



October 8, 2010

Rick Metzger, District Ranger
Wind River Ranger District
P.O. Box 186
Dubois, WY 82513

Re: Comments on the pre-decisional environmental assessment for Scott Well #2

Dear Rick:

Please accept these comments on behalf of Wyoming Outdoor Council, Greater Yellowstone Coalition and The Wilderness Society on the pre-decisional environmental assessment regarding the proposal by Hudson Group LLC (Hudson) to drill an oil well on the Wind River District of the Shoshone National Forest. As we advocated in our scoping comments, there are a number of reasons why the Forest Service should take a cautious approach prior to authorizing the first well to be drilled on the Shoshone in more than two decades. Although we believe this project is one in which an EIS is warranted, preparation of an EA rather than a categorical exclusion was an important first step, and we appreciate your responsiveness to this concern. We also appreciate the willingness the Forest Service exhibited when asked to disclose public records. We remain concerned, however, about the level of analysis in the EA—specifically your decision not to analyze other action alternatives aside from Hudson’s proposal and not to consider impacts from full field development. We urge the Forest Service to consider and require more stringent mitigation measures and conditions of approval in its final decision.

1. The Forest Service did not define a balanced purpose and need statement for the project.

As we stated in our scoping comments, because the stated purpose and need for a federal action determines the range of alternatives, it is essential the Forest Service clearly articulates the project’s purpose and need from the agency’s perspective rather than simply adopting Hudson’s objectives for the project as its own. 40 C.F.R. § 1502.13. As courts have cautioned, “One obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence.)” Davis v. Mineta, 302 F.3d 1104, 1119 (10th Cir. 2002) (quoting Simmons v. United States Army Corps of Eng’rs, 120 F.3d 664, 669 (7th Cir. 1997).

Unfortunately, the purpose and need statement is not balanced and fails to reflect a dual

commitment to protect surface resources and wildlife on par with oil exploration. Rather, it defines the purpose for the proposed action solely from Hudson's perspective. Most troubling is the Forest Service's identified purpose, which is to "allow" Hudson to drill and its identified need, which is to "authorize" surface use of the national forest for drilling operations. EA at 2. Authorization of the project may be the Forest Service's final decision if it finds the project will have no significant impact, but it is inappropriate at this pre-decisional stage to characterize the need for the project as project authorization. This turns the entire NEPA process on its head.

The purpose and need statement sets the stage for the range of alternatives the Forest Service considers. For this reason, it is perhaps not surprising that given the narrow statement in this EA, only one action alternative was considered: Hudson's proposal. We urge the Forest Service to amend the purpose and need statement to reflect that authorization of Hudson's proposal is not an inevitability—especially without stronger conditions of approval and mitigation measures—and to analyze more than one action alternative.

2. The Forest Service did not consider a reasonable range of alternatives.

The EA only analyzes one action alternative, which is Hudson's proposal. Given the seriousness of the project, the incredible wildlife values that could be impacted, and the potential to set a precedent for expanded oil development in the Carrot Unit, this is insufficient. NEPA mandates that the Forest Service "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). This requirement to consider a reasonable range of alternatives applies whether an agency is preparing an EIS or an EA and requires the Forest Service in this case to give full and meaningful consideration to all reasonable alternatives. Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1245 (9th Cir. 2005); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1229 (9th Cir. 1988).

a. The Forest Service should have analyzed a conservation alternative.

In our scoping comments, we noted the importance of including an alternative that would require Hudson to meet a "gold standard" of operations. This type of alternative—what might be deemed a "conservation alternative"—was absent from the EA. We urge the Forest Service to amend the EA to include such an alternative that would require strict operational ground rules to safeguard wildlife, air, water and other surface resources. The following is a list of best management practices that we believe should have been included in a conservation alternative and that we believe the Forest Service should adopt as conditions of approval if the project moves forward.

- a. Baseline data collection for water quality prior to any ground disturbance. This baseline survey should test for a suite of chemicals as discussed below in (b).
- b. The Forest Service has committed to monitoring for conductivity after development commences and throughout the life of the project. However, conductivity testing alone, which can serve as a measurement for total dissolved solids and is, in essence, a measurement of salts in the water, is insufficient and will not alert the Forest Service to other forms of water contamination. The Forest Service should commit to testing for a

- suite of chemicals, including chemicals that Hudson may be using in its drilling operations, or that may be present in the produced water that comes to the surface along with the oil, as well as for Total Petroleum Hydrocarbons (TPH).
- c. A vegetative survey should be conducted prior to ground disturbance to determine baseline vegetative cover, density, height and species mix.
 - d. A protocol for monitoring noxious weeds should be adopted.
 - e. Prohibition of any and all types of waste pits. Hudson should agree to a fully closed-loop system for wastes and no storage of wastes on site.
 - f. Steel tanks need to be large enough to store product (oil) and any other production materials (condensate, produced water, etc.) over the winter so that winter access is not necessary.
 - g. Sufficiently impervious secondary containments (e.g. steel) around above ground tanks should be required. A soil berm is inadequate.
 - h. Tier 2 or better (or the equivalent) for drill rig engines.
 - i. And motorized units or heavy equipment should be fitted with mufflers or enclosed in insulation to minimize noise.
 - j. Green completions technology.
 - k. Backflow preventers.
 - l. Prohibition of the burial or backfill of hazardous materials.
 - m. The reclamation bond should be sufficiently high to cover costs of potential spills, blowouts and surface recontouring and revegetation. The Forest Service has the discretion to set the bond amount and should err on the side of caution.
 - n. Reclamation should not be considered complete after an arbitrary one-year time period. The Forest Service should require Hudson to ensure a certain level of vegetative re-growth (especially shrub re-growth) to match the original site's vegetation characteristics and habitat should be fully functional before reclamation is deemed complete. Consultation with Wyoming Game and Fish should be required to determine if reclamation is adequate.
 - o. Interim reclamation should start right away to reduce the surface footprint. For example, the well pad need not be square, but could be contoured to the landscape to reduce impacts. Revegetation efforts could begin on part of the pad after drilling is completed.
 - p. Absolutely no waivers, exceptions or modifications should be granted to the timing restrictions allowing drilling only between July 1 and October 15.
 - q. Remote monitoring: A specific plan and a requirement that Hudson will use remote monitoring to minimize truck traffic. This is especially important in the winter to ensure limited instances of snow compaction on roads to mitigate impacts to lynx. The current mitigation requirement's caveat that remote monitoring will occur "when possible" should be amended and a requirement for remote monitoring or a limited amount of traffic should be added.
 - r. The Forest Service should include a list of recommendations made in the 2006 Forest Plan amendment regarding grizzly bear management and require that these measures be followed.
 - s. Independent wildlife monitoring should occur for grizzly bear and elk to determine responses to the development and potential avoidance of the site. The lessee could pay

- for such monitoring by a third-party, but will not itself monitor for bear presence.¹
- t. Fracking was not mentioned in the EA, but because this technique is now also being used for some oil drilling operations, Hudson should use no hazardous chemicals in the fracking process.
 - u. Fugitive dust control for access road and new road construction via low speed limits or application of dust suppressants. EA at 12.

Most of these practices can be found in BLM documents regarding wildlife, operational and air quality best management practices for fluid minerals. See Exhibits 1, 2 & 3. These are standard practices and should be minimum mitigation measures for any new oil and gas operations, especially on a world-class forest like the Shoshone. We urge the Forest Service to amend the EA by adding an alternative that discusses these requirements and if it selects this alternative, to include these as conditions of approval.

b. The Forest Service should analyze a buy-out alternative.

Hudson holds valid leases on the Shoshone National Forest. However, judging from the administrative record, it is fair to say that the company has not diligently pursued development of its leases. Coupled with this fact is the clear sentiment from a local and national public that oil and gas development on the Shoshone is undesirable. It is against this backdrop that a buy-out alternative is entirely appropriate and should be considered in any analysis the Forest Service undertakes. This is a “win-win” solution that would simultaneously protect the forest from industrial development while honoring Hudson’s financial interests and lease rights.

This type of alternative is not without precedent and will be included (as far as we know) in the draft EIS now being prepared in response to a drilling proposal in the Hoback Basin of the Bridger-Teton National Forest. At first, Bridger-Teton personnel were skeptical of the need to include this as a separate alternative from the no-action alternative. They correctly noted that a buy-out is something that could occur at any time, and there is no prerequisite that it be considered first in a NEPA document. In addition, they were concerned that because the Forest Service lacks the authority to fully enact such an alternative (as it would require voluntary action

¹ The Forest Service should require Hudson to take the utmost precaution to avoid any conflicts between its employees and bears. As mentioned in our scoping comments, the Forest Service’s own records reflect that Hudson has no experience drilling on sensitive, national forest lands and that the company’s employees were uninformed and careless with respect to bears in the past at this very location. Documents related to past iterations of this proposal suggest that it was the Forest Service’s intention to allow Hudson to monitor and report back to the Forest Service about the presence of grizzly bears. Unfortunately, this intention has been retained in the EA. EA at 15. It is unorthodox for the Forest Service to expect oil and gas company employees to have the wherewithal or expertise monitor and assess listed species. It is even more inappropriate for the Forest Service to transfer monitoring responsibility to Hudson, given the company’s documented lack of knowledge and track record of carelessness in its initial operations with respect to bears. We ask the Forest Service to remedy this by committing to monitoring bears itself, or hiring an independent biologist (funded by Hudson) to monitor grizzly bears.

on behalf of the company) they couldn't include it in the analysis. We advocated that neither of these issues precluded the Forest Service from including such an alternative for consideration and offered the following discussion as support.

The regulations implementing NEPA are clear: the agency "shall include reasonable alternatives not within the jurisdiction of the lead agencies." 40 C.F.R. § 1502.14(c). Although the Forest Service alone may not be able to "choose" the buy-out alternative, this is not a factor that should have any weight in the agency's decision whether to include it as an alternative. The regulations contemplate the inclusion of alternatives beyond the agency's authority to enact; the only determining factor is whether a buy-out alternative is reasonable. The NEPA process was not designed as a tool to assist agencies in reaching a predetermined end, but rather as a vehicle to facilitate a open-ended, meaningful, public decision making process. Including this alternative in the EA would validate this reasonable option and encourage further negotiations outside of the NEPA process to proceed.

Courts have found fault with agencies for failing to consider alternatives when such alternatives were beyond the jurisdiction of the agency to complete, but were reasonable nevertheless. In Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999), the court addressed a situation in which the Forest Service initiated an EIS to address a land exchange with a timber company. The court found that the Forest Service violated NEPA by not considering an alternative that would have involved a purchase of the timber company's inholding, rather than just an exchange. Id. at 814. The Forest Service argued that it was unclear whether funds would be available and for this reason it had no obligation to consider what in its estimation was a "remote and speculative alternative." Id. The court disagreed and citing 40 C.F.R. § 1502.14(c), found that "the alternative clearly [fell] within the range of such reasonable alternatives, and should have been considered." Id.

In another case, National Wildlife Federation v. National Marine Fisheries Service, 235 F.Supp.2d 1143, 1154 (D. Wash. 2002), Plaintiffs argued that the Service and the U.S. Army Corps of Engineers should have considered an alternative that would have controlled sediment deposits into a reservoir by encouraging better upstream agricultural and forestry practices. The Corps responded that it did not have the authority to regulate land uses and practices within the vast majority of the affected basin and as such did not need to include the alternative in its analysis. Id. Again, the court disagreed finding the "agency's refusal to consider an alternative that would require some action beyond that of its congressional authorization is counter to NEPA's intent to provide options for both agencies and Congress." Id.

In a final example, Natural Resources Defense Council v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972) the Department of Interior posited that "the only alternatives required for discussion under NEPA are those which can be adopted and put into effect by the official or agency issuing the statement." The court disagreed, responding that an EIS is not only a tool for the lead agency, but also a means by which "Congressional objectives of Government coordination [and] a comprehensive approach to environmental management" are implemented. Id. at 836. It instructed, "The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what it required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by

decisionmakers in the legislative as well as the executive branch.” *Id.* at 837. Moreover, the court stated that an agency may not “disregard alternatives merely because they do not offer a complete solution to the problem.” *Id.* at 836.

As reflected in both NEPA’s implementing regulations and in these examples from case law, there is ample support for including a buy-out alternative in the EA. Although none of the fact patterns in the cases mentioned above precisely mirror the situation the Forest Service faces here, there is no doubt that it can—and indeed should—consider an alternative whereby a conservation interest’s purchase of Hudson’s existing leases would occur.

After the purchase is completed, it is unlikely given the wildlife values and the strong public opposition that the Forest Service would consent to lease these parcels again. We understand the BLM Lander Field Office may designate the area as unavailable for future oil and gas leasing in the upcoming draft revision of its resource management plan. It is only the Carrot Unit—some 4,700 acres—in that is currently leased on the Wind River District of the Shoshone. In the upcoming forest plan revision, too, citizens will likely call for an unavailable designation for this area. Therefore, if these leases were retired, the area would likely be managed in the future primarily for wildlife and recreation without threat of future leasing and industrialization.

In addition to amending the EA to include a buy-out alternative, the Forest Service at a minimum, should agree to host its own public meeting in Dubois and require Hudson to attend so that the possibility of buy-out can be discussed directly with the company.

3. The Forest Service should have analyzed impacts from a reasonably foreseeable development scenario for the Carrot Unit.

We disagree with the statement: “Currently... there is no way to accurately describe a ‘what-if’ scenario if production were to be established.” EA at 91. Far from asking the Forest Service to analyze impacts from development of a RFD scenario forest-wide or something akin to the density present in Sublette County’s Jonah Field, it is entirely reasonable to require the company to provide, and to ask that the Forest Service consider, the impacts development of the Carrot Unit might present. The boundaries of the unit are already established. Surely the company can estimate the potential number of wells that would be drilled in the unit. Then, in the cumulative impacts analysis, the Forest Service could discuss the larger footprint, the necessary road access, the impacts to wildlife, vegetation and water quality—just to name a few of the affected resources.

Analysis of full field development of the Carrot Unit is especially important when considering the impact on wildlife—especially elk, grizzly bears and lynx. As we stated in our scoping comments, the project area is classified as critical elk parturition range by the Wyoming Game and Fish Department, is winter range for upwards of 300 elk, and lies in the path of a major elk migration for more than 2000 elk in the spring and fall. This area has been identified as highly critical for elk and it is not open to the public during spring calving. Although the Brent Creek area is not currently considered crucial winter range for elk, we understand it is likely that this designation will be changed the next time that the WGFD assesses habitat in the area and updates its maps.

The analysis area provides exceptional seasonal (spring and fall) habitat for grizzly bears. As the EA notes, “bear use of the analysis area is frequent” and “select areas have high habitat values during short periods of the spring and fall.” EA at 52. Grizzly bears were recently re-listed under the Endangered Species Act. One concern leading to that re-listing decision was the high level of mortality inflicted on bears in the Greater Yellowstone region. Serious impacts to bears could result from the development of the Carrot Unit, including degradation of habitat and increased conflicts with humans. Both of these circumstances can lead to an increase in bear mortality. The EA acknowledges that grizzly bears prefer less-disturbed habitat and that there will be some “short-term disturbance and possibly displacement of bears” during the development of the well. EA at 66. Development of Carrot Unit would have an even greater impact on habitat and should be analyzed at this stage.

Of additional concern—and a topic not adequately addressed in the EA—is the status of whitebark pine, whose seeds (the pine nuts) are an important food source for bears in the fall. It is theorized that with the demise of these trees and the absence of this historically important food source, grizzly bears are wandering farther a field into lower elevations looking for alternative foods, including livestock and buffalo berry. This greater movement outside the PCA to lower elevations could also increase the risk of human-bear conflicts. Adding additional stress (e.g. habitat fragmentation from industrial oil and gas development) to an already tenuous situation for grizzly bears, should warrant additional caution and analysis.

In addition to grizzly bears, Canada lynx are another species listed as threatened under the Endangered Species Act. In addition to the presence of a listed species in the area, the proposed well site lies within an area the U.S. Fish and Wildlife Service designated just last year as critical habitat for the Canada lynx. See 74 Fed. Reg. 8,616 (Feb. 25, 2009). In the Forest Service’s BA and as reflected in the EA, the project “may affect, but is not likely to adversely affect” lynx and lynx critical habitat. Presumably the rationale for this conclusion is found in the BA, which states that LAU 11 “has less than 30% of lynx habitat in an unsuitable condition ... management actions have not and will not change more than 15% of lynx habitat within the LAU to an unsuitable condition within a 10-year period...and [n]o new permanent roads are proposed....” EA at 98. It is not known whether the finding would be the same if development of the entire 4,700 acre unit was analyzed. The Forest Service should err on the side of caution by determining potential effects to listed species based on the reasonably foreseeable development of the area.

4. The Forest Service failed to give adequate consideration of cumulative impacts.

Even without consideration of the larger unit development, the general cumulative impacts analysis falls short with respect to wildlife species—particularly listed species like lynx and grizzly bear. The consideration of what activities might qualify as past, present or reasonably foreseeable activities is so vague as to be meaningless. The EA simply lists all of the possible multiple uses that have, currently do or could occur in the future, without respect to specific projects. A narrative listing of generic uses such as timber harvest, livestock grazing, increased motorized recreation, wildfires, oil and gas development and road construction is insufficient for analytical purposes. See EA at 96-100. The only specificity is found in Table 13, but these

projects are not analyzed whatsoever. EA at 99-100. For this reason, it is difficult to find support for statements such as, “Considering existing and foreseeable impacts to lynx over the area of concern, the proposed actions, with mitigation, would not significantly add to the cumulative effects of lynx or their habitat in the long-term.” EA at 98. Moreover, “mitigation” is never defined and it is unclear from other sections in the EA what mitigation measures the Forest Service intends to require of Hudson. This is true for the discussion of cumulative effects to grizzly bears as well. EA at 99.

5. Additional comments regarding the EA

- a. Page 2: Please define “environmentally sound manner” in the sentence, “This project would contribute to meeting the need for energy resources and [sic] produced in an environmentally sound manner.”
- b. Page 5: The EA should clarify that the Forest Service declined to host a public meeting, but agreed to meet with interested members of the public on February 2, 2010 at the request of conservation organizations.
- c. Page 11: Please identify the subject of the sentence: “Any spills of oil, gas, salt water or any other potentially noxious substance would be cleaned up and immediately removed to an approved disposal site.” Would the Forest Service, Hudson, a third-party contractor, or someone else be responsible for the clean up and removal?
- d. Page 11: Please specify who will monitor the project to “assure strict adherence to the lease terms, surface use plan, and project design features. Please also specify at what intervals and how frequently monitoring will occur.
- e. Page 12: Does the following sentence mean that Hudson will report cultural resource discoveries to the Forest Service? “New cultural resources discovered during the course of project implementation will be reported to the Forest’s archaeologist and will be protected from ground disturbance.” The Forest Service should monitor (at Hudson’s expense) whether any cultural resources are uncovered during development, not rely on the company to identify and report these resources.
- f. Page 13: “If any threatened, endangered, sensitive or rare plants are discovered during project layout or implementation, the appropriate specialist(s) will examine the area and the necessary mitigation action shall be taken.” Does this mean that Hudson will be responsible for “discovering” these plants? What is the specific “action” that shall be taken? As with all monitoring requirements, the Forest Service should be responsible for oversight (even if this means hiring at Hudson’s expense a third party to do this).
- g. Page 14: Please explain what is meant by, “Water monitoring would be required at a moderate or higher intensity.”
- h. Page 14: Please specify what mitigation measures the Forest Service refers to in the phrase “mitigation measures included in the Application for Permit to Drill.”

- i. Page 15: We believe it is entirely inappropriate to rely on Hudson to “monitor lease areas for grizzly bear presence.” There is an inherent conflict of interest (and the creation of a “fox guarding the hen house” scenario) if the Forest Service expects Hudson to be responsible for monitoring and reporting grizzly bear presence. If “temporary cessation or cancellation of activities” could be invoked upon grizzly bear activity, it is not in the company’s interest to adequately monitor or truthfully report. The Forest Service should monitor or hire a third party biologist—funded by the company— to perform this function on a regular schedule.
- j. Page 16: Please clarify what is meant by the sentence: “The Hudson Group is also required to monitor specific portions of their permitted activities.”
- k. Page 47: Please provide specific examples of the reclamation plan that is mentioned in the sentence, “A reclamation plan will be in place prior to drilling to restore habitat after drilling operations are completed.”
- l. Page 64: Please also clarify what is meant by “after drilling operations are completed.” Does this mean after the drilling phase and during production or does this mean during reclamation of the site if the well is dry? There is very little discussion in the EA about impacts if the well is productive. This is a flaw in the analysis that should be remedied.
- m. Page 87: Statements such as “It is very likely that after the drilling operations are complete, the level of use in this area by [moose and mule deer] would return to pre-drilling levels” assume a dry hole. What are the effects if the well is productive and the site is not reclaimed for decades? What support does the Forest Service have to support this conclusory statement?

6. Compliance with the Endangered Species Act

In situations where species afforded protection under the Endangered Species Act “may be present” an agency must prepare a biological assessment (BA) in order to meet the obligations of section 7(a)(2) of the Endangered Species Act (ESA). 16 U.S.C. § 1536(c)(1). A BA “shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitats are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is needed.” 50 C.F.R. § 402.12(a). The ESA also requires the Forest Service to “use the best scientific and commercial data available” in its biological assessments. 16 U.S.C. § 1536(a)(2).

We appreciate the Forest Service undertaking the preparation of a biological assessment, a necessary first step in determining, in conjunction with the U.S. Fish and Wildlife Service, whether the project can move forward, and if so, under what specific conditions. We join the Wyoming Game and Fish Department, however, in that we “disagree with the assessment that the project is unlikely to adversely affect grizzly bears.” WGFD comments re: EA for Scott Well #2, October 7, 2010 at 2. “At the very least, the analysis should acknowledge the proposed work will potentially have an adverse effect on grizzly bears in the area.” *Id.* Moreover, had an adequate cumulative effects analysis been prepared, the Forest Service likely would not have concluded that “this project does not add to cumulative impacts for grizzly bears in the area.” *Id.*

at 3. As WGFD properly states, “[E]verything associated with the project tends to be detrimental to grizzly bears.”

We will await the U.S. Fish and Wildlife Service’s opinion about the effect the impacts of the project may have to grizzly bears, as well as to lynx and lynx critical habitat.

7. Conclusion

Thank you for considering these comments. Please keep us on your mailing list for further information about this project. In addition to the request made in these comments, we mailed you a separate request on behalf of citizens to host a public meeting in Dubois about this project before a final decision is made. We ask that you require Hudson to attend so that the public can learn more about the project from the lessee, ask questions and provide input directly to the company and the Forest Service. We look forward to hearing from you about this request.

Sincerely,

Lisa McGee
Wyoming Outdoor Council
262 Lincoln St., Lander, WY 82520
lisa@wyomingoutdoorcouncil.org

And on behalf of:

Hilary Eisen
Greater Yellowstone Coalition
1285 Sheridan, Suite 215, Cody, WY 82414
heisen@greateryellowstone.org

Steff Kessler
The Wilderness Society
304 Main St. Lander, WY 82520
stephanie_kessler@tw.s.org

cc:
Dave Freudenthal, Governor
John Emmerich, WGFD
Ann Belleman, USFWS