

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:09-cv-00085-JLK

COLORADO ENVIRONMENTAL COALITION,  
WESTERN COLORADO CONGRESS,  
WILDERNESS WORKSHOP,  
BIODIVERSITY CONSERVATION ALLIANCE,  
SOUTHERN UTAH WILDERNESS ALLIANCE,  
RED ROCK FORESTS,  
WESTERN RESOURCE ADVOCATES,  
NATIONAL WILDLIFE FEDERATION,  
CENTER FOR BIOLOGICAL DIVERSITY,  
THE WILDERNESS SOCIETY,  
NATURAL RESOURCES DEFENSE COUNCIL,  
DEFENDERS OF WILDLIFE, and  
SIERRA CLUB,

Plaintiffs,

v.

KEN SALAZAR, in his official capacity as Secretary of the Department of Interior,  
NED FARQUHAR, in his official capacity as Acting Assistant Secretary for Land and Minerals,  
Department of the Interior,  
THE U.S. DEPARTMENT OF THE INTERIOR,  
MICHAEL POOL, in his official capacity as Acting Director of the Bureau of Land  
Management, and  
THE BUREAU OF LAND MANAGEMENT,

Defendants, and.

SHELL FRONTIER OIL AND GAS,

Intevrnor-Defendant.

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**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF  
AND PETITION FOR REVIEW OF AGENCY ACTION**

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## INTRODUCTION<sup>1</sup>

1. The canyon country, mesas, and sagebrush steppe of western Colorado, eastern Utah, and southern Wyoming contain abundant natural resources including: wilderness lands; habitat for rare and imperiled wildlife; plentiful game such as deer, elk, and pronghorn; and critical watersheds that provide drinking and agricultural water for millions in one of the nation's most arid regions. Many of these lands are owned by the American people and managed by the United States Bureau of Land Management (BLM).

2. Some of these lands also contain underground deposits of oil shale and tar sands, in which hydrocarbons are locked in rock, sand, or clay. While boosters have long proclaimed the benefits of oil shale and tar sands as fuel sources, all efforts to develop these resource commercially in the United States have failed. In 2005, Congress sought to change that, adopting provisions in the Energy Policy Act to promote oil shale and tar sands industries on federal public lands. Among other things, the Act required the Department of the Interior to evaluate the environmental impacts of a commercial oil shale and tar sands leasing program on federal lands.

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<sup>1</sup> Plaintiffs file this amended complaint as a matter of course, pursuant to Fed. R. Civ. P. 15(a)(1)(A). Federal courts hold that where “there is more than one defendant, and not all have served responsive pleadings, the plaintiff may amend the complaint as a matter of course with regard to those defendants that have yet to answer.” See Williams v. Savage, 569 F. Supp. 2d 99, 104 (D.D.C. 2008); Boyd v. District of Columbia, 465 F. Supp. 2d 1, 3 (D.D.C. 2006) (same); Barksdale v. King, 699 F.2d 744, 747 (5th Cir. 1983) (“Where some but not all defendants have answered, plaintiff may amend as of course claims asserted solely against the non-answering defendants”); Wright, Miller & Kane, Federal Practice and Procedure 2d § 1481 (1990& Supp. 2009) (same).

Because Plaintiffs assert claims only against the federal defendants, who have not yet answered, Plaintiffs may amend their complaint as of right.

3. The 2005 law prompted concern from local communities, conservationists, the Governors of Colorado and Wyoming, and members of Congress (including Senator Ken Salazar), who argued that a leasing program for these resources should come only after further research. The stakes for the future of the West are high. Development of domestic oil shale and tar sands industries would destroy important habitat. It would also require massive amounts of electricity and water to produce. Those demands for power and water could foul the air, worsen global warming, and dry up streams and rivers.

4. Despite these concerns, in November 2008 BLM amended ten land management plans in Colorado, Wyoming, and Utah to open two million acres of public land to commercial oil shale leasing, and over 430,000 acres to commercial tar sands leasing.

5. In its haste to open these public lands to leasing, BLM ignored its own regulations granting the public an opportunity to protest the agency's decision. BLM also ignored environmental law requiring it to study a range of alternatives to its proposed action. Specifically, the agency refused to consider protecting unspoiled wilderness lands and important wildlife habitat from commercial leasing.

6. BLM also ignored environmental law requiring it to analyze and disclose the direct, indirect, and cumulative effects of its proposed action, particularly the potential impacts of the proposed action on water quality, the air we breathe, and global warming, as well as potential ways to mitigate those impacts.

7. Finally, BLM failed to analyze how its actions may impact threatened and endangered wildlife, and how to mitigate such impacts, in violation of the Endangered Species Act (ESA).

8. Because BLM's decision opening public lands to commercial oil shale and tar sands leasing violates federal law, it must be set aside and BLM enjoined from taking any action, including the sale of oil shale or tar sands commercial leases, that relies on either the decision opening lands to leasing or the inadequate environmental analysis supporting that decision.

### **JURISDICTION AND VENUE**

9. This Court has jurisdiction over this action by virtue of the Administrative Procedure Act, 5 U.S.C. § 551 et seq., 28 U.S.C. § 1331 (federal question jurisdiction), and 16 U.S.C. §§ 1540(c), (g) (action arising under the ESA and citizen suit provision).

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the events or omissions giving rise to the claims occurred within this judicial district, BLM has offices in this district, public lands and resources in question are located in this district, environmental harm resulting from the Defendants' actions will impact this district, and a number of Plaintiffs reside in this district.

11. As required by the ESA, Plaintiffs informed Defendants of ESA violations arising from Defendants' issuance of the Record of Decision amending land use plans in Colorado, Utah, and Wyoming by written notice sent to Defendants via certified mail and received by the Defendant Assistant Secretary's office on January 12, 2009 and the Defendant BLM Director's office on January 22, 2009. 16 U.S.C. § 1540(g).

### **PARTIES**

12. Plaintiff Colorado Environmental Coalition (CEC) is a state-based environmental advocacy organization with two field offices in western Colorado and a main office in Denver. CEC has more than 3,000 individual members and over 90 affiliated organizations. CEC

campaigns work to engage citizens in the protection of Colorado's wild places, open spaces, wildlife, and quality of life. CEC is an active participant in public lands management in Colorado, with a demonstrated interest in energy development on Colorado's BLM lands.

13. Plaintiff Western Colorado Congress (WCC) is a grassroots, democratic organization dedicated to challenging injustice by organizing people to increase their power over decisions that affect their lives in western Colorado. WCC's eight community groups and 3,000 members work together to create healthy, sustainable communities, social and economic justice, environmental stewardship and a truly democratic society. WCC has continued to be a local voice encouraging a "Go Slow" approach to oil shale development, in which impacts to communities and landscapes can be mitigated prior to their inception.

14. Plaintiff Wilderness Workshop is a non-profit advocacy organization headquartered in Carbondale, Colorado, dedicated to conserving the natural resources and preserving the public lands of the Roaring Fork watershed, the White River National Forest, the Glenwood Springs Field Office, and adjacent public lands. To accomplish these goals, the Wilderness Workshop engages in research, education, legal advocacy, and grassroots organizing. Wilderness Workshop not only defends pristine public lands from new threats, but also helps restore the functional wildness of landscapes fragmented by human activity. Wilderness Workshop protects and preserves existing wilderness areas, advocates for expanding wilderness, and safeguards the ecological integrity of all federal public lands in its area of interest. Wilderness Workshop has a long history of participation in oil shale debates – commenting on proposed development at every opportunity and working to inform the people of Northwest Colorado about the impacts oil development may have.

15. Plaintiff Biodiversity Conservation Alliance (BCA) is a non-profit conservation group based in Laramie, Wyoming, with hundreds of members in Wyoming and other states. The Alliance is dedicated to protecting Wyoming's wildlife and wild places, particularly on public lands. BCA has a long record of advocating for environmentally sound energy development in Wyoming and throughout the West, and has been active in watchdogging oil shale development in Wyoming and elsewhere. BCA and its members benefit from the intact ecosystem found in the oil shale leasing area as it exists today.

16. Plaintiff Southern Utah Wilderness Alliance (SUWA) is a Utah non-profit membership organization. SUWA, based in Salt Lake City, Utah, has more than 15,000 members, many of whom reside in Utah. SUWA's mission is the preservation of the outstanding wilderness at the heart of the Colorado Plateau, and the management of these lands in their natural state for the benefit of all Americans. SUWA is a founding member of the Utah Wilderness Coalition and promotes local and national recognition of the region's unique character through research and public education; supports both administrative and legislative initiatives to permanently protect Utah's wild places within the National Park and National Wilderness Preservation System or by other protective designations where appropriate; builds support for such initiatives on both the local and national level; and provides leadership within the conservation movement through uncompromising advocacy for wilderness preservation. BLM frequently solicits SUWA's input and participation in the land use planning process for a variety of resource decisions and SUWA actively participates in all levels of BLM's decision-making process.

17. Plaintiff Red Rock Forests, based in Moab, Utah, is a non-profit organization with over 300 members, many of whom reside in Utah. Red Rock Forests' mission is the preservation of Utah's forested and desert habitats. Red Rock Forests relies on sound biological principles to guide its policy, goals, and decision-making, with a particular emphasis on conservation biology. Red Rock Forests uses citizen action, community organizing, and collaborative agreements, as well as legal challenges, to further its conservation mission. Red Rock Forests maintains a particular interest in the forested uplands and canyon country of Utah's National Forests and public lands.

18. Plaintiff Western Resource Advocates (WRA) is a non-profit environmental law and policy organization with offices in Colorado, Utah, and Nevada, and staff in Idaho and New Mexico. WRA's mission is to protect the West's land, air, water, and wildlife. WRA's lawyers, scientists, and economists: 1) advance clean energy to reduce pollution and global climate change; 2) promote urban water conservation and river restoration; and 3) defend special public lands from inappropriate energy development and other threats. WRA collaborates with conservation partners to build a sustainable future for the West. WRA's goals include protecting habitat for threatened, endangered, and sensitive plant and animal species. WRA has a long history of involvement on oil shale and tar sands issues. WRA has focused its efforts on working through government and other channels to promote informed decision-making and to protect the West's land, water, people and climate.

19. Plaintiff National Wildlife Federation (NWF) is a national non-profit organization, with forty-eight state affiliate organizations, dedicated to the protection and

restoration of wildlife and wildlife habitat for this and future generations. NWF has 1.1 million members, including over 28,000 members in Colorado, 6,000 in Utah, and 2,900 in Wyoming.

20. Plaintiff Center for Biological Diversity (CBD) is a non-profit 501(c)(3) corporation with offices in California, Arizona, New Mexico, Oregon, Illinois, Minnesota, Nevada, Alaska, Vermont, and Washington, D.C. CBD works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. CBD is actively involved in species and habitat protection issues worldwide, including throughout the western United States. CBD has over 42,000 members throughout the United States and the world.

21. Plaintiff The Wilderness Society (TWS) is a nonprofit environmental organization incorporated in the District of Columbia. Formed in 1935, TWS has 310,000 members and supporters, including more than 6,500 members in Colorado. The TWS Central Rockies Office addresses public lands management issues in Colorado and Utah. TWS is devoted to preserving wilderness, forests, parks, rivers, deserts, and shorelands and is committed to fostering an American land ethic. Its mission is to protect America's wilderness and wildlife and to develop a nationwide network of wild lands through public education, scientific analysis, and advocacy. Its goal is to ensure that future generations will enjoy the clean air and water, wildlife, beauty, and opportunities for recreation and renewal that pristine forests, rivers, deserts, and mountains provide. TWS has long worked to enact legislation and policies that provide for the sound management of BLM lands.

22. Plaintiff Natural Resources Defense Council (NRDC) is a national nonprofit environmental membership organization with more than 400,000 members throughout the

United States and more than 14,900 members in Colorado, Utah and Wyoming. NRDC has a long history of efforts to protect federal public lands in these three states (as well as other Western states), to require the federal government to consider environmental protection when making energy development decisions, and to support long-term solutions to America's energy problems.

23. Plaintiff Defenders of Wildlife (Defenders) is a non-profit conservation organization dedicated to the protection and restoration of native wild animals and plants. Founded in 1947 and headquartered in Washington, D.C., Defenders currently has over one-half million members, including over 29,000 in the states of Colorado, Utah, and Wyoming. Ensuring the conservation of wildlife and habitat on federal public lands is one of Defenders' organizational priorities, and has become ever more critical in the face of global warming. Defenders is committed to helping wildlife overcome the unprecedented threat of climate change, both by reducing the greenhouse gas emissions that lead to global warming, and by helping species adapt to the climate change that is already occurring.

24. Plaintiff Sierra Club is a national nonprofit organization of over one million members and supporters dedicated to exploring, enjoying and protecting the wild places of the earth; practicing and promoting the responsible use of the earth's ecosystems and resources; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and using all lawful means to carry out these objectives. The Utah Chapter of the Sierra Club has more than 6,000 members and supporters; the Wyoming Chapter has more than 1,000 members and supporters, and the Rocky Mountain Chapter (Colorado) has

approximately 20,000 members and supporters. The Sierra Club's concerns encompass the protection of wildlands, wildlife habitat, and water resources in Utah, Colorado, and Wyoming.

25. Plaintiffs Colorado Environmental Coalition, Western Colorado Congress, Wilderness Workshop, Biodiversity Conservation Alliance, Southern Utah Wilderness Alliance, Red Rock Forests, Western Resource Advocates, National Wildlife Federation, Center For Biological Diversity, The Wilderness Society, Natural Resources Defense Council, Defenders of Wildlife, and Sierra Club (collectively "Conservation Groups"), their employees, and their members regularly use and enjoy the public lands subject to BLM's resource management plan (RMP) amendments for recreational, scientific, spiritual, aesthetic, and other purposes. They also derive recreational, scientific, spiritual, aesthetic, and other benefits from the public lands at issue in this case through wildlife observation, study, and photography. Conservation Groups and their staff and members have an interest in preserving the possibility of such activities in the future. As such, Conservation Groups, their members and staff have an interest in advocating for the protection of these public lands and helping to ensure their continued use and enjoyment of these lands. Each of the Conservation Groups presented comments to BLM and otherwise participated in the Oil Shale and Tar Sands RMP amendment planning process.

26. Defendants' failure to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., and implementing regulations in the adoption of the RMP amendments injures Conservation Groups and their members by denying them (and agency decisionmakers) the information that NEPA requires concerning environmental impacts and environmentally superior alternatives to the adopted RMP amendments.

27. Defendants' failure to comply with the protest procedures established by the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq., and implementing regulations injures Conservation Groups and their members by denying them the opportunity to administratively challenge BLM's decision amending ten RMPs to open over two million acres of public lands to oil shale and/or tar sands leasing and development without considering protecting sensitive areas. Defendants' failure to comply with the protest procedures established by FLPMA and implementing regulations with respect to the RMP amendments also injures Conservation Groups and their members by removing essential procedural safeguards that help to ensure that BLM actions amending RMPs are accountable, responsive to public concerns, avoid unnecessary litigation, and that BLM's decisions are reasoned rather than arbitrary.

28. Defendants' failure to comply with the ESA, 16 U.S.C. § 1531 et seq., and implementing regulations in its adoption of the RMP amendment injures Conservation Groups and their members' interests in wildlife and biodiversity protection by failing to ensure that the RMP amendment is not likely to jeopardize the continued existence of any listed species or result in the adverse modification of critical habitat. It further injures Conservation Groups and their members' interests by failing to disclose information on species and the impacts of the RMP amendment and failing to develop measures that will mitigate harm to threatened and endangered species.

29. Conservation Groups' recreational, scientific, spiritual, aesthetic, and other interests have been, are being, and, unless this Court grants the requested relief, will continue to be harmed and irreparably injured by Defendants' actions.

30. Defendant Ken Salazar is sued in his official capacity as Secretary of the Department of the Interior. Mr. Salazar is responsible for ensuring that lands administered by the Department of Interior, including BLM lands, are managed in accordance with all applicable laws and regulations.

31. Defendant Ned Farquhar is sued in his official capacity as Acting Assistant Secretary for Land and Minerals, Department of the Interior. Mr. Farquhar's predecessor as Assistant Secretary for Land and Minerals, C. Stephen Allred, is the official who, on behalf of the Department of the Interior, approved the RMP amendments challenged here.

32. Defendant the United States Department of the Interior (DOI) is an agency of the United States. DOI is responsible for oversight of several agencies managing public lands, including those lands managed by BLM, and for ensuring that BLM's management is in accordance with federal law.

33. Defendant Michael Pool is sued in his official capacity as Acting Director of BLM. Mr. Pool is responsible for ensuring that BLM lands are managed in accordance with all applicable laws and regulations.

34. Defendant Bureau of Land Management is an agency of the United States within the Department of the Interior. BLM is responsible for managing its lands, including the lands proposed to be opened for oil shale and tar sands commercial leasing by the decision challenged here, in accordance with federal law.

## LEGAL FRAMEWORK

### A. The Administrative Procedure Act

35. Because neither NEPA nor FLPMA include a citizens suit provision, this case is brought pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq.

36. The APA allows persons and organizations to appeal final agency actions to the federal courts. 5 U.S.C. §§ 702, 704. The APA declares that a court shall hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

### B. The Federal Land Policy and Management Act

37. BLM manages its lands pursuant to the FLPMA, 43 U.S.C. § 1701 et seq. Prior to FLPMA's passage in 1976, BLM lands were governed by some 3,000 outdated and often-conflicting public lands laws, most of which were written when it was assumed that these "public domain" lands would be conveyed expeditiously to private ownership. FLPMA cleared away many of these outmoded laws and, for the first time, provided BLM with a comprehensive, statutory statement of purposes, goals, and authority for the use and management of BLM lands.

38. Section 202 of FLPMA, 43 U.S.C. § 1712(a), requires that BLM develop and maintain land use plans for each BLM area. BLM's land use plans, known as RMPs, provide an orderly, public process for balancing competing demands such as commercial exploitation, recreation, and environmental protection. 43 U.S.C. § 1712. The Secretary is required to establish, by regulation, procedures to give the public adequate opportunity to comment on and participate in the formulation of land use plans. Id. § 1712(f); see also id. § 1740.

39. Pursuant to FLPMA's Section 202, the Secretary of the Interior established regulations governing the development, amendment, and revision of RMPs. See 43 C.F.R. §§ 1601.0-1 et seq. These procedures have governed the RMP process for more than 25 years. See 48 Fed. Reg. 20,364, 20,368 (May 5, 1983) (final rule). The Reagan Administration adopted these regulations, amending previous procedures, after an 18-month process of proposal, public comment, and evaluation of comments. See 46 Fed. Reg. 57,448 (Nov. 23, 1981). All parts of the regulations, including the protest procedures, were adopted to provide a "consistently applied set of regulations and procedures ... which ensure participation by the public." 43 C.F.R. § 1601.0-2. All of the regulations, including the protest procedures, were adopted "to assure meaningful public participation." 48 Fed. Reg. 20,364 (May 5, 1983).

40. These regulations establish numerous public participation opportunities in BLM's land management planning process. For example, regulations governing RMPs provide that "[t]he public shall be provided opportunities to meaningfully participate in and comment on the preparation of plans, amendments, and related guidance and be given early notice of planning activities." 43 C.F.R. § 1610.2(a).

41. Section 1610.2(f) further provides that "[p]ublic notice and opportunity for participation in resource management plan preparation shall be appropriate to the areas and people involved and shall be provided at the following specific points in the planning process: ... (4) Publication of the proposed resource management plan and final environmental impact statement which triggers the opportunity for protest (See §§ 1610.4-8 and 1610.5-1(b)) ...." 43 C.F.R. § 1610.2(f) (emphasis added).

42. Section 1610.4-8 provides that “[a]fter publication of the draft resource management plan and draft environmental impact statement, the Field Manager shall evaluate the comments ... and recommend to the State Director ... a proposed resource management plan and final environmental impact statement ... the State Director shall publish the plan and file the related environmental impact statement.” 43 C.F.R. § 1610.4-8.

43. In furtherance of FLPMA’s public participation goals, BLM’s RMP regulations specifically require BLM to permit the public to file an administrative protest before the agency formally amends an RMP. Section 1610.5-1(b) states that “[n]o earlier than 30 days after the Environmental Protection Agency publishes a notice of the filing of the final environmental impact statement in the Federal Register, and pending final action on any protest that may be filed, the State Director shall approve the plan. Approval shall be withheld on any portion of a plan or amendment being protested until final action has been completed on such protest.” 43 C.F.R. § 1610.5-1(b) (emphasis added).

44. Section 1610.5-2 is entitled “Protest procedures.” It provides that “[a]ny person who participated in the planning process and has an interest which is or may be adversely affected by the approval or amendment of a resource management plan may protest such approval or amendment.” The regulations further provide that “[t]he protest shall be in writing and shall be filed with the Director. The protest shall be filed within 30 days of the date the Environmental Protection Agency published the notice of receipt of the final environmental impact statement containing the plan or amendment in the Federal Register.” 43 C.F.R. § 1610.5-2(a)(1) (emphasis added).

45. After reviewing protests, “[t]he Director shall promptly render a decision on the protest. The decision shall be in writing and shall set forth the reasons for the decision. The decision shall be sent to the protesting party by certified mail, return receipt requested.” 43 C.F.R. § 1610.5-2(a)(3).

46. Finally, after responding to protests, “[t]he decision of the Director shall be the final decision of the Department of the Interior.” 43 C.F.R. § 1610.5-2(b).

### **C. The National Environmental Policy Act**

47. NEPA is “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Congress enacted NEPA to, among other things, “encourage productive and enjoyable harmony between man and his environment” and to promote government efforts “that will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321.

48. To fulfill this goal, NEPA requires federal agencies to prepare an environmental impact statement (EIS) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The agency should describe “any adverse environmental effects which cannot be avoided should the proposal be implemented.” 42 U.S.C. § 4332(2)(C)(ii). Overall, an EIS must “provide [a] full and fair discussion of significant impacts” associated with a federal decision and “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

49. NEPA requires federal agencies, including BLM, to include within an EIS “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis is the “heart” of a NEPA document, requiring the agency to “[r]igorously explore and objectively

evaluate all reasonable alternatives” so that “reviewers may evaluate their comparative merits.”  
40 C.F.R. § 1502.16.

50. NEPA further requires that agencies must consider and disclose to the public the direct, indirect and cumulative impacts to the environment from their actions. 42 U.S.C. § 4332(2); 40 C.F.R. §§ 1508.7; 1508.8; 1508.25(c). Indirect effects are those “caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Cumulative impacts are impacts from “past, present and reasonably foreseeable future actions regardless of what agency (federal or non-Federal) or person undertakes such other action.” Id. § 1508.7.

51. Where an agency finds that there is incomplete or unavailable information concerning a potentially significant adverse effect, NEPA requires the agency to obtain the information if the cost of doing so is not exorbitant, or to: (1) state that such information is incomplete or unavailable; (2) state the relevance of such information; (3) summarize the existing credible evidence relevant to evaluating impacts; and (4) evaluation such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. 40 C.F.R. § 1502.22.

52. Finally, in addition to alternatives and impacts, NEPA requires agencies to consider mitigation measures to minimize the environmental impacts of the proposed action. 40 C.F.R. § 1502.14 (alternatives and mitigation measures); 40 C.F.R. § 1502.16 (environmental consequences and mitigation measures).

#### **D. The Endangered Species Act**

53. The Endangered Species Act (ESA) is a federal statute enacted to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA “is the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). Section 2(c) of the ESA sets out that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1).

54. The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Commerce and Interior. The Secretaries of Commerce and Interior have delegated this responsibility to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (FWS), respectively. 50 C.F.R. § 402.01(b). In this case, the FWS holds primary responsibility for administering the ESA.

55. To make certain federal agencies fulfill the substantive purposes of the ESA, the statute requires they engage in consultation with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species ... determined ... to be critical ....” 16 U.S.C. § 1536(a)(2) (“Section 7 consultation”). A federal agency must engage in the Section 7 consultation process if its proposed action “may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Under the ESA’s governing regulations, agency “action” means “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.

Examples include, but are not limited to “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02. Courts have determined that the “act of approving, amending, or revising” a land management plan constitutes ‘action’ under ESA Section 7. Forest Guardians v. Forsgren, 478 F.3d 1149, 1154 (10th Cir. 2007). The result of Section 7 consultation is a biological opinion (BO) that analyzes the action’s projected effects and sets forth the FWS’s opinion as to whether the proposed action is likely to jeopardize a listed species or destroy or adversely modify its designated critical habitat. 50 C.F.R. §§ 402.14(g) & (h).

56. If the BO concludes that the agency’s action is likely to jeopardize a species, then it may specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b).

## **STATEMENT OF FACTS**

### **A. Oil Shale and Its Potentially Damaging Impacts**

57. The term “oil shale” generally refers to any sedimentary rock that contains a solid material called “kerogen” that is released as a petroleum-like liquid when the rock is heated. Theoretically, oil shale can be mined and processed to generate oil similar to that pumped from conventional wells. However, extracting kerogen and producing oil from oil shale is much more complex and expensive than conventional oil recovery. It requires, among other things, huge amounts of energy and water to essentially bake the rock to release the kerogen.

58. While oil shale is found in many places worldwide, the largest deposits on earth are found in the United States in the Green River Formation of Colorado, Utah, and Wyoming. The RAND Corporation estimated in 2005 that there could be between 500 billion and 1.1 trillion barrels of oil in the Formation, although none of it is now commercially recoverable.

59. Despite its potential, the complexity and expense of oil shale development has rendered its commercial exploitation a tantalizing prospect always just out of reach. After a hundred years of research and promotion, commercial development of oil shale occurs nowhere in North America. Previous attempts to exploit oil shale have caused environmental damage and social dislocation, but produced little if any marketable oil. For example, in the late 1970s, bolstered by high oil prices and federal subsidies, Exxon and other companies invested billions of dollars in speculative oil shale technologies on Colorado's West Slope. When oil prices dropped and subsidies lagged, Exxon locked the gates of its "Colony" project and fired 2,000 workers on May 2, 1982. This day – remembered on the West Slope as "Black Sunday" – signaled the dramatic bust of the early 1980s oil shale boom, and caused economic disruption across Colorado.

60. More than 70% of the oil shale acreage in the Green River Formation – including the richest and thickest oil shale deposits – lies beneath federally owned and managed lands. As a consequence, the federal government directly controls access to much of the potentially commercially attractive portions of the oil shale resource.

61. Currently, the millions of acres of federal public lands in Colorado, Utah and Wyoming overlying the Green River Formation provide numerous benefits to residents, visitors, and wildlife. The area's streams and rivers, which drain to the Colorado River, provide drinking water and agricultural water, and support recreation for millions of people across the West. These lands are home to some of the nation's healthiest elk herds, rare plants, and more than a dozen species protected as threatened or endangered under the ESA. Species protected by the

ESA include the razorback sucker, Colorado pikeminnow, Mexican spotted owl, Southwestern willow flycatcher, and Canada lynx.

62. The imperiled sage grouse has numerous breeding grounds (or “leks”) within federal lands overlying the Green River Formation. Sage grouse are on the verge of requiring listing under the Endangered Species Act. Their numbers have declined precipitously throughout the range of their historic habitat. A panel of experts convened by the FWS recently concluded that energy development in the eastern reaches of the sage grouse’s range, including Wyoming and Colorado, represented one of the top threats to sage grouse survival. Western Watersheds Project v. United States Fish & Wildlife Service, 535 F. Supp. 2d 1173, 1180 (D. Id. 2007). Leks, nesting habitat, and winter concentration areas are all vital to the continued viability of sage grouse.

63. These lands also include tens of thousands of acres of lands that qualify as wilderness; that is, pristine roadless lands unfettered by human development. Thousands of hunters, anglers, hikers, bird-watchers and others enjoy these lands every year.

64. Commercial development of oil shale on federal lands overlying the Green River Formation would have significant and damaging environmental consequences. Currently proposed technologies would require that vast areas be strip-mined so that the kerogen-infused rocks could be baked off-site, or that similarly vast natural areas be turned into a maze of industrial facilities that would allow the rock to be baked below ground (a process known as “in situ retorting”). Because the kerogen-bearing shale must be baked to hundreds of degrees for long periods, development of oil shale would require massive amounts of electricity. A RAND Corporation study found that an oil shale industry producing an equivalent of 1 million barrels of

oil a day would require about 12 gigawatts of dedicated electric generating capacity, more than likely from coal-fired power plants - the equivalent output of roughly 25 power plants the size of the current Hayden Generating Station in Routt County, Colorado. The power plants needed to develop oil shale would foul the region's air and pump huge amounts of carbon dioxide and other climate change-inducing greenhouse gasses into the atmosphere.

65. Studies also predict that oil shale development in this arid region could dry up many streams and rivers – including the Colorado River – for weeks at a time. BLM estimates that three gallons of water or more may be needed to produce a single gallon of oil from shale. The U.S. Water Resources Council estimated that oil shale development would increase annual consumptive water use in the Upper Colorado Region by about 150,000 acre-feet per year for each million barrels per day (bbl/day) of oil shale produced. Commercial oil shale development will cumulatively impact water supplies, as water dedicated to this use will increase stress on a resource already over-taxed by other activities, such as oil and gas development, agriculture, and ongoing growth in the region. In addition, as discussed below, commercial oil shale development will cumulatively impact water supplies by contributing to one of the biggest threats to water availability in the West – global climate change.

66. Air and water pollution and toxic waste resulting from the development of an oil shale industry may also threaten human health in nearby communities.

67. The infrastructure required for oil shale exploration and development will fragment habitat and consume water resources, reducing stream flows, and increasing the temperature and salinity levels of these waters.

## **B. Tar Sands Development and Its Potentially Damaging Environmental Impacts**

68. Another potential source of “unconventionally” produced liquid fuel is tar sands. Tar sands are a combination of clay, sand, water, and “bitumen,” which is a heavy hydrocarbon. Like kerogen, bitumen from tar sands, once extracted, can be “upgraded” to synthetic crude oil and then further refined to make gasoline, but only after significant processing using technology not used in any commercial facility in the United States.

69. In the early 1980s, the U.S. Geological Survey delineated eleven “special tar sands areas” (STSAs) covering one million acres in Utah. Nearly two-thirds of the total acreage of tar sands deposits within these STSAs are owned or administered by BLM. The Department of Energy estimated United States tar sands resources to be equivalent to 60-80 billion barrels of oil, although less than a quarter of that amount is likely recoverable.

70. Like oil shale, production of oil from tar sands has proved more fantasy than reality. In 1981, Congress established a commercial leasing program for tar sands under the authority of the Combined Hydrocarbon Leasing Act. Pub. L. 97-78. The Act failed to spawn commercial tar sands development. Since the law’s enactment more than a quarter-century ago, only six tar sands leases have been sold, and no development has occurred on these leases. Today, no commercial tar sands industry exists anywhere in the United States.

71. The eleven STSAs in Utah include important habitat for sage grouse, deer, elk, and spectacular pristine lands proposed for Congressional wilderness protection. These wildlands include portions of Utah’s remote San Rafael Swell, lands near the Green River’s Desolation Canyon, and public lands adjacent to the Glen Canyon National Recreation Area, which is managed by the National Park Service.

72. Commercial development of tar sands in the STSAs on federal lands, like that for oil shale, would likely significantly damage the environment. Tar sands resources can be recovered using strip mining or underground mining, with subsequent recovery of the bitumen by a number of different processes, including washing, flotation or retorting. Bitumen can also be recovered through in-place processes, involving heating or combusting the tar sands or injecting material (such as steam, hot water, gas, or solvent) into the sands to release the bitumen for recovery. Like oil shale development, tar sands recovery will thus require significant surface disturbance over large areas, destroying vegetation, disrupting habitat and increasing erosion. Like oil shale development, tar sands recovery will consume significant amounts of water and energy, the use and production of which will reduce or eliminate stream and groundwater flows, foul the air, increase greenhouse gas emissions, and worsen the impacts of global warming. For example, it takes an estimated 2 - 4.5 barrels of water to extract and upgrade one barrel of oil from a tar sands mine. Greenhouse gas emissions from tar sands are estimated to be three times those of conventional oil and gas production. Thus, development of tar sands, like oil shale, will cumulatively impact water supplies and worsen global warming.

### **C. Global Warming and Oil Shale and Tar Sands**

#### **1. Background on Climate Change and Greenhouse Gases**

73. It is now unequivocal that the Earth's climate is warming due to society's production of greenhouse pollution, primarily from the combustion of fossil fuels for energy. The primary greenhouse gases (GHGs) include carbon dioxide and methane. Increasing concentrations of GHGs cause the Earth's atmosphere to retain a greater proportion of the sun's energy, warming the Earth's climate like the interior of a greenhouse. The average air

temperature at the Earth's surface has increased by 1.3° Fahrenheit (0.74 ° C) over the past century, and the rate of warming over the past 50 years is nearly twice that of the past century. At the same time, human-caused GHG emissions are increasing each year. The more GHGs are emitted into the atmosphere, the more warming will occur, making it very likely that the changes in the global climate system will be larger and more pronounced than the ones already observed.

74. According to the U.S. Supreme Court, “[t]he harms associated with climate change are serious and well recognized.” Massachusetts v. EPA, 549 U.S. 497, 521 (2007). The U.S. government’s “objective and independent assessment of the relevant science identifies a number of environmental changes that have already inflicted significant harms, including the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years.” Id. (citations & quotations omitted). As a result, climate change is a threat to biodiversity worldwide, affecting both terrestrial and marine species from the tropics to the poles.

75. Some regions of the world are particularly susceptible to climate change. One such region is the Western United States, which faces a water supply crisis due in part to a persistent drought attributable to some extent to climate change.

76. Climate change will directly harm BLM lands that are within the area analyzed for leasing in the RMP EIS. For example, in his Climate Action Plan issued in November 2007, Colorado Governor Bill Ritter, Jr., summarized the likely impacts to his state from global warming:

For Colorado, global warming will mean warmer summers and less winter snowpack. The ski season will be weeks shorter. Forest fires will be more

common and more intense. Water quality could decline, and the demand for both agricultural and municipal water will increase even as water supplies dwindle.

Colorado Climate Action Plan at 1 (November 2007).

77. Many wildlife species in the project area will be harmed both directly by oil shale and tar sands development, and by the direct, indirect, and cumulative impacts such development will have on climate change. The direct impacts of oil shale and tar sands development on wildlife may also act in a cumulative and synergistic way with impacts to wildlife from climate change.

**2. The Direct, Indirect, and Cumulative Impacts of Oil Shale and Tar Sands Development and Use on Climate Change**

78. The vast energy inputs required for extraction and refining of oil from oil shale and tar sands may produce up to four times more GHG pollution than conventional oil production. This is true in part because industry is likely to rely on coal-fired power plants to fuel the extractive process.

79. The 2,400 megawatts of electricity needed to maintain a 200,000 bbl/day oil shale in situ facility, expected to be produced by coal-fired power plants, would produce millions of tons of GHG emissions. BLM predicts that during the initial phase of oil shale development, production in Colorado may reach 1 million bbl/day, and that this level could double once the oil shale industry reaches its highest volume of energy production. Studies suggest that five new coal mines and ten new coal-fired power plants – each emitting millions of tons of GHG emissions – would be needed to support a 1 million bbl/day industry.

80. Increased GHG emissions would also result from the large amounts of electricity needed to deliver water required by oil shale production facilities, and from the process of

extracting a refinable product from tar sands. Transporting the liquid fuel to market will cause additional GHG emissions. The end use of the refined product of oil shale and tar sands – burning liquid fuel in motor vehicles – would cause more GHG emissions. As the Supreme Court has stated: “Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence ... to global warming.” Mass. v. EPA, 549 U.S. at 525. The volume of fossil fuels anticipated to be produced from oil shale and tar sands, when burned in vehicles, will cause billions of tons of carbon dioxide emissions.

**D. The Energy Policy Act of 2005 (EP Act)**

81. In May 2001, President George W. Bush received recommendations on energy policy from his National Energy Task Force. The President used these recommendations, prepared by the Office of the Vice President, to formulate his national energy policy. In response, BLM developed a plan containing 54 tasks designed to implement the President’s directives, including efforts to promote the development of oil shale resources on public lands.

82. In April 2005, Bush Administration officials and oil company executives testified before the United States Senate’s Committee on Energy and Natural Resources concerning oil shale. Administration officials argued that royalty rates should be set to encourage production, and that “various regulatory issues” discouraged the production of oil shale in the United States. S. Hrng. 109-35 at 26 (Apr. 12, 2005). Industry officials agreed. A representative of Shell Oil testified that “the time has come for the United States ... to encourage, facilitate, and accelerate the development” of oil shale, and asserted that “the Secretary of the Interior should develop a commercial oil shale leasing program on an expedited basis.” Id. at 36. A representative of Anadarko Petroleum Corporation testified that Congress should help “make commercial oil shale

production a reality within the next decade and provide the momentum needed for private enterprise to commit to domestic projects of sufficient magnitude to make this happen.” Id. at 69. He recommended that the federal government “develop[] a federal oil shale leasing program,” and “encourage[d] Congress to direct the Department of the Interior to develop regulations governing oil shale leasing and development.” Id.

83. In response, Congress enacted EP Act, which became law on August 8, 2005. Section 369 of EP Act relates to “Oil Shale, Tar Sands, and Other Strategic Unconventional Fuels.” See 42 U.S.C. § 15927 (codifying Sec. 369). The Act recognized the strategic importance of developing oil shale and tar sands reserves, but also declared it to be Congress’s policy that commercial development of these resources “should be conducted in an environmentally sound manner, using practices that minimize impacts.” 42 U.S.C. § 15927(b). The Act required that, “in accordance with” NEPA, the Secretary of the Interior prepare a “programmatic environmental impact statement for a commercial oil shale and tar sands leasing program on public lands, with an emphasis on the most geologically prospective lands” in Colorado, Utah and Wyoming. 42 U.S.C. § 15927(d)(1). The Secretary was given 18 months to complete the programmatic EIS (PEIS). Id.

#### **E. The Programmatic Environmental Impact Statement**

84. Following EP Act’s mandate, BLM announced its intent to prepare a PEIS on oil shale and tar sands leasing in three states on December 13, 2005. 70 Fed. Reg. 73,791 (Dec. 13, 2005). BLM stated its analysis would consider how “to amend applicable [RMPs] to open BLM lands for oil shale and tar sands leasing in Colorado, Utah and Wyoming.” Id. at 73,971. BLM

promised the draft EIS would address “major issues” that included “wildlife and wildlife habitat quality and fragmentation” and the “protection of wilderness, riparian, and scenic values.” Id.

85. Two years later, BLM announced the issuance of its draft PEIS. 72 Fed. Reg. 72,751 (Dec. 21, 2007). BLM provided the public 90 days to comment on the draft PEIS, though the deadline was later extended. See 73 Fed. Reg. 51,838, 51,839 (Sep. 5, 2008).

86. In its draft PEIS, BLM announced that it had changed the scope of the PEIS’s analysis from that mandated by Congress. While EP Act required that BLM analyze “a commercial oil shale and tar sands leasing program on public lands, with an emphasis on the most geologically prospective lands” in Colorado, Utah and Wyoming, 42 U.S.C. § 15927(d)(1), BLM announced:

The purpose and need for the PEIS now is to:

- (1) Identify the most geologically prospective areas where oil shale and tar sands resources are present on public lands and that could be open to application for commercial leasing, exploration, and development; and
- (2) Evaluate the environmental effects associated with amendments of 12 land use plans to allow for application for commercial oil shale or tar sands leasing.

72 Fed. Reg. 72,752. BLM stated that it made the change because it lacked “critical information on which to assess potential impacts, define required mitigation and approve commercial leasing.” Id.

87. The draft PEIS examined only three alternatives in detail for each resource. For oil shale, the draft PEIS examined:

- Alternative A. This is the “no action” alternative under which BLM would amend no RMPs, limiting oil shale leasing to approximately 300,000 acres of BLM land in Colorado where such leasing is permitted by existing RMPs.

- Alternative B. This is the “preferred alternative,” which would amend RMPs to open two million acres of BLM land to oil shale leasing, excluding from leasing only those areas where such leasing is prohibited by law.
- Alternative C. This alternative would amend RMPs to open over 800,000 acres of BLM land to oil shale leasing. It would exclude from leasing lands identified as requiring special management or resource protection in existing land use plans.

Final PEIS at 2-17; 2-26; 2-32.

88. For tar sands, the draft PEIS examined three similar alternatives:

- Alternative A. Under this “no action” alternative, BLM would amend no RMPs, and tar sands would be regulated under the 1981 Combined Hydrocarbon Leasing Act program, which has yielded no proposal for development over the last three decades. BLM assumes no federal land tar sands development from this alternative.
- Alternative B. The “preferred alternative” would amend six RMPs to open about 430,000 acres of BLM land to commercial tar sands leasing, excluding from leasing only those areas where such leasing is prohibited by law.
- Alternative C. This alternative would amend six RMPs to open about 230,000 acres of BLM land to commercial tar sands leasing. It would exclude from leasing lands identified as requiring special management or resource protection in existing land use plans.

Final PEIS at 2-39 – 2-45.

89. BLM failed to consider an alternative for either oil shale or tar sands that would open lands to oil shale leasing while protecting wilderness quality lands. Both of the oil shale and tar sands “action alternatives” (Alternatives B and C) would authorize leasing on tens of thousands of acres of such lands. Both oil shale action alternatives open to leasing portions of areas proposed for wilderness protection by Congress including: Desolation Canyon, White River, Lower Bitter Creek, and Sunday School Canyon in Utah; and Devil’s Playground, Adobe Town, and Kinney Rim in Wyoming. Further, both alternatives open to leasing that part of Adobe Town designated by the State of Wyoming on April 10, 2008 as a “Very Rare or Uncommon Area,” a designation specifically designed to protect the area from “surface mining

for oil shale.” Both tar sands action alternatives open to leasing wilderness lands in Utah including Desolation Canyon, Dirty Devil, Mexican Mountain, San Rafael Reef, and Sunday School Canyon proposed wilderness areas.

90. BLM failed to consider an alternative for oil shale that would open lands to leasing while protecting habitat critical to the survival of the sage grouse.

91. The states of Colorado and Utah identified a total of more than 350,000 acres of sage grouse habitat open for oil shale leasing under Alternatives B and C. Final PEIS at 6-77; 6-104. Both tar sands action alternatives open to commercial leasing more than 100,000 acres of state-identified sage grouse habitat. Final PEIS at 6-227; 6-253. BLM thus failed to consider an action alternative for either tar sands or oil shale that would protect habitat critical for the sage grouse’s survival.

92. BLM received over 100,000 comments on the proposed action and draft EIS, many of them critical of the agency’s failure to properly disclose environmental impacts. 73 Fed. Reg. 51,839. The Governor of Colorado, the Governor of Wyoming, the City of Rifle, and thousands of other commentators supported the “no action alternative,” and expressed concern about the proposed action’s impact on wildlife. Final PEIS, Vol. 4 at 678, 5,296, 5,300-5,301, 5,455. Some Conservation Groups and others specifically requested that BLM consider action alternatives that protected wilderness quality lands and crucial sage grouse habitat from leasing.

93. BLM chose not to heed these comments. On September 5, 2008, BLM published a notice of availability (NOA) of the final PEIS, and of proposed RMP amendments. 73 Fed. Reg. 51,838 (Sept. 5, 2008). BLM stated that it had clarified some of the analysis and description of the proposed action based on the comments it received on the draft PEIS, but that

the “proposed land use plan alternatives remained unchanged” from the draft PEIS. 73 Fed. Reg. at 51,839.

94. In the final PEIS, BLM failed to consider action alternatives that protected wilderness lands or crucial sage grouse habitat from leasing.

95. BLM’s preferred alternative in the PEIS would amend BLM land use plans across the three states “to make approximately 2 million acres of lands containing oil shale resources” and “approximately 430,000 acres” of lands with tar sands “available for application for commercial leasing.” 73 Fed. Reg. at 51,839.

96. In the final PEIS, BLM provides some general information on the impacts oil shale and tar sands development is likely to have on climate change. However, the final PEIS does not attempt to quantify GHG emissions from production of the oil shale or tar sands. The final PEIS does not evaluate (either qualitatively or quantitatively) the impact on climate from those emissions. Nor does it identify what information would be required to quantify the GHG emissions or determine their impacts.

97. In addition, the final PEIS does not mention the GHG emissions from the refining or end use of the oil shale or tar sands. The final PEIS does not evaluate (either qualitatively or quantitatively) the impact on climate from those emissions. Nor does it identify what information would be required to quantify the GHG emissions or determine their impacts.

98. Instead, the final PEIS concludes that the science was not adequate to determine what the impacts of oil shale and tar sands development, its refining and/or its end-use would be on climate change and what the impacts would be in the study area. While the final PEIS reaches this conclusion, it does not summarize the existing credible evidence relevant to

evaluating these impacts. Nor does the final PEIS evaluate such impacts based on theoretical approaches or research methods generally accepted in the scientific community.

99. In its discussion of climate change, the final PEIS fails to analyze the impact of climate change to ecosystems or endangered or threatened species within the project area.

100. The final PEIS fails to analyze or disclose the fact that development of oil shale and/or tar sands will insert large amounts of oil into the energy markets for refining into liquid fuels, and the potential direct and indirect impacts of such development. The increased availability of oil could make oil a more attractive option to future entrants into the market when compared with other potential fuel sources, such as wind power, solar power, or natural gas. Thus, development of a commercial oil shale and/or tar sands industry could affect the nation's long-term reliance on fossil fuels.

101. The final PEIS fails to address air pollution in numerous respects. For example, the final PEIS inaccurately characterizes existing air quality, wrongly stating that background concentrations of ozone (also known as smog) and PM<sub>2.5</sub> (fine particulate matter) are "relatively low" whereas monitoring data from affected areas show background concentrations of these pollutants are close to or already exceeding National Ambient Air Quality Standards (NAAQS) for these pollutants.

102. Similarly, the final PEIS wrongly claims that background concentrations of sulfur dioxide (SO<sub>2</sub>), nitrogen dioxide (NO<sub>2</sub>) and particulate matter (PM) are also relatively low. Monitoring data, as well as modeling conducted in conjunction with development-stage projects, establish that visibility in several Class I airsheds in the region is already being adversely

impacted by current activities and that, in some locations in the affected areas, Class I and Class II increments are already consumed.

103. Moreover, while the final PEIS acknowledges that numerous power plants may be necessary to provide energy for oil shale development, it fails to analyze the potential impacts of these power plants on the area's air quality. In addition, the final PEIS fails to address the impacts of reasonably foreseeable conventional oil and natural gas development within or adjacent to the RMP amendment area when considered cumulatively with air pollution impacts from oil shale and tar sands development.

104. In preparing its decision on the RMP amendments, BLM acknowledged the presence of endangered and threatened species and critical habitat in lands allocated for oil shale and tar sands leasing in Colorado, Utah, and Wyoming. ROD at 51. "BLM determined, however, that the administrative action of amending land use plans in the manner described would not affect listed species or designated critical habitat." *Id.* Because the RMP amendments may affect numerous endangered species, BLM was required by ESA § 7 to initiate consultation with FWS. BLM failed to do so.

105. In announcing the availability of the proposed RMP amendments and final PEIS, BLM stated that the Assistant Secretary of Interior for Land and Minerals Management is the "responsible official for these proposed plan amendments," and, as such, the NOA "is the final decision" of DOI. 73 Fed. Reg. at 51,840. Therefore, "[t]his decision is not subject to administrative review (protest) under the BLM or Departmental regulations." *Id.* (emphasis added).

106. Then-United States Senator Ken Salazar condemned the release of the final PEIS, stating that “the Administration seems bent on tuning out the voices of Coloradans, ignoring the BLM’s own conclusions about oil shale, and rushing ahead with a last minute fire sale of commercial oil shale leases at any cost.” Press release, “Sen. Salazar’s Statement on Administration’s Latest Step Toward Last Minute Oil Shale Leasing” (Sept. 4, 2008).

107. On October 6, 2008, Conservation Groups and others wrote then-Interior Secretary Dirk Kempthorne notifying him that his decision to eliminate any administrative protest opportunity for the proposed RMP amendments violated FLMPA and BLM’s governing regulations. Letter from A. Morgan, et al. to Sec’y Kempthorne (Oct. 6, 2008). Secretary Kempthorne never responded, nor took any action to provide the public with an opportunity to protest the RMP amendments.

108. On November 17, 2008, then-BLM Director Caswell recommended adoption and implementation of the proposed RMP amendments. Then-Assistant Secretary Allred approved the amendments as part of the Record of Decision (ROD) that same day. The ROD amended ten RMPs as proposed in the preferred alternative, making nearly 2 million acres of lands containing oil shale resources and over 430,000 acres of lands with tar sands “available for application for commercial leasing and future exploration and development of these resources.” ROD at iii, 38-39. Issuance of the ROD constituted final agency action on the RMP amendments.

109. On November 17, 2009, Conservation Groups sent a letter to Defendants again notifying them that their adoption of the ROD without allowing for an administrative protest period violated FLMPA and BLM’s regulations. Defendants never responded to this correspondence.

110. Likewise, on January 6, 2009, many of the Conservation Groups sent a letter notifying Defendants that their issuance of the ROD without consulting the FWS violated Section 7 of the ESA. Defendants never responded to this letter, nor did they engage in Section 7 consultation with the FWS as required by the ESA.

111. Issuance of the ROD in violation of these and other environmental regulations constituted final agency action.

**FIRST CLAIM FOR RELIEF**

Violation of 43 C.F.R. §§ 1610.2, 1610.5, and the Administrative Procedure Act:  
Preclusion of Public Administrative Protest

112. The allegations in paragraphs 1-111 are incorporated herein by reference.

113. BLM regulations require that the agency provide the public with an opportunity to file a formal administrative protest of an RMP amendment before the agency adopts the amendment. See 43 C.F.R. §§ 1610.2, 1610.5.

114. BLM failed to provide the public an opportunity to protest the proposed RMP amendment decision, in violation of its own regulations.

115. By precluding public administrative protest, BLM's decision violates 43 C.F.R. §§ 1610.2, 1610.5, and so is arbitrary, capricious, or otherwise not in accordance with law. See 5 U.S.C. § 706(2)(A) (APA).

**SECOND CLAIM FOR RELIEF**

Violations of the Federal Land Policy and Management Act:  
Preclusion of Public Administrative Protest

116. The allegations in paragraphs 1-111 are incorporated herein by reference.

117. Section 102(a)(5) of the Federal Land Policy and Management Act, 43 U.S.C. § 1701(a)(5), "declares that it is the policy of the United States" that in "administering public

land statutes and the discretionary authority granted by them” the Secretary “be required ... to structure adjudication procedures to assure ... objective administrative review of initial decisions ....” Emphasis added.

118. FLPMA § 202(f), 43 U.S.C. § 1712(f), provides that “[t]he Secretary ... by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.” See also 43 U.S.C. § 1739(e).

119. BLM’s announcement of its final decision to preclude public administrative protests violates section 102 of FLPMA, which declares that the Secretary “be required ... to structure adjudication procedures to assure ... objective administrative review of initial decisions.” 43 U.S.C. § 1701(a)(5). BLM’s decision to preclude public administrative protests also violates the requirements of sections 202 and 309 of FLPMA to give the public “adequate” opportunity “to participate in the formulation of plans and programs.” 43 U.S.C. §§ 1712(f) & 1739(e).

120. BLM’s decision to preclude a public administrative protest, in violation of FLPMA, is arbitrary, capricious, or otherwise not in accordance with law. See 5 U.S.C. § 706(2)(A) (APA).

### **THIRD CLAIM FOR RELIEF**

#### **Violation of the National Environmental Policy Act: Failure to Consider a Range of Reasonable Alternatives**

121. The allegations in paragraphs 1-111 are incorporated herein by reference.

122. NEPA requires federal agencies, including BLM, to include within an EIS “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis is the “heart” of a NEPA document, and the statute’s implementing regulations direct BLM to “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a).

123. BLM’s failure to consider an action alternative that fully protected wilderness quality lands and/or the Adobe Town Very Rare or Uncommon Area, and/or crucial sage grouse habitat violated NEPA’s range of alternatives requirement and regulations implementing NEPA, and so is arbitrary, capricious, or otherwise not in accordance with law. See 5 U.S.C. § 706(2)(A) (APA).

### **FOURTH CLAIM FOR RELIEF**

#### **Violation of the National Environmental Policy Act: Failure to Disclose the Direct, Indirect and Cumulative Impacts to Climate Change**

124. The allegations in paragraphs 1-111 are incorporated herein by reference.

125. NEPA requires that agencies consider and disclose to the public the direct, indirect and cumulative impacts of their actions. 42 U.S.C. § 4332(2); 40 C.F.R. §§ 1508.7, 1508.8; 1508.25(c). Indirect effects are those “caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Cumulative impacts are impacts from “past, present and reasonably foreseeable future actions

regardless of what agency (Federal or non-Federal) or person undertakes such other action.” Id.  
§ 1508.7.

126. BLM’s failure to consider and disclose – either qualitatively or quantitatively – the impact on climate change and the study area from GHG emissions from the production of oil from shale and/or tar sands, from the refining of such oil, or from its end use, and BLM’s failure to otherwise take a “hard look” at the climate change impacts of the proposed RMP amendments violates NEPA and implementing regulations, and so is arbitrary, capricious, or otherwise not in accordance with law. See 5 U.S.C. § 706(2)(A) (APA).

127. BLM’s failure to analyze the environmental impacts of the proposed RMP amendments in the context of an already warming climate violates NEPA and implementing regulations, and so is arbitrary, capricious, or otherwise not in accordance with law. See 5 U.S.C. § 706(2)(A) (APA).

128. NEPA requires that if information is essential to a reasoned choice among alternatives, and can be obtained without exorbitant cost, the agency must include the information in the EIS. 40 C.F.R. § 1502.22(a). If the information cannot be obtained because the overall cost of obtaining it is exorbitant or the means of obtaining it are not known, the agency must: (1) state that such information is incomplete or unavailable; (2) state the relevance of such information; (3) summarize the existing credible evidence relevant to evaluating impacts; and (4) evaluate such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. 40 C.F.R. § 1502.22(b).

129. BLM’s failure to determine the cost of obtaining information concerning the impact of the proposed RMP amendments on global warming, and its failure to otherwise

comply with 40 C.F.R. 1502.22(a) & (b), violates NEPA and implementing regulations, and so is arbitrary, capricious, or otherwise not in accordance with law. See 5 U.S.C. § 706(2)(A) (APA).

**FIFTH CLAIM FOR RELIEF**

Violation of the National Environmental Policy Act:  
Failure to Disclose and Analyze Properly Air Pollution Impacts

130. The allegations in paragraphs 1-111 are incorporated herein by reference.

131. NEPA requires that agencies consider and disclose to the public the direct, indirect and cumulative impacts of their actions. 42 U.S.C. § 4332(2); 40 C.F.R. §§ 1508.7, 1508.8; 1508.25(c).

132. BLM failed to accurately characterize existing air quality, and failed to consider the impacts of the RMP amendments, when taken together with the impacts of ongoing and projected oil and gas and other development, on air quality.

133. BLM's failure to properly analyze and disclose the direct, indirect, and cumulative impacts of the RMP amendments to air quality, or otherwise take a "hard look" at the impacts of the RMP amendments to air quality, violates NEPA and implementing regulations, and so is arbitrary, capricious, or otherwise not in accordance with law. See 5 U.S.C. § 706(2)(A) (APA).

**SIXTH CLAIM FOR RELIEF**

Violation of the Endangered Species Act:  
BLM's Failure to Consult with FWS on Adoption of the RMP Amendments

134. The allegations in paragraphs 1-111 are incorporated herein by reference.

135. Under ESA Section 7's consultation process, a federal agency proposing an action that "may affect" a listed species or its critical habitat must ensure, in consultation with FWS,

that the agency's action is not likely to jeopardize any listed species or adversely modify the critical habitat of any listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

136. BLM failed to consult with FWS on BLM's approval of the RMP amendments.

137. BLM's failure to consult with FWS on BLM's approval of the RMP amendments violated ESA Section 7 and implementing regulations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that BLM violated its regulations at 43 C.F.R. §§ 1610.2 and 1610.5 when it made the final decision denying a public administrative protest;
2. Declare that BLM violated FLPMA when it made the final decision denying a public administrative protest;
3. Declare that BLM's adoption of RMP amendments opening areas to oil shale or tar sands commercial leasing violated NEPA as set forth above;
4. Order BLM to comply with the requirements for 43 C.F.R. §§ 1610.2 and 1610.5 and provide a 30-day public protest period starting from the date of this Court's order;
5. Declare that BLM violated the ESA when it failed to consult with FWS pursuant to Section 7 of the ESA as set forth above;
6. Issue an injunction setting aside the record of decision approving the RMP amendments opening areas to oil shale leasing;
7. Enjoin BLM from implementing or relying upon the RMP amendments opening areas to oil shale and tar sands leasing, including the sale or issuance of any oil shale or tar sands

leases within the planning area, until such time as BLM has complied with NEPA and FLPMA as set forth above;

8. Grant such restraining orders and/or preliminary and permanent injunctive relief as Plaintiffs may request;

9. Award Plaintiffs their reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412, and the ESA, 16 U.S.C. § 1540; and

10. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted June 15, 2009.

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**CERTIFICATE OF SERVICE**

I certify that on the June 15, 2009, I filed the foregoing PLAINTIFFS' FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR REVIEW OF AGENCY ACTION with the Court's electronic filing system, thereby generating service upon the following counsel of record:

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