

**Wyoming Outdoor Council \* National Parks Conservation Association \* National Audubon Society \* Audubon Rockies**

Heather M. Schultz  
BLM Wyoming State Office  
5353 Yellowstone Road  
Cheyenne, Wyoming 82009

Via eplanning at <https://eplanning.blm.gov/eplanning-ui/project/1502028/510>

July 16, 2020

**Comments on the Draft Resource Management Plan Amendments and Environmental Impact Statement for the Wyoming Pipeline Corridor Initiative (WPCI)**

Dear Heather Schultz,

Please accept these comments on the above Draft Resource Management Plan amendments and Environmental Impact Statement that are submitted by the Wyoming Outdoor Council, National Parks Conservation Association, National Audubon Society, and Audubon Rockies.

The Environmental Impact Statement prepared for this project is numbered DOI-BLM-WY-0000-2020-0001-RMP-EIS.

The Wyoming Pipeline Corridor Initiative (WPCI) proposes to designate almost 2,000 miles of pipeline corridors across private, state and BLM managed lands in Wyoming. Approximately 1,150 miles of the proposed corridors are located on BLM managed lands. The project would designate a statewide pipeline corridor network for future development of pipelines associated with carbon capture, utilization and storage, as well as pipelines and facilities associated with enhanced oil recovery. The materials note that project will not authorize any new pipelines or construction but will amend nine BLM Resource Management Plans across the state to make future analysis of project specific proposals more efficient. As explained, one of the primary purposes of the pipeline corridor network is to connect existing oil fields suitable for enhanced oil recovery (EOR) with anthropogenic and natural carbon dioxide (CO<sub>2</sub>) sources. The CO<sub>2</sub> will be injected into existing, often “played-out” oil fields, thereby increasing oil production beyond conventional recovery methods with little additional surface disturbance. The DEIS analyzes four alternatives, A-D, from which the BLM has identified Alternative D: “Resource Conflict Minimization and Dedicated Carbon Capture and Storage; Enhanced Oil Recovery; and Other Compatible Use” as the agency preferred alternative. DEIS at 2-4.

**I. ISSUES OF CONCERN**

We have a number of concerns regarding the draft RMP amendments and EIS for the WPCI project. First, the BLM has not sufficiently established the purpose and need for this

project as required by National Environmental Policy Act (NEPA) and Council for Environmental Quality (CEQ) implementing regulations. Second, the proposed project does not prioritize development outside of Priority Habitat Management Areas (PHMA), also known as core Greater sage-grouse habitat, in violation of the Federal Land Policy and Management Act (FLPMA) and the 2015 sage-grouse RMP amendments.<sup>1</sup> These amendments are currently in effect and must be adhered to as the 2019 revisions have been enjoined by litigation. *See* Mem. Order and Decision, *Western Watersheds Project v. Schneider*, 2019 U.S. Dist. LEXIS 181043 (D. Idaho Oct. 16, 2019) (attached as Appendix 1 and incorporated fully by reference herein). A federal court in Idaho recently affirmed the BLM’s duty to prioritize leasing outside of PHMA on FLPMA grounds, vacating three BLM lease sales including a sale in Wyoming. *See* Mem. Order and Decision, *Montana Wildlife Federation et.al. v. Bernhardt et.al.* CV-18-69-GF-BMM (D. Montana May 22, 2020) (attached as Appendix 2 and incorporated by reference). The BLM must apply the *Montana Wildlife* court’s interpretation of the 2015 grouse plan’s “priority requirement” in its review of the WPCI. Third, the BLM’s review of potential adverse impacts to wildlife habitat and water resources does not take a hard look at the full range of direct, indirect and cumulative environmental impacts that will result from reasonably foreseeable development within the corridor, as NEPA requires. Particularly, the BLM must conduct further review of potential impacts to Greater sage-grouse and to mule deer migration corridors and crucial winter range. Additionally, the BLM has not sufficiently consulted and engaged with Tribes in Wyoming, although they have a significant stake in the project. And finally, the BLM should not proceed with the project because meaningful public participation is not possible at this time.

## II. INTERESTS OF THE PARTIES

The Wyoming Outdoor Council, National Parks Conservation Association (NPCA), National Audubon Society, and Audubon Rockies have a long-standing interest in the management of BLM lands in Wyoming and we engage frequently in the decision-making processes for land use planning and project proposals that could potentially affect our public lands and mineral estate, including RMP amendments. Our members and staff enjoy a myriad of recreational, scientific and other opportunities on BLM-managed public lands, including hiking, biking, nature-viewing, photography, and quiet contemplation in the solitude offered by wild places. Our missions are to work for the protection and enjoyment of the public lands for and by our members and the public.

Founded in 1967, the Wyoming Outdoor Council is the state’s oldest and largest independent conservation organization. Its mission is to protect Wyoming’s environment and quality of life for present and future generations.

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<sup>1</sup> 2015c. *Record of Decision and Approved Resource Management Plan Amendments for the Rocky Mountain Region, Including the Greater Sage-Grouse Sub-Regions of Lewistown, North Dakota, Northwest Colorado, Wyoming, and the Approved Resource Management Plans for Billings, Buffalo, Cody, HiLine, Miles City, Pompeys Pillar National Monument, South Dakota, Worland.* Available at: [https://eplanning.blm.gov/epl-front-office/projects/lup/105596/143663/176863/2015\\_Rocky\\_Mountain\\_Region\\_Record\\_GRSR\\_ROD\\_ARMPA\\_508.pdf](https://eplanning.blm.gov/epl-front-office/projects/lup/105596/143663/176863/2015_Rocky_Mountain_Region_Record_GRSR_ROD_ARMPA_508.pdf).

NPCA, founded in 1919, represents thousands of Wyoming residents who, along with our 1.3 million members and supporters nationwide, understand the need to conserve and protect our National Park System throughout the country. To that end, we hope that our comments will inform critical public lands planning decisions in Wyoming that impact national parks and their connected landscape.

Incorporated in 1905, National Audubon Society (NAS) is one of the oldest conservation organizations in the world. Staff use science, education and grassroots advocacy to protect birds and the places they need, today and tomorrow. Audubon Rockies is a regional office of NAS, representing over 36,000 members in Wyoming, Colorado, and Utah.

### III. STATEMENT OF CONCERNS

#### A. The BLM has not sufficiently established the purpose and need for this project in violation of NEPA.

The BLM has not sufficiently established the purpose, or the need, for this project. NEPA and CEQ regulations require a description of a proposed project's purpose and need. 40 CFR 1502.13. In this DEIS, the BLM's purpose for the WPCI is defined so broadly that it calls the environmental analysis into question, and the need for the project is uncertain given the lack of project proponents. The DEIS states that

The WPCI would result in a system of corridors that is integrated with the BLM's existing corridor network for the construction of pipelines for the transport of CO<sub>2</sub>, EOR products, *and other compatible uses* on federal lands throughout the state of Wyoming." DEIS at Page i. (emphasis added).

The purpose for the BLM action is to designate corridors for the preferred location of future pipelines associated with the transport of CO<sub>2</sub>, EOR products, *and other compatible uses* and to amend the various BLM RMPs within the State of Wyoming to incorporate the proposed corridors."

DEIS at i.

Here, and throughout the DEIS, the purpose of the corridor designation is vague. It is not clear what "other compatible uses" the corridor may be used for. A brief elaboration in Appendix D lists broadband infrastructure as an example and states "corridors are constrained to only transport CCUS and EOR products; however, other compatible uses may be considered that would not limit future use of the corridors for CCUS and EOR pipelines and facilities." DEIS, Appendix D at 6. Without knowing the scope of the corridor's purpose, it is impossible for the BLM or the public to take a "hard look" at the WPCI's potential impacts. This catchall clause renders the WPCI's purpose impermissibly vague.

The BLM NEPA handbook states that "We recommend that the purpose and need statement be brief, unambiguous, and as specific as possible... The broader the purpose and need statement, the broader the range of alternatives that must be analyzed." BLM, National

Environmental Policy Act Handbook H-1790-1 (2008) at 35. The purpose described in the DEIS is both ambiguous and unspecific, and the catchall clause “other compatible uses” is so broad that the scope of necessary analysis is unclear. The DEIS observes

Besides oil and gas resources, the planning area also produces mineral products such as coal and coalbed CH<sub>4</sub>; trona; locatable minerals such as uranium, limestone, gypsum, bentonite, and precious metals; and mineral materials such as building stone, sand and gravel, and clay.

And notes that

Wyoming has been the top coal- producing state in the United States since 1986, accounting for more than 40% of the annual U.S. coal supply (WSGS 2020c). The proposed corridors overlap the Bighorn Coal Field, the Wind River Coal Field, the Powder River Coal Field, the Hanna Coal Field, and the Green River Coal Field. There are approximately 416,322 acres of active coal permits (Wyoming Department of Environmental Quality [WDEQ] permits) in the planning area. There is also approximately 1,004,640 acres of trona areas in the planning area.

DEIS at 3-42.

Later, the DEIS explains

The BLM could still consider any proposal for mineral development within the proposed corridors, and any facilities proposed would have to be re-routed around those first in time approvals.

DEIS at 3-47

The BLM does not specify whether development of these other resources constitutes “compatible uses” and their potential impacts are not analyzed in the DEIS. With such a broadly defined purpose and need, it is also unclear what criteria will be used to determine whether the BLM’s alternatives will meet the WPCI’s purpose, and whether any future projects would meet that purpose. This problem will be amplified as projects inevitably tier to the WPCI. As the BLM handbook states “The ‘purpose’ can be described as a goal or objective that we are trying to reach.” NEPA Handbook at 35. Here, the BLM has not established what goals or objectives would be reached by “other compatible uses.” The vagueness of the stated purpose undermines the legitimacy of the BLM’s environmental analysis.

Regarding the need for the project, the BLM’s NEPA handbook states,

For many types of actions, the “need” for the action can be described as the underlying problem or opportunity to which the BLM is responding with the action. Often, the “purpose” can be presented as the solution to the problem described in the “need” for the action.”

*Id.*

But the problem to which BLM's broad purpose responds is not well established. The DEIS states that the WPCI is needed in order to respond to an almost eight-year effort to support future development.

The DEIS reads

The need for the BLM action is to respond to the State of Wyoming Governor's Office project proposal and to support future development of CCUS and EOR through the development of infrastructure to existing oil fields within the state of Wyoming.

DEIS at i.

And further

The BLM action responds to the need to reverse the downward trend of declining oil production by stimulating economic development through EOR.

DEIS at 1-1.

Governor Gordon's proposal, available online at <https://www.wyopipeline.com/projects/wpci/>, states that

The scoping period is the result of a nearly 8-year effort that began under the administration of Governor Matt Mead with funding support from the Wyoming Legislature. Pipelines are critical to transporting CO2 from sources to locations where it can be used or stored. The initiative supports Governor Mark Gordon's goals of supporting carbon capture projects and extending the life of coal fired power plants in Wyoming.

The BLM explains that "This need is based on the BLM's responsibility under Section 503 of the Federal Land Policy and Management Act of 1976 (FLPMA) to consider and designate ROW corridors." The following section, FLPMA section 504, elaborates on the federal government's responsibilities in specifying the boundaries of rights-of-ways designated pursuant to section 503. It reads

Boundary specifications; criteria; temporary use of additional lands The Secretary concerned shall specify the boundaries of each right-of-way as precisely as is practical. *Each right-of-way shall be limited to the ground which the Secretary concerned determines*

(1) *will be occupied by facilities* which constitute the project for which the right-of-way is granted, issued, or renewed,

(2) to be *necessary for* the operation or maintenance of *the project*,

(3) to be *necessary to protect the public safety, and*

(4) *will do no unnecessary damage to the environment.* The Secretary concerned may authorize the temporary use of such additional lands as [he or she] determines to be reasonably necessary for the construction, operation, maintenance, or termination of the project or a portion thereof, or for access thereto.

FLPMA Sec. 504 [43 U.S.C. 1764] (a). (*emphasis added*).

FLPMA establishes a high bar for the designation of rights-of-way. The boundaries shall be limited to areas that the government has determined will be occupied by a project's facilities, are necessary to conduct that project, are necessary for public safety, and will not unduly damage the environment.

With the WPCI, there are no proposed facilities, operations, or maintenance to evaluate as necessary or otherwise, and thus the DEIS does not conduct the analysis that section 504 of FLPMA requires. There is no apparent public safety need. And because we do not know what projects will be tiered to the WPCI because none have been proposed, neither the public nor the BLM can reasonably consider whether there might be unnecessary damage to the environment. Given the vague purpose addressed above, we also can't evaluate what facilities might occupy the corridor and what kind of operation and maintenance might occur beyond the enumerated purposes of CCS and EOR.

**B. The proposed project does not prioritize development outside of core Greater sage-grouse habitat in violation of FLPMA.**

The WPCI proposal violates FLPMA because it relies on the faulty logic inherent in the recently vacated instruction memorandum (IM) 2018-026 and fails to apply a procedure sufficient to meet the 2015 sage grouse plan amendments' priority requirement, such as the procedure detailed in IM 2016-143. Per FLPMA, BLM cannot take actions that are inconsistent with the governing land use plans – in this case the 2015 grouse plan amendments, which the Fish & Wildlife Service noted as having “mandatory requirements” to protect habitat. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 69 (2004). The BLM's duty to apply the 2015 plan's priority requirement was recently at issue in federal court and is applicable to the WPCI proposal, as the requirement pertains to oil and gas development broadly, including EOR and CCS.

On May 22, 2020 a federal district court in Montana ruled in favor of sage-grouse protection in a case brought by Montana Wildlife Federation, Montana Audubon, National Audubon Society, National Wildlife Federation and The Wilderness Society. In a victory for the plaintiffs, the court vacated BLM's Instruction Memorandum 2018-026, which states that “[i]n effect, the BLM does not need to lease and develop outside of [sage-grouse] habitat management areas before considering any leasing and development within [sage-grouse] habitat.” The court vacated IM 2018-026, and vacated and remanded three contested lease sales in Montana and Wyoming, on the grounds that both the IM and the lease sales themselves violate FLPMA because they are inconsistent with the 2015 plans. *See Montana Wildlife Federation v. Bernhardt*, supra.

The court stated it “sees no reason to leave the 2018 IM in place. BLM’s errors undercut the very reason that the 2015 Plans created a priority requirement in the first place and prevent BLM from fulfilling that requirement’s goals.” *Id.* At 30. The court found that “BLM’s reinterpretation of the prioritization requirement in the 2018 IM conflicts with both its own application of the prioritization requirement before issuance of the National Directives and FWS’s understanding of the requirement in rejecting the request to list the sage-grouse under the ESA.” *Id.* At 23. In addition, the court found the new guidance violated FLPMA “because it misconstrues the 2015 Plans and renders the prioritization requirement into a mere procedural hurdle” instead of the meaningful provision that was clearly intended to accomplish 2 goals: limiting surface disturbance and encouraging development outside grouse habitat.

In particular, The 2018 IM interpreted prioritization to only apply in instances of an backlog in expressions of interest (EOI), in which case the BLM would prioritize processing leases outside habitat, but did not require consideration of the many factors set out in the 2016 IM, which directed actual prioritization of leasing outside habitat and consideration of development potential regardless of EOIs. Further, BLM’s new guidance did not include any reference to encouraging development outside grouse habitat – an explicit goal of the 2015 plans. The court also held that the contested lease sales themselves violated FLMPA because they applied the faulty logic inherent in the 2018 IM. *Montana Wildlife Federation* at 26

Here, the WPCI violates FLPMA because, as in the above cited case, it “either explicitly, or in effect, follow[s] the same rationale as the 2018 IM.” *Id.* All four alternatives overlap both PHMA and General Habitat Management Areas (GHMA) for Greater sage-grouse. The agency preferred alternative, Alternative D, would affect 17,405.9 acres within PHMA, and 2,940,330.2 acres within a 4-mile buffer of PHMA; 37,837.3 acres of GHMA, and 3,065,454.5 acres within a 2-mile buffer of GHMA. DEIS at 3-123.

Despite the potential for significant surface disturbance in core habitat under all alternatives including the preferred alternative, the BLM did not apply the priority requirement from the 2015 plans and has not conducted the kind of thorough review envisioned in the 2016 IM, which would have fulfilled the BLM’s prioritization obligation. Rather, the DEIS for the WPCI project ignores the 2015 plans’ priority requirement, citing neither the 2015 rules, the 2016 IM, nor the vacated 2018 IM, and offering no discussion of prioritization nor any articulated standards with which to evaluate the project’s success at prioritizing development outside of core. Thus, the BLM and the public have no means to assess whether the proposal fulfills the priority requirement. We only know that all alternatives would impact many thousands of acres of core habitat.

As the original 2016 IM explains

This IM does not prohibit leasing or development in GHMA or PHMA as the GRSG Plans will allow for leasing and development by applying prioritizing sequencing, stipulations, required design features, and other management measures to achieve the conservation objectives and provisions in the GRSG Plans.

Instruction Memorandum No. 2016-143

A thorough review such as that required under the 2016 IM is essential to meet the conservation objectives of the 2015 plans and prevent an Endangered Species Act (ESA) listing of the bird. The court in *Montana Wildlife* stressed the importance of adequate regulatory mechanisms, including the prioritization requirement, in preventing a listing:

FWS relied on this understanding of the 2015 Plans when it declined to list the sage-grouse as an endangered species. The ESA recognizes that “the inadequacy of existing regulatory mechanisms” to protect a species represents an important factor to consider in deciding whether a species must be listed. 16 U.S.C. § 1533(a)(1)(D). FWS expressly relied on the prioritization requirement and other protections in BLM’s 2015 Plans in deciding in 2015 not list to sage-grouse as endangered. FWS instead noted that the important “regulatory mechanisms” contained in the 2015 Plans adequately would protect the sage-grouse. 80 Fed. Reg. 59,874-875, 59,891. FWS viewed the prioritization requirements as establishing “mandatory” protections. *Id.* at 59,875. FWS specifically noted that the 2015 Plans “prioritize the future leasing and development of nonrenewable-energy resources outside of sage-grouse habitats.” *Id.* at 59891. The 2015 Plans instead require BLM to “follow an avoidance, minimization, and mitigation approach.” *Id.*

*Montana Wildlife, supra* at 22.

The appended Special Status Species Report for the WPCI lists acreage of Greater sage-grouse core habitat affected by the proposal and assures that a density/disturbance calculation tool (DDCT) would be applied to surface disturbance per state policy.<sup>2</sup>

This is an important first step, but falls far short of the sequencing, stipulations, required design features, and other management measures that were established in IM 2016-143 in order to implement the 2015 plans. Though the 2016 IM has now expired, the underlying priority requirement in the 2015 plans remains. Now that BLM’s reinterpretation of that requirement in IM 2018-026 has been vacated for its failure to adhere to the 2015 plans, the BLM must establish a standard for prioritization consistent with the requirements and objectives of the 2015 plans and review the WPCI accordingly.

Instead, as in the challenged lease sales in *Montana Wildlife*, “the errors here occurred at the beginning of the... process, infecting everything that followed.” *Montana Wildlife, supra* at 31. The BLM does not consider and apply the priority requirement. The DEIS merely lists the impacted PHMA, GHMA, and leks for each alternative and explains that subsequent development could lead to long-term reduction in habitat. DEIS at 3-123. This cursory review

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<sup>2</sup> Special Status Species Report for the Wyoming Pipeline Corridor Initiative, prepared by SWCA Environmental Consultants (February 2016) available online at [https://eplanning.blm.gov/public\\_projects/1502028/200341243/20020736/250026940/Special%20Status%20Species%20Report%20WPCI.pdf](https://eplanning.blm.gov/public_projects/1502028/200341243/20020736/250026940/Special%20Status%20Species%20Report%20WPCI.pdf)



cannot fulfill the BLM's duty to prioritize development outside of core. Thus, this proposal violates FLPMA's requirement to apply the prioritization requirement in a manner consistent with the 2015 plans.

### **C. The BLM's analysis of potential adverse impacts to wildlife habitat and water resources are not sufficient to meet NEPA's "hard look" mandate**

The BLM has not taken a hard look at impacts to wildlife habitat and water resources in violation of NEPA. NEPA is our "basic national charter for the protection of the environment." 40 C.F.R. § 1500.1(a). It achieves its purpose through "action forcing" procedures. *Id.* §§ 1500.1(a), 1502.1. The courts have termed this crucial evaluation as a "hard look." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 864 (9th Cir. 2005). NEPA's fundamental purpose is to ensure "important effects will not be overlooked or underestimated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA requires BLM to consider national policy in its decision-making process. 40 C.F.R. §§ 1500.6, 1502.16(c), 1506.2(d).<sup>3</sup> This includes the consideration of best available information and data, as well as disclosure of any inconsistencies with federal policies and plans. *Id.* §§ 1502.22, 1502.24.

Recognizing that "each person should enjoy a healthful environment," NEPA ensures that the federal government uses all practicable means to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings," seeking to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." 42 U.S.C. §§ 4331(b)–(c).

To that end, NEPA requires the lead agency to take a "hard look" at potential direct, indirect, and cumulative impacts of a proposed project. *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970). Despite this mandate, the BLM has not taken a hard look at impacts to Greater sage-grouse, mule deer, and water resources in this DEIS. Notably, the Wyoming Game and Fish Department (WGFD) was not invited to be a cooperator on this project – DEIS at A-1. Closer coordination with WGFD in future proposals would help the BLM fulfill NEPA's hard look requirements regarding impacts to wildlife.

#### *1. Impacts to Greater sage-grouse habitat have not been adequately evaluated and disclosed.*

In addition to the FLPMA concerns regarding sage-grouse addressed above, we are concerned that the BLM has not taken a hard look at impacts to Greater sage-grouse in violation of NEPA. The DEIS acknowledges that

Direct impacts to greater sage-grouse include surface disturbance to important habitats, mortality resulting from collisions, and destruction of nests and nest abandonment.

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<sup>3</sup> NEPA regulations direct federal agencies to "discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned)," 40 C.F.R. § 1506.2(d), and require agencies to address "[p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned." 40 C.F.R. § 1502.16(c).

Indirect impacts to greater sage- grouse include habitat fragmentation, increased noise levels and human activity, dispersal of noxious weeds and invasive plant species, increased risk of wildfire, dust effects, potential for increased presence of West Nile virus, and increase in predation.

DEIS at 3-109.

However, the DEIS does not disclose and evaluate the extent of potential impacts, because it does not incorporate the best available science on sage-grouse. Significant new science indicates that Greater sage-grouse population declines between 2015 and 2019 cannot be explained by population cycles and weather, contrary to the assertions of agency biologists.<sup>4</sup> (attached as Appendix 3). These findings are directly relevant to BLM's proposal to develop oil and gas resources in sage-grouse habitat and the reasonably foreseeable impacts thereof. For instance:

Numerous studies (Naugle et al. 2011) have shown greater sage-grouse avoid habitat within approximately 4.8 km of industrial activity and scientists have documented industrial impacts extending approximately 19 km. Nevertheless, within about the last four years the Bureau of Land Management offered energy leases on nearly 2.5 million hectares of sage-grouse habitat; leases from these offerings have been sold on over one million hectares of habitat. Range-wide, nearly three million hectares of currently occupied sage-grouse habitat, including almost 1.6 million hectares of priority habitat, have had a change of management status with respect to energy development since 2015 (Gardner et al. 2019, Thuermer 2019a). Energy companies have obtained drilling approvals under present administration rules at a rate that is more than six times higher than under previous policies according to a recent report (Gardner et al. 2019).

The authors conclude that

Given the continued loss and degradation of sage-grouse habitat, cycles do not appear to be a sufficient or compelling explanation for recent declines and blaming cycles or weather seems to be an abdication of responsibility.

*Id.* At 9.

The impact of these findings cannot be ignored and must be considered in an evaluation of the reasonably foreseeable impacts of the WPCI. The BLM is approving development in PHMA at accelerating rates, amid sustained population declines, operating under a demonstrably false assumption that those declines are attributable to cyclic population declines and weather, and refusing to consider data that suggests otherwise. Clearly, this cannot satisfy NEPA's hard look requirement.

Additionally, the BLM has not adequately considered cumulative impacts to grouse. The DEIS, which devotes a single paragraph to cumulative impacts to wildlife and fisheries, explains

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<sup>4</sup> John W. Connelly, Clait E. Braun and Michael A. Schroeder, *Sage-Grouse Population Declines: Species in Crisis and Agencies in Denial*, Grouse News 58 (December 2019), attached as Exhibit 2.

that Greater sage-grouse are among the wildlife species that would be cumulatively impacted but falls short of NEPA's requirement to analyze cumulative impacts in sufficient detail. DEIS at 4-7. The appended Special Status Species Report does not elaborate on cumulative impacts to sage grouse at all.

BLM's responsibility to fully evaluate cumulative impacts was recently clarified in *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019) [hereinafter *WildEarth Guardians*] (attached as Appendix 4 and incorporated by reference).

NEPA requires that the environmental consequences should be considered together when several projects that may have cumulative environmental impacts are pending concurrently. *Kleppe*, 427 U.S. at 410. NEPA also requires that agencies do more than merely catalogue relevant projects in the area. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971 (9th Cir. 2006). An agency instead must give sufficiently detailed analysis about these projects and the differences between them. *Id.* The agency must provide sufficient detail in its analysis such that the analysis will assist the "decisionmaker in deciding whether, or how, to alter the program to lessen cumulative environmental impacts." *Churchill Cty. v. Norton*, 276 F.3d 1060, 1080 (9th Cir. 2001) (quoting *City of Carmel-by-the-Sea v. U.S. Dept' of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997)).

*WildEarth Guardians* at 23.

In that case, an environmental organization challenged the BLM's failure to evaluate the impacts of greenhouse-gas emissions that would result from nine oil-and-gas lease sales in Wyoming. The court held that the BLM's findings of no significant impact for the sales were inadequate because the agency had failed to consider the lease sales' reasonably foreseeable climate impacts. The BLM has previously argued the agency could not reasonably foresee the impacts of oil-and-gas development without "a discrete proposal for surface occupancy." *See e.g.* BLM-Wyoming Response to Public Comment No. 51 for the 2nd Quarter, June 2019 Lease Sale. Under the court's opinion in *WildEarth Guardians*, however, the BLM could provide a range of potential climate impacts based on the wealth of available data. Here, as in that case, the BLM has ample data to forecast a range of reasonably foreseeable impacts to sage grouse from the WPCI and must explain where there is uncertainty.

The impacts of the WPCI on sage-grouse must be analyzed in the context of other local and regional development. The BLM must sufficiently analyze projects in Wyoming and neighboring states and "set forth in sufficient detail" a description of past lease sales and projects and the previous impacts to sage grouse resulting from them. *See e.g. Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005), (faulting an agency for failing to catalogue other agency projects in its environmental assessments). Similarly, the Ninth Circuit in *Klamath-Siskiyou* held that BLM failed to comply with NEPA where it discussed other projects but offered "no quantified assessment of their combined environmental impacts." 387 F.3d at 994.

Tiering to the 2015 plans alone cannot satisfy the requirement to review cumulative impacts. The recent order in *Western Watersheds Project* enjoining the 2019 plans highlights a significant issue with BLM's cumulative impacts analysis - the 2019 plans tier to six separate EISs for individual states, splitting up the sage-grouse range and not considering the cumulative

impacts of the BLM actions across states. Mem. Order and Decision, *Western Watersheds Project v. Schneider*, Case No. 16-CV-83-BLW (D. Idaho Oct. 16, 2019). The court noted that “sage grouse range covers multiple states and that a key factor—connectivity of habitat—requires a large-scale analysis that transcends any single state.” *Id.* at 23.

In assessing the impacts of this lease sale on the sage-grouse, the BLM must consider the broader context of impacts from past, present, and reasonably foreseeable federal actions. Otherwise, members of the public and decision-makers have no context for the BLM’s conclusion that impacts beyond those analyzed in RMPs are not expected. Here, the BLM has merely listed the acreage of impacted PHMA and GHMA and the number of leks for each alternative, without reviewing the broader context or forecasting a reasonable range of impacts to the population.

Additionally, the BLM’s cumulative impacts analysis must consider development that has occurred since the relevant RMP amendments went into effect, as the *WildEarth Guardians* made clear. *WildEarth Guardians, supra* at 26. The 2015 amendments predate the WPCI by five years. The cumulative impact regulations require a catalogue of past, present, and reasonably foreseeable projects at the time of the project proposal. BLM has the benefit of five years’ worth of information that it did not have at the RMP amendment stage about what constitutes past, present, and reasonably foreseeable projects. Tiering to the relevant RMPs is insufficient because the BLM has not catalogued nor evaluated the past, present, and reasonably foreseeable projects at the time of the proposal, nor has the agency accounted for actions outside the planning area. Tiering to the 2015 Plans without conducting further cumulative impacts analysis cannot satisfy NEPA’s mandate. Instead, before moving forward with the WPCI, the BLM must set forth with reasonable specificity the cumulative effect of the leasing, improve the analysis in its EIS, and make decisions accordingly.

2. *Impacts to big game migration corridors and crucial winter range have not been adequately evaluated and disclosed.*

The BLM must also conduct further review of potential impacts to big game migration corridors and crucial winter range (CWR) in order to comply with NEPA’s hard look and cumulative impacts requirements. The DEIS for the WPCI explains that

All three action alternatives cross numerous movement corridors, migration routes, and crucial or year- long seasonal habitats for big game. Construction and operations for all the action alternatives would have the potential to cause stress or displace big game, or both from parts of their crucial winter range, parturition areas, and migration corridors for the duration of the activity. Areas of human activity within big game migration corridors or parturition areas would be temporarily unavailable for big game feeding, resting, migration, or parturition. Noise, dust, equipment and vehicle traffic, and general human activity would cause big game to avoid construction areas and potentially restrict big game movement if the activity area is large enough. The intensity of big game avoidance would depend on the scale of the human activity and the ability to address crucial seasonal use through avoidance measures and timing limitations.

DEIS at 3-105.

Here again, because the WPCI's purpose is vague, the BLM does not review a reasonable range of potential impacts. Instead, the BLM asserts that big game avoidance behavior, which can range from a detour or accelerated pace through vital habitat to the complete and permanent loss of a migration corridor, will depend on the scale of the undefined "human activity." This cannot meet NEPA's mandate to take a "hard look" at environmental impacts. The BLM merely lists the acreage of impacts to migration corridors and crucial winter range. *See* DEIS at 3-110, Table 3.21-3. Acreages and Linear Miles of Alternative B Area of Analysis within Big Game Seasonal Habitats and Percentage of Seasonal Habitats within Area of Analysis.

Essentially, the DEIS lists the amount of impacted acreage for each vital habitat under each alternative, stating that they either would or would not be impacted, without discussing the consequences for big game in detail. The BLM has not taken hard look at the extent of those potential impacts, nor has the agency considered them in the context of cumulative impacts.

i. The BLM must fully consider impacts to migration corridors

The BLM must fully consider potential impacts to mule deer migration corridors in order to comply with NEPA's hard look requirement. All of the alternatives analyzed in the DEIS would route corridors within State of Wyoming-designated mule deer migration corridors, mule deer crucial winter range, and/or parturition areas — habitats that the WGFD considers "vital" pursuant to the 2019 Wyoming Action Plan for the Implementation of Department of the Interior Secretarial Order 3362. *See* DEIS at 3-110, Table 3.21-3.

The DEIS, however, does not disclose or analyze potential impacts to mule deer from development within migration corridors and other vital habitats. Instead, the BLM suggests that "[i]mpacts to big game species migration routes and crucial habitat would need to be addressed by individual pipeline project proponents." Wildlife Resources Technical Report at 18 (available online at [https://eplanning.blm.gov/public\\_projects/1502028/200341243/20019820/250026024/WPCI\\_Wildlife-03-2016-final.pdf](https://eplanning.blm.gov/public_projects/1502028/200341243/20019820/250026024/WPCI_Wildlife-03-2016-final.pdf)).

Particularly, the DEIS conducts no analysis whatsoever of the potential impacts from development within vitally important high use areas and stopovers. The DEIS and appendices do not even disclose whether the alternatives intersect stopovers, high use areas, or bottlenecks. Incredibly, the BLM neglects this analysis even within herd units that have already faced dramatic population declines due to human disturbance.

The public cannot evaluate the risks from development in these vital habitats because the DEIS does not discuss the statewide decline in our mule deer populations nor does it discuss the affected environment in terms of herd units. The DEIS does not even disclose that the majority of mule deer herd units in Wyoming are significantly below WGFD population objectives. Instead, the DEIS pays lip service to Wyoming's migration executive order without reviewing the science that made the order necessary. Not only is this a violation of NEPA, it also violates FLPMA. In violating the letter and the spirit of the Wyoming Mule Deer and Antelope Migration

Corridor Protection Executive Order (Order 2020-1) (attached as Appendix 5), this project also violates FLPMA's requirement to adhere to state law to the extent possible.

As the EO states, "migration corridors are essential to the maintenance of viable mule deer and antelope populations." *Id.* at 1. The order defines High Use Areas as the "segment or portion of a mule deer and antelope migration corridor used by 20% or greater of the [GPS] collared animals," and defines Stopover Areas as "the area used the majority of time by GPS-collared animals to forage and rest during spring and fall migration." *Id.* at 5. High use areas and stopovers are the most important portions of "vital" habitat and are integral to corridor functionality.

Wyoming's migration EO makes clear that "whenever possible, development, infrastructure, and use should occur outside of designated corridors" and outlines management considerations for specific areas within corridors. For high use areas "surface disturbance and human presence shall be limited to levels that maintain the corridor functionality and do not cause migrating mule deer or antelope to avoid or leave the high-use portion of the designated corridor during migration periods" and for stopovers within high use areas "surface disturbance should be avoided" and "permitted human activities during migration periods should be limited or avoided." *Id.*

Yet despite this strong state policy directive to maintain corridor functionality and protect the most important and vulnerable habitat within migration corridors, the WPCI proposes to develop within vital habitat without even a cursory review of the risks to our herds. For example, overlaying the BLM's provided GIS layer for the agency preferred Alternative D with WGFD layers for stopovers and high use areas reveals that the preferred alternative routes the corridor through both stopovers and high use areas of the Red Desert to Hoback mule deer migration corridor. *See* Appendix 6 – Map of Alt. D intersecting in RD2H MDC high use areas and stopovers.

However, the DEIS excludes significant information including the fact that the Red Desert to Hoback is the longest mule deer migration corridor ever recorded, that the Sublette herd unit which relies upon the corridor is about 38 percent below WGFD objectives, and that the WPCI proposes development in the most vital habitats within that corridor. This data is readily available to the BLM as evidenced by environmental assessments for BLM's own oil and gas lease sales. *See e.g.* EA for the September 2020 sale, available online at [https://eplanning.blm.gov/public\\_projects/nepa/1505373/20017843/250023832/2020Q3\\_DOI-BLM-WY-0000-2020-0009-EA.pdf](https://eplanning.blm.gov/public_projects/nepa/1505373/20017843/250023832/2020Q3_DOI-BLM-WY-0000-2020-0009-EA.pdf).

The BLM must at a minimum review the available data on WGFD population objectives for the impacted herd units and the actual populations of those herds, incorporate the best available science regarding development in stopovers and high use areas, and disclose the potential impacts from each of the proposed alternatives to Wyoming's mule deer herds in order to meet NEPA's hard look requirement. It has not done so in this DEIS.

ii. The BLM must fully consider impacts to crucial winter range

Similarly, the BLM must fully consider impacts to mule deer crucial winter in its DEIS and has not done so here. As with migration corridors, the BLM merely lists the affected acreage of CWR under each alternative, without reviewing the environmental impacts of developing in that habitat. There is no substantive discussion of those impacts in the attached Wildlife Resources Technical Report. *See* Report at page 16 (devoting a single paragraph to quoting a 2004 WGFD definition for winter range, without further review of potential impacts). This approach is not adequate.

The DEIS includes a brief discussion of crossing features to reduce impacts to big game in the Technical Report at page 18, but this is not availing. Mitigation measures must be developed to a reasonable degree and supported by evidence. Here, BLM has merely listed a potential measure with no analysis and no supporting evidence. Courts have held that mere listing of mitigation measures is inadequate. *See, e.g.* HCPC I, Case No. 3:11-cv-00023-PK, slip copy at 26-27 (USFS's wetland/springs mitigation was insufficiently developed to justify a CE, to support a FONSI "proposed mitigation measures must be 'developed to a reasonable degree' and supported by analytical data."), citing *Bosworth*, 510 F.3d at 1029 (citing *Nat'l Parks&Conservation Ass'n*, 241 F.3d 722, 734 (9th Cir. 2001); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473-75 (9th Cir. 2000). While "a mitigation plan need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements"[,] a 'perfunctory description' or 'mere listing' of mitigating measures is inadequate to satisfy NEPA's requirements." *Id.* (citing *Neighbors of Cuddy Mtn. v. USFS*, 137 F.3d 1372, 1380 (9th Cir. 1998); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998).

Additionally, BLM's approach to development in crucial winter range is outdated. The timing limitation stipulations attached to mule deer crucial winter range are based on WGFD's admittedly inadequate and out of date Recommendations for Development of Oil and Gas Resources within Crucial and Important Habitat" (2010). Responding to a decade of new science, WGFD now recognizes that the TLS recommended in 2010 to protect crucial winter range are not effective to protect that vital designated habitat and is in the process of revising its recommendations. Yet, because BLM has not analyzed their own proposed mitigation measures and considered their ability to maintain corridor functionality based on the available evidence.

BLM must take a hard look at potential impacts to CWR. This includes evaluating potential impacts using the best available science which indicates, for instance, that ungulate avoidance of anthropogenic disturbance increases over time, a relevant scientific finding that indicates impacts will be greater than those expected in the underlying RMPs. *See* Samantha Dwinnell et. al "Where to forage when afraid: Does perceived risk impair use of the foodscape?" *Ecological Applications* 29(7), June 2019 ("Disturbance from energy development causes not only direct habitat loss but has a multiplicative effect through avoidance behavior resulting in indirect habitat loss 4.6-times greater than direct habitat loss from roads, well pads, and other infrastructure."). *See also* Sawyer H, Beckmann JP, Seidler RG, Berger J. Long-term effects of energy development on winter distribution and residency of pronghorn in the Greater Yellowstone Ecosystem. *Conservation Science and Practice* (2019) (Our 15-year study showed that pronghorn avoidance and displacement from well pads increased through time and revealed a significant decline in winter residency rates concurrent with large-scale natural gas

development in the GYE... The predicted distance from nearest well pad in our displacement analysis increased from 908 m in 2005 to 1,708 m in 2017 and presumably led to indirect habitat losses much larger than habitat lost directly to infrastructure.) The BLM must consider significant new information including these studies in its analysis, rigorously evaluate potential impacts from leasing in crucial winter range, propose mitigation accordingly, and if those impacts are beyond those anticipated in the underlying RMPs, conduct an EIS.

The tiering and cumulative impacts concerns raised in our sage grouse comments apply to the BLM's review of impacts to corridors and winter range as well. The underlying RMPs predate the WPCI proposal significantly. The cumulative impacts analysis required by NEPA must catalogue past, present, and reasonably foreseeable projects at the time of the proposal. This requires a deeper analysis of potential impacts to big game than merely tiering to the underlying RMPs. As in the *Montana Wildlife Federation* case cited above, the BLM has the benefit of years of information since the relevant RMPs were published and must account for that information here. Otherwise the public has no way to understand the extent of development in these vital habitats and the potential impacts resulting from it.

3. *Impacts to groundwater resources have not been adequately evaluated and disclosed*

The BLM has not taken a hard look at potential impacts to groundwater resources, because the DEIS does not review the range of reasonably foreseeable direct, indirect, and cumulative impacts to groundwater stemming from the WPCI proposal. The WPCI's stated purpose is to "to designate corridors for the preferred location of future pipelines associated with the transport of CO<sub>2</sub>, EOR products, and other compatible uses and to amend the various BLM RMPs within the State of Wyoming to incorporate the proposed corridors." DEIS at i. In the Project Overview discussion from Appendix D, the DEIS states

The WPCI corridors were established based on reasonably foreseeable development of resources that will require pipeline construction for development. EOR was the principal development activity used to select the WPCI corridors.

*Id.* at Appendix D, 11.

In reviewing climate impacts, the DEIS explains that "[i]ndirect effects would include the use of EOR in technically and economically feasible oil fields." The BLM describes the process of enhanced oil recovery with carbon dioxide in the climate impacts section of the DEIS:

The CO<sub>2</sub> is directed to injection wells strategically to optimize the areal sweep of the reservoir. The injected CO<sub>2</sub> enters the reservoir and moves through the pore spaces of the rock, encountering residual droplets of crude oil, becoming miscible with the oil, and forming a concentrated oil bank that is swept toward producing wells. At the producing wells—there may be three, four, or more producers per injection well—oil and water are pumped to the surface, where they typically flow to a centralized collection facility. The pattern of injection wells and producers, which can change over time, will typically be determined based on computer simulations that model the reservoir's behavior based on



different design scenarios... The produced fluids are separated and the produced gas stream, which may include CO<sub>2</sub> as the injected gas begins to break through at producing well locations, must be further processed. Produced CO<sub>2</sub> is separated from the produced gas and recompressed for reinjection along with additional volumes of newly-purchased CO<sub>2</sub>. In some situations, separated produced water is treated and re-injected, often alternating with CO<sub>2</sub> injection, to improve recovery efficiency.

*Id.* at 3-8.

The DEIS then considers a range of foreseeable emissions based on based on the anticipated additional production from EOR in fields identified as technically feasible.

Yet the DEIS conducts no review of the potential impacts to groundwater resources from the injection of CO<sub>2</sub> into reservoirs, or from the disposal, through either reinjection or surface disposal, of oil and gas produced water. Nor does the DEIS disclose the range of reasonably foreseeable impacts from this development as NEPA requires. The BLM's review only considers the direct impacts of surface disturbance within the corridor. While sedimentation, turbidity, and salinity are important considerations, NEPA instructs the BLM to consider the entire range of reasonably foreseeable direct, indirect, and cumulative impacts of a proposed project. *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970). Here, the BLM has identified the use of EOR in technically and economically feasible oil fields as an indirect impact but does not review the risks it presents to groundwater.

The recent *WildEarth Guardians* case discussed above is instructive here. In that case, the court held that BLM's "analysis" of potential groundwater impacts "fail[ed] to satisfy NEPA's hard look requirement because, at best, they prove to be "general statements about 'possible' effects and 'some risk.'" *WildEarth Guardians* at 10. Here, as in the *WildEarth Guardians* case "the EA fail[s] to tell 'the reader . . . what data the conclusion was based on, or why objective data cannot be provided."

The BLM has sufficient data to analyze impacts at this stage based on its identification of oil plays where EOR is technically and economically feasible. The court in *WildEarth Guardians* held that BLM's "inability to fully ascertain the precise extent of the effects of mineral leasing" at the leasing stage cannot justify a failure to consider those effects at this stage." *Id.* at 13. The same rationale applies here. While the BLM may be unable to fully ascertain the precise extent of the effects of the WPCI, the BLM has ample evidence to forecast a reasonably foreseeable range of effects from the EOR and CCS projects the WPCI anticipates and will facilitate.

The BLM must undertake a sufficiently specific analysis for the WPCI. In *WildEarth Guardians*

A comparison of BLM's analysis of groundwater impacts from shallow fracturing and surface casing depths and the factual record show[ed] that BLM improperly deferred its analysis to the APD stage. BLM provide[d] almost no analysis related to shallow fracturing and surface casing depth. The factual record, on the other hand, shows that BLM possessed the information necessary to

undertake a more specific analysis at the leasing stage than it did. WildEarth correctly argue[d] that BLM had access to records showing “aquifer depth and quality in the areas where the leases are located” and “records of existing wells drilled in the area.” (Doc. 30 at 13.)

Here, the DEIS improperly defers analysis to the project stage. The BLM must fully consider the range of reasonably foreseeable direct, indirect, and cumulative impacts to groundwater resulting from EOR, CCS, and any other compatible projects in the DEIS for this project. DEIS at 3-97.

**D. The BLM has not sufficiently consulted and engaged with Tribes in Wyoming, although they have a significant stake in the project**

The NEPA process requires that BLM consult with American Indian Tribes in two ways. The first is through Section 106 of the National Historic Preservation Act. The second, are requirements set forth in NEPA itself. Further, BLM agency manuals and executive orders direct the BLM to consult with Tribes in a prescribed manner. The DEIS fails to meet the requirements of these provisions in the following ways.

*1. The BLM must adhere to Section 106 of the NHPA*

One of the broad policy goals of the NHPA is to "foster conditions under which our modern society and our historic property can exist in productive harmony." 54 U.S.C. § 300101(1).

Tribal consultation under Section 106 of the NHPA requires that

The agency official shall ensure that consultation in the section 106 process provides the Indian Tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effect....Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties. 36 C.F.R. 800.2(A)

§ 800.2(B) goes on to say that “The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty.”

§ 800.2(C) says that

Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government

or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

#### 800.2(D)

When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

Finally, § 800.16(f) provides a definition for consultation in context of the NHPA. It defines Consultation as “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.

Taken together the requirements under § 106 of the NHPA show that consultation is supposed to more than a simple opportunity for a tribe(s) to comment or a box to check in the NEPA process. It is meant to be a more robust process that is sensitive to the importance of effects of management decisions as well as the historic and ongoing relationship between tribes and agencies. First, in order for the process to be robust, consultation needs to happen early on in the process and the consultation needs to be ongoing with multiple attempts made by an agency to engage in consulting. *San Juan Citizens Alliance v. Norton* 586 F. Supp 2d 1270 (2008). Here, the entire section on consultation feels cursory and rushed, as though it is simply a procedural box to check. Second, the tribes were not consulted early in the process. According to the DEIS, tribes with potential interest in this project appear to have only been contacted once by letter after the project proposal had been formed and submitted to the BLM.

While not required by the NHPA, it should be noted that the absence of an alternative that does not impact cultural sites is apparent. Because of this lack of options, the BLM is in a position where it must make a choice between alternatives that harm cultural sites or choose the no action alternative stalling the project completely. This binary choice between harm or no action creates a situation that offers a false choice and invites conflict. This is exactly what early consultation seeks to remedy. Early and ongoing consultation is meant to help avoid conflict and discovering problems before it is too late. Failing to consult is not only legally problematic but it is disrespectful, sending a message of contempt and disregard to Indian Tribes who are owed the respectful and dignified treatment of sovereigns.

2. *Consultation is inadequate under NEPA, Executive Order 13175, and Presidential Memorandum for the Heads of Executive Departments and Agencies April 29, 1994*

NEPA has its own consultation requirements via Executive Order 13175 and Presidential Memorandum for the Heads of Executive Departments and Agencies April 29, 1994. NEPA in 42 U.S.C. § 4331 (a) states that

it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony”

and that further it is the policy of the Federal Government to “preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice.” § 4331 (b)(4).

Along with these broad policy statements in NEPA, Executive Order 13175 sets out further requirements for agency consultation with tribes and Presidential Memorandum for the Heads of Executive Departments and Agencies April 29, 1994, *Government-to-Government Relations with Native American Tribal Governments*, directs agencies to

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

- (a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.
- (b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.
- (c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.

The BLM must recognize and honor the government to government relationship between them and any Tribe. Which here they have not done with the single letter sent to the tribes to invite them to participate. All of the sources provided above point to engagement that is respectful and more involved on the part of the BLM. The BLM is required to honor any treaty or trust obligations that the federal government is obligated to. The Federal Government is in a unique role in regard to relationships with American Indian Tribes. They are both an independent sovereign and the Trustee. The BLM needs to consider their actions from both of these

perspectives. Finally, the consultation should be meaningful in order to generate suitable alternatives.

The BLM has shown here that they have not meaningfully engaged with the tribes. They rely on one letter soliciting consultation to satisfy their requirements. One letter is not enough to satisfy the meaningful requirement of consultation. Further, the letter attempts to engage in consultation during the NEPA process which here, in a way, comes too late, as the project was conceived and developed by the project sponsors, and for whatever reason, did not consult with tribes. Had the project sponsors done this, tribes would have been able to give input early in the project planning process, potentially developing pipeline routes that would not be harmful or conflict with cultural sites that are highly valued and sacred to tribes. Because tribes were not consulted by the project sponsors early in developing the proposed project, the BLM will now find it hard to meaningfully consult with tribes as the alternatives proposed offer only two real choices, harm sacred cultural sites or deny the project. Again, early consultation is meant to avoid this exact kind of catch 22 problem.

### 3. *The proposed tiering precludes adequate tribal consultation*

The BLM is proposing to engage in tiering of EIS's and then engage in more meaningful consultation efforts once specific pipeline segments are proposed to be built. This kind of tiering is inappropriate however because there is no guarantee that full EIS's will be carried out for each proposed section of pipeline. If BLM chooses to conduct Environmental Assessments rather than the EIS's, then there is no requirement for the BLM to pursue further consultation effectively freezing out any tribal involvement outside specific requirements of other laws upon discovery of cultural, sacred, or historical sites. Tiering is meant to be used for broad programs, plans, or policies. Here a specific project is being evaluated which will create a corridor for pipelines to be built. If BLM designates a corridor for this project, it creates a situation where tribes will not have any meaningful way to be consulted even though the BLM alludes to doing that in the future. What is true for tribal consultation would also be true for the public more generally who will want to comment on any proposed specific sections of pipeline being constructed.

The tribal consultation here also fails to meet the guidelines set forth in its own agency manuals, primarily *Manual 1780 Tribal Relations*. Section 1.1(E) recognizes that consultation is a government to government relationship, and that within that framework consultation should "ensure that it":

1. Begins early in the life cycle of a proposed action;
2. Directly involves the agency official who has delegated authority for disposition of the proposed action;
3. Recognizes the transparent and deliberative nature of consultation;
4. Includes a reasonable and sustained effort to invite tribes to consult, which may include several invitations and/or other methods of offering engagement;
5. Is carried out in the context of an ongoing relationship involving regularly scheduled meetings and other forms of communications;
6. Communicates final decisions with a summary explanation of how tribal concerns were taken into account; and

7. Does not terminate with the decision or authorization itself, but rather continues to engage tribes regarding land and mineral resources, land uses, treatments, all forms of mitigation (including data recovery, interpretation, funding for tribal social/cultural programs, lease stipulations, operating plan conditions-of-approval, etc.), inspections and monitoring, reclamation requirements, and dissemination of reports and information for the lands and resources affected.

The first five bullet points are directly at issue here. (1) as discussed previously, consultation was clearly not started early in the life cycle of the proposed WPCI project. (2) It is unknown whether the agency official with delegated authority for disposition was involved in the consultation process. (3) Consultation is generally non-existent and late in the process. This leaves doubt about whether or not the BLM is being transparent in its efforts to consult and there can be no deliberation if there has been not been any consultation. (4) The BLM has only made one attempt to consult with tribes via letter. This is neither a reasonable or sustained effort. (5) The minimal effort put into consulting for this DEIS does not indicate that it is part of an ongoing relationship with regularly scheduled meetings and alternative forms of communication. BLM needs to explain how this is being accomplished. The final two bullet points from the manual need to be considered and commented on when entering a final decision.

The BLM needs to comply with AHPA, NEPA, and BLM Manual 1780 in order to properly carry out tribal consultation. Early meaningful consultation is required.

4. *The BLM must consider off-reservation treaty rights in its analysis*

Various parts of Wyoming are subject to or potentially subject to off-reservation treaty rights held by various American Indian tribes. These rights to hunt, fish, and gather would be harmed if the proposed pipeline has effects on wildlife travel patterns and numbers, ecosystem quality, or water quality. Further, a pipeline may cause a reduction in the area where their rights extend to. The BLM needs to consider the impacts on these off-reservation rights held by tribes.

Treaties that Guarantee tribes rights to use unoccupied lands of the United States can be found in at least two treaties relevant to the WPCI, these are the Fort Bridger Treaty Council of 1868, and the 1868 Treaty of Fort Laramie. Article IV of the Fort Bridger Treaty Council of 1868 states that the tribes “shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.” Article XI of the 2nd Treaty of Fort Laramie 1868 states that the Sioux Nation “reserve[s] the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase.”

The United States Supreme Court has recently shown a willingness to uphold and enforce treaties made with American Indian Tribes. *see Herrera v. Wyoming*, 136 S. Ct. 1686 (2019) and *McGirt v. Oklahoma*, 140 S. Ct. 659 (2020). The case of *Herrera v. Wyoming* is particularly relevant. In that case the Court found that the off-reservation treaty rights to hunt on unoccupied lands of the United States have not been extinguished for the Crow Tribe. While there is still a question for the lower courts as to what lands are considered unoccupied for the purposes of the

treaty, case law from other U.S. Districts strongly indicates that the lands in question in Herrera would be considered unoccupied. *see State v. Tinno*, 94 Idaho 759 (1972) and *State v. Arthur*, 74 Idaho 251 (1953). While BLM lands have not yet been evaluated by the courts as to whether they would be considered “unoccupied lands,” the aforementioned case law dealing with U.S. Forest Service lands address criteria that, as applied to BLM lands, indicate that BLM lands would be considered “unoccupied.”

The criteria applied to determine whether the lands were unoccupied were presented in Herrera as: whether the lands were reserved from disposal and settlement by the federal government, whether the lands had no settlements (some intensive uses meet this criteria), and that wildlife continued to exist on those lands for hunting (a treaty stipulation). *Herrera*, 136 S. Ct. at 1698-1703. The BLM lands in question as part of the WPCI would meet these criteria and therefore the courts would likely deem these lands unoccupied federal lands subject to off-reservation treaty rights.

In the case of the 1868 Treaty of Fort Laramie (15 stat. 635) , the off-reservation treaty rights to hunt were later abrogated by Congress when it enacted a subsequent 1876 agreement with the Sioux that removed the Black Hills from the Sioux Nations reservation and removed the Sioux Nation’s rights to hunt in lands West of the reservation. *U.S. v. Sioux Nation of Indians*, 488 U.S. 382-83 (1980). This later agreement was found to be coercive and in bad faith leading that same court to find that the U.S. Government had effected a taking and owed the Sioux interest on the amount of money that was due to the tribes. *Id.* Payment for this taking has not been accepted, and the Sioux Nation continues to demand a return of their lands and for the U.S. Government to uphold all treaty rights. The BLM then as a matter of policy and respect for the sovereignty of the Sioux Nation should consider and address any treaty rights that the Sioux Tribes have within the project area.

In order to fully comply with NEPA, the BLM needs to consider the effects that the corridor for the WPCI project would have on these off-reservation hunting rights held (or claimed to be held) by American Indian Tribes.

#### **E. The BLM Should Not Proceed Because Meaningful Public Participation is Not Possible at this time**

We are in the midst of a national emergency around COVID-19 which makes it exceptionally difficult for people to participate in comment processes. Proceeding with the WPCI at this time would violate the public participation requirements of the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA). As BLM has recently been reminded, “[p]ublic involvement in oil and gas leasing is required under FLPMA and NEPA” and “the public involvement requirements of FLPMA and NEPA cannot be set aside in the name of expediting oil and gas lease sales.” *Western Watersheds Project v. Zinke*, Case No. 1:18-cv-00187-REB (D. Idaho, Sept. 21, 2018).

This holding is relevant to the WPCI as well. In particular, FLPMA requires that BLM give “the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and

programs for, and the management of, the public lands.” 43 U.S.C. § 1739(e). NEPA requires that “environmental information is available to public officials and citizens before decisions are made and before actions are taken” and reiterates that “public scrutiny is essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). Further, NEPA obligates the BLM to “[m]ake diligent efforts to involve the public in preparing and implementing the NEPA procedures.” *Id.* § 1506.6(a).

Moving forward with the WPCI comment period and approval, a decision that sets the stage for many potential future projects, when the public is unable to properly participate violates the requirements of NEPA and FLPMA. BLM’s public rooms are closed (making it difficult to conduct research or deliver comments), and state and local orders are encouraging or requiring people to stay at home and limiting travel. Notably, Wyoming’s connectivity rating ranks 46<sup>th</sup> in the nation for broadband internet access, compounding the challenges with participating in the comment process. Broadband internet is particularly problematic in rural areas of the state, exacerbating the challenges of participation in areas likely to be affected by the WPCI. Further, the WPCI alternatives cross significant segments of private lands, so there are owners and residents of these lands who will be particularly interested in and affected by the proposal. Moving forward with a project proposal that will require companies to enter on to private land for development activities is especially irresponsible at this time.

Members of Congress, attorneys general, and state and local governments have submitted requests that the Federal government pause or extend public comment periods for rulemaking efforts and other processes during the novel coronavirus pandemic.<sup>5</sup> Administrative actions and public comment periods for other Federal agency actions are being suspended or extended for “to be determined” amounts of time due to the national emergency.<sup>6</sup> BLM should heed these many indications that it is not responsible to move forward with the WPCI at this time. Five conservation organizations in Wyoming requested an extension of the public comment periods for the foregoing reasons (attached as Appendix 7 and incorporated by reference) but did not receive a response from the BLM State Office.

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<sup>5</sup> See, e.g., letter from fourteen House of Representatives Committee Chairs to Office of Management and Budget, Acting Director Russell Vought, submitted April 1, 2020:

[https://www.eenews.net/assets/2020/04/02/document\\_gw\\_08.pdf](https://www.eenews.net/assets/2020/04/02/document_gw_08.pdf). Letter from Senators Wyden, Merkley, and Udall to Secretary Bernhardt requesting a pause on comment periods, April 3, 2020:

<https://www.wyden.senate.gov/imo/media/doc/040320%20Letter%20on%20DOI%20comment%20periods.pdf>. Letter from state attorney generals to Office of Management and Budget, Acting Director Russell Vought, submitted March 31, 2020: [https://portal.ct.gov/-/media/AG/Press\\_Releases/2019/COVID-19-Rule-Delay-Letter---Final.pdf?la=en](https://portal.ct.gov/-/media/AG/Press_Releases/2019/COVID-19-Rule-Delay-Letter---Final.pdf?la=en). Letter from various state and local government organizations requesting a pause on public comment and rulemaking processes, submitted March 20, 2020: <https://www.nga.org/letters-nga/state-and-local-government-organizations-seek-pause-on-public-comments-on-rulemaking-processes>.

<sup>6</sup> For example, DOI’s Interior Board of Land Appeals extended all filing deadlines by 60 days in response to COVID-19; the Daniel Boone National Forest Supervisor suspended the public objection period for its planning effort in light of COVID-19; and the U.S. Forest Service extended a public comment period for the Nantahala and Pisgah forest plan revision with the length of time to be determined (available at: <https://www.fs.usda.gov/detail/nfsnc/home/?cid=stelrdb5397660>).



#### IV. CONCLUSION

For the aforementioned reasons, we the undersigned ask that the BLM conduct further analysis of this project proposal to ensure that the WPCI complies with NEPA, FLPMA, and the relevant implementing regulations. Particularly, we ask that the BLM establish the purpose and need for this project; disclose and analyze the project's potential impacts to wildlife and water resources as NEPA requires; adhere to the 2015 grouse plans, and Wyoming's sage grouse and ungulate migration corridor executive orders as FLPMA requires, conduct robust engagement with Tribes in Wyoming that have a significant stake in this project, and postpone the project in its entirety until the public can meaningfully engage in its review. Thank you for the opportunity to comment on this proposal.

Sincerely,

John Rader  
Conservation Advocate  
Wyoming Outdoor Council  
[john@wyomingoutdoorcouncil.org](mailto:john@wyomingoutdoorcouncil.org)

Jerry Otero  
Senior Energy Analyst  
National Parks Conservation Association  
[jotero@npca.org](mailto:jotero@npca.org)

Brian Rutledge  
Vice President/Director, Sagebrush Ecosystem Initiative  
National Audubon Society  
[Brian.Rutledge@audubon.org](mailto:Brian.Rutledge@audubon.org)

Daly Edmunds  
Policy and Outreach Director  
Audubon Rockies (WY, CO, UT)  
[Daly.Edmunds@audubon.org](mailto:Daly.Edmunds@audubon.org)

## Appendices

1. Mem. Order and Decision, *Western Watersheds Project v. Schneider*, 2019 U.S. Dist. LEXIS 181043 (D. Idaho Oct. 16, 2019)
2. Mem. Order and Decision, *Montana Wildlife Federation et.al. v. Bernhardt et.al.* CV-18-69-GF-BMM (D. Montana May 22, 2020)
3. John W. Connelly, Clait E. Braun and Michael A. Schroeder, *Sage-Grouse Population Declines: Species in Crisis and Agencies in Denial*, Grouse News 58 (December 2019).
4. *WildEarth Guardians v. Zinke*. 368 F. Supp. 3d 41 (D.D.C. 2019)
5. Wyoming Mule Deer and Antelope Migration Corridor Protection Executive Order (Order 2020-1)
6. Map of Alt. D intersecting RD2H MDC high use areas and stopovers
7. Letter to Acting Wyoming State Director Duane Spencer Re: Request for Extension of Wyoming Pipeline Corridor Initiative Comment Period (June 11, 2020).