little resource development potential, the Service strongly recommends the BLM to adopt this conservation measure at the 3% level from the NTT Report and incorporate it into the Proposed Plan. Attachment 3 at 2. Alternative B would impose a limit of 2.5% surface disturbance within Core Areas. FEIS at 945. The proposed Lander RMP (and Alternative B) would apply a 0.6-mile surface disturbance buffer around leks. FEIS at 126. But USFWS states:

The NTT report states that "To limit impacts to breeding and nesting habitat, surface-disturbing and disruptive activities shall be prohibited or restricted within 4 miles of a lek to the extent possible consistent with valid existing rights. If the entire

lease is entirely within the 4-mile perimeter of a lek, require any development to be placed at the part of the lease farthest from the lek, or, based depending on topography and other habitat features, in an area demonstrably the least harmful to sage-grouse." However, the management action was not incorporated into the proposed plan. Because of the very high value of the BLM's Lander resource area to sage-grouse conservation and because the area has relatively little resource development potential, the Service urges the BLM to further investigate the possibility of adopting conservation measures to protect nesting and brood-rearing habitat within 4 miles of leks within priority habitat areas. Attachment 3 at 2. The BLM's proposed plan would only provide an 0.6-mile NSO buffer inside Core Areas. FEIS at 962. No alternative would provide a 4-mile buffer for surface disturbing and disruptive activities. FEIS at 126. The USFWS also points out a number of additional recommendations included in the NTT Report, including unitization, bonding for reclamation, locating compressor stations outside Core Areas under all circumstances, and a moratorium on prescribed fire in Wyoming big sagebrush zones, which were not included in the proposed RMP. In fact, USFWS recommended: Regarding the range of alternatives in the current version of the draft Lander RMP revision, the Service favors the "Conservation Alternative" as it offers the most extensive protective measure for the greater sage-grouse. Furthermore, because the area offers superb opportunities to proactively manage some of the last remaining optimal greater sage-grouse habitat but has relatively little resource development potential, the Service urges the BLM to include the Government Draw/Upper Sweetwater sage-grouse Area of Critical Environmental Concern (1,246,791 acres), in its entirety, in the Selected Alternative as part of the Final Lander RMP. Attachment 3 at 3. By contrast, BLM proposes to protect only 306,360 acres in this designation under the Lander RMP. Lander RMP Biological Assessment at 4-15.

**Issue Number:** PP-WY-Lander-13-01-41

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

In our DEIS comments, BCA recommended that Core Areas be recommended for withdrawal from future locatable mineral entry, in part to prevent degradation of sage grouse habitat during

uranium extraction. USFWS recommended the same measure. See Attachment 3. BLM's only response to these comments is as follows: "The BLM believes the discussion of uranium in the RMP and EIS accurately depicts uranium's importance and benefits in the planning area, and the magnitude of deposits." FEIS at 1857. This statement is unresponsive to the comment that stronger protections for sage grouse are necessary.

**Issue Number:** PP-WY-Lander-13-01-45  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**  
The USFWS specifically has recommended that the Lander RMP include standards for rangeland management and grazing to ensure sage grouse viability. Attachment 3 at 1. BCA also made recommendations in our DEIS comments for stubble-height standards to ensure adequate sage grouse habitat effectiveness. But BLM does not appear to have emplaced much in the way of grazing standards to ensure that Core Areas remain viable sage grouse habitat.

**Issue Number:** PP-WY-Lander-13-09-3  
**Organization:** Audubon  
**Protestor:** Mike Chiropoulos

**Issue Excerpt Text:**  
First, USFWS emphasized the importance of closing priority habitat areas to new oil and gas leasing. Line 52, Conformance Table. The NIT Report states "Close priority sage-grouse habitat areas to fluid mineral leasing. Upon expiration or termination of existing leases, do not accept expressions of interest for parcels within priority areas." This management action was evaluated in the Lander RMP as part of the Conservation Alternative; however, it was not selected as part of the proposed plan. Because of the very high value of the sage-grouse priority areas within the Lander resource area to sage-grouse conservation and because this area has relatively little resource development potential, the Service strongly recommends the BLM to adopt this conservation measure from the NIT Report, in full, and incorporate it into the Proposed Plan.

USFWS Conformance Review at 2 (emphasis added). Alternative D would only close 4% of federal mineral estate in the field office to oil and gas leasing, compared to 81% in Alternative 8. FEIS at 254m Table 2.53. Clearly, the extent of closures in the proposed plan falls far short of conservation measures strongly recommended by the Service and 8LM's own NTT Report.

**Issue Number:** PP-WY-Lander-13-09-5  
**Organization:** Audubon  
**Protestor:** Mike Chiropoulos

**Issue Excerpt Text:**  
Second, USFWS found that 2.5 or 3% disturbance levels are needed, rather than 5%. Line 57, Conformance Table. The NTT report states that "if a lease is partially or entirely within priority habitat areas, to the extent possible, and consistent with existing rights, limit disturbance to an average of one site per 640 acres on average, with no more than 3% direct surface disturbance in the analysis area." A similar management action (2.5% disturbance level) was evaluated in the Lander RMP as part of the Conservation Alternative; however, it was not selected as part of the proposed plan. Instead, a limit of no more than 5% direct surface disturbance was incorporated into the proposed plan. Because of the very high value of the priority habitat areas in the BLM's Lander resource area to sage-grouse conservation and because this area has relatively little resource development potential, the Service strongly recommends the BLM to adopt this conservation measure at the 3% level from the NTT Report and incorporate it into the Proposed Plan. Id. (emphasis added).

This recommendation speaks for itself. Designating 96% of federal mineral estate as open for leasing and allowing 5% disturbance on those lands are each individually incompatible with recovery goals.

**Issue Number:** PP-WY-Lander-13-09-8  
**Organization:** Audubon  
**Protestor:** Mike Chiropoulos

**Issue Excerpt Text:**  
Third, the Service stated a clear preference for Conservation Alternative Band designating the entire Government Drawl Upper Sweetwater ACEC. Regarding the range of alternatives in the current

version of the draft Lander RMP revision, the Service favors the "Conservation Alternative" as it offers the most extensive protective measures for the greater sage-grouse. Furthermore, because the area offers superb opportunities to proactively manage some of the last remaining optimal greater sage-grouse habitat but has relatively little resource development potential, the Service urges the BLM to include the Government Drawl Upper Sweetwater sage-grouse Area of Critical Environmental Concern (1,246,791 acres), in its entirety, in the Selected Alternative as part of the Final Lander RMP. Id. at 3 (emphasis added).

These recommendations should be adopted. BLM did not fully analyze the potential consequences of rejecting proactive management opportunities at this crucial point in time for sage-grouse recovery efforts, especially given the high quality habitat and strong sage-grouse populations within the Lander Field Office. Energy resources in the Field Office have been forming for millions of years. While these resources are at a much lower potential than found elsewhere in the state (FEIS Maps I7 and 20), they aren't going anywhere. Wind, of course, is a renewable resource (FEIS Map 96). By contrast, the scientific literature establishes immediate threats to greater sage-grouse populations from development

and habitat disturbance. Full ESA listing could result from failing to adopt stronger conservation measures in the Lander RMP. Designation of the ACEC is supported by the USFWS recommendation at Line 58 (Conformance Review at 2) regarding buffer zones to adequately protect leks, nesting and brood rearing habitat.

**Issue Number:** PP-WY-Lander-13-09-9

**Organization:** Audubon

**Protestor:** Mike Chiropolos

**Issue Excerpt Text:**

BLM has not analyzed the likely potential socio-economic impacts of rejecting the Service's recommendations. It has neither asked nor analyzed whether emphasizing wildlife conservation could be the best way to ensure a stable mix of multiple uses during the life of the plan and thereafter. The assertion that "BLM lacks the data to evaluate the environmental impacts of applying some of the [NTT Report] recommendations without regard to site-specific considerations" does not justify rejecting the scientific recommendations from USFWS. FEIS at 36.

**Summary:**

The BLM incorrectly claims that the Lander PRMP/FEIS directly addresses the FWS concerns related to its listing decision and fails to consider a significant amount of the FWS's recommendations presented to the BLM during the planning process.

**Response:**

The BLM has worked closely with the FWS during the preparation of the Lander PRMP/FEIS. The PRMP/FEIS lists the cooperating agencies actively involved in the planning process in Section 5.3 of the PRMP/FEIS. The BLM coordinates with cooperating agencies commensurate with each agency's recognized jurisdiction or expertise. In areas where the State of Wyoming has clear jurisdiction, such as wildlife populations, the BLM has worked closely with them. In regards to the management of threatened and endangered species under the ESA, the BLM has coordinated and cooperated and consulted with the FWS (in compliance with Section 7 consultation of the ESA and 50 CFR 402.12).

While the GRSG is not a listed species under the ESA, the BLM and FWS have constructed a robust coordination process during the development and review of conservation measures

relative to GRSG habitat. The FWS staff members worked with the BLM Lander RMP identification teams at the sub-regional, regional, and national policy level to address and clarify their concerns on the Lander proposed plan. The NTT Conformance Table (which is available on the Lander PRMP website) was one of several correspondence tools that the BLM and FWS used during this sequential review process. This table was completed at the sub-regional review level. Since then, the BLM and FWS have resolved many of the FWS concerns raised in this table. On October 25, 2012, the FWS submitted a letter to the BLM stating that "the Service appreciates the BLM sharing the Wyoming Sage-Grouse Management Comparison and Explanation for Wyoming BLM Proposed Plan Related to Recommendations from the National Technical Team (NTT) Report Table. The table provides clarification and rationale for deviations from the NTT that the Service had commented on in the proposed plan, and it also correspondingly reflects that the BLM remains in line with the Wyoming Core Area Strategy. We believe the Wyoming Core Area Strategy, along with the guidelines outlined by the Implementation Team and the Inter-agency Implementation working subgroup, is a sound policy framework by which to conserve sage-grouse in Wyoming."

## *Required Design Features*

**Issue Number:** PP-WY-Lander-13-02-14

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

Devon first objects to the imposition of the new Required Design Features because they are inconsistent with Devon's valid existing rights. As set forth in detail in Part I of this Protest, the BLM cannot modify, alter, or diminish Devon's existing lease rights through the promulgation of a land use plan. See supra Part I of this Protest. The BLM cannot attempt to incorporate the so-called Required Design Features as COAs on all of Devon's leases without violating the express terms of FLPMA. Nonetheless, in the Proposed Lander RMP, the BLM specifically states that Required Design Features will be applied to all leases. Proposed Lander RMP, pgs. 71 -712. As noted above, the BLM also states that the "Required Design Features" will be "required of every project" in order to provide regulatory certainty. Proposed Lander RMP, Appd. H, pg. 1521. Similarly, the BLM states that the "following measures, and other as they are identified, will be required for all BLM-authorized development." Id. at 1522 (emphasis added). In order not to violate the terms of Devon's existing leases, the BLM must make

it clear that the Required Design Features cannot be applied to valid existing leases through COAs. The BLM seems to make this statement on page 715 of the Proposed Lander RMP, but the language on pages 711 -712 and in Appendix H is directly contradictory. The language in Appendix H makes it clear the BLM intends to impose the proposed sage-grouse mitigation measures on all BLM-authorized activities. Proposed Lander RMP, Appd. H, pg. 1522. As such, Devon protests to the proposed Required Design Features to the extent they will apply to existing leases. The BLM must clarify in the Record of Decision and final approved RMP for the Lander Planning Area that the Required Design Features will not be applied to oil and gas operations on or related to existing leases.

**Issue Number:** PP-WY-Lander-13-02-16

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

The BLM's inclusion of the numerous Required Design Features identified in Appendix H of the



Proposed Lander RMP violates both NEPA and FLPMA because they were not included in the Draft EIS for the Lander RMP and because BLM did not allow the public an opportunity to meaningfully comment on said features.

**Issue Number:** PP-WY-Lander-13-02-18

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

Devon did not have an opportunity to review or submit comments regarding any of the specific Design Features before they were proposed for inclusion in the Final EIS. It is wholly inappropriate under NEPA for the BLM to introduce radically new and different concepts and procedures in the Final EIS for the Lander RMP, especially given the limited ability for companies such as Devon to submit comments or react to the new measures once a proposed RMP has been issued. See 43 C.F.R. § 1610.5-2 (requiring parties to file a protest rather than comments regarding a Proposed RMP); 43 C.F.R. § 1610.2(f)(4) (same); BLM Land Use Planning Handbook H-1610-1, III.A.11, pg. 24, Appd. E (same) (Rel. 1-16930311 1105). In the Draft EIS for the Lander RMP the BLM did not suggest, indicate, or include any of the proposed Required Design Features. Proposed Lander RMP, Appd. H. The imposition of these detailed and potentially limiting Design Features were not reasonably included within the range of alternatives presented in the Draft EIS. As such, the BLM should have issued a supplement to the Draft EIS. 40 C.F.R. § 1502.9(c); BLM Land Use Planning Handbook H-1610-1, III.A.11, pg. 24 (Rel. 1-1693 0311 1/05).

**Issue Number:** PP-WY-Lander-13-02-20

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

The imposition of detailed, site-specific required designed features was not anticipated, included or even mentioned within the range of alternative presented in the Draft EIS for the Lander RMP. The proposed Required Design Features hence constitute "substantial changes from the previously proposed actions that are relevant to environmental concerns," and should have been presented in a supplemental Draft EIS for public comment. *Dubois v. U.S. Dept.*

of Agriculture, 102 F.3d 1273, 1293 (1<sup>st</sup> Cir. 1996).

Further, the BLM's inclusion of the Required Design Features in the Proposed RMP violates FLPMA because the public was not provided a meaningful opportunity to comment upon the Required Design Features. The BLM's planning regulations require the public to be provided an opportunity to meaningfully participate in and comment upon preparation of land use plans. 43 C.F.R. § 1610.2. The BLM's own planning handbook specifically and unequivocally requires the agency to issue a supplement to either the draft or final EIS when "substantial changes to the proposed action, or significant new information/circumstances collected during the comment period" are presented. BLM Land Use Planning Handbook H-1610-1, III.A.11, pg. 24 (Rel. 1-1693 03/11/05). Because the Required Design Features are unquestionably a "substantial change" when compared to any of the alternatives included in the Draft EIS, the BLM should have prepared and released for comment a supplement to the Draft EIS.

**Issue Number:** PP-WY-Lander-13-03-14

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Encana first objects to the imposition of the new Required Design Features because they are inconsistent with Encana's valid existing rights. As set forth in detail in Part I of this Protest, the BLM cannot modify, alter, or diminish Encana's existing lease rights through the promulgation of a land use plan. The BLM cannot attempt to incorporate these Required Design Features as COAs on all of Encana's leases without violating the express terms of FLPMA. Nonetheless, in the Proposed Lander RMP, the BLM specifically states that Required Design Features will be applied to all leases. Proposed Lander RMP, pgs. 71 -712. As noted above, the BLM also states that the Required Design Features will be "required of every project" in order to provide regulatory certainty. Proposed Lander RMP, Appd. H, pg. 1521. Similarly, the BLM states that the "following measures, and other as they are identified, will be required for all BLM-authorized development." *Id.* at 1522 (emphasis added). In order not to violate the terms of Encana's existing leases, the BLM must make it clear that the Required Design Features cannot be applied to valid existing leases. The BLM seems to make this statement on page 715 of the Proposed Lander RMP, but the language on

pages 711-712 and in Appendix H is directly contradictory. The language in Appendix H makes it clear the BLM intends to impose the proposed sage-grouse mitigation measures on all BLM-authorized activities. Proposed Lander RMP, Appd. H, pg. 1522. As such, Encana protests to the proposed Required Design Features to the extent they will apply to existing leases. The BLM must clarify in the Record of Decision and final approved RMP for the Lander Planning Area that the Required Design Features will not be applied to oil and gas operations on or related to existing leases.

**Issue Number:** PP-WY-Lander-13-03-16

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

The BLM's inclusion of the numerous Required Design Features identified in Appendix H of the Proposed Lander RMP violates both NEPA and FLPMA because they were not included in the Draft EIS for the Lander RMP and because BLM did not allow the public an opportunity to meaningfully comment on said features.

**Issue Number:** PP-WY-Lander-13-03-18

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Encana did not have an opportunity to review or submit comments regarding any of the specific Required Design Features before they were proposed for inclusion in the Final EIS. It is wholly inappropriate under NEPA for the BLM to introduce radically new and different concepts and procedures in the Final EIS for the Lander RMP, especially given the limited ability for companies such as Encana to submit comments or react to the new measures once a proposed RMP has been issued. See 43 C.F.R. § 1610.5-2 (requiring parties to file a protest rather than comments regarding a Proposed RMP); 43 C.F.R. § 1610.2(f)(4) (same); BLM Land Use Planning Handbook H-1610-1, III.A.11, pg. 24, Appd. E (same) (Rel. 1-169303/11/05). In the Draft

EIS for the Lander RMP the BLM did not suggest, indicate, or include any of the proposed Required Design Features. Proposed Lander RMP, Appd. H. The imposition of these detailed and potentially limiting Required Design Features were not reasonably included within the range of alternatives presented in the Draft EIS. As such, the BLM should have issued a supplement to the Draft EIS. 40 C.F.R. § 1502.9(c); BLM Land Use Planning Handbook H-1610-1, III.A.11, pg. 24 (Rel. 1-1693 03/11/05).

**Issue Number:** PP-WY-Lander-13-03-20

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

The imposition of detailed, site-specific required designed features was not anticipated, included or even mentioned within the range of alternative presented in the Draft EIS for the Lander RMP. The proposed Required Design Features hence constitute "substantial changes from the previously proposed actions that are relevant to environmental concerns," and should have been presented in a supplemental Draft EIS for public comment. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1293 (1st Cir. 1996).

Further, the BLM's inclusion of the Required Design Features in the Proposed RMP violates FLPMA because the public was not provided a meaningful opportunity to comment upon the Required Design Features. The BLM's planning regulations require the public to be provided an opportunity to meaningfully participate in and comment upon preparation of land use plans. 43 C.F.R. § 1610.2. The BLM's own planning handbook specifically and unequivocally requires the agency to issue a supplement to either the draft or final EIS when "substantial changes to the proposed action, or significant new information/circumstances collected during the comment period" are presented. BLM Land Use Planning Handbook H-1610-1, III.A.11, pg. 24 (Rel. 1-1693 03/11/05). Because the Required Design Features are unquestionably a "substantial change" when compared to any of the alternatives included in the Draft EIS, the BLM should have prepared and released for comment a supplement to the Draft EIS.

**Summary:**

The Greater Sage-Grouse RDFs presented in Appendix H of the Lander PRMP/FEIS violate FLPMA and NEPA because they are inconsistent with valid existing leasing rights and were not presented in the DRMP/DEIS, thus not providing the public with the opportunity to provide meaningful comments on these features. The inclusion of the RDFs in the PRMP/FEIS is also contrary to the BLM Land Use Planning Handbook (H-1610-1) which requires the agency to issue a supplement to either the draft or final EIS when "substantial changes to the proposed action, or significant new information/circumstances collected during the comment period" are presented.

**Response:**

The protesters claim that the inclusion of the RDFs in the PRMP/FEIS presented in Appendix H are inconsistent with their valid existing rights associated with existing oil and gas leases. As referenced in the first "General" RDF of Appendix H, "in applying protections for greater sage-grouse, all projects must evaluate (1) whether the conservation measure is reasonable (see 43 Code of Federal Regulations [CFR] 3101.1-2 for the definition of "reasonable" for fluid mineral leases) and consistent with valid existing rights, and (2) whether the action is in conformance with the RMP. Each conservation measure will be evaluated on a site-specific basis for likely effectiveness on a cost-benefit basis." Therefore protections (including these RDFs) would not be applied if they are found to violate any valid existing rights.

The protesters also believe that the inclusion of these RDFs in the Lander PRMP/FEIS (and not within the DRMP/DEIS) constitutes a substantial change from what was analyzed within the range of alternatives in the DRMP/DEIS, therefore, a supplement to the PRMP/FEIS is needed so that the public has an opportunity to comment on these substantial changes (40 CFR 1502.9(c)(1)(i)). However, the inclusion of the term "required design features" in the PRMP/FEIS does not constitute a substantial change relevant to environmental concerns from what was presented in the DRMP/FEIS. Many of the RDFs presented in the PRMP/FEIS were included within the DRMP/DEIS as best management practices, mitigation measures, and in some instances, were tied to management actions presented in Chapter 2 and the public was given a chance to meaningfully comment on them. Between draft and final, the term "best management practices" was replaced or referenced as "required design features" throughout the PRMP/FEIS. The reasoning behind this change stems from the fact the FWS will only consider conservation measures that are required within an RMP to be "regulatory mechanisms" when they are making their listing determination under the Endangered Species Act in 2015. This simple modification provides the appropriate level of regulatory certainty that may contribute to reducing the need for FWS to list the Greater Sage-Grouse under the ESA.

The required design features that were not specifically addressed in the DRMP/DEIS, but were later included in the PRMP/FEIS are measures that the agency applies to an authorization or lease at the site specific level as a stipulation, mitigation measure, or conditions of approval, rather than applied universally through the RMP. As stated in Appendix H of the PRMP/FEIS, it is not possible to evaluate all the known practices and make determinations as to which are best, particularly without a specific project in a specific location. These RDFs should be matched and

adapted to meet the site-specific requirements of the management action, project and local environment.” Therefore, during the site-specific analysis that will take place before the BLM approves an authorization, the BLM will evaluate which RDFs are applicable for the project and the public will have the opportunity to comment on the application of these RDFs at that time.

## Air Quality

**Issue Number:** PP-WY-Lander-13-02-24

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

### **Issue Excerpt Text:**

First, BLM sets as its first objective in the Proposed Lander RMP Air Quality Section to "maintain concentrations of criteria pollutants in compliance with applicable state and federal Ambient Air Quality Standards." Proposed Lander RMP, Table 2.8, pg. 75. The BLM's second objective is to "maintain concentration of PSO pollutants associated with management actions in compliance with applicable instruments." *Id.* As its third objective, the BLM intends to "reduce visibility impairing pollutants in accordance with the reasonable progress goals and timeframes established within the State of Wyoming's Regional Haze State Implementation Plan. *Id.* Finally, the BLM imposes a series of specific air quality emission rates for various engine sizes and imposes various other restrictions. See *Id.* Although Devon supports the BLM's laudable goal of protecting air quality, as a matter of unequivocal Federal law, the BLM does not have the authority to impose air emission standards, ensure air quality standards are maintained, or protect visibility within the Lander Field Office.

The BLM does not have direct authority over air quality or air emissions under the Clean Air Act ("CAA"). 42 U.S.C. §§ 7401 et seq. Under the express terms of the CAA, the EPA has the authority to regulate air emissions. In Wyoming, the EPA has delegated its authority to the Wyoming Department of Environmental Quality (WDEQ). See 42 U.S.C. §§ 7401 -7671q; 40 C.F.R. pts. 50 -99; 40 C.F.R. § 52.2620 (Wyoming's State Implementation Plan); WYO. STAT. ANN. §§ 35-11-201 to 214 (LexisNexis 2011); Wyo. Air Quality Stds. & Regs. ("WAQSR") Chs. I -14.

**Issue Number:** PP-WY-Lander-13-02-26

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

### **Issue Excerpt Text:**

With respect to potential visibility impacts, the BLM's authority is also limited by existing federal law. Under the CAA, a federal land manager's authority is strictly limited to considering whether a "proposed major emitting facility will have an adverse impact" on visibility within designated Class I areas. 42 U.S.C. § 7475(d)(2)(B). Oil and gas operations do not meet the definition of a major emitting facility. Further, under the CAA, the regulation of potential impacts to visibility and authority over air quality in general, rests with the WDEQ. 42 U.S.C. § 7407(a). The goal of preventing impairment of visibility in Class I areas will be achieved through the regional haze state implementation plans ("SIPs") that were recently approved. 42 U.S.C. § 7410(a)(2)(J); 77 Fed Reg. 73,926 (Dec. 12,2012). Although federal land managers with jurisdiction over Class I areas may participate in the development of regional haze SIPs, the BLM has no such jurisdiction in Wyoming because it does not manage a Class 1 area in the State. 42 U.S.C. § 7491; see also Wyo. STAT. ANN. §§ 35-11-201 to 214. Accordingly, the BLM has no authority over air quality and cannot impose emissions restrictions, either directly or indirectly, on natural gas operations in Wyoming, particularly if the overall goal is to reduce potential visibility impacts.

**Issue Number:** PP-WY-Lander-13-02-27

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

The BLM should also recognize that the agency does not have the authority to implement, regulate, or enforce the prevention of significant deterioration ("PSD") increment. The BLM's lack of authority regarding PSD increment analysis was recently recognized in the Memorandum of Understanding ("MOU") issued by the Department of the Interior, Department of Agriculture, and the EPA which indicates that BLM NEPA documents relating to oil and gas activities will model PSD increment consumption for informational purposes only. See Memorandum of Understanding Among Department of Agriculture, Department of the Interior and the Environmental Protection Agency Regarding Air Quality Analyses and Mitigation for Federal Oil and Gas Decisions Through the National Environmental Policy Act Process ("EPA MOU"), Section V.G (June 23,2011). Wyoming's PSD program was approved by the EPA in June of 2012, 77 Fed. Reg. 33021 (Jun. 12, 2012) and currently controls Wyoming's enforcement of the PSD program within the State of Wyoming. There is no justifiable or legal support for the BLM's alleged authority over PSD analysis.

**Issue Number:** PP-WY-Lander-13-02-29

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

Further, and contrary to BLM's Response to Comments in the Proposed Lander RMP Final EIS, FLPMA does not authorize the BLM to regulate air quality. See Proposed Lander RMP, Appd. X, pg. 1841. Section 202(c)(8) of FLPMA does not require or authorize the BLM to enforce air quality controls. Instead, the cited section of FLPMA provides: "In the development and revision of land use plans, the Secretary shall- . . . (8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementations plans." 43 U.S.C. § 1712(c)(8). The very language of the statute demonstrates BLM is required to provide for compliance," not independently regulate air emissions. Id. So long as the Lander RMP does not interfere with the enforcement of State and Federal pollution laws, the BLM has satisfied its obligations under FLPMA. FLPMA does not authorize the BLM to

independently regulate air quality control measures such as those imposed in the Proposed Lander RMP.

**Issue Number:** PP-WY-Lander-13-02-31

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

The provisions of the Air Plan set forth in detail when and how the BLM will conduct air quality modeling for oil and gas operations. However, the provisions of Appendix F do not comply with the MOU among the United States Department of Agriculture, United States Department of the Interior, and the United States EPA regarding air quality analyses and mitigation for Federal Oil and Gas Decisions through the NEPA process. This Memorandum executed by the Department of Agriculture, Department of the Interior, and the EPA on June 23, 2011, is the current national management guidance determining when and how air quality modeling for oil and gas projects will be conducted. The appendix could create confusion and even contradicting requirements of when and how air quality modeling and monitoring should be performed.

**Issue Number:** PP-WY-Lander-13-02-33

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

the Lander Air Resources Management Plan is also inappropriate because it sets forth specific mitigation measures and emission limitations on oil and gas operations that it intends to impose. In section F.3A, the BLM specifically provides that it will "require project proponents to include measures for reducing air pollutant emissions in proposals and Plans of Development," that that "BLM will require additional air emissions and control measures" and that the agency will "ensure that pollutant control measures and strategies" are enforced in Records of Decisions. Proposed Lander RMP, Appd. F, pg. 1498. Given the BLM's lack of authority to regulate air quality, it is inappropriate for the agency to impose emissions or mitigation measures on oil and gas operations. Instead, these measures should only be imposed by agencies with expertise and authority over air quality in Wyoming, which, according to the Secretary of the

Interior, is the WDEQ. See Wyoming Outdoor Council. et al. 176 IBLA at 26.

**Issue Number:** PP-WY-Lander-13-03-24

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

First, BLM sets as its first objective in the Proposed Lander RMP Air Quality Section to "maintain concentrations of criteria pollutants in compliance with applicable state and federal Ambient Air Quality Standards." Proposed Lander RMP, Table 2.8, pg. 75. The BLM's second objective is to "maintain concentration of PSO pollutants associated with management actions in compliance with applicable instruments." Id As its third objective, the BLM intends to "reduce visibility impairing pollutants in accordance with the reasonable progress goals and timeframes established within the State of Wyoming's Regional Haze State Implementation Plan. Id. Finally, the BLM imposes a series of specific air quality emission rates for various engine sizes and imposes various other restrictions. See id. Although Encana supports the BLM's goal of protecting air quality, as a matter of federal law, the BLM does not have the authority to impose air emission standards, ensure that air quality standards are maintained, or protect visibility within the Lander Field Office.

The BLM does not have direct authority over air quality or air emissions under the Clean Air Act ("CAA"). 42 U.S.C. §§ 7401 et seq. Under the express terms of the CAA, the EPA has the authority to regulate air emissions. In Wyoming, the EPA has delegated its authority to the Wyoming Department of Environmental Quality (WDEQ). See 42 U.S.C. §§ 7401 -7671q; 40 C.F.R. pts. 50 -99; 40 C.F.R. § 52.2620 (Wyoming's State Implementation Plan); WYO. STAT. ANN. §§ 35-11-201 to 214 (LexisNexis 2011); Wyo. Air Quality Stds. & Regs. ("WAQSR") Chs. I -14.

**Issue Number:** PP-WY-Lander-13-03-26

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

With respect to potential visibility impacts, the BLM's authority is also limited by existing federal

law. Under the CAA, a federal land manager's authority is strictly limited to considering whether a "proposed major emitting facility will have an adverse impact" on visibility within designated Class I areas. 42 U.S.C. § 7475(d)(2)(B). Oil and gas operations do not meet the definition of a major emitting facility. Further, under the CAA, the regulation of Major emitting sources are those that emit or have the potential to emit 250 tons per year of any regulated pollutant, or any of the 28 listed industrial sources that have the potential to emit 100 tons per year of any regulated pollutant. 42 U.S.C. § 7479(1); 40 C.F.R. §§ 51.166(b)(1), 52.21(b)(1). potential impacts to visibility and authority over air quality in general rests with the WDEQ. 42 U.S.C. § 7407(a). The goal of preventing impairment of visibility in Class I areas will be achieved through the regional haze state implementation plans ("SIPs") that were recently approved. 42 U.S.C. § 7410(a)(2)(J); 77 Fed Reg. 73,926 (Dec. 12, 2012). Although federal land managers with jurisdiction over Class I areas may participate in the development of regional haze SIPs, the BLM has no such jurisdiction in Wyoming because it does not manage a Class I area in the State. 42 U.S.C. § 7491; see also Wyo. STAT. ANN. §§ 35-11-201 to 214. Accordingly, the BLM has no authority over air quality and cannot impose emissions restrictions, either directly or indirectly, on natural gas operations in Wyoming, particularly if the overall goal is to reduce potential visibility impacts.

**Issue Number:** PP-WY-Lander-13-03-27

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

The BLM should also recognize that the agency does not have the authority to implement, regulate, or enforce the prevention of significant deterioration ("PSD") increment. The BLM's lack of authority regarding PSD increment analysis was recently recognized in the Memorandum of Understanding ("MOU") issued by the Department of the Interior, Department of Agriculture, and the EPA which indicates that BLM NEPA documents relating to oil and gas activities will model PSD increment consumption for informational purposes only. See Memorandum of Understanding Among Department of Agriculture, Department of the Interior and the Environmental Protection Agency Regarding Air Quality Analyses and Mitigation for Federal Oil and Gas Decisions Through the National Environmental

Policy Act Process ("EPA MOU"), Section V.G (June 23, 2011). Wyoming's PSD program was approved by the EPA in June of 2012, 77 Fed. Reg. 33021 (Jun. 12, 2012) and currently controls Wyoming's enforcement of the PSD program within the State of Wyoming. There is no justifiable or legal support for the BLM's alleged authority over PSD analysis.

**Issue Number:** PP-WY-Lander-13-03-29

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Further, and contrary to BLM's Response to Comments in the Proposed Lander RMP Final EIS, FLPMA does not authorize the BLM to regulate air quality. See Proposed Lander RMP, Appd. X, pg. 1841. Section 202(c)(8) of FLPMA does not require or authorize the BLM to enforce air quality controls. Instead, the cited section of FLPMA provides: "In the development and revision of land use plans, the Secretary shall... (8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementations plans." 43 U.S.C. § 1712(c)(8). The language of the statute demonstrates BLM is required to "provide for compliance," not independently regulate air emissions. *Id.* So long as the Lander RMP does not interfere with the enforcement of state and federal pollution laws, the BLM has satisfied its obligations under FLPMA. FLPMA does not authorize the BLM to independently regulate air quality control measures such as those imposed in the Proposed Lander RMP.

**Issue Number:** PP-WY-Lander-13-03-31

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Despite its lack of authority under federal law, the BLM states that it intends to actively regulate air quality emissions within the planning area. On page 713 of the Proposed Lander RMP and Final EIS, the BLM specifically states that "[l]imits on emissions could adversely impact oil and gas by making exploration and development more expensive, including possibly limiting development because of limits on emissions." Proposed Lander RMP, pg. 713. This language, which was added for the first time in

the Final EIS, demonstrates the BLM intends to exceed its authority under FLPMA, and impermissibly and actively limit emissions from oil and gas authority. As explained in detail above, the BLM does not have direct authority to impose limitations on emissions within the State of Wyoming. The BLM simply does not have the authority to impose limits on emissions of oil and gas operations.

**Issue Number:** PP-WY-Lander-13-03-33

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

The Lander Air Resource Management Plan is inappropriate for several specific reasons. First, the provisions of the Air Plan set forth in detail when and how the BLM will conduct air quality modeling for oil and gas operations. The provisions of Appendix F do not comply with the MOU among the United States Department of Agriculture, United States Department of the Interior, and the United States EPA regarding air quality analyses and mitigation for federal oil and gas decisions through the NEPA process. This Memorandum executed on June 23, 2011, is the current national management guidance determining when and how air quality modeling for oil and gas projects will be conducted. The appendix will create unnecessary confusion and even contradicting requirements of when and how air quality modeling and monitoring should be performed. It is inappropriate for a single BLM Field Office to attempt to develop its own procedures for air quality modeling when the Department of the Interior has agreed to specific provisions on a national scale.

**Issue Number:** PP-WY-Lander-13-03-36

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Next, the language in Appendix F also impermissibly attempts to require monitoring and modeling in the area as if the Planning Area had been designated as non-attainment under the CAA. In fact, no portion of the Planning Area is currently in or predicted to be in a non-attainment status. Thus, all of the BLM's language requiring modeling if a potential project emissions are detected at 85% of an National

Ambient Air Quality Standard is simply unnecessary. Proposed Lander RMP, Appd. F, pg. 1493. Once again, the WDEQ was very critical of the BLM's air plan because the 85% standard "has no actual basis in an air quality management context." Id.

**Issue Number:** PP-WY-Lander-13-03-38

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Lastly, and most importantly, the Lander Air Resources Management Plan unlawfully attempts to impose specific mitigation measures and emission limitations on oil and gas operations. Section F.3.4 of

the Proposed Lander RMP Air Resources Plan provides that BLM will "require project proponents to include measures for reducing air pollutant emissions in proposals and Plans of Development," and that "BLM will require additional air emissions and control measures" and that the agency will "ensure that pollutant control measures and strategies" are enforced in Records of Decisions. Proposed Lander RMP, Appd. F, pg. 1498. Given the BLM's lack of authority of air quality, it is inappropriate for the agency to impose emissions or mitigation measures on oil and gas operations. Instead, emission controls should only be imposed by agencies with expertise and authority over air quality in Wyoming, which, according to the Secretary of the Interior, is the WDEQ. See Wyoming Outdoor Council, et al., 176 IBLA at 26.

**Summary:**

The BLM does not have the authority to regulate Air Quality through this planning process. Specifically, the BLM does not have authority to:

- enforce controls and standards
- control visibility impacts
- regulate PSD increment
- impose mitigation measures and emission limits
- require monitoring/modeling

**Response:**

The BLM does not regulate air quality nor does it attempt to regulate air quality through this planning process. The Wyoming Department of Environmental Quality - Air Quality Division (WDEQ-AQD) has been delegated authority by the U.S. Environmental Protection Agency (EPA) to implement Federal programs of the Clean Air Act. The WDEQ-AQD is responsible for managing and regulating air quality through the Wyoming Air Quality Standards and Regulations (WAQSR) and the Wyoming State Implementation Plan.

Land Use Plan Objectives are a standard part of all BLM RMPs. Objectives "identify specific desired outcomes for resources" and are often quantifiable and measureable. BLM Land Use Planning Handbook, page 12. All of the air quality objectives identified in the Lander RMP are designed to provide for compliance with either State or Federal Air Quality standards set in applicable laws, regulations, or plans. Lander PRMP/FEIS, pages 75 to 76. The BLM's authority to provide for compliance with these air quality standards derives from the Federal Land Management Policy Act (FLPMA). Section 102 of FLPMA states in part that "(a) The



Congress declares that it is the policy of the United States that... (8) 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...[emphasis added].” 43 U.S.C. 1701. Furthermore, Sec 202 of FLPMA states in part that “(c) In the development and revision of land use plans, the Secretary shall...(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans...” 43 U.S.C. 1712. The BLM is not required to merely avoid interfering with the enforcement of State and Federal pollution laws in order to meet its obligations under FLPMA regarding air quality as the protesting parties’ state. The BLM has the statutory authority to protect air and atmospheric resource values (including visibility) and provide for compliance with State and Federal pollution laws, regulations, and standards through the land use planning process, and the BLM is required to adhere to certain laws regarding air quality, including but not limited to specific provisions of the Clean Air Act (CAA), and the Wyoming Department of Environmental Quality (DEQ) smoke management rules for air quality. Lander PRMP/FEIS, page 40.

Thus, in order to meet the air quality objectives established in the Lander RMP, the BLM has established allowable uses and management actions. BLM Land Use Planning Handbook, page 13. Seven of the eight air quality management actions included in the FEIS apply across all alternatives because they are designed to conform to existing laws or regulations, or because they address issues such as cooperative management or the use of best management practices that are intended to be standard practice. Lander PRMP/FEIS, pages 75 to 76. The only management action that varies is 1008, which in three out of the four alternatives calls for minimizing adverse impacts to air quality, while allowing impacts up to existing standards and guidelines. These standards include the National Ambient Air Quality Standards (NAAQS), Wyoming Ambient Air Quality Standard (WAAQS), the Wyoming DEQ O3 standards. Lander PRMP/FEIS, pages 1493 and 1496.

The version of 1008 for Alternative B in contrast requires a reduction in existing emissions levels by working in collaboration with Wyoming DEQ to implement prevention and mitigation measures to reduce emissions. Lander PRMP/FEIS, page 76. One of the primary reasons that the BLM analyzed an alternative that reduced existing emissions levels is that there have already been measurements of air quality at concentrations that exceeded air quality standards in the planning area. The Wyoming Department of Environmental Quality (DEQ) Air Quality Division recorded O3 exceedances at the South Pass, Wyoming, monitor in 2009, and seven exceedances of the NAAQS eight-hour O3 standard above 75 parts per billion (ppb) were recorded in 2009 “while one hour values at or above 75 ppb were recorded twice in 2008 and once in 2010” (FEIS, page 1492). It is not known whether these exceedances were specific to the South Pass area, or apply across the planning area since the only monitoring station in the planning area is in South Pass. Lander PRMP/FEIS, page 1492.

Within the planning area, oil and gas development is the primary contributor to total air emissions. Lander PRMP/FEIS, page 1492. Thus, while not classified as a “major emitting facility” under the Clean Air Act, oil and gas development within the planning area has the potential to cause or contribute to increased levels of O3 due to increased emissions of ozone-forming precursor pollutants (NOx and VOCs) (see final Air Resources Management Plan

included in the ROD). As these oil and gas development activities are BLM-permitted, and as the BLM has the authority to protect air and atmospheric values, and must comply with pollution laws and regulations, including the CAA, from which the NAAQS standards are derived, as well as Wyoming DEQ standards, the BLM may require within the BLM's authority that the mitigation reduction measures identified in Table F.2 be applied to oil and gas development within the planning area subject to valid existing rights. Lander PRMP/FEIS, pages 1501 to 1504.

Therefore the BLM is not asserting direct authority over the management of air emissions generally, but is asserting its authority to manage air and atmospheric resources across the public lands as part of its multiple use mission, as well as fulfilling its requirements to adhere to the various applicable laws and regulations governing air quality in Wyoming and the United States. That authority is not limited to Class I areas as defined under the CAA as air and atmospheric resources do not end at the border of Class I areas. Regarding the objective related to PSD pollutants, the BLM recognizes that the PSD permitting program is administered by the WDEQ-AQD who is responsible for PSD increment consumption analyses. Per the Air Quality Memorandum of Understanding (MOU) signed in 2011, the BLM would calculate and disclose in the NEPA document for informational purposes only the PSD increment consumption from proposed actions at Class I areas. Regarding visibility and BLM authority under the Regional Haze program, the rule calls for state and federal agencies to work together to improve visibility in national parks and wilderness areas, and to develop and implement air quality protection plans to reduce the pollution that causes visibility impairment. Whether or not the BLM manages the Class I area is irrelevant; the BLM has an obligation to work with the WDEQ and Federal agencies to protect visibility in Class I areas. The BLM has acted consistent with the Air Quality MOU and fulfilled in this FEIS its responsibilities with respect to NEPA to disclose whether there are potential impacts to nearby Class I areas. Class I areas near the planning area include Bridger Wilderness Area, Fitzpatrick Wilderness Area, Washakie Wilderness Area, Yellowstone National Park, Teton Wilderness Area, and Grand Teton National Park. Lander PRMP/FEIS, page 1651.

The Lander Air Resources Management Plan (Appendix F) is consistent with the 2011 Air Quality Memorandum of Understanding (MOU). The Air Quality MOU applies to Federal oil and gas decisions only, and Appendix F followed procedures required in the MOU as appropriate. The Lander Air Resources Management Plan, however, also addresses air management for other BLM authorized activities, such as mining activities, that are outside the scope of the 2011 Air Quality MOU.

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## *Water Resources*

**Issue Number:** PP-WY-Lander-13-03-48  
**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Encana protests the BLM's attempt to regulate the surface discharge of water in potential conflict with the Federal National Pollution Discharge Elimination System (NPDES) and the Wyoming Pollution Discharge Elimination System (WYPDES) as set forth in Record Numbers 1027, 1028, 1029, 1031, 1034, and 1035. Lander Proposed RMP, Record Nos. 1028, 1029, 1031, 1034, and 1035, pgs.83 -84. Encana submitted comments regarding the BLM's proposed regulation of discharged water in its comments on the Lander RMP Draft EIS. Encana Comments, pgs.18 -19, 39 -40.

Rather than attempting to regulate the disposal of discharged water, the BLM should recognize that erosion and stormwater runoff are regulated by the EPA through its NPDES program under the Clean Water Act, which is administered by the State of Wyoming. See 33 U.S.C. § 1342 (2012); 40 C.F.R. parts 122, 123 (2012). Pursuant to the express provisions of the Clean Water Act, the EPA has primacy to regulate the discharge of produced water, although Congressional policy encourages the delegation of said authority to the States. 33 U.S.C. § 1251(b); see S. Rep. No. 414, 1972 U.S.C.C.A.N. 3668,3730 (describing Congress' intent that states retain power to regulate surface water quality unless they fail to do so, in which case that authority falls to the EPA). It is inappropriate for the BLM to attempt to second guess or even overrule the comprehensive permitting and monitoring program in place under the NPDES and WYPDES programs. Congress granted "final voice" on Clean Water Act standards to the EPA, not the BLM. *Mississippi Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1275 (5th Cir. 1980).

**Issue Number:** PP-WY-Lander-13-03-52

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Encana especially protests Record No 1027 and the BLM's language regarding subsurface disposal on pages 314, 649, and 650, and 652, and 655-656 of the Proposed Lander RMP. Encana submitted comments regarding water and potential impacts oil and gas may have upon water quality. Encana Comments, pgs. 18-19, 39-40, 50-51.

The Safe Drinking Water Act (SDWA) authorizes states to assume the primary role for regulating groundwater, pursuant to approval from the

Environmental Protection Agency (EPA). 42 U.S.C. § 300h. For Class II injection wells in Wyoming, the EPA approved the program administered by the Wyoming Oil and Gas Conservation Commission (WOGCC) on November 23, 1982. Wyoming Oil & Gas Conservation Commission, *Underground Injection Control Program Approval*, 47 FR 52434 (November 23, 1982); 40 C.F.R. § 147.2551 (2012); Wyo. Admin. Code OIL GEN Ch. 4 § 1-15 (2013). Similarly, for Class I, III, IV, and V injection wells, the EPA approved the program administered by the Wyoming Department of Environmental Quality (WDEQ) on July 15, 1983. Wyoming Department of Environmental Quality *Underground Injection Control; Program Approval*, 48 FR 32344 (July 15, 1983); 40 C.F.R. § 147.2550. A State with an approved delegation of authority under the UIC program retains primacy under the program unless and until the EPA determines the State's program does not comply with the provisions of the SDWA. See, e.g., *HRJ, Inc. v. E.P.A.*, 198 F.3d 1224, 1232 (10th Cir. 2000). The BLM's Onshore Order Number 7 recognizes the primacy of EPA and states over UIC permits. Onshore Order No.7, Part III.C. The Order specifically states that the BLM will approve the necessary permits and sundries in order to facilitate disposal of produced water in connection with a UIC permit unless the BLM makes a determination that such approval will have an adverse impact on public health and safety. Onshore Order No. 7, Part II.B.2.b.i.

Given the express authority of the EPA, as delegated to the State of Wyoming, BLM should not attempt to exercise control over the underground injection of water. Underground Injection Permits (UIC) are administered by the Wyoming Oil and Gas Conservation Commission with oversight from the EPA. Because the SDWA "affords the EPA," not the BLM, "wide discretion to establish the procedures and criterion for deciding when to grant and withdraw primacy," *Nat'l Wildlife Fed'n v. Us. E.P.A.*, 980 F.2d 765, 770 (D.C. Cir. 1992), there is no room for the BLM to second guess or to attempt to interfere with the technical expertise and authority of those agencies. Broadly construed, the language in Record 1027 could be viewed as giving BLM the authority to second-guess or overrule the underground injection of products in compliance with an approved UIC permit. Yet, the EPA's interpretation of the SDWA's primacy provisions does not permit such oversight by the BLM: "The EPA's policy for the Public Water System and Underground Injection Control programs is to delegate [to the states] primary enforcement

responsibility for all program activities . . ." 53 FR 37396, 37403 (Sept. 26, 1988); see Nat'l Wildlife Fed'n v. U.S. E.P.A., 925 F.2d 470, 474 (D.C. Cir. 1991) (acknowledging "EPA's general policy in favor of full state primacy"). At the very least, in the approved RMP the BLM should recognize the primacy of the State of Wyoming and EPA regarding the UIC permit.

**Issue Number:** PP-WY-Lander-13-03-53

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Further, the BLM must review and clarify the inaccurate language regarding potential impacts of oil and gas development on water aquifers. Lander Proposed RMP pgs. 313 -314, 649, and 650, and 652, and 655-656. The language in these sections is not only misleading, it involves matters well beyond the legal authority and expertise of the BLM. The language on page 652 in the first, third, seventh, and eighth bullets are not accurate or beyond the BLM's authority. In particular, the BLM should review and correct the misleading information regarding the potential impacts of hydraulic fracturing on water aquifers. As far as Encana is aware, there are no known instances of hydraulic fracturing impacting water aquifers under the conditions described in the Proposed Lander RMP at pages 655-656. In particular the BLM should correct, or preferably strike, the incorrect information on pages 313 and 314 regarding the water quality samples taken near Pavillion, Wyoming as the BLM's description is wholly inaccurate and unsupported by existing scientific data.

**Issue Number:** PP-WY-Lander-13-03-55

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Encana protests the inclusion of the new provision in

the Lander RMP that requires the development of groundwater monitoring programs and protocols in site-specific oil and gas project approvals. Proposed Lander RMP, Record Nos. 1036, 1046. Although this aspect was not included in the Draft EIS for the Lander RMP, Encana commented regarding groundwater issues in its previous comments. Encana Comments, pgs. 18 -19, 39 -40, 50 -51.

Encana first protests the inclusion of the groundwater monitoring protocols because they are new to the Final EIS and Proposed RMP and were not included in the Draft EIS. As set forth in detail in Section II.B of this Protest, it is a violation of both NEPA and FLPMA to include substantial changes to the Proposed RMP without providing the public and potentially interested parties such as Encana an opportunity to review and comment. For this reason alone they should be remanded back to the BLM for additional public comment and process.

**Issue Number:** PP-WY-Lander-13-03-56

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Second, Encana objects to the BLM's attempt to regulate matters already administered by the EPA and State of Wyoming. Groundwater appropriation and regulation are matters of State concern, regulated by the State of Wyoming. Wyo. Const. art. 8, § 5; WYO. STAT. ANN. §§ 41-101 -1014 (LexisNexis 2011). Unless Congress clearly indicates otherwise, a federal agency may not "alter the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001). All water within the State of Wyoming is owned by the State of Wyoming. Wyo. Const. art. 8, § 1. The BLM may not exercise regulatory authority over that water because no statute, regulation, or other law clearly evidences a congressional intent to give that authority to the BLM. See *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

**Summary:**

The BLM does not have the authority to regulate water quality and water resource concerns that are the purview of either EPA or the State of Wyoming as part of this planning process.

The requirements for development of groundwater monitoring programs and protocols in site-specific oil and gas project approvals violates NEPA and FLPMA because they were not included in the Draft RMP/EIS.

**Response:**

The BLM's authority to protect and manage water resources derives from the FLPMA. Section 102 of FLPMA states in part that "(a) The Congress declares that it is the policy of the United States that... (8) 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...[emphasis added]." 43 U.S.C. 1701. Furthermore, Section 202 of FLPMA states in part that "(c) In the development and revision of land use plans, the Secretary shall...(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans...[emphasis added]." 43 U.S.C. 1712. In requiring the use of best management practices to reduce pollution and groundwater contamination, controlling dust and surface disturbances, developing water management plants, including requirements for watershed improvement in activity plans, controlling pollution in Class 1 waters, avoiding authorization for activities that cause channel erosion, and taking actions to improve the quality of streams impacted by BLM-permitted activities, the BLM is acting under its Congressionally declared policy to protect the quality of water resources and to ensure compliance with various pollution control laws. Lander PRMP/FEIS, pages 83 to 84.

Furthermore, the BLM's management of water resources as set forward in this RMP does not contravene or alter the authority, nor diminish the primacy of the EPA or the State of Wyoming to regulate water quality under the Safe Drinking Water Act, or any other set of regulations or laws regarding water quality. Contrary to the protest, the BLM is not exercising authority over the EPA's Underground Injection Control program. The EPA has authority over the Underground Injection Control program.

Instead, the BLM is exercising its authority to protect the quality of water resources within the Lander RMP planning area through its management of the public lands. The protective measures that BLM has included in this RMP to help protect the quality of water resources are standard mitigation measures that are within BLM's authority under FLPMA to implement. Lander PRMP/FEIS, pages 83 to 84, 313 to 314, 649, 650, 652, 655 to 656. As per the BLM's Land Use Planning handbook, these measures identify desired outcomes such as standards or goals under the Clean Water Act; watersheds or specific soils that may need special protection from the standpoint of human health concerns, ecosystem health, or other public uses; for riparian areas, they identify desired width/depth ratios, streambank conditions, channel substrate conditions, and large woody material characteristics; and they identify area-wide use restrictions or other protective measures to meet Tribal, State, and local water quality requirements. BLM LUP Handbook, Appendix C, page 2.

The PRMP recognizes the NPDES and the WYPDES programs. Lander PRMP/FEIS, page 84. Furthermore, compliance with the Clean Water Act (33 USC 1251) and the Watershed Protection and Flood Prevention Act (16 USC 1001-1009) as well as collaboration with local watershed groups is required by the Planning Handbook H-1601-1 Appendix C, page 3. The BLM also has authority to regulate the discharge of produced water (BLM Onshore Oil and Gas Order #7). The BLM consults with the State when a WYPDES permit is in place. Lander PRMP/FEIS, page 92.

Also, the inclusion of new groundwater monitoring protocols (records 1036 and 1046) in the final EIS does not require supplementation and further public comment and review as these are not substantial changes to the EIS. "Supplementation is not necessary if you make changes in the proposed action that are not substantial (i.e., the effects of the change proposed action are still within the range of effects analyzed in the draft or final EIS)." The BLM NEPA Handbook, page 30. Record 1036 reads as follows: "Integrate soil, groundwater, and surface water management to maintain or improve groundwater and surface water quality. Evaluate the need to require groundwater monitoring as part of site-specific NEPA analysis." Lander PRMP/FEIS, page 84. Adding a measure to evaluate the need to require ground water monitoring is an action that only has direct bearing on the BLM itself. The ultimate decision on whether or not to require monitoring would be evaluated in a subsequent NEPA process for a site specific project in consultation with the WDEQ (MA 1040), including opportunity for public involvement and comment.

Furthermore, the Draft RMP had already identified the use of monitoring protocols as an appropriate management tool for management of water resources. "PR: 6.6 Protect and improve groundwater quality and quantity through appropriate measures (e.g., predictive modeling, monitoring, and protection of known water recharge areas) during BLM activities and permitted actions over the life of the plan." Lander DRMP/DEIS, page 67. The effects of monitoring generally were analyzed in the DRMP. Lander DRMP/DEIS, pages 259, 262, 272, 273, 597, 599, 1226, 1231. Particularly, the negative impacts of not requiring monitoring of oil and gas development were noted "Without appropriate site assessment, engineering, mitigation and monitoring, activities associated with oil and gas development and production may have the potential to contaminate ground and surface waters." Lander DRMP/DEIS, page 272. The positive impacts of monitoring were also noted "For example, withdrawals that close areas to surface-disturbing activities or requirements for construction, operation, monitoring, and rehabilitation planning before surface-disturbing activities are initiated would, at a minimum, reduce the potential for adverse impacts to water resources from surface-disturbing activities." Lander DRMP/DEIS, page 599. Including a requirement to evaluate the need to require ground water monitoring is therefore within the scope of effects already identified and analyzed in the DRMP, and not a substantial change requiring additional public comment.

Relatedly, record 1046 reads as follows: "Require project-level NEPA analyses for oil and gas development with project-specific comprehensive groundwater monitoring plans and programs to track potential groundwater impacts as drilling and productions occur. The level of monitoring will depend on the size of the proposed project, the groundwater vulnerability, the target zone of operations, and other site-specific factors." Based on consultation with the Wyoming Governor's Office during consistency review, this language will be modified slightly

in the ROD to state: “In cooperation with stakeholders, implement decisions to prevent degradation of groundwater and surface water quality on a case-by-case basis, utilizing existing watershed plans where possible. Require project-level NEPA analyses for energy development with cooperatively developed project-specific comprehensive groundwater and/or surface water monitoring plans consistent with state and BLM policies and regulations, as appropriate. The level of monitoring will depend on the size of the proposed project, the groundwater vulnerability, the target zone of operations, and other site-specific factors.” Requiring that future oil and gas projects include monitoring plans and programs is not a substantial change. A subsequent NEPA process will allow for public comment and involvement during the development of these monitoring plans and programs, and as each monitoring plan will vary depending on the specific parameters of the project, it is more appropriate to analyze these monitoring plans and programs as part of a subsequent project level NEPA process and not as part of this current higher level planning and NEPA process. Also, as noted earlier, since monitoring was already identified in the DRMP as a an appropriate measure for protecting and improving water quality, and its effects were analyzed, requiring its use in oil and gas development projects is within the scope already defined in the DRMP, and therefore not a substantial change requiring additional public comment.

With regard to the issue of the water testing referenced on pages 313 and 314 of the PRMP/FEIS, the BLM did not base any of the decision in the ROD on the results of these tests. While the information provided in the EIS is correct regarding the EPA’s initial results, the EPA Report is in draft and has not been finalized. The information is from the original testing, and the preliminary nature of the findings are not adequate to inform any BLM management decision. The MA 1036 states that the BLM should "evaluate" the need for baseline and groundwater monitoring. Lander PRMP/FEIS, page 84. This need was identified by the WDEQ report on groundwater vulnerability to surface contamination. Wyoming Department of Environmental Quality Source Water Assessment Project Final Project Report, June 30, 2004.

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## *Social and Economic Interests*

**Issue Number:** PP-WY-Lander-13-01-50

**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project

**Protestor:** Erik Molvar

**Issue Excerpt Text:**

We are concerned that the Socioeconomic analysis as performed did not give BLM decision makers an accurate yardstick for comparison among alternatives. For instance, Alternative B appears to assume not only that there will be no future oil and gas leasing within Core Areas (which is accurate),

but also that there will be no oil and gas development within Core Areas on existing leases. Alternative B has about 1/3 fewer oil and gas wells projected than the other three alternatives. FEIS at 1259; 1534. BLM’s EIS is predicated on the assumption that the agency will honor valid existing rights. These include existing oil and gas leases, which can be explored and developed at any time by operators, and which can be held by production once a well begins producing oil and gas. Comparing FEIS Map 33 (oil and gas leases) with Maps 17 and 20 (fluid mineral potential) and Map 64 (sage grouse Core Areas and

lek buffers under Alternative B), existing mineral leases are currently widespread in Core Areas, and these leases could be (and likely will be) developed pursuant to the stipulations in Alternative B for sage grouse. Included are producing oil fields such as Bison Basin, for example, where 10 APDs were approved by the Lander Field Office in 2012. How many oil and gas wells would be drilled on these leases under Alternative B, and what would be their economic contribution? How many leases are currently held by production or would be held by production over the life of the Plan? The Socioeconomic analysis is silent on these important matters, leading the reader to the conclusion that BLM has failed to consider the economic contribution of wells drilled and producing on existing leases within Core Areas under Alternative B, artificially decreasing the estimated economic output of this alternative.

**Issue Number:** PP-WY-Lander-13-01-51  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**  
Conversely, the Socioeconomic analysis for Alternative D appears to be overestimated, because there is no indication that BLM considered the measures applies within Core Areas under Alternative B (notably the limitation of a mean of one wellsite per square mile in the context of ODCT area). In particular, Alternative D caps wellpad density at one per square mile; was there a corresponding reduction in wells forecast as a result? Indeed, the well totals and economic outputs for minerals are quite similar among Alternatives A, C, and D. FEIS at 1253. Given that Alternative D applies sage grouse Core Area protections while Alternatives A and C do not, and that more than 70% of the Lander Field Office is in sage grouse Core Area, it seems curious that the well numbers and economic outputs are so similar. This apparent source of bias makes the economic difference between

## Summary:

The BLM did not adequately analyze the socioeconomic impacts of leasing within Core Areas, under Alternative B. Additionally, when compared to Alternative B, the socioeconomic analysis for Alternative D appears to be overestimated.

Alternatives B and D appear greater than it actually is.

**Issue Number:** PP-WY-Lander-13-01-52  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**  
Also troubling is the substantial amount of coalbed methane projected for the economic analysis. See FEIS at 1534. Coalbed methane development has ground to a halt statewide, and the initial flush of development has crashed as a result of high production costs relative to conventional natural gas as well as low natural gas market prices. What makes BLM think that the commodity market dynamics will sustain the level of CBM well drilling and production projected in the FEIS economic analysis? These figures appear in need of correction, and this correction would further shrink the economic differences among the alternative options presented in the FEIS.

**Issue Number:** PP-WY-Lander-13-01-53  
**Organization:** Biodiversity Conservation Alliance and Western Watersheds Project  
**Protestor:** Erik Molvar

**Issue Excerpt Text:**  
The economic analysis concerning the contribution of recreation also appears to be biased. While Recreation Visitor Days are presented as the appropriate metric for measuring economic impact, the BLM's analysis appears to consider only Nonresident Recreation Visitor Days. FEIS at 1592. What about the economic contribution of resident RVDs? It would seem to be a safe assumption that most RVDs are resident RVDs, and they have an economic impact on the local economy.



The analysis for the development of coalbed methane is unrealistic and should be reviewed to account for fluctuations in natural gas market prices.

The economic analysis for recreation days should account for impacts from residents, as well as non-residents.

**Response:**

On the issue of whether the FEIS underestimates the economic output of Alternative B, the protestor is correct that the assumptions for analysis in the economic section may overstate the reduction in economic activity under Alternative B because it is assumed that no new oil and gas wells would be drilled and start producing in Core Area (all alternatives assume that existing wells will continue in production). Lander PRMP/FEIS, page 1649. That assumption does not take into consideration new wells on existing leases (as of the publication of the Lander PRMP/FEIS, 24 percent of Core Area was leased) or the economic benefits that would be generated by those new wells.

The economic analysis for Alternative B is adequate, however, for several reasons. As stated in the PRMP/FEIS, the number of wells drilled and completed in the economic impact analysis is based on the Reasonable Foreseeable Development Scenario (RFDS) and the constraints applied under each alternative. Lander PRMP/FEIS, page 1252. Appendix L identifies the assumptions used to estimate the economic impacts associated with oil and gas production. Lander PRMP/FEIS, page 1584 to 1589. Further detail on the number of existing and projected oil and gas wells can be found in Appendix T, Table T.2. Lander PRMP/FEIS, pages 1649 to 1650. When developing a RFDS and associated socioeconomic analysis, it is necessary to make reasonable assumptions, as was done in the Lander PRMP/FEIS. These assumptions are not meant to predict actual future development; rather they provide a framework to inform the analyses. The PRMP/FEIS emphasizes the limited utility of the RFDS to predict future development. Lander PRMP/FEIS, pages 1252-1253. As stated in the PRMP/FEIS, “The economic analysis is based on a set of assumptions that allow the BLM to compare the economic consequences of each alternative. As stated in multiple places, these assumptions are not predictions, ceilings, or caps as to what will occur in the future. Some of this is well known, such as the amount of acres of disturbance needed to accommodate an oil rig to drill a well to a specific depth. However, much is not known, such as which zones are targeted for development.” Lander PRMP/FEIS, page 1252. While the economic benefit associated with oil and gas development may be understated in Alternative B because some of the leased areas in Core Area might be developed in the future and produce revenue, the economic benefit of recreation including hunting and wildlife viewing and livestock grazing are correspondingly overstated, since they are, in large part, a function of land not being developed for oil and gas. Lander PRMP/FEIS, pages 1591 and 1593. Thus, the analysis of recreational activities and other sectors adds to the overall projected economic conditions for this alternative. Lander PRMP/FEIS, page 1253.

In regards to the economic analysis for Alternative D, the protestor is correct that there was no reduction in projected oil and gas generated revenue because of the Greater Sage-Grouse conservation measure which limits energy disturbance to an average of one energy disturbance per 640 acres (1 square mile). It is reasonable to assume that this conservation measure would not limit development in the Lander planning area because most of the Core Area where the management is applied has low to no oil and gas potential (Maps 17 and 20). In these areas, the RFDS projected from 0 to 20 wells per township (36 square miles). Lander PRMP/FEIS, page 345. Even in areas with moderate potential, the projection of 20-100 wells per township when averaged over a project area was not anticipated to meaningfully reduce development. It is also important to note, the decision to select Greater Sage-Grouse management in Core Area as the preferred alternative (Alternative D) was a result of the adoption of the Core Area Strategy and not because of differences in the economic projections between alternatives. Lander PRMP/FEIS, pages 34 to 40.

Regarding natural gas market prices, the protestor correctly notes that methane prices fluctuate greatly which in turn results in lower economic benefit both by the lowered gas revenue and the suppression of new drilling activity. Accordingly, the Lander PRMP/FEIS notes that price fluctuation is a factor that limits the utility of the RFDS. Lander PRMP/FEIS, page 1252. The PRMP/FEIS also acknowledges that the projected coalbed natural gas development in the planning area ranges from moderate to none. Lander PRMP/FEIS, page 347. Additionally, the PRMP/FEIS notes that the market prices for oil and gas activities fluctuate. Lander PRMP/FEIS, page 349. As previously stated, the economic analysis is based on a set of assumptions, some of which depend on factors the BLM cannot definitively predict, such as the future price of methane and petroleum. Appendix L of the Lander PRMP/FEIS provides the best available data during the development of the Lander PRMP/FEIS. Lander PRMP/FEIS, pages 1584 to 1589.

The analysis of Recreation Visitor Days (RVD) is not biased and clearly explains why the PRMP/FEIS analyzed only Nonresident Recreation Visitor Days. The PRMP/FEIS states that the reason for excluding the economic analysis for residents in the area is based on the “assumption that expenditures of residents would occur in the region regardless of the BLM’s actions that impact recreational opportunities.” Lander PRMP/FEIS, page 1592. Additionally, the PRMP/FEIS states that it is the recreation patterns of nonresidents that would account for noticeable fluctuations in the local region’s economies. Lander PRMP/FEIS, page 1592.

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## *Oil and Gas Leasing*

**Issue Number:** PP-WY-Lander-13-02-10

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

The imposition of timing limitations on existing leases is also inconsistent with the contractual rights conveyed to Devon. Oil and gas leases, like those owned by Devon, are real property rights. *Winkler v. Andrus*, 614 F.2d 707, 712 (10th Cir. 1980); *Union*

*Oil v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975). Further, Devon's Leases are contracts that cannot be unilaterally modified by the BLM. See *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000) (recognizing that federal oil and gas leases are contracts and that the federal government's breach of lessee's right to explore for and develop oil and gas entitles lessee to refund); *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006-7 (10th Cir. 2001) (noting that the Tenth Circuit has long held that federal oil and gas leases are contracts) *rev'd* on other grounds, *BP America Production Co. v. Burton*, 549 U.S. 84 (2006). The BLM cannot unilaterally modify the existing lease contract.

Under well-established precedent, after BLM accepts the bid, the lessee fully pays for the lease, and a lease is issued, a contract exists between the lessee and BLM based solely on those identified terms and conditions. See e.g., *Coastal States Energy Co.*, 80 IBLA 274, 279 (1984). BLM may not later amend the lease with terms not identified in the sale notice and not part of the contract subject to the bidding process. A retroactive amendment of lease terms by BLM would be a unilateral breach of the lease contract. In addition, "[t]o hold otherwise would ... violate the equal opportunity for all bidders to compete on a common basis for leases." *Anadarko Prod. Co.*, 66 IBLA 174, 176 (1982), *aff'd*, Civ. No. 82-1278C (D.N.M. 1983).

As a federal lessee, Devon has a legal right to occupy the surface to explore for, produce, and develop oil and gas resources on its leases. See *Pennaco Energy v. United States Dep't of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004); 43 C.F.R. § 3162.1(a) (requiring a federal lease to maximize production). Courts have recognized that once the BLM has issued an oil and gas lease conveying the right to access and develop the leasehold, the BLM cannot later impose unreasonable mitigation measures that take away those rights. See *Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (BLM can impose only "reasonable mitigation measures ... to minimize adverse impacts ... to the extent consistent with lease rights granted").

**Issue Number:** PP-WY-Lander-13-02-2

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

Devon protests the BLM's decision to impose timing restrictions on oil and gas operations and maintenance activities, including when such activities occur on existing and producing federal oil and gas leases. See Proposed Lander RMP, Record No. 4056, pg. 117, § 4.2.4.5.3, pg. 716; see also Appendix J. Devon objected to this aspect of the Draft Lander RMP in its comments on the Draft EIS for the Lander RMP. Devon Comments, pgs. 3-4, 24-26, 45-46; see also PLAIPAW Comments, pgs. 23-24.

Federal oil and gas leases constitute valid existing rights. *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 (D.C. Cir. 1983); *Solicitor's Opinion M-36910*, 88 J.D. 909,912 (1981). As development operations are proposed in the future, the BLM cannot attempt to impose stipulations or conditions of approval ("COAs") on Devon's existing leases that are inconsistent with its contractual rights. 43 C.F.R. § 3101.1-2. In sharp contrast to the terms of Devon's existing leases and the express provisions of the current Lander RMP, the BLM intends to impose timing limitations on routine oil and gas operations and maintenance activities. See Proposed Lander RMP, Record No. 4056, pg. 117, § 4.2.4.5.3, pg. 716; Appendix J. The addition of timing restrictions to operations and maintenance activities could have a profound adverse impact on Devon's operations in the Lander Field Office. This change is a dramatic departure from the existing Lander RMP, which specifically does not impose timing limitations on operations and maintenance activities. See Devon Attachment 5, Final Resource Management Plan/Environmental Impact Statement for the Lander Field Office (1986), Appd. 2. The current Lander RMP specifically notes timing limitations will not be applied to maintenance and operations of producing wells. *Id.* The BLM's proposal to impose seasonal restrictions on "operation and maintenance" activities is particularly troubling because the agency has not clearly defined the phrase "operation and maintenance" activities or specified the types of activities that will now be subject to seasonal limitations.

As the BLM is aware, many types of routine oil and gas operations and maintenance activities occur year-round on active, producing oil and gas wells. Recognizing the routine nature of these activities, many do not even require BLM approval prior to the operations. See 43 C.F.R. § 3162.3-2 (subsequent well operations). Under the current BLM regulations, no prior approval, and thus no timing limitations, are imposed upon routine activities

including routine fracturing or acidizing jobs, recompletions in the same interval, routine well maintenance, or bottom hole pressure surveys. 43 C.F.R. § 3162.3-2(b), (c). The Proposed Lander RMP does not indicate whether or if it intends to impose timing limitations on these routine activities in apparent violation of the BLM's regulations. Further, the BLM has not indicated whether it intends to impose timing limitations on other routine subsequent operations, including those that require prior approval. 43 C.F.R. § 3162.3-2(a). In the Lander Resource Area, the BLM routinely approved subsequent well operations quickly and efficiently and without the imposition of timing limitations. Devon is concerned the BLM intends to prohibit such activities during certain portions of the year, which may strand production, limit operational efficiencies, and otherwise reduce development potential. In certain circumstances, the inability to quickly conduct repairs and other operations on producing wells may even lead to loss of a well or permanent damage to a reservoir. The ability to conduct repair and maintenance operations is also a significant safety and environmental issue as when issues arise, operators need to be able to quickly respond to the situation. Forcing operators to comply with seasonal limitations for these otherwise routine issues may create or exacerbate significant safety and environmental issues.

The BLM has not justified this significant departure from the existing Lander RMP or the terms and provisions of Devon's existing leases. Devon protests the BLM's imposition of timing limitations on operation and maintenance activities for two primary reasons. First, as described in more detail below, the BLM does not have the authority to impose timing stipulations on Devon's valid existing leases under the Federal Land Policy and Management Act of 1976 (FLMPA). Such leases were issued pursuant to the terms of the existing RMP, or prior to said RMP and the enactment of FLPMA, and the BLM cannot modify the terms of those leases through an RMP revision. Second, Devon's leases constitute valid existing contracts that cannot be unilaterally modified by the BLM.

**Issue Number:** PP-WY-Lander-13-02-35

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

In the Proposed Lander RMP, the BLM indicates that

it intends to require unitization of federal oil and gas leases when necessary for proper development and operation of an area and in order to require phased or clustered development as a means of minimizing adverse impacts to resources. Proposed Lander RMP, Record No. 2004, pg. 90. Devon protests the inclusion of this management action because (1) it was not included in the Draft EIS for the Lander RMP, (2) the provisions are inconsistent with Devon's existing lease rights, and (3) it is inappropriate and impractical to utilize unitization to slow down or modify development practices. First, the proposal to require unitization was not included in the Draft EIS for the Lander RMP. For the reasons set forth in Part II.B. of this Protest, it was inappropriate for the BLM to include new and radically different management practices in the Final EIS and Proposed Lander RMP. Doing so deprives the public of the opportunity to comment on the proposals. The Director should remand this portion of the Proposed Lander RMP back to the Field Office for additional public comment.

Second, as set forth in Part I of this Protest, the BLM cannot impose new requirements on Devon's existing leases. Requiring operators to join federal units is a radical mitigation measure because it requires those lessees not designated as the unit operator of the federal exploratory unit to surrender control over development operations to another party. 43 C.F.R. § 3186.1; Law of Federal Oil and Gas Leases, Chapter 18 Unitization, § 18.03[2][b][ii], Rocky Mountain Mineral Law Foundation (Rel. 45-8/2010 Pub.515). The BLM should not impose such a significant mitigation measure on existing leases.

Third, requiring unitization for the protection of resources other than oil and gas is not appropriate or practical. The BLM Draft Handbook on Unitization recognizes that a central reason for unitization is the promotion of exploration in unproven areas. See BLM Draft Unitization Handbook 3180, § .1. The ISLA has determined that the primary purpose of unitization is the maximization of oil production and revenue for the federal government, not the protection of other resources. Marathon Oil Co., 16 ISLA 298, 310 -311 (1974). Requiring unitization for other resource protection is not consistent with the purposes of federal unitization. Finally, requiring unitization is simply not practical given the presence of private and State of Wyoming leases within the planning area. Large portions of the Planning Area with significant potential for oil and gas resources contain significant private lands and minerals. See Proposed Lander RMP, Maps 2, 33. The BLM does

not have the authority to require non-federal lease owners to enter federal unit agreements. *Biodiversity Conservation Alliance v. Bureau of Land Management*, 608 F.3d 709, 716 (2010); 43 C.F.R. § 3181.3. For all of the foregoing reasons, the BLM should remove Record No. 2004 from the Proposed Lander RMP.

**Issue Number:** PP-WY-Lander-13-02-37

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

Finally, the proposed mitigation measure is not consistent with Devon's existing lease rights and is otherwise impractical. As set forth in Part LA and B. of this Protest, the BLM cannot impose new or unreasonable mitigation measures on existing leases. For this reason alone, the BLM cannot and should not impose the new noise limitation. Further, the BLM's proposal is likely technically and economically impossible. The BLM does not have the authority to impose uneconomic or technically impossible mitigation measures. *Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (BLM can impose only "reasonable mitigation measures ... to minimize adverse impacts ... to the extent consistent with lease rights granted").

**Issue Number:** PP-WY-Lander-13-02-4

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

The proposed addition of timing limitations on existing leases is impermissible because it exceeds the BLM's legal authority under FLPMA. By attempting to impose timing restrictions on routine oil and gas operation and maintenance activities, the BLM is proposing to modify Devon's existing lease rights through its land use planning process. Such a result is not permissible because the authority conferred in FLPMA is expressly made subject to valid existing rights pursuant to FLPMA, all BLM actions, such as authorization of Resource Management Plans, are "subject to valid existing rights." 43 U.S.C. § 1701 note (h); see also 43 C.F.R. § 1610.5-3(b) (BLM is required to recognize valid existing lease rights). Thus, pursuant to federal statute, the BLM cannot terminate, modify, or alter any valid or existing property rights. *Id.* Devon

commented on the BLM's inability to modify existing lease rights through the land use planning process. *Devon Comments*, pgs. 3 -4.

BLM cannot deprive Devon of its valid and existing lease rights either directly or indirectly through the RMP revision. When it enacted FLPMA, Congress made it clear that nothing within the statute, or in the land use plans developed under FLPMA, was intended to terminate, modify, or alter any valid or existing property rights. See 43 U.S.C. § 1701. Thus, an RMP prepared pursuant to FLPMA, after lease execution, is likewise subject to existing rights. See *Colorado Environmental Coal. et al.*, 165 IBLA 221, 228 (2005). The Proposed Lander RMP, when revised, cannot defeat or materially restrain Devon's valid and existing rights to develop its leases through unreasonable COAs or other means. *Colorado Environmental Coal. et al.*, 165 IBLA 221, 228 (2005) (citing *Colorado Environmental Coal.*, 135 IBLA 356, 360 (1996) *aff'd*, *Colorado Environmental Coal. v. Bureau of Land Management*, 932 F. Supp. 1247 (D. Colo. 1996); *Mitchell Energy Corp.*, 68 IBLA 219, 224 (1982) (citing Solicitor's Opinion, M-36910, 88 ID. 908, 913 (1981)).

Federal courts have interpreted the phrase "valid existing rights" to mean that federal agencies cannot impose stipulations or COAs that make development on existing leases either uneconomic or unprofitable. See *Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979); see also *Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988). BLM cannot prohibit a lessee from developing its leases. *National Wildlife Federation, et al.*, 150 IBLA 385, 403 (1999). Only Congress has the right to completely prohibit development once a lease has been issued. *Western Colorado Congress*, 130 IBLA 244, 248 (1994).

**Issue Number:** PP-WY-Lander-13-02-5

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

In order to ensure the protection of existing lease rights as federal law requires, the BLM promulgated policies regarding the contractual rights granted in an oil and gas lease. First, the BLM's Planning Manual specifically mandates the protection of existing lease rights. "All decisions made in land use plans, and subsequent implementation decisions, will be subject to valid existing rights. This includes, but is not limited to, valid existing rights associated with oil

and gas leases...." See BLM Manual 1601 -Land Use Planning, 1601.06.0 (Rel. 1-1666 11/22/00). The BLM must comply with the provisions of its planning handbook and recognize existing rights. Any attempts to modify Devon's existing rights would violate the terms of its leases with the BLM and the BLM's own policies.

**Issue Number:** PP-WY-Lander-13-02-7

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

The BLM cannot impose COAs that are inconsistent with Devon's existing, contractual lease rights and the BLM cannot restrict operations to the point that economic development on a lease is precluded. *Sierra Club v. Hodel*, 848 F.2d 1068, 1087-88 (10th Cir. 1988); *Colorado Environmental Coalition*, 165 ISLA 221, 228 (2005) (determining that an RMP may not constrain restrictions on the exercise of existing oil and gas leases that defeat or materially restrain existing rights."); *Colorado Open Space Council*, 73 IBLA 226, 229 (1983) (holding that regulation of existing oil and gas leases may not "unreasonably interfere" with the rights previously conveyed in an oil and gas lease). Despite these restrictions on the BLM's authority, the BLM openly admits that the imposition of seasonal limitations would adversely impact oil and gas operations" particularly with regard to the limitation on O&M [operation and maintenance activities]. Proposed Lander RMP, pg. 716.

**Issue Number:** PP-WY-Lander-13-02-8

**Organization:** Devon Energy Corporation

**Protestor:** Randy Bolles

**Issue Excerpt Text:**

The Lander RMP also cannot defeat or materially restrain Devon's valid and existing rights to develop its leases through the broad application of COAs or other means on all future activities. See *Colorado Environmental Coal, et al.*, 165 IBLA 221, 228 (2005) (citing *Colorado Environmental Coal.*, 135 IBLA 356, 360 (1996) *aff'd*, *Colorado Environmental Coal. v. Bureau of Land Management*, 932 F. Supp. 1247 (D. Colo. 1996). The BLM often cites a relatively recent decision from the Interior Board of Land Appeals ("IBLA") for the proposition that the agency can impose COAs on existing leases,

including the type of seasonal limitations proposed for operation and maintenance activities. *Yates Petroleum Corp.*, 176 IBLA 144 (2008). The Yates decision does not stand for the proposition that BLM can impose COAs whenever it deems necessary or in broad programmatic documents such as the CD-C DEIS. Rather, in Yates, the IBLA merely affirmed the imposition of an additional COA based only upon site-specific information including recent and directly applicable scientific research. Yates, 176 IBLA at 157; see also William P. Maycock, 177 IBLA I, 16-17 (2009). The Yates decision does not authorize the BLM to ignore relevant lease terms, the BLM regulations at 43 C.F.R. § 3101.1-2, or the rights previously conveyed to Devon. The Yates decision certainly does not authorize the BLM to impose broad, comprehensive timing restrictions on existing leases through a revised land use plan. Further, BLM must recall that it cannot impose new, unreasonable mitigation requirements on existing leases. Courts have recognized that once the BLM has issued an oil and gas lease conveying the right to access and develop the leasehold, the BLM cannot later impose unreasonable mitigation measures that take away those rights. See *Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (BLM can impose only "reasonable mitigation measures ... to minimize adverse impacts ... to the extent consistent with lease rights granted").

**Issue Number:** PP-WY-Lander-13-03-11

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

The imposition of timing limitations on existing leases is also inconsistent with the contractual rights conveyed to Encana. Oil and gas leases, like those owned by Encana, are real property rights. *Winkler v. Andrus*, 614 F.2d 707, 712 (10th Cir. 1980); *Union Oil v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975). Further, Encana's Leases are contracts that cannot be unilaterally modified by the BLM. See *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000) (recognizing that federal oil and gas leases are contracts and that the federal government's breach of lessee's right to explore for and develop oil and gas entitles lessee to refund); *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006-7 (10th Cir. 2001) (noting that the Tenth Circuit has long held that federal oil and gas leases are contracts) received on other grounds, *BP America Production Co. v. Burton*, 549 U.S. 84 (2006). The

BLM cannot unilaterally modify the existing lease contract.

Under well-established precedent, after BLM accepts the bid and the lessee fully pays for the lease, a contract exists between the lessee and BLM based solely on those identified terms and conditions. See e.g., *Coastal States Energy Co.*, 80 IBLA 274, 279 (1984). BLM may not later amend the lease with terms not identified in the sale notice and not part of the contract subject to the bidding process. A retroactive amendment of lease terms by BLM would be a unilateral breach of the lease contract. In addition, "[t]o hold otherwise would... violate the equal opportunity for all bidders to compete on a common basis for leases." *Anadarko Prod. Co.*, 66 IBLA 174, 176 (1982), *aff'd*, Civ. No. 82-1278C (D.N.M. 1983).

As a federal lessee, Encana has a legal right to occupy the surface to explore for, produce, and develop oil and gas resources on its leases. See *Pennaco Energy v. United States Dep't of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004); 43 C.F.R. § 3162.1(a) (requiring a federal lessee to maximize production). Courts have recognized that once the BLM has issued an oil and gas lease conveying the right to access and develop the leasehold, the BLM cannot later impose unreasonable mitigation measures that take away those rights. See *Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (ELM can impose only "reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted").

**Issue Number:** PP-WY-Lander-13-03-3

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Encana protests the BLM's decision to impose timing restrictions on oil and gas operations and maintenance activities, including when such activities occur on existing and producing federal oil and gas leases. See Proposed Lander RMP, Record No. 4056, pg. 117, § 4.2.4.5.3, pg. 716; see also (status) Appendix I. Encana objected to this aspect of the Draft Lander RMP in its comments on the Draft EIS for the Lander RMP. Encana Comments, pgs. 4-5, 22 -23, 28 -29, 54; see also PLAJPAAW Comments, pgs. 23 -24.

Federal oil and gas leases constitute valid existing rights. *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 (D.C. Cir. 1983); Solicitor's Opinion M-36910, 88 1.0. 909, 912 (1981). As development operations are proposed in the future, the BLM cannot attempt to impose stipulations or conditions of approval ("COAs") on Encana's existing leases that are inconsistent with its contractual rights. 43 C.F.R. § 3101.1-2. In sharp contrast to the terms of Encana's existing leases and the express provisions of the current Lander RMP, the BLM intends to impose timing limitations on routine oil and gas operations and maintenance activities. See Proposed Lander RMP, Record No. 4056, pg. 117, § 4.2.4.5.3, pg. 716; Appendix 1. The addition of timing restrictions to operations and maintenance activities could have a profound adverse impact on Encana's operations in the Lander Field Office. This change is a significant departure from the existing Lander RMP, which specifically does not impose timing limitations on operations and maintenance activities. See Encana Attachment 5, Final Resource Management Plan Environmental Impact Statement for the Lander Field Office (1986), Appd. 2. The current Lander RMP specifically notes timing limitations will not be applied to maintenance and operations of producing wells. *Id.* The BLM's proposal to impose seasonal restrictions on "operation and maintenance" activities is particularly troubling because the agency has not defined the phrase "operation and maintenance" activities or specified the types of activities that will now be subject to seasonal limitations.

As the BLM is aware, many types of routine oil and gas operations and maintenance activities occur year-round on active, producing oil and gas wells. Recognizing the routine nature of these activities, many do not even require BLM approval prior to the operations. See 43 C.F.R. § 3162.3-2 (subsequent well operations). Under the current BLM regulations, no prior approval, and thus no timing limitations, are imposed upon routine activities including routine fracturing or acidizing jobs, recompletions in the same interval, routine well maintenance, or bottom hole pressure surveys. 43 C.F.R. § 3162.3-2(b), (c). The Proposed Lander RMP does not indicate whether it intends to impose timing limitations on these routine activities, which limitations would violate BLM's regulations. Further, the BLM has not indicated whether it intends to impose timing limitations on other routine subsequent operations, including those that require prior approval. 43 C.F.R. § 3162.3-2(a). In the Lander Resource Area, the BLM routinely approved subsequent well operations quickly and efficiently and without the imposition of timing limitations. Encana is concerned the BLM

intends to prohibit such activities during certain portions of the year, which may strand production, limit operational efficiencies, and otherwise reduce development potential. In certain circumstances, the inability to quickly conduct repairs and other operations on producing wells may even lead to loss of a well or permanent damage to a reservoir.

The BLM has not justified this significant departure from the existing Lander RMP or the terms and provisions of Encana's existing leases. Encana protests the BLM's imposition of timing limitations on operation and maintenance activities for two primary reasons. First, as described in more detail below, the BLM does not have the authority to impose timing stipulations on Encana's valid existing leases under the Federal Land Policy and Management Act of 1976 (FLMPA). Such leases were issued pursuant to the terms of the existing RMP, or prior to the RMP and the enactment of FLPMA, and the BLM cannot modify the terms of those leases through an RMP revision. Second, Encana's leases constitute valid existing contracts that cannot be unilaterally modified by the BLM.

**Issue Number:** PP-WY-Lander-13-03-42

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

In the Proposed Lander RMP, the BLM indicates that it intends to require unitization of federal oil and gas leases when necessary for proper development and operation of an area and in order to require phased or clustered development. Proposed Lander RMP, Record No. 2004, pg. 90. Encana protests the inclusion of this management action because (1) it was not included in the Draft EIS for the Lander RMP, (2) the provisions are inconsistent with Encana's existing lease rights, and (3) it is inappropriate and impractical to utilize unitization to slow down or modify development practices. Encana commented on wildlife mitigation measures and phased development in its comments. Encana Comments, pgs. 21-26, 28, 32, 44 -47, 56 -57. First, the proposal to require unitization was not included in the Draft EIS for the Lander RMP. For the reasons set forth in Part II.B. of this Protest, it was inappropriate for the BLM to include new and radically different management practices in the Final EIS and Proposed Lander RMP. Doing so deprives the public of the opportunity to comment on the proposals. The Director should remand this portion of

the Proposed Lander RMP back to the Field Office for additional public comment.

Second, as set forth in Part I of this Protest, the BLM cannot impose new requirements on Encana's existing leases. Requiring operators to join federal units is a radical mitigation measure because it requires those lessees not designated as the unit operator of the federal exploratory unit to surrender control over development operations to another party. 43 C.F.R. § 3186.1; Law of Federal Oil and Gas Leases, Chapter 18 Unitization, § 18.03[2][b][ii], Rocky Mountain Mineral Law Foundation (Rel. 45-8/2010 Pub. 515). The BLM should not impose such a significant mitigation measure on existing leases. Third, requiring unitization for the protection of resources other than oil and gas is not appropriate or practical. The BLM Draft Handbook on Unitization recognizes that a central reason for unitization is the promotion of exploration in unproven areas. See BLM Draft Unitization Handbook 3180, § .1. The IBLA has determined that the primary purpose of unitization is the maximization of oil production and revenue for the federal government, not the protection of other resources. Marathon Oil Co., 16 IBLA 298,310 -311 (1974). Requiring utilization for other resource protection is not consistent with the purposes of federal unitization. Finally, requiring unitization is simply not practical given the presence of private and State of Wyoming leases within the planning area. Large portions of the Planning Area with significant potential for oil and gas resources contain significant private lands and minerals. See Proposed Lander RMP, Maps 2, 33. The BLM does not have the authority to require non-federal lease owners to enter federal unit agreements. Biodiversity Conservation Alliance v. Bureau of Land Management, 608 F.3d 709, 716 (2010); 43 C.F.R. § 3181.3. For all of the foregoing reasons, the BLM should remove Record No. 2004 from the Proposed Lander RMP.

**Issue Number:** PP-WY-Lander-13-03-45

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

Finally, the proposed mitigation measure is not consistent with Encana's existing lease rights and is otherwise impractical. As set forth in Part I.A and B. of this Protest, the BLM cannot impose new or unreasonable mitigation measures on existing leases. For this reason alone, the BLM cannot and should not



impose the new noise limitation. Further, the BLM's proposal is likely technically and economically impossible. The BLM does not have the authority to impose uneconomic or technically impossible mitigation measures. *Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (BLM can impose only "reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted").

**Issue Number:** PP-WY-Lander-13-03-5

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

The proposed addition of timing limitations on existing leases is impermissible because it exceeds the BLM's legal authority under FLPMA. By attempting to impose timing restrictions on routine oil and gas operation and maintenance activities, the BLM is proposing to modify Encana's existing lease rights through its land use planning process. Such a result is not permissible because the authority conferred in FLPMA is expressly made subject to valid existing rights pursuant to FLPMA; all BLM actions, such as authorization of Resource Management Plans, are "subject to valid existing rights." 43 U.S.C. § 1701 note (h); see also 43 C.F.R. § 1610.5-3(b) (BLM is required to recognize valid existing lease rights). Thus, pursuant to federal statute, the BLM cannot terminate, modify, or alter any valid or existing property rights. *Id* Encana commented on the BLM's inability to modify existing lease rights through the land use planning process. Encana Comments, pgs. 3 -4.

BLM cannot deprive Encana of its valid and existing lease rights either directly or indirectly through the RMP revision process. When it enacted FLPMA, Congress made it clear that nothing within the statute, or in the land use plans developed under FLPMA, was intended to terminate, modify, or alter any valid or existing property rights. See 43 U.S.C. § 1701. Thus, an RMP prepared pursuant to FLPMA, after lease execution, is likewise subject to existing rights. See *Colorado Environmental Coal., et al.*, 165 IBLA 221, 228 (2005). The Proposed Lander RMP, when revised, cannot defeat or materially restrain Encana's valid and existing rights to develop its leases through unreasonable COAs or other means. *Colorado Environmental Coal., et al.*, 165 IBLA 221, 228 (2005) (citing *Colorado Environmental Coal.*, 135 IBLA 356, 360 (1996) *aff'd*, *Colorado Environmental*

*Coal. v. Bureau of Land Management*, 932 F. Supp. 1247 (D. Colo. 1996)); *Mitchell Energy Corp.*, 68 IBLA 219, 224 (1982) (citing Solicitor's Opinion, M-3691O, 88 ID. 908, 913 (1981)).

Federal courts have interpreted the phrase "valid existing rights" to mean that federal agencies cannot impose stipulations or COAs that make development on existing leases either uneconomic or unprofitable. See *Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979); see also *Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988). BLM cannot prohibit a lessee from developing its leases. *National Wildlife Federation, et al.*, 150 IBLA 385, 403 (1999). Only Congress has the right to completely prohibit development once a lease has been issued. *Western Colorado Congress*, 130 IBLA 244, 248 (1994).

**Issue Number:** PP-WY-Lander-13-03-6

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

In order to ensure the protection of existing lease rights as federal law requires, the BLM promulgated policies regarding the contractual rights granted in an oil and gas lease. The BLM's Planning Manual specifically mandates the protection of existing lease rights. "All decisions made in land use plans, and subsequent implementation decisions, will be subject to valid existing rights. This includes, but is not limited to, valid existing rights associated with oil and gas leases...." See BLM Manual 1601 -Land Use Planning, 1601.06.G (Rel. 1-1666 11/22/00). The BLM must comply with its planning handbook and recognize existing rights. Any attempts to modify Encana's existing rights would violate the terms of its leases with the BLM and the BLM's own policies.

**Issue Number:** PP-WY-Lander-13-03-8

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

The BLM cannot impose COAs that are inconsistent with Encana's existing, contractual lease rights and the BLM cannot restrict operations to the point that economic development on a lease is precluded. *Sierra Club v. Hodel*, 848 F.2d 1068, 1087-88 (10th Cir. 1988); *Colorado Environmental Coalition*, 165 IBLA 221, 228 (2005) (determining that an RMP may not

constrain restrictions on the exercise of existing oil and gas leases that defeat or materially restrain existing rights."); Colorado Open Space Council, 73 IBLA 226, 229 (1983) (holding that regulation of existing oil and gas leases may not "unreasonably interfere" with the rights previously conveyed in an oil and gas lease). Despite these restrictions on the BLM's authority, the BLM openly admits that the imposition of seasonal limitations would adversely impact oil and gas operations "particularly with regard to the limitation on O&M [operation and maintenance activities]." Proposed Lander RMP, pg. 716.

**Issue Number:** PP-WY-Lander-13-03-9

**Organization:** Encana Oil and Gas Inc.

**Protestor:** John Jordan

**Issue Excerpt Text:**

The Lander RMP also cannot defeat or materially restrain Encana's valid and existing rights to develop its leases through the broad application of COAs or other means on all future activities. See Colorado Environmental Coal, et al., 165 IBLA 221, 228 (2005) (citing Colorado Environmental Coal., 135 IBLA 356, 360 (1996) aff'd, Colorado Environmental Coal. v. Bureau of Land Management, 932 F. Supp. 1247 (D. Colo. 1996). The BLM often cites a relatively recent decision from the Interior Board of Land Appeals ("IBLA") for the proposition that the agency can impose COAs on existing leases, including the type of seasonal limitations proposed for operation and maintenance activities. Yates Petroleum Corp., 176 IBLA 144 (2008). The Yates decision does not stand for the proposition that BLM can impose COAs whenever it deems necessary or in broad programmatic documents such as the Lander RMP. Rather, in Yates, the IBLA merely affirmed the imposition of an additional COA based only upon site-specific information including recent and directly applicable scientific research. Yates, 176 IBLA at 157; see also William P. Maycock, 177 IBLA 1, 16-17 (2009). The Yates decision does not authorize the BLM to ignore relevant lease terms, the BLM regulations at 43 C.F.R. § 3101.1-2, or the rights previously conveyed to Encana. The Yates decision furthermore does not authorize the BLM to impose

broad, comprehensive timing restrictions on existing leases through a revised land use plan. And, BLM cannot impose new, unreasonable mitigation requirements on existing leases. Courts have recognized that once the BLM has issued an oil and gas lease conveying the right to access and develop the leasehold, the BLM cannot later impose unreasonable mitigation measures that take away those rights. See Conner v. Burford, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (BLM can impose only "reasonable mitigation measures ... to minimize adverse impacts ... to the extent consistent with lease rights granted").

**Issue Number:** PP-WY-Lander-13-07-6

**Organization:** Fremont County Board of County Commissioners

**Protestor:** Douglas Thompson

**Issue Excerpt Text:**

Fremont County also protests the Beaver Rim MLP area designation, opposition that we addressed in our formal comments on the Draft RMP. Our opposition is based on the understanding that this designation would be a redundant level of analysis which would result in additional permitting constraints that will increase development and leasing costs thereby reducing Fremont County's revenues by creating an unattractive regulatory environment. However, after coordination with the Lander Field Office staff, and discussions with the local conservation community in Fremont County, we believe the Beaver Rim MLP could be acceptable if it is proposed as a front-loaded environmental analysis, which would streamline future leasing and development. As it is currently written in the Proposed RMP, this concept of using the MLP as a front-loaded environmental analysis is not clear. Instead, as the MLP is currently described, it appears to be a redundant level of costly regulation and the beneficial aspects to industry are not evident. We reference this item to section 4.2.4.3.5.2. We request that the BLM re-word the intention and purpose of the Beaver Rim MLP area designation in order to make it clear that the MLP will be used as an environmental analysis that will streamline future leasing and development.

**Summary:**

The BLM cannot abrogate the valid existing rights of oil and gas lessees or impose unreasonable or impractical mitigation measures that it has not previously disclosed during this NEPA process, which may deny valid existing rights.

The concept of the Master Leasing Plan (MLP) is not clearly described in the PRMP/FEIS.

**Response:**

All BLM decisions are subject to valid existing rights. (43 U.S.C. 1701 (h)) The Lander RMP is no exception. Lander PRMP/FEIS, page 9. “Management actions developed under all alternatives are subject to valid existing rights.” Lander PRMP/FEIS, page 18.

Record 2004 reads in part “Require unitization when deemed necessary for proper development and operation of an area or to facilitate more orderly (e.g., phased and/or clustered) development as a means of minimizing adverse impacts to resources, including greater sage-grouse, so long as the unitization plan adequately protects the rights of all parties, including the United States.” Lander PRMP/FEIS, page 90. This requirement was added between the Draft and Final stages of the NEPA process. However, supplementation of the FEIS is not necessary because this change is not substantial. Agencies are only required to prepare supplements to a draft or final EIS if “The agency makes substantial changes in the proposed action that are relevant to environmental concerns [or] There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 CFR 1502.9 (c)(1). “Supplementation is not necessary if you make changes in the proposed action that are not substantial (i.e., the effects of the changed proposed action are still within the range of effects analyzed in the draft or final EIS).” BLM NEPA Handbook, page 30.

This change is not substantial because it does not have a measureable effect outside the range of those analyzed for the alternatives described in the DRMP/DEIS. Lease Term #4, attached to all oil and gas leases, provides: “Before issuance of lease for lands within an approved unit, the offeror may be required to join the unit (43 CFR 3101.3-1).” The Notice of Competitive Oil and Gas Lease Sale identifies whether the offered lease parcels are within a unit. As stated in the PRMP/FEIS, “Comments submitted on the Draft RMP and EIS fell within the wide range of alternatives analyzed by the BLM. The changes made in the Proposed RMP and Final EIS prompted by the comments do not require a supplemental EIS because they do not include or raise any issues that were outside the range of the alternatives.” Lander PRMP/FEIS, page 17. Requiring unitization “when deemed necessary” means that some future determination must be made to actually implement the unitization, and that determination would require an additional NEPA process to analyze the impacts of the requirement and allow for public involvement and comment. Until that future analysis and decision, it is impossible to know what impact this requirement will have. Also, since this requirement would protect “the right of all parties,” it will not diminish or abrogate any valid existing rights of current or future lessees. Unitization is a management tool. This requirement does not impose it in a specific context, but merely identifies it as an appropriate tool that may in particular circumstances be deemed the appropriate tool to efficiently manage oil and gas development as well as provide protections for the Greater

Sage-Grouse. A determination of whether its use in specific parts of the planning area is practical cannot be made at this time as that would require a specific proposal to analyze. However, two of the major threats to the Greater Sage-Grouse are habitat fragmentation and loss, and non-renewable energy development. COT Report, page 9-0. As unitization can help to limit the footprint of development and limit disturbance during the Greater Sage-Grouse's breeding season, unitization may be an appropriate management tool to help protect the Greater Sage-Grouse from the deleterious impacts of habitat loss and fragmentation and non-renewable energy development within the planning area.

The Lander RMP identifies as one of its goals to "Provide opportunities for the exploration and development of solid and fluid leasable minerals." Lander PRMP/FEIS, page 89. Under the preferred alternative, Alternative D, management of resource development was found to "not adversely impact oil and gas development, and there could be beneficial impacts in the form of increased infrastructure such as roads and powerlines built to support non-oil and gas resource use." Lander PRMP/FEIS, page 716. The management actions identified in the Lander RMP are not designed to stop oil and gas development through the application of overly onerous COAs and stipulations. The Lander RMP is designed to provide a balanced approach that provides for both resource use and resource conservation. While there are some negative impacts from the seasonal limitations and other COAs and stipulations imposed on oil and gas development activities, there are also beneficial impacts on oil and gas development resulting from those management actions. Lander PRMP/FEIS, page 716. The tables in Appendix I of the PRMP identify the routine oil and gas activities that in both Designated Development Areas and in Non-Designated Development Areas will require conditions of approval or stipulations, including timing limitations. Lander PRMP/FEIS, pages 1535 to 1536. The intent is to apply timing limitations to non-emergency routine activities. This management is independent of the subsequent operations of 43 CFR 3162.3-2, which require prior BLM approval and after-the-fact reporting. The RMP/FEIS defines routine operations outside of Designated Development Areas as disruptive activities subject to timing limitations. Lander PRMP/FEIS, page 1536. Routine hydraulic fracturing can involve 20 or 30 tanks of hydraulic fracturing fluid, many trucks and heavy equipment, multiple site visits and can take weeks to complete. These routine activities can be much more disruptive than the original drilling of the well. The majority of subsequent well operations require prior approval because they do not fit into the exceptions identified in 43 CFR 3162.3-2. There is however an exemption for "Emergency and safety situations related to operations and maintenance..." Lander PRMP/FEIS page, 1535.

The Reasonably Foreseeable Development Scenario for the preferred alternative, Alternative D, identifies a similar level of production to the no action alternative, indicating that the COAs and stipulations included in the RMP are not overly onerous, or designed to abrogate valid lease rights. Lander PRMP/FEIS, page 1649 to 1650.

Record 4056 imposes seasonal limitations on surface disturbing activities, including oil and gas maintenance and operation. Seasonal limitations for exploration and development are applied in other management actions. Alternative D reads in part "Outside of [Designated Development Areas (DDAs)], wildlife seasonal protections from surface-disturbing and disruptive activities apply to maintenance and operations actions when the activity is determined to be detrimental to wildlife (see Appendix I, page 1535). Lander PRMP/FEIS, page 117. Since part of the purpose

and need for this plan was to respond to the FWS's determination that the Greater Sage-Grouse was warranted but precluded from listing under the Endangered Species Act, it is appropriate that the BLM include seasonal and other limitations designed to protect the sage-grouse and other species from undue degradation. Lander PRMP/FEIS, page 3. Activities identified in Appendix I as subject to seasonal constraints are those that can be conducted outside of important breeding, nesting, parturition, and wintering periods. Seasonal limitations are intended for those activities that require multiple days to accomplish that could negatively impact wildlife during critical times of the year. Lander PRMP/FEIS, page 1535-1536.

Record 4104 includes four alternatives that limit noise to protect Greater Sage-Grouse breeding and nesting habitat. Lander PRMP/FEIS, page 130. These management actions are consistent with the scientific findings identified in the COT report indicating that noise could contribute to "functional habitat loss" as well as indirect impacts to the sage-grouse. COT Report, pages 9 and 49. The protesting parties have not identified any reasons as to why it would be "technically or economically impossible" to limit noise "with an adequate buffer" as the COT report proposes, and the preferred alternative establishes by limiting "noise sources to 10 dBA above natural ambient noise measured at the perimeter of occupied greater sage-grouse leks from March 1 to May 15." COT Report, page 43 and Lander PRMP/FEIS, page 130.

Finally, the basis of Fremont County's protest is that the Beaver Rim MLP would discourage oil and gas development in the area by adding an additional layer of regulation. In fact, as the Planning for Fluid Mineral Resources Handbook (H-1624-1) makes clear, the MLP analysis should facilitate development by clearly identifying the stipulations and certain conditions of approval that would apply under the lease. Moreover, absent new information or changed circumstances, leases in the area could be offered without additional NEPA analysis since the RMP fully analyzed the site-specific conditions.

The master leasing plan (MLP) process addresses oil and gas leasing at a more focused level than the broader analysis typically conducted for an RMP (but less site-specific than a master development plan for an operator proposed development). The intention of the process is to identify oil and gas decisions to apply to future leasing and development (BLM Planning for Fluid Mineral Resources Handbook H-1624-1 Chapter 5). Resource protections such as riparian and habitat protections and required Best Management Practices identified for the MLP area facilitate resolution of conflicts but also enable "bidders to better identify the resource protection costs associated with development of the lease parcels" (BLM Handbook-1624-1).

Management Action 2022 will be revised to make this point more explicitly.

Management Action 2022 will read in part: "The 150,782 acre Beaver Rim area (Map 135) has been analyzed for site-specific resource conflicts and issues. As a result of that analysis, the following provisions will be applied to oil and gas leases in the Beaver Rim MLP analysis area."

Management Actions 2023-2034 identifies the protections for the analysis area.

These clarifications will be made in the ROD.

## Livestock Grazing

**Issue Number:** PP-WY-Lander-13-04-2  
**Organization:** Wyoming State Grazing Board  
**Protestor:** Dick Loper

**Issue Excerpt Text:**

Page 171, item 6063 -This language in Alternative "D" conveys a willingness of the BLM to discontinue livestock grazing on all or parts of allotments when the grazing permit has been relinquished. The WSGB Protest this language because we can find no authority in BLM grazing Regulations other than documented resource reasons for the BLM to discontinue livestock grazing. The BLM grazing Regulations at Subpart 4110, clearly conveys that BLM will offer livestock ADM's that are available to qualified applicants. The Regulations do not authorize "no use" except for the reasons shown on the grazing permit application.

Page 172, item 6065 -This language would allow extended periods of non-use of active livestock AUM's, without penalty, to "benefit" grouse or other resource values". In 2000, the United States Supreme Court ruled that it was illegal for the BLM to issue "permits not to graze". The portion of the "Rangeland Reform 94" Grazing Regulations that authorized "conservation use" permits was ruled illegal. We Protest the language in the Final Lander RMP that would allow the BLM to authorize by permit, extended periods of non-use of livestock AUM's with no penalty, to benefit grouse or other resource values because this action would effectively, be the same as the intent of "conservation use".

**Issue Number:** PP-WY-Lander-13-04-3  
**Organization:** Wyoming State Grazing Board  
**Protestor:** Dick Loper

**Issue Excerpt Text:**

Page 1082 -In the third paragraph, it conveys that utilization would "likely" be restricted to 30-35% in order to make "significant progress" towards meeting Standards of rangeland health. We Protest this

language because there are six rangeland health standards to be assessed and at least two of these standards have nothing to do with the level of utilization in the area of assessment. In addition, the range science community and many BLM employees recognize that if utilization was not the problem identified in the rangeland health assessment, it is most inappropriate to impose a utilization restriction as a "fix" to a problem that may not be a problem. We also Protest the application of ANY numerical restriction in a Land Use Plan for any resource parameter until such time as that parameter has been identified as a causal factor in not meeting a standard and the BLM range staff has determined on a site by site situation what would be the action to resolve that issue.

**Issue Number:** PP-WY-Lander-13-04-4  
**Organization:** Wyoming State Grazing Board  
**Protestor:** Dick Loper

**Issue Excerpt Text:**

Page 1084 -We Protest the language in the second paragraph that conveys that Alternative "D" would prevent any new range improvements until a "comprehensive grazing strategy", CGS, has been developed by the BLM. Our Protest is based on a lack of definition in the LUP that clearly conveys what is, or is not, considered a CGS by the BLM. Our Protest is also based on the fact that the Lander BLM Field office has many responsibilities that may very well limit their internal ability to develop CGS's in a timely fashion. The LUP and terms and conditions in grazing permits require the permittee to do all he/she can do within their areas of responsibility to meet rangeland standards. A LUP restriction on development of range improvements until the BLM develops a CGS will adversely affect the permittees and the BLM's ability to use this tool to accomplish resource objectives in the livestock, wildlife, and "wild" horse programs.

**Issue Number:** PP-WY-Lander-13-07-8  
**Organization:** Fremont County Board of County Commissioners  
**Protestor:** Douglas Thompson

**Issue Excerpt Text:**

Fremont County also protests the concept of a Comprehensive Grazing Strategy contained within the Proposed RMP. The description of the Comprehensive Grazing Strategy contained within the Proposed RMP does not clearly state how a strategy would be developed. Would a strategy be developed on an allotment, watershed/landscape or field office level? It is also unclear who would be involved in its development and how it would be implemented.

**Issue Number:** PP-WY-Lander-13-08-2  
**Organization:** Lower Wind River Conservation District  
**Protestor:** Gavin Woody

**Issue Excerpt Text:**

Section 2.6 Livestock Grazing Analysis (pg 29 volume 1)

Livestock producers are extremely concerned about the proposed reduction in permitted AUMs. In the Livestock Grazing Analysis, the reduction was based upon historical use (73% of the permitted use) and the idea that livestock grazing utilization should be light (21 to 40%) rather than moderate (41 to 60%). There was no production data used. Only models and theories were used. There was no information included on why livestock producers historically used less than the permitted amount – was it due to range conditions, ranch business changes or BLM decisions? In Chapter 3 (page 481) in the last paragraph, the statement is made “...conditions on the ground have generally not supported authorizing full AUMs.” The intent of the Lander Field Office of the BLM to permanently reduce AUMs “for all allotments without regard to range condition so as to allocate more forage for wildlife and to provide cover” (2.6.2 Implementation; page 30) is completely contrary to goals and objectives set in the Vegetative Alternatives (page 108) and in the Land Resources Livestock Grazing Alternatives (page 170) which were cooperatively discussed and written.

**Issue Number:** PP-WY-Lander-13-08-4  
**Organization:** Lower Wind River Conservation District  
**Protestor:** Gavin Woody

**Issue Excerpt Text:**

Record 6050 (page 170) – the original objective talked about utilizing livestock grazing management actions to improve forage and rangeland health. The additional language in the shaded area talks about adding BMPs to AMPs and permit renewals. The level at which BMPs or additional requirements will be added needs to be clarified.

**Issue Number:** PP-WY-Lander-13-08-5  
**Organization:** Lower Wind River Conservation District  
**Protestor:** Gavin Woody

**Issue Excerpt Text:**

Record 6059 (page 170) – During our cooperating agency meetings, we did not discuss “Comprehensive Grazing Strategies”. It is unclear whether this is an additional plan to an allotment Management Plan or if the Strategies are another level of planning.

**Issue Number:** PP-WY-Lander-13-08-7  
**Organization:** Lower Wind River Conservation District  
**Protestor:** Gavin Woody

**Issue Excerpt Text:**

Record 6063 (page 171) – When allotments are relinquished, they will be closed to grazing. We believe that this is contrary to federal law.

**Issue Number:** PP-WY-Lander-13-12-2  
**Organization:** Herbst Lazy TY Cattle Co.  
**Protestor:** Lois Herbst

**Issue Excerpt Text:**

The private lands are not supposed to be managed by the BLM for sage grouse, but there are too many restrictions on its use if I apply for a permit for a water well, new pipeline, or any infrastructure will have to be approved by BLM or a state agency based on the impact to sage grouse, even on my private land.

## **Summary:**

The BLM's analysis of the impacts of livestock grazing on other resources is inadequate and/or flawed. Specifically, the Lander PRMP/FEIS:

Implies in Alternative B and D that livestock grazing will not be permitted once current permits are relinquished and that the BLM's statement to "benefit" sage-grouse and other resource values for grazing allotments equates to "conservation use" permits;

- reduces permitted animal unit months (AUMs);
- employs a numerical measure for utilization that is not used in rangeland health standards;
- does not clearly discuss what the "comprehensive grazing strategy" (CGS) is; and
- does not clearly state the level of best management practices (BMPs) or additional requirements needed for allotment management plans (AMPs) and permit renewals.

## **Response:**

Consistent with 43 CFR 4130.2(a) and the BLM's Land Use Planning Handbook (H-1601-1, Appendix C(II)(B)), the Lander PRMP/FEIS makes appropriate land use planning decisions by identifying lands available or not available for livestock grazing (see Lander PRMP/FEIS Section 3.6.5). The PRMP/FEIS is also consistent with the Standards for Healthy Rangelands and Guidelines for Livestock Grazing Management for the Public Lands administered by the BLM in the State of Wyoming, which is listed in Appendix J of the Lander PRMP/FEIS. The BLM management focus is directed to achieving and maintaining rangeland health, and may find portions of some allotments unsuitable for grazing due to resource conflicts, terrain, lack of forage, distance from water, or other factors. Lander PRMP/FEIS, page 481. Further, the Lander PRMP/FEIS is consistent with the Taylor Grazing Act, which does not preclude the BLM from identifying some lands not available to livestock grazing.

For the concerns related to Alternatives B and D and reducing the AUMs, the methods and assumptions listed in the analysis for livestock grazing management reiterates that grazing on BLM lands will meet the Wyoming Standards for Healthy Rangelands and will be in accordance with grazing regulations (43 CFR 4110.3). Lander PRMP/FEIS, page 1062. With that noted, the focus on protection or enhancement of resource values ensures that rangeland health requirements are met, first and foremost. These actions are meant to benefit vegetative resources, and lead to healthy and abundant forage for livestock and other animals. Management Action 6063 states that when a grazing permit and/or grazing preference is voluntarily relinquished, the BLM will "analyze" appropriate livestock management including considering closure of the allotment to livestock grazing. This management action is in accordance with current BLM guidance; "In August 2012, the Land Use Planning Handbook livestock grazing planning requirements were clarified by Washington Office (WO) IM 2012-169. Both WO IM



2012-169 and the Handbook support analyzing a range of forage allocation.” Lander PRMP/FEIS, page 29. Instruction Memorandum 2012-169 states “a ‘no-grazing’ alternative should be considered in detail where it is appropriate, and may be beneficial to show trade-offs between resource uses...” and “There are a variety of factors to consider in developing the range of alternatives for livestock grazing. Field offices must consider actual or potential resource conflicts and competing or alternate uses of available resources.”

With regard to the rangeland utilization issue, the second and third standards that are listed in the Wyoming Standards for Healthy Rangelands discuss the importance of wetland and upland vegetation. Assigning a numerical value helps to achieve that standard by which rangeland health can be quantified. It also correlates with meeting guidelines 6, 7, and 9. Lander PRMP/FEIS, pages 1537 to 1543. Utilization levels would be specified as necessary on a site specific level during the permit renewal stage based on the specific resource concerns and conflicts identified and the associated monitoring data.

A protester commented that production data was not used for proposing a reduction in permitted AUMs. The PRMP does not reduce AUMs except for the one allotment and one pasture in Dubois that are closed to grazing because of resource conflicts. The PRMP makes clear (MA 6060) that AUMs will be modified based on monitoring data. The best available data and information was used in preparation of the Lander PRMP/FEIS to determine whether or not allotments were to be closed and the level of use appropriate for areas preferred by livestock in order to achieve rangeland health objectives.

While the PRMP did not reduce AUMs, the Lander PRMP/FEIS analysis projected what AUMs would likely be in the future under each alternative when the grazing management tools and resource protections required by each alternative were applied. This model predicted a range of actual use AUMs in 2027 from 122,321 AUMs in Alternative B (the most restrictive alternative) to 203,962 AUMs in Alternative A (the least restrictive alternative). Lander PRMP/FEIS, page 1591. These projections were made to support the reasonable foreseeable economic analysis but they were not AUM allocation decisions in the PRMP. The AUMs will be authorized during permit renewals (MA 6067-6070) and changes in AUMs must be supported by monitoring data and rangeland health assessments (MA 6060).

In regards to the comment that the Comprehensive Grazing Strategy (CGS) is unclear or not defined, the CGS is defined in the Glossary of the Lander PRMP/FEIS, page 1402: “A Comprehensive Grazing Strategy is a management approach that incorporates a documented grazing prescription that tailors the timing and intensity (utilization) of grazing to specific vegetation objectives to maintain, or make significant progress toward, fulfillment of the Wyoming Standards for Healthy Rangelands. The grazing prescription is clearly linked to the physiological requirements of the species identified in the objectives and is considerate of other resource values e.g., greater sage-grouse and critical wildlife habitat.) Objectives are established for locations preferred by livestock. A Comprehensive Grazing Strategy gives specific attention to the critical growing season on upland ranges and the hot season in riparian-wetland habitat. The kind and class of livestock along with the season of use will affect the timing and intensity requirements.” Lander PRMP/FEIS, page 1402.

The CGS and the requirement for BMPs are intended to maintain, and/or make substantial progress toward fulfillment of the Wyoming Standards for Healthy Rangelands. Lander PRMP/FEIS, page 1548. Livestock grazing decisions at the planning level are broad allocations. The BLM categorized allotments as: Improve Existing Resource Conditions (I), Maintain Existing Resource Conditions (M), or Custodial Management (C). Lander PRMP/FEIS, page 479. For Category 'I' allotments, the CGS focuses on criteria such as carrying capacity, season of use, class of livestock, and range improvement projects. Category 'M' and 'C' allotments are evaluated on a case-by-case basis, and are evaluated for conflicts with other resources and the potential impacts to the Wyoming Standards for Healthy Rangelands.

Regarding the concern that the BLM will not be able to complete the CGS, the CGS is not a new workload. The PRMP does not require a planning area-wide CGS be completed immediately following the ROD. The PRMP requires that changes in livestock grazing management be based on monitoring (MA 6057 and 6060). A CGS is specifically required when the BLM is evaluating range infrastructure projects (MA 6066), to achieve vegetation/habitat objectives (MA 6068) or when an allotment is not meeting rangeland health standards. As shown in Figure K-1, the Comprehensive Grazing Strategy is identified as important before the BLM evaluates the proposed range projects ("Is the project proposal incorporated into a broader management strategy?"). Lander PRMP/FEIS, page 1582. Further, the CGS is only applicable if the Wyoming land health standards are not being met ("Is allotment meeting rangeland health standards, or where failing rangeland health standards the failure is due to reasons other than current livestock grazing?"). Lander PRMP/FEIS, page 1582. If the land health standards are being met with existing grazing management, the PRMP does not require anything new, as the existing management would meet the purposes of a CGS as it is defined in the Glossary. If the Wyoming Standards are not being met and livestock grazing is determined to be a causal factor, the BLM is required to take action prior to the next grazing season. 43 CFR 4180.2(c)(2). The Lander PRMP/FEIS identifies the CGS as the action to be taken. The CGS will be the product of the NEPA analysis that the BLM is already required to do in order to renew livestock grazing permits, and thus does not represent a new workload.

With regard to the concern about the application of BMPs to AMPs and permit renewals, Appendix H of the Lander PRMP/FEIS discusses the Required Design Features (RDFs) and BMPs suggested by the National Technical Team. The BMPs are to be applied at the site-specific level. Lander PRMP/FEIS, page 1521; MA 6067, Lander PRMP/FEIS, page 173.

Lastly, there was a concern from a protester about land use restrictions between public and private lands. As stated in the PRMP/FEIS, "This Proposed Resource Management Plan (RMP) and Final Environmental Impact Statement (EIS) describes and analyzes alternatives for the future management of public lands and resources administered by the Bureau of Land Management (BLM), Lander Field Office... The approved RMP will not include planning and management decisions for (1) lands or minerals privately owned or owned by the State of Wyoming or local governments or (2) lands and minerals administered by other federal agencies" (Lander PRMP/FEIS, page 1). Further, it is only Federal actions on Federal lands or minerals that require an environmental analysis under Section 102 of the National Environmental Policy Act of 1969. 42 U.S.C. 4332.

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## Locatable Minerals

**Issue Number:** PP-WY-Lander-13-10-11  
**Organization:** Wyoming Outdoor Council  
**Protestor:** Julia Stuble

**Issue Excerpt Text:**

We believe the decision to not withdraw the Bridger Mountains from locatable mineral entry was wrong because it does not fully protect wildlife and recreational values from mineral development, or ensure that BLM "prevent[s] unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b).

**Issue Number:** PP-WY-Lander-13-10-3  
**Organization:** Wyoming Outdoor Council  
**Protestor:** Julia Stuble

**Issue Excerpt Text:**

The Bridger Mountains, because of their important ecological, recreational, and scenic values—particularly because of adjacency to the proposed Moneta Divide natural gas project—need to be withdrawn from locatable mineral entry. This will ensure ecosystem health in the Bridger Mountains, will provide for the mule deer and greater sage-grouse using this area now, and for those populations of both species that will be pushed off of the Moneta Divide project area if it is approved for intense development. Withdrawing this area from locatable mineral entry would also help ensure protection for

the important raptor nesting, pronghorn and elk crucial winter ranges, key nongame wildlife areas, and habitat for six rare plant species found in the Bridger Mountains, not to mention ensuring protection for important cultural resources such as the wilderness study area and citizens' proposed wilderness areas and the Bridger Trail, which are all found in the area. In the proposed RMP BLM would withdraw a substantial area from locatable mineral entry in the Lander, South Pass, and Beaver Rim areas (449,068 acres). FEIS Map 24. Repeatedly in the final EIS the BLM states that the reason for this decision is that without this protection ecologically and culturally important lands in this area would suffer unnecessary and undue degradation in contravention of the prohibition found at 43 U.S.C. § 1732(b). In our view the same is true of the lands in the Bridger Mountains. If these lands are not withdrawn from locatable mineral entry, they too could suffer unnecessary or undue degradation. There is no doubt these lands have numerous important values, as shown in the maps contained in the FEIS, as well as our map of the Bridger Mountain presented here in Exhibit 2. The final EIS contains no analysis of this issue, which is a significant shortcoming and warrants remand to the Field Office to fully consider whether the Bridger Mountains should be withdrawn from locatable minerals entry. The BLM must ensure that the Bridger Mountains do not suffer unnecessary or undue degradation as a result of the locatable minerals entry decisions made in the RMP, and the FEIS currently does not provide this needed analysis.

## **Summary:**

Despite the presence of habitat for important wildlife and flora species, the BLM does not ensure that the Bridger Mountain range is protected, so as to prevent unnecessary or undue degradation from locatable minerals decisions.

**Response:**

The protestor is correct that the Bridger Mountain range, located in Fremont and Hot Spring counties and identified on Map 3, has several unique features. These features are described in the Lander PRMP/FEIS, and include:

- Trophy game, such as mountain lions and black bears (page 402)
- Owl Creek miner's candle, a BLM sensitive species (page 412)
- Bridger Trail, a regionally significant historic trail eligible for listing on the NRHP and nominated for ACEC designation (pages 432, 437 to 439)
- Potential Fossil Yield Classification (pages 448 to 449)
- Important mule deer habitat (Map 53)
- Copper Mountain WSA (MA 7015, page 204)
- Visual resources (Map 78)
- Greater sage-grouse priority habitat (Map 65)

The Lander PRMP/FEIS provides protections for the Bridger Mountain values in a number of ways. The areas of the Bridger Mountains containing potential for phosphate are closed to phosphate leasing (MA 4055 and 4065). The Wilderness Study Area is withdrawn from locatable minerals. The historic trail has viewshed protections and controlled surface use (MA 7137), and the high value visual resources are protected with VRM Class 1 and 2 management (Map 78). The greater sage-grouse priority habitat in the Bridger Mountains is protected by Greater Sage-Grouse GSG Core Area Management (Map 65).

While Map 24 does identify that the portion of the Bridger Mountain range outside of the Copper Mountain WSA is open for locatable mineral entry, any potential activity related to locatable minerals will still have to undergo a site-specific or project-specific evaluation, and be consistent with NEPA, including public notice and comment, before it can be approved. Section 3.2.1 of the PRMP/FEIS outlines the statutory and regulatory authorities related to locatable minerals. In short, the BLM has no authority to direct where or when mining claims made under the General Mining Law of 1872 can be located on open public lands. Section 302(b) of FLPMA, however, requires that the Secretary of the Interior take any action necessary to prevent unnecessary or undue degradation of Federal lands, and in turn, grants the authority to the BLM to ensure that mining operations do not violate that portion of FLPMA. Thus, although a mining claim may be made, the BLM may not approve a Plan of Operations under 43 CFR 3809 that would cause unnecessary or undue degradation to public lands. Lander PRMP/FEIS, page 323. In regards to Bridger Mountain, the identification of locatable minerals in Map 24 does not give carte blanche to potential mining activities in that area. Potential projects will still undergo further environmental analysis to ensure adherence to all regulatory protections for sensitive species and other protected resources.

## **Rights-of-Way (ROW)**

**Issue Number:** PP-WY-Lander-13-10-12  
**Organization:** Wyoming Outdoor Council  
**Protestor:** Julia Stuble

### **Issue Excerpt Text:**

We believe the decision to extend the Bison Basin ROW north of U.S. Highway 287, instead of along it to the east where it could nevertheless intersect with the Beaver Creek ROW, was wrong because it increases unnecessary environmental impacts and was not considered in either the draft or final environmental impact statements.

**Issue Number:** PP-WY-Lander-13-10-5  
**Organization:** Wyoming Outdoor Council  
**Protestor:** Julia Stuble

### **Issue Excerpt Text:**

The ROW we are protesting is the portion, and only the portion, of the Bison Basin ROW that extends north of U.S. Highway 287. We are in agreement that the Bison Basin ROW south of U.S. 287, which follows a Fremont County road and is underground-

only, is a necessary addition to the proposed RMP. Importantly, because it follows an existing road and is underground-only, it has limited environmental impacts post-construction. However, the portion that extends north of U.S. 287 also follows an existing transportation corridor but it has not been analyzed in-depth or on-the-ground in any of the draft alternatives. Additionally, this portion of the Bison Basin ROW, which connects to the Beaver Creek ROW (in the DEIS, this was named the Lost Creek Spur) is unnecessary. No needs for this ROW have been articulated in the draft or final environmental impact statements. If the ROW was extended east from where Bison Basin meets U.S. 287 along that highway, it would still meet the Beaver Creek ROW, yet environmental impacts could be avoided from the unneeded northward extension of the Bison Basin ROW. Routing this ROW east along U.S. Highway 287 completes the connection without additional environmental disturbance, which, importantly, has not been fully analyzed in either the DEIS or FEIS. Pending this full analysis, as well as the possibility of achieving the same connectedness with the Beaver Creek ROW but by following a highway corridor, this portion of the Bison Basin ROW should not be included in the proposed RMP.

## **Summary:**

The BLM has failed to thoroughly evaluate the Bison Basin ROW as it relates to existing ROW in the area.

## **Response:**

The BLM has thoroughly evaluated all right-of-way (ROW) designations in the Lander PRMP/FEIS and selected ROW designations to reduce overall impacts to resources while still fulfilling statutory requirements to grant ROW applications. 43 CFR 2800, FLPMA Section 501. As stated in the Lander PRMP/FEIS, if at all possible, ROWs would be co-located with an existing disturbance. Lander PRMP/FEIS, page 592. Use of designated corridors will be evaluated on a case-by-case basis, and the burden of proof will fall upon the proponent to establish why a designated corridor is appropriate. Lander PRMP/FEIS, pages 1045 to 1046.

In regards to the Bison Basin ROW, the BLM coordinated designated corridors with the Wyoming Governor's Office. The Governor's comment to the DEIS identified a need for a corridor network meeting existing corridors in other BLM field offices and supporting oil and gas facilities including carbon dioxide pipelines (Comment at page 3). The Governor specified the need for the Bison Basin "spur" or the portion north of Highway 287 to supply CO2 from the southwest where it is generated, north through the Lander area to the Bighorn Basin where it would be used to enhance oil and gas recovery and for carbon sequestration (Comment at page 6). The route of the corridor was chosen to co-locate with an existing pipeline. Appendix E.6 provides criteria that will be required for proposed projects that will utilize the Bison Basin ROW. Lander PRMP/FEIS, page 1490. Notably, these Bison Basin designated corridor criteria include ensuring VRM guidelines are adhered to, as well as aggressive and accelerated reclamation plans for disturbances to wildlife or flora.

### *National Scenic and Historic Trails (NSHT)*

**Issue Number:** PP-WY-Lander-13-10-14  
**Organization:** Wyoming Outdoor Council  
**Protestor:** Julia Stuble

**Issue Excerpt Text:**

We believe the decision to have a narrow corridor for part of the CDNST was wrong because this entire corridor deserves consistent protection for its recreational, cultural, and wildlife values, and such protection is needed to meet the legal requirement to "to provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass."

**Issue Number:** PP-WY-Lander-13-10-7  
**Organization:** Wyoming Outdoor Council  
**Protestor:** Julia Stuble

**Issue Excerpt Text:**

The proposed plan provides that it will, "[r]ecognize lands within V. mile of the CDNST, from Happy Springs Oil Field east to the Lander Field Office boundary in the Crooks Gap area" as the CDNST extensive recreation management area at 4,589 acres. FEIS at 195, Map 93. This area will be managed as VRM Class III rather than the VRM Class II that

applies to the rest of the NTMC. FEIS at Map 78. The apparent basis for designating this much narrower corridor is that "[i]n the Crooks Gap area the trail travels through a more industrialized zone with many resource uses including major pipeline ROWs, reclaimed uranium mining, major motorized travel routes, and an oil field on top of Crooks Mountain." FEIS at 498.

Basing the proposed management for this segment of the CDNST on this rationale is inappropriate. The National Trails System Act provides for the designation of national scenic trails "so located as to provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass" FEIS at 497. "The nature and purposes of the CDNST are to provide for high-quality scenic, primitive hiking and horseback riding opportunities and to conserve natural, historic, and cultural resources along the CDNST corridor." FEIS at 498. Thus it is clear there is no legally valid basis for providing a lesser level of protection for this section of the National Trails Corridor relative to the section traversed only by the National Historic Trails (the CDNST is a National Scenic Trail). The same legal standards apply to this section of the CDNST as apply further west where BLM would recognize a broader corridor and provide for much more

restrictive management so as to protect trail resources.

**Issue Number:** PP-WY-Lander-13-10-9

**Organization:** Wyoming Outdoor Council

**Protestor:** Julia Stuble

**Issue Excerpt Text:**

To meet these management needs, a corridor width in alignment with that shown in Map 121 in the FEIS, where 5 and 15-mile corridors abutting the CDNST are shown, should be provided for along the entire CDNST route. Other management provisions applicable to the NTMC, such as making the area unavailable for phosphate leasing, should also be provided for. The management provisions for the NTMC shown on pages 197-200 of the FEIS should be made applicable to this wider corridor, including this southern-most portion of the CDNST. These changes in the proposed RMP are required to meet the requirements of the National Trails Management Act with respect to National Scenic Trails. In addition, this would meet the policy of the Federal Land Policy and Management Act to "protect" the scenic, historical, ecological, environmental, and archeological values found in the vicinity of the entire CDNST. 43 U.S.C. § 1701(a)(8)

**Issue Number:** PP-WY-Lander-13-11-7

**Organization:** Continental Divide Trail Society

**Protestor:** James Wolf

**Issue Excerpt Text:**

Under CEQ regulations, 40 CFR 1503.3(a), comments "shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both." Our comments were very specific both as to a geographic description of the proposed route and as to the values associated with it in relation to the Trails Act and the Comprehensive Plan. The FEIS, in our judgment, is inadequate because it makes no provision for consideration of a relocation that would better achieve the objectives of a national scenic trail. We also addressed the merits of the FEIS alternatives (in particular, Alternative D), by providing specific suggestions – including revised language in several places – that would result in an improved resource management plan. Our submission constituted a substantive comment (NEPA Handbook H-1790-1, 6.9.2.1) for one or more of the listed reasons: (1)

presents new information relevant to the analysis, (2) presents reasonable alternatives other than those analyzed in the EIS, or (3) cause changes or revisions in one or more of the alternatives.

Under 40 CFR 1503.4, we would expect BLM to modify the proposed action on the basis of supplemental, improved, or modified analyses of our recommendations. Otherwise, BLM should explain why our comments do not warrant further response, citing the sources, authorities, or reasons which support its position. As provided in NEPA Handbook H-1790-1, 6.9.2.2, guidance for response to substantive comments can be found in Question 29b, CEQ, Forty Most Asked Questions Concerning CEQ's NEPA Regulations. The apposite section in Question 29b reads as follows: "... an agency may receive a comment that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits, or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS."

**Issue Number:** PP-WY-Lander-13-11-9

**Organization:** Continental Divide Trail Society

**Protestor:** James Wolf

**Issue Excerpt Text:**

The substantive issue being protested is the failure to address our proposal that the Bureau of Land Management give consideration, in accordance with the management plan, to a relocation of the Continental Divide National Scenic Trail (CDNST) through a segment of Sweetwater Canyon. The administrative issue being protested is the failure to analyze our proposal and include a reasoned discussion in the final EIS. The parts of the proposed RMP being protested are identified above as "particular recommendations that have not been adopted or responded to."

**Issue Number:** PP-WY-Lander-13-11-2

**Organization:** Continental Divide Trail Society

**Protestor:** James Wolf

**Issue Excerpt Text:**

• "include our recommendation as a proposal that will be studied and considered as part of the implementation of the final RMP." [BLM Response: "2004-1"] The response, quoted below, does not

respond to this recommendation, nor have we found any place in the proposed RMP that does so.

- “Record 7003 should provide for the evaluation of relocating the CDNST by way of Sweetwater Canyon.” [BLM Response: “2004-1”] Record 7003 has been revised, calling for management of lands associated with Congressionally Designated Trails in the NTMC with the allocations described and shown on Map 127. Neither Record 7003 nor Map 127 makes any reference to a Sweetwater Canyon relocation.
- “Record 7040 states that the reader should see the Congressionally Designated Trails section for management of trails-related lands outside the South Pass Historical Landscape ACEC. Since our proposal deals with lands within the ACEC, Record 7040 should also provide for the evaluation of relocating the CDNST by way of Sweetwater Canyon.” [BLM Response: none. (This recommendation was not mentioned in the comment analysis.)]
- [In Table C.7] “our proposal would require a short change in the route as it turns east to Rock Creek Hollow. This can be accommodated by deleting the phrase ‘near Phelps-Dodge Bridge;’ the modified action would be to ‘investigate opportunities to re-route the CDNST, so that thru-hikers do not have to parallel the Atlantic City-Three Forks County Road.’” [BLM Response: “2004-1”]. Table C.7 has not been modified.
- “Also, under ‘Other Programs,’ there needs to be a reference to allowable use decisions contained in Table 2.32, ‘7000 Special Designations (SD) – Congressionally Designated Trails (p.157) and Table 2.35 “Table 2.35, “7000 Special Designations (SD) - Areas of Critical Environmental Concern (p.175).” [BLM Response: “2004-1”] This revision would recognize that the CDNST might be relocated in the South Pass Historical Landscape ACEC, as mentioned in connection with Record 7040. The proposed language has not been modified in response to this recommendation.
- “The narrative text should also be revised to reflect the prospect of CDNST relocation.”
- “One appropriate place would be in Section 3.7.1.1. At the end of the last full paragraph on page 446, BLM might add: ‘(From Antelope Hills to South Pass City, the trail experience may be enhanced by relocating it through Sweetwater Canyon.)’
- ‘Similarly, at the end of the following paragraph,

add: ‘(Relocation of the trail through Sweetwater Canyon would add several miles of travel through VRI Class I.)’

- “Analogous modifications should be made in Chapter 4.” [BLM Response: “2004-1”] The recommended changes have not been made in Chapter 3 (p. 498 of FEIS), nor have we identified any changes in Chapter 4 relating to our comment.

**Issue Number:** PP-WY-Lander-13-11-4  
**Organization:** Continental Divide Trail Society  
**Protestor:** James Wolf

**Issue Excerpt Text:**

Summary Comment 2004-1, in its entirety, reads as follows:

Commenters indicated general concern regarding the proposed uses and protection of Congressionally Designated Trails in the planning area. In addition, commenters stated impacts from trail management and other development, such as uranium development, were not fully assessed. Specific concerns included the limitation of surface-disturbing activities within 5 miles of a Congressionally Designated Trail, a lack of adequate justification for Congressionally Designated Trails protection, and a need for the BLM to incorporate direction contained in the Continental Divide National Scenic Trail Comprehensive Plan. Commenters provided suggested language and actions for the BLM to incorporate in the management of the Congressionally Designated Trails.

Commenters also identified a number of technical edits related to the Congressionally Designated Trails analysis, including requests to use alternative language, corrections to technical statements and/or terms, requests to define terms, clarification of language, and corrections to GIS maps depicting the Congressionally Designated Trails.

We submit that this summary does not recognize the comments we offered in any substantive way.

**Summary:**



The rationale for managing the segment of the Continental Divide National Scenic Trail (CDNST) east of Happy Springs Oil Field as VRM Class III is inappropriate because the same legal standards apply to this section of the CDNST as apply elsewhere.

The FEIS does not adequately meet the requirements of the National Trails Management Act because the corridor width is too narrow, the area is available for phosphate leasing, and the management provisions shown on pages 197-200 of the FEIS do not apply to the entire CDNST corridor.

The FEIS violates NEPA because it did not consider the proposal to relocate CDNST through a segment of Sweetwater Canyon and it did not address several public comments regarding the proposal. Further, summary comment 2004-1 does not adequately summarize public comments.

**Response:**

Under the proposed alternative the CDNST would be managed primarily as VRM class II designation. The protestor is correct, however, that the area east of Happy Springs Oil Field will be managed as part of the CDNST ERMA with a Class III VRM designation. This area coincides with existing disturbance, including major pipeline ROWs, reclaimed uranium mining, major motorized travel routes, and an oil field on top of Crooks Mountain; it is currently managed as VRM Class III or higher. The VRM Class III designation, although less protective than Class II, allows only moderate change to the characteristic landscape and requires that activities do not dominate the view of the casual observer. Application of the VRM Class III designation meets the purpose and need of the CDNST, while providing for other existing land use demands and valid existing rights in the area.

The National Trails System Act (NTSA) of 1968 establishes that national scenic trails “will be extended trails so located as to provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass” 16 USC § 1242. The NTSA does not, however, require that corridor width or management prescriptions are consistently applied across the entirety of the trail. Rather, the NTSA states “Development and management of each segment of the National Trails System shall be designed to harmonize with and complement any established multiple-use plans for that specific area in order to insure continued maximum benefits from the land.” The Lander PRMP/FEIS has appropriately met the requirements of the NTSA by establishing a trail corridor and applying appropriately designed protective measures to all segments of the trail corridor.

The idea to locate the CDNST in the Sweetwater Canyon was evaluated in the environmental assessment that was prepared at the time the CDNST was created. The Sweetwater Canyon was identified in 1987 as a Wilderness Study Area; the interim guidance for managing WSAs

precludes new recreational ways or trails. There has been no change in condition that diminishes the Canyon as a WSA or as suitable for designation as Wilderness.

The Sweetwater River through the Canyon was analyzed in depth in the EIS including closing it to livestock grazing. Lander PRMP/FEIS, page 1097. The proposed plan identifies the segment of the Sweetwater River through the Canyon as eligible and suitable for inclusion in the National Wild and Scenic River System and adopts management that precludes building structures or visual intrusions into the river segments to maintain the values associated with eligibility and suitability. Record #7029, Lander PRMP/FEIS, page 208.

The Sweetwater River is a perennial river with a very high rate of flow, particularly in the spring. The Sweetwater River flows from the south-west to the north-east (Map 1). The CDNST goes from the south-east to the north-west (Map 121). In its current location, the CDNST crosses the Sweetwater at the Phelps Dodge Bridge (page 446). If the CDNST were moved to the Sweetwater Canyon, a river crossing could not be avoided (for a description of the Canyon and its 500 walls, see page 512 of the Lander PRMP/FEIS). Visitor safety is a primary concern for recreation management (Goal LR 12 on page 178). There is no existing bridge across the Sweetwater in the Canyon and both the WSA and WSR management precludes building one to provide for safe crossing.

In regards to Summary Comment 2004-1, the summary comments were written to capture broad themes and topics of concern expressed in the substantive comments. The original substantive comments, including those submitted by the protestor, can be found in Comment Analysis Attachment B. When considering public comments, the original comments were considered in their entirety.