January 27, 2010

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

Re: Scoping comments re: Scott Well #2

Dear Rick:

Please accept these comments on behalf of Wyoming Outdoor Council, Greater Yellowstone Coalition and The Wilderness Society regarding the proposal by Hudson Group LLC (Hudson) to drill an oil well on the Wind River District of the Shoshone National Forest. We appreciate the Forest Service meeting with our organizations to hear our concerns, responding to requests for information and agreeing to extend the scoping comment deadline.

As these comments will illustrate, 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. From the outset, the Forest Service can demonstrate caution by preparing a comprehensive analysis of the proposed development and its likely impacts to wildlife, vegetation, air and water quality and recreational opportunities on the forest. Hudson, too, can be a good operator by its support of such an approach. In this case, the necessary analysis cannot be accomplished through a categorical exclusion, but can only be realized through the preparation of a more thorough environmental review. In the second half of our comments we have outlined the issues and resources that the Forest Service should analyze in this more detailed environmental document.

1. **The categorical exclusion (CE) the Forest Service is considering using for this project is deficient as written.**

The CE the Forest Service has identified for potential use in authorizing Hudson's drilling proposal is relatively new; the final rule was published in the Federal Register on February 15, 2007. Although the Forest Service Region 2 minerals staff was unable to determine the exact number of times or locations where this CE has been used, apparently "it has been used in a few circumstances in Region 1." Melody Holm, USFS Geologist, Office of Leasable Minerals, pers. comm. Dec. 10, 2009. Although the Shoshone National Forest would not be the "test case" for this CE, it would almost certainly be the first instance that the CE was used to authorize this type of development in a high-elevation, mountainous forest unit and the first

instance it would be used to authorize industrial development in exceptional wildlife habitat in the Greater Yellowstone Ecosystem. The CE allows:

> Approval of a Surface Use Plan of Operations for oil and natural gas exploration and initial development activities, associated with or adjacent to a new oil and/or gas field or area, so long as the approval will not authorize activities in excess of any of the following:
>
> (i) One mile of new road construction;
> (ii) One mile of road reconstruction;
> (iii) Three miles of individual or co-located pipelines and/or utilities disturbance; and
> (iv) Four drill sites.

Forest Service Handbook: 1909.15 ch. 30 #17, 36 C.F.R. § 220.6(e)(17). This CE was envisioned and promulgated to "compliment[]" the § 390 CEs in the Energy Policy Act of 2005. 72 Fed. Reg. 7391, 7397. There are five § 390 CEs. These include:

> 1) Individual surface disturbance of less than five (5) acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to NEPA has been previously completed.
>
> 2) Drilling an oil and gas location or well pad at a site at which drilling has occurred within five (5) years prior to the date of spudding the well.
>
> 3) Drilling an oil or gas well within a developed field for which an approved land use plan or environmental document prepared pursuant to NEPA analyzed drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five (5) years prior to the date of spudding the well.
>
> 4) Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five (5) years prior to the date of placement of the pipeline.
>
> 5) Maintenance of a minor activity, other than any construction or major renovation of a building or facility.

The § 390 CEs have received criticism over the years, most recently in an official report by the Government Accountability Office; however, they are less problematic than the Forest Service CE. In contrast to the Forest Service CE, the § 390 CEs require the existence of recent NEPA documentation from which projects implemented under them must tier and they specifically limit the acreage that may be disturbed. As a result, they are far more narrowly defined and more limited in scope than the Forest Service CE.

In contrast, the Forest Service CE is overly broad and vague, as it places no limit on the

number of wells that could be drilled from up to four pads or "drill sites" and there is no acreage limit on the size of the pads. It also allows development to proceed in areas—like this one—that are currently undeveloped "new fields." This CE would seem to violate the basic premise of categorical exclusions, which are only appropriate for projects that have been proven to have no significant individual or cumulative effects on the environment. 40 C.F.R. § 1508.4. Categorical exclusions, once only appropriate for minor projects like mowing a lawn or painting a government building, were greatly expanded under the Bush administration. When challenged, some of these new CEs were found to be illegal.

To cite one example, the Ninth Circuit Court of Appeals enjoined a Forest Service hazardous fuels-related CE for its failure to adequately identify activities covered by the CE. See Sierra Club v. Bosworth, 510 F.3d 1016 (9th Cir. 2007). Citing the CEQ regulations that require agencies to include: "[s]pecific criteria for and identification of those typical classes of action…[w]hich normally do not require either an environmental impact statement or an environmental assessment," the court found that "the Fuels CE as written lack[ed] the requisite specificity to ensure that the projects taken under it achieve the objective of hazardous fuels reduction, but do not individually or cumulatively inflict a significant impact." Id. at 1032 (citations omitted). The court cited examples such as the Forest Service's failure to "identify the maximum diameter or species of trees that [were] permitted to be logged," the fact that "no limit" was placed "on the proximity of different projects under the Fuels CE" and that the Forest Service had not issued a "cap on the number of projects in a particular watersheds…" that could be approved under the CE. Id. Other problems the court cited were instances where terminology within the CE was not defined. Id. at 1033.

The problems the court identified with the hazardous fuels CE are analogous to the problems with this Forest Service CE, which places no limits or caps on the number of wells that can be drilled from each drill site and it imposes no limits or caps on the acreage of the drill sites. With such open-ended activity that could be authorized, there is no logical basis to claim that this is a narrow category of action that has been proven not to have a significant effect on the human environment, individually or cumulatively. This is a glaring deficiency in the CE as written. It doesn't matter whether the Shoshone National Forest intends to authorize such large-scale development under this CE. Implementing it under any circumstances puts the CE as written under scrutiny.

2. The Forest Service must have a rational basis for determining the project will not affect extraordinary circumstances.

As discussed above, the use of a CE is reasonable with respect to minor projects like mowing a lawn or painting a building, but the clear-cutting and leveling of a 3-acre well pad and the construction and upgrade of roads in prime grizzly bear and elk habitat in a forest free from industrial development altogether, is an entirely different and more serious undertaking. Moreover, because this is an obligation well for an entire unit, it is reasonably foreseeable that further development could follow that would impact a far greater area. While the project proposal may meet criteria outlined in the Forest Service CE at issue here—criteria that as already indicated are legally questionable—the presence of extraordinary circumstances and the degree to which this project will impact them caution against the use of this CE.

The scoping notice correctly acknowledges that even if a project meets the specific CE criteria, a list of extraordinary circumstances must be considered to determine whether a higher level of analysis is needed. However, according to the Forest Service, if the extraordinary circumstances are "minor or non-existent" a categorical exclusion can be used. Scoping notice at 2. This is not the proper standard. Even if there are no extraordinary circumstances, the Forest Service is still bound to consider whether the proposed action may have a significant effect on the environment. 36 C.F.R. § 220.6(c).

> If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA. If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS.

Id. As the regulation states, after scoping, if the Forest Service is uncertain whether the proposal may significantly affect the environment, at a minimum an EA is warranted. Id. And if a proposal may have a significant effect, an EIS is necessary. Id. These are very low thresholds. In other words, the Forest Service doesn't need proof that the project will have a significant impact in order to justify an EA or EIS, it merely needs to have questions about the effects or suspect that a project could possibly have effects. Moreover, it cannot limit itself only to the short list of extraordinary circumstances when considering the appropriate level of NEPA analysis that is required. It must consider all of the issues raised in scoping—many of which are highly significant, but may fall outside of the short list of extraordinary circumstances.

In this case, the Forest Service reaches a conclusion not supported by the findings of expert biologists from other agencies and is contrary to statements made in its own records. The Forest Service states that "there will not be impacts to any resource conditions that would qualify as extraordinary circumstances" is contrary to its own statements in other records. Scoping notice at 2. Although not mentioned anywhere in the scoping notice, other Forest Service documents concede at least two extraordinary circumstances could be implicated by this project. See Scott Well #2 Briefing Paper (Exhibit 1). "Two circumstances are present: Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species; and archaeological sites, or historic properties or areas." Id.

When an extraordinary circumstance is present—as it is here—the regulations require the Forest Service to determine: 1) whether there is "a cause and effect relationship between a proposed action and the potential effect on these resource conditions;" and 2) if that relationship exists, "the degree of the potential effect of a proposed action on these resource conditions." 36 C.F.R. § 220.6(b)(2). The Forest Service cannot in one document disclose the presence of these circumstances and yet in the scoping notice completely disregard them.

The Forest Service cannot also dismiss an extraordinary circumstance based on an erroneous conclusion that the effects to it will be "minor." With respect to one of the extraordinary circumstances—threatened and endangered species—another separate Forest Service document states, "In July 2008, the area was visited by the Level 1 team as part of its

annual summer field trip—there was a consensus that the impact to T&E would be minor." Scott Well #2 Talking Points (Exhibit 2). To be sure, minor impacts are different from no impacts whatsoever.[1] The scoping notice concludes that there "will not be impacts to any resource conditions that would qualify as extraordinary circumstances." Scoping notice at 2.

Moreover, the statement that the project's impact to threatened and endangered species would be "minor" is not an accurate summary of the conclusions reached during that field trip. The Level 1 team visited the site to assess the impact to then-listed species, namely Canada lynx and did not address potential impacts to grizzly bears. See Scott Well #2 Briefing Paper that states, "In July 2008 an informal field meeting was held with the Level 1 team on site to discuss the degree of impacts on the lynx. The consensus was the level of impacts would be of such a magnitude to not preclude the use of the CE. While the bear was not listed at that time, it is highly likely the same conclusion would be reached for it as well." (Exhibit 1). A biologist with the USFWS who attended that field trip confirmed that because the grizzly bear was not listed at the time, the team focused almost exclusively on impacts from the proposal to Canada lynx. Ann Belleman, USFWS Biologist, pers. comm. Jan. 11, 2010. Thus, the Forest Service has no basis to conclude that because a team of biologists concluded the project's effects on Canada lynx would be minor, that the same conclusion can be reached with respect to grizzly bears, a species whose habitat needs different significantly from lynx. Furthermore, the proposed well site area is now designated critical habitat for the lynx. The field trip and the conclusions reached at that time pre-dated the critical habitat designation and, as will be explained in more detail below, such a designation affords greater protection to listed species.

In order to make a rational and correct determination about the degree of the project's impacts to each individual species and its habitat that may be affected, the Forest Service must consult with expert biologists about these species in the context of the specific habitat that will be impacted. Although the Forest Service has been contemplating reinitiating the permitting process for this proposal since at least the summer of 2008, as of January, 2010 it had not contacted the U.S. Fish and Wildlife Service for consultation or the Wyoming Game and Fish Department's grizzly bear experts for up to date information. Pers. comm. Ann Belleman, USFWS, Jan. 11, 2010 and pers. comm. Dave Moody and Dan Bjornlie, WGFD, Jan. 8, 2010. Without this expert consultation, the Forest Service cannot conclude, as it does, that there "will not be impacts to any resource conditions that would qualify as extraordinary circumstances." Scoping notice at 2.

3. Approval of the project may affect threatened and endangered species and for this reason the CE is not appropriate.

As Forest Service documents confirm, at least one circumstance—federally listed threatened or endangered species or designated critical habitat, or Forest Service sensitive species—is potentially implicated by the proposed development. The area proposed for this well is known to be high quality grizzly bear habitat and is designated critical habitat for the Canada lynx. Both of these species are listed as threatened under the Endangered Species Act. This area may also provide suitable habitat for wolverines, another species that is being considered for

[1] Even the finding that impacts to threatened and endangered species would be "minor" nevertheless triggers the requirement to initiate § 7 consultation with the U.S. Fish and Wildlife Service. 16 U.S.C. § 1536(a)(2).

listing under the Act and is considered a sensitive species on the Shoshone National Forest. Other sensitive species may occur at this site and we request that the Forest Service carefully investigate this possibility.

There are confirmed lynx sitings in the area and the WGFD has said that the area has supported lynx at least temporarily. Pers.comm. Greg Anderson, Jan. 20, 2010 WGFD; see map showing 14 locations where lynx have been sited (Exhibit 3). In February 2009 the proposed well site and the surrounding lands were designated as critical habitat for the lynx. With respect to wolverines, an expert biologist remarked that "[w]olverines have certainly been documented higher up around Togwotee pass crossing the highway, and I would expect they certainly move through the Ramshorn peak area once and a while." Pers. comm. Jason Wilmot, Executive Director and Field Biologist, Northern Rockies Conservation Cooperative, Absoraka Beartooth Wolverine Project, Jan. 14, 2010. The Forest Service must consult with the U.S. Fish and Wildlife Service regarding lynx and their habitat and confer with the Service regarding the wolverine and should initiate discussions with the Wyoming Game and Fish Department's wildlife biologists in order to inform the NEPA analysis it needs to prepare.

Grizzly bear use of this area is well documented and unquestionably high. According to the Wyoming Game and Fish Department (WGFD), the agency that analyzed radio-collared grizzly bear point-location data from 2005-2009 within 12 km of the Carrot Unit boundary, there were "128 locations of 24 different radioed bears." Pers. comm. Dan Bjornlie, Trophy Game Biologist, Wyoming Game and Fish Department, Jan. 13, 2010. As the WGFD explained, "That of course is a minimum of what would use the area since we have a pretty small, but unknown, percentage of them collared in the area. Many more uncollared bears undoubtedly use the area." Id. Attached is a 2004 unofficial distribution map and article, which were published in the journal Ursus in 2006. (Exhibit 4). Over a longer time period, from 1990-2009, there have been 37 distinct bears the WGFD has collared within 5 km of the Scott Well #2 site. Please see WGFD map illustrating the extraordinarily high density and frequency of bear use in this area (Exhibit 5). The WGFD also knows of "three den locations of radio-collared bears within the 12 km buffer. All three are around the Ramshorm and within 5 km of the lease." Pers. comm. Dan Bjornlie, Trophy Game Biologist, Wyoming Game and Fish Department, Jan. 13, 2010.

This area, often referred to as the Brent Creek area, has long been hailed as some of the best grizzly bear habitat in the Greater Yellowstone Ecosystem. Some years ago, in a biological opinion prepared in response to the Shoshone National Forest's oil and gas leasing plans, the U.S. Fish and Wildlife Service noted the importance of the area to grizzly bears because of its relatively low elevation and varied food sources for bears:

> "The [Brent Creek] area offers high quality year-round grizzly bear habitat, providing important security cover and foraging opportunities for bears during spring, summer, and fall as well as functioning as an important travel corridor."
>
> "Spring bear use [of the area] is intense with winter-killed elk and lush areas of grasses and forbs available below 8600 feet in the narrow belt of land between private lands and snowline, where early green-up and elk calving also occurs. Spring habitat not associated with human development or private land is limited

in this area."

> "[T]he subject area is important to bears during summer and fall as well, providing a crucial source of forage, berries, and whitebark pine nuts especially during periods of drought and years when other alternate food sources fail."
>
> "Riparian areas/drainages in the area also function as movement corridors for bears between ungulate wintering and calving areas to the south and moth feeding sites to the north."

The Wyoming Game and Fish Department recently reviewed these statements and when asked about their relevance today, confirmed that the statements remain accurate. Pers. comm. Dan Bjornlie, Trophy Game Biologist, Wyoming Game and Fish Department, Jan. 14, 2010. "[T]he area is especially important in the spring/early summer, but grizzly bears are definitely found in the area year round. Also, since the elevation increases quickly as you move to the north from the well site, there is high quality summer habitat quite close to the site itself." Id.

The likely impacts to threatened and endangered species as a result of this project—particularly to grizzly bears—is a serious issue that warrants the Forest Service's careful consideration in a comprehensive environmental analysis, not through a CE. That the Forest Service is even considering the use of a CE to authorize industrial development in an area renown for its high quality grizzly bear habitat—an area that supports no less than dozens of individual bears and three known den sites—is not responsible management.

4. An EIS is the appropriate level of NEPA analysis the Forest Service should require for Scott Well #2.

NEPA directs federal agencies to prepare a detailed environmental impact statement ("EIS") for major federal actions that significantly affect the quality of the human environment. 42 U.S.C. § 4332(C)(i). The EIS must address all adverse environmental effects that cannot be avoided should the proposal be implemented, alternatives to the proposed action, and any irreversible and irretrievable commitment of resources that would be involved. Id. at § 4332(C)(ii), (iii) & (v). Unless the agency is certain that the project is the type that normally would require an EIS or is the type that normally would not require an EIS, (i.e. actions that are categorically excluded) it must prepare an environmental assessment (EA) to determine whether the project is one that may significantly affect the quality of the environment. 40 C.F.R. §§ 1501.4(b), 1508.9. If, through the process of preparing an EA, the agency concludes that the project will not significantly affect the environment, the agency must issue a finding of no significant impact (FONSI). Id. at §§ 1501.4(e), 1508.13. Otherwise, the agency must prepare an EIS. Id. at 1501.4(c).

As discussed above, agencies may create categories of actions for which neither an EA nor an EIS is required. 40 C.F.R. §§ 1507.3(b)(2)(ii); 1508.4. These actions may be categorically excluded from NEPA review only if the agency determines that the specific category of proposed action will have no significant effect, either individually or cumulatively, on the quality of the environment. Id. at § 1508.4. The regulations implementing NEPA also require that "any

procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." Id.

The Forest Service's directives require it to undergo scoping even on actions "that would appear to be categorically excluded." FSH 1909.15 Chap. 30.3(5). "If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment" the Forest Service is directed to prepare an EA. Id. If the Responsible Official determines that the proposed action may have a significant environmental effect, an EIS is required. Id.

To help define the meaning of "significantly" NEPA's implementing regulations explain that the word as used in the Act requires consideration of both context and intensity. 40 C.F.R. § 1508.27. With regard to context, the "significance of the action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). Intensity "refers to the severity of the impact" and ten issues should be considered when assessing intensity. 40 C.F.R. § 1508.17(b). These include:

1) Impacts may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes on balance the effect will be beneficial.
2) The degree to which the proposed action affects public health or safety.
3) Unique characteristics of the geographic area such as proximity to historical or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers or ecologically critical areas.
4) The degree to which the effects of the quality of the human environment are likely to be highly controversial.
5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
6) The degree to which the action may establish precedent for future actions with significant effects or represents a decision in principle about a future consideration.
7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.
8) The degree to which the action may adversely affect districts, sites, highways, structures or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural or historical resources.
9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
10) Whether the action threatens a violation of Federal, State or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27 (b)(1-10).

The ten factors listed above assist agencies in determining whether a project significantly affects the quality of the human environment, and thus when an EIS is warranted. Arguably, five

of the ten factors are implicated in Hudson's drilling proposal: 1) unique characteristics of the geographic area, i.e. an ecologically rich area; 2) the degree to which the effects on the environment will be highly controversial; 3) the degree to which the effects are highly uncertain; 4) the action may establish a precedent for further development; and 5) the proposed action may adversely affect threatened species. Thus, it is these criteria in addition to other factors raised during scoping—and not only the short list of extraordinary circumstances—that the Forest Service should consider.

Taking the first and last of these criteria together, the Brent Creek area is ecologically rich, supporting myriad wildlife species, including species protected by the Endangered Species Act. It is likely the drilling proposal may adversely affect threatened species, specifically the grizzly bear and lynx and diminish habitat for big game. As the WGFD stated,

The following are some of the potential impacts to wildlife as a result of this project:

1. Increased disturbance along a crucial elk migration corridor.
2. Increased disturbance in an important elk parturition area.
3. Increased disturbance to wintering elk.
4. Increased disturbance to wintering moose.
5. Increased disturbance and decreased security in lynx habitat.
6. Increased disturbance and decreased security in heavily utilized grizzly bear habitat.
7. Increased potential for human/bear conflict due to development in high density grizzly bear habitat.

Greg Anderson, WGFD biologist, pers.comm. January 20, 2010.

Moreover, the project's more than 10-year history has been highly controversial. See email from Garry Edson to Bob Lee [former SNF District Ranger], March 19, 1997 "The company wants to drill this fall. I told them they don't have a chance in you know where because the location is in Brent Creek and it is going to be hotly contested by the environmental community." In response, Bob Lee wrote, "Thanks for the update. [A]s if we needed more controversy in that area." (Exhibit 6); see also email from Garry Edson re: Scott Well #1, Brent Creek "The lease parcel request for the same area, the proposed timber sale, and the pending APD is going to generate a lot of controversy for that particular piece of the Shoshone." (Exhibit 7).

Just as controversy ensued more than a decade ago surrounding the leasing and proposed oil and gas development in the area, it remains the same, if not more so, today. Anecdotal remarks from the Forest Service that "most people know about the project in Dubois and don't seem to care much" should not be the basis upon which the Forest Service foregoes hosting the necessary scoping meetings in communities around the forest and proceeds with inadequate analysis. Pers. comm. Rick Metzger, District Ranger to Hilary Eisen, January 21, 2010. In addition, the Forest Service's conclusion is premature prior to the receipt of the scoping comments and one wonders if the statement is not a self-fulfilling prophecy since the Forest Service has opted not to host a single public meeting about the proposal. Perhaps if the Forest Service had taken the lead in educating the local and national public there would have been more

concern voiced to date. Scoping meetings would have been appropriate in Dubois and Lander. Nonetheless, it is likely there will be numerous comments submitted by the scoping deadline. The Forest Service should not disregard these comments, even if many of them are "duplicates" and "value-based" as this illustrates public concern and controversy.

Further, the effects of the project are highly uncertain. The assumptions reflected in the CE—that any project that meets the criteria will have no individual or cumulative effect on the environment—cannot possibly apply to the extremely sensitive habitat in question. This is the first well to be drilled on the Shoshone in more than two decades. This is hardly a situation in which the effects of industrial development on the Shoshone National Forest are well-known or are proven to have no effect on wildlife and forest resources. Shoshone National Forest staff have no experience analyzing, permitting or monitoring this type of project and Hudson has no experience drilling on sensitive, national forest lands. See Forest Service Reconnaissance Meeting Notes, Hudson Oil, July 1,1997 (stating, "Hudson Oil has not ever drilled a well on National Forest land, nor have they ever dealt with the NEPA process before.")(Exhibit 8). Thus, based on these facts, the effects on the environment are uncertain; caution and thorough analysis are warranted.

Last, the action may establish a precedent for further development. The proposed Scott Well #2 is part of a unit known as the Carrot Unit. It will be the "obligation well" for the unit. Whether the well is a dry hole or productive in paying quantities, as the BLM explained, other wells will be required, e.g. another obligation well if the first well is dry or a "confirmation well" if the first is productive. Pers. comm. Curtis Bryan, BLM October 22, 2009. There was mention too that these latter wells would need to be drilled quickly—within 6 months—in order to hold the unit and keep it from dissolving. Id.

The scoping notice acknowledges the potential for further development, yet the Forest Service has declined to address it at this point stating, "Any additional wells will require a new APD and analysis." This is insufficient for two reasons. First, the Forest Service must take into account and analyze now any reasonably foreseeable development as part of its cumulative effects analysis. 40 C.F.R. § 1508.25(a)(2). That other wells are a reasonable possibility within the very near future means that the Forest Service must address the effects of this one well coupled with the potential further development of the unit. Hudson should supply the Forest Service with its plans for the entire unit and this should be included in the analysis. The Forest Service cannot opt to piecemeal the analysis into smaller segments. Second, "analysis" is a relative term. It should not give a concerned public any comfort to know that if and when a second well is proposed, the Forest Service will subject it to "new analysis." If the level of analysis this first well is likely to receive via a CE is any indication, this is really no meaningful analysis whatsoever.

As the Forest Service's own policy explains, the test for preparing an EIS is not whether the project will have a significant effect on the environment, but whether the project individually or cumulatively may have a significant environmental effect. FSH 1909.15 Chap. 30.3(5). This is not a routine situation that warrants a CE, but an extremely sensitive development proposal that implicates five of ten factors used as criteria to determine significance and has the potential to impact surface resources in a substantial way. As such, it is not much of a stretch to assume that

this drilling proposal may affect the environment—quite a low threshold—and as a result, an EIS is required. Notably, the Forest Service is on record surmising that an EIS was the necessary level of analysis in 1997. See Brent Creek Notice of Staking Review, 8/14/97 (Exhibit 9). "Bob Anderson [NEPA consultant for Hudson] asked about whether an EIS or EA would be necessary. Bob Lee [former Wind River District Ranger] indicated he thought it would probably require an EIS since the FS is doing an EIS for the vegetative analysis in the area." Id.

There are several benefits associated with preparing this more thorough analysis. An EIS would benefit Hudson, the Forest Service and the concerned public. First, preparation of an EIS would benefit Hudson. It would allow Hudson to demonstrate that it is serious about this proposal and serious about taking steps to mitigate adverse impacts. This builds trust between the company and local citizens—not only users of the Shoshone National Forest, but particularly the community members along Horse Creek road and in the greater Dubois area who will be most affected by the project. Hudson's leases remain in suspension while the analysis is prepared so the company's rights to the leasehold are not affected.

While it is true that an EIS will be more costly and take more time than a CE, cost and necessary delay in order to comply with federal law are part and parcel of operating on leased public lands. To that end, Hudson should be responsible for covering the cost of the analysis, as is routine for companies to do at the APD stage.[2] The administrative record reveals that this was the very thing the Forest Service was going to require Hudson to do in 1997. See id. (stating that "[t]he APD will initiate the environmental analysis process. We will then need to develop a third party agreement for Anderson consulting to do the environmental assessment. Scoping would begin after the third party agreement is in place."); see also email correspondence from Gary Edson, Shoshone National Forest to other SNF staff, 7/20/99, regarding the request made to Hudson to help with the additional costs of the analysis (stating "I asked if they could help out in the cost for some of the additional analysis we are going to experience as a result of their new proposal. He asked how much, and I mentioned about $10,000. I couldn't recall what we had said we want to seek from them….") (Exhibit 10).

As for any additional delay, Hudson has not objected to this project being under suspension for the past ten years, and has held this unit, or its previous incarnation—the Ramshorn Unit—for almost twenty years while demonstrating only the bare minimum amount of due diligence. The record reveals that as far back as 1998 the Forest Service had to prod Hudson and its contractor to "get them moving" and the agency suspected that "[t]hey must not be in a hurry if they're sitting on the MOU." Email correspondence between Gary Edson and Bob Lee, March 20, 1998 (Exhibit 11). In other records, the Forest Service considered asking Hudson for funds to do the additional analysis (in the new location) "since they were so late in getting us information on the new site." Undated email correspondence from Bob Lee (Exhibit 12). In yet another memo the Forest Service describes that it had asked Hudson for feedback on a site

[2] We are aware of the budget constraints facing the Shoshone at this time and are concerned that the District is opting for a CE because it is less expensive than an EIS. The Forest Service should compare the cost of an EIS to the irreplaceable value of the Brent Creek area, for residents, visitors, and wildlife. The Forest Service should also compare the economic and environmental cost of reclamation in the Brent Creek area to that of a thorough environmental analysis. It will likely find that taking a careful approach from the outset is ultimately the most responsible and affordable path.

location in Jan/Feb 1999 and "Hudson Oil has been non-responsive until the end of April and we did not receive this new preferred location map until May." Scott Well APD and Ramshorn Area Analysis Memorandum, June 17, 1999 (Exhibit 13.)

Most recently in September 2008, the Shoshone National Forest sent Hudson a letter to reinitiate the project proposal and to gauge the company's continued interest in the project. Letter to Robert Hudson from Rick Metzger, Sept. 11, 2008. (Exhibit 14). More than five months passed without any response from Hudson. In February 200, the Shoshone National Forest sent a second letter of inquiry to Hudson, asking specifically "Does Hudson Group LLC want the Forest Service to reinitiate their project analysis?" Letter to Robert Hudson from Rick Metzger, Feb. 24, 2009 (Exhibit 15). Hudson finally replied affirmatively in March 2009. Letter from Robert Hudson to Rick Metzger, March 2, 2009 (Exhibit 16). Given this history of obvious inattention and lack of due diligence, the federal agencies have no reason to rush within a period of a few short months to authorize the latest iteration of this proposal. Any APD/SUPO authorization should only occur after the most careful and thorough environmental review is undertaken.

The preparation of an EIS would also benefit the Forest Service. A thorough analysis would provide the agency a safety net, allowing it to better understand, anticipate and mitigate impacts prior to approval of the project. A CE does not provide the kind of in-depth analysis required in this situation. Indeed, use of a CE indicates the Forest Service has determined up front that there are no individual or cumulative impacts that would result from the project. An EIS will assist the Forest Service in its responsibility to manage resources on the forest and ensure that this project, if approved, occurs in a manner that does the least harm to other important resources.

Last, the preparation of a comprehensive EIS benefits the public. An EIS is a public disclosure document that outlines the environmental impacts of the proposed action and is a tool by which agencies make informed decisions through analysis of alternatives and public comment and participation. With an EIS, the public has the opportunity to weigh in at the scoping stage and again at the draft EIS stage and has the opportunity to learn about the potential impacts associated with the project and the ways in which the agency will mitigate those impacts. An EIS will do a far more thorough job of this than an EA and certainly will exceed any cursory remarks that might appear in a decision memo accompanying a CE.

Because of the circumstances surrounding the proposal, an EIS is the most responsible course of action. The project proposal is slated for an ecologically rich area that supports two threatened species, has a long history of controversy surrounding it and poses uncertain consequences based on the valuable habitat implicated and the lack of experience of Forest Service staff and Hudson to implement drilling proposals in sensitive forest areas. In addition, Scott Well #2 is the obligation well for the Carrot Unit. Drilling this well necessarily triggers the drilling of additional wells if the company intends to ensure the existence of the unit. For this reason, any analysis should encompass not only this single well proposal, but also the impacts of this well coupled with any reasonably foreseeable future development. This depth of analysis can be best accomplished within an EIS.

5. In the EIS, the Forest Service should define a balanced purpose and need statement for the project.

Because the stated purpose and need for a federal action determines the range of alternatives, it is essential that 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).

The Forest Service should include a commitment to protect surface resources and wildlife as a purpose and need on par with oil exploration rather than defining the purpose and need for the proposed action solely from Hudson's perspective. Although the goals of a private party proponent are, to a limited extent, relevant in determining a project's purpose and need, "more importantly, an agency should always consider the views of Congress, expressed, to the extent that an agency can determine them, in the agency's statutory authorization to act, as well as in other Congressional directives." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991). As just one example, Congress was unwavering in its message when it passed NEPA: Federal agencies are entrusted to act as trustees of the environment for present and future generations. 42 U.S.C. § 4331(b).

The Forest Service should consider its broader responsibility as surface land manager and its affirmative responsibility to protect air quality related values in Class I areas, not to mention its responsibilities under the Endangered Species Act and other statutes so that the purpose and need statement encompasses greater protections for the sensitive and irreplaceable National Forest lands at stake—not only the desires of the project proponent. Because the purpose and need statement sets the stage for the range of alternatives the Forest Service selects, its importance should not be underestimated.

6. The Forest Service should consider a reasonable range of alternatives, something it can best do in an EIS.

It is only through an EA or EIS that the Forest Service can consider a reasonable range of alternatives; a CE does not allow such an expansive review. NEPA mandates that the Forest Service provide a detailed statement regarding the alternatives to a proposed action. 42 U.S.C. § 4332(2)(C)(iii). Its implementing regulations also require the Forest Service to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14. In fact, a thorough and objective analysis of alternatives is so essential to reasoned and informed decision making that a discussion of alternatives is considered the "heart of the environmental impact statement." Id. at § 1502.14(a). Given the seriousness of this project and its potential to set a precedent for expanded oil development in the unit, a CE is not the appropriate vehicle by which to analyze the impacts from the proposal.

In an EIS the Forest Service should develop a range of alternatives for the proposed

drilling project. One option the Forest Service should consider is an alternative that requires Hudson to meet a "gold standard" of operations. The BLM, Forest Service and Hudson should develop and define that standard given the resource concerns identified during scoping.

7. The Forest Service must take a "hard look" at the project's likely environmental and economic impacts.

As envisioned by Congress, one of NEPA's goals is to "'prevent or eliminate damage to the environment' . . . by focusing government and public attention on the environmental effects of proposed agency action." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989) (quoting 42 U.S.C. § 4321). "By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late." Marsh, 490 U.S. at 371. As such, NEPA requires the Forest Service to take a "hard look" at a project's environmental impacts. Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976). In this case, that means giving thorough consideration to the direct, indirect and cumulative impacts of the project on fish and wildlife species and water resources. 40 C.F.R. §§ 1502.16, 1508.8.

Our organizations and the public have advocated and continue to urge the Forest Service to prepare the most comprehensive and erudite analysis that will not only meet, but exceed NEPA's requisite "hard look" standard. People in Wyoming are keenly aware of the rapidly expanding energy development projects across the state and the impacts we are experiencing as a result. For example, development in the Upper Green River Valley has transformed sagebrush winter range into what some would consider industrial sacrifice zones whose impacts are felt far beyond the fields themselves, threatening air and water quality, viability of big game herds and the quality of life in surrounding small towns. While full development of the Carrot Unit will probably not ever reach the level of impact seen in the major oil or gas fields in Wyoming, even limited development in this setting will drastically alter the character of the area and its suitability for traditional uses such as hunting, wildlife viewing and other forms of recreation.

A new oil well on National Forest land is an undesirable prospect for most of the concerned public. We urge the Forest Service to require nothing less than the "gold standard" for this project. In defining such a standard, the Forest Service should keep in mind that it must apply to both the design and conditions of approval for the project, but also to the scope and quality of the NEPA analysis prepared. The planning and potential authorization of this project cannot be business as usual, resulting in a fast-tracked decision where the NEPA analysis is a means to an end, rather than a cautious and comprehensive process in which impacts are fairly evaluated. The Forest Service's well-informed decision whether to authorize the project can only result from a high quality NEPA analysis.

The Forest Service is fully empowered to require the highest level of comprehensive study and review. It should not be pressured by the project proponent or others to streamline the NEPA analysis. The Forest Service is not bound to any timetable Hudson has established or desires. Indeed, as mentioned above, Hudson has taken full advantage of the suspensions the leasing regulations provide; its leases are not at risk of expiring while the Forest Service prepares an adequate environmental review. Indeed, it was the BLM and the Forest Service who re-initiated the APD process. Hudson didn't even respond to the first letter of inquiry from the

Forest Service. Thus, the Forest Service should feel secure that in order to address this important proposal, it can and should take all the time that is necessary to do it right.

Below are specific resources or issues that require comprehensive consideration in what we hope will be a draft EIS.

A. The EIS should address the potential cumulative impacts to air quality as a result of Hudson's proposal coupled with any reasonably foreseeable future development in the Carrot Unit.

Energy development in other parts of the state, specifically in southwest Wyoming, has contributed to the degradation of air quality. This degradation has been well documented and is a serious concern, not only because it impairs visibility in what was once a region of the country with impeccably clear skies, but also because it poses threats to human health. The Greater Yellowstone Area Clean Air Partnership, of which the Shoshone National Forest is a member, identified oil and gas development in southwest Wyoming as one of four primary threats to the quality of air in Greater Yellowstone Area. Greater Yellowstone Area Air Quality Assessment Update, 2005 at 17 (Exhibit 17). Because even as far back as five years ago there was already evidence that air quality impacts from surrounding oil and gas development projects were affecting Shoshone National Forest lands and because this is the first drilling project to be proposed on the forest in many years, the Forest Service should proceed cautiously and ensure that: 1) comprehensive baseline studies are in place; 2) a quantitative air quality model is prepared as part of the EIS; and 3) if new development is authorized, that monitoring and mitigation are incorporated as part of any conditions of approval.

The Shoshone National Forest should follow the example of the Bridger-Teton National Forest with respect to the approach it ultimately decided to take in response to the first drilling proposal on its lands in many years. Although the project proponent and the Forest Service initially scoped and prepared a draft EIS for just 1-3 exploratory wells in the Noble Basin, after public investigation and scrutiny of the company's intentions, it became clear the wells were not exploratory, but in fact "appraisal" wells.[3] After reviewing information from scoping, the company requested the Forest Service to prepare a new EIS to include an analysis of the impacts from potential full field development. Included in the upcoming draft EIS will be a comprehensive, quantitative air quality model and analysis to ensure that the Forest Service, an agency that has an affirmative duty to protect visibility in its Class I areas, does not authorize a project that could violate the Clean Air Act.

The Shoshone National Forest, as the manager of three Class I areas, has an affirmative responsibility to protect air quality related values, including visibility over these lands. 42 U.S.C. § 7475(d)(1)(B). Forest Service wilderness areas are protected by provisions of the Clean Air Act. See 42 U.S.C. § 7401(b)(1) (stating that the purposes of the Clean Air Act are "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare…."); 42 U.S.C. § 7470(2), 7491(a)(1) (directing that air quality in protected landscapes

[3] Evidence to support this assertion included the fact that a test well had been drilled in the area the 1970s that provided sufficient geologic information, the proposal included pipeline development, which was unusual for exploratory well operations, and the company had bragged about its intentions to develop a full field.

and airsheds be protected). The Wilderness Act provides additional direction, requiring the Forest Service to administer wilderness areas so they are "unimpaired for future use and enjoyment as wilderness." 16 U.S.C. § 1131(a). The goal established by the Clean Air Act is that "any future" impairment of visibility must be prevented and that "any existing" impairment of visibility must be remedied. 42 U.S.C. § 7491(a)(1) (emphasis added). Likewise, air quality must be "preserve[ed], protect[ed], and enhance[ed] in protected landscapes like wilderness areas, and the "affirmative responsibility" imposed on the Forest Service for the prevention of significant deterioration in areas is to "protect" them, not to allow them to be incrementally degraded. Id. §§ 7470(2), 7475(d)(1)(B).

Although much of the existing and proposed oil and gas development across Wyoming is not occurring, nor is it slated to occur on National Forest lands, the Forest Service is nevertheless in a unique position as the manager of Class I areas. It must remain actively involved in an inter-agency advisory capacity to ensure these off-forest projects are done in a manner and at a pace that will protect visibility in these protected areas. Arguably, the Forest Service's responsibility is heightened when projects—like this one—that have the potential to contribute to the degradation of air quality are proposed on lands it manages.

Without proper analysis, the Forest Service cannot be sure that authorization of Hudson's proposal would not actively contribute to the problem of declining air quality and visibility on the Shoshone. To meet its responsibilities under the Clean Air Act, the Shoshone National Forest should be vigilant in protecting these areas by requiring the highest level of baseline analysis and quantitative air quality modeling prior to authorizing the first new oil well on its lands in many years. If the impacts from this proposed well coupled any reasonably foreseeable future wells would impair visibility and thus violate a non-discretionary statute like the Clean Air Act, the Forest Service has the authority to deny Hudon's SUPO/APAD outright.

The Forest Service should consider the cumulative impacts to air quality stemming from the existing development coupled with the reasonably foreseeable future development in the area. Hudson holds substantial leases in the Brent Creek area, including all of the leases in the Carrot Unit. Clearly, with the establishment of the Unit in 2001, Hudson intends to move towards full field development if at all possible. As this is the first well, this is the first opportunity to fully consider impacts to air quality. The Forest Service should take full advantage of this opportunity.

There are numerous sources of air pollution associated with oil drilling and production including but not limited to vehicle exhaust, flared gas, nitrous oxides (NOx), volatile organic compounds (VOCs) and dust. Emissions from natural gas wells and associated production activities and storage facilities—some of which might be similar with respect to oil wells—have been shown to contain benzene and other VOCs and have led to citizen complaints of foul air, dizziness, and various respiratory and other illnesses. This well is especially worrisome, as it has been identified as having a high potential of releasing hydrogen sulfide gas. SUPO Review Hudson Scott Well #2, 8/28/09 at 1 (Exhibit 18). While some of these impacts may be small for a particular well, the cumulative impact of multiple wells and vehicles could be significant.

In conclusion, air quality is a serious issue now facing the Shoshone National Forest. As this is the first drilling project proposed on the forest in many years, we ask that the Forest Service consider its affirmative responsibility to protect visibility on its lands by taking three important steps. First, the Forest Service should analyze all existing emissions closely in a baseline study. Second, it should prepare a quantitative air quality model to examine the impacts of increased drilling on the Shoshone's protected airsheds and an analysis as part of the EIS that examines impacts to human health. Finally, if the model predicts that there will be no air quality impacts or that the impacts can be effectively mitigated such that the Forest Service decides to authorize Hudson's proposal, the Forest Service should require monitoring throughout the development and production stages of the field as a condition of approval. If the monitoring reveals errors in the model, the Forest Service should have in place thresholds and standards to adaptively manage and remedy the problem. It is unacceptable that this project coupled with other reasonably foreseeable development in the unit could adversely impact the air in this world-class forest, especially when the Forest Service has the authority to prevent this from happening.

B. The EIS should fully address the potential impacts to wildlife from this well proposal, coupled with the impacts from reasonably foreseeable future development in the area.

The Dubois area is home to all of the iconic wildlife species in Wyoming: elk, deer, pronghorn, bighorn sheep, wolves, black and grizzly bears and mountain lions, just to name a few. The habitat fragmentation, increased noise, air pollution, traffic, human activity, and light associated with the drilling and production of an oil well are effects that spread beyond the boundaries of the well pad. Of particular concern is how this development—both individually and coupled with the reasonably foreseeable future development of the Carrot Unit—will affect wildlife populations that use the project area.

a. Elk, moose, bighorn sheep, mule deer and pronghorn

In developing the EIS for this project, the Forest Service should consider and utilize data available from the Wyoming Game and Fish Department to determine protections for game species and other species. For general guidance, the Forest Service should refer to and incorporate the information in the Wyoming Game and Fish Department's publication "Recommendations for Development of Oil & Gas Resources within Crucial & Important Wildlife Habitats." Please see http://gf.state.wy.us/downloads/pdf/og.pdf for a copy of this document. In addition, the Forest Service should fully consider and abide by the Western Governors Association's Migration Corridors Initiative. Please see http://www.westgov.org/ for a link to this initiative. The Forest Service should also utilize the information regarding the needs of big game species available from other sources.[4] Attached as Exhibit 19 is a map the

[4] We specifically request that the Forest Service consider the following studies: Sawyer, H., and F. Lindzey, Jackson Hole Pronghorn Study, Wyoming Cooperative Fish and Wildlife Research Unit, September, 2000; Sawyer, H., and F. Lindzey, Sublette Mule Deer Study, Wyoming Cooperative Fish and Wildlife Research Unit, March 2001; Western Ecosystems Technology, Inc., An Evaluation Of The 1988 BLM Pinedale Resource Management Plan, 2000 BLM Pinedale Anticline Final EIS, And Recommendations For The Current Revision Of The Pinedale Resource Management Plan, (Scoping comments submitted for the Pinedale RMP revision), January, 2003.

Wyoming Outdoor Council produced illustrating the migration routes and crucial winter ranges for elk, deer, pronghorn, bighorn sheep and moose as well as elk parturition areas.

Of particular concern in this area are the project's potential impacts to elk. The project area is classified as critical elk parturition range by the WGFD, 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. Pers.comm. Greg Anderson, Jan. 20, 2010. 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 "critical" winter range for elk, it is likely that this designation will be changed the next time that WGFD assesses habitat in the area and updates its maps. Pers. comm. Greg Anderson, WGFD, October, 2009. Please see map of WGFD data illustrating documented elk locations new the proposed well site as well as elk migration corridors and parturition areas (Exhibit 20).

According to the WGFD, the area is "extremely important habitat for a number of wildlife species" and is an area of "quite a few documented winter moose sitings." Pers. comm. Greg Anderson, WGFD, Jan. 20, 2010. As a result of this project there will be "increased disturbance to wintering moose." Id. Moose populations are declining throughout Wyoming and special care should be taken by the Forest Service to assure that this project will not negatively impact moose.

Consideration of the above issues is necessary to protect habitat on which wildlife rely. At a minimum, the Forest Service should fully implement the protective provisions specified in the Shoshone Forest Plan and Wyoming Game and Fish guidance specific to oil and gas development, and the Forest Service should take steps to ensure that noise does not disturb big game, especially during critical periods such as parturition. The impact of noise on hunters and the hunting experience must also be fully considered and mitigated.

b. Grizzly bears

Although this area lies outside of the established Primary Conservation Area (PCA) it is nevertheless exceptional habitat for grizzly bears. A biologist with the WGFD dubbed the area "grizzly bear central." Pers. comm. Greg Anderson, WGFD, October, 2009. This is not an overstatement judging from the map illustrating a minimum of 37 distinct bears that have used the area surrounding the well over the past 20 years (Exhibit 5). Serious impacts to bears could result from this well and 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. As mentioned above, 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. This project will undoubtedly affect bears—and the possibility that the Carrot Unit will be fully developed should be analyzed at this stage.

The Forest Service must ensure that this project will not impact bears and should require Hudson to take the utmost precaution to avoid any conflicts between their employees and bears. As mentioned, the Forest Service's own records reflect that Hudson has no experience drilling on

sensitive, national forest lands. See Forest Service "Reconnaissance Meeting Notes, Hudson Oil, July 1,1997" (stating, "Hudson Oil has not ever drilled a well on National Forest land, nor have they ever dealt with the NEPA process before.")(Exhibit 8). It was also evident from these records that the company's employees were uninformed and careless with respect to bears in the past at this very location. See id.

> On the way out of the area we ran into the surveyors going to the site location to stake it. [I] noticed that they did not have any bear spray and suggested that when they are walking around the woods that they make a lot of noise. One of the surveyors made a remark that there wasn't any chance of running into a Grizzly Bear. When I reached the road I checked their pickups and there was a cooler with beer and pop in the back of the bed of the truck. I ran back down the hill and told them that they needed to place their cooler in a secure location and that there was a food storage requirement for the area. They walked back up to the trucks to correct the problem.
>
> I talked with the Hudsons about the need for them, industry, to follow the environmental regulations for the area and during the course of the project. Industry complains about the environmentalists and I said that you cannot give them any reason to complain. By complying with the rules and doing things right they do not give folks . . . any reasons to complain. It is up to them. The cooler in the back of the pickup was an excellent example.

Id.

Notably, one of the reasons the Montana federal district court enjoined the U.S. Fish and Wildlife Service from delisting the grizzly bear last year was the lack of any "standards to serve as regulatory mechanisms for the protection of the recovered grizzly bear population" outside the Primary Conservation Area (PCA). Greater Yellowstone Coal. v. Servheen, -- F. Supp. 2d --, 2009 WL 3775085 at *7 (D. Mont., Sept. 21, 2009). The NEPA process is designed to anticipate and mitigate adverse impacts to listed species and other resources. It is clear that the Forest Service—in its denial of even the existence of threatened species in its scoping notice—is demonstrating its inclination to make uniformed management decisions that do not adequately protect this species.

Not only is the trend to circumvent a thorough environmental review problematic, but also 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. Notes re: Meeting with Hudson Oil at the Scott's Well #2 site, 9/17/2001 (Exhibit 21). With respect to changes the Forest Service was proposing prior to authorization of the project, the notes reflect, "Measures to protect grizzly bears were added. Lessee would visually monitor lease areas for grizzly bear presence and inform the Forest Service if any grizzly bears are observed in the area. All other mitigation measures appear adequate." Id. (emphasis in original). It is unorthodox for the Forest Service to expect oil and gas company employees to have the wherewithal or expertise (or frankly, the motivation as the presence of bears could curtail their operations) to 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. Although it is unclear whether this "mitigation measure" will still be a condition of approval now some nine years later, it is certainly not an adequate regulatory mechanism the Forest Service can point to as evidence the project will not adversely impact the species.

c. Canada lynx

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). This designation has significant ramifications for the well authorization process. As will be described in more detail below, the Forest Service is required to comply with ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), which mandates federal agencies to consult with the Service to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to . . . result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." Requirements under the ESA compliment those found in NEPA's implementing regulations. Just as the mandate to consult with expert USFWS biologists can anticipate and mitigate adverse impacts, so too, does NEPA envision a process by which proper analysis occurs and alternatives are considered to mitigate damage prior to committing resources and authorizing ground-disturbing activities. The Forest Service should ensure in its NEPA documentation that destruction or adverse modification of designated critical habitat will not threaten lynx recovery, a higher standard than just ensuring the species' survival. See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059 (9th Cir. 2004). "Congress said that 'destruction or adverse modification' [of designated critical habitat] could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival." Id. at 1070. The Forest Service must do a thorough analysis of how this project, and further development of the Carrot Unit, could impact lynx and whether authorization of the project, which will undoubtedly lead to adverse modification of habitat, will threaten lynx recovery.

d. Ferruginous hawks and other raptors

The EIS should determine whether Ferruginous hawks and other raptors are using or could potentially use the area in and around the lease parcel. The Forest Service should then ensure that it meets its duties to provide management protections for the species that are addressed in the Forest Service's Sensitive Species Manual and given special management direction in the Shoshone Forest Plan. The Forest Service must ensure that no extreme noise occurs during the nesting season or near occupied nests. The EIS should examine whether habitat that could potentially be occupied by raptors, such as previously utilized nests, should receive protection so as to ensure the continued viability of raptors in the area. It should consider all biological needs of raptors and develop suitable protections for all significant life-stages of the various raptors, all of which should be included in any decision document. Additionally, the EIS should address compliance with the Bald Eagle Protection Act and Migratory Bird Treaty Act and the decision document should specify the means by which the Forest Service will ensure

compliance with these laws as well as pursue or facilitate enforcement of them, relative to raptors as well as other bird species protected by these laws.

C. The EIS should fully address the potential impacts to water quality, riparian habitats and human health.

We are concerned about the potential of this project to effect water sources in the area, impacting aquatic and terrestrial ecosystem health as well as the health of citizens who live in Dubois. Any environmental analysis should address these concerns and provide guidance for preventing and/or cleaning up contamination.

It is imperative that the Forest Service ensure that water quality standards in the Scott Well #2 project area are not violated by oil exploration activities. Specifically, development cannot be allowed in or very near streams, wetlands, and riparian areas. The Wyoming State Geologic Survey stated that it is concerned about slope instability in the area and has indicated that Scott Well #2 is in a location with numerous areas of slope instability. Comments to Rick Metzger from Alan J. Ver Ploeg, Assistant Director/Senior Geologist, Wyoming State Geological Survey, Nov. 25, 2009. "We have examined the scoping notice for the Scott Well # 2 APD with respect to general geology, minerals/energy, geologic hazards, and paleontologic issues. Our Surficial Geologist, Seth Wittke, indicated concerns relative to potential landslides and slope instability in the areas immediately surrounding the proposed well site." Id. The potential for slope instability to lead to contamination of nearby creeks is a possibility. Of particular concern is Tappan Creek, which is located directly below the well site at the base of a very steep hillside. There is high potential that contaminants could run off the well pad and into Tappan Cree or that unstable slopes could slough off into Tappan Creek, causing sediment build-up and degradation of water quality.

We request that the Forest Service require baseline studies of water quality in the Tappan and Brent Creek drainages prior to project approval. These studies should include micro and macro-invertebrate sampling, pH testing, and identification of any hydrocarbons or other chemicals existing in the creek or aquifers. The Forest Service also should provide an analysis of potential project impacts to riparian areas and ground water resources including springs and seasonal ponds. As the forest plan requires, the Forest Service must "design and implement activities in management areas to protect and manage the riparian ecosystem" and "protect wetlands and riparian areas from mineral activities." Forest Plan III-69. Scott Well #2 would be located less than one mile from Tappan Creek, a mountain stream that flows into the Wind River. The Forest Service has an obligation to protect riparian areas and properly manage these areas. This is a critical component of managing for biological diversity and for meeting many other needs, including protecting human health and safety.

In order to help ensure that water quality in Tappan Creek is not affected by this project, the Forest Service should require Hudson to transport any produced water off-site to an approved disposal location. Waste products should be transported off-site as well rather than stored in an on-site waste pit.

D. The EIS should consider the impacts of the Hudson's proposal on native vegetation and the impacts from the potential introduction of invasive/noxious weeds.

The Forest Service should ensure compliance with Executive Order 13112, which establishes requirements and procedures to which federal agencies must adhere relative to invasive species. Section 2 of the Executive Order requires the Forest Service to identify actions that may affect the status of invasive species and to then:

> Use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv) provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them . . . .

Id. Just as important, the Executive Order requires the Forest Service to "not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions." The EIS should fully analyze the extent of the invasive species problem in this area, the causes, and options for both restoration and prevention in the future.

The Forest Service can prevent invasive species from becoming established by protecting native plant species and communities, especially rare and special status species. The Forest Service should conduct surveys to determine the characteristics of native plant communities and rare or special status species in the project area. The survey results should be presented in the EIS, and the decision document should establish standards for protecting native plant communities and rare or special status species.

E. The EIS should consider impacts to soils and surface geology.

Please provide an analysis of project impacts to soils and surface geology. Baseline soil surveys should occur prior to any surface disturbance. Studies should examine microbiotic community structure, cryptobiotic crusts if they exist and determine the components of healthy topsoil. It is accepted practice for energy companies to stockpile topsoil to use for later reclamation work. Recent studies, however, have shown that stockpiled topsoils lose many of their essential qualities if stored for over two years. Particularly troubling is the loss of microbial communities that occurs in stockpiled topsoil as these are essential components in healthy soils. This is of particular concern for the Scott Well #2 project due to the large amount of leveling that will have to occur to create a flat surface for the well pad. At some point this area will need to be reclaimed and re-contoured and healthy topsoil is essential for successful reclamation.

F. The EIS should analyze the effects of noise from the proposed project.

The EIS should address issues and impacts to people and wildlife that are related to noise created by well pad construction, generators, truck traffic, drill rig operation, and other activities associated with this proposal. These impacts should be evaluated in terms of the remoteness and quiet character that so many seek on National Forest lands. Impacts on hunting experiences should be considered, and mitigation that prohibits noisy activities during the hunting season and critical times of year for wildlife should be required. Efforts should be made to disclose to hunters that their hunting experience and related activities might be disrupted if noisy activities are permitted during the hunting season. Additionally, the impacts on homeowners who live nearby, and on hikers and other visitors who may use the area, should be considered.

G. The EIS should consider the impacts to visual resources.

The Shoshone National Forest 1992 Oil and Gas Leasing EIS designates the project area as having a visual quality objective of "partial retention." This means that activities must remain "visually subordinate" to the characteristic landscape as viewed by the average public observer traveling on an adjacent route. EIS at III-25. According to the objectives laid out in the 1992 EIS, activities may repeat form, line color, and texture commonly found in the characteristic landscape but changes must remain visually subordinate.

The Forest Service should also consider how this project may contribute to light pollution. A clear and starry night sky is an important, but often overlooked, visual resource in Wyoming and it is imperative that this project does not dim our night sky. Likewise, darkness is an often-overlooked quality that many in Wyoming take for granted. Drilling rigs are the largest source of light pollution associated with this sort of project, but vehicle lights add to the problem as well. If the Forest Service authorizes the project it should require Hudson to take steps to reduce light pollution throughout the drilling and production phases.

H. The EIS should address impacts from the proposal on nearby Wilderness Areas and Special Management Areas.

The proposed project site is located within close proximity to the Washakie Wilderness and DuNoir Special Management Area. As discussed above, the Forest Service has an affirmative responsibility to manage Class I areas (and Class II areas) to protect visibility. The EIS must include baseline studies reflecting current air quality and quantitative air quality model so as to take steps to protect air quality in these sensitive areas.

I. The EIS should consider the effects of the proposed drilling project on recreational use.

Hunters, hikers, mountain bikers, horseback riders, wildlife watchers and others frequently use the area. The project could adversely impact these recreational activities. Forest Road 511 is currently a narrow, winding, single lane road with few turnouts. The Forest Service should provide a detailed assessment of what changes will be made to this road to make it suitable for heavy truck traffic and how this will impact public access and use of the Brent Creek

area. Access to the Shoshone National Forest will undoubtedly be impacted by the increased traffic and activity along forest road 511 and the Horse Creek Road.

J. The EIS should address road closures due to wildlife policy and snow conditions.

Forest Road 511 is not plowed during the winter, effectively closing it to wheeled motorized use. It is important that this policy stay in place to protect snow based recreation opportunities and the wildlife that depend on the peace and quiet that comes from reduced human use during the winter. In addition, the Forest Service gates this road in the spring in consideration of calving elk. Hudson should not be granted an exemption from this closure and must take steps to deal with this issue. Winter access for monitoring purposes can be accomplished via snow machine or skis. Due to these periods of reduced or non-existent access, the Forest Service should require Hudson to either: 1) ensure that they can provide adequate contained, on-site storage for oil, produced water, and condensate (not in waste pits) in the winter and spring months; or 2) shut down production of the well during the winter and spring elk calving closure period so that access and excessive storage is not necessary.

K. The EIS should consider the adverse impacts of increased drilling on the local economy.

In the forest plan revision process, the Shoshone National Forest identified its niche as a wild, backcountry forest whose role as the gateway to Yellowstone National Park has a positive impact on a local tourism and an amenity-based economy. The Shoshone National Forest plays a unique role in a regional economy reliant on the protection of natural resources in the Greater Yellowstone Area. The Forest Service should consider all factors that contribute both positively and adversely to the socio-economic spectrum of the region and the state's economy. The Forest Service should not limit its analysis to factors that can be easily quantified, but should approach this project with the aim to produce an analysis that considers all economic and social drivers and the impact from this and other reasonably foreseeable oil and gas development proposals on and off the forest.

The analysis should include, but not be limited to the following suggestions. The Forest Service should gather baseline information about revenue sources from visitor spending (i.e. general tourism), hunting and fishing licenses and related expenditures, income from outfitting and guide businesses and from local businesses and real estate firms that literally market a healthy forest as an amenity to incoming residents. It should include not only revenue produced, but also costs associated with commodity-based endeavors, including the environmental costs. It should include amenity-based values associated with the quality of life and desirability of living in towns like Dubois that provide easy access to the forest and attempt to quantify these values. The detriment to property values when increased industrialized development is proposed just miles from one's home should also be analyzed. The agency should consider impacts from the new worker influx the project may create.

The analysis should also include an assessment of the value of ecosystem services that would be lost if this field is developed. This can be approached by quantifying what it would

cost to artificially replace a healthy watershed for example or the costs associated with impacts to human health from polluted water. The analysis should be geographically broad enough to encompass local communities, but also address statewide impacts.

8. The Forest Service must comply 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).

Although not a final decision, the Forest Service indicated in its scoping notice that "there will not be impacts to any resource conditions that would qualify as extraordinary circumstances." Scoping notice at 2. Assuming it was referring to threatened and endangered species as the extraordinary circumstance, the Forest Service cannot claim there will not be impacts and thus make a "no effect" finding with respect to grizzly bears or Canada lynx. A "no effect" finding "obviates the need for consultation" with the appropriate federal fish and wildlife agency—in this case the U.S. Fish and Wildlife Service. Habitat Educ. Center, Inc. v. Bosworth, 363 F.Supp.2d 1090, 1110 (E.D. Wis. 2005) (quoting Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 810 (8th Cir. 1998); see also Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (explaining that "if the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered").

As mentioned above, the Forest Service is on record in other documents admitting that at the very least the impacts to these species would be "minor." See Talking Points (Exhibit 2) and Scott Well #2 Briefing Paper (Exhibit 1). Thus, the Forest Service has already determined that this proposed action "may affect" one or more listed species and formal consultation is required. The Fish and Wildlife Service explains that the "may affect" conclusion is appropriate "when a proposed action may pose any effects on the listed species or designated critical habitat." United States Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook ("Consultation Handbook") xvi (1998) at http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm (emphasis in original) (Exhibit 24). "When the Federal agency proposing the action determines that a 'may affect' situation exists, then they must either initiate formal consultation or seek written concurrence from the Services that the action 'is not likely to adversely affect' the listed species." Id.; see also 50 C.F.R. § 402.14(a), (b)(1).

The Forest Service cannot say that the introduction of industrial development into this currently undeveloped area of the forest would have no effect on grizzly bears. Moreover, because the area is designated critical habitat for Canada lynx, the Forest Service must ensure that it initiates proper consultation with the USFWS and that ultimately the project it authorizes does not destroy or

adversely modify lynx habitat, putting the species at any disadvantage for recovery. The intent of consultation under the ESA is to determine and mitigate potential effects to listed species like the grizzly bear and Canada lynx. For this reason, the Forest Service or BLM must formally consult with the FWS and it must issue a biological opinion or a written concurrence that the proposed action is not likely to affect the grizzly bears in particular, but also Canada lynx and its habitat.[5] See 50 C.F.R. § 402.14(a), (b)(1). The consultation should not only inquire about the effects to species from one well, but the potential effects from any reasonably foreseeable development of the entire Carrot Unit.

9. The Forest Service and the BLM have broad authority to condition, or in certain instances deny, oil and gas development at the APD stage.

A number of federal laws impose a requirement on the Forest Service to consider environmental safeguards as a key component of oil and gas development. For example, the purposes of the Endangered Species Act "are to provide a means whereby the ecosystems upon which [listed] species depend may be conserved and to provide a program for the conservation of such [species], and the Secretary of the Interior shall "utilize [programs administered by him] in furtherance of the purposes of this chapter." 16 U.S.C. §§ 1531(b), 1536(a)(1). The objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The purposes of the Clean Air Act are "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare . . . ." 42 U.S.C. § 7401(b)(1); see also id. §§ 7470(2), 7491(a)(1) (directing that air quality in protected landscapes and airsheds be protected). Under the National Historic Preservation Act, prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmarks . . . ." 16 U.S.C. § 470h-2(f). This is just a small sampling of the numerous environmental protection statutes under which the BLM and the Forest Service operate.

Given these mandates, it is clear that the Forest Service and the BLM are obligated to ensure environmental protection even in areas that have been leased. In addition to the legal obligations noted above, contractual provisions relative to oil and gas development allow and in fact demand protection of the natural environment in areas that have been leased. The BLM's standard lease form (form 3100-11) contains the following rights that federal lessors retain upon issuance of an oil and gas lease:

- Lease Terms Section 4: "Lessor reserves the right to specify rates of development and production in the public interest . . . ."

[5] Section 7(a)(2) imposes a duty on federal agencies that have discretionary involvement or control over an action to insure that actions by the agencies are not likely to jeopardize the continued existence of any endangered or threatened species. See 16 U.S.C. § 1536(a)(2); 50 C.F.R § 402.03. In this case, the BLM retains discretion over subsurface minerals and the Forest Service retains discretion over surface resources. As such, both the BLM and the Forest Service have independent obligations under the ESA.

- Lease Terms Section 6: "Lessee must conduct operations in a manner that minimizes adverse impacts to the land, air, water, to cultural, biological, visual, and other resources . . . . Lessee must take reasonable measures deemed necessary by lessor to accomplish the intent of this section. To the extent consistent with lease rights granted, such measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures."

- Lease Terms Section 7: "To the extent that impacts from mining operations would be substantially different or greater than those associated with normal drilling operations, lessor reserves the right to deny approval of operations."

The regulation at 43 C.F.R. § 3101.1-2 is also instructional:

> A lessee shall have the right to use so much of the leased land as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold subject to: stipulations attached to the lease; restrictions deriving from specific, non-discretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed. To the extent consistent with lease rights granted, such reasonable measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures. At a minimum, measures shall be deemed consistent with lease rights granted provided they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year.

The Forest Service and BLM should not interpret this regulation narrowly; nor should the agencies claim that in the absence of a specific stipulation or non-discretionary statute it can only impose "reasonable measures" demanding no more than that lease operations be moved by a maximum of 200 meters, leasehold operations be prohibited for no more than 60 days, or that operations not be moved off the leasehold.[6] The regulation is clear that this represents a minimum prescription for reasonable measures to remain consistent with lease rights granted. It does not rule out the application of more extensive mitigation measures. In fact, the Federal Register preamble to this regulation states unequivocally that "the authority of the Bureau to prescribe 'reasonable,' but more stringent, protection measures is not affected by the final rulemaking." Oil and Gas Leasing, Geothermal Resources Leasing, 53 Fed. Reg. 17,340, 17,341 (May 16, 1988). Put differently, the regulation establishes a floor, not a ceiling.

Other statutes and regulations give the Forest Service further authority to condition oil and gas development on National Forest lands. The Mineral Leasing Act itself instructs agencies as to their retained rights and puts leaseholders on notice that their right to develop is uncertain

[6] 43 C.F.R. § 3101.1-2

and conditioned on numerous factors.[7] For example: "Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property…." 30 U.S.C. § 187. In addition, "The Secretary of the Interior, or for National Forest lands, the Secretary of Agriculture, shall regulate all surface disturbing activities pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources. Id. at § 226(g).[8]

It is worth noting that only three rights are conveyed when an oil and gas lease is issued:

- An "exclusive right" to remove all of the oil and gas on the leasehold.[9]
- The right to "use" as much of the leasehold as "necessary" to recover all of the leased resource.[10]
- The right to build and maintain "necessary" improvements to extract the leased resource.[11]

Thus, Hudson has not been conveyed a right to develop the oil and gas in exactly the manner it desires or on the exact timeline it desires. Federal agencies have retained the right to condition those aspects of oil and gas development. In contrast to the limited rights that have been conveyed, under the standard lease form and the 3101.1-2 regulation, the BLM has specifically retained the right to condition development based on the following:

- Applicable laws.[12]
- Terms, conditions, and stipulations in the lease.[13]
- Regulations and formal orders in effect when the lease is issued.[14]
- Regulations and orders issued afterward, if not inconsistent with lease rights and provisions in the lease.[15]
- Specific, non-discretionary statutes.[16]
- Reasonable measures.[17]

We ask the Forest Service to pay particular attention to the aspect of the Standard Lease Form 3100-11 that makes the removal of oil and gas "subject to applicable laws."[18] This is a considerably broader provision than the reference to non-discretionary statutes in the 3101.1-2

[7] See Wyoming Outdoor Council v. Bosworth, 284 F.Supp.2d 81, 92 (D.D.C. 2003) (explaining that a lessee's right to drill is not absolute and a determination that drilling operations would violate a nondiscretionary statute gives the Forest Service the right to restrict the operator's plans or "even disallow use.").
[8] Courts have determined that the meaning of the phrase "in the interest of conservation" in the Mineral Leasing Act allows suspension of operations so as to protect the environment. Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981).
[9] Form 3100-11.
[10] 43 C.F.R. § 3101.1-2.
[11] Form 3100-11.
[12] Id.
[13] Id.
[14] Id.
[15] Id.
[16] 43 C.F.R. § 3101.1-2.
[17] Id.
[18] Form 3100-11.

regulation. Many laws are applicable even if they are not strictly non-discretionary and Hudson is "subject to" these laws under the explicit terms of the standard lease contract. We would also note that the "terms, conditions, and stipulations of this lease," to which Hudson is also "subject to" under form 3100-11, specifically includes the three limitations noted above that are stated in the standard lease form. That is, the rate of development can be specified as needed in the public interest, reasonable measures not necessarily limited to only the three mentioned in the 3101.1-2 regulation that are deemed necessary to minimize adverse impacts can be required, and if the impacts of the proposed operation are substantially greater than normal, operations can be denied.

This broad range of retained rights gives the Forest Service and the BLM great authority to specify the time, place, and manner of oil and gas development. And while an agency cannot arbitrarily deny an APD, if denial is based on sound evidence that development would violate "applicable laws" (and other conditions), the Forest Service and BLM would have the authority to deny an APD/SUPO outright.

The limited conveyance of rights under a federal oil and gas lease and the government's high degree of retained authority to condition development is well established. Thus, the Forest Service and the BLM should not capitulate to the development desires of Hudson due to a belief that any standards or conditions imposed would risk a takings lawsuit. Before a taking can occur, a property right must have been given. While certainly the federal government has conveyed the right to extract oil and gas from a leasehold, using no more of the leasehold than is "necessary" and building only "necessary" improvements, it has done so subject to development occurring under a highly regulated, comprehensive framework administered by the federal agencies, as discussed in detail above. Specifically, whatever right has been "given" has been made "subject to" applicable laws; terms, conditions and stipulations in the lease itself; other regulations and orders in place when the lease was granted; later-issued regulations if not inconsistent with the lease; specific, non-discretionary statutes; and any reasonable measures that the agencies may require.

The United States Supreme Court described the limited property right that is given when an oil and gas lease is granted:

> Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary. . . . . In short, a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals.[19]

Having given only a highly conditioned right to development, federal agencies can fully regulate development of existing leases by adding strict conditions of approval or the requirement of a reclamation bond with little fear of there being a "taking," and under the legal authorities discussed above the agencies are mandated to do so. Moreover, if the agency's rationale for denying an APD altogether is well founded and based on conditions of which the

[19] Boesche v. Udall, 373 U.S. 472, 477-78 (1963).

lessee was given fair notice in the lease form and applicable regulations, the lessee would have a difficult time convincing a court a taking had occurred.

We engage in this review of relevant law and policy so as to emphasize that the Forest Service and BLM certainly have the authority, and indeed the obligation, to fully protect the natural environment and human health in either authorizing the project with strict conditions—including requiring an adequate reclamation bond—or denying the project if the agencies determine the proposal will violate other applicable laws.

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10. Conclusion

We've raised numerous issues in these scoping comments in the hope that the NEPA analysis the Forest Service undertakes is comprehensive so that it serves as a useful decision making tool for the agency. Another important role of preparing an adequate NEPA analyses is to provide transparency so that the public is aware of the potential risks associated with the project. If done correctly this NEPA document can also provide assurance to the public that the lead agencies, cooperating agencies and the company are committed to a design and approval process that guarantees the protection the natural resources and wildlife in the Dubois area.

To highlight the main points raised:

1) The CE that the Forest Service is considering using to authorize the project is deficient as written and given the threats to threatened species and other resources is not appropriate for use in this specific situation.
2) Given the numerous resources that may be affected—most notably wildlife—and the potential cumulative impacts that could arise from this and future development proposals in the Carrot Unit, an EIS is the appropriate level of NEPA analysis the Forest Service should prepare.
3) The EIS should take a "hard look" at the direct, indirect and cumulative impacts of this project to the natural and human environment and the local economy, taking into account a reasonable range of alternatives and a balanced purpose and need statement.
4) The Forest Service should comply with the Endangered Species Act.
5) If the well is authorized, the Forest Service should require strict conditions of approval including an adequate reclamation bond to cover the costs of restoring the area back to its original condition.

Thank you for considering these comments. Please keep us on your mailing list for further information or meetings about this project. Although we believe the Forest Service should have hosted a public scoping meeting in Dubois and perhaps ones Lander and Jackson, we do appreciate the Forest Service meeting with interested citizens at their request on Feb. 2, 2010. If this proposal moves ahead, we hope this would be the first of many meetings—some of which Hudson should attend—where the public can learn more about the project, ask questions and provide input.

Sincerely,

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