

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THEODORE ROOSEVELT)
CONSERVATION PARTNERSHIP)
555 Eleventh St. N.W., 6th Floor)
Washington, DC 20004)
(202) 654-4600,)

Plaintiff,)

v.)

DIRK KEMPTHORNE, in his official)
capacity as the Secretary of the United)
States Department of the Interior)
1849 C Street, N.W.)
Washington, DC 20240)
(202) 208-3100,)

and)

UNITED STATES BUREAU OF LAND)
MANAGEMENT)
1849 C Street, Room 406-LS)
Washington, DC 20240)
(202) 452-5125,)

Defendants.)

Case: 1:08-cv-01047
Assigned To : Leon, Richard J.
Assign. Date : 6/18/2008
Description: Admn. Agency Review

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Theodore Roosevelt Conservation Partnership ("TRCP") states its Complaint and prays for relief as follows.

INTRODUCTION AND OVERVIEW OF CLAIMS

1. This action challenges the Bureau of Land Management's ("BLM") failure to implement the monitoring and mitigation requirements established in BLM's July 2000 Record of Decision ("ROD") for the Pinedale Anticline Oil and Gas Exploration and Development Project ("Project") in the Pinedale Anticline Project Area ("PAPA"). A copy of the ROD is available online at <http://www.blm.gov/wy/st/en/info/NEPA/pfodocs/anticline.html> (visited May

27, 2009). The ROD authorizes the development of 700 oil and gas wells over 10 to 15 years by various development entities (collectively, the “Operators”). The ROD is based on the Final Environmental Impact Statement for the Project (“FEIS”), a copy of which also is available at the above referenced web address.

2. The PAPA comprises 197,345 acres of Federal, state and private land in western Wyoming. The PAPA historically supported substantial populations of greater sage grouse and is home to what traditionally has been one of Wyoming’s strongest mule deer populations. These species, along with other big game ungulates (moose, pronghorn antelope and elk), have offered some of Wyoming’s best hunting and recreational opportunities.

3. In developing the ROD and its supporting environmental documentation under the National Environmental Policy Act (“NEPA”), 42 U.S.C. 4321 *et seq.* (collectively, the “NEPA Documents”), BLM committed to Adaptive Environmental Management (“AEM”), which BLM concluded was both necessary and fundamental to development of the PAPA in an environmentally sensitive manner that complied with BLM’s obligations under the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. 1701 *et seq.*, and related oil and gas operations authorities (e.g., 43 C.F.R. § 3162.1).

4. The AEM mechanism, by which BLM committed to comply with both NEPA and FLPMA, has failed unequivocally. *See, generally*, Declaration of Rollin D. Sparrowe attached hereto as Exhibit A (“Sparrowe Declaration”). In fact, AEM did not even commence until *four years after the ROD was adopted*. Today, the AEM mechanism has completely collapsed, with most of the relevant working groups not having met for over two years. By failing to carry out the mitigation promised in the ROD and supporting NEPA Documents, BLM has violated its procedural obligations under NEPA and its substantive obligations under FLPMA.

5. Plaintiff TRCP seeks judicial review of BLM's violations pursuant to the Administrative Procedure Act ("APA"), which allows this Court to hold unlawful and set aside final agency action it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" 5 U.S.C. § 706(2)(a), or that is "without observance of procedure required by law;" 5 U.S.C. § 706(2)(d). Alternatively, the APA allows this Court to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1).

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant NEPA, 42 U.S.C. §§ 4321 *et seq.* and its implementing regulations, FLPMA, 43 U.S.C. §§ 1701 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. § 2201, 28 U.S.C. § 1331 (federal question), and the APA, 5 U.S.C. §§ 551 *et seq.* BLM's failure to implement the required AEM constitutes a "failure to act" for purposes of 5 U.S.C. § 551(13) (definition of "agency action") and 5 U.S.C. § 706(2), or alternatively, "agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1).

7. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because Defendant Kempthorne, as the Secretary of the United States Department of the Interior ("Department"), and Defendant BLM, both are headquartered in Washington, D.C. Plaintiff maintains its corporate office in Washington, D.C. Moreover, oil and gas development on public lands is being dictated by federal policies formulated and directed by the Department's Washington-based officials, including Defendant Kempthorne. On information and belief, much of the decision-making regarding this development, including the Project, is being made by those officials. Finally, the manner in which oil and gas development is carried out on public lands

throughout the western United States constitutes a matter of national concern that is not confined to the geographic area in which development occurs.

PARTIES

9. Plaintiff TRCP is a 501(c)(3) nonprofit corporation, representing a coalition of leading hunting, fishing and conservation organizations, labor unions and individual grassroots partners working together to preserve the traditions of hunting and fishing by: 1) expanding access to places to hunt and fish; 2) conserving fish and wildlife and the habitats necessary to sustain them; and 3) increasing funding for conservation and management. TRCP is supported by a nationwide network of over 90,000 sportsmen and women and more than 1,400 local and state-level clubs and organizations, that themselves represent nine million Americans.

10. TRCP's members, including Dr. Sparrowe, historically have hunted, fished, and observed wildlife and fish species, currently hunt, fish and observe wildlife and fish species, and plan to continue to hunt, fish and observe wildlife and fish species, in areas within the PAPA and in areas to which animals using the PAPA in winter migrate during other seasons. Areas within the PAPA will be adversely impacted by irresponsible development of the PAPA, which is occurring in the absence of AEM. Dr. Sparrowe personally participated in the AEM process until its demise and has worked aggressively to revive and give meaning to AEM as originally intended in the ROD. *See, generally*, Sparrow Declaration.

11. In addition to the interests of its members directly impacted by actions within the PAPA, TRCP has an interest at the organizational level in receiving and disseminating current and accurate information about federal activities that impact the hunting and fishing resources on which TRCP members depend throughout the Nation. TRCP's governing Board of Directors specifically relies on such information when determining and recommending to its members

appropriate responses to proposed land use activities on public lands in one or more western states, including Wyoming, Utah, Colorado, Montana and New Mexico.

12. The best available scientific data demonstrates that the number of mule deer using the “Mesa” in the PAPA have declined by 46% since the ROD was signed in 2000. *See* Sawyer, H. et al., 2006 ANNUAL REPORT. SUBLETTE MULE DEER STUDY (PHASE II): LONG-TERM MONITORING PLAN TO ASSESS POTENTIAL IMPACTS OF ENERGY DEVELOPMENT ON MULE DEER IN THE PINEDALE ANTICLINE PROJECT, Cheyenne, Wyoming, USA (2006) and Sawyer, H. et al., 2006. WINTER HABITAT SELECTION OF MULE DEER BEFORE AND DURING DEVELOPMENT OF A NATURAL GAS FIELD, *Journal of Wildlife Management* 70:396-403 (2006).

13. In addition, the best available science demonstrates that protections currently employed in the PAPA for sage grouse are utterly inadequate. *See* Western Association of Fish and Wildlife Agencies, *Using the Best Available Science to Coordinate Conservation Actions that Benefit Sage-Grouse Across States Affected by Oil and Gas Development in Management Zones I-II (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming)* (29 January 2008) citing, among others, Naugle et al., *Sage-grouse Population Response to Coal-bed Natural Gas Development in the Powder River Basin: Interim Progress Report on Region-wide Lek-count Analyses* (May 26, 2006).

14. The unmitigated mule deer decline across the PAPA, and continuing use of inadequate sage grouse protections in the PAPA are the direct result of BLM’s failure to implement AEM. A favorable decision from this Court declaring unlawful BLM’s non-compliance with the ROD and EIS, and an injunction prohibiting BLM from authorizing new development activities in the PAPA pending compliance with the ROD and EIS, will redress TRCP’s injury.

15. Defendant Dirk Kempthorne is sued in his official capacity as the Secretary of the Department. In that capacity, he is responsible for ensuring the Department and the agencies within the Department, including BLM, comply with all applicable laws and regulations, including NEPA and FLPMA.

16. Defendant BLM, an agency within the Department, is responsible for managing public lands for a variety of resources, including oil and gas development, and for protection of natural and human environments. BLM is required to comply with NEPA and FLPMA, and to evaluate, analyze, and disclose the impacts of federal undertakings to the public. BLM, through its Wyoming State Office, is responsible for production of the ROD, the EIS and subsequent failure to implement AEM as required by the ROD, which failure is the subject of this action.

LEGAL BACKGROUND

The National Environmental Policy Act

17. NEPA, 42 U.S.C. § 4321 *et seq.*, was enacted in recognition of “the profound impact of man’s activity on the interrelations of all components of the natural environment, [and] ... the critical importance of restoring and maintaining environmental quality to the overall welfare ... of man” 42 U.S.C. § 4331. NEPA “prescribes the necessary process by which federal agencies must take a ‘hard look’ at the environmental consequences of [their] proposed courses of action.” *Pennaco Energy, Inc. v. U.S. Dept. of Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004) (internal quotations omitted); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

18. NEPA is intended to focus the attention of the government and the public on the likely environmental consequences of a proposed agency action. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). It “places upon an agency the obligation to consider every significant aspect of the environmental impact of the proposed action” and

“ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (citations omitted).

19. As relevant to this action, NEPA required BLM to prepare an environmental impact statement (“EIS”) for the Project because it constituted a “major Federal action significantly affecting the quality of the human environment” 42 U.S.C. § 4332(2)(C). The EIS requirement “insure[s] a fully informed and well-considered decision” when a proposed activity may “significantly affect[] the quality of the human environment” *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978); 42 U.S.C. § 4332(2)(C).

20. NEPA requires that an EIS contain “a reasonably complete discussion of possible mitigation measures.” *Methow Valley*, 490 U.S. at 352. The mitigation must “be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d at 1142, 1154 (9th Cir. 1997). In other words, an EIS must include “[m]eans to mitigate adverse environmental impacts.” 40 C.F.R. § 1502.16(h); *see also* 40 C.F.R. § 1502.14(f).

21. Under NEPA, mitigation means:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action. (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment. (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. (e) Compensating for the impact by replacing or providing substitute resources or environments.

40 C.F.R. § 1508.20.

22. CEQ regulations implementing NEPA make clear that in any environmental impact statement and record of decision, “[a] monitoring and enforcement program shall be

adopted and summarized where applicable for any mitigation.” 40 C.F.R. § 1505.2. CEQ further admonishes that “[a]gencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases.” 40 C.F.R. § 1505.3.

23. CEQ regulations also state that “[m]itigation (§1505.2(c)) and other conditions established in the [EIS] or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency.” *Id.* To do so, CEQ explains the agency “shall: (a) Include appropriate conditions in grants, permits or other approvals[;] (b) Condition funding of actions on mitigation[;] (c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision[; and] (d) Upon request, make available to the public the results of relevant monitoring.”

24. All agencies of the federal government, including BLM, must comply with CEQ’s regulations. 40 C.F.R. § 1507.1.

25. BLM has adopted a NEPA Handbook to aid implementation. BLM’s NEPA Handbook provides: “Monitoring activities which are adopted in an appropriate decision document must be implemented as specified.” BLM NEPA Handbook VI-1. The BLM NEPA Handbook further provides: “All actions and mitigation measures, including monitoring and enforcement programs, adopted in a decision document are legally enforceable commitments.” *Id.*

The Federal Land Policy and Management Act

26. FLPMA directs the Secretary and BLM to manage public lands “under principles of multiple use and sustained yield.” 43 U.S.C. § 1732(a); *see also* 43 U.S.C. § 1701(a)(8) (listing purposes and values that should be considered in the management of public lands). FLPMA further requires that “[i]n managing the public lands the Secretary shall, by regulation or

otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”
43 U.S.C. § 1732(b).

27. BLM has not adopted regulations specifically to implement the prohibition on unnecessary or undue degradation, but has adopted regulations that implement its spirit in the context of onshore oil and gas development. One example of such regulations is 43 C.F.R. § 3162.1, which provides: “(a) The operating rights owner or operator, as appropriate, shall comply with applicable laws and regulations; with the lease terms, Onshore Oil and Gas Orders, NTL’s; and with other orders and instructions of the authorized officer. These include, but are not limited to, conducting all operations in a manner ... which protects other natural resources and environmental quality” Similarly, BLM regulations provide: “(a) The operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality.” 43 C.F.R. § 3162.5-1(a). Moreover, “(b) The operator shall exercise due care and diligence to assure that leasehold operations do not result in undue damage to surface or subsurface resources or surface improvements.” 43 C.F.R. § 3162.5-1(b).

28. Before BLM approves any Application for Permit to Drill (“APD”), BLM must “prepare an environmental record of review or an environmental assessment, as appropriate. These environmental documents will be used in determining whether or not an environmental impact statement is required and in determining any appropriate terms and conditions of approval of the submitted plan.” 43 C.F.R. § 3162.5-1(a).

FACTUAL BACKGROUND

The Importance of AEM in Protecting the PAPA’s Wildlife Resources

29. The AEM mechanism was originally described in the 1999 Draft Environment Impact Statement (“DEIS”) for the Project. A copy of the DEIS is available at <http://www.blm.gov/wy/st/en/info/NEPA/pfodocs/anticline.html> (visited May 27, 2008).

30. According to the DEIS (Appendix F) an adaptive management plan conceptually “defines a process to increase the speed at which managers learn from their decisions about resources and how development activities affect them.” According to that framework, adaptive management programs consist of several sequential obligations: 1) assessing the problem; 2) designing management plans; 3) implementing monitoring plans; 4) monitoring; 5) evaluating progress; and 6) adjusting plans based on lessons learned. DEIS, Appx. F, F-1.

31. BLM “determined that an AEM plan for [the Project] would be prepared and implemented generally following the framework contained in [DEIS Appendix F].” At that time, BLM “anticipated that a draft AEM plan would be developed during the spring and summer of 2000 and presented for public review and comment by the end of 2000.” DEIS, Appx. F, F-1.

32. Appendix F explained there were significant uncertainties regarding the level of development in the PAPA and the impact of development on the environment. DEIS, Appx. F, F-2. According to BLM, however, a “properly prepared and thoroughly evaluated AEM plan may be suitable for dealing with these uncertainties. Such a plan would provide a mechanism for continuously modifying management practices in order to allow continued exploration and development while continuing to protect the environment.” DEIS, Appx. F, F-2.

33. BLM explained that AEM included the following:

- Determine the effectiveness of mitigation measures contained in the EIS and routinely required by the BLM and modify the measures to achieve the stated goal. ...
- Provide a rapid response to environmental change.
- Validate predictive models used in the EIS and revise the models/projections as necessary as based on field observations and monitoring.
- Accurately monitor and predict cumulative impacts
- Allow for stakeholder participation in future decisionmaking.

DEIS, Appx. F, F-2. The contemplated framework was set forth explicitly in Section 6 of Appendix F. F-4 through F-8. Specific commitments included problem assessment (Step 1); designing management and monitoring programs (Step 2); implementation (Step 3); monitoring (Step 4); evaluation (Step 5); and adjustment (Step 6).

34. The DEIS (Executive Summary) elaborated on the role of AEM as foreseen by BLM in 1999. BLM explained:

This EIS contains a framework for an [AEM] Plan that would be adopted for this project. This plan would involve the participation of all affected interest (public land users, federal, state and local agencies, industry, and others). The plan would be designed to verify implementation of mitigation measures adopted in the ROD; measure the success of those mitigation measures; make appropriate modifications to mitigation based on actual performance; allow for peer review of mitigation and monitoring results; and provide feedback to the interested public.

DEIS, Executive Summary 5.

35. The ROD itself explained the importance of AEM in relation to the overall Project. For example, BLM explained that proposed and cumulative development within each management area would be reviewed “at least annually within the context of the Adaptive Environmental Management (AEM) planning process period.” Moreover, monitoring would be developed “to address both direct and cumulative impacts.” ROD, Section 4, 25.

36. BLM acknowledged that inventories and special studies would be needed to determine the extent of site specific impacts and appropriate mitigation and that the Operators might be required to complete those inventories or studies “under guidelines provided by the BLM or as developed through the AEM planning process.” *Id.* According to BLM, AEM would help, for example, to “provide information to develop the need/appropriateness of [centralized production facilities] and when and where they should be installed.” *Id.* at 27.

37. The AEM mechanism was explained further in Appendix C of the FEIS. That document “outlines the planning process for the Adaptive Environmental Management (AEM) of

the Pinedale Anticline Project Area (PAPA).” FEIS, Appx. C, C-1. Appendix C explains the AEM mechanism would develop resource monitoring plans and, among other things:

- Determine the effects of PAPA Development on these resources;
- Determine the effectiveness of the mitigation measures contained in the Record of Decision (ROD);
- Modify the mitigation measures as deemed appropriate to achieve the stated goals/objectives;
- Assure that non-oil-and-gas related BLM decisions (such as grazing, recreation, etc.) regarding the PAPA are coordinated with gas-related development;
- Provide a rapid response to unnecessary/undo environmental change; (validate predictive models used in the EIS and revise the models/projections as necessary based on field observations and monitoring;
- Accurately monitor and predict cumulative impacts through BLM maintenance of a geographic information system (GIS) for the PAPA including all activities (natural gas, residential, agricultural, etc.) on federal and non-federal lands and how they are effecting resources; allow for Stakeholder participation in future decision making;
- Provide guidance for monitoring (surveys) upon which the need to initiate Section 7 consultation with USFWS will be determined.

FEIS, Appx. C, C-2. Appendix C further explains that monitoring plans “will be prepared for the following resources and activities” including big game (mule deer and antelope) and upland game (sage grouse). *Id.*

38. The AEM mechanism was to be chaired by the Pinedale Anticline Working Group (“PAWG”). The PAWG would oversee various task groups, including a wildlife task group, a water resources task group and others. FEIS, Appx. C, C3. Appendix C promised that the PAWG would meet “at least once a year or more often as needed.” FEIS, Appx. C, C4. BLM further promised that the PAWG would “keep written record[s] of meetings and disseminate to members and interested public [relevant information].” FEIS, Appx. C, C-4.

BLM also promised that the PAWG, itself, would “conduct an annual field inspection to review the implementation of construction and rehabilitation operations.” *Id.* Most importantly, the PAWG would “oversee implementation of monitoring plans for the project.” *Id.*

39. The task groups would be responsible for implementing monitoring plans approved by BLM, reviewing and evaluating monitoring data, recommending modifications to the development and monitoring plan to the PAWG (and therefore BLM), and recommending modification to mitigation plans as needed. FEIS, Appx. C, C-4.

40. Appendix C promised that “BLM will implement and coordinate the AEM Planning Process.” FEIS, Appx. C, C4.

41. When responding to comments on the DEIS, BLM again emphasized the importance of the AEM program to successful implementation of the Project. *See, e.g.*, FEIS, Appx. 5, (Response to comment letters) 5-181 (“BLM concurs that the Adaptive Environmental Management (AEM) planning process will be vital to ensuring that all reasonable efforts are undertaken to reduce environmental impacts from this project while still allowing the operators to develop the leases. As stated on page 5 of the Executive Summary, BLM will require implementation of an AEM planning process in the Record of Decision (ROD).”). BLM further explained that its AEM “must be designed to consider synergistic affects. BLM anticipates that one of the primary goals of the planning process will be to design monitoring to allow for the extrapolation of results to all aspects of environmental protection.” FEIS, Appx. 5, 5-182 -183.

42. BLM also made clear that the “AEM planning process will be open to public participation.” FEIS, Appx. 5, 5-183.

43. With respect to mitigation measures associated with the Project, BLM explained:

One purpose of the AEM planning process is to formulate [mitigation] measures, identify what level of impact would initiate practices and what those practices

would be. It is understood that the level of adequacy of those measures and practices would be debated and identified by the anticipated agency work group discussed in Appendix F, Section 3.0, page F3 of the DEIS. The ROD will provide the commitment for the funding and identify who will conduct the monitoring of impacts and enforcement as well as specify a time frame within which the plan must be completed.

FEIS, Appx. 5, 5-184.

44. BLM elaborated on the role that its AEM program would play relative to NEPA's requirements for mitigation. FEIS, Appx. 5, 5-190. According to BLM:

[T]he decision to require monitoring through the AEM planning process is consistent with BLM's obligations under NEPA. CEQ Regulations at 40 CFR § 1505.2 require BLM to adopt the monitoring and enforcement program 'where applicable for any mitigation'. BLM has determined that the AEM planning process is applicable to future development in the PAPA and that the process will satisfy the monitoring and enforcement plan requirements in the CEQ Regulations. In addition, CEQ Regulations at 40 CFR § 1505.3 address BLM's obligations for implementing a decision. ... BLM has determined that adopting AEM planning process is an effective mechanism to assure that decisions made in the ROD are carried out and the results of monitoring are effectively communicated to cooperating agencies as well as the public.

FEIS, Appx. 5, 5-190.

45. In responding to comments on the DEIS, BLM explained its duty to "balance the need for maximum economic recovery with the need to protect natural resources and environmental quality on the leased lands." FEIS, Appx. 5, 5-191 *citing* 40 CFR § 3162.1(a). BLM further explained "FLPMA regarding the management of use, occupancy and the development of the public lands (Section 302)(b), requires the 'Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.'" *Id.* BLM explained "it must preserve, to the extent practicable and reasonable, unique in valuable characteristics of the natural resources present in the PAPA" to comply with these obligations. *Id.*

46. BLM further made clear that it has the authority to enforce its mitigation requirements. FEIS, Appx. 5, 5-192. According to BLM a purpose of the DEIS was “to identify reasonable and relevant mitigation measures that could improve the project” *Id.* The AEM mechanism represented this effort.

47. In response to criticism of AEM from industry representatives, BLM defended it, in part by referencing the Environmental Protection Agency’s (EPA) approval of the program. FEIS, Appx. 5, 5-200. (“EPA, in their role as final arbitrator of the adequacy of all NEPA documents, agreed that AEM planning process would play a key role in monitoring future development in the PAPA”).

48. BLM candidly recognized:

Mitigation eventually adopted by BLM in the ROD may or may not be effective in minimizing impacts. This fact alone demands that monitoring of project activities occur. BLM has a responsibility to protect the natural resources on federal lands and minerals in the PAPA and that public trust necessitates diligent monitoring of the impacts of the project. Although BLM welcomes and encourages the participation of operators in the design and implementation the AEM planning process, BLM is and will remain the final decision maker regarding the need for and adequacy of monitoring programs in the PAPA. As such, BLM will not “negotiate” the monitoring program but rather will rely on the AEM planning process to design the monitoring program.

FEIS, Appx. 5, 5-200.

49. BLM further explained that, notwithstanding concerns expressed by industry groups about the scope of AEM, “because the potential threats to natural resources are so severe, BLM is compelled to recommend a process that far exceeds monitoring applications developed for past projects.” FEIS, Appx. 5, 5-24.3. BLM also reiterated its statement that it would not have funds available to implement the monitoring program and that therefore, costs would be born by the operators.” *Id.*

50. BLM responded to specific concerns expressed about mitigation required for pronghorn antelope by explaining “research is in progress that will reveal pronghorn movement routes in the vicinity of the PAPA. If additional protection to these habitat components becomes necessary, the AEM planning process is the appropriate vehicle to change management strategies as new information becomes available over the life of the project.” FEIS, Appx. 5, 5-245.

51. BLM made clear the “AEM planning process (Appendix F) will ensure newly available information, from whatever source, is applied to decision making.” FEIS, Appx. 5-247.

52. Many of BLM’s responses to comments received on the DEIS were reiterated in response to comments on the FEIS. For example, BLM again made clear that the costs of monitoring would be born by the Operators. FEIS, Exhibit G, G-33. In response to concerns about AEM, BLM reiterated that it “was optimistic that the AEM approach would allow for quick and meaningful response to development issues.” *Id.* BLM reiterated that Appendix F of the DEIS “addresses the need for the AEM planning process to develop scientifically sound monitoring and correct practices based on the results of that monitoring, as necessary.” *Id.*

53. BLM further reiterated that the AEM mechanism would conduct (at a minimum) annual reviews of ongoing development and monitoring data. FEIS, Exhibit G, G36. BLM made clear that AEM was not a NEPA requirement, but that its AEM mechanism would satisfy NEPA’s monitoring requirements since the EIS deemed them necessary. FEIS, Exhibit G, G39. BLM explained AEM “is a way of administering a complex program of monitoring and for providing a means for making mid-course corrections in planned activities. The AEM process identified in the EIS is simply a mitigating opportunity that, if properly and diligently applied, will result in less impacts in the PAPA over the long term period.” *Id.*

The Collapse of AEM

54. The PAWG was convened shortly after the ROD was adopted, but did not perform as BLM anticipated. *See generally* Sparrowe Declaration. After its initial year, and while still in the preliminary phases, the PAWG was challenged by one of the Operators and temporarily suspended. Sparrowe Declaration ¶ 26.

55. Intensive drilling and development authorized by the ROD continued for the next 2½ years while BLM reconstructed the PAWG under a federal charter from the Secretary and in compliance with the Federal Advisory Committee Act. Vetting the PAWG membership and obtaining internal approvals took another year. Sparrowe Declaration ¶ 27.

56. The PAWG had its first meeting in August 2004 – four years after drilling began under the ROD. Virtually no baseline data had been reviewed during the intervening period of development and no substantive changes were made to development protocols.

57. In the meantime, modifications to the Project were being made without oversight from the PAWG. Sparrowe Declaration ¶¶ 28-29. One such modification involved year-round drilling in mule deer crucial winter range and greater sage-grouse breeding and nesting habitat. *See Questar Year-Round Drilling Proposal Environmental Assessment* (November 2004) (copy available at <http://www.blm.gov/wy/st/en/info/NEPA/pfodocs/questar.html>).

58. BLM's NEPA documentation for this modification was "tiered" off the ROD and EIS, *see id.* at 9, and despite the fact that the PAWG had not functioned for 4 years, BLM explained that the issue of year-round drilling would be subjected to PAWG review and analysis. The PAWG was, however, incapable of reviewing year-round drilling proposals because no good baseline data existed. Thus, Questar's year-round drilling was approved without PAWG review or analysis.

59. When the PAWG convened again in 2004, the task groups conducted analytical work and made recommendations to the PAWG, who decided what to transmit to BLM. Sparrowe Declaration ¶¶ 32-33. These task groups began by evaluating the EIS and ROD requirements for managing development, including mitigation and monitoring for wildlife. In general, the task groups found that key provisions of the EIS and ROD had never been implemented. *Id.* This fact was later confirmed by BLM. *Id.* ¶ 43.

60. Foremost among the neglected requirements of the ROD and EIS was the AEM requirement itself, by which BLM was to review wildlife data on impacts of development, and to make changes in field operations as necessary to lessen those impacts. Sparrowe Declaration ¶¶ 33 and 43. Dr. Sparrowe, operating as the Chair of the Wildlife Monitoring Task Group, attempted to develop for BLM the parameters of a functional AEM project. Sparrowe Declaration ¶ 34.

61. Under Dr. Sparrowe's guidance, the Wildlife Monitoring Task Group identified several tasks in significant detail that BLM could immediately perform to help reinvigorate AEM. Most of these were sidestepped or ignored entirely. Sparrowe Declaration ¶¶ 35-36.

62. In 2005, under criticism from the PAWG itself, BLM called a special meeting at which the Field Manager reinterpreted the PAWG's charge, narrowing it to only "post-decisional issues" and clarifying that each participant could exercise its right to comment through NEPA processes prior to site-specific project decisions. Sparrowe Declaration ¶ 38. BLM's newfound interpretation of the PAWG's role was not consistent with the ROD or EIS and many members of the task groups ceased participating. Meetings of both the task groups and the PAWG became increasingly infrequent. Sparrowe Declaration ¶ 39.

63. In September 2005, BLM approved the “Anschutz-Shell-Ultra Year-Round Drilling Demonstration Project” which, like the 2004 Questar proposal, included year-round drilling. BLM approved drilling operations between November 15, 2005 and July 31, 2006 within big game crucial winter ranges. It allowed completion operations beginning May 1, 2006. The Decision Record allowed up to two drilling rigs on each of three well pads between November 15, 2005 and July 31, 2006.

64. In November 2005, the Wildlife Monitoring Task Group transmitted through the PAWG to BLM two specific recommendations regarding mule deer management in the PAPA: a) maintain current mule deer populations, and b) maintain current remaining, undisturbed habitats useful to deer in winter. Sparrowe Declaration ¶40. Year-round drilling modifications approved by BLM have been inconsistent with these recommendations, but because the AEM program was so dysfunctional, the recommendations could not be made timely. *Id.* Today, BLM is ignoring these recommendations by preparing to approve expanded year-round drilling as discussed below.

65. Also in November 2005, BLM approved an addendum to the Questar Year-Round Drilling Proposal, which allowed for accelerated winter development on the Mesa, including well completions and the addition of a third drilling rig on the Mesa 3-20 winter drilling pad, and allowed a total of seven drilling rigs during winter 2005-2006.

66. In the spring of 2006, the appointments of the PAWG members were allowed to expire without notice and without any guidance as to PAWG management in the interim. A period of several months followed during which the PAWG again fell dormant while drilling continued without any AEM program in place. Sparrowe Declaration ¶ 42.

67. Several alienated members of the PAWG in May 2006 sent a letter to the editor of the local newspaper explaining their views that BLM “refuses to enable the PAWG to consider the recommendations that are a result of extensive work conducted by the volunteer members of the task groups.” A copy of PAWG members’ letter is available at <http://www.pinedaleonline.com/news/2006/05/IsPAWGdead.htm> (visited May 27, 2008). Those members opined that “because of the BLM’s dysfunctional management” many of the monitoring requirements that the task groups had formulated “have not been able to move forward proactively.” They explained “the BLM itself is the biggest impediment to realization of” the potential of AEM. The group explained that “a small fraction of the monitoring recommendations, or even the monitoring required by the Record of Decision has been acted upon by the agency.” They explained that much of the relevant monitoring data “is hidden, inaccessible to the public or re-interpreted to meet BLM’s public agenda. And now that its clear that mitigation is immediately needed to offset impacts to declining wildlife and their quality, BLM is unwilling to take the steps necessary to follow its own guidelines.”

68. The PAWG was re-chartered in the Fall of 2006. However, Dr. Sparrowe informed the PAWG in early 2007 that the Wildlife Monitoring Task Group was no longer functional due to a lack of participation by its members, all of whom concluded that BLM was ignoring the PAWG entirely. It appears the Wildlife Monitoring Task Group is not the only non-functioning task group. The last official minutes for the various task groups were dated as follows: Air Quality (Nov. 2004); Cultural-Historic Resources (May 2005); Reclamation (Nov. 2004); Socioeconomic (Feb. 2006); Transportation (Nov. 2004); Water Resources (Sept. 2007). Copies of these minutes may be found at http://www.blm.gov/wy/st/en/field_offices/Pinedale/pawg/minutes.html (visited May 27, 2008).

69. The Wildlife Monitoring Task Group has done nothing substantive since late 2005. The Wildlife Task Group's last published minutes (Nov. 10, 2005) explain: "Operationally, it is our conclusion that neither the [Wildlife Task Group] nor PAWG are active players in mitigation negotiations and that there is no comprehensive plan to mitigate effects on wildlife."

70. The Sporting Conservation Council ("SCC"), an advisory committee chartered under the Federal Advisory Committee Act ("FACA") and whose special expertise was recently acknowledged by President Bush in Executive Order ("EO") 13443: Facilitation of Hunting Heritage and Wildlife Conservation (Aug. 16, 2007) recently called to Defendant Kempthorne's attention the demise of the PAWG and the problem presented for wildlife in the PAPA. One of the SCC's specific duties, as reflected in its FACA charter, is "Recommending policies or programs to fully incorporate the conservation of wildlife and other natural resources into energy development."

71. In a letter dated December 4, 2007, the SCC transmitted a list of "Improvements Needed for Wildlife in Energy Development on the Pinedale Anticline." SCC noted, among other things:

- "Important requirements for wildlife-related actions from the Resource Management Plan [RMP] Record of Decision [ROD] and Pinedale Anticline Project Area [PAPA] Exploration and Development ROD have not been implemented."
- "The impacts of some development are sufficiently great to justify the need to mitigate for the losses. ... BLM apparently has no process to trigger mitigation, qualitative or quantitative, for resources damages resulting from energy development."
- "It appears that there is no AEM process in place. It also appears that the best use of available data is not being made to drive an AEM process and therefore BLM decisions are not consistently being made using available data."

72. As an example of this last point, SCC explained: “1) Modifications in operations are not being made based on available data for mule deer that show adverse impacts unless individual companies voluntarily agree to changes[,] 2) Sage grouse data also show effects on breeding behavior and abandonment of habitats and it is not clear that those data are being used, 3) BLM field offices have resisted implementation of AEM and proposed demonstration projects.”

73. BLM is currently soliciting nominations for individuals to serve on the PAWG. http://www.blm.gov/wy/st/en/info/news_room/2008/05/20pfo-pawg.html. On information and belief, the PAWG lacks the following required representatives: 1) a representative from Sublette County, 2) a representative from the Town of Pinedale, 3) a representative from the oil and gas operators, 4) a representative from the environmental community, 5) a representative from the livestock operators, and 6) a representative from the adjacent landowners are needed. In short, nearly all of the PAWG seats are vacant.

74. Under its federally approved charter, the PAWG cannot take any official action at this time, because it currently lacks a quorum (six of its nine seats).

75. At this time, there is no entity overseeing monitoring, evaluation or adjustment of oil and gas drilling procedures to protect wildlife as promised under the ROD and EIS.

76. Recently the Department of the Interior issued Technical Guide on Adaptive Management, which explains: “The accumulation of understanding and subsequent adaptation of management strategy depends on feeding monitoring and assessment results back into the decision making process.” Adaptive Management Technical Guide at 53 (copy available at <http://www.doi.gov/initiatives/AdaptiveManagement/documents.html>) (visited May 29, 2008). As the Department explained: “Success in adaptive management ultimately depends on

effectively linking monitoring and assessment to objective-driven decision making.” *Id.* These key linkages simply are not occurring in the PAPA today.

Proposed Expansion of Development in the PAPA

77. Since 2000, most natural gas development in the PAPA has been along the Anticline Crest, which is approximately 2 to 3 miles wide, 25 to 30 miles long, and centered along the length of the PAPA. As of November 2006, there were at least 642 producing wells on 340 well pads in the PAPA.

78. In December 2007, BLM issued a “revised draft” Supplemental Environmental Impact Statement (“SEIS”) analyzing expanded, year-round drilling throughout the PAPA. *Revised Draft Supplemental Environmental Impact Statement Pinedale Anticline Oil And Gas Exploration And Development Project, Sublette County, Wyoming* (December 2007). The proposal includes year-round development of 4,399 additional natural gas wells within the PAPA. SEIS at iii (Executive Summary). In addition to year-round development, BLM identified the need for additional pipeline corridors to transport hydrocarbon products from the PAPA to processing plants in southwestern Wyoming. *Id.*

79. As part of year-round development (construction, drilling, completion, and production), BLM is considering granting a permanent exception from seasonal development restrictions within big game (mule deer and pronghorn) crucial winter habitats and greater sage grouse seasonal habitats. *Id.* Indeed, as explained in the SEIS: “In the years since the PAPA ROD was issued, the most frequently requested exception is one where the operator/leaseholder seeks to continue working past the onset of big game timing restrictions.” BLM has granted (or partially granted) requests for exceptions from wildlife-based development restrictions approximately 90% of the time. SEIS, Appx. 1, Table 3.

80. Development under the proposed plan would exceed thresholds authorized in the ROD. Analysis thresholds with respect to air quality already have been exceeded, with multiple ozone warnings issued this past winter. BLM has determined that the latest proposal “could cause significant impacts to the human and natural environments.” *Id.*

81. BLM’s “Preferred Alternative” in the SEIS includes the same project components, including up to 4,399 additional wells on up to 12,885 acres of disturbance, but limits development in some areas. An adaptive management approach and compensatory mitigation fund are additional elements of the BLM preferred alternative. The PAWG, however, will have a reduced role, and there will be a new “wildlife monitoring group” limited to BLM, State representatives and the Operators (i.e., no public representatives will participate).

82. Regardless of the alternative BLM selects, BLM has explained “Decreased hunting opportunities are expected in the PAPA with decreased abundance of big game and upland game birds as density of wellfield development increases. Impacts to Recreation Resources would include increased traffic and human presence in the PAPA, increased noise, and changes to the visual landscape, making it a less desirable place to recreate.” SEIS at vii (Executive Summary).

83. With respect to wildlife, BLM has explained: “Implementation of any Alternative is likely to create additional barriers to wildlife movements with increased fragmentation by creation of edges and patches within former contiguous habitats.” SEIS at viii (Executive Summary). Moreover: “Big game would continue to be adversely affected by well field development that causes direct loss of crucial winter range, other seasonally-used habitats, and decreased habitat function near roads and well pads due to human activity. Similarly, decreased

habitat function is expected at greater sage-grouse leks by surface disturbance and potential human presence within 2 miles of nesting and brood-rearing habitats.” *Id.*

84. The SEIS “incorporates by reference and tiers to the environmental documents prepared for the PAPA EIS.” SEIS 1-5 (Introduction).

85. BLM has explained that, once the SEIS is finalized, a new ROD will be prepared that “will supersede the PAPA ROD.” SEIS at 1-14 (Executive Summary).

86. The SEIS ignores the decline in mule deer populations documented by recent studies. BLM’s preferred alternative under the SEIS would “reset” the “environmental baseline” with respect to mule deer populations, incorporating the 46% decline into a new baseline. All impacts to mule deer would be measured against mule deer populations in the PAPA not as they existed when development began under the ROD, but rather, as they existed in May 2006. SEIS, Appendix 10 (Wildlife and Monitoring Mitigation Matrix). This is specifically contrary to the governing Resource Management Plan. Moreover, the preferred alternative would allow another 15% decline (or a total decline of 61% since 2000) in mule deer before any additional mitigation would be required. *Id.*

87. Similarly, BLM’s preferred alternative would allow another 30% decline in active sage grouse leks within the PAPA and a 30% decline in male lek attendance over two years. SEIS, Appendix 10 (Wildlife and Monitoring Mitigation Matrix).

88. In sum, BLM has failed to apply whatever monitoring data it has collected, as it committed to do in the ROD. The new development being contemplated in the SEIS is specifically contrary to earlier recommendations of the Wildlife Monitoring Task Group. Sparrowe Declaration ¶¶ 46-51. But, because the PAWG cannot function without a quorum, there is no mechanism in place to address the impact of proposals being considered in the SEIS.

CLAIMS FOR RELIEF

Count One – NEPA Violation

89. The Partnership incorporates each of the foregoing paragraphs.

90. “Mitigation ... and other conditions established in the [EIS] ... and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency.” 40 C.F.R. § 1505.3. “A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.” 40 C.F.R. § 1505.2.

91. BLM determined that AEM was critical to the success of the Project and specifically incorporated AEM, both as a means of mitigation, and as a means of monitoring and enforcement of the terms of the ROD.

92. The AEM requirements in the ROD are not being implemented. The PAWG is not functioning substantively. BLM is not monitoring, evaluating and revising operations as required by the ROD as a condition of developing the PAPA. Development is proceeding in a manner that ignores the best available science and data concerning wildlife needs.

93. By failing to implement AEM, BLM failed to ensure compliance with mitigation and monitoring mechanisms in the ROD and EIS and to enforce the same. Accordingly, BLM has violated NEPA and its implementing regulations and has acted in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;” 5 U.S.C. § 706(2)(a), and that is “without observance of procedure required by law;” 5 U.S.C. § 706(2)(d).

94. Alternatively, BLM’s failure to implement AEM constitutes “agency action unlawfully withheld or unreasonably delayed” under 5 U.S.C. § 706(1).

Count Two – FLPMA Violation

95. The Partnership incorporates each of the foregoing paragraphs.

96. FLPMA directs the Secretary and BLM to manage public lands “under principles of multiple use and sustained yield” and requires “[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(a); 43 U.S.C. § 1701(a)(8); 43 U.S.C. § 1732(b).

97. BLM determined that AEM was critical to the success of the Project and specifically incorporated AEM, both as a means of ensuring that oil and gas development authorized under the ROD would not violate the principles of multiple use and sustained yield and would not result in unnecessary or undue degradation.

98. The AEM requirements in the ROD are not being implemented. The PAWG is not functioning substantively. BLM is not monitoring, evaluating and revising operations as required by the ROD as a condition of developing the PAPA. Development is proceeding in a manner that ignores the best available science and data concerning wildlife needs.

99. By failing to implement AEM, BLM has failed to meet its multiple use and sustained yield mandates and has failed to ensure against unnecessary and undue degradation of the public lands in the PAPA. Accordingly, BLM has violated FLPMA and BLM’s onshore oil and gas regulations and has acted in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;” 5 U.S.C. § 706(2)(a), and that is “without observance of procedure required by law;” 5 U.S.C. § 706(2)(d).

100. Alternatively, BLM’s failure to implement AEM constitutes “agency action unlawfully withheld or unreasonably delayed” under 5 U.S.C. § 706(1).

PRAYER FOR RELIEF

For the foregoing reasons, TRCP prays that this Court:

A) Adjudge and declare that BLM has violated both NEPA and FLPMA by failing to implement the AEM requirements and conditions established and mandated by the ROD;

B) Affirmatively enjoin BLM from authorizing any further development in the PAPA until BLM has complied with the requirements of the ROD and implemented a plan to mitigate wildlife losses already suffered due to BLM's violations;

C) Award Plaintiff TRCP its reasonable costs and attorneys' fees, including as applicable, under the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and

D) Order such other relief as the Court may deem necessary, just or proper.

Respectfully submitted this 18th day of June, 2008.



Donald D. Blankenau
D.C. Bar No. ND0003

HUSCH BLACKWELL SANDERS LLP
206 South 13th Street, Suite 1400
Lincoln, NE 68508
T: (402) 458-1500
F: (402) 458-1510
don.blankenau@huschblackwell.com

*Counsel for the Theodore Roosevelt
Conservation Partnership*