

***Land Use Planning Protest Resolution
Report***

for the

**Final Environmental Impact
Statement and Proposed Resource
Management Plan Amendment for
the Converse County Oil and Gas
Project**

December, 2020

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Acronyms

APA	Administrative Procedure Act
APD	Application for Permit to Drill
BGEPA	Bald and Golden Eagle Protection Act
BLM	Bureau of Land Management
CCEIS	Converse County Environmental Impact Statement
CCPA	Converse County Project Area
CFR	Code of Federal Regulations
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
GPTWA	Great Plains Tribal Water Alliance, Inc.
MBCP	Migratory Bird Conservation Plan
MBTA	Migratory Bird Treaty Act
MOU	Memorandum of Understanding
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
O&G	oil and gas
OG	Converse County Oil and Gas Project Operator Group
OST	Oglala Sioux Tribe
PA	Programmatic Agreement
PRMPA	Proposed Resource Management Plan Amendment
RMP	Resource Management Plan
RMPA	Resource Management Plan Amendment
ROD	Record of Decision
ROW	right-of-way
SDEIS	Supplemental Draft Environmental Impact Statement
SHPO	State Historic Preservation Officer
TLS	Timing Limitation Stipulation
U.S.C.	United States Code
USFWS	U.S. Fish and Wildlife Service
WGFD	Wyoming Game and Fish Department

Introduction

Upon release of the Final Impact Statement (EIS) and Proposed Resource Management Plan Amendment (RMPA), a 30-day protest period began on July 31, 2020, at which time any person who previously participated in the planning process and had an interest that is or may be adversely affected by the proposed plan could submit a protest on the proposed plan. A protest could raise only those issues which were submitted for the record during the planning process.

All protests had to be in writing and filed with the Bureau of Land Management (BLM), either as a hard copy or electronically via the ePlanning website by the close of the protest period, which was August 31, 2020. All protest letters sent to the BLM via fax or e-mail were considered invalid unless a properly filed protest was also submitted.

The ePlanning page for each planning project contained a tool for submitting a valid protest electronically. The link to the respective ePlanning project page where a protest could be filed was included in the Notice of Availability for the Final EIS and Proposed RMP, and in related news releases and Dear Reader letters.

All protests had to be filed within the 30-day protest period, which began on the date that the notice of receipt of the Final EIS/Proposed RMPA is published in the Federal Register (FR), July 31, 2020.

The following items must have been included to constitute a valid protest (see 43 C.F.R. Part 1610.5-2):

- The name of the RMP or RMPA and final EIS being protested;
- The name, mailing address, telephone number and interest of the person filing the protest (in other words, how the protestor will be adversely affected by the approval or amendment of the plan);
- A statement of the issue or issues being protested;
- A statement of the part or parts of the plan or amendment being protested (including Chapter, Section, Page, and/or Map);
- A copy of all documents addressing the issue or issues that were submitted during the planning process by the protesting party, or an indication of the date the issue or issues were discussed for the record; and
- A concise statement explaining why the State Director's decision is believed to be wrong.

Protestors were informed that before including their personal identifying information in their protests, their entire protest—including personal identifying information—may be made publicly available at any time. BLM cannot guarantee that personal identifying information would be withheld upon request.

In order for the issue raised in a protest to be valid, it had to include the following:

- It must be in the record that the protest issue has been raised in the planning process before, or that the issue provides significant new information (in other words, it came to light near the end of the draft RMP or RMPA comment period);
- The protest must relate to a planning issue, not an implementation issue;

- The protest must clearly state what law/regulation/policy the BLM is violating (i.e., names the law/regulation/policy specifically or uses key words that make it clear);
- The protest must clearly explain why the proposed RMP or RMPA violates the stated law/regulation/policy;
- The protest must give a reference in the document where the violation stated occurs; and
- The protest must be concise.

If the protest lacked any of the above elements, it was deemed invalid.

The 30-day protest period ended on August 31, 2020. The BLM then reviewed all protest issues for the proposed planning decisions in accordance with 43 C.F.R. § 1610.5-2. The BLM received 25 protest letters, and the BLM reviewed all protest issues for the proposed planning decisions. The Secretary approved this Protest Resolution Report, issued a written decision to protesting parties, and posted this Report on the BLM’s website. The decision of the Secretary is the final decision of the Department of the Interior.

Specific information related to the protests received can be found below.

Protesting Party Index

Letter ID¹	Protester	Organization	Determination
PP-WY-CCOGP-RMPA-20-001	Tripp Parks	Western Energy Alliance	Dismissed – Comments Only
PP-WY-CCOGP-RMPA-20-004	Angi Bruce	Wyoming Game and Fish Department	Dismissed – Comments Only
PP-WY-CCOGP-RMPA-20-006	John Rader et al. ²	Wyoming Outdoor Council	Denied
PP-WY-CCOGP-RMPA-20-008	Heather Jacobson	W.I. Moore Ranch Co. Inc.	Dismissed – Comments Only
PP-WY-CCOGP-RMPA-20-011 ³ PP-WY-CCOGP-RMPA-20-025	Kathleen Schroder	Davis Graham & Stubbs LLP (on behalf of The Operator’s Group)	Dismissed – Comments Only Dismissed – Invalid Protest Submission
PP-WY-CCOGP-RMPA-20-012	Kelly Fuller et al. ⁴	Western Watersheds Project	Denied

¹ Letter IDs are not consecutive due to the Comment Analysis and Response Application skipping letter numbers, some numbers being attachments to other submissions, and duplicate submissions. All submissions received by the Bureau of Land Management are accounted for in the table.

² This letter had multiple signatories including Daly Edmunds (Audubon Rockies), Nada Culver (National Audubon Society), Jerry Otero (National Parks Conservation Association), Shannon Anderson (Powder River Basin Resource Council), Dan Smitherman (The Wilderness Society), and Joshua Axelrod (Natural Resources Defense Council).

³ This letter had a duplicate submission, Letter ID PP-WY-CCOGP-RMPA-20-015.

⁴ This letter had multiple signatories including Steve Holmer (American Bird Conservancy) and Michael Saul (Center for Biological Diversity). It also had multiple attachments, some of which were submitted as separate entries in the Comment Analysis and Response Application including Letter IDs PP-WY-CCOGP-RMPA-20-014 and -016.

Letter ID¹	Protester	Organization	Determination
PP-WY-CCOGP-RMPA-20-017	Philip Strobel	Environmental Protection Agency	Dismissed – Invalid Protest Submission ⁵
PP-WY-CCOGP-RMPA-20-018	James Parsons		Dismissed – Invalid Protest Submission
PP-WY-CCOGP-RMPA-20-019	Jean Publicee		Dismissed – Invalid Protest Submission
PP-WY-CCOGP-RMPA-20-020	Robert Short	Board of Commissioners, Converse County, WY	Dismissed – Invalid Protest Submission
PP-WY-CCOGP-RMPA-20-021	Daniel Reardon	Campbell County Board of Commissioners	Dismissed – Invalid Protest Submission
PP-WY-CCOGP-RMPA-20-022	Jonathan Teichert	City of Douglas	Dismissed – Invalid Protest Submission
PP-WY-CCOGP-RMPA-20-023	Doug Crow Ghost	Great Plains Tribal Water Alliance	Denied
PP-WY-CCOGP-RMPA-20-024	Thomas Poor Bear	Oglala Sioux Tribe	Denied

⁵ The protesting party did not include one or more of the requirements at 43 CFR 1610.5-2(a)(2)(i)-(v) with their submission; therefore, they were dismissed.

Impact Analysis on and Application of the Amendment

Western Watersheds Project

Kelly Fuller

Issue Excerpt Text: The Converse County Oil and Gas Project Operator Group (OG) has asked BLM to remove this seasonal protection and allow year-round development. DEIS at 1-2. But as we pointed out in our SDEIS comments, the way BLM has proposed to remove this seasonal protection and allow year-round development could apply not just to the OG, but to other oil and gas projects inside the Project’s boundaries, a fact that was not disclosed to the public. SDEIS Comments at 3-4. This is significant because the Converse County Project Area is very large, comprising 1.5 million acres, with 10% federal surface (6% administered by BLM) and 65% federal fluid minerals (all administered by BLM). FEIS at ES-1. BLM-administered surface acreage and fluid mineral acreage inside the Converse County Oil and Gas Project Area (Project Area) is not and would not be used exclusively by the Converse County Oil and Gas Project’s Operator Group. The five companies identified in the FEIS as the Project’s Operator Group are not the only companies that hold federal leases and produce oil and gas inside the Converse County Oil and Gas Project Area. According to BLM, there are many more...In the FEIS’s Response to SDEIS Comments, BLM confirmed that we were correct in our concerns. The FEIS states: The CCEIS analysis and the Converse County ROD will apply to any O&G operator in the CCPA [Converse County Project Area], not just the OG [Operator Group] members. If an operator were to choose not to follow the Converse County EIS mitigations and commitments, then the new proposal could be governed under the Casper RMP but would need a new NEPA analysis.

Western Watersheds Project

Kelly Fuller

Issue Excerpt Text: Yet BLM’s Response to SDEIS Comments also proposes to apply the CCEIS analysis, ROD, and Casper RMP amendment to any oil and gas operator within the Converse County Project Area that “follow[s] the Converse County EIS mitigations and commitments” without requiring additional NEPA analysis. FEIS at I-2.

Because BLM has not analyzed the additional environmental impacts of wells proposed by other operators or additional wells proposed by the Operator Group as projects separate from the Converse County Oil and Gas Project, BLM cannot extend the Converse County Oil and Gas Project’s EIS, ROD, and Casper RMP amendment to those additional wells without requiring additional NEPA analysis for them. Doing so – and proposing in the Converse County Oil and Gas EIS and its ROD to do so – violates NEPA.

Western Watersheds Project

Kelly Fuller

Issue Excerpt Text: It is important to note that BLM cannot offer the Operator Group assurances of prosecutorial discretion under the Migratory Bird Treaty Act. The determination if the MBTA has been violated and whether to forward cases to the Department of Justice for potential prosecution is USFWS’s to make, not BLM’s. The FEIS itself remarks on the distinction between BLM’s and USFWS’s authorities: “The BLM follows the MBTA and BGEPA. Incidental take determinations is a specific function of the USFWS.” FEIS at I-6. In our DEIS and SDEIS Comments, we noted that the importance of the Converse County Oil and Gas Project Area to birds and the Project’s potential to violate the Migratory Bird Treaty Act. See DEIS Comments at 16-19 and SDEIS Comments at 10-11. The FEIS is of even more concern in that regard because BLM’s Preferred Alternative is the Operator Group’s Proposed Alternative, with a new-in-the-FEIS RMP Amendment Option that was not analyzed in the DEIS or SDEIS (Alternative B, RMP Amendment Option 6). FEIS at ES-5.

Western Watersheds Project

Kelly Fuller

Issue Excerpt Text: BLM’s RMP Amendment Option #6 would also apply to them [other operators] – even if their wells were additional to the Operator Group’s 5,000 wells analyzed in this EIS. There is also nothing in BLM’s RMP Amendment Option 6 to prevent other companies operating inside the Converse County Project Area from receiving one of the automatic exceptions to the Casper RMP’s non-eagle raptor timing stipulations even if they never contacted USFWS to discuss ways to avoid, minimize, and mitigate impacts to birds protected by the MBTA.

Third, BLM’s RMP Amendment Option 6 does not require an adaptive management plan until after BLM has granted 98 automatic stipulation exceptions. FEIS at 2-37.

Wyoming Outdoor Council

John Rader

Issue Excerpt Text: However, BLM did not adopt the option recommended by the USFWS or the other option that the USFWS found would conserve migratory birds. Instead, the BLM has chosen a substantially less protective approach, Option 6 (as described in more detail above), which would relieve the operators from timing limitations that protect non-eagle raptors “if the applicant applies the conservation measures set forth in Appendix G4.” Final EIS, p. 1-6. Further, BLM repeatedly confirms that: “The Migratory Bird Conservation Strategy (MBCS) being developed between the Operator Group and USFWS has been placed on hold and is not available for review.” See, e.g., response to comment B-01-09, Final EIS, Appendix H, p. H-1. Selection of this alternative does not comply with the initial recommendations of the USFWS to prevent incidental take of migratory birds and is not consistent with the MBTA. Notably, in selecting this new alternative, BLM was operating within the constraints imposed by Opinion M- 37050, which was binding on all agencies within the Department of the Interior.

Summary:

The Bureau of Land Management (BLM) failed to analyze the application of a seasonal timing limitation removal across the entirety of the Converse County Project Area (CCPA) and applicable to all operators, not only those as part of the Operating Group. Application of the amendment removing the seasonal timing limitation could be applied to any operator (not just those as part of the proposed action) and therefore must be analyzed beyond the 5,000 wells identified in the proposed action. The BLM failed to require an adaptive management plan as part of avoiding, minimizing, and mitigating impacts. The BLM failed to analyze Option 6 in the Supplemental Draft Environmental Impact Statement (EIS)/Resource Management Plan Amendment (RMPA) or to allow public comment on the new-to-the-Final EIS Option 6 amendment in the alternatives.

Response:

The National Environmental Policy Act (NEPA)⁶ regulations direct that data and analyses in an EIS must be commensurate with the importance of the impact (40 Code of Federal Regulations [CFR] 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to

⁶ References to the CEQ regulations throughout this protest resolution report and within the underlying EIS refer to the regulations in effect prior to September 14, 2020. The revised CEQ regulations effective September 14, 2020 are not referred to in this protest resolution report or in the underlying EIS because the NEPA process associated with the proposed action began prior to this date (See 40 C.F.R. § 1506.13).

take a “hard look” at potential environmental impacts of adopting the Proposed RMPA (PRMPA) for the Converse County Oil and Gas Project (Converse County Final EIS/PRMPA).

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The BLM adequately analyzed the impacts related to the potential removal of the seasonal timing if they are requested by any operator in the CCPA, not just those identified in the Operators Group. The Converse County Final EIS/PRMPA describes potential impacts of the No Action Alternative and the preferred alternative on migratory birds and, specifically, on raptors, in Section 4.18.2.1. Under the No Action Alternative, the BLM analyzed existing development and disturbance from new development that is anticipated in the CCPA as a result of recently approved NEPA projects and reasonably foreseeable wells based on trends in the CCPA (Final EIS Section 2.3, pp. 2-16–2-24). The combined disturbance from existing and new development under the No Action Alternative is also noted in Alternative B, the preferred alternative (Final EIS Section 2.3 p. 2-16). Additionally, the BLM analyzed cumulative impacts of the preferred Alternative B on migratory birds, which included the RMPA Option 6 (Final EIS Section 5.3.18.2, p. 5-66). The BLM notes on pages 2-35 to 2-39 that the timing limit stipulations would only apply within the CCPA, and only if the applicant applies conservation measures set forth in Appendix G4. The BLM’s intent was to clarify that the proposed amendment would apply to any operator working within the CCPA that applies the Appendix G4 conservation measures. The non-raptor timing limit stipulation would continue to apply outside the CCPA. The impacts analysis for the preferred alternative examined both existing and reasonably foreseeable development within the CCPA, including wells and projects beyond those proposed by the Operator Group; accordingly, the BLM fulfilled its obligation under NEPA.

A land use planning-level decision, such as this amendment, is broad in scope. For this reason, analysis of land use plan alternatives is typically broad and qualitative rather than quantitative or focused on site-specific actions. As the amendment under consideration by the BLM is programmatic in nature and would not result in on-the-ground planning decision or actions (e.g., the BLM is not approving an Application for Permit to Drill [APD] to start drilling), the scope of the analysis was conducted at a regional, programmatic level; site-specific locations and designs of projects are unknown at this time and will be analyzed through NEPA and a public process at a later time during implementation of the project. For projects for which operators request relief from the Timing Limitation Stipulation (TLS), operators would be required to include with APD and right-of-way (ROW) applications a list of commitments outlined within Option 6 that minimize the potential for incidental take of migratory birds (see Final EIS Appendix G4, pp. G4-1–G4-2); as part of the environmental analysis for the APD/ROW, the BLM will analyze alternative locations outside of the non-eagle raptor nest buffer. Operators granted relief from TLS are required to report on projects each year in part to provide information that would be used in an adaptive management framework to be implemented by the BLM in accordance with Department of the Interior guidance (see Final EIS Appendix G4, pp. G4-2–G4-3).

NEPA requires the BLM to include a discussion of measures that may mitigate adverse environmental impacts (40 CFR 1502.14(f), 40 CFR 1502.16(h)). Potential forms of mitigation include: (1) avoiding the impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or (5) compensating for the impact by replacing or providing substitute resources or environments (40 CFR 1508.20). The Converse County Final EIS/PRMPA analyzes

and adopts mitigation measures that avoid and minimize potential future impacts by requiring restrictions as well as managing for uncertainty by including an adaptive management plan and annual reporting. The requirement for annual reporting and an adaptive management plan was incorporated based on State of Wyoming comments on the Supplemental Draft EIS/RMPA. As noted in the response to comments (Appendix I, p. I-7), “Section 4.18.1.2, Section 4.18.1.3, Section 4.18.14 and Section 4.18.2 of the Final EIS have been updated to incorporate additional conservation measures to include TLS discussions provided by the Governor’s Office and OG into Option 3 as well as the addition development of Option 6.” More information is provided in the Record of Decision regarding implementation of the adaptive management framework.

NEPA requires agencies to prepare supplements to either a draft or final EIS if the agency makes substantial changes to the proposed action that are relevant to environmental concerns, or if 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)). However, if a new alternative is added after the circulation of a draft EIS, supplementation is not necessary if the new alternative lies within the spectrum of alternatives analyzed in the draft EIS or is a minor variation of an alternative analyzed in the draft EIS. In such circumstances, the new alternative may be added in the final EIS (BLM NEPA Handbook, H-1790-1, 5.3.2 When Supplementation is Not Appropriate).

The BLM did introduce the Option 6 amendment, the BLM-Proposed Alternative, in the Converse County Final EIS/PRMPA. Importantly, Option 6 is a reasonable combination of objectives and actions from the Supplemental Draft EIS/RMPA’s other alternatives with consideration given to public comments, U.S. Fish and Wildlife Service (USFWS) input on the Supplemental Draft RMPA/EIS, such as inclusion of its preferred amendment as outlined in Option 5, corrections, and rewording for clarification of purpose and intent, while continuing to meet its legal, regulatory, and policy mandates (see Final EIS, pp. 2-35–2-39, and ES-5). No change in the range of alternatives is relevant to environmental concerns in the Converse County Final EIS/PRMPA. During review of the public comments on the Supplemental Draft RMPA/EIS, the BLM determined that there were no new significant circumstances or information relevant to environmental concerns bearing on the proposed plan or its impacts to require re-release of Alternative B, Option 6 for additional public comment.

The BLM adequately analyzed the impacts from removal of a seasonal timing limitation as well as Option 6 in the Supplemental Draft Environmental Impact Statement (EIS)/Resource Management Plan Amendment (RMPA), and properly addressed adaptive management measures in the FEIS. Accordingly, this protest is denied.

Violation of the Migratory Bird Treaty Act

Western Watersheds Project

Kelly Fuller

Issue Excerpt Text: BLM’s RMP Amendment Option #6 would also apply to them [other operators] – even if their wells were additional to the Operator Group’s 5,000 wells analyzed in this EIS. There is also nothing in BLM’s RMP Amendment Option 6 to prevent other companies operating inside the Converse County Project Area from receiving one of the automatic exceptions to the Casper RMP’s non-eagle raptor timing stipulations even if they never contacted USFWS to discuss ways to avoid, minimize, and mitigate impacts to birds protected by the MBTA.

Third, BLM’s RMP Amendment Option 6 does not require an adaptive management plan until after BLM has granted 98 automatic stipulation exceptions. FEIS at 2-37.

Western Watersheds Project***Kelly Fuller***

Issue Excerpt Text: It is important to note that BLM cannot offer the Operator Group assurances of prosecutorial discretion under the Migratory Bird Treaty Act. The determination if the MBTA has been violated and whether to forward cases to the Department of Justice for potential prosecution is USFWS's to make, not BLM's. The FEIS itself remarks on the distinction between BLM's and USFWS's authorities: "The BLM follows the MBTA and BGEPA. Incidental take determinations is a specific function of the USFWS." FEIS at I-6. In our DEIS and SDEIS Comments, we noted that the importance of the Converse County Oil and Gas Project Area to birds and the Project's potential to violate the Migratory Bird Treaty Act. See DEIS Comments at 16-19 and SDEIS Comments at 10-11. The FEIS is of even more concern in that regard because BLM's Preferred Alternative is the Operator Group's Proposed Alternative, with a new-in-the-FEIS RMP Amendment Option that was not analyzed in the DEIS or SDEIS (Alternative B, RMP Amendment Option 6). FEIS at ES-5.

Western Watersheds Project***Kelly Fuller***

Issue Excerpt Text: BLM may itself violate the Migratory Bird Treaty Act by approving its preferred alternative, which would in turn potentially violate the Administrative Procedure Act, which prohibits actions "not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(B), (C). BLM cannot rely on the 2017 MBTA M-Opinion to solve these legal problems because it was recently vacated as contrary to statutory text. See *Natural Resources Defense Council v. U.S. Dep't of the Interior*, No. 1:18-cv-4596 (S.D.N.Y. Op. and Order Aug. 11, 2020).²⁸ Nor can BLM use the USFWS 2018 Nest Destruction memo referenced in the FEIS because it relies on the MBTA M-Opinion that has been vacated.

Great Plains Tribal Water Alliance, Inc.***Doug Crow Ghost***

Issue Excerpt Text: The waiver of timing limit stipulations and the decision-making authority granted to the operator group with respect to non-eagle raptor nests lack support in the record as being necessary, are poorly conceived, and delegate too much authority on mitigation decisions. This may violate the Migratory Bird Treaty Act, 16 U.S.C. §§703-713 (1919). Species that may be of special interest to the Lakota people could be affected by this.

Wyoming Outdoor Council***John Rader***

Issue Excerpt Text: Monitoring and reporting requirements do not contain any thresholds or triggers for reevaluating TLS relief, for instance in response to significant population decline. This approach in the face of significant and documented risk to raptors highlights how unjustified, and arbitrary and capricious, BLM's approach to removing TLS is in this FEIS. BLM's preferred alternative does not comply with NEPA and cannot be adopted. We note that Options 2 and 3, proposed by the Operator Group, do not even attempt to condition the removal of the TLS and thus suffer from even more fatal flaws than the preferred alternative. Because the BLM has not justified its removal of these stipulations, and has ignored the best available science on raptor conservation in its analysis, its actions are arbitrary and capricious in violation of the APA.

Wyoming Outdoor Council***John Rader***

Issue Excerpt Text: The U.S. District Court for the Southern District of New York recently confirmed that Solicitor Opinion M-35070-and its mistaken conclusion that the MBTA does not protect against incidental take-is invalid. *Natural Resources Defense Council v. U.S. Department of the Interior*, Case 1:18-cv- 04596-VEC, 2020 U.S. Dist. LEXIS 143920 (S.D.N.Y August 11,

2020). The court found that “the Opinion is riddled with ambiguities” (Id. at *7) and concluded that the opinion “is simply an unpersuasive interpretation of the MBTA’s unambiguous prohibition on killing protected birds.” Id. at *8. Importantly, the court also vacated the opinion, noting that its vacatur “undoes a recent departure from the agency’s prior longstanding position and enforcement practices.” Id. at *14. As a result of this ruling, the interpretation of the MBTA by which BLM was bound during the preparation of the Supplemental DEIS and Final EIS, and the selection of a Proposed RMP Amendment is no longer applicable. BLM and the USFWS are now required to - again - comply with the MBTA and its prohibitions against incidental take, and the operators will also be incentivized to propose and adopt measures to ensure conservation of migratory birds. While BLM claimed that it “could still condition its approval on the imposition of ‘voluntary’ mitigation measures to address incidental take of migratory birds, and the USFWS would aide in proposing such measures” (Response to comment B-11-061, FEIS, Appendix H, p. H-18), all indications are that BLM did not condition approval to address incidental take and the operators did not volunteer any either. To the contrary, the Proposed RMP Amendment selected an alternative that is inconsistent with the MBTA.

Summary:

BLM’s preferred alternative and RMPA option could reasonably foreseeably lead to violations of the Migratory Bird Treaty Act (MBTA).

Response:

A Resource Management Plan (RMP) is a general document that provides overarching management guidance and direction, consistent with Section 202 of the Federal Land Policy and Management Act (FLPMA), but does not authorize projects or any other on-the-ground activities. Land use plans serve as a preliminary step in the overall process of managing public lands and are designed to guide and control future management actions and the development of subsequent, implementation-level plans that provide more detailed and site-specific analysis of impacts for resources and uses (43 CFR 1601.0-2).

NEPA and its implementing regulations require that the effects analysis demonstrate that the BLM took a “hard look” at the impacts of the action (BLM NEPA Handbook, H-1790-1, 6.8.1.2, Analyzing Effects). A “hard look” is a reasoned analysis containing quantitative or detailed qualitative information. (BLM NEPA Handbook, H-1790-1, 6.8.1.2 Analyzing Effects). The BLM must use information of high quality and scientific integrity in its NEPA analysis, including information provided as part of the public involvement (40 CFR 1500.1(b) and 1502.24). The Council on Environmental Quality regulations require agencies to make a good-faith effort to include in an effects analysis those impacts that are not known but are reasonably foreseeable (40 CFR 1508.8), meaning that agencies must make a reasonable effort to predict the environmental effects of the proposed action even if that analysis requires some level of speculation. However, agencies are not required to engage in an analysis of potential effects that are highly speculative or indefinite (Question 18 in the Council on Environmental Quality’s 40 Most Asked Questions; The BLM NEPA Handbook H-1790–1, Section 6.8.3). The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The BLM’s obligation in developing the Converse County Final EIS/PRMPA is to analyze impacts to resources, including migratory birds, and to identify terms and conditions that direct the operators to follow applicable law, which includes the MBTA. Section 3.18.2 of the Final EIS/PRMPA

provides an explanation of the legal and regulatory framework of the MBTA and how it applies to decisions in the plan (p. 3.18-17). The plan amendment goes on to explain which migratory birds are present in the planning area (Section 3.18.2.5, p. 3.18-20) and analyzes the impacts on those migratory bird species under each of the alternatives (Section 4.18.2, pp. 4.18-20–4.18-23). Finally, the plan is consistent with the MBTA and associated agency regulations (Table 1.5-1; Section 3.18.2.1). The plan requires a variety of protections for migratory bird species present in the planning area, including design features (Table 2.2-1; p. 6-22) and mitigation measures to protect migratory birds (pp. 6-28 to 6-29). The plan also acknowledges the MBTA requires operators to consult with the USFWS at the APD level to ensure protection for migratory birds, including raptors (Comment F03-14, p. H-51; p. 4.18-37).

With regard to the alleged reliance on Solicitor Opinion M-37050, neither the FEIS nor the DEIS references Solicitor Opinions M-37050 or M-37041, as noted the FEIS response to comment B11-050 (see FEIS Appendix H, p. H-16). In any event, those M-Opinions govern possible criminal liability for actions of third parties that could result in “take” of migratory birds, which would attach independent of any planning decision by the BLM. Furthermore, as noted in the FEIS response to comment B11-062, there has been no change to Executive Order 13186 or the 2010 Memorandum of Understanding (MOU) between the USFWS and the BLM, and BLM IM WY 2013-005, *Interim Management Guidance for Migratory Bird Conservation Policy on Wyoming BLM Administered Public Lands Including the Federal Mineral Estate*. As explained in the FEIS, Section 3.12.2.1, Executive Order 13186, establishes responsibilities of Federal agencies regarding migratory birds and requires that agencies:

“shall, to the extent permitted by law and subjected to the availability of appropriations and within Administration budgetary limits, and *in harmony with agency missions*: (1) support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions...”

In selecting Option 6, which includes avoidance and minimization measures and other procedural considerations relating to the future authorization of projects within non-eagle raptor buffers, the BLM is fulfilling its obligation under Executive Order 13186, while still meeting the purpose and need of the Final EIS and the agency mission.

The BLM has satisfied its obligations under NEPA, FLPMA, and the MBTA to analyze impacts to migratory birds and to include appropriate mitigation measures to reduce impacts to migratory bird species present in the planning area. Accordingly, this protest is denied.

Range of Alternatives - Migratory Bird Conservation Plan

Wyoming Outdoor Council

John Rader

Issue Excerpt Text: While the FEIS briefly describes the MBCP [Migratory Bird Conservation Plan], nothing in the FEIS “explores” or “evaluates” the MBCP option. When commenters on the SDEIS asked why the MBCP was not included in the project’s environmental review, the BLM replied that The MBCP was not included as part of the EIS because the Operator Group withdrew the document from further consideration by USFWS. Note that the MBCP was being prepared by the Operator Group and USFWS without BLM input. The MBCP is a USFWS specific document that the BLM can have input on, but it is between the USFWS and the proponent. FEIS at Appendix I-27. This is unsatisfactory. BLM has the authority to condition relief from TLS on an MBCP developed in coordination with state and federal wildlife agencies, and the duty to evaluate such a

plan in its environmental review of this project. The fact that the OG would prefer not to adhere to a more stringent and cooperative plan is unavailing.

Wyoming Outdoor Council

John Rader

Issue Excerpt Text: Option 5 references, but does not evaluate, an MBCP established in consultation with USFWS. The FEIS provides only a rough outline of what could be included in an MBCP instead of disclosing the draft plan and considering its efficacy in protecting raptors. Moreover, the BLM should have considered an option that incorporates both a Decision Matrix to guide BLM's Authorized Officer in decision-making and an MBCP written in consultation with USFWS, the agency with superior expertise on migratory bird conservation. Ideally WGFD, Wyoming's state wildlife agency, would have the opportunity to review and provide input on an MBCP. BLM clearly had the capacity to evaluate such an alternative, which would have established sideboards for BLM's decisions on TLS relief and ensured robust USFWS input on conservation measures, monitoring, and adaptive management protocols. Here, BLM did not consider a reasonable range of alternatives because the agency did not evaluate an option including both a Decision Matrix and an MBCP, and did not "rigorously explore and objectively evaluate"³ the MBCP option in its FEIS in order to make an informed decision and facilitate public understanding.

Wyoming Outdoor Council

John Rader

Issue Excerpt Text: But the new preferred option, Option 6, fares no better than the SDEIS options. Option 6 merely requires operators to "consider alternative locations outside of the non-eagle raptor buffer," and "discuss" their "efforts" to avoid buffers with BLM. FEIS at Appendix G4. Operators are required to "participate with the BLM" in designing an Adaptive Management Plan, no details of which are included in the FEIS. *Id.* USFWS and WGFD are not even mentioned in Appendix G4. The appendix merely suggests that "any other pertinent entities that the BLM invites" may participate in the development of an Adaptive Management Plan. *Id.* It is of little consolation that these entities "could include USFWS and/or WGFD." FEIS at Appendix I-27. This is a far cry from the early and ongoing consultation that should be required with both agencies. Tellingly, WGFD made that very request in both DEIS and SDEIS comments, asking that a technical team be assembled "including but not limited to the Department [WGFD] and the Service [USFWS]." *Id.*⁴ It is unclear why BLM neglected to implement a proactive, strategic framework like the MBCP, and instead decided to rely on a less thorough, less collaborative approach. We understand, on information and belief, that an MBCP was nearly complete at the time of the SDEIS' release, the product of two years of research. However, BLM chose not to include a draft of the MBCP. The BLM provides a generic outline of the MBCP at Appendix G3. However, BLM's FEIS does not "rigorously explore and objectively evaluate" the MBCP option as NEPA requires. The FEIS describes the MBCP as a life-of-a-project framework for identifying and implementing actions to conserve migratory birds during oil and gas project planning, construction, operation, maintenance, and decommissioning. It is the responsibility of project developers and operators to effectively assess project-related impacts to migratory birds and their habitats, and to work to avoid and minimize those impacts.

Wyoming Outdoor Council

John Rader

Issue Excerpt Text: Under the BLM's preferred option, operators would benefit from TLS relief, but raptors and the public would not. The BLM must evaluate an alternative that rigorously explores and evaluates the MBCP option (and actually reviews a draft of the MBCP and its potential impacts), provides for robust and ongoing consultation with state and federal wildlife agencies, and establishes a decision-making framework for TLS relief. Until the BLM has done so, it has not analyzed a reasonable range of alternatives in violation of NEPA.

Summary:

The BLM failed to evaluate an option that included the Migratory Bird Conservation Plan (MBCP) as part of a reasonable range of alternatives. The BLM did not rigorously explore and objectively evaluate the MBCP in the Final EIS.

Response:

When preparing an EIS, NEPA regulations require an agency to rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives eliminated from detailed study, to briefly discuss the rationale for elimination (40 CFR 1502.14(a)). The BLM developed a reasonable range of alternatives that meet the purpose and need of the Converse County Final EIS/PRMPA and that address resource issues identified during the scoping period and comments on the Draft and Supplemental Draft EISs. The alternatives analyzed in the Converse County Final EIS/PRMPA cover the full spectrum by varying in: (1) degrees of protection for each resource and use; (2) approaches to management for each resource and use; (3) mixes of allowable, conditional, and prohibited uses in various geographic areas; and (4) levels and methods for restoration.

The alternatives adequately considered a range of management strategies for addressing impacts on migratory birds. For example, within Alternative B, the Proposed Action, the current raptor TLS (Option 1) along with five non-eagle raptor amendment options were analyzed in terms of potential effects resulting from either following the current raptor stipulations or various means for the BLM to grant relief from TLS on non-eagle raptors (see pp. 4.18-27–4.18-38). Two raptor amendment options proposed by the applicant include Option 2 (TLS will not apply to non-eagle raptor nests within the CCPA) and Option 3 (applicant applies conservation measures involving additional applicant-committed design features) (pp. 4.18-31–4.18-32). Three other amendment options included Option 4 (BLM proposal to implement a Raptor Management Plan), Option 5 (USFWS proposal to implement an MBCP), and Option 6 (pp. 4.18-32–4.18-33). Option 5 is noted as the USFWS's proposed alternative and states that the TLS may be relieved within the CCPA if the applicant works with the BLM and USFWS to alleviate impacts on non-eagle raptors within buffers by developing an MBCP; a proposed outline for the MBCP is provided in Appendix G3 of the Final EIS.

As described in Section 2.4.9 of the Final EIS, the MBCP provides a framework for the life of the project that will guide the identification and implementation of conservation actions to protect migratory birds during oil and gas project planning, construction, operation, maintenance, and decommissioning. It is the responsibility of project developers and operators to effectively assess project-related impacts on migratory birds and their habitats, and to work to avoid and minimize those impacts. Developing the full MBCP is not the responsibility of the BLM in developing the Converse County Final EIS/PRMPA. Rather, the MBCP was being prepared by the Operator Group and the USFWS and the BLM's participation was limited to providing an advisory role on BLM policies and guidance and in reviews of the document. Once the Operator Group withdrew from the process of developing the MBCP, the BLM opted to not include the unfinished MBCP in the Final EIS. MBCPs are not a requirement within Executive Order 13186, the 2010 MOU between the BLM and USFWS, BLM IM WY 2013-005, or BLM IM 2008-050. Rather, those guidance documents direct the agency to consider impacts on migratory birds and their habitat during the land use planning process and provide recommendations for developing measures to avoid and minimize impacts on migratory birds. The options considered under Alternative B address many of these objectives. For example, Option 6 includes avoidance and minimization measures for impacts on migratory birds and requirements for justification of placement of projects within non-eagle raptor buffers, which fulfills the BLM's obligation under Executive Order 13186 to implement the MBTA and reduce incidental take of migratory birds to the greatest extent practicable while still meeting the purpose and need of the Final EIS and the agency mission. Furthermore, as described under Alternative B, Option 6, the

Operator Group may still work with the USFWS to fully develop an MBCP in the future consistent with the requirements of the MBTA. However, the MBTA does not require the BLM to develop an MBCP or ensure that an MBCP is completed prior to issuing a decision on this plan amendment.

The BLM adequately considered the MBCP as well as other avoidance and mitigation measures in the FEIS. Accordingly, this protest is denied.

Alternatives Not Analyzed in Detail

Western Watersheds Project

Kelly Fuller

Issue Excerpt Text: BLM did not analyze all reasonable alternatives that were suggested to it during public comment periods, nor does the FEIS explain why some alternatives were not carried forward for full analysis.

These unlawfully excluded alternatives include:

- “[A]t least one action alternative that requires the cessation of activities if and when Clean Air Act violation(s) occur.” This analysis was requested in scoping comments that were incorporated by reference in our DEIS comments, and we noted its absence in our DEIS comments. See Scoping Comments at 3 and DEIS Comments at 2.11
- An alternative that analyzes placing more than 16 wells on the wellpads, as has already been done in the Pinedale Anticline. This analysis was requested in scoping comments that were incorporated by reference in our DEIS comments, and we noted its absence in our DEIS comments. See Scoping Comments at 3 and DEIS comments at 2.12
- An alternative that analyzes “comprehensive moratoria for project-related vehicle traffic and human activities (except in emergencies) in sensitive wildlife habitat such as sage grouse seasonal habitats, big game crucial winter ranges or migration corridors, and within 2 miles of ferruginous hawk nests or one mile of other raptor nests, during their key season of use for the wildlife species in question. The Bill Barrett Corporation committed to similar measures for their Big Porcupine Coalbed Methane Project on the Thunder Basin National Grassland, adjacent to the current Project Area, therefore demonstrating that such an alternative is reasonable. . . . BLM should consider at least one alternative that requires these measures to be applied, without exception, for this project.”

See Scoping Comments at 15 and DEIS comments at 4.13 This analysis was requested in scoping comments that were incorporated by reference in our DEIS comments, and we noted its absence in our DEIS comments.

Summary:

The BLM failed to provide explanation for why alternatives submitted during scoping and in draft comments were not analyzed in detail in the EIS.

Response:

Agencies are allowed to dismiss an alternative from detailed analysis for a variety of reasons (40 CFR 1502.14). An alternative may be eliminated from detailed study if it is determined not to meet the proposed action’s purpose and need; it is determined to be unreasonable given the BLM mandates, policies, and programs; it is substantially similar in design to an alternative that is analyzed; its implementation is speculative or remote; or it is technically or economically infeasible

(BLM Handbook H-1790-1, Section 6.6.3). The agency must also briefly discuss the reasons for having dismissed the alternative from detailed analysis (40 CFR 1502.14).

The BLM considered all of the alternatives submitted during scoping and from public comments on the Draft and Supplemental Draft EISs and documented the reasons for dismissing them from detailed study in Section 2.6, *Alternatives Considered but Eliminated from Detailed Analysis* (p. 2-48). As noted in that section, the BLM did not analyze those alternatives that did not meet the purpose and need, were not technically or financially feasible, were addressed wholly or partially in other alternatives, or for other reasons as detailed in the Final EIS at Section 2.6 (pp. 2-48–2-54).

The BLM considered an alternative that would have included the cessation of development activities if a Clean Air Act violation were to occur, but did not carry it forward for full analysis because the provisions related to conservation of the human and natural environment were substantially similar to Alternative C, which was carried forward for analysis (see Section 2.6.6, *Full Resource Protection Alternative*, p. 2-52; surface disturbance would be minimized, development in sensitive habitats would be clustered, and all timing and distance stipulations would be enforced for wildlife). Also, as noted in the response to comments (Appendix H, p. H-113) the Wyoming Department of Environmental Quality, Air Quality Division is responsible for regulating emissions from oil and gas sources through its Oil and Gas Permitting Guidance. Air quality construction permits would need to be obtained to proceed prior to site-specific construction. Oil and gas developments must comply with U.S. Environmental Protection Agency regulations and standards as well as Wyoming Department of Environmental Quality regulations and standards. In addition, the rationale for dismissal of the Full Resource Protection Alternative indicates that any actions taken to address further violations of the Clean Air Act are speculative in nature and do not warrant analysis of a stand-alone alternative.

The BLM did not analyze an alternative that placed more than 16 wells per well pad as noted by the protestor; however, as noted in the response to comments on the Draft EIS (Appendix H, p. H-121), Alternatives B and C analyzed different development scenarios by varying the number of wells to be drilled on fewer wellpads with 16 wells per well pad as one end of the spectrum. This comparison can be extrapolated to increase the number of wells per pad and, therefore, an alternative to analyze a larger number of wells per pad does not warrant analysis as a stand-alone alternative, nor does it preclude the applicant from proposing more than 16 wells per well pad at the time of APD submission and analysis. Additionally, as noted in the same response to comments, the number of wells per pad on the Pinedale Anticline is not directly applicable to Converse County due to differences in geology and hydrocarbon target zones (Appendix H, p. H-121).

Finally, although the BLM did not specifically consider “an alternative that analyzes ‘comprehensive moratoria for project-related vehicle traffic and human activities (except in emergencies) in sensitive wildlife habitat...,’” the BLM’s consideration of the Full Resource Protection Alternative fulfills the intent of considering an alternative that would provide for recovery of fluid minerals “with the greatest conservation of human and natural environment” (Final EIS, p. 2-52). The aspects of this alternative included concentrating development to minimize equipment, traffic, and human activity; cessation of activities if violations of the CAA were to occur; and enforcement of all wildlife timing and distance stipulations. As noted in the rationale for elimination, the BLM found that it was substantially similar to Alternative C already being analyzed and the alternative was therefore dismissed.

The BLM properly considered all alternatives submitted by the public. Accordingly, this protest is denied.

Tribal Consultation

Great Plains Tribal Water Alliance, Inc.

Doug Crow Ghost

Issue Excerpt Text: The Final EIS includes no documentation of government-to-government consultation by BLM with the Tribes of the Great Plains Tribal Water Alliance. A record documenting early, sustained efforts to engage, develop relationships with individual Tribal leaders, accept input, attend meetings on the Reservations, listen and learn about concerns with Treaty rights and cultural issues - there is no documentation showing that was even attempted, much less accomplished

Oglala Sioux Tribe

Tom Poor Bear

Issue Excerpt Text: The OST contends that the BLM Authorizing Officer Stephanie Connolly failed to develop and complete the minimum requirements of NEPA. The BLM Authorizing Officer Stephanie Connolly also failed her responsibilities overseeing the NEPA process which required her to develop a complete record listing “all” commenters to the DEIS and the FEIS. By these actions she limited BLM RESPONSEs to certain detailed comments on treaty rights and water rights from the GPTWA; and failed to list the OST comments and concerns in Resolution No. 18-SSXB, and comments on the DEIS provided at the government-to-government consultation meetings held at the Prairie Winds Casino Hotel on April 17-18, 2018, on the Pine Ridge Reservation and the Pierre Chamber of Commerce Building on July 10-11, 2018.

Oglala Sioux Tribe

Tom Poor Bear

Issue Excerpt Text: The Oglala Sioux Tribe protests BLM Authorizing Officer Stephanie Connolly for prohibiting the disclosure of comments made by OST and other Tribes; and failing to include the BLM meeting notes of a government-to-government consultation meeting initiated by the Bureau of Land Management (BLM) with the Oglala Sioux Tribe, and other Sioux Tribes, at the Pierre Chamber of Commerce, Community Room -800 W Dakota Ave, Pierre, South Dakota into the record of the Draft Environmental Impact Statement for Converse County Oil and Gas Project

Oglala Sioux Tribe

Tom Poor Bear

Issue Excerpt Text: The OST alleges that BLM failed to initiate consultation under section 106 of the National Historic Preservation act (NHPA) as amended in 1992 on the findings and determination of effects BLM reviewed and concurred with on archaeological reports previously and today. Because BLM cannot produce any field notes on any sites visits BLM said happened since 2014 during the initiation of the DEIS, those consultation process which should have made the NEPA record are non-existent. This eliminates the voice of OST and other tribes and diminishes the “reasonable and good faith effort.”

Oglala Sioux Tribe

Tom Poor Bear

Issue Excerpt Text: BLM produced three EIS’s, but they do not contain any analysis of project impacts on the cultural, religious, historical-prehistoric resources, burials and sacred sites of the OST and other tribes. All three documents are silent on these concern(s) of OST and other tribes. Because of this decision by BLM, these cultural, religious, historical-prehistoric resources, burials, and sacred sites have now been opened to potential destruction; and will not be identified in any tribal cultural survey and catalogued to be included for the FEIS.

***Oglala Sioux Tribe
Tom Poor Bear***

Issue Excerpt Text: The FEIS must identify mitigation measures sufficient to protect the OST and other tribes' ownership of their cultural, religious, historic-prehistoric resources, burials and sacred sites that may be affected by the Converse County Oil and Gas Project. This will not be achieved because there is no listing in any of the (3) EIS documents of these concerns expressed by OST and other tribes.

Summary:

The BLM failed to conduct adequate government-to-government consultation, conduct adequate Section 106 consultation, respond to comments and information provided by tribes, and analyze project impacts on the cultural, religious, and historical-prehistoric resources noted by the tribes. The BLM failed to include mitigation measures to protect resources of tribal concern.

Response:

The BLM adequately consulted with tribal governments regarding the Converse County Final EIS/PRMPA. Section 101(d)(6) of the NHPA requires that "in carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties [of traditional religious and cultural importance to be eligible for inclusion on the National Register]." It is BLM policy to provide "an early opportunity for tribes to help inform BLM decisions with the potential to affect their interests through both formal consultation and serving as cooperating agencies" through the FLPMA land use planning process and the NEPA analysis that accompanies it (BLM Handbook H-1780-1, p. IV-2).

While the BLM manager must give tribal concerns and preferences due consideration and make a good-faith effort to address them as an integral part of the decision-making process, final decisions may not always conform with the preferences and suggestions of the tribes. In these cases, the BLM must notify the tribe of final plan decisions, including an explanation for why the plan was or was not able to accommodate particular tribal concerns (BLM Handbook H-1780-1, p. IV-7).

The BLM has consulted with tribal governments throughout the development of the Converse County Final EIS/PRMPA as summarized in Chapter 7, *Consultation and Coordination*, of the Final EIS. As noted here, "The BLM initiated formal consultation with 13 tribes on July 28, 2014 (Final EIS/PRMPA, p. 7-3)." The BLM sent additional communications to the tribes to attempt to engage in government-to-government consultation including a subsequent letter to the 13 tribes on February 4, 2016, followed up with phone calls to the tribes, and garnered interest in participating from seven of the tribes. Two additional tribes were sent consultation letters on August 1, 2016. Consultation with interested tribes continued throughout the planning process, including additional communications and in-person meetings, as described in the Final EIS/PRMPA, page 7-4. As noted by the Oglala Sioux Tribe in its protest letter, the BLM also has records of consultation and meetings held with the tribes in 2018 in the project's decision file that can be made available to the tribe or other parties; however, the BLM may choose to prohibit disclosure of confidential consultation information from non-tribal requestors to protect sensitive information. This clarifying information regarding records documenting tribal consultation has been included in an updated consultation section in the Record of Decision. Also, as noted in the Final EIS, tribal consultation will continue through additional project-specific NEPA analysis, including all activities implemented under the Record of Decision.

The BLM utilized the NEPA commenting process to fulfill the public involvement requirements of section 106 of the NHPA (16 U.S.C. 470f), consistent with the ACHP regulations (36 CFR 800.2(d)(3)) in order to collect information about historic and cultural resources within the area of

potential effect to aid with the identification and evaluation of environmental impacts on cultural resources and resources of Native American concern in the Converse County Final EIS/PRMPA in the context of both NEPA and section 106 of the NHPA. A land use planning-level decision is broad in scope. For this reason, analysis of land use plan alternatives is typically qualitative rather than quantitative and is not based on site-specific actions. As the decisions under consideration by the BLM in the PRMPA are programmatic in nature and would not result in on-the-ground actions that result in an irretrievable commitment of agency resources (e.g., the BLM is not approving an APD to start drilling), the scope of the analysis was conducted at a programmatic level.

NEPA regulations direct that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a “hard look” at potential environmental impacts of adopting the Converse County PRMPA. The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Within that context, the BLM undertook a reasonable and good-faith effort to engage consulting parties to identify historic properties and potential impacts to historic properties in the planning area, consistent with the requirements of section 106 of the NHPA. The FEIS describes the process for identifying all known previous cultural inventories and historic properties on pages 3.2-11 through 3.2-12 for cultural resources and page 3.2-29 for resources of Native American concern. Specifically, the BLM updated the *Cultural Resources* and *Resources of Native American Concern* section of Chapter 4 (Section 4.2, pp. 4.2-1–4.2-14) to capture issues raised by the Oglala Sioux Tribe as part of the impacts analysis for the FEIS. For example, the impact analysis for Alternative B notes that “direct and indirect impacts to resources of Native American concern, particularly those spread over large distances such as in the Pine Ridge area, under Alternative B would be more extensive than those under Alternative A and there would be greater potential for impacts to Indian sacred sites and [Traditional Cultural Properties]” (FEIS, p. 4.2-9). Further, the BLM would follow the existing laws, regulations, and policies cited in Section 1.4.2 to consult with tribes about potential impacts to specific resources of Native American concern on a case-by-case basis during site-specific NEPA and NHPA analyses. This site-specific approach potentially would lead to incremental impacts and loss of integrity at a landscape level” (Final EIS, p. 4.2-9). Additionally, the BLM addressed mitigation to avoid or minimize impacts on resources of Native American concern by including measure CR-4 (Final EIS, p. 4.2-10), “A qualified tribal monitor will monitor sediment-disturbing activities during construction in areas that have been determined, through tribal consultation and the NHPA process, to contain or be likely to contain Indian sacred sites and/or [Traditional Cultural Properties]. A monitoring and discovery plan may be developed for large or complex undertakings or areas known to contain such resources.”

Future, site-specific activities will require additional environmental review and authorization, including all applicable procedures to comply with NEPA, the NHPA, and government-to-government consultation. Specifically, the agencies will conduct appropriate NEPA and NHPA analyses for implementation decisions that would authorize specific uses in specific areas, and complete government-to-government consultation as necessary. Conducting cultural resources inventory is a continuous and ongoing process resulting from related NHPA Section 106 and Section 110 compliance processes.

Finally, the BLM adequately responded to public comments on the Draft EIS/RMP, including comments from tribes and tribal members. The BLM is required to assess, consider, and respond to all substantive comments received (40 CFR 1503.4). Substantive comments are those that reveal new

information, missing information, or flawed analysis that would substantially change conclusions (BLM Handbook H-1601-1, p. 23-24). In compliance with NEPA, the BLM considered all public comments, including those submitted by the Oglala Sioux Tribe, submitted on the Converse County Draft EIS/RMPA and Supplemental Draft EIS/RMPA. The BLM complied with 40 CFR 1503.4 by performing a detailed comment analysis that assessed and considered all substantive comments received. Appendix H, *Draft EIS Public Comments and Responses*, and Appendix I, *Supplemental Draft EIS Public Comments and Responses*, in the Converse County Final EIS/PRMPA present the BLM's responses to all substantive comments, including those submitted by the Great Plains Tribal Water Alliance as found on pages H-91 through H-95. The BLM summarized the issues raised by each comment letter and provided a meaningful response. The BLM's responses identified any modifications to the alternatives, improvements to the impacts analysis, or factual corrections made as a result of public comment. The BLM's responses also explain why certain public comments did not warrant further agency response.

The BLM completed adequate plan-level government-to-government consultation and Section 106 consultation and complied with NEPA by providing a sufficient response to comments and information provided by tribes, analyzing project impacts on the cultural, religious, and historical-prehistoric resources noted by the tribes, and addressing mitigation measures to protect resources of tribal concern presented. Accordingly, these protests are denied.

Developing a Programmatic Agreement

Oglala Sioux Tribe

Tom Poor Bear

Issue Excerpt Text: The OST contends that by not including a PA that followed the regulation requirement in Subpart C, Program Alternatives, 36 CFR 800.14 into the FEIS, BLM cannot piece-meal the DEIS and cannot achieve a ROD. BLM cannot also use 36 CFR § 800.8 to comply with the “hard look” clause required in the NEPA process. Based on the lack of a PA attached to the FEIS, the FEIS is rendered “inadequate” and is determined “Deficient” by OST and “Objects” to the FEIS.

Summary:

The BLM failed to include a Programmatic Agreement (PA) as part of the Converse County Final EIS/PRMPA project.

Response:

In 2014, BLM WY and the State of Wyoming entered into a Protocol Agreement with the Wyoming State Historic Preservation Office (SHPO) that supplements and tiers to the BLM's 2012 National Programmatic Agreement (PA), which governs the BLM's compliance with Section 106 of the National Historic Preservation Act (NHPA) and other obligations under the NHPA. The Protocol Agreement describes how BLM WY will coordinate and cooperate with the SHPO consistent with the National PA. Both the Protocol Agreement and the National PA specifically contemplate how to approach land use planning decisions. The National PA specifically acknowledges phased decision-making beginning with land use planning designations as an appropriate strategy for meeting the steps of the Section 106 process. *See* National PA at Section 2.a(5). It also instructs that BLM take some steps to consider the effect on potentially eligible sites in each phase, National PA at Section 2.a(5), and seek input from the SHPO and Indian tribe(s) regarding the identification of historic properties during the land use planning process, National PA at Section 4.a. Additionally, the Protocol Agreement contemplates how BLM WY will engage the SHPO and seek input during the

land use planning process, including an invitation to comment on any cultural resource use allocation. Protocol Agreement at III.A.

In developing the Converse County Final EIS/PRMPA, BLM WY followed the direction in the Protocol Agreement. In particular, the BLM communicated with SHPO and others about the proposed land use plan amendments, invited them to participate in the planning process, and sought information regarding historic properties (including the OST; see FEIS at pages 7-3 to 7-4). The BLM also offered the SHPO an opportunity to review the NEPA documentation, which included information about historic properties. Additionally, the BLM explained the process for satisfying the requirements of the Protocol Agreement before making future implementation decisions based on the proposed plan amendments. For example, consistent with the recommendation of the SHPO, and as noted in Appendix H, *Draft EIS Public Comments and Responses*, specific text in Sections 4.2.2.4 and 4.2.3.4 has been added to reiterate that the BLM would follow Section V.A. of the State Protocol for considering the effects of its undertakings on historic properties located on non-Federal surface.

The Converse County Final EIS/PRMPA does not authorize any actual operations (FEIS at page 1-5: “Although the RODs may approve the proposed oil and gas wellfield development on a conceptual basis, a site-specific environmental review of areas proposed for surface disturbance and sub-surface mineral extraction would be completed to the extent required by NEPA. Prior to drilling on BLM- or USFS-administered surface and mineral estate, the project proponent must submit an APD to the BLM or USFS, as appropriate, which would include a Surface Use Plan of Operation and a Drilling Plan. At that time, the BLM/USFS would conduct a site-specific NEPA review and attach appropriate measures to the permit to protect natural and human resources.”) and BLM acknowledges that before it can make future implementation-level decisions it must comply with the applicable procedures set forth in the Protocol Agreement to meet the requirements of Section 106 of the NHPA. As a result, it is not necessary to prepare a programmatic agreement for this plan amendment. Accordingly, this protest is denied.

Tribal Treaty Rights and Trust Assets

Great Plains Tribal Water Alliance, Inc.

Doug Crow Ghost

Issue Excerpt Text: The BLM stated on page H-2, “Issues concerning water rights, boundaries and treaty rights are beyond the scope of this EIS.” On its face, the Final EIS concedes that BLM failed to consider the RMPA’s impact on Treaty rights and water rights. Indian reserved water rights are rights acquired by Treaty, and are federal trust resources. 106 Stat. 4694. BLM’s scope of review in the Final EIS was far too limited. Additional evaluation of the impacts to Indian Treaty rights and water rights is required.

Great Plains Tribal Water Alliance, Inc.

Doug Crow Ghost

Issue Excerpt Text: The finding that there is sufficient surface water in the Cheyenne River for the Converse County Oil and Gas project ignores the existence of Treaty protected water to which Tribes have consumptive and instream rights downstream.

Great Plains Tribal Water Alliance, Inc.

Doug Crow Ghost

Issue Excerpt Text: The BLM approved the amendment based in part on a finding that “There are still substantial portions of the annual surface water volumes available for new uses in the... Cheyenne river drainage(s).” Final EIS, p. 3.16-8. That is erroneous, because the quantity of Indian

Treaty water in the Cheyenne basin has not been adjudicated or compacted, and these claims may result in over-appropriation of the Cheyenne.

Great Plains Tribal Water Alliance, Inc.

Doug Crow Ghost

Issue Excerpt Text: Reserved Water Rights in the Missouri River Basin, 6 GREAT PLAINS NATURAL RESOURCES J. 131 (2002). Any federally-approved project that affects the waters of the basin and could affect sub-basins, such as the Cheyenne, triggers the obligation under Executive Order 13175 to consult with Tribes and respect Treaty rights. Under Executive Order 12898 on Environmental Justice, the agency must disclose the impacts to Treaty rights in any environmental impact studies prepared under NEPA.

Great Plains Tribal Water Alliance, Inc.

Doug Crow Ghost

Issue Excerpt Text: The Final EIS fails to adequately evaluate environmental impacts of the preferred alternative, because it does not disclose the water requirements for 5,000 new oil and gas wells. The BLM also under-estimates the potential for groundwater contamination. The Final EIS fails to adequately evaluate the potential environmental impacts of water contamination and air pollution from hydraulic fracturing (fracking).

Oglala Sioux Tribe

Tom Poor Bear

Issue Excerpt Text: The OST protests the failure of BLM to respond in the Draft EIS on the letter dated March 12, 2018 of the Great Plains Tribal Water Alliance (GPTW A) that identified adverse impacts to the treaty rights of the Oglala Sioux Tribe, and other treaty tribes

Oglala Sioux Tribe

Tom Poor Bear

Issue Excerpt Text: The OST allege that the DEIS failed to adequately identify the environmental effects on OST and other tribes, their cultural, religious, historical-prehistoric resources, burials, and sacred sites. These resources are not only Federal Trust Assets-trust resources they are protected by the Fort Laramie Treaty of 1851, Federal law, and Executive Orders.

Oglala Sioux Tribe

Tom Poor Bear

Issue Excerpt Text: The OST protests the failure of BLM to respond in the Draft EIS on the: (a) adverse impacts to the area affected by the Converse County Oil and Gas Project that are Sioux Nation Treaty lands under the 1868 and 1851 Fort Laramie Treaties. Executive Order 1317S prohibits the BLM from violating the Fort Laramie Treaties; and (b) impacts on Treaty rights and hunting and fishing rights, in violation of Executive Order 12898 on Environmental Justice. ...

The BLM is hereby put on both actual and constructive notice that the OST has never ceded its 1851 Treaty lands or mineral rights in Wyoming, and has rejected the monetary award in Docket 74 since 1983, and still claims ownership of all lands, minerals, water and other natural resources within the Article 16, 1868 Treaty unceded territory in Wyoming, that includes all of Converse County, and also protests the approval of the FEIS for the Converse County Oil & Gas Project on this basis. The OST has exhausted all of its federal judicial remedies in Docket 74, and its claims to all lands, minerals, waters and other natural resources will remain until they are resolved through mutual agreement that is ratified by congressional legislation.

Summary:

The BLM failed to consider the amendment's impact on tribal treaty rights and Indian reserved water rights.

Response:

Regarding tribal treaty rights and reserved water rights, BLM Manual MS-1780 reads that “any proposed action that could affect water use must provide for Indian tribal water requirements in accordance with established treaty rights, as confirmed by the responsible State water right authority or pertinent legal decisions” (BLM MS-1780, p. 3-7). The water policy of the BLM is to acquire and perfect Federal reserved water rights necessary to carry out public land management purposes. If a Federal reserved water right is not available, then the BLM will acquire and perfect water rights through state law (BLM Manual Section 7250.1.2.A). The BLM has no specific regulatory authority related to use of water or enforcement of water quality laws.

The Final EIS/PRMPA makes no decision regarding water rights. However, the plan does analyze impacts on tribal treaty rights as part of the analysis of environmental justice effects on tribal resources including treaty-protected resources in the analysis area, which includes the CCPA plus the viewshed of resources of Native American concern (Section 3.11.2, *Socioeconomic Analysis Area*, p. 3.11-5). Regarding water rights generally, the Converse County Final EIS/PRMPA makes clear that “any new water use will be subject to interference considerations as they apply to existing water rights within the project area” (p. 4.16-15). As such, the Wyoming State Engineer's Office, not the BLM, is the regulatory agency with the authority to declare a groundwater control area and place a cap on water permitting and production should impacts on existing water rights occur due to the project.

The BLM has records of consultation and meetings held with the tribes in the project's decision file that can be made available to the tribe or other parties; however, the BLM may choose to prohibit disclosure of confidential consultation information from non-tribal requestors to protect sensitive information. This clarifying information regarding records documenting tribal consultation has been included in an updated consultation section in the Record of Decision.

The Converse County Final EIS/PRMPA considers impacts on water rights and does not violate tribal treaty rights or existing water rights, nor does it grant/claim/establish water rights. Accordingly, this protest is denied.