IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

BIODIVERSITY CONSERVATION ALLIANCE, Plaintiff, v. BUREAU OF LAND MANAGEMENT, Defendant, v. STATE OF WYOMING; BP AMERICA PRODUCTION COMPANY; ENCANA OIL & GAS (USA) Inc., Intervenors.	)	No. 09-CV-08-J

ORDER AFFIRMING IBLA FINAL DECISION

The above captioned matter came before the Court upon the plaintiff's Petition for Administrative Review. Oral arguments were held June 2, 2010. Mary Ann Budenske presented argument for plaintiff; the United States, Bureau of Land Management, was represented by Michael D. Thorp and Nicholas Vassallo; Intervenor State of Wyoming was represented by James Kaste;

Intervenor BP American Production was represented at the hearing by John F. Shepherd; and Intervenor Encana Oil & Gas (USA) Inc. was represented at the hearing by Robert Charles Mathes and Rebecca Wunder Watson. The Court, having considered the parties' written submissions, the Administrative Record, the applicable law, and the arguments of counsel, FINDS and ORDERS that the IBLA Final Decision should be **AFFIRMED**, for the reasons stated below.

BACKGROUND

This case involves a challenge by Biodiversity Conservation Alliance ("BCA")[1] to the Final Environmental Impact Statement ("FEIS") and 2006 Record of Decision ("ROD") for the Jonah Infill Drilling Project ("JIDP"). BCA asserts jurisdiction is present pursuant to 28 U.S.C. §§ 1331, 1346 and 2201 and arises under the Administrative Procedures Act ("APA") 5 U.S.C. §§551 and 701, the National Environmental Policy Act ("NEPA") 42 U.S.C. 4321 *et seq.*, and the Federal Land Policy and Management Act ("FLPMA") 43 U.S.C. § 1701 *et seq.*

The JIDPA ("Jonah Infill Drilling Project Area") is located in Sublette County, Wyoming. The JIDPA comprises 30,500 acres, 28,580 of which are

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[1]Appendix A includes a Glossary of Acronyms and Abbreviations used in this opinion and throughout the case.

federal surface and mineral estate managed by the BLM. Ninety percent of the JIDPA is located within the Pinedale Resource Area, managed under the Pinedale Resource Management Plan ("RMP"). The federal lands in the Pinedale Resource area are vast and include 931,000 surface acres of public land surface and over 1,185,000 acres of federal mineral estate (approximately 917,000 acres encompass both federal surface and mineral estate). The remaining one percent of the JIDPA is located within the Rock Springs Resource Area, managed under the Green River RMP. The JIDP is expected to produce 8 trillion cubic feet of natural gas – "enough to heat 96 million homes for one year – and serves the purpose of the Energy Policy Act of 2005 by increasing domestic energy production while reducing the country's dependence on foreign oil and gas sources." (See BLM response brief at page 3, citing to the record.)

In September 2002, the Operators submitted a proposal to BLM to further develop natural gas drilling in the Jonah Field. March 13, 2003, BLM's Notice of Intent was published in the Federal Register and the public was invited to comment or provide research information on the Operators' proposal. On March 26, 2003 a scoping notice describing the proposed action and seeking comment was mailed to government offices, elected officials, public land users, groups, newspapers, and radio and television stations. A scoping meeting was

held April 2003, and an additional public meeting was held November 14, 2003. November 20, 2003, the Operators submitted a revised proposal that envisioned adding up to 3,100 new wells on a minimum of 64 well pads per section as related infrastructure on up to 16,200 acres within the Jonah Field. The scoping participants were notified in December 2003 of the updated proposal and further comment was solicited.

To analyze the impacts associated with this development, BLM prepared a Draft Environmental Impact Statement ("DEIS") completed February 2005. A Notice of Availability of the DEIS was published in the Federal Register and opened a 60 day public comment period.

The DEIS studied ten alternatives in detail: The No Action Alternative, the Proposed Action, and seven additional action alternatives. The action alternatives to the Proposed Action considered minimizing directional drilling, minimizing surface disturbance by requiring all new wells to be drilled from existing well pads, limiting new wells to differing levels, varying surface well pad spacing, and BLM's preferred alternative of optimizing natural gas recovery while minimizing impacts through mitigation and outcome-based performance objectives. BLM also prepared an additional air quality study which was made available for public review and comment pursuant to a Notice of Availability

published in the Federal Register.

In January 2006, BLM issued the Final Environmental Impact Statement ("FEIS"). The FEIS carried forward five of the ten alternatives from the DEIS for detailed study and established a revised Preferred Alternative based on public comment and technical information received on the DEIS. The Preferred Alternative, developed to optimize natural gas recovery and minimize impacts, would enable the project to proceed subject to reclamation requirements which would limit total surface disturbance to 46% of the JIDPA at any given time. It also examined four separate alternatives and considered the potential impacts of the proposed action and its alternatives, among other resources: topography/water; paleontology; air quality/visibility; soils; wildlife (including threatened and endangered species); plant cover; land use; socioeconomics; and cultural and historic resources. The FEIS discussed the mitigation measures that were to minimize potential impacts from the project. THE FEIS determined "that the [proposed action] will be in accord with FLPMA. Every attempt has been made to provide for the extraction of minerals while managing the area for multiple uses. . . . The revised Preferred Alternative in the FEIS will minimize adverse impacts while undertaking actions necessary to prevent undue degradation of the land through mitigation and restoration." AR

35475.[2]

In March 2006, BLM issued the ROD which adopted, with some modification, the Preferred Alternative. AR 37309-37429. The project provides for drilling of approximately 3,100 new wells at a rate of approximately 250 wells per year for twelve years. Drilling is limited to no more than 46% of the JIDPA (14,030 acres) at any one time, and total disturbance cannot exceed 20,334 acres over the life of the project. The ROD was not the final review or approval of specific development activities within the JIDPA. Site-specific approvals, including environmental review, are required for site-specific actions such as Applications for Permit to Drill, right of way grants, and Applications for Special Use Permits. The ROD authorized the project on the condition that Operators comply with specific mitigation objectives and implement Best Management Practices. Operators are required to begin reclamation as soon as disturbed areas are no longer needed for drilling activities, with final reclamation to occur as soon as the site is no longer needed for production activities. They are also obliged to conduct compensatory offsite mitigation, which they do voluntarily and at their own expense of $24.5 million, to

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[2]The Administrative Record will be referred to throughout this opinion as "AR."

ameliorate project impacts that may not be adequately mitigated onsite. Mitigation measures also include an adaptive management technique which enables adjustments to planned mitigation efforts in the event of unanticipated impacts. The ROD also establishes the Jonah Interagency Monitoring and Mitigation Office (JIO), comprised of members of the BLM, the Wyoming Game and Fish Department, the Wyoming Department of Environmental Quality and the Wyoming Department of Agriculture. The JIO is to monitor, enforce and coordinate the Operators' mitigation efforts.

One of the alternatives considered by BLM was "Alternative B," the all directional drilling alternative that BCA again argues is the best alternative. Under that alternative, operators would be required to drill all new wells directionally from existing well pads. The ROD states that although this alternative would minimize surface disturbance, it would increase air emissions by 20% over the chosen alternative and would have a greater impact on air quality resources. It would also result in lower oil and gas recovery rates than the chosen alternative and cause a loss of 1.8 trillion cubic feet of natural gas and 81 million barrels of oil.

In the ROD, BLM found that although the proposed development requires intensive surface disturbing activities that will result in significant impacts to

resource values, long-term reestablishment of habitat value and function will occur through the proposed reclamation practices and monitoring efforts. AR 37315. BLM also found the ROD was consistent with the Pinedale and Green River RMPs; that development of these federal resources satisfies requirements of FLPMA; that the leasing and subsequent production of federal oil and gas resources provides the United States, the State of Wyoming and affected local counties with income in the form of royalty payments; and that the JIDP meets one of the goals of the National Energy Policy Act.

In April 2006, BCA, with the Center for Native Ecosystems, appealed and petitioned for a stay of the ROD to the IBLA. As here, the BCA asserted that BLM violated FLPMA and NEPA by failing to take action to prevent undue and unnecessary degradation ("UUD") to wildlife, wildlife habitat, and cultural and paleontological resources, and by failing to adequately assess on and offsite mitigation measures. In September 2008, the IBLA issued a 47 page decision which considered and rejected BCA's arguments. As to FLPMA, the IBLA found the BLM was cognizant of its substantive obligation under FLPMA to prevent UUD and that BLM appropriately determined that the JIDP was not likely to cause UUD based on its environmental analysis in the EIS. The IBLA also found BCA failed to demonstrate error in BLM's environmental analysis, or otherwise

show that the JIDP will actually result in any UUD of public lands. The IBLA rejected BCA's assertion that BLM should have identified a threshold beyond which any impacts would be considered unnecessary or undue, because there is no support in the statute, regulations or case law for that position. The IBLA found, as to NEPA, that the BLM fully complied with its obligations by preparing an EIS that fully considered all reasonable alternatives to the proposed action.

The IBLA denied the petition to stay and its decision affirmed the ROD. BCA filed its complaint in this action, "contesting the FEIS and the ROD for the JIDP on January 13, 2009."

PETITION FOR REVIEW

BCA states the following describing the "Nature of the Case":

> This case comes to the Court upon BCA's Petition for Administrative Review. BCA challenges Respondent's 2006 Record of Decision ("ROD") for the Jonah Infill Drilling Project, Sublette County, Wyoming, ("JIDP") authorizing large scale drilling on federal public lands. BCA seeks a declaration that BLM violated federal laws under the causes of action alleged below, and seeks injunctive relief to redress the injuries caused by these violations of law.
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> Petitioner also seeks an award of costs and attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

BCA then goes on to state in "Disposition Below":

BCA files its Petition for Administrative Review from the IBLA decision entered September 11, 2008 affirming the Record of Decision and Final Environmental Impact Statement for the Jonah Infill Drilling Project which were entered in January and March of 2006 respectively.

The issues presented to review by BCA are:

- Approval of the JIDP ROD and FEIS resulted in unnecessary or undue degradation in violation of FLPMA.
- BLM failed to assess the efficacy of mitigation measures violating FLPMA and NEPA.
- BLM has failed to balance multiple use duties under FLPMA.
- BLM relies on adaptive management to make up for shortfalls in their NEPA and FLPMA duties.

The Court notes that IBLA reviews BLM decisions *de novo*. *IMC Kalium Carlsbad, Inc.*, 206 F.3d 1003, 1009-1010 (10th Cir. 2000) (review "is de novo" because IBLA is "delegated responsibility to decide for the Department 'as fully and finally as might the secretary' appeals regarding use and disposition of the public lands and their resources", quoting 43 C.F.R. § 4.1). Moreover, the IBLA is not bound by the findings of the BLM, but rather is the final arbiter for the agency. *Id.*; *see also* 43 C.F.R. § 4.1(b)(3) (noting that the IBLA issues the final decision for the Department of the Interior). Again, it is the *IBLA's*

decision that is being reviewed, not the decisions of the BLM in crafting the FEIS and ROD. The pertinent question is whether the IBLA's decision to affirm the BLM's decision was arbitrary, capricious, otherwise not in accordance with law or not was supported by substantial evidence. *See id.*; *Pennaco Energy, Inc. v. United States Department of Interior*, 377 F.3d 1147 (10th Cir. 2004).

STANDARD OF REVIEW

> This review comes under the auspices of the Administrative Procedure Act (APA). *See* 5 U.S.C. §§ 701-706. When, as here, review is sought not pursuant to specific authorization in a particular substantive statute, but rather, under the general review provisions of the APA, "the 'agency action' in question must be 'final agency action.'" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990); *see also* 5 U.S.C. § 704. A district court's review of the agency's final agency action is governed by 5 U.S.C. § 706. The APA, and thus this Court, demands that administrative agencies (1) act within their scope of authority; (2) comply with prescribed procedures; and (3) act in accordance with law. *Wyoming Lodging and Rest. Ass'n. v. United States Dep't of Interior*, 398 F. Supp.2d 1197, 1207 (D. Wyo. 2005). Section 706(2)(A) of the APA provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the "arbitrary and capricious" standard, the Court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997). In addition to requiring a reasoned basis for agency action, the 'arbitrary or capricious' standard requires an agency's action to

be supported by the facts in the record." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994).[3]

An agency's factual determinations are evaluated under a "substantial evidence" standard of review. *See* 5 U.S.C. § 706(E)(2). Substantial evidence is evidence that a reasonable mind might accept as adequate to support the IBLA's conclusion. *Doyal v. Barnhart*, 331 F.3d 758, 760 (10th Cir. 2003) (internal quotation omitted). It is something less than a preponderance of the evidence, but more than a mere scintilla. *Foust v. Lujan*, 942 F.2d 712, 714 (10th Cir. 1991); *see also Pennaco Energy, Inc. v. United States Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004) ("Evidence is generally substantial under the APA if it is enough to justify, if the trial went to a jury, refusal to direct a verdict on a factual conclusion.") (internal quotation omitted). The mere existence of countervailing or contradictory evidence in the administrative record does not foreclose a finding that an agency's action is supported by substantial evidence. *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1241 (10th Cir. 2000). To that end, a district court may find the evidence "substantial" even when such evidence could support an entirely different result. *Id.*

A reviewing court's inquiry begins and ends with the

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[3] Agency action is "arbitrary and capricious" if the agency in question:

> [1] relied on factors which Congress had not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *accord Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1167 (10th Cir. 1999).

> administrative record.[4] Judicial review is factually exhaustive, but legally narrow. *Utahns for Better Transp. v. United States Dep't of Transp.*, 305 F.3d 1152, 1164 (10th Cir. 2002). This Court does not sit as an honorary member of the BLM – it unquestionably lacks such expertise. *Cf. Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Accordingly, neither this Court nor the agency is allowed to supplement the administrative record with post-hoc rationalizations. *Bar MK Ranch v. Yuetter*, 994 F.2d 735, 739-40 (10th Cir. 1993) (citations omitted). Further, the Court is not permitted to substitute its judgment for that of the agency or supply a reasoned basis for agency action where none existed before. The Court simply must ask whether the IBLA acted within its scope of authority, in accordance with law, complied with prescribed procedures, and ultimately, whether it examined relevant data within the record and "articulated a satisfactory explanation for its decision, including a rational connection between the facts found and the decision made." *Colorado Wild, Heartwood v. United States Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006); *accord Olenhouse*, 42 F.3d at 1574. Generally, so long as substantial evidence exists to support this decision, judicial hands will be kept off administrative agency judgment calls.

Coronado Oil v. United States Department of Interior, 05-CV-111J, Docket

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[4] The Tenth Circuit has acknowledged five limited exceptions to this general rule. *See, e.g., American Mining Congress v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985). First, "that the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials." *Id.* Second, "that the record is deficient because the agency ignored relevant factors it should have considered in making its decision." *American Mining Congress*, 772 F.2d at 626. Third, "that the agency considered factors that were left out of the formal record." *Id.* Fourth, "that the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues." *Id.* And fifth, "that evidence coming into existence after the agency acted demonstrates that the actions were right or wrong." *Id.*

Entry 16 at 9-12 (August 23, 2006).]

Petitioner's Brief and Contentions (Docket Entry 47)

BCA argues that the BLM failed to identify the threshold for determining unnecessary and undue degradation ("UUD"). In the JIDP BLM recognized the rights of mineral lessees to develop federal mineral resources as long as unnecessary and undue environmental degradation is not incurred. It did not define what constituted UUD. In the absence of a definition, the Secretary may exercise discretion and address UUD on a case-by-case basis. BCA argues that recognition of UUD is not the same as defining it within the context of the project. BCA raised this issue during the scoping, DEIS and FEIS stages. In the ROD, BLM responded to concerns that the plan would result in UUD as follows:

> Numerous comments stated that the FEIS was inadequate, or did not properly follow the law. These comments alleged violation of BLM mandates under the Federal Land Policy and Management Act (FLPMA), inadequate range of alternatives, failure to provide for multiple use of the public lands, incomplete cumulative impacts analysis, and inadequate prevention of undue and unnecessary degradation. BLM does not believe that these comments are valid and further that the agency has complied with the public land laws and policies in all cases.

AR 37429. BCA contends this is inadequate analysis allowing the agency to inform and shape the agency's decisions at the project level.

BCA argues that BLM departed from its own guidance. BCA cites to the BLM Handbook 6840 Sensitive Species, at AR 39031, which BCA contends requires the agency to use all methods and procedures which are necessary to improve the condition of special status species and their habitats to a point where their special status recognition is no longer warranted. The sensitive species designation, for species other than federally listed, proposed, or candidate species, may include such native species as those that "3. are undergoing significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution, 4. are undergoing significant current or predicted downward trends in population or density such that federally listed, proposed, candidate, or State listed status may become necessary." AR 39041.

BCA notes that the BLM Wyoming State Director designated in 2002 the greater sage-grouse, Brewer's sparrow, sage sparrow, sage thrasher, and pygmy rabbit as BLM Sensitive Species (i.e., species for which viability is a concern). The levels of oil and gas development prior to JIDP approval, at 16 wells per square mile, had already reduced the amount and quality of

sagebrush habitat for these species. AR 37317.[5] BCA contends wildlife population declines were documented by the BLM inside the Jonah Field as early as 2003. The project area is 30,000 acres that is slated to have two of every three acres bulldozed. 99.98% of the wildlife habitat will be within 1/3 mile of surface disturbing activity and 99.2% within 1/8 mile of actual oil and gas development. BCA argues BLM has violated the provisions of its own manual by approving actions which will likely result in federal listing under the endangered species act. BCA offers in support internal comments made by BLM officials early during consideration of the project about the levels of destruction in the project and that the level of surface disturbance is not acceptable from a wildlife perspective. (See comments of 9-12-2003 by BLM's Keith Andrews, AR 3521; Communication Record of 10-3-2003 of BLM hydrologist Don Doncaster, AR 4091; comments of 1/23/2004 of BLM range specialist Steve

[5]On page 37317 of the AR, it provides: "After federal decisions authorizing the current level of Jonah Field development (16 well pads per section, or 40-acre spacing), the Wyoming Game and Fish Department (WGFD) issued a guidance document for oil and gas development impacts to wildlife (Recommendations for Development of Oil and Gas Resources within Crucial and Important Wildlife Habitats, December 6, 2004). Using the definitions in this guidance, the current state of development in the Jonah Field had already reached a threshold (oil and gas development at levels greater than four well pads per 640-acre section [160-acre spacing]). The WGFD report recommends off-site mitigation to address impacts when this threshold is exceeded." ROD, AR at 37317.

Laster, AR 6541). BCA contends that BLM has not supplied reasons documented in the administrative record explaining why it departs from guidance or policy and also contends that it provided no evidence that it has complied with the UUD or BLM's own guidance as to BLM sensitive species. Thus, BCA argues there is no rational connection between the facts found and the decision made. BCA argues that the BLM does not discuss anywhere in the FEIS the UUD standard.

BCA argues the JIDP ROD violated the FLPMA's substantive requirements to prevent UUD. A level of development has been permitted that will completely destroy habitat function for sensitive species in the project area, in BCA's view. BCA cites to comments of BLM sage grouse biologist Tom Rinkes that the "sage brush community return to late seral stage . . . [similar to] pre-development will be an additional 30 to 100 years, making the duration of the disturbance from 86 to 156 years. Page 4-181. Description of impact is otherwise good." (Comments made in December 2002 at AR 18638.) Rinkes further comments state, not quoted by BCA, "Overall, infill development probably wont [sic] increase effects seen from Jonah and Jonah II. But, affected environment must reflect post-Jonah II as the baseline condition. See first and second Rinkes bullet." AR 18638.

BCA argues that sensitive species, including Brewer's sparrow, sage sparrow, and sage thrasher, songbirds which are sagebrush obligates, are not mentioned in the ROD, citing AR 37317-9. The Court notes that this assertion is not entirely accurate. Responding to arguments that the JIDPA would no longer be suitable habitat for many wildlife species (e.g., threatened and endangered species, BLM-sensitive species, and raptors), the ROD states:

> The FEIS acknowledged that habitat impacts would be substantial due to full field development. The mitigation strategy for limiting the allowable surface disturbance is designed to ensure accelerated reclamation by the Operators and to facilitate the long-term return of habitat function. Compensatory mitigation, committed to by the Operators and accepted by the BLM as a condition of approval, should result in significant improvements to existing habitats and/or development of additional suitable habitats used by the affected species. The off-site mitigation will remain in place and offset some of the on-site impacts until such time as final reclamation of the full field development impacts occurs.

AR 37318.

BCA argues the approved project causes UUD to sage grouse habitat. BLM identified sage grouse habitat function as a key issue to be addressed in all alternatives. See e.g., FEIS, particularly AR 32979 which states greater sage-grouse/greater sage-grouse habitat protection is one of nine key issues. Sage grouse populations have declined in the JIDPA. Comments in the AR noted extreme level of sage grouse habitat destruction in the JIDPA. See e.g.,

AR 07694; memo, with comments, to Carol Krause dated June 8, 2005 at AR 14832-14837.

BCA argues that the approved project causes UUD to pygmy rabbit habitat. Pygmy rabbits are a BLM sensitive species and are not mentioned or considered in the ROD. BCA also asserts the JIDP will cause UUD to archaeological and paleontological resources. BCA argues that 2/3 of the cultural resources including intact buried artifacts, human burial sites, and housepits, will likely be impacted by the project. BCA asserts that under the Jonah ROD, the principal prevention strategy is abdicated to the operators. "Operators will suspend all operations if previously undetected vertebrate fossil materials are discovered during surface-disturbing activities" until authorization to proceed is granted by the BLM. AR 37341, 37347. The ROD states, beginning on 37347:

> 17. At the Operator's discretion, wells, pipelines, and ancillary facilities would be designed and constructed such that they would not be damaged by moderate earthquakes. Any facilities defined as critical, according to the Uniform Building Code, would be constructed in accordance with applicable Uniform Building Code Standards for Seismic Risk Zone 2B.
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> 18. In areas of paleontological sensitivity, a determination would be made by the BLM as to whether a survey by a qualified paleontologist is necessary prior to the

> disturbance. In some cases, construction monitoring, project relocation, data recovery, or other mitigation may be required to ensure that significant paleontological resources are avoided or recovered during construction.
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> 19. If paleontological resources are uncovered during surface-disturbing activities, Operators would suspend all operations that would further disturb such materials and would immediately contact the BLM, who would arrange for a determination of significance and, if necessary, recommend a recovery or avoidance plan. Mitigation of impacts to paleontological resources would be on a case-by-case basis, and Operators would either avoid or protect paleontological resources.
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> 20. Contractors and their workers would be instructed about the potential for encountering fossils and the steps to take if fossils are discovered during project-related activities. The illegality of removing vertebrate fossil materials from federal lands without an appropriate permit would be explained.

AR 37347-37348.

BCA relies on a declaration from Dr. Jason Lillegraven stating that recognition of fossils is not easy and experienced palaeontologists often must look very closely, often crawling on hands and knees. He questions the willingness of many crew chiefs to halt drilling activities to await the appearance of a trained fossil evaluator on the site. Dr. Lillegraven's declaration was prepared for a different project, but BCA argues his statements are applicable

to any geological site containing paleontological resources.

BCA argues that the JIDP also constitutes UUD of sensitive resources that the BLM should have worked to prevent. The primary means of doing so is directional drilling, which was not required by the BLM in approving the project ROD. This is Alternative B which was considered and rejected by the BLM.

BCA argues that the BLM failed to assess the efficacy of mitigation measures violating FLPMA and NEPA. It contends that verification of the efficacy of mitigation measures is essential for the BLM to demonstrate that such measures are sufficient to prevent UUD. It argues that mitigation requires a predicate determination by the BLM of acceptable or unacceptable impacts – a threshold of impacts beyond which they are unacceptable. BLM has based its mitigation plan on offsite mitigation and asserts that the BLM will allow the environment in the JIDPA to be totally destroyed because they will make up for this degradation by preserving and enhancing acreage offsite. BCA argues that once the BLM has disclosed significant impacts under NEPA, it must then identify thresholds of acceptable/unacceptable impacts under the FLPMA UUD standard and apply those thresholds to the impacts disclosed.

BCA argues also that the BLM Instruction Memorandum 2005-069 (AR 38272 attached to Petition for Stay filed with IBLA) requires BLM to apply all

forms of onsite mitigation, including Best Management Practices, before offsite mitigation can be considered. Here, BCA argues that the BLM has noted that the effectiveness of mitigation measures was not known, so the resulting differences among alternatives could not be quantified. Thus, BCA contends in this case, BLM has not made a final determination that is reasonable and that the action of the BLM in issuing the Jonah ROD is arbitrary and capricious.

Here, the BLM has relied on mitigation measures which are either untested or have been tested and have decisively been shown to be ineffective such as the current stipulations for greater sage-grouse which are leading the species to listing and/or extirpation.

BCA asserts that the BLM has failed to balance multiple use duties under FLPMA. As to this argument, BCA states only that the "Jonah ROD and the FEIS, however violate the FLPMA because they evidence no such balancing in any respect. Instead BLM fixates solely on infill development to maximize recovery of oil and gas resources while minimizing costs to the operators." Petitioner's Brief at 27.

BCA asserts that the BLM relies on adaptive management to make up for shortfalls in NEPA and FLPMA duties. It argues that nothing in the FEIS establishes front-end landscape-level habitat or population management

objectives and thus, the Wildlife Monitoring/Protection Plan (WMPP) has nothing by which to measure success or failure. These deficiencies are compounded by the fact that the BLM failed to assess the efficacy of the WMPP, which is largely a communication tool and not a substitute for action, and has failed to conduct the requisite hard look at impacts that function as a necessary predicate to assessing and confirming the WMPP's efficacy. The only front-end preventative measures are found in lease stipulations. The Holleran and other studies referenced in BCA's brief have shown the stipulations under a less dense drilling plan were ineffective. BLM refuses to alter its plans in the face of scientific evidence pointing to the need for enhanced and more extensive efforts to understand and protect greater sage-grouse, sagebrush obligate songbirds, and pygmy rabbits, as well as other species threatened by the development.

The BCA seeks a determination that the BLM violated FLPMA by permitting a level of development that is unnecessary and undue in relation to the impacts on the environment; that BLM violated NEPA and the APA by failing to conduct the NEPA process and prepare a NEPA document that takes a "hard look" at the JIDP proposal; a declaration that all future APDs and other surface disturbing activities comply with NEPA and enjoining further implementation of the ROD and BLM infill authorizations until such time as BLM has complied with

NEPA, except for requests involving drilling directional wells from existing well pads; an order for the BLM to comply with NEPA and the APA and their implementing regulations by performing BLM's mandatory procedural duties when considering whether or not to authorize surface use and occupancy for oil and gas development in the JIDPA; and costs of litigation, including reasonable attorneys' fees.

The Bureau of Land Management's Response to Biodiversity Conservation Alliance's Brief in Support of Its Petition for Review of Agency Action (Docket Entry 52)

BCA challenges the decision of the IBLA upholding the ROD for the JIDP. However, the JIDP was hailed by the EPA as a "'model of collaboration' that successfully balances 'provid[ing] greatly needed energy resources [] while protecting the environment of southwestern Wyoming." AR 37313. It is the culmination of a three and one half year process including the preparation of multiple environmental analyses, public meetings and five separate comment periods. The FEIS examined five separate alternatives and included a comprehensive examination of potential impacts associated with the project. In approving the JIDP, BLM took great care to ensure surface disturbance would be limited to the extent practicable and that Operators were compelled to

implement a series of on and offsite mitigation measures to counter any impacts. BLM was aware of, and strictly adhered to, its obligations to take a hard look at the project under NEPA, to prevent unnecessary and undue degradation and to manage the project area for multiple uses under FLPMA. AR 37313-37329.

BLM argues that BCA's claims must be denied because BCA improperly objects only to the ROD instead of the IBLA decision which, under the APA is the only agency action subject to review by this Court. Substantively, BCA's arguments train on the notion that, because the ROD and FEIS identified potential impacts, those impacts inherently result in UUD as a matter of law. This is a fundamental misunderstanding of UUD and the multiple use balancing required by FLPMA. BCA also contends that the mitigation plans are not proper because they have not been verified to be effective. This is also a fundamental misunderstanding of applicable law because NEPA requires only that BLM discuss mitigation measures, which it did. BCA also ignores that BLM, although not required to do so, instituted detailed mitigation measures and took the extra step of creating an oversight body to monitor and enforce them, the JIO.

BCA has failed to challenge the IBLA order: BCA has not demonstrated the IBLA order was arbitrary or capricious. The only agency decision properly

before this Court is the September 11, 2008 IBLA decision. BCA, in its brief, "challenges Respondent's 2006 Record of Decision." Petitioner's Brief at 5. While the ROD and FEIS are significant parts of the Administrative Record, they are not final agency action. The pertinent question is whether the IBLA's decision was supported by substantial evidence in light of the entire administrative record, citing *Coronado Oil*, No. 05-CV-111J, at 18 (D.Wyo. August 23, 2006).

BLM contends that it has fully complied with its obligations to prevent UUD under FLPMA's substantive requirements. BLM recognized that although operators have a statutory right to develop the JIDPA's oil and gas resources, drilling activities may only go forward as long as unnecessary and undue environmental degradation does not occur. AR at 33007. The FEIS noted that mitigation measures would provide a method of preventing UUD. AR at 33296. The ROD, like the FEIS, considered the likelihood of impacts from the project and (a) limited drilling to 46% of the JIDPA at any one time; (b) limited total disturbance to no more than 20,334 acres over the life of the project; (c) mandated that onsite reclamation commence as soon as disturbed areas are no longer needed for drilling activities, with final reclamation to occur as soon as the site is no longer needed for production activities; and (d) obligated

operators to carry through with their commitment for funding for compensatory offsite mitigation to ameliorate project related impacts that may not be adequately mitigated onsite. It also established the JIO to monitor, enforce and coordinate the operators' mitigation efforts and provide a rapid response to unnecessary and undue environmental degradation. AR 37365. BLM took action to prevent UUD and concluded the project will not cause UUD to the JIDPA.

BLM asserts FLPMA does not require BLM to establish a UUD threshold or otherwise address substantive UUD in the NEPA process. BLM did not violate FLPMA with respect to impacts to wildlife or habitat. The JIDP will not result in UUD to wildlife resources, contrary to the BCA assertion that the level of development approved by the ROD will completely destroy the habitat of the JIDPA. BLM contends that BCA has cherry-picked statements in the record where BLM explained that impacts to certain habitat within the JIDPA could last 100 years or longer before they are fully reclaimed. It is improper for a litigant to flyspeck the record to support an overall proposition that an agency decision was improper. *New Mexico v. Bureau of Land Management*, 565 F.3d 683, 710 (10th Cir. 2009). BCA has failed to acknowledge that these are observations of potential impacts and that the BLM extensively examined and imposed

mitigation measures and reclamation to reduce impacts. As stated in the ROD:

> Although the proposed development requires intensive surface-disturbing activities that will result in significant impacts to resource values, including displacement and/or local extirpation of wildlife resources, long-term reestablishment of habitat value and function will occur through the proposed reclamation practices and monitoring efforts. While the intensive development will limit opportunities for other uses for many years, the long-term outcome will be full reclamation and the return of these lands to near prior existing conditions for other use opportunities in the future.

AR 37315.

The JIDP will not result in UUD to the habitat of sagebrush obligate songbirds. BLM specifically analyzed mitigation measures as well as potential impacts to songbirds in the EIS. To ameliorate the acknowledged loss of songbird habitat, the ROD requires operators to conduct immediate reclamation measures once drilling ceases, and to perform onsite and offsite mitigation measures which are to be closely monitored and enforced by the JIO.

The JIDP will not result in UUD to the sage grouse habitat. BLM openly disclosed that impacts to sage grouse habitat would be significant but determined that the potential for displacement and/or local extirpation of sage grouse from its habitat within the JIDPA is not anticipated to affect the long-term species sustainability due to the relatively small size of the JIDPA in relation to overall habitat availability in the area. AR 37318. Some areas

directly outside of the JIDPA had incurred a 48% increase in male lek attendance. BCA also ignores the mitigation measures adopted by the ROD specifically directed at protecting sage grouse.

The JIDP will not result in UUD to pygmy rabbit habitat. BLM acknowledged that the sensitive species pygmy rabbit and its habitat would be substantially impacted by the JIDP, but imposed mitigation strategies limiting surface disturbance designed to ensure accelerated reclamation by operators and to facilitate the long term return of habitat function. Compensatory mitigation should result in significant improvements to existing habitats and development of additional suitable habitats used by affected species. Offsite mitigation remains in place and offsets some of the onsite impacts until final reclamation of the field occurs. Impacts were considered and the BLM determined protective measures would prevent UUD. This finding was upheld by the IBLA.

BLM did not depart from its own sensitive species policy. BLM determined that the anticipated impacts to these species are not expected to contribute to their listing under the Endangered Species Act ("ESA"). There is no evidence that any of the sensitive species would be proposed for listing as threatened or endangered as a result of any cumulative impacts under any of the project

alternatives. AR 33256. BCA offers no record evidence to contradict this determination. The IBLA also stated that BCA had failed to provide any evidence the project is likely to contribute to the need to list any sensitive species as threatened or endangered under the ESA. BLM determined that, even with infill drilling, the project and reasonably foreseeable future development will impact only a small portion of the overall habitat area used by the affected wildlife, including sensitive species. AR 52844.

The JIDP will not result in UUD to archaeological and paleontological resources. BCA's argument is basically that acknowledgment of potential impacts constitutes UUD. This is without legal authority nor substantive evidence in the record. BCA has ignored BLM's in-depth analysis. Cultural and archaeological resources are discussed in the FEIS at length. Measures were instituted to protect them in the ROD. AR 37343-37356. Appropriate mitigation, in areas of religious importance, traditional cultural properties or other sensitive Native American areas are identified in affected areas, BLM is to consult with affected tribes and, in consultation with operators, identify potential impacts and determine appropriate mitigation on a case by case basis. AR 37356. Operators could not resume operations until BLM authorizes same with a formal notice to proceed. BCA has not provided any evidence that any

historic property considered eligible or potentially eligible for inclusion in the National Register of Historic Places and entitled to protection under section 106 of the National Historic Preservation Act is likely to suffer an adverse effect which cannot be avoided or mitigated as required by statute and implementing regulations. AR 52844.

The JIDP will not result in UUD to paleontological resources. There is no factual nor legal support for these contentions. Disclosure of potential impacts in the EIS and ROD is improperly equated with UUD. The potential impacts of the JIDP to paleontological resources was carefully considered by BLM and BLM concluded UUD would not result. AR 54069, 35475.

The JIDP will not result in UUD to sensitive resources. This addresses the argument that BLM should have selected Alternative B, requiring all directional drilling. This was considered, and BLM concluded that while it would minimize surface disturbance, Alternative B would also increase air emissions by approximately 20% over the proposed action and Alternative A by extending the amount of drilling time per well. This would result in a greater cumulative impact on air quality resources. It would also result in lower oil and gas recovery rates. BLM determined that the preferred alternative, allowing additional drill pads instead of restrictions to directional drilling would achieve

high levels of natural gas recovery and minimize impacts related to the key issues. This management approach would achieve the fewest long-term impacts while allowing recovery of the mineral resource as provided by federal laws and regulations including FLPMA and leasing stipulations. AR 33031-33032. BCA has made no showing this finding is arbitrary and capricious.

BLM asserts it was steadfast in its adherence to FLPMA's multiple use mandate. BCA has failed to support its claim that BLM "fixates solely on infill development to maximize recovery of oil and gas resources while minimizing costs to operators" without citations to record or explanation. BLM did not ignore resources that could be impacted by the JIDPA and it took measures to protect them while still enabling recovery of the JIDPA's much needed oil and gas resources. BLM took great care to balance competing objectives of oil and gas recovery while also protecting habitat, wildlife, cultural and paleontological resources of the JIDPA.

BLM asserts it has properly considered mitigation measures. There is no FLPMA requirement compelling BLM to set a threshold of unacceptable UUD. There is nothing in FLPMA that requires BLM to verify the efficacy of mitigation measures in order to show they will prevent UUD. BLM must ensure that no action is excessive, improper, immoderate or unwarranted. *State of Utah v.*

Andrus, 486 F. Supp. 995, 1005 n. 13 (D.Utah 1979). Decisions regarding UUD are afforded broad discretion. There is abundant evidence in the record that BLM carefully considered UUD and determined no UUD would result from the JIDP.

The adaptive management process is proper. It is a mechanism through which BLM can make incremental adjustments to field management over time, as information is gained about how JIDPA resources are reacting to new technologies or restrictions. AR 37364. Adaptive management is designed to address unknown problems that will arise in the future and thus, there is a natural limit to the specificity with which those measures can be described.

Encana's Oil & Gas (USA) Inc.'s Response to Petitioner's Opening Brief (Docket Entry 51)

Encana notes that neither NEPA nor FLPMA create a private right of action; the only means of review is pursuant to the APA. In this case, the IBLA's final decision of September 11, 2008 (15 IBLA 15) is the final agency action reviewable by this Court. AR 54037-54069.

The JIDP ROD was approved March 2006. Onsite mitigation for sensitive wildlife was considered and is in the AR at 37338-37355.

BCA's petition for stay at the IBLA was denied June 28, 2006. The final IBLA decision affirming the ROD was entered September 11, 2008. This is the agency action now before this Court.

In addition to the facts noted in the initial portion of this opinion, Encana reminds that the ROD adopted the BLM's Preferred Alternative, as reflected in the FEIS, with minor modifications and clarifications. That alternative authorizes continued development in the JIDPA, but limits overall surface disturbance to 14,030 acres at any one time and requires the Operators to comply with a series of outcome-based performance objectives and mitigation measures designed to protect various resources. AR 37309-37429.

The ROD includes substantial onsite mitigation measures, provides for adaptive management to allow the BLM to adjust mitigation measures if necessary as development proceeds, and implements offsite mitigation and the establishment of a unique interagency office, the Jonah Interagency Mitigation and Reclamation Office (JIO). In the ROD, the BLM charged the JIO with monitoring, enforcing, and coordinating mitigation efforts in and around the JIDPA. AR 37315, 37320-37321, 37363-37379. BLM developed and imposed a comprehensive set of conditions of approval, operator committed practices, development procedures and other mitigation measures for the JIDP. The ROD

establishes critical onsite mitigation measures for sensitive wildlife species, including sage grouse, sagebrush obligate species and pygmy rabbits. Additional mitigation measures imposed to protect wildlife resources include limits on total surface disturbing operations, limitations on the size of well pads, centralized production facilities, removal of fluids from reserve pits in specific time periods, extensive wildlife monitoring programs, strict reclamation requirements, restrictions on off-road travel, and coordination and consultation requirements for sensitive species and their habitats.

BCA and others filed a notice of appeal and petition for stay with the IBLA April 17, 2006 challenging the JIDP ROD. Encana, BP America and the State of Wyoming intervened in support of the ROD. The IBLA issued its decision denying the petition for stay June 28, 2006. In its denial of the stay, IBLA considered and specifically denied the same challenges brought by BCA in this appeal, including BCA's allegations regarding directional drilling in JIDPA and its suggestion that approval of the JIDP will cause UUD in violation of FLPMA. After additional briefing the IBLA issued a final decision affirming the ROD on September 11, 2008. In its decision, the IBLA again determined that BLM fully considered and properly rejected an all-directional drilling alternative in the JIDP EIS and that BCA failed to demonstrate that approval of JIDP would cause

UUD in violation of FLPMA's substantive mandate. AR at 54064-69. This appeal was filed by BCA January 13, 2009.

The standard of review is discussed, and Encana reiterates that the final agency decision before the Court is the final decision of the IBLA. BCA has neither presented any evidence from the record nor any argument demonstrating the IBLA's final decision was arbitrary, capricious, an abuse or discretion or otherwise not in accordance with law. Encana suggests BCA merely reasserts the same arguments it made before the IBLA and offers no reason to upset the IBLA's careful decision. The IBLA's decision must be affirmed, in Encana's opinion.

Encana discusses the BLM's obligations under NEPA, FLPMA and the agency decision in the JIDP ROD. It notes that oil and gas development on federal lands is a multi-staged process involving a series of reviews and regulatory approvals by BLM. BLM is required to undertake a series of environmental reviews at key points in the process and each successive environmental review builds on previous analyses and also addresses those specific environmental impacts that were unknown or unquantifiable at previous steps in the process, citing *New Mexico v. Bureau of Land Management*, 565 F.3d at 716; *Pennaco Energy, Inc. v. United States Dep't of Interior*, 377 F.3d

1147, 1151 (10th Cir. 2004). Typically, onshore oil and gas leasing and development involves three steps. First, the BLM undergoes a planning stage at which time the BLM prepares or revises its RMP to determine which acres within a planning area are suitable for oil and gas leasing; second, the BLM undertakes leasing, when it identifies particular parcels for oil and gas development at competitive public action; and third, BLM reviews proposals for exploration and development. BLM typically first reviews proposals for exploration based on Applications for Permit to Drill (APDs) submitted by the lessee that outline the drilling proposal for exploratory well(s). If exploration is successful, lessee may submit additional plans for development and request approval for a larger number of wells or a project to bring a field into commercial production. At each stage of the process BLM evaluates the need for environmental analysis or additional review.

Under FLPMA, BLM must manage federal lands for multiple use. All agree that multiple use management is a deceptively simple term describing the complicated task of striking a balance among the many competing uses to which land can be put, including recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values. Under FLPMA, BLM also has a substantive duty to prevent UUD of public lands. 43

U.S.C. 1732(b). Neither FLPMA nor the BLM regulations define UUD, but Interior has determined that oil and gas development projects do not constitute UUD so long as development is consistent with applicable laws, policies, and prudent operating standards. *Biodiversity Conservation Alliance*, 174 IBLA 1, 5-6 (2008); 43 C.F.R. § 4.1 (2008).

Under NEPA, federal agencies are required to consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives before committing resources to a project. 42 U.S.C. § 4332(b). It requires the preparation of an EIS for major federal actions significantly affecting the quality of the human environment. It is a procedural statute, and imposes no substantive limits on agency conduct. It does not address the substantive action an agency may take; NEPA simply imposes procedural requirements intended to prevent uninformed, rather than unwise, agency action. Here BLM complied with NEPA requirements by preparing the exhaustive, detailed JIDP EIS.

Encana remarks that BCA disagrees with BLM's decision authorizing infill oil and gas development within the JIDPA. BCA objects to the BLM decision to authorize drilling vertical wells from individual well pads rather than requiring directional drilling of multiple wells from a single pad due to the greater surface

impacts from vertical wells. In the JIDP EIS, BLM analyzed the potential impacts of various proposals, including directional versus vertical drilling, no directional drilling, all directional drilling from existing pads, and various amounts of directional drilling in between. BLM adequately considered requiring all directional drilling in the Jonah Field and did not do so based on significantly greater impacts to air quality, a dramatically lower recovery rate of natural gas and oil, and the technical difficulties of employing wide-spread directional drilling in the Jonah Field.

In the EIS and ROD, BLM determined that although directional drilling under Alternative B would minimize surface disturbance and thereby benefit wildlife and other resources, it "would also increase air emissions by approximately 20% over the Proposed Action . . . by extending the amount of drilling time per well." AR 37325. Each directional well contributes greater levels of air emissions due to extended drilling time, greater load factors on drilling equipment, and increased traffic levels. The IBLA affirmed the BLM's conclusions regarding increased impacts to air quality under Alternative B as compared to the Preferred Alternative selected by the BLM in the ROD. AR 52840.

BLM further found Alternative B "results in significantly lower oil and gas

recovery rates in relation to the Proposed Action or Preferred Alternative (approximately 1.8 trillion cubic feet of natural gas and 81 million barrels of oil)." AR 37325. Less reserves recovered would result in decreased revenues for the federal treasury and the State of Wyoming, as well as Sublette County, in taxes and royalties.

The BLM also concluded there are significant technical limitations on the use of directional drilling in Jonah Field and that directional drilling in the JIDPA has significant technical, economic and environmental limitations. Two independent reports were prepared by Reservoir Management Service Inc. regarding the technical limitations, risks and costs of directional drilling in the JIDPA. The reports were submitted to BLM, independently reviewed and incorporated into the EIS by the BLM. These reports discuss both the unique geologic conditions and difficulties associated with directional drilling in JIDPA, including stuck drill pipe and casing and the inability of the casing to reach the total depth of the borehole.

BLM made an informed decision and concluded, based on increased air emissions, loss of significant reserves and associated revenue, and technical difficulties, that despite increased surface disturbance the preferred alternative "would achieve the fewest long-term impacts while allowing recovery of the

mineral resource." AR at 37325. The IBLA extensively reviewed and specifically affirmed the BLM's decision not to require all directional drilling within JIDPA. AR 54066.

Encana asserts the BLM's approval of the JIDP ROD does not constitute UUD of the public lands. Interior has determined that surface occupancy and oil and gas development are not *per se* UUD. Congress intended FLPMA's multiple use standard, including UUD to coexist with mineral development. *Biodiversity Conservation Alliance*, 174 IBLA at 5-6.

Encana asserts the BLM is not required to define a threshold for UUD. This is a novel argument: BCA asserts that during the NEPA process, the BLM must undertake a formal assessment of whether UUD will result and suggests the BLM must define or establish a threshold for UUD. Nothing in FLPMA, NEPA, implementing regulations or BLM's regulations for oil and gas development requires BLM to define a threshold at which UUD will occur or to analyze in an EIS whether such degradation will result from implementing the alternatives under consideration.

The IBLA rejected BCA's arguments. "In effect, BCA asserts that BLM has a procedural obligation under NEPA to properly consider whether the [JIDP] Project will result in unnecessary or undue degradation of the public lands and

thereby demonstrate compliance with section 302(b) of FLPMA. We disagree."

AR 54068.

> "BLM's obligation under section 102(2)(C) of NEPA is to fully consider the likely significant impacts of approving the Project. It is not to address the question of whether BLM will, in approving the Project, transgress its FLPMA obligation to prevent unnecessary or undue degradation, by exceeding some pre-determined "threshold" or otherwise. We agree with BP America's statement that BCA's "attempt to convert [section 302(b)] of FLPMA] into a *procedural requirement* that BLM identify a specific threshold beyond which any impacts would be considered unnecessary or undue. . . finds no support in the statute, regulations, or case law. . . . We conclude that BLM was not required to assess compliance with the FLPMA requirement to prevent unnecessary or undue degradation in an EIS prepared to consider the potential environmental impacts of oil and gas development."

Id.

> Further:
>
> > However, we recognize that BLM does have a *substantive obligation*, under FLPMA, to prevent unnecessary or undue degradation of the public lands, and is thus required to ensure that approved activities will not unnecessarily or unduly degrade public lands. . . . BLM was cognizant of that obligation, and found that the project was not likely to cause unnecessary or undue degradation, based on its environmental analysis in the EIS. . . .
> >
> > BCA has not carried its burden to demonstrate, by a preponderance of the evidence, error in BLM's environmental analysis, or otherwise show that the Project will actually result in any unnecessary or undue degradation of the public lands.

Id. at 54068-54069.

Encana asserts that BLM complied with its policies, including the Sensitive Special Manual. The Sensitive Species Manual in effect at the time of the JIDP ROD is in the Administrative Record beginning at 39031, dated January 16, 2001. (A new sensitive species manual was adopted December 12, 2008.) The purpose of the manual is to ensure that actions on BLM-administered lands do not contribute to the need to list identified species under the ESA. Section .02 of the manual describes objectives, AR at 39033:

> The objectives of the special status species policy are:
>
> A. To conserve listed species and the ecosystems on which they depend.
>
> B. To ensure that actions requiring authorization or approval by the Bureau of Land Management (BLM or Bureau) are consistent with the conservation needs of special status species and do not contribute to the need to list any species status species, either under provisions of the ESA or other provisions of this policy.

Id. AR 39033. To prove a violation of the manual, one is to demonstrate the

agency failed to disclose an impact to a sensitive species that would cause it to become threatened or endangered, citing *Native Ecosystem Council*, 139 IBLA 209, 219 (1997).

The record demonstrates compliance with the policy and concluded that approval of the JIDP will not contribute to the need to list any sensitive species under the ESA. AR 33253, 44019, 44033. This finding was affirmed by the IBLA. BLM has complied with its obligations of disclosure and obligation to consult with the USFWS during preparation of the EIS and its obligation to manage sensitive species habitat in accordance with the manual and other wildlife regulations.

The JIDP does not violate the BLM'S substantive obligation to prevent UUD. BCA must prove impacts of development are greater than the usual effects anticipated from such development or that the project is inconsistent with applicable laws and prudent industry standards, citing *Biodiversity Conservation Alliance*, 174 IBLA at 5-6. BCA has presented no information or evidence that the development authorized in the ROD fails to comply with all applicable laws, regulations and prudent management practices or that it results in more than usual effects anticipated from such development. BCA confuses the BLM's NEPA responsibility to disclose significant impacts with the

substantive obligation to prevent UUD. NEPA requires agencies to identify potential significant impacts of federal projects in an EIS. It did so by identifying potential significant impacts from continued development of a variety of resources and analyzed those impacts in the JIDP EIS. AR 43696-44493, 32970-33381. Disclosure of significant impacts under NEPA does not equate to UUD under FLPMA.

The JIDP ROD does not constitute UUD. BLM disclosed potential significant impacts to wildlife resources in the EIS. See e.g., AR 33253-33256. It specifically disclosed the facts that impacts to sagebrush habitat could last 100 years or longer, AR at 33243, but found that a mosaic of sagebrush habitat will be established in a shorter period. AR 44007; 33243. It determined that there were sufficient mitigation measures to prevent UUD to wildlife. BCA presented no information in the record or analysis to demonstrate the BLM or IBLA's conclusions were arbitrary and capricious. *New Mexico v. Bureau of Land Management,* 565 F.3d at 704. BCA cites to internal BLM comments on the preliminary DEIS and infers that they indicate a different conclusion regarding UUD than that in the JIDP FEIS. The intervenor Encana argues that this demonstrates the careful, deliberate process BLM engaged in when preparing the JIDP EIS. After review of all comments and expert scientific

reports, BLM concluded approval of the JIDP would not result in UUD. BCA may disagree with the decision but cannot show the decision was arbitrary and capricious. BLM's decision as to cumulative impacts to wildlife was reviewed and affirmed by the IBLA. AR 52844.

Intervenor Encana also asserts that approval of the JIDP EIS will not cause UUD to sagebrush obligate species. This was specifically analyzed and potential impacts to sagebrush obligate species, including songbirds, were considered in the FEIS. AR 44018, 33254-56. BCA wrongly suggests that the existence of significant impact demonstrate a violation of FLPMA's UUD standard. BCA has presented no information in the record or analysis to demonstrate BLM or IBLA's conclusions were arbitrary and capricious. BLM was aware of the studies cited by BCA regarding potential impacts to sagebrush obligates in the Pinedale Anticline Field and was considered in the JIDP EIS. BLM also developed numerous mitigation measures designed to minimize potential impacts to these species in the JIDP ROD, including annual wildlife monitoring and protections plans, requirements to reduce surface disturbing operations, mandates to minimize road construction through careful planning and reductions in the size of wellpads through consolidated facilities and remote completion operations. It also imposed strict reclamation requirements.

Approval of the JIDP ROD will not result in UUD to sage grouse habitat. This impact was disclosed and most impacts to sage grouse had already occurred as a result of previously authorized development. It stated that no long-term impacts were expected due to the relatively small size of the JIDPA in relation to overall habitat availability in the area. BCA cites to internal preliminary drafts of the EIS and internal communications between BLM staff members. They do not evidence that these impacts constitute UUD and demonstrate careful reasoned analysis regarding potential impacts.

BLM was also aware of the Matthew Holloran study regarding potential impacts to sage grouse which was referenced in the FEIS. The ROD imposes mitigation measures, including prohibition of surface disturbing activities within 2 miles of an occupied lek during lekking and brooding season (March 15 through July 15) and requirements prohibiting placement of compressor stations within two miles of a sage grouse lek. There are also operator committed practices to protect sage grouse, including sage grouse nest surveys during nesting and prior to beginning construction and delaying surface disturbing activities if nests are located until nesting is complete. Operators also agreed to utilize only directional drilling techniques to access resources beneath Sand Draw, an area in the JIDPA that provides key nesting and

wintering habitat for sage grouse.

Approval of the JIDP does not constitute UUD to pygmy rabbits. The BLM disclosed potential impacts and determined they did not constitute UUD. AR 33254; 54069. Mitigation measures were also designed to alleviate potential impacts to pygmy rabbits and their habitat, including agreement not to construct well pads or roads within 600 feet of Sand Draw (known to be best habitat for pygmy rabbit); a no surface occupancy within 300 feet of Sand Draw, limits on total surface disturbing operations, limitations on well pad size, centralized production facilities, removal of fluids from reserve pits in specific time periods, extensive wildlife monitoring programs, strict reclamation requirements, restrictions on off-road travel, and coordination and consultation requirements for all BLM sensitive species and their habitats. AR 37336-37, 37339, 37341-42, 37353-54.

JIDP will not cause UUD to archaeological or paleontological resources. Impacts to cultural resources were studied in the FEIS and information used in the EIS was relied upon when BLM determined approval of the JIDP would not result in UUD. IBLA found:

> However, BCA does not provide any evidence that any historic property considered eligible or potentially eligible for inclusion in the National Register of Historic Places and entitled to protection

> under section 106 of the National Historic Preservation Act, as amended, 16 U.S.C. § 470f (2000), is likely to suffer an adverse effect which cannot be avoided or mitigated, as required by the statute and its implementing regulations (36 CFR Part 800). Likewise it offers no evidence that, given mitigation measures, paleontological resources will be unnecessarily or unduly degraded.

Order Denying Petition for Stay at IBLA; AR 52844. BCA's discussion of the information in the FEIS does not demonstrate anything beyond the usual impacts of development which were carefully analyzed by the BLM. It also ignores the conditions of approval and operator committed practices, including consultation with potentially affected Tribes prior to activities in areas of religious importance, traditional cultural properties or other sensitive Native American areas, site-specific resource literature searches and Class III inventory reports prior to surface disturbing activities.

Encana asserts the record actually demonstrates that development in the JIDPA has led to the discovery, mitigation or protection of hundreds of cultural resources in the Jonah field – nearly one in six projects have yielded discoveries. AR at 33122. Upon discovery of human remains and housepits, BLM complied with all laws including the Native American Graves Protection and Repatriation Act and consulted with the Shoshone and Ute Tribes.

Approval of the JIDP will not result in UUD to paleontological resources.

Literature indicates that the JIDPA does not contain significant fossil localities. AR 33070. Dr. Lillegraven's declaration, upon which BCA relies, does not relate to the JIDPA but to a BLM seismic projects hundreds of miles from the JIDPA. His comments have no bearing and also do not indicate the two areas are geologically similar. Further fossil resources have been discovered and recovered as a result of oil and gas activities in the JIDPA. BCA fails again to acknowledge conditions of approval and operator committed practices to protect paleontological resources, as well as mitigation measures including construction monitoring and project relocation if necessary, and data recovery.

BLM's decision on directional drilling in the JIDP does not constitute UUD to sensitive resources. Directional drilling was extensively reviewed by the BLM, but not approved for all the reasons stated above. BCA relies on comments of Kenneth Kreckel and information regarding directional drilling in the Pinedale Anticline Field, which were reviewed and rejected by BLM. The comments did not address the technical limitations of directional drilling, increased air emissions and potential for lost reserves. BLM relied on its own experts regarding scientific and technical decisions within their areas of expertise, and its decision not to require all directional drilling is supported in the record.

BLM properly assessed the efficacy of mitigation measures. NEPA requires that discussion of mitigation measures in an EIS must be reasonably complete in order to properly evaluate the severity of the adverse effects and the agency may not merely list potential mitigation measures. *San Juan Citizens Alliance v. Norton*, 586 F. Supp. 2d 1270, 1290 (D.N.M. 2008). It does not impose any substantive requirement that mitigation measures be implemented. However, BLM developed and imposed a comprehensive set of conditions of approval, operator committed practices, development procedures and other mitigation measures for the JIDP.

Neither NEPA nor FLPMA impose a procedural requirement for the BLM to verify the efficacy of mitigation measures in order for the BLM to utilize those measures to protect public lands from UUD. Here, the BLM undertook an EIS, implemented mitigation measures to address potential significant impacts identified in the EIS, and as an added precaution mandated creation of the JIO and charged it with ensuring mitigation measures are adequate so no UUD occurs.

The BLM complied with Instruction Memorandum 2005-069 governing the agency's use of offsite compensatory mitigation at the time of the ROD. BCA argues that this IM provides the BLM should consider offsite mitigation only

after it has applied onsite mitigation. This argument is without merit because the BLM adopted numerous, appropriate onsite mitigation measures and ignores the fact that BLM's decision to approve development in the JIDP was not contingent upon the operators' voluntary financial commitment for offsite mitigation which was also not necessary to prevent UUD.

BLM complied with its multiple use/sustained yield mandate under FLPMA. This policy allows the BLM considerable administrative flexibility. *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1305 (10th Cir. 1999). BCA argues the JIDP ROD violates FLPMA because it focuses solely on oil and gas development and evidences no balancing between the many competing uses to which lands can be put. The intervenor argues this is belied by the resource protections and many mitigation measures in the ROD and the fact that the multiple use obligations apply on a landscape scale. The Act does not mandate every use be accommodated on every piece of land; balancing is required. *New Mexico v. Bureau of Land Management*, 565 F.3d at 710. Intervenor notes that a piece of land cannot be both preserved in its natural character and mined, quoting *New Mexico v. Bureau of Land Management*, 565 F.3d at 710.

Overall, the JIDP is a minuscule amount of public land on a local, statewide or national scale. It is roughly the size of a township, 30,500 acres

of which 28,500 is federal surface and minerals, less than 2.5% of the entire Pinedale Resource Area (which contains over 931,000 acres of public land and 1,185,000 acres of federal mineral surface). This is 0.1% of the 29,937,421 acres of federal land in Wyoming; nationally, the JIDPA is negligible part of 253 million surface acres and 700 million acres of subsurface mineral estate the BLM manages. The JIDPA will provide substantial recovery of domestic energy, provide local employment, provide funding for state, federal and local governments. It is expected to produce nearly 8 trillion cubic feet of natural gas and approximately $6.1 billion in royalties to be divided between the federal treasury and the State of Wyoming.

Additionally, as discussed at length above, the BLM imposed numerous mitigation measures and mandates designed to reduce potential impacts. It carefully analyzed impacts and employed resource protection measures and mitigation to avoid, minimize or mitigate identified impacts.

BLM developed an appropriate adaptive management policy for the JIDP. The JIO is charged with monitoring, enforcing and coordinating mitigation efforts in the JIDP through an adaptive management process. This process allows BLM to review actual impacts with the potential impacts anticipated in the EIS and determine whether additional adjustments to field management are

necessary. This management is encouraged by NEPA regulations. BCA argues the BLM improperly relied on adaptive management to compensate for shortfalls in its obligations under FLPMA and NEPA and to challenge the decision to prepare wildlife monitoring and mitigation plans annually. No support is provided for this argument. Federal courts reviewing other BLM decisions approving oil and gas projects in Wyoming have determined adaptive management is appropriate. To the extent BCA criticizes BLM's NEPA analysis, it does not demonstrate the analysis was not adequate. There is no information in the record demonstrating BLM did not comply with FLPMA or NEPA when developing the comprehensive forward-looking adaptive management process to minimize potential future impacts of development in the JIDPA.

BP America Production Company and the State of Wyoming Response Briefs (Docket Entries 50 and 49, respectively)

The arguments in both are very similar, if not the same, as those arguments of the BLM and Encana outlined above. They will not be set out at length as it is extremely redundant to do so.

BP America asserts:

- BLM's approval of the project complied with FLPMA's UUD standard.

- BLM was not required to establish a quantitative threshold for allowable impacts.
- BLM properly rejected the alternative of complete directional drilling.
- BLM did not depart from its Special Status Species Manual.
- The project will not cause UUD to wildlife or cultural and paleontological resources, addressing songbirds, sage grouse, pygmy rabbits, and cultural and paleontological resources.
- BLM's mitigation measures complied with NEPA and FLPMA, asserting the BLM properly incorporated offsite mitigation and adequately addressed the effectiveness of mitigation.
- BLM approval of the project did not violate FLPMA's multiple use provisions.
- BLM's use of adaptive management was appropriate.

The State of Wyoming addresses three main arguments and contends:

- NEPA does not require the BLM to demonstrate compliance with FLPMA's substantive requirements in the FEIS.
- BLM fulfilled its substantive obligation under FLPMA to prevent UUD; further no such UUD has or will occur in the JIDPA.

- While BLM implemented comprehensive onsite and offsite mitigation measures, NEPA does not require BLM to assess the efficacy of mitigation measures when it decides to prepare an EIS or to demonstrate in the FEIS that those measures will mitigate the impacts of the proposed action to insignificant levels as BCA claims.

BCA's Reply (Docket Entry 53):

All the response briefs were filed by February 26, 2010. On March 15, 2010 BCA filed its reply brief, seventeen days after last response brief filed; this is not a timely reply. Federal Rules of Appellate Procedure, Rule 27(a)(4) requires replies to be filed within 7 days after service of the response.

The reply is a re-hash of the arguments presented in the initial brief of BCA. Regarding the jurisdictional question, BCA asserts it did appeal the IBLA decision, but that the "IBLA did little more than reaffirm the ROD and the FEI[s]." BCA asserts BLM violated FLPMA; BLM did not take any action necessary to prevent UUD and permitted a level of development that will completely destroy the habitat function for sensitive species in the project area. It contends that the record notes serious deficiencies in the monitoring studies required under Jonah II in establishing then-existing habitat and wildlife

numbers. There was no baseline established to use as a measure of the actual on-going destruction caused by drilling under Jonah II.

BCA reiterates that BLM failed to identify the threshold for UUD. It argues BLM jumped from recognizing impacts inherent in the JIDP to concluding that UUD will not result. BLM's monitoring reports required under Jonah II and included in the AR showed declines in habitat and sage grouse populations. BLM ignored research available that showed greater sage-grouse are landscape scale species requiring large expanses of sagebrush to meet all seasonal habitat requirements. Fragmentation of sagebrush habitats is cited as a primary cause of decline of sage grouse populations in many studies, which are not in the AR but which were available to BLM. These reports, taken as a whole assert the sage grouse populations are negatively affected by energy development. Restoration of habitat may not be possible and even if it is possible, it may take decades. BLM acknowledged in approving high density drilling in the JIDP the area may have to be sacrificed in favor of maintaining habitat in adjacent BLM managed land areas including the Pinedale Anticline.

BLM departed from its own guidance and asserts that ignoring internal guidance is in and of itself a basis for violation of NEPA, citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). BLM officials raised concerns that the

level of destruction in the project was excessive. BCA cites to the same comments noted in its opening brief: those of Keith Andrews, Don Doncaster and Steve Laster. It argues that BLM departed from its own policies without supplying a reason documented in the AR.

BCA asserts BLM departed from its own expert opinions and ignored the warnings of their experts and those of other agencies that the JIDP would result in total destruction of habitat in the Jonah Field.

BCA contends that BLM failed to assess the efficacy of mitigation measures, thus violating FLPMA and NEPA. BCA contends that BLM should not be allowed to move forward with a mitigation plan that has for the most part already been proven not to work. BLM cannot blindly consider mitigation measures without weighing their effectiveness in some way, which it did not do at the time of the ROD and asserts identification was deferred until some unspecified future time by a JIO that was not even controlled by the agency making the decision. Listing and not analyzing the effectiveness of mitigation measures violates NEPA. Mitigation also requires a predicate determination by BLM of acceptable or unacceptable impacts – a threshold of impacts beyond which they are unacceptable.

BLM ignores multiple use mandates. Adaptive management cannot be

used to make up for shortfalls in the BLM's planning. Adaptive management can assist an agency to fine tune its plans after implementation but cannot be a substitute for those plans. It must do analysis before the project commences, utilizing a verified and supported methodology by which it assess the efficacy and probable success of the plan. Nothing in the FEIS establishes front-end landscape level habitat or population management objectives and thus, the Wildlife Monitoring and Protection Plan ("WMPP") has nothing by which to measure success or failure. The only preventative measures are found in lease stipulations, which have been shown to be ineffective. BLM refuses to alter its plans in the face of scientific evidence pointing to the need for enhanced and more extensive efforts to understand and protect greater sage-grouse, sagebrush obligate songbirds, and pygmy rabbits, as well as other species threatened by the development.

DISCUSSION

The Court is mindful of the deferential standard of review set forth at length above. It is also mindful that it is the IBLA's Final Decision that is being reviewed in this case. The Court is also reminded that the IBLA has reviewed the BLM decision *de novo* and is not bound by the findings of the BLM, but is

rather the final arbiter for the agency. *IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1009-10 (10th Cir. 2000); 43 C.F.R. § 4.1(b)(3) (noting that the IBLA issues the final decision for the Department of Interior); *Pennaco Energy, Inc. v. United States Department of Interior*, 377 F.3d 1147, 1156 n.5 (10th Cir. 2004) ("The IBLA issues the DOI's final and binding decision, not the BLM.") As noted in *Coronado Oil Company v. United States Department of Interior*, No. 05-CV-111-J, at 18 (D.Wyo. Aug. 23, 2006), the pertinent question is whether the IBLA's decision to affirm was supported by substantial evidence in light of the administrative record. *Id*. Review is deferential and narrow and a court may not substitute its own judgment for that of the agency.

NEPA requires federal agencies "to examine the environmental effects of proposed federal actions, and to inform the public of the environmental concerns that went into the agency's decision-making." *San Juan Citizens Alliance v. Norton*, 586 F. Supp. 2d 1270, 1279 (D.N.M. 2008). "The intent behind NEPA is to "'focus[] the agency's attention on the environmental consequences of a proposed project,' [and] to 'guarantee[] that the relevant information will be made available to the larger audience that may also play a role' in forming and implementing the agency's decision, as well as to give other potentially affected governmental bodies sufficient notice of the expected

consequences so that they may be able to implement corrective measures. . . . NEPA's purpose is not to encourage a particular substantive decision, but rather to "[insure a fully informed and well-considered decision." *San Juan Citizens Alliance v. Norton*, 586 F. Supp. 2d at 1279 (citations omitted).

There is little in the AR to suggest that the BLM did not comply with NEPA's mandate to take a "hard look" at the environmental consequences of its proposed actions. *See Pennaco Energy, Inc. v. United States Department of Interior*, 377 F.3d 1147, 1150-1151 (10th Cir. 2004). NEPA is a procedural statute which does not require particular results or impose substantive environmental obligations upon the federal agency. In reviewing an agency's compliance with NEPA, a rule of reason standard is applied to determine whether claimed deficiencies in an FEIS are "merely flyspecks" or are significant enough to defeat the goals of informed decision making and informed public comment. *Lee v. U.S. Air Force*, 354 F.3d 1229, 1237 (10th Cir. 2004) (citing *Utahns for Better Transp. v. U.S. Dep't. of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002)); *New Mexico v. Bureau of Land Management*, 565 F.3d 683, 704 (10th Cir. 2009). The AR in this case is over 54,000 pages long. It includes extensive comment from interested parties, experts and cooperating agencies regarding the proposals for the JIDP and pertinent factors considered in

determining whether the project should be approved. Using the hard look standard, it is not difficult for this Court to find and conclude that the BLM did a careful and thorough job of fact gathering and supporting its position and ultimate decision to approve the proposed JIDP.

In its papers, BCA never clearly identifies any specific area or portion of the IBLA Final Decision that it claims to be in error, except for sweeping arguments that the IBLA simply reaffirmed the FEIS and ROD. The IBLA's decision is 47 pages long. The Court recognizes that much of that decision is directed toward the appeal issues raised by the Wyoming Outdoor Council concerning the Clean Air Act, air quality and air emissions likely to occur with this Project. However, the introductory portion of the IBLA decision states:

> 5. Federal Land Policy and Management Act of 1976: Surface Management – Oil and Gas Leases: Generally–Oil and Gas Leases: Discretion to Lease
>
> BLM's decision to approve a large scale oil and gas development project without setting a threshold level beyond which the project will constitute unnecessary or undue degradation of the public lands does not amount to a failure to take an "action necessary to prevent unnecessary or undue degradation of the [public] lands" under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000).

AR at 54039. The project, the FEIS and ROD, are discussed at length in the

final decision of September 11, 2008. The issue presented there by BCA was that:

> BLM violated NEPA by rejecting the directional drilling alternative (Alternative B) in its ROD. Such rejection, BCA argues, is "unreasonable and unsupported by the record," and thus arbitrary and capricious, since the directional drilling of wells from the existing well pads is technically and economically feasible. BCA Petition at 24. According to BCA, directional drilling would produce the gas reserves of the Jonah Field as fully as the use of 3,100 vertical wells. *Id.*
>
> BCA also argues that the construction, noise, pollution, and traffic in the Project area during the 76-year life of the Project will eradicate most of the Wyoming sensitive species remaining in the area, specifically the greater sage-grouse, pygmy rabbit, sage thrasher, Brewer's sparrow, and sage sparrow. BCA contends that such harm to Wyoming's wildlife will violate section 302(b) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1732(b) (2000), which dictates that BLM, in managing the public lands, "take any action necessary to prevent unnecessary or undue degradation of the lands." BCA Petition at 20. BCA ties this FLPMA requirement to obligations under NEPA, arguing that "BLM must demonstrate that it has complied with the 'unnecessary or undue degradation' standard," that it must do so in the EIS, and that, having failed to do so, BLM violated NEPA. *Id.* at 20-23.

AR at 54046. Further, the IBLA stated:

> 2. *BLM Considered the Directional Drilling Alternative.*
>
> [3] BLM is required by section 102(2)(C) and (E) of NEPA and its implementing regulations to rigorously explore and objectively evaluate, in an EIS, all *reasonable* alternatives to the proposed action, which will accomplish its intended purpose, are technically and economically feasible, and yet have a lesser or no

impact. . . . [citations omitted] All this ensures that the BLM decisionmaker "has before him and takes into proper account all possible approaches to a particular project." *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d at 1114.

BCA contends, as it did in *BCA*, 174 IBLA at 6-7, that BLM violated NEPA by rejecting the directional drilling alternative (Alternative B) in its ROD. BCA argues that BLM's determination is "unreasonable and unsupported by the record," and thus arbitrary and capricious, since the directional drilling of wells from the existing well pads "is feasible from both the technical and economic perspective, and would produce the gas reserves of the Jonah Field as fully as the use of 3,100 vertical wells." . . . BCA states that directional drilling would reduce production by 4% (or less with "remediation") compared to vertical drilling, and that "[i]n a field estimated to contain 10.5 **trillion** cubic feet of natural gas reserves, the difference of 4% is quite negligible[.]" . . .

Contrary to BCA's contention, the record shows that BLM fully considered the all directional drilling alternative. BLM recognized that the alternative would reduce the expected total cumulative surface disturbance from 20,334 acres, with BLM's Preferred Alternative, to 7,431 acres (including 3,222 acres of new and 4,209 acres of existing disturbance), thereby benefitting wildlife and other resources. ROD at 13, FEIS at 2-17. BLM concluded, however, that, because of technical limitations, the exclusive use of directional drilling would result in the non-recovery of approximately 1.8 trillion cubic feet of natural gas and 18 million barrels of oil, thus failing to fully achieve the aims of the proposed action. ROD at 13; FEIS at 4-28 to 4-29. EnCana notes that BLM relied on a report prepared for EnCana by Resource Management Services, Inc. (RMS), entitled "Jonah Infill Drilling Project Evaluation of Directional Drilling," dated July 16, 2004 (Ex. 15 attached to EnCana Opposition (IBLA 2006-157)), and referenced in the FEIS, which discusses in detail the unique geological conditions of the Jonah Field and the difficulties associated with

directional drilling in that field, based on EnCana's experience. [footnote omitted.] EnCana Opposition (IBLA 2006-157) at 18.

EnCana explains that, in addition to increased costs of approximately $240,000 per well, "directional drilling leads to differential sticking (when the drill pipe becomes attached to the borehole wall), stuck casing (the inability to circulate casing at the bottom of the well during completion which potentially strands reserves), and casing set off-bottom (when casing does not reach the total depth of the well bore, stranding reserves)." . . . EnCana asserts that, based on its experience drilling 140 directional wells in the Jonah Field, it found that "casing in directional wells is stuck 86% of the time, and that casing in directional wells is stuck off bottom 28% of the time, resulting in significant lost reserves." . . . Moreover, EnCana states that directional drilling will have "significantly (20%) greater air emissions" than vertical drilling, owing to "[t]he longer drilling times, increased load factors on drilling rig engines, and increased traffic required[.]" . . .

Our review leads us to conclude that BCA has failed to demonstrate any error in BLM's analysis of any lost recovery attributable to all directional drilling. . . . BCA's analysis fails to demonstrate any error in BLM's overall analysis or conclusion of higher air quality impacts, and in fact acknowledges that directional drilling may result in the potential for greater air emissions. . . . We conclude that BLM's rejection of the all directional drilling alternative rests upon a rational basis, is supported by the record, and is not arbitrary and capricious.

AR at 54064-54066 (citations omitted; emphasis in original).

As to BCA's assertions that the project would cause unnecessary or undue degradation under Section 302(b) of FLPMA, the IBLA decision states:

[5] BCA contends that BLM's approval of the Project violates the requirement of section 302(b) of FLPMA, 43 U.S.C. §

1721(b)(2000), that BLM, in managing the public lands, "take any action necessary to prevent unnecessary or undue degradation of the lands." . . . BCA also avers that BLM violated NEPA, arguing that "BLM must demonstrate that it has complied with the 'unnecessary or undue degradation' standard," that it must do so in the EIS and that, having failed to do so, BLM violated NEPA as well as FLPMA. . . . BCA concludes that, "[w]hile impacts are disclosed by the NEPA analysis in the FEIS, BLM has not assessed the impacts *through the lens of its FLPMA 'unnecessary or undue degradation' duties,"* and has thereby failed in its affirmative obligation to prevent impacts that cause such degradation. . . .

In effect, BCA asserts that BLM has a procedural obligation under NEPA to properly consider whether the Project will result in unnecessary or undue degradation of the public lands, and thereby demonstrate compliance with section 302(b) of FLPMA. We disagree. BLM's obligation under section 102(2)(C) or NEPA is to fully consider the likely significant impacts of approving the Project. It is not to address the question of whether BLM will, in approving the Project, transgress its FLPMA obligation to prevent unnecessary or undue degradation, by exceeding some pre-determined "threshold" or otherwise. We agree with BP America's statement that BCA's "attempt to convert [section 302(b) of FLPMA] into a *procedural requirement* that BLM identify a specific threshold beyond which any impacts would be considered unnecessary or undue . . . finds no support in the statute, regulations, or case law." . . . We conclude that BLM was not required to assess compliance with the FLPMA requirement to prevent unnecessary or undue degradation in an EIS prepared to consider the potential environmental impacts of oil and gas development.

However, we recognize that BLM does have a *substantive obligation*, under FLPMA, to prevent unnecessary or undue degradation of the public lands, and is thus required to ensure that approved activities will not unnecessarily or unduly degrade public lands. . . . BLM was cognizant of that obligation, and found that the Project was not likely to cause unnecessary or undue

> degradation, based on its environmental analysis in the EIS. See FEIS at 1-4 ("[Lessees have a] statutory right . . . to develop [F]ederal mineral resources . . . as long as unnecessary and undue environmental degradation is not incurred.")[.] . . .
>
> BLM has not carried its burden to demonstrate, by a preponderance of the evidence, error in BLM's environmental analysis, or otherwise show that the Project will actually result in any unnecessary or undue degradation of the public lands. . . .

AR at 54068-54069 (citations omitted).

As to the FLPMA claims, what is apparent in all of this is that BCA does not agree with the ultimate decision made to allow the JIDP to go forward with the Project and believes that the onsite and offsite mitigation measures outlined in the ROD are wholly inadequate. There is no statutory or regulatory requirement that a threshold be established to determine whether UUD will occur. While UUD is a bit of an ethereal concept, BLM did determine that no UUD would occur and that appropriate mitigation measures had been put in place to minimize foreseeable impacts. The mitigation measures included the creation of the JIO, as well as various onsite and offsite compensatory mitigation measures. Additionally, adaptive management principles would allow BLM to address and manage unforeseen impacts as they were encountered over the life of the project. The BLM properly attempted to balance various interests consistent with its multiple use mandate for public lands.

The mere existence of countervailing or contradictory evidence in the Administrative Record does not foreclose a finding that the agency's action is supported by substantial evidence. *Wyoming Farm Bureau Federation v. Babbitt,* 199 F.3d 1224, 1241 (10th Cir. 2000). The Court may find evidence to be substantial even if the evidence in the AR might support an entirely different decision by the agency. *Id.* The agency is required to balance all interests to fulfill its multiple use mandate for public lands under FLPMA. In this case, the record amply shows the difficulty of balancing the different interests and concerns. It also provides evidence supporting the ultimate decision which is substantial, in this Court's view. There is little question that the all directional drilling alternative advocated by BCA would result in less surface disturbance. Other than BCA's arguments, however, there is little evidence in the record that the reduced surface disturbance resulting from an all directional drilling requirement would actually facilitate or completely eliminate harm to the species of concern in the JIDPA, which appears to be the matter of greatest concern to BCA in this petition for review. Contrary to the petitioner's assertions, impacts to wildlife, fisheries and sensitive species are discussed and considered at length in the AR, including the DEIS, FEIS and ROD. See e.g., AR at 33234-33258; 37316-320, 37339-37340, 37352-37355, 44017-44022,

39135-39156.

The BLM was faced with a decision that also required it to consider other factors to achieve and comply with its FLPMA obligations, such as loss or non-recovery of resources, the unique geological conditions of the Jonah Field and difficulties associated with directional drilling, increased costs of directional drilling, and significantly greater air emissions than vertical drilling, owing to longer drilling times, increased load factors on drilling rig engines and increased traffic. *Wyoming Outdoor Council et al.*, 176 IBLA 15, 44, AR at 54065-54066. The IBLA opinion stated:

> However, we recognize that BLM does have a *substantive obligation*, under FLPMA, to prevent unnecessary or undue degradation of the public lands, and is thus required to ensure that approved activities will not necessarily or unduly degrade public lands. *E.g., BCA*, 174 IBLA at 4-5; *WOC*, 171 IBLA 108., 121 (2007). BLM was cognizant of that obligation, and found that the Project was not likely to cause unnecessary or undue degradation, based on its environmental analysis in the EIS. *See* FEIS at 1-4 ("[Lessees have a] statutory right . . . to develop [F]ederal mineral resources . . . as long as unnecessary and undue environmental degradation is not incurred."); Public Comment Analysis Report, Part II, at 185-87, 350 ("The revised Preferred Alternative in the FEIS will minimize adverse impacts while undertaking actions necessary to prevent undue degradation of the land through mitigation and restoration.").
>
> BCA has not carried its burden to demonstrate, by a preponderance of the evidence, error in BLM's environmental analysis, or otherwise show that the Project will actually result in

> any necessary or undue degradation of the public lands. *See, e.g., BCA*, 174 IBLA at 5-6, and cases cited; *e.g.,* ROD at 4, 5-6; FEIS at 3-28 to 3-29, 3-66 to 3-68, 3-71 to 3-85, 4-30 to 4-32, 4-55 to 4-77, 4-79 to 4-84.

AR at 54068-54069.

Additionally, it is important to remember in this case that the consideration of environmental consequences in this matter to date are not the end of the story. Site-specific analyses are required in connection with Applications for Permit to Drill, right of way grants, and Applications for Special Use Permits. The JIO, which includes representatives of interested cooperating agencies, has authority to monitor, coordinate and enforce mitigation efforts in the JIDPA through use of the adaptive management process. The adaptive management process is designed to accommodate unforeseen circumstances that were not, and could not have been, addressed in the FEIS or ROD. Adaptive management recognizes that the decision making process and actual implementation of any particular project is not static and may require modification, mitigation or changes to the original plan over time as changing or unforeseen circumstances dictate.

While sage grouse, pygmy rabbits and sagebrush obligate songbirds may appear to be the sacrificial lambs in the limited and small JIDPA, there has not

been a clear showing by BCA that the agency's decision was not reasoned, did not consider the threats to these species and this habitat in the short and long run, or that it was not supported by substantial evidence. In the absence of such a showing, the Court finds and concludes that the IBLA's Final Decision should be affirmed. BCA has not demonstrated, under the rule of reason standard, that the decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Accordingly, it is therefore

ORDERED that the IBLA Final Decision of September 11, 2008 shall be, and is, **AFFIRMED.**

Dated this 10th day of June 2010.

UNITED STATES DISTRICT JUDGE

APPENDIX A

GLOSSARY OF ACRONYMS AND ABBREVIATIONS:

APA	Administrative Procedure Act
AR	Administrative Record
BCA	Petitioner, Biodiversity Conservation Alliance
BLM	Bureau of Land Management
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FEIS	Final Environmental Impact Statement
FLPMA	Federal land Policy Management Act
IBLA	Interior Board of Land Appeals
IBLA Order	IBLA's September 11, 2008 decision affirming BLM's ROD for the Jonah Project
IM	Instruction Memorandum
JIDP	Jonah Infill Drilling Project
JIDPA	Jonah Infill Drilling Project Area
JIO	Jonah Interagency Mitigation and Reclamation Office
NEPA	National environmental Policy Act
Operators	Intervenors Encana Oil & Gas (UJSA), Inc. and BP America production company, as well as other companies taking part in the JIDP
RMP	Resource Management Plan
ROD	Record of Decision for the Jonah Project dated March 14, 2006
UUD	Unnecessary and Undue Degradation
WMPP	Wildlife monitoring/protection plan