

**WYOMING OUTDOOR COUNCIL • GREATER YELLOWSTONE COALITION
JACKSON HOLE CONSERVATION ALLIANCE
THE WILDERNESS SOCIETY**

April 30, 2007

Greg Clark, District Ranger
Big Piney Ranger District
215 South Front St.
P.O. Box 218
Big Piney, WY 83113

RE: Comments on the Draft Environmental Impact Statement for the Eagle Prospect Exploratory Wells Project on the Bridger-Teton National Forest

Dear Mr. Clark:

Please accept the following comments on behalf of the Wyoming Outdoor Council, The Wilderness Society, Greater Yellowstone Coalition and Jackson Hole Conservation Alliance regarding the Draft Environmental Impact Statement (“DEIS”) for the Eagle Prospect Exploratory Wells Project.

A local, regional and national public cherish the Bridger-Teton National Forest for its scenic vistas, backcountry recreational opportunities, abundant wildlife populations, habitat that supports threatened and sensitive species, clear skies, pristine streams and its ability to foster sustainable tourism-related businesses. The choices the Forest Service makes today about whether to authorize further industrialization in one of our nation’s most popular and ecologically important forests will chart a course that will either degrade or protect this invaluable public resource for generations.

Oil and gas development in the Upper Green River Valley is occurring at a pace and to a degree never before seen in Wyoming’s history. The Pinedale Resource Management Plan and the Bridger-Teton National Forest Land and Resource Management Plan certainly never contemplated—and for this reason do not reflect—the current development scenario or the massive increase in development now slated for the region. To date, neither the BLM nor the Forest Service has finished updating and revising these management plans. Instead, new projects like this one are being analyzed and will be decided without the benefit of up-to-date, landscape-scale assessments that accurately depict this development and more importantly assess whether new development in some of the last, best places is even appropriate.

Given this context, the Bridger-Teton National Forest is undoubtedly at a crossroads. Nothing about the Eagle Prospect proposed development project should be assumed to be insignificant. Three exploratory wells, if authorized, will have far reaching consequences. Not only do the three wells threaten to adversely impact an undeveloped area of the forest renown for its backcountry and wildlife values, but they also have the potential

to usher in new full-field industrial development, something the public and our elected officials believe is unacceptable anywhere in the Bridger-Teton National Forest. Although Plains Exploration & Production Company (“Plains”) holds valid leases, the Forest Service has the utmost discretion when making decisions that affect the lands it manages—including conditioning or denying development. We urge the Forest Service to defer making a final decision at this time and suspend the DEIS process at least until the Forest Plan is revised, a new oil and gas availability decision is made or a landscape-wide assessment is prepared. As discussed in detail below, this is not unprecedented and would provide the opportunity for stakeholders and Plains to pursue other alternatives, such as lease buy out, lease credits or other actions.

I. THE FOREST SERVICE SHOULD SUSPEND THE DEIS PROCESS UNTIL A LANDSCAPE SCALE ASSESSMENT IS COMPLETED.

The Forest Service received more than 700 comments during scoping for this project. As part of this process and through the many, in-depth comments received from other state and federal agencies, the Forest Service has come to better understand the exceptional wildlife, recreation, scenic and other values of this portion of the Bridger-Teton National Forest. Furthermore, through the extensive public involvement process conducted over the last year for the Bridger Teton Forest Plan revision, the agency now better recognizes the public’s views for desired management of this area of the forest and its importance to local and regional economies. See Letter from T.R. Pierce, President of the Jackson Hole Chamber of Commerce to Supervisor Hamilton, 2/28/07 (opposing drilling for oil and gas on the forest and stating that the forest’s “incomparable scenic beauty, wildlife and natural environment” provides “recreational and tourism opportunities” that translates into jobs and millions of dollars in business earnings and sales tax distributions) (Exhibit 1); see also Letter from Gene Bryan, Chair of the Wyoming Tourism Board to Supervisor Hamilton, 4/15/07 (opposing the proposed Eagle Prospect project and urging the Forest Service to “protect and preserve the attributes that bring more than 7 million money-spending visitors to Wyoming annually.”) (Exhibit 2).

While the Forest Service cannot extinguish Plains’ valid lease rights or arbitrarily deny its Application for Permit to Drill (“APD”), it can suspend the Eagle Prospect DEIS process in order to ensure that a landscape level analysis is first conducted to which an updated DEIS could be tiered. Because the new Forest Plan will likely include this sort of updated, broad landscape review and updated analysis of implications for regional wildlife populations, economies, and recreational opportunities, a logical option would be to suspend the Eagle Prospect DEIS until the new Forest Plan has been adopted.

Suspending the Eagle Prospect DEIS in order for completion of a landscape level analysis would not only allow for a more effective basis for analysis of impacts, but would also provide the space and time for pursuit of other, non-development alternatives outside the Forest Service’s direct authority. This includes the option of voluntary removal of leases in the Wyoming Range (including Plains’ leases) through purchase or trade, which is a course of action for which Governor Freudenthal, Republican and Democratic members of the Wyoming Legislature, the Wyoming AFL-CIO, numerous

sportsmen groups, many businesses, landowners, outfitters, recreational users and others have publicly advocated.

This course of action and its supporting rationale is not novel, but something that was recently pursued by the current administration for a similarly sized and equally controversial drilling proposal in Montana's Rocky Mountain Front. There, after more than a year of work on an EIS analyzing APDs submitted by Startech Energy for three wells in the Blackleaf Area (National Forest and BLM lands), the Department of Interior stopped the process in October 2004. It explained its reasons in a press release, stating:

'Clearly, development along the Front is a complex issue,' said Assistant Secretary of the Interior for Lands and Minerals Management Rebecca Watson. 'The Rocky Mountain Front is important for wildlife and is of great interest to the hunting community. There is very little existing development in this area and we need to step back and look at the issue on a landscape level to be sure we conserve our resources in a balanced way.' Watson said that halting work on the EIS would allow more time for all involved parties to explore alternatives that would resolve the complex issues associated with energy development in the Blackleaf area.

Press Release, Assistant Secretary Watson Announces Stoppage of Work on Blackleaf Environmental Impact Statement, 10/5/04 (emphasis added) (Exhibit 3).

The Montana BLM office elaborated on these reasons in a briefing document it released on the Blackleaf Project EIS. It reads in part:

Work on an environmental impact statement to analyze Startech's proposal to drill for natural gas in the Blackleaf area of the Rocky Mountain Front has been halted indefinitely. The Department of the Interior made this decision in consultation with the BLM.

There are two primary reasons for stopping the work on the EIS. First, due to the controversial nature of drilling on the Rocky Mountain Front, it seemed likely, that regardless of the outcome of the EIS, court challenges would follow, making actual energy production something that would take place many years in the future, if at all. Next, by stopping work on the Blackleaf EIS, it will allow us to focus on other planning efforts, particularly updating the West HiLine Resource Management Plan, which was scheduled to begin in five years.

There may be a better resolution of the issue than the EIS process. Stopping work on the EIS will give all parties a chance to step back and look at other alternatives to resolve the issues of energy development in the Blackleaf Area. Some of the alternatives could include providing the lessee with credits towards other BLM leases; buying out the lease; exchanging the lease for other public land leases; or completing the EIS in

the future. There may be other ideas and alternatives that have not surfaced yet. We hope to hear them as well. BLM does not have the authority to begin work on buying out or exchanging the leases. The course of action would need to be initiated through the lessee and Congress.

(Exhibit 4)(emphasis added).

The Wyoming Range and the Eagle Prospect DEIS share many similarities with Montana's Rocky Mountain Front. The reasons stated above for suspending the Startech EIS apply with equal force here:

- Lands are important for wildlife and popular with hunters
- Energy development proposal is highly controversial at local and national levels
- Existing development in the immediate area is limited
- Project is part of a larger, well-known landscape necessitating landscape review
- Likely to result in court challenges, making actual energy production uncertain
- Need for agency to focus on planning efforts, i.e. revision of management plan
- Situation in which there is the "possibility of better resolution of the issue than the EIS process"

For these reasons, the Forest Service should carefully review the example provided by the Blackleaf EIS and consider suspending the Eagle Prospect EIS until a full landscape analysis that addresses future oil and gas development is conducted for the Wyoming Range and Bridger-Teton National Forest.

If the Forest Service instead decides to authorize the project, it must not do so without first ensuring compliance with the National Environmental Policy Act ("NEPA") 42 U.S.C. § 4321 *et seq.*, the Endangered Species Act ("ESA") 16 U.S.C. § 1536(a)(2), the Clean Air Act, 42 U.S.C. 7401 *et seq.* and the Wilderness Act 16 U.S.C. 1131. The Forest Service must also ensure compliance with National Forest Management Act ("NFMA") 16 U.S.C. § 1604 and the Bridger-Teton Land and Resource Management Plan.

The following comments describe the numerous deficiencies inherent in Eagle Prospect Exploratory Wells DEIS. At a minimum, the Forest Service must remedy these shortcomings prior to making a final decision whether to authorize the project in order to avoid violation of NEPA and its implementing regulations.

II. THE FOREST SERVICE VIOLATED NEPA.

- a. **The Forest Service improperly defined the purpose and need for the project and arbitrarily selected Forest Plan and BLM Resource Management Plan objectives and goals to justify the proposed action.**

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 Plains' objectives for the project as its own. See DEIS at 2-1 (stating that "[a]lternatives were formulated based on the purpose of and need for the action."); 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)).

Rather than also including the commitment to protect surface resources as a purpose and need on par with oil and gas exploration, the Forest Service impermissibly truncated the purpose and need statement to meet only the needs of the applicant. The purpose and need for the proposed action is defined solely from Plains' perspective: "The purpose of [Plains'] proposal is to search for and test certain geologic formations for the presence of commercial quantities of natural gas." DEIS at 1-8.

Although the Forest Service briefly mentions protecting other natural resources and environmental quality as general background information regarding oil and gas lease operations, these values are not carried forward in an explicit statement of purpose and need. Id. at 1-7. The goals of a private party proponent are, to a limited extent, relevant in determining a project's purpose and need, but "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). Had the Forest Service considered this broader responsibility, not to mention its responsibilities under the Endangered Species Act and other statutes, the purpose and need statement may have included greater protection of the sensitive and irreplaceable National Forest lands at stake.

The Forest Service also chose "applicable" goals and objectives that justify Plains' proposal rather than including ones protective of wildlife and surface resources. As stated in the DEIS, "The purpose of and need for action should be consistent with and support applicable Forest Plan goals and objectives (USFS 1990) and Resource Management Plan guidance (BLM 1988)." DEIS 1-8. From some 24 goals and 73 objectives in the Forest Plan, the Forest Service selected four objectives that further development and one goal that generally mentions that other resources should be protected during oil and gas exploration and development:

- 1.1(d): Provide leasable, locatable, and salable mineral exploration and development opportunities.
- 1.2(c): Provide up to 35 miles of new road access opportunities to areas of high mineral or oil and gas potential for exploration and development.

- 1.2(f): Upgrade up to 68 miles of substandard roads over the life of the Forest Plan where improved road access is desirable to meet 1.2(a-e).
- 4.1(b): Design roads and structures to retain soil, visual and water quality values.
- 4.4: Other resources are protected during exploration and development of subsurface resources.

Bridger-Teton Land and Resource Management Plan (1990) at 112-121 (Exhibit 5). Goals and objectives that would support a modified and more balanced purpose and need statement are numerous. For example, Objective 4.1(a): “Minimize new road building... to increase wildlife security.” This could have supplemented the objective chosen—4.1(b), which only strives to mitigate impacts from the building of new roads.

Moreover, given the age of the Forest Plan, there are some omissions that the Forest Service must consider today. For instance, there is no goal or objective in the Forest Plan that addresses Canada lynx, a species now protected under the Endangered Species Act, because the Forest Plan pre-dates lynx listing. The Forest Service must acknowledge aspects of the plan that are out of date and its goals and objectives for projects today must encompass circumstances that have changed since 1990. If the Forest Plan and accompanying Final EIS no longer provide relevant direction, as is the case with outdated information regarding Canada lynx, they should not be used as documents that justify this project. See DEIS at 1-11 (“The goals and objectives of the Forest Plan guide all management on the BTNF and this analysis tiers to the Forest Plan and accompanying EIS, approved in 1990.”)

The Forest Service also selectively cites as BLM Resource Management Plan (“RMP”) guidance only part of the objective for minerals management decisions: “The federal mineral estate will be made available for orderly and efficient development of mineral resources.” DEIS at 1-8 (citing Pinedale RMP Record of Decision (“ROD”)1988 at 15) (Exhibit 6). In fact, the objective also considers protection of other natural resources: “All mineral actions will comply with goals, objectives, and resources restrictions (mitigations) required to protect other resource values in the planning area.” RMP ROD at 15. Although the BLM only has jurisdiction over the minerals underlying National Forest lands, it is worth noting that its own objective envisions protecting other resource values, not only making mineral resources available. This document, now nearly twenty years old, also suffers from an outdated perspective, particularly given the now massive oil and gas development occurring and slated for the Pinedale resource management area.

As mentioned above, the purpose and need statement sets the stage for the range of alternatives the Forest Service selects. By choosing a statement that defines the project from the narrow perspective of the project proponent, the Forest Service foreclosed a range of diverse alternatives including those that would have been more restrictive of the project as proposed and more protective of the sensitive and

irreplaceable National Forest lands at stake.¹ The Forest Service compounds this error by justifying the purpose and need statement with selective and out-of-date Forest Service and BLM plan goals and objectives.²

b. The Forest Service failed to consider a reasonable range of alternatives.

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 discussion of alternatives is considered the “heart of the environmental impact statement.” *Id.* at § 1502.14(a).

The DEIS considers only three alternatives: 1) the legally required “no action” alternative; 2) the proposed action of developing three exploratory gas wells in the Grayback Ridge roadless area; and 3) one additional action alternative (apparently the Forest Service’s preferred alternative,³ which is nearly identical to the proposed action save for the placement of a temporary gas pipeline. By choosing to analyze what essentially amounts to one action alternative, given only the slight modification between Alternatives B and C, the Forest Service failed to consider a reasonable range of alternatives.

As illustrated in Table 2-2, the action alternatives differ hardly at all. DEIS at 2-35. Both alternatives propose drilling 1 to 3 exploratory wells in an inventoried roadless area from a well pad that may be 6.5 acres in size. *Id.* Both alternatives propose 2.3 miles of new road construction, the reconstruction of 9.1 miles of road and 28 years of long-term disturbance in the area if the wells are productive. *Id.* at 2-35 to 2-36. The only difference in the two action alternatives is in the short-term disturbance from the temporary pipeline routes. *Id.* at 2-36. That the project’s action alternatives—save for a temporary pipeline, which may or may not be installed given the productivity of the wells—are exactly the same is a blatant violation of NEPA. See Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 813 (9th Cir. 1999) (holding Forest Service

¹ In addition, as explained in more detail below, the Forest Service should have characterized the purpose and need for the project as that of an appraisal of oil and gas resources already explored rather than as an exploratory project. Defining the project in that way would have then precipitated not only an analysis of diverse alternatives, but also an analysis of full field development.

² The BTNF Land and Resource Management Plan and the BLM Pinedale Resource Management Plan are 17 and 19 years old respectively. Both are in the process of being revised.

³ The DEIS considers “a no action alternative, the proposed action, and one additional action alternative.” DEIS at 2-1. On page SUM-1, there is mention that Alternative C is the preferred alternative. This is not mentioned again in the document. Despite the confusion, Alternative C is in fact the Forest Service’s preferred alternative. Teresa Trulock, pers. comm., 4/16/07.

violated NEPA when its EIS considered only a no action alternative along with two virtually identical alternatives.”)

Courts’ interpretation of NEPA’s requirements is clear: “[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency’s action...[as] the EIS would become a foreordained formality.” Citizens Against Burlington, 938 F.2d at 196. In Table 2-3, the Forest Service illustrates to what extent the three alternatives achieve the purpose and need for the project by cross referencing them with the five “applicable” goals and objectives the Forest Service selected. DEIS at 2-37. Not surprisingly, the two action alternatives meet all of the selected goals and objectives. In contrast, the no action alternative meets none of them.⁴

Because the Forest Service failed to analyze a true range of alternatives, the record of decision risks becoming a foreordained formality. Either the Forest Service chooses the no action alternative, which seems highly unlikely given that it fails to meet the purpose and need for the project, or it chooses one of the nearly identical action alternatives, both of which are calculated to meet the purpose and need for the project perfectly. Neither action alternative differs from the other in any meaningful way so as to “insure a fully informed and well-considered decision.” Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). This failure must be remedied by a full and thorough consideration of alternatives that differ substantially from the current action alternatives so as to allow the Forest Service the opportunity to adequately review a true array of options.

c. The Forest Service acted arbitrarily when it decided not to consider other reasonable alternatives.

The Forest Service briefly considered, but eliminated from study twelve other alternatives. DEIS at 2-2 to 2-9. A number of these alternatives are not only reasonable, but if carried forward would have allowed the Forest Service to objectively consider options that could potentially avoid or mitigate some of the project’s most significant impacts. In the section that follows, three of the twelve alternatives are discussed.

i. The Wyoming Game and Fish Department’s alternative is reasonable and should have been fully analyzed in the DEIS.

The Forest Service rejected an alternative proposed by the Wyoming Game and Fish Department (“WGFD”) to relocate the well pad to “a tree-covered area hidden from views on a ridge in T.36N. R.113W., Section 16 or 21, more than 1 mile southeast of the proposed location.” DEIS at 2-3. The Forest Service eliminated this alternative from study for three reasons: 1) it “would be infeasible to move the proposed well pad more

⁴ Although the Forest Service states that Alternative A (the no action alternative) meets Goal 4.4—“other resources are protected during exploration and development of subsurface resources”—this makes little sense as the no action alternative would not authorize any exploration and development. This should be clarified. Table 2-3, DEIS at 2-37.

than a mile to the southeast and still effectively evaluate the Eagle Prospect using directional drilling”; 2) two raptor nests in the “general area” of the WGFD-proposed site were identified in a 2005 field survey; and 3) it “would not comply with federal regulations that address the surface use rights of holders of oil and gas leases.” *Id.* at 2-4. None of these reasons warrant dismissal of this alternative from further consideration in the DEIS.

Taking these points in order, the Forest Service offers no explanation or supporting evidence that moving the proposed well pad would be “infeasible” or ineffective to evaluate the natural gas potential. The Forest Service likely took Plains’ employees at their word that all other locations would not be as promising as its proposed well pad location. While this may be true—although there is no evidence to support this claim in the DEIS—the Forest Service seems to assume that other locations less favorable in Plains’ opinion cannot and should not be considered. It is necessary therefore to remind the Forest Service that federal oil and gas leases “do[] not give the lessee [i.e. Plains] anything approaching the full ownership of a fee patentee, nor do[] [they] convey an unencumbered estate in the minerals.” *Boesche v. Udall*, 373 U.S. 472, 478 (1963). As discussed in more detail below, because federal leases come with numerous encumbering limitations, the Forest Service is well within its authority to condition the location of the well pad—and certainly within its authority to consider other well pad locations as possibilities in its draft NEPA analysis.

Next, the Forest Service dismissed the WGFD’s proposed well pad location based on 2005 field surveys that showed raptor nests in the “general area.” DEIS at 2-4. The agency immediately goes on to note, however, that “[o]ne of the nests was inactive and one failed that spring.” *Id.* Thus, it is unclear whether these nests remain viable or what significance they hold for raptors today. The Forest Service also fails to mention what raptor species used or may use these nests in the future. This information is critical to assessing potential impacts from the WGFD’s proposed location.⁵ In addition, because the Forest Service notes only that these nests (of undetermined species) are in the “general area” of the WGFD’s proposal, there is no basis to determine whether they could be adequately buffered from disturbance. The information provided in the Biological Evaluation regarding specific raptor species gives no greater assistance. It states, “The most recent active [goshawk] nest (2006) was about 0.5 mile from the project area boundary.” DEIS Appendix E at E-16. Similarly, “The most recent active [great gray owl] nest (2005) was about 0.5 mile from the project area boundary.” *Id.* at E-18. The “project boundary” could refer to any number of locations, as the boundary encompasses an area greater than 20,000 acres. The limited information provided and the numerous resulting questions suggest the Forest Service too quickly dismissed the WGFD’s alternative based on the presence of these two nests.

The final reason the Forest Service offers for eliminating this alternative from study is that it would not comply with federal regulations that address the surface use rights of holders of oil and gas leases as described in 43 C.F.R. § 3101.1-2. *Id.* at 2-4.

⁵ The Biological Evaluation analyzes four raptor species: northern goshawk, great gray owl, flammulated owl and boreal owl. DEIS Appendix E at E-9 to E-10.

The Forest Service claims this regulation allows for application of “reasonable measures” to minimize the impacts of surface development on an oil and gas lease, so long as such measures “do not require the relocation of proposed operations by more than 200 meters.” *Id.* Because the WGFD’s alternative would have required movement of proposed operation more than 200 meters, it rejects the alternative.

The Forest Service misconstrues the regulation, which provides:

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.

43 C.F.R. § 3101.1-2 (emphasis added). Thus, the regulation specifies that reasonable mitigation measures may include relocation of facilities, so long as such measures are consistent with lease rights granted, and then specifies that relocation of operations by as much as 200 meters is presumptively reasonable. 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).

By misconstruing the applicable regulation, the Forest Service justifies eliminating this alternative from further consideration. Contrary to the Forest Service’s reasoning, the regulation does not preclude moving the proposed operations more than 200 meters if circumstances indicate that such a relocation is warranted and would be consistent with lease rights granted—i.e. the right to explore for and extract gas from the leasehold. The regulation simply establishes the minimum mitigation measures that will be presumptively deemed consistent with lease rights granted; it does not identify the maximum mitigation authority of the Forest Service. Put differently, the regulation establishes a floor, not a ceiling.

The regulation the Forest Service cites is also not the final word on the authority

both the BLM and the Forest Service have to condition location of operations. BLM's standard lease form (Form 3100-11), which was adopted the same year as 43 C.F.R. § 3101.1-2, must be considered alongside the regulation to determine the rights retained by the federal lessor. Two sections of the lease form are particularly relevant:

Lease Terms § 6: Lessee must conduct operations in a manner than 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 or operations, and specification of interim and final reclamation measures.

Lease Terms § 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.

Thus, 43 C.F.R. § 3101.1-2 is not the sole word as to what constitutes “reasonable measures” and in any event, the regulation itself is highly permissive, stating in no uncertain terms that the reasonable measures “are not limited to” those mentioned and are “at a minimum” of what is in the agencies’ authority.

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 and conditioned on numerous factors.⁶ 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 (emphasis added). 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) (emphasis added).⁷

In sum, the Forest Service’s attempt to divest itself of authority to condition development, including the location of drilling operations is unavailing. As shown, the

⁶ The regulations the Forest Service cites, for example, subject lessees’ rights to three reservations: 1) lease stipulations; 2) restrictions deriving from specific, nondiscretionary statutes; and 3) other “reasonable measures.” 43 C.F.R. § 3101.1-2; see also Wyoming Outdoor Council v. Bosworth, 284 F.Supp.2d 81, 91 (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.”) Id. at 92.

⁷ 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).

agency has the utmost authority to require alternate siting on the leasehold and is not limited to locations that are only within 200 meters of Plains' proposed cite. Even the USFWS in its scoping comments advised that because "[n]atural gas development poses a serious threat to wildlife habitat," [t]he Forest Service should use their authority to deny drilling activities in areas where impacts to wildlife are such that stipulations or mitigation cannot replace the habitat that may be lost." Letter from Brian Kelly, USFWS Wyoming Field Office Supervisor to Greg Clark, 2/13/06. (Exhibit 7). Given the Forest Service's authority to deny development, its rationale for eliminating the WGFD's proposed location because it could not modify the location of the proposed development is entirely without support. To remedy this error, the Forest Service should carry forward the WGFD's suggested location as a fully analyzed alternative.

ii. The alternative that would have kept drilling and new road building out of the Grayback Ridge inventoried roadless area is reasonable and should have been fully analyzed in the DEIS.

The Forest Service's decision not to consider thoroughly an alternative that would avoid impacts to the Grayback Ridge roadless area suffers from the same flawed reasoning used to eliminate the WGFD's alternative. This alternative would have required moving the proposed operations approximately two miles to the south to exclude intrusion into the roadless area. DEIS at 2-8. The Forest Service rejected it because: 1) "it would not be feasible to move the proposed well pad more than two miles to the south and still effectively evaluate the Eagle Prospect using directional drilling;" and because 2) in the agency's opinion the surface use rights regulation at 43 C.F.R. § 3101.1-2 does not allow it to require Plains to move drilling operations more than 200 meters. Id.

As discussed above, the Forest Service's interpretation of 43 C.F.R. § 3101.1-2 is wrong and should not be used to justify elimination of alternatives that may be more protective of surface resources. Further, the Forest Service and the BLM have the authority to condition the location of the well based on their retained rights as the surface managing agency and the federal lessor of subsurface minerals, respectively. The Forest Service's claim that any location other than Plain's proposal is "infeasible" is nothing more than an adoption of the project proponent's opinion.

We urge the Forest Service to consider in detail an alternative that protects the "rural character" of the section of the Grayback Ridge roadless area that is included within the project boundary. DEIS at 3-83. This roadless area is the Bridger-Teton National Forest's largest primitive/semi-primitive area outside of wilderness, where natural integrity is "high" as is its degree of remoteness and potential for wilderness recommendation. Id. at 3-83 to 3-84. Although there are some low standard roads that have been developed within this inventoried roadless area, its character is nevertheless largely that of an "expansive backcountry" which "embodies a 'sense of place' associated with the Yellowstone region." Id. at 3-78. For these reasons, the Grayback Ridge roadless area should be regarded with the highest esteem and be managed carefully to protect its backcountry qualities.

iii. The helicopter access alternative is reasonable and should have been fully analyzed in the DEIS.

Brian Churchill, a registered professional biologist and independent consultant for Chillborne Environmental who has substantial oil and gas drilling technology expertise, has submitted independent comments regarding the feasibility of helicopter drilling as a reasonable alternative for the proposed project. His credentials and curriculum vitae are attached as Exhibit 8. We incorporate his comments (“Churchill comments”) in their entirety by this reference and attach them as Exhibit 9.

Kirby Hedrick, retired Executive Vice President of Worldwide Exploration and Production for Phillips Petroleum Company has also submitted independent comments regarding the Eagle Prospect DEIS. We incorporate his comments (“Hedrick comments”) in their entirety by this reference and attach them as Exhibit 10.

The Forest Service eliminated consideration of an alternative that would require helicopter access to the drilling site. It stated five reasons for rejecting this alternative: 1) it would require a buried gathering line to transport gas from the wells, and the Forest Service deemed use of such buried line to be speculative until the wells are actually drilled; 2) use of helicopters is more expensive; 3) helicopters would disturb wildlife and nearby subdivision residents; 4) helicopter access would be inadequate to address well control operations, a medical emergency or a wildland or operations fire; and 5) helicopter access would be inadequate to transport computer equipment and water needed for the project.

Taking these points in order, the Forest Service first contends that helicopter drilling would require a buried gathering line to transport gas from the wells. DEIS at 2-7. This assumption does not consider the reasonable alternatives to a buried pipeline such as a drilled pipeline. See Churchill comments at 3 (stating that the Forest Service didn’t consider installing a “drilled pipeline ... to a less sensitive point below the south rim (near FDR 10143).”) Moreover, a gas line may not even be needed for appraising subsurface geology because drill stem testing, gas flaring and condensate measurement could be used to determine if the reserve is going to produce sufficient quantities of gas. Kirby Hendrick, pers. comm., April 2007. If a temporary pipeline is needed, it could be laid on the surface and access to it could be via ATV or 4WD truck on the access road that already exists, without the need for road upgrades or new road construction. Id.

Next, the Forest Service claims that the cost of helicopter drilling would continue to accrue during the drilling of three wells, whereas the cost of the road is a single expenditure. DEIS at 2-7. For this reason, the higher cost of helicopter drilling makes this alternative infeasible. Id. What the Forest Service overlooks in its analysis, however, is that the major cost of helicopter supported drilling is in mobilization and transport of the rig, which would be amortized over the process of drilling the three wells. Churchill comments at 4. Had the Forest Service documented the full cycle cost differential of road building and reclamation in geologically unstable terrain to helicopter supported drilling, the Forest Service might have found the costs to be not as great as

initially thought. No such economic evaluation was presented in the DEIS. In addition, although helicopter rigs may be more expensive, considering Plains is attempting to confirm a prospect it has boasted is akin to the highly productive and lucrative Jonah Field, additional expenditures are reasonable.⁸ Kirby Hedrick, pers. comm., April 2007.

Helicopter access was next dismissed due to considerable noise impacts that would affect nearby residents and wildlife. DEIS at 2-7. This short-term disturbance, however, is one that the Forest Service mitigated in past projects on the Bridger-Teton National Forest. The DEIS fails to mention that in 1991, Chevron U.S.A., Inc. submitted an APD for an exploratory well on the Bridger-Teton National Forest eight miles southeast of Hoback Junction (eleven miles southwest of Bondurant) using helicopter access with limited road use. See Chevron U.S.A, Inc. Hunter Creek Exploratory Well Environmental Assessment and Finding of No Significant Impact, January 1992, Appendix A at A-1 (Exhibit 11). The EA compared the short-term noise impacts from helicopter access that would affect recreational users, hunters and wildlife with impacts associated with the road reconstruction alternative such as increased traffic volume. Id. at 4-5 to 4-6. The Forest Service concluded (after analyzing in addition to the no action alternative and the proposed helicopter access alternative, the feasibility of four different well pad locations and a non-helicopter alternative that would have required upgrading an existing access road) that helicopter access was preferred. Id. at 2-2 to 2-18.

It may be that short-term, but intense disturbance from helicopter traffic is less disruptive to residents and wildlife than the longer, more comprehensive disturbance caused by new road construction and upgrade and increased truck traffic. The only way to determine this is by fully defining and analyzing a helicopter access alternative—something the Forest Service failed to do. See Churchill comments at 4 (stating that the question the Forest Service should have asked in the DEIS “is not whether helicopter access would cause some disturbance to wildlife and nearby residents but how this disturbance compares in length, time and impact with the disturbance associated with the proposed action and upgrading/building of a major access road into this part of the Forest.”). Moreover, if helicopter access was used only to transport infrastructure with most worker access provided by 4WD or ATV on the existing road, the length of the helicopter-created disturbance would be less. Kirby Hedrick, pers. comm., April 2007.

The Forest Service next offers the explanation that helicopter drilling is incapable of responding to situations such as well blowout, medical emergency or a fire—both from a technical standpoint and because it would be too expensive. DEIS at 2-7. The Forest Service seems to have overlooked that helicopters are used frequently for medical emergencies and having one staged and ready nearby would certainly address this need. Kirby Hedrick, pers. comm., April 2007. For firefighting and well control, the groundwater well at the well pad and a storage tank (transported by helicopter) would address fire risks. See Churchill comments at 5. Mr. Churchill co-authored a study for the British Columbia Ministry of Sustainable Resource Management to address the

⁸ See pgs. 18-19 below for a more detailed discussion regarding Plains’ knowledge of the subsurface natural gas resources from an earlier test well and its anticipated plans for the field.

feasibility of helicopter assisted oil and gas exploration in areas of high wildlife value in northeast British Columbia, not unlike the area proposed for drilling in the Bridger-Teton National Forest, which addresses these concerns. See Muskwa-Kechika Management Area Heliportable Drilling Feasibility Study, June 2002 at 18-27 in Technical Report (Exhibit 12). The Forest Service should incorporate analysis from this study into its review for the proposed Eagle Prospect project.

Last, the Forest Service claims that helicopter access would be inadequate to transport computer equipment and water needed for the project. However, other geophysical exploration projects that require sophisticated computer technology—some in areas as remote as the Amazon jungle—have been carried out “flawlessly” using helicopter access. Churchill comments at 5 (stating that “[l]arge helicopters can move all truck-sized computer trailer units. A detailed consideration of a helicopter alternative should show that the concerns are easily overcome.”) Drilling-related computer equipment is helicopter transported to off-shore drilling platforms “all the time” and it should be “easy” to transport computer equipment to the proposed Eagle Prospect well pad via helicopter. Kirby Hedrick, pers. comm., April 2007. With respect to water, the Forest Service could have analyzed other options including bringing water from a non-sensitive remote source and trucking it in on existing FDR 1043 to a staging area. Churchill comments at 5. Also, water on site from the groundwater well and storage tanks, in addition to helicoptered supplemental water, would meet the needs for this project. Id.

While some of these reasons the Forest Service identifies may raise concerns about the feasibility of helicopter access, others would appear to always preclude consideration of helicopter access for any well-drilling operation on National Forest lands. Based on the fact that another oil and gas drilling operation using helicopter access was proposed and authorized on the Bridger-Teton National Forest in an area just a few miles from the Eagle Prospect project area in 1992 and that other studies suggest helicopter access is often feasible and in fact more sensitive to forest resources and wildlife in the long-term, the Forest Service’s dismissal of this alternative without detailed analysis is premature. The Forest Service has a responsibility to adequately consider all reasonable alternatives prior to making a final decision.

iv. Conclusion

By choosing two virtually identical action alternatives coupled only with the legally required no action alternative, the Forest Service impermissibly narrowed its analysis so as to usher forward what appears to be a predetermined result. This is unacceptable. NEPA requires an EIS to serve as an objective assessment of reasonable alternatives, not simply as an endorsement of the proposed action of a private party. See 40 C.F.R. § 1502.2(g) (environmental impact statements shall not serve as the means to “justify[] decisions already made.”). Because the Forest Service’s DEIS failed to demonstrate a true range of alternatives, it must remedy this error by including in its final analysis thorough consideration of other reasonable alternatives. At a minimum, the alternatives the Forest Service rejected that are mentioned in these comments (namely the

WGFD's suggested alternative, the no-roadless area intrusion alternative and the helicopter access alternative) should have been carried forward and fully analyzed in the DEIS.

It is important to note that the Eagle Prospect DEIS suffers from the same deficiencies the Environmental Protection Agency ("EPA") recently identified in the Draft Supplemental EIS ("SEIS") for the Pinedale Anticline Oil and Gas Development Project. It gave the SEIS a rating of EO-2: "Environmental Objections—Inadequate Information" because the document failed to consider a reasonable range of alternatives. Letter to BLM State Director Bob Bennett from EPA Regional Administrator Robert Roberts, April 6, 2007 at 4 and as an attachment to the letter, Detailed Comments by the Region 8 Environmental Protection Agency for the for the Draft SEIS Pinedale Anticline Oil and Gas Exploration and Development Project at 1-3 (Exhibit 13).

Like the Eagle Prospect DEIS, the Draft SEIS considered the legally required no action alternative and two action alternatives that "consist[ed] of the same project components," including the same number of wells and similar on-the-ground impacts. Id. at 2. The EPA expressed concern that the BLM "identified reasonably available alternatives" that may have "mitigate[d] significant impacts to the environment." Id. at 4. However, BLM did not carry these alternatives forward in the analysis, nor did BLM sufficiently explain its rationale for excluding the alternatives. Id. Because the Eagle Prospect DEIS illustrates similar shortcomings, the Forest Service must remedy these problems prior to making its final decision.

The Forest Service has a responsibility to the public as trustee of one of the nation's most spectacular and beloved forests to undertake its decisionmaking process thoughtfully. New oil and gas development on the Bridger-Teton National Forest is highly controversial, as illustrated by the huge outpouring of opposition to new leasing and development in the Wyoming Range and the public comments the Forest Service received in its forest planning workshops regarding future oil and gas development on the forest. See, Casper Star Tribune article, "Locals seek to protect Wyoming Range from development," 12/23/06 (explaining diverse citizens who are want to protect the Wyoming Range from new oil and gas development) (Exhibit 14); Jackson Hole News & Guide article, "Residents: Curb oil drilling," 12/6/06 (stating, "People who filled out comment forms at the workshops were overwhelmingly opposed to oil and gas development, whether . . . [in] the Wyoming Range, or the entire Bridger-Teton.") (Exhibit 15); Casper Star Tribune article, "New management plan in works for Bridger-Teton," 3/8/07 (stating that labor union members, many of whom are hunters and anglers, attended forest plan revision meetings to express hope that the Wyoming Range will become off limits to new oil and gas development under the new plan) (Exhibit 16). The Forest Service should take stock of this public sentiment and at the very least ensure its NEPA documentation reflects the best and most comprehensive analysis possible. Whether to allow an oil and gas company to industrialize a currently undeveloped, backcountry area of the forest—the first step toward potential full-field development—should be a decision the Forest Service makes with the utmost caution. The DEIS illustrates an opposite approach.

d. Full field development is a connected, cumulative and similar action to the Eagle Prospect proposal and should have been considered in the DEIS.

The Forest Service must include in its analysis a discussion of impacts of all reasonably foreseeable connected, cumulative and similar actions. 40 C.F.R. § 1508.25(a). Actions are connected if they: 1) “automatically trigger other actions which may require environmental impact statements”; 2) “cannot or will not proceed unless other actions are taken previously or simultaneously”; 3) “are independent parts of a larger action and depend on the larger action for their justification.” *Id.* at § 1508.25(a)(1)(i),(ii),(iii). Cumulative actions are those that “when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” *Id.* at § 1508.25(a)(2). Similar actions are those that “when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.” *Id.* at § 1508.25(a)(3).

In this case, Plains’ proposal is connected to the possibility of full field development, a reasonably foreseeable outcome of this smaller project. Plains is already contemplating full field development as a realistic outcome of the three wells; the DEIS mentions full field development thirteen times. *See, e.g.* DEIS at 4-27 (“An economic discovery in the project area could lead to full field development, which would be analyzed in a separate EIS.”); DEIS at 2-22 (“Once the wells are drilled . . . [Plains] would evaluate well production and the potential for full field development”); DEIS at 1-10 (“Should field development be determined to be commercially viable after the results of the testing program are evaluated, [Plains] would prepare and submit delineation and/or development places for additional wells). Thus, if the three wells are successful, this will automatically trigger Plains’ application for permits to drill the full field, necessitating an EIS. 40 C.F.R. § 1508.25(a)(1)(i). Further, full field development will not proceed unless the three wells proposed in the DEIS are first drilled; the three wells therefore are a necessary first step. 40 C.F.R. § 1508.25(a)(1)(ii). Last, the proposed wells are independent parts of a larger action. 40 C.F.R. § 1508.25(a)(1)(iii). Indeed, the whole purpose of the wells is to assess the potential for full field development. Moreover, the “field” has already been delineated. *See* DEIS at SUM 1 (explaining that Plains applied for and in 2005 BLM approved unitization of the project area.)

Plains’ proposal should also be analyzed in conjunction with larger full field development for its cumulative impacts. Cumulative impacts are those that “result from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions” 40 C.F.R. §§ 1508.7, 1508.25(a)(2). Because full field development is reasonably foreseeable, the Forest Service must consider it a cumulative action such that its analysis must include consideration of the potential impacts from the larger development scheme.

Plains' three well proposal is also similar to the full field development that Plains is already contemplating, necessitating analysis of both actions prior to the Forest Service authorizing any ground disturbing activity. 40 C.F.R. § 1508.25(a)(3). Each will involve drilling natural gas wells in a geographically similar area—the South Rim Unit—of the National Forest, BLM and private surface lands. Each will involve the extraction of natural gas from a similar geologic structure. Because the proposed action is a connected, cumulative and similar action to full field development, the Forest Service must supplement the DEIS to include a full, technical review of the likelihood of such development, its possible size and components and the resulting impacts.

i. The Forest Service failed to disclose the true extent of the proposed project and should have considered potential impacts from full field development rather than limiting its analysis to three wells.

It is abundantly clear that the proposed action—if permitted—has a high likelihood of leading to further development. See Hedrick comments at 1-3 (Exhibit 10). Although the Forest Service was careful not to elaborate in the DEIS about this potential so as to avoid the requirement of a more comprehensive analysis, Plains has disclosed a great deal of information in presentations to its investors that suggests full field development is likely.

Plains cites in its investor reports a nearby well that was drilled by Shell in the 1970s (approximately 1-2 miles from the proposed wells) and calls the proposed Eagle Prospect wells not “exploratory wells” (as the Forest Service does in the DEIS), but “appraisal wells to the 1970 Shell Discovery well.” (Exhibit 17). In researching this well on the Wyoming Oil and Gas Conservation Commission website, Mr. Hedrick learned that it tested 1.2 mmcf/d gas at 1200 psi flowing wellhead pressure from a 5 foot interval in the Mesaverde formation. In his professional opinion, this is a very good result compared to unstimulated results in the highly profitable Jonah and the Pinedale Anticline gas fields. Kirby Hedrick, pers. comm., 4/22/07. In materials presented to investors, Plains has consistently made it clear that it believes this project has a similar geology to the Jonah field with similarly productive wells, which would necessitate development of a full field.

‘The key about it (Eagle Prospect) is it mirrors the same geologic aspects of the Jonah Field,’ Plains Exploration and Production Company Chairman, President and CEO Jim Flores said in a presentation to oil and gas investors earlier this month.... ‘We’re hoping to get a thicker, much more commercial play, so we can develop a nice field right in the middle of the forest.’

Pinedale Roundup article, “Plains CEO Compares Eagle Prospect to Jonah” 4/27/06, (Exhibit 18).

Other aspects of the project's design indicate that Plains anticipates that full field development is likely. First, Plains formed the South Rim Unit at the same time it submitted the APD for the three proposed wells. Thus, from the very beginning, Plains has contemplated that full field development is a realistic possibility. Second, it is unusual for a true "exploratory" gas well project to include a temporary gas pipeline in its design. Hedrick comments at 2 (stating that "[r]isk and economic considerations normally preclude a company from . . . installing pipelines until productive potential of a prospect is determined."). Third, it is uncommon—if this were truly an exploratory well project—that Plains would seek approval of three wells simultaneously. Three wells would not be proposed if this were indeed a high risk, wildcat exploratory well. Id.

Information from nearby producing wells also suggests that much is known about the subsurface geology and petroleum reserves in the project area. This supports the argument that Plains' knowledge of the likelihood of full field development is greater than is disclosed in the DEIS. Nearby gas wells (2-5 miles) south and east of the South Rim unit are already producing with field components (permanent pipeline, etc) in place. Five wells in this "Merna field" have produced over 179,000 MCF of gas with most in last few years and from the same formations (Mesaverde and Lance) and depths (13,000 feet) as with Plains' proposed wells. DEIS at 3-38. Moreover, a geologic review reveals that the Eagle Prospect is intended to appraise a much larger area than the South Rim Unit. The actual prospect extends along Highway 191 nearly to the mouth of Hoback Canyon, underlying and extending westerly encompassing the town of Bondurant. See attachments to Mr. Hedrick's comments: maps illustrating the extent of the subsurface area (Exhibits 19 and 20.) The DEIS limits its analysis only to the impacts of three wells, when it should have analyzed the impacts from full field development within and beyond the South Rim Unit.

As mentioned above, the DEIS acknowledges that full field development is reasonably likely numerous times. See also DEIS at 4-78 (stating that "[t]he potential for future oil and gas drilling on federal and private lands is moderate to high in some portions of the [areas] which encompass the project area."). Despite these admissions, the Forest Service failed to analyze the impacts that would result from such full field development. This is unacceptable given the information known about the subsurface gas deposits confirmed by a nearby test well coupled with steps Plains has already taken to prepare itself for full field development (e.g. unitization, a plan design that includes pipelines and three wells). Although full field development is not an absolute certainty, NEPA doesn't require analysis merely of definite future actions; it requires more. Namely, the Forest Service must consider impacts of the proposed action when coupled with "reasonable foreseeable future actions." 40 C.F.R. § 1508.7. There is enough information in this case that analysis of full field development is warranted. The Forest Service violated NEPA—and the public's trust—by not disclosing critical information and analyzing comprehensively a full field development scenario.

Other projects illustrate that an assessment of potential impacts from full field development is often appropriate at the APD stage when only a few wells are initially proposed. For example, consideration of full field development and inclusion in the

analysis of additional future wells as connected actions was done with a recent and very similar project in Montana's "Blackleaf Study Area" (Rocky Mountain Front) which is located on the Lewis and Clark National Forest and on BLM lands in the Great Falls Field Office area. Like the Eagle Prospect proposal, the EIS process there was triggered by an APD submitted for three wells from one location. A technical review of potential full field development and inclusion of this larger development scenario was incorporated as part of that EIS.

The Bureau of Land Management and the Forest Service will prepare an environmental impact statement in response to Applications for Permit to Drill within the Blackleaf Study Area (see attached map for study area boundary and identification of proposed wellsites, reasonably foreseeable development sites and existing well site information)... The EIS will be a site specific analysis of pending and anticipated applications for permit to drill and associated pipelines, access roads, and gas treatment facilities associated with the Blackleaf Unit gas field and adjacent areas in Teton County, Montana. The EIS will also analyze a reasonably foreseeable development (RFD) scenario which includes six sites and is currently in peer review status.... Because oil and gas production has been confirmed by existing (currently shut in) gas wells, in the Blackleaf gas field unit, BLM is required to conduct an RFD scenario for the area. The RFD includes six potential well sites and is currently in the peer review stage. The RFD report will be incorporated in the EIS and be attached as an appendix.

BLM's "Statement of Work" document for consultant under contract for Blackleaf EIS at 1. (Exhibit 21). Just as in the Blackleaf project, the well drilled in the 1970s by Shell in the same formation underlying the South Rim Unit confirmed the likelihood of production. For this reason, the Forest Service should have required analysis of full field development.

Here, although faced with a similar situation as posed in the Blackleaf EIS, the Forest Service has characterized the Eagle Prospect wells as "exploratory" in an attempt to sidestep what is required at the "appraisal" stage of development: an analysis of full field development. In this case, where the exploratory phase has already occurred (i.e. the 1970 Shell well) from which information was gathered indicating the likelihood of commercially viable wells, where Plains has applied for and been granted unitization and has included gas pipelines in the project's design along with the request to drill three wells, and where geologic information indicates development could exceed even the South Rim Unit itself, full field development is a reasonably foreseeable event. The Forest Service's mischaracterization of the project, i.e. as exploratory rather than as an appraisal, has allowed it to justify compartmentalizing its analysis. The Forest Service must remedy this deficiency in the DEIS by preparing a reasonably foreseeable development scenario for the field and analyzing the likely impacts associated with full field development.

If the Forest Service does not include such an analysis prior to making a final decision about the project, at a minimum it must explicitly state that the subsequent NEPA documentation that will be prepared if full field development becomes an actual proposal will be an environmental impact statement (“EIS”). As the Forest Service is aware, Section 390 of the Energy Policy Act implements a rebuttable presumption that new categorical exclusions would apply to five types of activities conducted pursuant to the Mineral Leasing Act. 42 U.S.C. § 15942; see also Forest Service guidance document Energy Policy Act of 2005, Use of Section 390, Categorical Exclusions for Oil and Gas Activities, March 13, 2006 (Exhibit 22).⁹ Two of these activities for which categorical exclusions may apply are particularly relevant to this project: 1) surface disturbance of less than five acres provided site specific NEPA analysis has previously been completed; and 2) drilling a gas well within a developed field for which an approved land use plan or NEPA document was approved within the last five years. See id.

Assurances from the Forest Service in the DEIS that subsequent NEPA will be prepared do not specify what level of NEPA analysis that it will require. In other words, it is not certain whether this will be another EIS, or whether the Forest Service will apply one of the Energy Policy Act’s new categorical exclusions to future wells Plains may want to drill in the field. See DEIS 1-10, 2-17 (stating that if the three wells are commercially viable, “[d]evelopment of the South Rim Unit would be considered in a subsequent NEPA analysis that addresses reasonably foreseeable development”); DEIS at 4-1 (“After evaluation, if any Eagle Prospect well is productive, full field development . . . would be considered outside this analysis in a follow-up NEPA analysis”). Out of the numerous times “subsequent or follow-up NEPA” is mentioned, only once does the Forest Service clarify that this follow up NEPA would in fact be an EIS. See DEIS at 4-27 (stating that “[a]n economic discovery of in the project area could lead to field development, which would be analyzed in a separate EIS.”) The Forest Service should clarify these statements and assure the public that if it chooses to not undertake the legally required full field development analysis at this time—which is unadvised—this analysis will occur in a subsequent EIS in the future.

e. The Forest Service failed to take a “hard look” at the project’s likely impacts to wildlife and water resources.

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

⁹ In addition to the provisions in the Energy Policy Act of 2005, the Forest Service issued a new final directive that authorizes the use of categorical exclusions for oil and natural gas exploration and initial development activities, associated with or adjacent to a new oil and/or gas field or area. As long as the activities don’t exceed one mile of new road construction, one mile of road reconstruction, three miles of pipelines and four drill sites, they can be categorically excluded from NEPA analysis. See 72 Fed. Reg. 7391 (February 15, 2007) entitled “National Environmental Policy Act Documentation Needed for Oil and Gas Exploration and Development Activities (Categorical Exclusion).”

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. The Forest Service failed to do that here.

1. Canada lynx

The Forest Service’s perfunctory analysis of the project’s potential impacts to Canada lynx is of great concern to the public and the state’s biologists—all of whom care about lynx and desire to see the Bridger-Teton National Forest’s line officers make management decisions that aid in lynx recovery. See WGFD’s scoping comments at 7, 8 1/18/07 (Exhibit 23) (stating that the Department was concerned with the “cursory” information provided in the DEIS with respect to lynx and warning that a “cautious approach” is necessary because even “minor impacts could potentially eliminate lynx in the Wyoming Range.”) Despite the seriousness of the WGFD’s comments and the woefully incomplete lynx analysis in the DEIS, the Forest Service nevertheless concluded that the project “is not likely to have a detrimental effect” on lynx habitat or populations. DEIS at SUM-10; see also DEIS at 2-44 (stating that the project will not likely noticeably affect lynx).

The Forest Service hardly even attempted—let alone succeeded—in taking a “hard look” at the direct, indirect and cumulative impacts to lynx as a result of this proposed development project. Its first shortcoming was to not include all relevant data about lynx in the DEIS itself. Instead of including support for its conclusions that the project will have no noticeable effects on lynx in the DEIS, the Forest Service directs the public to review the Biological Assessment, a document not included in the DEIS. In fact, the Forest Service instructs the public repeatedly to reference the Biological Assessment for “more detailed information” on lynx. DEIS at 3-56; see also DEIS at 3-55 (“A more detailed presentation of species selection, description, and analysis may be found in the Biological Assessment and MIS report in the *Project File* at the Big Piney Ranger District Office in Big Piney, Wyoming.”); Id. at 4-79 (“The direct, indirect, and cumulative effects upon Threatened and Endangered species are discussed in the Wildlife and Fisheries section. They are further documented in the Biological Assessment located in the *Project File*.”).

When members of the public followed the Forest Service’s instructions and requested the Biological Assessment, however, the Forest Service denied access to it. See Letter to Greg Clark from Lisa McGee, 3/20/2007 documenting this denial (Exhibit 24). Citing differences between the agency’s responsibilities under NEPA, where documents are “subject to public review and comments prior to development of the final” and the ESA, where a BA is “produced solely to analyze potential impacts to threatened and endangered species already displayed in the Draft EIS” the Forest Service explained that it will release the BA when it releases its Record of Decision/FEIS. Letter from Greg Clark to Lisa McGee, 3/27/07 (Exhibit 25). Thus, despite its comments in the DEIS to the contrary, the Forest Service now claims that all the necessary analysis regarding

the project's likely impacts to lynx are found in the DEIS. As explained below, this analysis is wholly inadequate and fails to meet NEPA's "hard look" requirement.

i. The Forest Service provided incomplete baseline data regarding lynx habitat and lynx presence in the project area and surrounding environs.

The Forest Service's requirement to take a "hard look" at the potential impacts to lynx as a result of the proposed project includes the mandate to provide a complete and accurate assessment of the affected environment. See 40 C.F.R. § 1502.15. Similarly, the Forest Service must "insure the professional integrity, including the scientific integrity, of the discussions and analyses in environmental impact statements." 40 C.F.R. § 1502.24. The data included in the DEIS fails to encompass all relevant data about lynx habitat and presence in and around the project area. Without this information it is impossible for the Forest Service to make an accurate assessment of the likely impacts to lynx and its habitat. In order to comply with NEPA and its implementing regulations, this must be remedied.

As the Forest Service is aware, the Canada lynx is an indigenous and current resident of the Bridger-Teton National Forest and an important member of the native ecological community. It is also one of the most severely imperiled mammals in the continental United States. The Fish and Wildlife Service listed the lynx as threatened under the Endangered Species Act ("ESA") on March 24, 2000. 65 Fed. Reg. 16052 (March 24, 2000); 50 C.F.R. part 17. The Fish and Wildlife Service identified the Northern Rocky Mountains/Cascades lynx population as "distinct" from other populations in the United States. 65 Fed. Reg. at 16054, 16057, 16060, 16071-16082. The Northern Rocky Mountains/Cascades area, which includes Wyoming is "the most likely stronghold for lynx populations in the contiguous U.S." Id. The majority of verified occurrences of lynx in the U.S. and confirmed resident populations occur in this geographic area. Id. at 16057, 16072, 16082.

There is no question that high quality lynx habitat exists within and around the project area. The Forest Service, however, is of the opinion that only the habitat "surrounding" the project area and nearby wilderness areas provide suitable habitat. See DEIS at 3-59 ("The habitat surrounding the project area is suitable for lynx with dense forest and wilderness areas in relatively close proximity.") This contradicts information provided elsewhere in the DEIS. See DEIS at 3-57 (Figure 3-5 illustrates the existence of potentially suitable habitat within the project area itself.) As explained below, it also contradicts the best available science.

Not only does suitable habitat exist, but this area of the state—including the project area—is "generally regarded as the best lynx habitat anywhere in the state [of Wyoming]; namely, USDA Forest Service (Bridger-Teton National Forest) holdings on the Overthrust Belt/Wyoming Range in northern Lincoln and western Sublette counties." Wyoming Natural Diversity Database, Habitat Mapping and Field Surveys for Lynx (*Lynx canadensis*) on Lands Administered by the USDI—Bureau of Land Management

in Wyoming at 9, 10/10/01 (Exhibit 26); see also Wyoming Natural Diversity Database, Species Assessment for Canada Lynx (*Lynx canadensis*) in Wyoming at 5-6 (Sept. 2004) (“The best contiguous lynx habitat in Wyoming is in the northwestern and western portion of the state.”) (Exhibit 27).

The Forest Service also failed to mention recent reports that have highlighted the unique and important lynx habitat found in the southern Bridger-Teton National Forest. See Endeavor Wildlife Research Foundation, The Greater Yellowstone Lynx Study, 2004/2005 Annual Report at 7 (Exhibit 28) (stating that “forest structure in the Wyoming Range/Hoback Rim sector might be somewhat unique when compared to other sectors on the B-TNF. The Wyoming Range appears to have a larger subalpine fir component, with perhaps a thicker understory than the other forest sectors.”) Moreover, this part of the forest supports abundant snowshoe hare, the primary prey source for lynx. Researchers commonly encountered snowshoe hares on snow tracking surveys and “[s]nowshoe hare activity in the drainages west of Merna Junction in the Wyoming Range/Hoback Rim appeared to be particularly high.” Id. at 7. Thus, the Wyoming Range/Hoback Rim area not only provides suitable habitat, but this habitat is perhaps some of the best on the entire forest.

The Forest Service never references the multi-year Greater Yellowstone Lynx Study or its findings in its analysis regarding lynx. Although the study is absent from any and all of the information provided about lynx in the DEIS, the Forest Service is well aware of its findings and mentions corollary information researchers gleaned about pine marten from the lynx study in another section of the DEIS. See DEIS at 3-66 (“During the winter of 2005-06, Endeavor Wildlife Research Foundation (EWR) collected marten track data while conducting lynx research on the BTNF.”) (citing Linell and Berg 2007). The Forest Service cannot selectively omit findings from the best available science in order to downplay the significance of the project area’s importance to lynx. That the project area and its environs are perhaps some of the last, best habitat for the long-term survival of lynx in Wyoming, as documented by the Greater Yellowstone Lynx Study, should have been mentioned and considered in the DEIS.

In addition to containing unique lynx habitat, the Bridger-Teton National Forest and the project area support actual individuals. The Forest Service includes only scant mention of lynx presence in the DEIS. Explaining generally that the majority of lynx sightings have been in the northwestern and west-central parts of the state, it then states, “Radio collared lynx from the Wyoming Range . . . have been tracked making long range movements, including travels through the project area.” DEIS at 3-59. This brief notation is insufficient to provide baseline information upon which informed management decisions must be made. This is not only a violation of NEPA, but also a disservice to species the Forest Service is charged with protecting under the Endangered Species Act and to the public who care about the future survival of lynx in Wyoming.

At the very least, the Forest Service must provide a detailed description of recent lynx presence and movement in and around the project area. For example, the Forest Service failed to mention that biologists have successfully documented lynx presence on

the Bridger-Teton over the last three winters—including a documented lynx occurrence in the project area itself. In the winter of 2004/2005 four “definite (DNA-based) Canada lynx detections” and “one probable lynx track and one possible lynx track” were found in the Wyoming Range/Hoback Rim sector. Endeavor Wildlife Research Foundation, The Greater Yellowstone Lynx Study, 2004/2005 Annual Report at 6, 7 (Exhibit 28). In that same season, biologists documented lynx along Muddy Creek within the project area boundaries. Id. at 11. In January 2007, in a subsequent annual study by the same researchers, a lynx was documented on the Hoback Rim—less than five miles from the proposed well pad location. Endeavor Wildlife Research biologist Nate Berg, pers. comm., 4/4/07; see also Skytruth and Earthjustice maps illustrating the lynx location (Exhibit 29). The Forest Service could have also conferred with the WGFD in order to obtain information about historic and recent lynx presence in and around the project area. Susan Patla, pers. comm., 4/19/07. It is only by obtaining all the best available information about lynx from all reasonable sources that the Forest Service can begin to make an informed decision with respect to the proposed project.

Although brief mention is made of the “long range movements” including travels through the project area, the Forest Service fails to explain the significance of these events. DEIS at 3-59. Lynx biologists tracked a male lynx for three consecutive summers (1999-2000) that traversed back and forth on exploratory movements each year using what the biologists dubbed the “Bondurant corridor”—a travel corridor that crosses highway 189/191 ten miles east of Bondurant, Wyoming. See Squires, John R. and Oakleaf, Robert, Northwest Science, “Movement of a male Canada lynx crossing the greater Yellowstone area, including highways”, 2005 vol. 79 no 2-3 pp. 196-201. (Exhibit 30). This corridor is important for long term survival of the sparse southern populations of lynx who “depend on movements of individuals across large geographic areas for demographic and genetic rescue.” Id. at 3. The biologists concluded, “improving our understanding of broad-scale movements has important conservation implications.” Id. According to another researcher,

The proposed access road dissects [this] corridor (made up of prime snowshoe hare habitat) for lynx between multiple mountain ranges. The area between North Fork Horse Creek and the Hoback Rim is one of the most important historic as well as current high lynx use areas in the entire Greater Yellowstone Ecosystem (“GYE”). The Hoback Rim connects this high lynx use area to other suitable habitat within the GYE.

Nate Berg, pers. comm., 4/20/07. Notably, lynx that have been reintroduced in Colorado that have made long-distance movements into this part of Wyoming have also been documented using this corridor. Bob Oakleaf, pers. comm., 3/16/07.

In addition to particularly suitable foraging habitat indicated by a high occurrence of snowshoe hare and favorable under/overstory vegetative components, documented lynx presence and a corridor of significant genetic and ecological value, the area also provides suitable denning habitat. DEIS at 3-59 (“The nearest denning activity to the project area has been documented in the vicinity of the South Rim about 1 to 2 miles west

of the project area.”) In fact, this den site was the first lynx den ever discovered in the lower forty-eight states. Bob Oakleaf, pers. comm., 3/16/07. All of these data combine to make a convincing case that the importance of the project area and surrounding National Forest lands to the successful recovery of lynx in Wyoming cannot be underestimated. The Forest Service cannot take a “hard look” at a project’s potential impacts to a species and its habitat, nor can it make informed decisions, without complete assessment of baseline information. For the reasons described above, the DEIS fails to accurately reflect the affected environment and fails to support its conclusions with complete and updated scientific information about lynx. See 40 C.F.R. §§ 1502.15; 1502.24.

ii. **The Forest Service’s implementation of the Lynx Conservation Assessment and Strategy (“LCAS”) is flawed.**

The Forest Service failed to properly implement the LCAS. As a result, it reached the erroneous conclusion that the proposed project is not likely to detrimentally affect lynx. DEIS at SUM-10; see also DEIS at 4-42 (stating that “[t]he proposed project is within the 30 percent threshold for unsuitable lynx habitat within each LAU and the 10 percent threshold for effects to available denning habitats within each LAU.”). Even with strict adherence to the LCAS, not all impacts can be avoided. For this reason, where there is unique habitat that will be impacted by a project or where the project’s impacts on lynx are relatively unknown (such as with oil and as development’s effects on lynx behavior in the southern part of its range), the agency is advised to “err on the side of maintaining and restoring habitat for lynx and their prey” rather than authorizing development based on a mechanical adherence to modeling exercises. Bill Ruediger et al., LCAS, at 7-1 (2d ed. 2000) (Exhibit 32).

The measures outlined in the LCAS are envisioned as minimum recommendations. Thus, the Forest Service cannot assume that because its data indicates impacts to lynx will remain within the thresholds established by the LCAS the project will have no adverse impacts on lynx such that formal consultation with the USFWS is not required. The LCAS states that its

measures are provided to assist federal agencies in seeking opportunities to benefit lynx and to help avoid negative impacts through the thoughtful planning of activities. Plans that incorporate them, and projects that implement them, are generally not expected to have adverse effects on lynx, and implementation of these measures across the range of the lynx is expected to lead to conservation of the species.

However, because it is impossible to provide standards and guidelines that will address all possible actions, in all locations across the broad range of the lynx, it is imperative that project specific analysis and design be completed, for all actions that have the potential to affect lynx. Circumstances unique to individual projects or actions and their locations may still result in adverse effects on lynx. In these cases additional or

modified mitigating measures may be necessary to avoid or minimize adverse effects.

LCAS at 7-1 (emphasis added).

There are numerous reasons why this project is “unique,” such that “additional or modified mitigating measures” are required. *Id.* In fact, “unique” is the exact word biologists used to describe the favorable vegetative structure and abundant prey base found in and near the project area. See Endeavor Wildlife Research Foundation, The Greater Yellowstone Lynx Study, 2004/2005 Annual Report at 7 (Exhibit 28) (stating that “forest structure in the Wyoming Range/Hoback Rim sector might be somewhat unique when compared to other sectors on the B-TNF. The Wyoming Range appears to have a larger subalpine fir component, with perhaps a thicker understory than the other forest sectors.” And “[s]nowshoe hare activity in the drainages west of Merna Junction in the Wyoming Range/Hoback Rim appeared to be particularly high.”)

When the WGFD describes this area and its significance to lynx it uses superlatives. “The most significant breeding population of Canada lynx in Wyoming has historically occupied habitats in Townships 34, 35 and 36N, Range 114. We also identify this habitat as most important for potential recovery of the species in Wyoming.” See WGFD’s scoping comments at 7- 8, 1/18/07 (Exhibit 23)(emphasis added). Further, “We are very concerned that this proposed development will fragment and degrade some of Wyoming’s most important lynx habitat.” *Id.*

It is also worth noting that in comments the WGFD submitted two years ago in response to new oil and gas leasing just south of the project area, it cautioned that “[a]dditional loss of lynx habitat and construction of new roads in the area as a result of oil and gas activity may well be the final threshold for the continued existence of this species in the Wyoming Range.” See Letter from WGFD’s Bill Wichers to Greg Clark in response to proposed new oil and gas leasing in the Wyoming Range, at 4, 5/26/05 (emphasis added) (Exhibit 33). Plains’ proposal epitomizes the types of threats—new road building and direct loss of lynx habitat—the WGFD was concerned may jeopardize the very existence of lynx in the Wyoming Range.

In order to meet the measures in the LCAS and its responsibilities under NEPA, the Forest Service must justify its complete disregard for the overwhelming body of knowledge and evidence suggesting the project area and surrounding environs are unique and critical to lynx survival in Wyoming. Because the Forest Service omitted important and substantial baseline data, it is not surprising that it also made no effort to incorporate additional mitigation measures into any of the action alternatives. In this case, more than a routine application of the LCAS measures is warranted. The Forest Service should incorporate all relevant information into its analysis and consider alternatives that maintain and restore lynx habitat.

iii. **The Forest Service delineated lynx analysis units (“LAUs”) incorrectly and failed to accurately explain the methodology it used to define suitable lynx habitat.**

The regulations implementing NEPA require that the Forest Service “shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.” 40 C.F.R. § 1502.24. By doing so, the Forest Service “insure[s] the professional integrity, including the scientific integrity, of the discussions and analyses in environmental impact statements.” *Id.* The Forest Service has not explained the methodology behind its conclusions that the project will not affect lynx. Without this underlying information, it is impossible to assess whether the Forest Service has fairly analyzed impacts to lynx and taken the steps required of it to further lynx recovery.

Under the LCAS, the Forest Service is instructed to delineate lynx analysis units—units of scale that aid in evaluating and monitoring effects of management actions on lynx habitat. There are three LAUs in the project area: Upper Hoback South, Upper Hoback North and Middle Beaver Creek. DEIS at 3-59. Each of the three LAUs is either: 1) impermissibly large, rendering them meaningless for analysis purposes; or 2) already beyond the 30 percent threshold as described in the LCAS. In addition, the DEIS does not explain the criteria the Forest Service used to determine the presence of suitable foraging and denning habitat.

Timothy Kaminski, an experienced wildlife biologist, researched Canada lynx and its habitat on the Bridger-Teton National Forest. His curriculum vitae is attached as Exhibit 53. He has provided for reference a copy of a presentation regarding his findings from studies regarding lynx in and around the project area. *See* Kaminski, et al. “Conservation of native Canada lynx in northwest Wyoming: Promise and Pitfalls of Agency Management,” (“Canada lynx presentation”) presented to the Northwest Section of the Wildlife Society, Helena, MT (2/05) and the Wyoming Chapter of the Wildlife Society, Jackson, WY (12/05) (Exhibit 31).

Between 2000-2004, Mr. Kaminski and fellow wildlife professionals familiar with lynx and their ecology reviewed recent and ongoing LCAS compliance and management practices on the Bridger-Teton National Forest. Timothy Kaminski, pers. comm., April 2007. The focus of this analysis, which was later presented at two Wildlife Society meetings, was the Middle Beaver LAU and adjacent areas known to be used by radio-collared and unmarked lynx prior to and during these years. *Id.* Using LANDSAT vegetation image, GIS, field investigation and available data from radio-collared lynx studied between 1996-2002, the authors described the importance of late successional forest types that mimic vegetation characteristics found in boreal environments. *Id.* Results detailed important vegetation characteristics as well as fragmentation in these LAUs from past timber harvest practices. *Id.* The results also documented that the 30 percent LCAS threshold for unsuitable habitat had been exceeded in the Middle Beaver LAU. *Id.* For this reason, the authors concluded that the Forest Service’s implementation of the LCAS was failing and recommended that the agency prepare a

landscape assessment that would take into account the best scientific and available information about lynx occurrence, movements, habitat use and ecology specific to the Middle Beaver LAU and surrounding portions of the Wyoming Range. Id.

The findings are illustrated in the Canada lynx presentation at unnumbered p. 35 (stating that “[a]pplication of [the] LCAS and its implementation [are] not serving lynx conservation in NW WY”); see also id. at unnumbered p. 5 (explaining that the best available science acknowledges the “dilemma of conserving lynx without adequate knowledge of lynx ecology in southern Rocky Mountains” and that for this reason land managers must: “1) use the best scientific information; 2) integrate ecological processes and landscape pattern; 3) consider multiple spatial scales; and 4) until more conclusive information on lynx management is available retain options.” (citing the LCAS)). (Exhibit 31).

Two of the three LAUs analyzed in the DEIS are uncharacteristically large—nearly 80,000 acres. See DEIS at 3-60, Table 3-21 (illustrating that the Upper Hoback North LAU in which the well pad will be located is 78,837 acres and the Upper Hoback South LAU is 78,119 acres). The LCAS states that LAUs should generally be between 16,000 and 25,000 acres, reflecting the average home range of a female lynx. LCAS at 7-3. Although some leeway is given for increasing the size of LAUs in areas in the southern portion of lynx range, where lynx home ranges are typically larger, it is unlikely that such enormous LAUs are justified. In Wyoming, the average annual home range of a collared female lynx was 90 square kilometers, or 22,239 acres. LCAS at 6-1 (citing Squires and Laurion 2000). This acreage is closer to the higher figure suggested by the LCAS (25,000 acres). Nowhere does the Forest Service explain why the LAUs implicated in this project area are greater than three times this size.¹⁰

The concern with respect to such large LAUs is that these are the units upon which the Forest Service calculates whether the thresholds for suitable habitat as outlined in the LCAS are being met. See LCAS at 7-3 (“[i]f more than 30 percent of lynx habitat is currently in unsuitable condition, no further reduction of suitable conditions shall occur as a result of vegetation management activities by federal agencies.”) It becomes less likely that a project will exceed the 30 percent threshold if the baseline acreage is inflated. See Canada lynx presentation at unnumbered p. 65 (stating that “[c]orrectly recognizing the scale and shape of [an] area at which habitat selection is likely to be most affected by systematic and human induced effects is important.”) (internal citations omitted) (Exhibit 31).

Next, the methodology the Forest Service used to determine potentially suitable lynx habitat within the three LAUs is unknown. See DEIS at 3-60, Table 3-21 and DEIS at 3-57, Figure 3-5. Because there is no explanation in the DEIS regarding the types of vegetation the Forest Service considered “suitable,” it is difficult to discern whether the acreage conclusions the Forest Service reached are accurate. There is brief mention that

¹⁰ See Canada lynx presentation at unnumbered p. 35 (stating, “Orientation and size of LAUs [are] in need of review. We believe this measure may consistently overestimate habitat types and distribution relative to management effects on lynx.”) (Exhibit 31)

“mature conifer stands occur in the project area and may provide suitable denning and foraging habitats,” but no greater detail regarding tree species, age class of stands—particularly the age class of areas that experienced historic clear cutting—or the dates the units were last assessed. Lodgepole pine, for example, may be mapped using a GIS program to illustrate “mature conifer stands” even though the literature is clear that dry, climax lodgepole pine stands do not provide suitable lynx habitat. LCAS at 1-3 (stating that “[d]ry forest types (e.g. ponderosa pine, climax lodgepole pine) do not provide lynx habitat.”) Offering conclusions mapped in figures and illustrated in tables in the DEIS without any explanation as to methodology is insufficient.

Because the Forest Service has never provided adequate information regarding the methodology it used with respect to other projects that implicated lynx habitat, two years ago the WGFD communicated its concern and requested an explanation. See Letter from Bob Oakleaf, Nongame Coordinator Wyoming Game and Fish Department, March 14, 2005 to Greg Clark, Big Piney District Ranger, Bridger-Teton NF (stating that “recent NEPA analysis provided by the Bridger-Teton National Forest [for the proposed timber sale and vegetation project] has failed to provide enough information for us to understand how the Forest is applying and interpreting the Lynx Conservation Assessment and Strategy (LCAS.)”) (Exhibit 34). In the same letter, the WGFD requested maps or aerial photographs depicting units within each LAU that had been or were proposed to be harvested, salvaged-logged, thinned or burned and a table showing size of treated/disturbed acreage, the date the treatment occurred, the current rating of suitable lynx habitat and the date the units were last assessed. Id. To date, the Forest Service has never responded or provided this information to the WGFD. Bob Oakleaf, pers. comm., 4/18/07.

These same questions remain today—some two years after the WGFD requested this data. For this reason, via a Freedom of Information Act (“FOIA”) request, 5 U.S.C. § 551 et seq., the Wyoming Outdoor Council asked the Forest Service to provide:

1. All documents referring or relating to the Forest Service's determination of the amount and specific areas of suitable lynx habitat within the Upper Hoback South, Upper Hoback North, and Middle Beaver Creek LAUs.
2. All documents referring or relating to the Forest Service's determination of the amount and specific areas of suitable lynx denning habitat within the same LAUs.
3. All documents referring or relating to the consistency of these LAUs with the criteria and standards imposed by the Lynx Conservation Assessment and Strategy.

Freedom of Information Act Request—Canada lynx records, 3/23/06, at 2 (Exhibit 35). In response to the first two requests, we received a file containing GIS data, from which we could access the information the Forest Service used to calculate LAUs. Letter from Kniffy Hamilton to Lisa McGee, 4/16/07 (stating that responses to the first two requests were provided via email in a zip file and that the Regional Office will respond to the third request.) (Exhibit 36). We then received a notice from the Regional Office regarding this

last item. See Letter to Lisa McGee from Jack Troyer, Regional Forester 4/18/07 (stating, “After a search by the Bridger-Teton NF, it was determined that they have no records responsive to item c of your FOIA request.”) (Exhibit 54). The Forest Service is not able to produce any documents that refer or relate to the consistency of the implicated LAUs within the criteria and standards imposed by the LCAS. Thus, any attempt in the DEIS to justify its conclusions that the proposed project will not adversely affect lynx based on compliance with the standards and criteria in the LCAS is entirely without supporting documentation.

After sharing the data with a GIS specialist who mapped unforested areas and past clear cuts as “unsuitable lynx habitat,” we learned that despite the Forest Service’s conclusions in the DEIS, habitat alteration in the Middle Beaver LAU has likely already exceeded the allowable thresholds set forth in the LCAS. See Middle Beaver LAU map, Earthjustice (showing unsuitable habitat at 30.5 percent) (Exhibit 37). The biologist authors of the Canada lynx presentation also found that the Middle Beaver LAU’s thresholds had been exceeded. See Canada lynx presentation (Exhibit 31). Similarly, in the Upper Hoback South LAU, unsuitable habitat was determined to be 41.8 percent. See Upper Hoback South LAU map, Earthjustice (Exhibit 38). Thus, the Forest Service’s conclusion that the proposed project would not cause the 30 percent LCAS threshold to be exceeded is questionable at best. DEIS at 4-42.

Under NEPA, the Forest Service must provide the public with adequate information about the affected environment when proposing major federal actions. 40 C.F.R. § 1502.15. Detailed information about the vegetation layers that were used to make the maps and inform the tables in the DEIS should have been included, particularly when such lingering questions have persisted from the public and the state wildlife’s agency for years and when the data appears not to support the conclusion the Forest Service reached in the DEIS. This project must not be authorized without first providing this baseline information to the public.

iv. The Forest Service failed to provide an adequate cumulative impacts analysis relative to lynx.

The cumulative impacts analysis for lynx is entirely inadequate and a blatant violation of NEPA’s “hard look “ requirement. First, the lynx cumulative impacts analysis is combined with a whole host of other wildlife species; it is not treated in a separate section. See DEIS at 4-49 to 4-50. For instance, lynx are lumped together with mule deer, other big game MIS species and special status fish species in the Forest Service’s analysis. Id. at 4-49.

Second, the bulk of this “analysis” is merely a listing of recent, ongoing and foreseeable projects that may affect wildlife species. Id. at 4-50. Nowhere does the Forest Service describe what types of effects each of these projects may pose. For example, under the no action alternative, the Forest Service doesn’t even attempt to specify the kind of cumulative effects lynx may well experience, just that the list of actions “would have a cumulative effect” on all of the species. Id. at 4-49. Similarly,

under both action alternatives, there may be “a slight increase in cumulative effects.” *Id.* at 4-50. This approach makes a mockery of NEPA’s requirement to thoughtfully analyze the cumulative effects of a project so as to ensure informed decisionmaking.

Even if the Forest Service had described the most basic impacts from these projects—which it didn’t—given its lumping approach, it would not have explained the impacts on a species-by-species basis. To assume that the cumulative impacts from livestock grazing and oil and gas development to vegetation treatment projects will affect a feline predator in the same way and to the same extent as fish and large ungulates is a gross simplification clearly illustrating the DEIS’ failings in this instance.

v. **The Forest Service’s action alternatives violate clear directives in the LCAS necessitating further NEPA analysis.**

The Forest Service’s analysis indicates the proposed project will not comply with specific measures in the LCAS. Under both action alternatives, the Forest Service proposes to plow or maintain access roads to the project area “daily, as needed, during drilling, completion, fracture stimulation and initial testing operations,” and “as frequently as weekly,” over a two week period each time the road is opened for the “concentrated plowing and hauling” of produced liquids. DEIS at 2-19. The DEIS states, “Snow plowing of the access route would result in increased human activity in the project area during winter months and would affect native snowpack conditions associated with the access route.” DEIS at 4-42.

The impacts of snow compaction into areas not previously plowed or groomed are well documented. *See* LCAS at 2-16 (stating that “snow compaction due to resource management or recreation activities may facilitate movement of coyotes and other potential competitors and predators into lynx habitat, potentially increasing competition for primary lynx prey.”)(internal citations omitted). The Forest Service acknowledges this risk factor stating, “Changes in snowpack reduce habitat effectiveness for the lynx by increasing predatory competition.” DEIS at 4-42. The proposal to allow increased snow compaction in an area currently not plowed is inconsistent with the LCAS standard that instructs land managers: “On federal lands in lynx habitat, allow no net increase in groomed or designated over-the-snow routes and snowmobile play areas by LAU.” LCAS at 7-10. For this reason alone, the Forest Service is wrong to conclude that the project as proposed will have no detrimental effects to lynx.

Nowhere in the DEIS does the Forest Service explain how this clear violation of an LCAS standard will be mitigated or designed in such a way so as not to negatively impact lynx—nor can it. The findings in the DEIS that the project will not adversely impact lynx are rebutted by the Forest Service’s own admission that the project will violate a measure in the LCAS and reduce overall habitat effectiveness for lynx. Unless the Forest Service prohibits snow plowing—thus curtailing access to the well site during the portions of the year when the road is impassible—it must find that the project will likely adversely affect lynx. The DEIS must then be remedied to reflect this changed

determination. As explained in more detail below, this finding also necessitates formal consultation with the USFWS in order to comply with the Endangered Species Act.

vi. Conclusion

The Forest Service failed to meet its NEPA obligations with respect to lynx. Instead of accumulating the best available science regarding the unique habitat and active presence of lynx in the southern Bridger-Teton National Forest, it omitted completely current research and data. Instead of adequately explaining its methodology with respect to LAU delineation and habitat suitability mapping, it relied on unsupported conclusions—conclusions that are rebutted by its own GIS data layers and lynx biologists. Instead of describing in detail the past, present and reasonably foreseeable future actions coupled with the potential impacts from the proposed project in order to assess the likely cumulative impact to lynx, the Forest Service broadly dismissed this requirement, relying on meaningless generalities for numerous species at once. Finally, in clear violation of an LCAS standard, the Forest Service made no effort to justify its conclusion that the project will not adversely affect lynx. At the very least, the Forest Service must remedy each of these failings. Until it demonstrates that it took a hard look at the affected environment and at the direct, indirect and cumulative impacts to lynx, it must not authorize this project.

2. Mule deer

The Forest Service failed to take a hard look at the project's likely impacts to mule deer. First, it used outdated big game seasonal range designation maps, thus prejudicing the assessment of the affected environment and the potential direct and indirect effects of the project. Second, it failed to include an analysis of the cumulative impacts to mule deer from oil and gas development on their winter range in the Upper Green River Valley together with the proposed oil and gas development on their summer range in the location of Plains' proposed drilling site.

i. The Forest Service's mule deer analysis is prefaced on outdated information, which compromises its ability to accurately assess direct and indirect impacts.

In its initial comments submitted to the Forest Service, the WGFD stated that the proposed project area lies within "spring/summer/fall and parturition range for the Sublette mule deer herd." WGFD's scoping comments at 2, 1/18/07 (Exhibit 23). It also noted that the WGFD "recently completed revising and updating big game seasonal range designation maps for those areas that lie within the proposed project area." Id. "All big game seasonal range maps that pertain specifically to the project area that are dated prior to June 2003," the WGFD explained, "should be considered obsolete and no longer accurate." Id. (emphasis added). The Forest Service failed to include these updated range maps, relying instead on "current Forest Plan guidance" from 1990. DEIS at 3-51. By claiming that "[r]evisions or updates to protection for wildlife habitat areas are...outside the scope of this analysis" and will occur "through the Forest Plan revision process," the

Forest Service attempts to impermissibly avoid its responsibility to consider the best available science in its analysis and decisionmaking process. *Id.* The Forest Service is not being asked to revise its own information; it need only incorporate the updated information already prepared by the WGFD. By disregarding this updated information and relying instead on data that is “obsolete and no longer accurate” the Forest Service violates NEPA’s hard look requirement.

This “blinders-on” approach has significant consequences. For example, the WGFD states, “The proposed area lies within . . . parturition range for the Sublette mule deer herd.” WGFD’s scoping comments at 2, 1/18/07 (Exhibit 23). Yet, the Forest Service, relying on its old data, concludes otherwise stating, “No mule deer fawning areas occur within the project area.” DEIS at 4-44. The Forest Service is not able to accurately assess the potential direct and indirect impacts the project may have on the species when it doesn’t even acknowledge the ways in which mule deer currently use the habitat within the project area.

ii. The Forest Service failed to adequately assess the cumulative impacts that may occur from simultaneous oil and gas development on all seasonal mule deer ranges.

The Forest Service failed to consider the potential cumulative impacts to the Sublette mule deer herd as a result of authorizing new oil and gas development on its spring/summer/fall and parturition ranges coupled with the well-documented effects such development has had on the herd’s winter range. Although the Sublette mule deer herd has been the focus of intense research since the late 1990s, the Forest Service makes no mention of this multi-phased study anywhere in the DEIS.¹¹

With new oil and gas leases having been sold in the Wyoming Range and existing leases like this one now proposed for development, the threat to mule deer spring/summer/fall and parturition ranges is now an issue of utmost importance. Despite documented declines to segments of the herd that winter on the Pinedale Anticline, no agency to date take has taken a hard look at the cumulative impacts this simultaneous development may have on the future survival of the herd. See 2005 Sawyer Study at 44-46 (showing a “disconcerting” 46 percent decline in mule deer populations within the Sublette mule deer herd between 2002 and 2005 in the Pinedale Anticline project area, with no drop in the nearby control area population that is not experiencing oil and gas development) (Exhibit 40).

The Forest Service seems to imply that because “no mule deer winter range exists in the project area” there is no inherent danger to the herd from this development project.

¹¹ See Sawyer, Hall and Fred Lindzey “Sublette Mule Deer Study” Wyoming Cooperative Fish and Wildlife Research Unit, March 2001 (“2001 Sawyer Study”) (Exhibit 39). See also Sawyer, Hall et al., Sublette County Mule Deer Study (Phase II): Long-Term Monitoring Plan to Assess Potential Impacts of Energy Development on Mule Deer in the Pinedale Anticline Project Area (October 2005) (“2005 Sawyer Study”) and (November 2006) (“2006 Sawyer Study”). (Exhibits 40 & 41).

DEIS at 4-45. Had the Forest Service referenced Phase I of the Sawyer mule deer study, however, it would have learned that summer and transitional ranges as well as winter ranges are critical components to herd viability.

The relative importance of each [seasonal range] will likely change annually but loss or degradation of one will not be compensated for by the others, and the mule deer population will suffer in the long run. Managers should recognize the importance of all seasonal ranges for maintaining healthy and productive mule deer populations.

See 2001 Sawyer Study at 43 (Exhibit 39).

A cumulative impacts analysis is particularly necessary in this instance because mule deer are a migratory species that require geographically distinct habitats at different times during the year for their survival. In another case implicating migratory species, a court found that the EIS at issue was inadequate in that it failed to address the cumulative impacts to migratory species from proposed oil and gas development. See Natural Resources Defense Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988). Petitioners there argued that had Secretary of Interior considered the “synergistic” effect of development in two regions where off-shore oil and gas lease sales were proposed, he might have “cancelled or deferred some of the lease sales in the two regions so that migratory species [whales and salmon] would not be exposed to maximum risks throughout their habitat simultaneously.” Id. at 297. The court found that the EIS only devoted a few conclusory sentences to the “inter-regional” cumulative impacts to migratory species. Id. at 299. It required the Secretary to rewrite this section of the document, suggesting that in order to comply with NEPA the Secretary should

[I]dentify the various migratory species and the full routes of migration, describe the [oil and gas and non-oil and gas] activities along those routes, and state the synergistic effect of those activities on the migratory species. The Secretary could support such a presentation with references to scientific studies and other materials so that a decisionmaker would have ready access to the information underlying the Secretary’s findings and conclusions. Finally, the Secretary could, consistent with NEPA’s requirement that he consider alternatives to the proposed action, examine alternatives to simultaneous development that would mitigate any synergistic impacts on migratory species, such as staggering development.

Id. at 300. Just as the cumulative impacts analysis was found to be inadequate in the Hodel case, the analysis in the Eagle Prospect DEIS is also highly flawed.

The Forest Service gives no attention to the potential cumulative impacts that oil and gas development pose to the Sublette mule deer herd that is now threatened by loss of habitat on both its winter and summer ranges. Because deer in this area are a highly migratory species, the Forest Service must assess the impacts on its entire range. See 2001 Sawyer Study at 43 (Exhibit 39) (stating that of the 157 radio-collared deer tracked

between February 1998 and October 2000, most seasonally migrated between 40-100 miles north of the Pinedale Anticline to portions of five different mountain ranges, including the Wyoming Range in the summer months.) Id. In the most recent report, biologists documented one collared mule deer's annual cycle of migration. See 2006 Sawyer Study at 2-25 to 2-26. (Exhibit 41). Deer #863 migrated from the Pinedale Anticline through the exact area proposed for the Plains' well pad and access road, then north to Jackson. Id. In the fall, it repeated the same route in reverse, demonstrating that "migratory routes to and from the respective winter range were consistent." Id. at 2-25. See also map from Hall Sawyer, (West, Inc.) showing same route used by fifteen other collared deer (Exhibit 42).

What treatment the Forest Service does give to addressing the cumulative effects to mule deer—as described in the lynx section above—is entirely inadequate. To attempt to consider cumulative impacts to numerous species at once, rather than addressing each species separately, fails to provide any reasoned analysis whatsoever. See DEIS at 4-49 to 4-50. Mule deer are just one of the species considered with other big game MIS species, Canada lynx and special status species of fish. Id. at 4-49.

And, as mentioned above, the "analysis" amounts to a mere listing of recent, ongoing and foreseeable projects that may affect wildlife species. Id. at 4-50. Nowhere does the Forest Service describe the kind of cumulative effects species may experience, just that the list of actions "would have a cumulative effect" on species. Id. at 4-49. Similarly, under both action alternatives, there may be "a slight increase in cumulative effects." Id. at 4-50. The Forest Service cannot defend this cursory treatment of its consideration of cumulative impacts as adequate in this case.

In sum, the Forest Service must incorporate updated information about mule deer seasonal range locations where, as here, this information is readily available from the WGFD. Moreover, it must prepare an adequate cumulative impacts analysis specific to mule deer that considers the well-studied impacts to the herd's winter range coupled with projected impacts from development of its spring/summer/fall and parturition ranges. Until these deficiencies are remedied the proposed project must not go forward.

1. Elk and Moose

The Forest Service failed to take advantage of the knowledge of the state's wildlife experts when designing the project and analyzing its potential effects, particularly with respect to impacts of the project on moose and elk. If it had referenced or acknowledged information and reports from the WGFD, the analysis would have contained accurate, updated information and would not have included erroneous conclusions.

First, although the Forest Service only identified 13 acres of the National Forest lands in the project area as crucial winter range and calving areas for moose—DEIS at 4-45—the WGFD has delineated over 20 square miles of the project area as "moose crucial winter/yearlong range." WGFD biologist, pers. comm., April 2007. Like the discrepancy

between the WGFD and the Forest Service regarding whether the project area contains parturition areas for mule deer, this baseline information is essential to assessing the affected environment and making informed decision about likely impacts to species as a result of the new development.

Second, the Forest Service incorrectly concludes that even though “[p]roject activities may temporarily displace moose from otherwise suitable habitats in the project area, [t]his potential displacement is not expected to affect individual moose health or the status of local populations based on the availability and suitability of other unaffected habitats in the vicinity of the project area.” DEIS at 4-45; see also DEIS at 4-44 (stating that “[p]otential displacement is not expected to have noticeable effects to the health of individual elk or the status of the local population because of the availability and suitability of undisturbed elk habitats near the project area.”)

In response to the argument that “wildlife [will] relocate to adjacent, unaffected habitats, so there really is no impact,” the WGFD explains,

This presumption contradicts the fundamental population axiom of population ecology and wildlife management that has been known and confirmed since the time of Aldo Leopold Wildlife populations occupy whatever vacant, suitable habitat exists. Conversely, the areas not used are not suitable for one reason or another. When activities associated with energy development displace animals from otherwise suitable habitat, the animals are either forced into marginal habitats or they compete with animals that already occupy the unaffected habitats. Consequences of such displacement and competition are lower survival, lower reproductive success, lower recruitment, and ultimately lower carrying capacity and reduced populations.

Wyoming Game and Fish Department, “Recommendations for Development of Oil and Gas Resources within Crucial and Important Wildlife Habitats,” 12/6/04, at 7 (Exhibit 43). Because this project admittedly will displace moose and elk, the Forest Service is wrong to conclude that it will have no resulting direct or indirect effects on these species. Had the Forest Service considered the best available science, it would have been required to disclose that the potential impacts to elk and moose are in fact severe and include: 1) lower survival, 2) lower reproductive success, 3) lower recruitment, 4) lower carrying capacity, and 5) reduced populations. Id.

Third, the Forest Service’s cumulative impacts analysis relative to elk and moose suffers from the same deficiencies as discussed with respect to Canada lynx and mule deer as all of these species were given short shrift in a combined section. We incorporate these comments by reference as they apply equally to moose and elk.

Last, should the Forest Service decide to authorize the project, conditions of approval such as seasonal timing stipulations should apply not only during drilling activities, but also during all construction and maintenance activities that would affect

wintering moose, including no surface occupancy between November 15 and April 30. No exceptions should be granted. Moreover, there should be no surface occupancy within the riparian zone and within a 500-foot buffer extending from the outer edge of the riparian zone.

2. Colorado River and Snake River fine-spotted cutthroat trout

The Forest Service concludes that either action alternative “may affect or disturb individuals, but is not likely to result in a loss of viability in the project area, cause a trend toward federal listing , or a loss of species viability range wide for the Snake River fine-spotted cutthroat or the Colorado River cutthroat trout.” DEIS at 4-47, 4-49. It relies on Forest Plan standards that are designed to protect fish habitat and populations to support this conclusion:

For fish habitat providing a fishery at or near its potential, fish populations should be maintained at existing levels. For habitat below its potential, habitat should be improved or maintained to at least 90 percent of its natural potential. At least 90 percent of the natural bank stability should be maintained for streams that support a fishery, particularly Threatened, Endangered, and Sensitive species and all trout species. Streambank vegetation should be maintained to 80 percent of its natural potential.

DEIS at 3-54. There is no discussion in the DEIS, however, regarding whether these standards will be followed or what measures the Forest Service will take to assure compliance with its Forest Plan. In fact, the DEIS admits that at least one stream reach in the project area—Muddy Creek—had 42 percent of its left bank and 48 percent of its right bank in unstable condition in 2006. DEIS at 3-19. This stream supports Snake River fine-spotted cutthroat trout. DEIS at Appendix E-25. Thus, the Forest Service makes broad conclusions that the Snake River fine-spotted cutthroat trout will not be adversely affected based on reliance on standards that are currently not even being met. These inaccurate and unsupported conclusions violate NEPA’s requirement that the Forest Service prepare a proper analysis of the affected environment and take a hard look at the potential impacts resulting to species as a result of the proposed project. It has failed to meet both of these mandates with respect to the Snake River fine-spotted cutthroat trout.

Core conservation populations of Colorado River cutthroat trout (“CRCT”) reside in South Beaver and Lead Creeks within the project area. Although Alternative C would involve “fewer open water crossings” and as a result, there would be fewer adverse impacts to stream channel conditions and stability with this alternative, both action alternatives put CRCT at risk. DEIS at 4-20 to 4-21. While the Forest Service may be able to minimize some impacts, road construction and removal of vegetation leading to increased erosion and sedimentation will undoubtedly have an adverse impact on sensitive fisheries in the project area. A decision authorizing this project is not consistent with Forest Plan Objective 3.3(a) that instructs the Forest Service not to authorize activities that cause “long-term or further decline in population numbers or habitats

supporting these populations.” Forest Plan at 118 (Exhibit 5).

In contemplating whether to authorize the proposed project, the Forest Service failed to consider the importance of the project area to the survival of CRCT, the most imperiled of the cutthroat trout subspecies.¹² The Wyoming Range and its environs are the only place in the world that can boast being the home to four species of cutthroat trout. The Wilderness Society, “The Wyoming Range, Wyoming’s Hidden Gem” at 11 (Exhibit 44). This is due in large part “to the range’s intact riparian habitats and the relative absence of introduced trout. . . . [F]isheries officials place their hopes to recover Colorado River cutthroat trout as a subspecies on the Wyoming Range, the state’s best stronghold for this signature fish.” Id. The Forest Service cites BMPs and design criteria that would minimize sedimentation—but neither action alternatives will entirely avoid adverse impacts to this species. DEIS at 4-17. If it decides after more thorough analysis to authorize the project—which it shouldn’t—in addition to its enumerated BMPs, it should require all of the additional mitigation measures suggested by the WGFD. See WGFD’s scoping comments at 11-12, 1/18/07 (Exhibit 23).

3. Water resources

Due to the large quantity of ground and surface water needed to complete the proposed project coupled with the threat of increased sedimentation that new roads and the well pad will have on nearby streams, the Forest Service must ensure that its analysis of water resources—with respect to water quality and quantity—is complete and accurate. Residents of the Hoback Ranches subdivision and nearby ranchers have raised concerns about impacts to water resources as a result of this proposal. Representatives from Plains confirmed in a public open house in Pinedale on April 18, 2007 that water is indeed a major issue.

When asked what individuals or groups should be most concerned about regarding the Eagle Prospect proposal – or who had the most at stake – [Randy Vine, Vice President of drilling for Plains] offered that the more valid concerns involved “truck traffic and water supply,” indicating the heavy vehicle impact from a forest development road originating in Daniel that will first require reconstruction and stretch about 11 miles to the well access.

Nearby residential areas such as Hoback Ranches depend on the area’s aquifer for well water that could be impacted by the volume of underground water needed to produce natural gas. “They are certainly good questions,” the PXP vice president said. J.J. Healey has a 6,000-acre ranch near Daniel. The surface water he depends on flows from the Wyoming Range, so he is concerned about contamination from an accident or even usual operations.

¹² CRCT occupy less than 1 percent of their historic range and are extremely difficult to rear in hatcheries. Cathy Purves, Technical Advisor for Trout Unlimited, pers. comm., 4/27/07. Increased silt and sedimentation from road construction is a limiting factor in cutthroat trout spawning beds. Id.

Planet Jackson Hole article, “Residents, users voice opposition to Wyoming Range drilling,” 4/22/07 (Exhibit 45). That Plains conceded that the public’s concerns about water resources raised “good questions” suggests not all is known about the impacts that may result from the project to the area’s fragile water reserves. Neither Plains nor the Forest Service have been able to answer these questions with any sufficiency. For this reason, a complete and accurate assessment of the impacts to ground and surface water must be conducted prior to the Forest Service’s decision whether to authorize the project.

None of the Forest Plan’s objectives, guidelines or standards support authorizing the massive removal of water this project proposes, nor do they encourage the water quality degradation that the Forest Service admits will occur from new road construction and pipeline installation. Thus, the Forest Service couches its statement that the objectives “substantially support[.]” forest-wide standards and guidelines. DEIS at 3-12. It is clear from the Forest Service’s own assessment, that many of the goals and objectives in the current Forest Plan will be compromised as a result of the proposed project. Id. see also Bridger-Teton National Forest LRMP (1990) at 112-121 (citing “Goal 1.3: Water quantity and quality are retained or improved for local users; Objective 1.3(a): Protect municipal, agricultural, and other potable water supplies and ensure that management activities do not cause a deterioration in water flow timing, quality or quantity; Objective 4.3(c): Protect and rehabilitate riparian areas to retain and improve their value for fisheries, aquatic habitat, wildlife and water quality.”) (Exhibit 5). It is difficult to understand how a project that will require substantial water resources, threaten both ground and surface water with pollutants and rely on the development of a transportation network that may adversely affect surface water quality and fisheries could retain—let alone improve—water quality and quantity for local users.

i. The Forest Service failed to provide adequate information about the ground and surface water resources and failed to take a hard look at the potential impacts to these resources.

John Gerstle, hydrologist with Hydrosphere Resource Consultants, Inc. has submitted independent comments regarding water resources and their treatment in the Eagle Prospect DEIS. His curriculum vitae is attached as Exhibit 46. We incorporate his comments, (“Gerstle comments”) which are attached as Exhibit 47, in their entirety by this reference.

It is likely that the Forest Service underestimated the amount of water the project will require. The DEIS estimates 4 acre-feet per for each well will be needed “to drill, complete, and stimulate a well over an estimated 3-month period.” DEIS at 2-25. In addition, 4.1 acre-feet will be needed for dust abatement and hydrostatic testing. Id. at 2-26. Thus, the water requirement for three wells and other uses amounts to an estimated 16.1 acre-feet. Other exploratory well drilling applications estimate as much as 20 acre feet are needed per 10,000 ft hole. Gerstle comments at 2-3. Because each location is variable and it is difficult to determine exactly what will be necessary, “a more

conservative water requirement estimate should be used unless justification can be provided for the very modest amount identified in the Eagle Prospect DEIS.” Id.

The Forest Service admits that the “[s]ite-specific groundwater data for the project and vicinity are limited.” DEIS at 3-25. Despite the dearth of information, the DEIS nevertheless concludes that the formation that will be explored is hydraulically isolated from the shallower aquifers used for local water supply, and thus will not impact those local wells. DEIS at 3-26 to 3-27. It provides no justification for this conclusion, nor can it apparently, with the limited information available. The lack of data should not be used as an excuse to move ahead, but rather as a rationale to study comprehensively the groundwater aquifers that may be affected by the project. The study should include information based on wells within at least a five-mile radius of the proposed project area. These wells should be mapped and identified as to depth, construction, screen intervals and permitted and actual yields. The Forest Service also should provide data on aquifer structure, connectivity, recharge areas and water volumes in various aquifer zones.

The DEIS also fails to adequately discuss the risks from potential groundwater contamination. There are several ways in which water could become polluted. First, when wells are drilled in a deep portion of an aquifer that contains high total dissolved solids (“TDS”), groundwater pumping can pull up water with potentially even higher TDS levels. There is the chance that this high saline/mineralized water could migrate upwards and discharge into the shallower, fresh groundwater, resulting in contamination. This reasonably foreseeable impact should be analyzed. Moreover, the DEIS should address monitoring, mitigation and remedial measures if such an occurrence were to happen. Second, treatment and disposal of produced water may pollute subsurface waters. Although the DEIS indicates that produced water will be disposed off-site, there is no detail as to the flows and volumes that may be involved. See DEIS at 4-1 (stating that “[n]o accurate information on the anticipated volumes of produced liquids is available.”) Last, it is likely the drilling fluids, fuels lubricants and other potential pollutants could pollute groundwater. Recently reported tests showed hydrocarbon contaminants in groundwater wells in the Jonah and Pinedale Anticline gas fields. See Casper Star Tribune article, “H2O test finds benzene,” 4/28/07 (stating that the BLM reported, “[B]enzene was found in four industrial water supply wells on the Jonah and Pinedale Anticline fields in August and September 2006.”) (Exhibit 48). Benzene, a hydrocarbon that is a component of gas and crude oil, can leak from underground storage tanks or from hazardous waste sites into well water. Id. In a related article, the contaminated wells were found to have been used exclusively by energy operators, not by ranchers. See Casper Star Tribune article “Well probe points to trucks,” 4/28/07 (Exhibit 49). The BLM thought that the hydrocarbons resulted from operators’ trucks used to siphon water out of the wells. Id. The DEIS contains minimal discussion of the ways to avoid this contamination. It also lacks sufficient discussion of tank lining, leakage and spill prevention activities—other than to identify best management practices (“BMPs”). This should be remedied and the BMPs in Appendix D should be described in more detail. Gerstle comments at unnumbered pgs. 5-7.

There are also numerous risks from the project that threaten surface water

resources. See DEIS at 2-39 (stating both action alternatives “may affect natural flow characteristics and water quality” and may “increase[] siltation at stream crossings associated with road and temporary pipeline.”); see also DEIS at 4-12 (stating that “[e]ffects on stream health and watershed conditions would be primarily tied to [the] construction phase and would include potential increases in sedimentation to streams, potential effects on streambank stability and disruption of streambeds and aquatic habitat.”). These impacts cannot be avoided even with implementation of design criteria and BMPs—only minimized or reduced. See id. (“Design criteria in Appendix D would minimize effects.”); DEIS at 4-13 (“Implementation of the BMPs and design criteria described in Appendix D would reduce the transports of sediments to streams”). Neither can the Forest Service claim with any certainty that federal or state water quality standards won’t be violated as a result of the project’s impacts. DEIS at 4-14 (stating that “[n]o violations . . . are likely to occur.”).¹³ The Forest Service should expand its discussion of ways in which it may mitigate erosion and sedimentation and clearly identify the BMPs that will be followed. Gerstle comments at unnumbered p. 6.

The Forest Service failed to collect baseline data regarding stream quality prior to its preparation of the DEIS. See DEIS at 3-21 (stating that “[n]o water quality data were available for the streams within the project area.”). In addition, it failed to consult numerous references that may have given the agency relevant information for the design and mitigation of the proposed project. See Gerstle comments at unnumbered p. 4 for a list of suggested references. (Exhibit 47). Monitoring and mitigation require accurate and up to date baseline information, which is completely lacking here.

ii. Conclusion

Threats to surface and ground water quantity and quality were not adequately addressed in the DEIS. Risks to these scarce and important resources should be treated in a detailed analysis and decisions about projects that may negatively impact these resources should be made with caution. The Forest Service should supplement the DEIS to address these omissions and errors.

III. THE FOREST SERVICE MUST FORMALLY CONSULT WITH THE USFWS REGARDING CANADA LYNX IN ORDER TO COMPLY WITH THE ENDANGERED SPECIES ACT.

As this project may affect listed species, the Forest Service must ensure compliance with the Endangered Species Act (“ESA”) 16 U.S.C. § 1536(a)(2), particularly timely § 7 consultation with the U.S. Fish and Wildlife Service. Section 7(a)(2) of the ESA requires that in preparation for authorizing any action, an agency must prepare a biological assessment (“BA”) in situations where a threatened or endangered species “may be present.” 16 U.S.C. § 1536(a)(2). A BA “shall evaluate the potential

¹³ As discussed in detail above, had the Forest Service included a helicopter drilling option in its range of alternatives—an option that may avoid some of the impacts associated with increased sedimentation altogether because it wouldn’t require the construction or upgrade of new roads—the likelihood that impacts would be minimized would be even more assured.

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 USFWS provided the Forest Service a list of federally listed threatened or endangered species that have the potential to occur in the project area. DEIS at 3-56. Three species were identified as potentially occurring in the project area and were selected for analysis: Canada lynx, gray wolf and grizzly bear. *Id.* The DEIS states, “A description of the selection and analysis for federally listed wildlife species is provided in the Biological Assessment in the *Project File* at the Big Piney Ranger District office in Big Piney, Wyoming.” DEIS at 4-42. As explained above, the Wyoming Outdoor Council requested a copy of the Biological Assessment and was denied access to it. *See* Letter from Greg Clark, 3/27/07 (denying request to view the BA and stating that “[t]he impacts to all wildlife species, including threatened and endangered species, including the lynx, are displayed in the DEIS.”) (Exhibit 25).

Because the BA has not been made available to the public it is not possible to say with certainty, but from the information relayed in the DEIS it appears the Forest Service intends to find that the project may affect, but is not likely to adversely affect lynx. *See* DEIS at SUM-10 (“The proposed project is not likely to have a detrimental effect on habitat or populations of grizzly bear, Canada lynx, or gray wolf.”); *Id.* at 2-44 (stating that the project will not likely noticeably affect lynx).

The ESA requires the Forest Service to “use the best scientific and commercial data available” when analyzing potential effects to listed species as a result of a proposed project. 16 U.S.C. § 1536(a)(2). The Forest Service has a responsibility to provide the FWS with the best scientific and commercial data available so that the FWS can properly perform an “adequate review of the effects that an action may have upon a listed species or critical habitat.” 50 C.F.R. § 402.14(d). As discussed in detail above in the section that discusses the Forest Service’s duties under NEPA with respect to lynx, the Forest Service’s cursory analysis relied on general information, rather than incorporating information recently gained by biologists that is specific to the habitat used by individual lynx that have been documented in and around the project area.¹⁴ Information from the Greater Yellowstone Lynx Study—showing recent lynx presence in the project area itself and findings that illustrate the project area and environs provide uniquely favorable habitat—was entirely absent from the analysis in the DEIS. Thus, the Forest Service’s initial conclusions that the project would not have a noticeable or detrimental effect on lynx are wrong, yet not surprising based on the fact that they were premised on incomplete data. For this reason, the Forest Service should reconsider its initial findings and determine that the project may likely adversely affect the lynx. This would then require formal consultation with the USFWS.

¹⁴ We incorporate all relevant information in the above NEPA sections to this section regarding ESA compliance by this reference.

Not only did the Forest Service fail to consider the best scientific and commercial data available, but the project as proposed violates an explicit standard in the LCAS. The measures in the LCAS are designed so that if followed, projects are “generally not expected to have adverse effects on lynx.” LCAS at 7-10. However, where projects such as this one include components that blatantly violate express standards in the LCAS, the Forest Service must at a minimum acknowledge the risks of such decisions and find that the project may likely adversely affect lynx.

In this case, the LCAS instructs land managers, “On federal lands in lynx habitat, allow no net increase in groomed or designated over-the-snow routes and snowmobile play areas by LAU.” LCAS at 7-10. Far from adhering to this standard so as to protect lynx from adverse effects, the Forest Service intends to allow frequent plowing of the project area roads over several winter seasons. The project proposes to plow or maintain access roads to the project area “daily, as needed, during drilling, completion, fracture stimulation and initial testing operations,” and “as frequently as weekly,” over a two week period each time the road is opened for the “concentrated plowing and hauling” of produced liquids. DEIS at 2-19.

Lynx are better adapted to deep snow travel than other predators, giving them an advantage in winter in areas that are not groomed or plowed. Where areas are plowed, lynx may be adversely impacted by competition from other predators who would not be able to travel as easily through the area without the access gained from a compacted route. See LCAS at 2-14 (stating that “snow compaction resulting from winter travel on roads may allow coyotes to easily move into higher-elevation lynx habitats, increasing competition for prey.”) (internal citations omitted). For this reason alone, the Forest Service should find that the project may likely adversely affect lynx, thus precipitating formal consultation with the USFWS.

In conclusion, the ESA and its implementing regulations do not limit the Forest Service’s consultation obligations only to those situations where the proposed actions are likely to jeopardize the continued existence of a species. Instead, the requirement is that agencies must consult with the FWS on any actions that may affect a listed species. See 50 C.F.R. § 402.14(a). Here, however, the state’s wildlife experts have cautioned that “[a]dditional loss of lynx habitat and construction of new roads in the area as a result of oil and gas activity may well be the final threshold for the continued existence of this species in the Wyoming Range.” See Letter from WGFD’s Bill Wichers to Greg Clark in response to proposed new oil and gas leasing in the Wyoming Range, at 4, 5/26/05 (emphasis added) (Exhibit 33). And with respect to this project, the WGFD warned that even “minor impacts could potentially eliminate lynx in the Wyoming Range.” See WGFD’s scoping comments at 8, 1/18/07 (emphasis added) (Exhibit 23). If there was ever an example in which a project may adversely affect a species, such that formal consultation is warranted, this is one.

IV. THE FOREST SERVICE HAS AN AFFIRMATIVE RESPONSIBILITY TO PROTECT AIR QUALITY RELATED VALUES IN THE CLASS I AREAS IT MANAGES.

As the Forest Service notes, three new wells may not cause measurable effects to air quality, particularly in the context of the impacts to air quality from the staggering development occurring on and slated for nearby BLM lands. DEIS at 4-7. Nevertheless, the Forest Service has an affirmative responsibility to protect air quality related values (including visibility) of the lands within Class I areas, like the Bridger Wilderness. 42 U.S.C. § 7475(d)(1)(B); see also Pendery, Bruce “Evidence of Impairment of Air Quality Related Values in the Bridger Wilderness Area, Wyoming,” February 2007 (Exhibit 50).

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 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 decision to actively contribute to the problem of declining regional air quality and visibility in the Bridger Wilderness by authorizing new oil and gas development runs contrary to these mandates, even if the additional impairment may be small.

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 landcapes like wilderness areas, and the “affirmative responsibility” imposed on the Forest Service for these prevention of significant deterioration areas is to “protect” them, not to allow them to be incrementally degraded. Id. §§ 7470(2), 7475(d)(1)(B).

If the Forest Service decides to authorize the proposed project, at the very least, it should require the highest level of protection of air related values. During the drilling and construction phases of the project, a myriad of pollutants will be released. See Table 4-3, DEIS at 4-7 (illustrating the amounts of nitrous oxide, carbon monoxide, sulfur dioxide, particulate matter, volatile organic compounds, benzene, toluene, ethylbenzene, xylene and n-hexane that will be released). The Forest Service should not grant any waivers of the current mandate that Tier II technology be used on the drilling rigs. See DEIS at D-14 (stating that “Tier II or equivalent diesel engine emission technologies will be required for all drill rigs.”). It should also prohibit flaring, as the BLM does to a large extent in the Jonah Field and Pinedale Anticline. DEIS at 4-67. This is not required now according to the information provided in the DEIS. Another viable option for protecting air quality related values in Class I areas would be to ensure that offsets are required such that the emissions from the wells at issue here are offset by emissions reductions elsewhere.

V. THE FOREST SERVICE VIOLATED THE NATIONAL FOREST MANAGEMENT ACT AND THE BRIDGER-TETON LAND AND RESOURCE MANAGEMENT PLAN BY FAILING TO COLLECT QUANTITATIVE DATA ON MANAGEMENT INDICATOR SPECIES.

If the Forest Service authorizes the project without complying with its obligations to collect quantitative data on management indicator species (“MIS”) it will violate both the National Forest Management Act (“NFMA”) and the Bridger-Teton National Forest’s Land and Resource Management Plan (“Forest Plan”). “The National Forest Management Act directs the Forest Service to develop Land and Resource Management Plans (‘Forest Plans’) by which to manage each National Forest under principles of ‘multiple use’ and ‘sustained yield.’” Colorado Env’tl. Coalition v. Dombeck, 185 F.3d 1162, 1167 (10th Cir. 1999) (quoting 16 U.S.C. § 1604). Among other things, Forest Plans must “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.” Id. at 1168 (quoting 16 U.S.C. § 1604(g)(3)(B)). All permits, contracts “and other instruments for the use and occupancy of National Forest System land” (such as oil and gas leases) “shall be consistent” with the Forest Plan. 16 U.S.C. § 1604(i).

NFMA also requires the Forest Service to adopt regulations “specifying guidelines” for Forest Plans. 16 U.S.C. 1604(g)(3), (h). As applicable to the 1990 Bridger-Teton Forest Plan, these regulations are codified at 36 C.F.R. part 219 (1982). The regulations governing fish and wildlife resources address the requirement to identify and monitor MIS. MIS are representatives for a class or guild of species that rely on a certain habitat type. Using MIS to determine species viability saves the Forest Service from having to evaluate each species individually. See Inland Empire Pub. Lands Council v. United States Forest Serv., 88 F.3d 754, 762 n.11 (9th Cir. 1996). The regulations require:

Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. . . . (a)(1) In order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as management indicator species and the reason for their selection will be stated. These species shall be selected because their population changes are believed to indicate the effects of management activities. . . . (6) Population trends of the management indicator species will be monitored and relationships to habitat changes determined.

36 C.F.R. § 219.19.

Not only do these regulations govern the development of Forest Plans, but they also apply to project level activities. The Tenth Circuit Court of Appeals affirmed this. The plaintiffs in Utah Env’tl. Congress v. Bosworth (“UEC I”) argued that the Forest Service’s obligations under a Forest Plan continue as long as the Plan is in existence. 372

F.3d 1219, 1224 (10th Cir. 2004). As such, the Forest Service is required to evaluate planning alternatives under § 219.19 prior to authorizing specific projects. The court agreed. It explained that because the “Forest Service implements the Forest Plan through individual projects and [because] . . . these projects must be consistent with the Forest Plan”, § 219.19 was applicable to project level actions. *Id.* at 1224-25.

The regulations also require that “inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present conditions.” 36 C.F.R. § 219.26. In *Utah Env'tl. Congress v. Bosworth* (“UEC II”), The Tenth Circuit Court of appeals affirmed its holding in UEC I, that the “Forest Service must use ‘actual, quantitative population data’ to meet MIS monitoring obligations under § 219.19.” 21 F.3d 1105 (10th Cir. 2005).

The Forest Service cites 36 C.F.R. 219.14(f) for the proposition that habitat can be used instead of population trends to meet its monitoring requirements. See *Management Indicator Species for the Bridger-Teton National Forest*, March 2007 at 3 (*Exhibit* 51). This is wrong. The regulation cited by the Forest Service was passed January 5, 2005—70 Fed. Reg. 1023—but was enjoined by court order March 30, 2007. See *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, --- F.Supp.2d --- (N.D.Cal. 2007) 2007 WL 966985, Mar 30, 2007. Thus, the Forest Service cannot rely on this regulation to argue that it may meet a lesser monitoring standard.

Because all project level activities must be consistent with the Forest Plan, the Forest Service may not authorize this project without having met its substantive obligations under NFMA to identify and monitor MIS. The Forest Plan acknowledges the agency’s responsibility to identify and monitor MIS. See *Bridger-Teton National Forest LRMP* (1990) at 34-35 (*Exhibit* 5). In the Plan, the Forest Service identified two MIS: the pine marten for old growth forest habitat and the Brewer’s sparrow for sagebrush habitat. See *id.* It also stated that additional MIS would be selected and validated for four other habitats i.e., riparian, aspen, mountain meadow and wetland, as part of the Forest Plan implementation process. See *id.*

i. **The Forest Service violated NFMA and the Bridger-Teton Forest Plan by failing to adequately monitor pine marten.**

The Forest Service references a report in the *Project File* that addresses what surveys the Bridger-Teton National Forest has conducted to date on MIS. See *Management Indicator Species for the Bridger-Teton National Forest*, March 2007 (*Exhibit* 51). Data in the report illustrate that the Forest Service has not met its responsibilities with respect to monitoring pine marten. The Forest Service first relies on data gathered from trapping records to estimate the size and extent of the pine marten population. *Id.* at 15. Due to “budget constraints” of the WGFD, however, data ceased being collected in 2000. *Id.* From 2000-2002, marten were detected with some frequency causing the Forest Service to conclude that “they are common throughout the survey area (Wyoming and Salt River Ranges).” *Id.* For the next three years, the Forest

Service conducted no surveys. Then in the winter of 2005-06, tracks were detected, but it doesn't appear population data was extrapolated. *Id.* The Forest Service cannot claim to be meeting its responsibilities with respect to monitoring pine marten based on this spotty survey record. This failure is of particular concern with respect to this project as pine marten share habitat with the Canada lynx, a threatened species very much at risk from further degradation of its habitat. The Forest Service cannot go forward with this project until more comprehensive surveys are conducted whereby quantitative population data is collected.

ii. **The Forest Service violated NFMA and the Bridger-Teton Forest Plan by failing to identify and monitor the management indicator species that represent wetland, riparian, mountain meadow and aspen habitats.**

It was not until 2005—some fifteen years after the Forest Plan was adopted—that the Forest Service even identified MIS for wetland, riparian, mountain meadow and aspen habitats. It named boreal toad and boreal chorus frog for wetland habitats, three cutthroat trout species for riparian areas, bighorn sheep for mountain meadows and aspen itself for aspen habitat. *Id.* at 4. Because these species were just recently identified as MIS, the Forest Service is “in the process of collecting baseline information which for some takes five years to get baseline so that trend can then be monitored.” *Id.* Thus, to date, no quantitative population data is available.

In one instance, the Forest Service attempts to rely on the MIS report that it says mentions “habitat and population trend information” to conclude that the action alternatives “would not alter current trends, habitats, or populations for the Snake River fine-spotted cutthroat [trout].” DEIS at 4-47. This is unavailing, however, because there is no quantitative data regarding Snake River fine-spotted cutthroat trout populations present in the MIS report. *See* Management Indicator Species for the Bridger-Teton National Forest, March 2007 at 7 (stating only that “current . . . data indicate that Snake River cutthroat trout are well distributed” and that a report will be published with “range wide status and trend for this species” in Summer 2007) (Exhibit 51).

Absent compliance with the MIS requirements imposed by the NFMA regulations and the Bridger-Teton Forest Plan, the Forest Service may not lawfully authorize the proposed project. The Forest Service has not taken the basic steps necessary to determine that wildlife in the project area may require protection, or what stipulations may be appropriate. Without “actual, quantitative population data” on MIS in each of the habitat types found in area in and around the project area, the Forest Service may not authorize the proposed project. Utah Envtl. Congress, 21 F.3d at 1112 (quoting Utah Envtl. Congress, 372 F.3d at 1226).

VI. THE FOREST SERVICE'S DIRECTIVES REQUIRE THE REGIONAL FORESTER RATHER THAN THE DISTRICT RANGER TO BE THE RESPONSIBLE OFFICIAL FOR THIS PROJECT.

Although Plains is not expressly prohibited from building new roads in the Grayback Ridge roadless area because it acquired its leases prior to the passage of the 2001 Roadless Area Conservation Rule, various interim directives may still apply. After the Roadless Rule was repealed, the current Administration replaced it with a rule allowing governors eighteen months in which to petition the Department of Agriculture for the protection of roadless areas within their states' boundaries. Thus, during this eighteen-month period, there was no rule per se that governed the Forest Service's management of roadless areas. For this reason, the Forest Service issued an interim directive to give general guidance to its employees. Interim Directive, Forest Service Manual 1925.03 (Dec. 8, 2005). This directive is in effect until it is repealed or until it expires on July 16, 2007.

According to this directive, because inventoried roadless areas “contain important environmental values that warrant protection, [u]ntil a forest-scale roads analysis (FSM 7712.13b) is completed and incorporated into a forest plan, [d]ecisions implicating roadless area are reserved to the Chief or the Regional Forester as provided in FSM 1925.04a and 1925.04b.” *Id.* The directive states that it is the responsibility of the Regional Forester to serve as the Responsible Official for decisions on road construction or reconstruction within an inventoried roadless area if—as in this case—a road is “needed in conjunction with any mineral lease, license, permit, or approval issued for mineral leasing operations.” FSM 1925.04b(1)(c).

The Bridger-Teton National Forest completed a Roads Analysis Report in January 2003. It is unclear whether this meets the requirements of FSM 7712.13b, however, which directs the Forest Service in the analysis to address road management issues and priorities related to construction and reconstruction of roads. FSM 7712.13b(2)(b). The Bridger-Teton National Forest's report explicitly does not address the construction of new roads in inventoried roadless areas, stating that this will “be decided through the forest plan revision process and an environmental impacts statement.” Bridger-Teton National Forest Roads Analysis Report at 54 (Exhibit 52). It would be antithetical to the directive's purpose to allow a roads report that purposely did not address the issue of road construction in roadless areas to exempt the Chief or the Regional Forester from retaining special oversight over this project.

Even if the Roads Analysis Report somehow would exempt the Chief from her responsibility as the Responsible Official on this project, the directive makes no similar exemption for the Regional Forester. The Chief's decisionmaking authority is clearly subject to an exception when a forest-scale roads analysis is completed and incorporated in to a forest plan. *See* FSM 1925.04a. However, there is no similar provision setting forth the Regional Forester's responsibility to serve as the Responsible Official under any of the seven scenarios—including roads needed in conjunction with mineral leases—listed in FSM 1925.04b.

As the Forest Service acknowledged, roadless areas are important and the values these areas contain “warrant protection.” FSM 1925.03. The decision to construct or reconstruct a road and to build a well pad within an inventoried roadless area on the Bridger-Teton National Forest is one that the Forest Service should make with the utmost caution and oversight. The Regional Forester, therefore, should be the Responsible Official and the person identified to make the final decision whether to authorize this project.

VII. CONCLUSION

For the reasons described in these comments, the above-named conservation organizations request that the Forest Service suspend the Eagle Prospect EIS until a full landscape analysis that addresses future oil and gas development is conducted for the Wyoming Range and Bridger-Teton National Forest. If the Forest Service instead decides to authorize the project, it must not do so without first ensuring compliance with the National Environmental Policy Act (“NEPA”) 42 U.S.C. § 4321 et seq., the Endangered Species Act (“ESA”) 16 U.S.C. § 1536(a)(2), the Clean Air Act, 42 U.S.C. 7401 et seq. and the Wilderness Act 16 U.S.C. 1131. The Forest Service must also ensure compliance with National Forest Management Act (“NFMA”) 16 U.S.C. § 1604 and the Bridger-Teton Land and Resource Management Plan. Thank you for considering these comments.

Sincerely,

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