

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NEW MEXICO WILDERNESS ALLIANCE;)
THE WILDERNESS SOCIETY; SIERRA CLUB;)
NATURAL RESOURCES DEFENSE COUNCIL;)
NATIONAL WILDLIFE FEDERATION;)
SOUTHWEST ENVIRONMENTAL CENTER;)
FOREST GUARDIANS; and)
NEW MEXICO WILDLIFE FEDERATION,)

Plaintiffs,)

vs.)

LINDA RUNDELL, in her official capacity as New)
Mexico State Director of the U.S. Bureau of Land)
Management; KATHLEEN CLARKE, in her)
official capacity as Director of U.S. Bureau of Land)
Management; BUREAU OF LAND)
MANAGEMENT; H. DALE HALL, in his official)
capacity as the Regional Director, Region 2, U.S.)
Fish and Wildlife Service; STEVEN A.)
WILLIAMS, in his official capacity as the Director)
of the U.S. Fish and Wildlife Service; U. S. FISH)
AND WILDLIFE SERVICE; GALE NORTON, in)
her official capacity as Secretary of the Interior; and)
UNITED STATES DEPARTMENT OF)
INTERIOR,)

Defendants.)

Case No. _____

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

INTRODUCTION

1. Through this action Plaintiffs, a coalition of conservation groups and their members, challenge the federal government's adoption of a land use plan amendment that authorizes oil and gas exploration on nearly 1.8 million acres of public land in Sierra and Otero Counties ("plan area"), which encompasses the ecologically fragile Otero Mesa of south-central New Mexico.

2. The Otero Mesa is one of the wildest places remaining in the United States. Rugged fault-block mountain ranges, broad basins, and gentle volcanic landforms make up its landscape. This area makes up part of the northern range of the Chihuahuan Desert, which stretches south to an area just north of Mexico City, west into southern Arizona, and east into Texas. The

Chihuahuan Desert is among the most biologically rich and diverse eco-regions in the world, and is often compared to the Great Sandy Desert of Australia or the Nambi-Karoo Desert in southern Africa.



Picture 1 – The Otero Mesa

3. The plan area, including the Otero Mesa, contains large, intact stretches of Chihuahuan Desert grasslands, one of the most endangered ecosystem types in North America. These grasslands provide habitat to many species of wildlife and native plants, including pronghorn, mule deer, black-tailed prairie dog, the endangered northern Aplomado falcon, and numerous species of desert songbirds.

4. The World Wildlife Fund has placed the Chihuahuan Desert on its Global 200 list, a scientific ranking of more than 200 critical terrestrial, freshwater, and marine habitats/areas that we must protect if we are to preserve the web of life.

5. This area is of great importance to the people of New Mexico. For example, the Otero Mesa is home to independent cattle ranches that operated in the area for generations. The Mesa and surrounding area also provides abundant recreational and tourism opportunities, including hiking, camping, mountain biking, bird watching, wildlife viewing, hunting, rock climbing,

archeological exploration, nature photography, and horseback riding. Finally, underlying the Mesa is an aquifer that can provide fresh, potable water to numerous New Mexicans in this otherwise arid portion of the State.

6. The State of New Mexico has recognized the importance of the Otero Mesa to “New Mexico ranchers, wilderness and conservation advocates, plant and animal conservation societies, and outdoor enthusiasts of all kinds.” On January 31, 2004, Governor Richardson issued Executive Order No. 2004-05 calling upon all New Mexico state agencies to act “to conserve and protect resources of Otero Mesa.” In March 2004, in his report to the federal Bureau of Land Management (“BLM”), the Governor called upon the federal government to make portions of the Otero Mesa part of a National Conservation Area to protect these resources for future generations of New Mexicans.

7. The people of New Mexico, as well as many other concerned Americans, have repeatedly expressed their desire to protect this area in its natural state. The BLM has received hundreds of thousands of letters, post cards, facsimiles, and e-mails from the public regarding proposed oil and gas development on the Mesa. A vast majority of these comments pleaded with BLM to place the most fragile portions of the planning area, including the fragile Otero Mesa and Chihuahuan desert grasslands, off limits to development and to fully ensure protection of the area’s groundwater. In fact, the public has taken advantage of every opportunity BLM has provided for public participation in preparing the land use plan amendment to voice concern for the future of this important, ecologically sensitive portion of New Mexico.

8. The federal government had originally acknowledged the need to balance protection of the most fragile portions of the plan area with any oil and gas development in the area. In November 2000, BLM issued a draft land use plan amendment that called for responsible energy development by making nearly 779,000 acres generally available to oil and gas leasing, while placing strict restrictions on development in fragile areas such as the desert grasslands.

9. Representatives of the oil and gas industry strongly objected to the November 2000 draft land use plan amendment. Industry representatives called upon the federal government to allow them “complete access” for oil and gas exploration. After these objections were made, the Bush administration issued a revised land use plan amendment in January 2004 that authorized oil and gas exploration, along with the development of associated pipelines, roads, well pads, and other infrastructure, on 1.4 million acres in the plan area. This revised plan amendment removed the grassland protection provisions that BLM had included in the November 2000 draft land use plan amendment. This revised amendment, with some minor alterations, was adopted by BLM on January 25, 2005.

10. In adopting the final land use plan amendment, BLM violated federal laws, including the National Environmental Policy Act, 42 U.S.C. §§ 4331 et seq. (“NEPA”), the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., and the Federal Land and Policy Management Act (“FLPMA”), 43 U.S.C. § 1701 et seq., by failing to adequately address the environmental impacts of oil and gas development on the Otero Mesa. Among other things, BLM failed to evaluate: (a) whether construction of roads, pipelines, well pads, and other infrastructure will destroy, degrade, or fragment these delicate grasslands habitats; (b) whether oil and gas exploration may result in contamination of the freshwater aquifer; (c) whether oil and gas activities would hinder the ability of Congress or BLM to permanently conserve this area for future generations; (d) whether there are reasonable alternatives to drilling within the fragile grasslands, such as the use of directional drilling technologies; and (e) whether oil and gas development will affect the recovery of the endangered northern Aplomado falcon.

11. Accordingly, Plaintiffs seek an order from the Court setting aside BLM’s adoption of the plan until such time as BLM has fully complied with its obligations under federal law.

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JURISDICTION

12. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 and 28 U.S.C. § 1346, because this action involves the federal government as a defendant, and it arises under the laws of the United States.

13. Venue lies in this judicial district by virtue of 28 U.S.C. § 1391(e) because the events or omissions out of which the claim arises took place in this district, and the defendants are located here.

PARTIES

14. Plaintiff NEW MEXICO WILDERNESS ALLIANCE (“NMWA”), a non-profit corporation with 3,400 members, is dedicated to the protection, restoration and continued enjoyment of New Mexico’s wildlands and wilderness areas. NMWA members are actively engaged in cataloging the wilderness values of New Mexico’s public lands, including the Otero Mesa. NMWA members use and enjoy New Mexico’s public lands, including those on the Otero Mesa, for a variety of purposes, including: recreation, birding, wildlife viewing, solitude, scientific study, and aesthetic appreciation.

15. NMWA and its members specifically seek to protect the Otero Mesa and the wildlife that depend on this unique environment from harm that will result if unrestricted oil and gas development is allowed by the BLM. Because oil and gas development on the Otero Mesa will significantly impact the wilderness value of these public lands, NMWA and its members have regularly participated in the preparation of the BLM’s land use management plans affecting Otero and Sierra Counties, New Mexico, by submitting comments and attending public hearings. NMWA and its members have also invested substantial time contributing to the public understanding of New Mexico’s wildlands, including informing the public of the potential impacts to the Otero Mesa and Nutt grasslands and the area’s wildlife that that may occur as a result of oil and gas development in the area.

16. Plaintiff THE WILDERNESS SOCIETY (“TWS”) is a non-profit environmental organization formed in 1935 with more than 200,000 members nationwide, including over 2000

members in New Mexico. TWS has a state office in Albuquerque, New Mexico, and eight regional offices, including the Four Corners States Office, which addresses public lands management issues in Arizona, Colorado, New Mexico and Utah, and a headquarters in Washington, D.C. TWS is devoted to preserving wilderness, forests, parks, rivers, deserts, and shorelands, and committed to fostering an American land ethic. Its mission is to protect America's wilderness and wildlife and to develop a nationwide network of wildlands through public education, scientific analysis and advocacy. The goal is to ensure that future generations will enjoy the clean air and water, wildlife, beauty and opportunities for recreation and renewal that pristine forests, rivers, deserts, and mountains provide. TWS's members in New Mexico use and enjoy public lands throughout the state for recreation, scientific study, solitude, and aesthetic appreciation. TWS and its members have worked for decades to enact legislation and policies that provide for the sound management of our nation's public lands. Towards that end, TWS submitted comments on BLM's proposal to open the Otero Mesa to extensive oil and gas development.

17. Plaintiff SIERRA CLUB (the "Club") is a national nonprofit organization of approximately 700,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Rio Grande Chapter of the Sierra Club has approximately 7,257 members, 6,728 of those residing in the state of New Mexico, many of whom utilize and enjoy the Otero Mesa. The Chapter's activities at Otero Mesa have included scientific, educational and recreational programs. The Chapter has also conducted educational programs about Otero Mesa for local citizens of Los Alamos, Santa Fe and Albuquerque.

18. Plaintiff NATURAL RESOURCES DEFENSE COUNCIL ("NRDC") is a national non-profit environmental membership organization with more than 489,800 members throughout the

United States. NRDC members use and enjoy public lands throughout New Mexico for recreation, birding, wildlife viewing, solitude, scientific study, and aesthetic appreciation. NRDC has had a longstanding and active interest in the protection of public lands in the western United States, including decades of work supporting responsible energy development. With its nationwide membership and a staff of scientists, lawyers, and other environmental specialists, NRDC plays a leading role in a diverse range of land and wildlife management and resource development issues, including oil and gas extraction. NRDC has years of work directed at protecting unique places such as the Otero Mesa. NRDC submitted, along with other conservation groups, comments on BLM's proposed land use plan for the Otero Mesa in June 2004 and, through its electronic activism, helped generate an additional 53,000 plus public comments to BLM on the proposed amendment from its BioGem and NRDC websites.

19. National Wildlife Federation ("NWF") is the nation's largest member-supported non-profit conservation, education, and advocacy organization. NWF has over 968,000 members and is affiliated with conservation organizations in 47 states and territories. NWF is dedicated to conserving wildlife and other natural resources, and believes that hunting, fishing, and trapping are legitimate recreational pursuits and useful wildlife management practices.

20. Plaintiff SOUTHWEST ENVIRONMENTAL CENTER ("SWEC") is a non-profit corporation with more than 750 members dedicated to restoring and protecting the unique natural heritage of the Southwest. SWEC members use and enjoy the Otero Mesa for a variety of recreational, scientific, and aesthetic uses. SWEC members enjoy hiking, bird watching, wildlife viewing, photography and hunting on the Otero Mesa. Other members reside within the areas to be impacted by proposed oil and gas development on the mesa. In keeping with its mission, SWEC has worked to ensure that any oil and gas development on the Otero Mesa is done in an environmentally responsible manner. To this end, SWEC and its members submitted comments on BLM's land use plan for the Otero Mesa.

21. Plaintiff FOREST GUARDIANS is a conservation organization dedicated to the preservation of native species, biodiversity, and natural ecosystems. Forest Guardians has approximately 1,500 members in New Mexico and Arizona. Members of Forest Guardians engage in wildlife viewing, outdoor recreation, and other activities on public lands throughout New Mexico, including on the Otero Mesa. The health and survival of the northern Aplomado falcon and its habitats are of particular importance to Forest Guardians and its members. Forest Guardians engages in scientific study of the falcon, has participated in public comment on its protection under the Endangered Species Act, and has pursued administrative and other legal efforts to protect for the falcon's Otero Mesa habitat.

22. Plaintiff NEW MEXICO WILDLIFE FEDERATION ("NMWF") is a statewide non-profit organization of sportsmen, conservationists and other concerned citizens dedicated to the protection of our environment and the wise use of our natural resources. Founded in 1914, NMWF's mission is to preserve and/or restore New Mexico's wildlife and habitat on a landscape scale. NMWF is an affiliate of the National Wildlife Federation (NWF), and the combined membership of NWF and NMWF in New Mexico is 6,000 people. As sportsmen, conservationists, birders and recreationists, NMWF members utilize the national forests in Arizona and New Mexico. The protection and restoration of endangered and threatened species is important to NMWF members. NMWF's members are deeply concerned about the degradation of wildlife habitat, including the habitat of the pronghorn, that will result from oil and gas development on the Otero Mesa.

23. Defendant LINDA RUNDELL is sued in her official capacity as the New Mexico State Director of the BLM. Ms. Rundell is responsible for ensuring that BLM lands in New Mexico are managed in accordance with all applicable laws and regulations.

24. Defendant KATHLEEN CLARKE is sued in her official capacity as the Director of the Bureau of Land Management. Ms. Clarke is responsible for ensuring that all BLM lands are managed in accordance with all applicable laws and regulations.

25. Defendant BUREAU OF LAND MANAGEMENT is an agency of the United States within the Department of the Interior.

26. Defendant H. DALE HALL is sued in his official capacity as the Regional Director for Region 2 of the U.S. Fish and Wildlife Service. Mr. Hall is responsible for ensuring that the activities of the Fish and Wildlife Service's ("FWS") Region 2 office in Albuquerque, New Mexico comply with all applicable laws and regulations.

27. Defendant STEVEN A. WILLIAMS is sued in his official capacity as the Director of the U.S. Fish and Wildlife Service. Mr. Williams is responsible for ensuring that FWS's activities comply with all applicable laws and regulations.

28. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency of the United States within the Department of the Interior.

29. Defendant GALE NORTON is sued in her official capacity as the Secretary of the Interior. Ms. Norton is responsible for ensuring that the activities of both BLM and the FWS comply with all applicable laws and regulations.

STATUTORY BACKGROUND

The National Environmental Policy Act ("NEPA")

30. Congress enacted NEPA to, among other things, "encourage productive and enjoyable harmony between man and his environment" and to promote government efforts "that will prevent or eliminate damage to the environment." 42 U.S.C. § 4321.

31. To fulfill this goal, NEPA requires all federal agencies to analyze the environmental impact of particular federal activities. 42 U.S.C. § 4332(2)(C).

32. The heart of NEPA is the environmental impact statement, or EIS. A federal agency must prepare an EIS for all its "major federal actions significantly affecting the environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The EIS must explore all reasonable alternatives to an action (see 40 C.F.R. § 1502.14), must identify direct, indirect and cumulative impacts for

each reasonable alternative (see 40 C.F.R. § 1502.15), and must consider possible mitigation measures to reduce such impacts to the environment (see 40 C.F.R. § 1502.14(f)).

33. The goals of an EIS are to “provide a full and fair discussion of significant impacts” associated with a federal decision and to “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

34. A federal agency must prepare a draft EIS and must request comments on the draft EIS from relevant federal agencies, interested state, local and tribal governments, the public, and other interested parties. 40 C.F.R. § 1503.1. The federal agency must assess and consider any comments in preparing the final EIS. Id. at 1503.4(a).

35. A federal agency has a continuing duty under NEPA to prepare and circulate a supplemental EIS (“SEIS”) when: (1) there is new information that has come to light that may result in significant impacts not previously disclosed or (2) where the agency makes substantial changes in the proposed action that are relevant to the environmental concerns. 40 C.F.R. § 1502.9(c). A SEIS must meet all the requirements applicable to draft and final EISs under NEPA and its implementing regulations. Id. at 1502.9(c)(4).

***The Federal Land Policy and Management Act
 (“FLPMA”)***

36. FLPMA requires BLM to develop a Resource Management Plan (“RMP”) to guide the management of specific public lands within the agency’s planning areas. See generally 43 U.S.C. § 1712. Each RMP sets forth standards and guidelines for long-term management of the resources within the planning area. Id. at § 1712(a). The RMP is a plan in which the BLM allocates the uses – e.g., recreation, grazing, mineral exploration, etc. – that it has determined are appropriate on specific public lands. See id. at § 1712(a), (c) and (e).

37. BLM may also prepare an amendment to an existing RMP where there is a need to consider new data, new or revised policies, a change in circumstances, or a proposed new action

that may result in a change in the scope of resource uses or in a change in the terms of an approved plan. 43 C.F.R. § 1610.5-5.

38. FLPMA mandates that BLM comply with nine criteria in developing or revising land use plans. 43 U.S.C. § 1712(c). Among these criteria, BLM must “give priority to the designation and protection of areas of critical environmental concern,” which is defined as an area “within public land where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes . . .” Id. at §§ 1712(c)(3) and 1702(a).

39. BLM is also required by FLPMA to weigh the long-term benefits to the public of resource conservation against the short-term benefits of resource extraction. 42 U.S.C. § 1712(c)(7).

40. In preparing a RMP or RMP amendment, BLM must comply with NEPA, and must provide the public opportunities for meaningful participation throughout the RMP or RMP amendment process. See 43 C.F.R. § 1610.2(a).

41. Before approving a RMP or RMP amendment, BLM must also provide the Governor of any affected State the opportunity to identify inconsistencies between the BLM’s proposal and any state or local resource related plan, policies or programs and to recommend changes the RMP or RMP amendment to the appropriate BLM State Director. See 43 C.F.R. § 1610.3-2(e). In reviewing any recommendations from the Governor, the State Director “shall provide the public with an opportunity to comment on the recommendation(s)” whenever the Governor recommends changes to a plan or amendment that were not previously raised during the public participation process. Id.

42. If the State Director does not accept the Governor’s recommendation(s), the Governor may appeal to the national BLM Director. 43 C.F.R. § 1610.3-2(e).

The Endangered Species Act
(“ESA”)

43. The purpose of the ESA is “to provide a program for the conservation” of “endangered species and threatened species” and “to provide a means whereby the ecosystems upon which [such] species depend may be conserved.” 16 U.S.C. § 1531(b). To achieve these ends, Congress directed FWS to list species that are “threatened” or “endangered” within the meaning of the ESA. 16 U.S.C. § 1533.

44. The ESA requires that federal agencies ensure that their actions are not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). An action causes jeopardy if it “reduce[s] appreciably the likelihood of both the survival and recovery of a listed species in the wild.” 50 C.F.R § 402.02.

45. In order to assist federal agencies in complying with their duty to avoid jeopardizing listed species, section 7 of the ESA establishes an interagency consultation process. During this consultation process, each agency must use the best scientific data available to evaluate the potential impact of a proposed federal action on the species. 16 U.S.C. § 1536(a)(2).

46. Under this process, a federal agency proposing an action that “may affect” a listed species must prepare and submit to the appropriate expert agency, here FWS, a “biological assessment” of the effects of the proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.12 (a) and (j). The biological assessment is used to determine whether the proposed federal action is likely to “adversely affect” the species. 50 C.F.R. § 402.12 (k).

47. For those actions that the action agency determines “may affect,” but are “not likely to adversely affect,” a species, FWS must review all information provided by the action agency in the biological assessment and any other relevant information, to determine if it can concur with the action agency’s determination. 50 C.F.R. § 402.12(j) and (k). This determination must be set forth in a written response from FWS to the action agency. *Id.* If the FWS concurs with the

action agency's "not likely to adversely affect" determination then the consultation process is concluded.

48. Even after the consultation process is complete, the action agency has a continuing duty to avoid action that would cause jeopardy to a listed species. 16 U.S.C. § 1536(a)(2). An action agency's reliance on an inadequate, incomplete, or flawed biological assessment and FWS concurrence to satisfy its duty to avoid jeopardy is arbitrary and capricious. Thus, the substantive duty to avoid jeopardy to listed species remains in effect regardless of the status of the consultation.

FACTUAL BACKGROUND

The Resources At Stake

A. The Otero Mesa And Chihuahuan Desert Grasslands.

49. The area covered by the land use plan amendment at issue in this case includes all federally administered public lands in Otero and Sierra Counties, New Mexico. Within these two counties the BLM administers approximately 1.8 million acres of surface land and 5 million acres of mineral subsurface estate.

50. This area covered by the plan amended encompasses the Otero Mesa, which is located entirely in the south-central portion of Otero County, New Mexico, just north of El Paso, Texas. The Otero Mesa is considered ecologically important by federal and state wildlife agencies, by private conservationists, and by members of the public generally.

51. Of particular importance are the remaining stretches of Chihuahuan Desert grassland located on the Otero Mesa and elsewhere within the area covered by the plan amendment. Human impacts have already converted approximately 50-70% of the former Chihuahuan desert grasslands to desert scrublands in the last 150 years. Much of the remaining Chihuahuan Desert grassland in the United States today is severely degraded and fragmented by road construction, mineral development, and, to some extent, grazing.

52. According to BLM, there are at least 105,000 acres of contiguous, relatively pristine grasslands on the Otero Mesa, which is referred as the Otero Mesa grassland complex. A second large grassland complex, known as the Nutt grasslands, is located in Sierra County and according

to the BLM comprises approximately 16,000. These two grasslands complexes are considered by scientists as some of the most important undeveloped remnants Chihuahuan Desert grasslands remaining in the United States. Together they provide a unique opportunity to view and study how a healthy desert grassland ecosystem functions. Accordingly, scientists have called for the Otero Mesa and Nutt grasslands to be protected to the “greatest extent possible” from further landscape alteration and fragmentation.

B. Wildlife Resources.

53. Numerous species rely upon the Chihuahuan desert grassland and the broader Otero Mesa habitat. Grassland species include pronghorn, mule deer, black-tailed prairie dog, western burrowing owl, coyotes, the endangered northern Aplomado falcon, raptors such as red tail and harrier hawks, and numerous species of grassland breeding birds, such as meadow larks, lark buntings, horned larks. Wildlife using the broader Otero Mesa includes mountain lions, badgers, bobcats, some 250 bird species, reptiles, and butterflies. The vegetation sustaining this suite of animal life on the Otero Mesa includes black grama grasses, ocotillo, tall old-growth soaptree, banana yucca, prickly pear, and a diversity of cacti and wildflowers.

54. The pronghorn herd on the Otero Mesa grassland is one of the very few herds that survived substantial over-hunting in the late 19th and early 20th centuries, and as a result is one of the only non-reintroduced herds remaining in the United States. The pronghorn on the Mesa are larger and more robust than those found in most other herds in New Mexico.

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Picture 2 – Pronghorn on the Otero Mesa

55. In addition, many scientists consider the Otero Mesa and Nutt grasslands to be some of the best remaining habitat for endangered northern Aplomado falcon in New Mexico. The falcon was considered extirpated from the United States in 1986 when it was placed on the endangered list under the ESA. In the past ten to fifteen years, the falcon has slowly begun to reappear in New Mexico.

56. In a letter dated October 27, 1999, a FWS staff biologist wrote the BLM expressing concern that extensive oil and gas leasing would further fragment the remaining grasslands and harm species that rely upon this habitat, particularly the endangered northern Aplomado falcon. Noting that the “most important decimating factor” leading to the decline of the falcon in the United States was “habitat loss/degradation,” the FWS letter continued by stating that because “the Otero Mesa is one of the few remaining expanses (particularly on public lands) of remnant Chihuahuan Desert grassland” the region is a “priority recovery area for the falcon.”



Picture 3 – The endangered northern Aplomado falcon

C. The Salt Basin Aquifer

57. Underlying the plan area is an aquifer (the “Salt Basin aquifer”) that the State of New Mexico has identified as a potential source of fresh drinking water. Based upon standards employed by the New Mexico State Engineer for determining quality of potable water, this aquifer contains nearly 30 million acre feet of recoverable fresh water. This is enough to provide water for nearly 1 million New Mexicans for close to 13 years.

58. In May 2002, the New Mexico Interstate Stream Commission adopted the “Tularosa-Salt Basin Regional Water Plan.” This plan outlines current and future uses for the aquifer underlying the Otero Mesa, stating that this vast water supply is an important water resource for the future of New Mexico. To this end, the State Water Plan for New Mexico has been revised

to call upon government agencies to take steps “to ensure that water from the basin is preserved to meet growing demands in Southern New Mexico.”

59. In Executive Order No. 2004-05, Governor Richardson declared that the “region has valuable underground water resources that should be protected from contamination.” To this end, the Governor ordered the Oil Conservation Division, New Mexico Energy, Minerals, and Natural Resources Department, to propose rules to protect groundwater resources underlying the plan area from contamination associated with oil and gas development.

60. In June 2004, the New Mexico Oil Conservation Commission held hearings to consider whether new rules for permitting of oil and gas wells in the plan area region were necessary to protect the Salt Basin aquifer from contamination. During these hearings, the Commission heard testimony from expert hydrologists that the aquifer was vulnerable to contamination for several reasons.

61. First, the majority of the basin is underlain by limestone (carbonate) rock that is fractured and also permeable to the extent that contaminants can migrate rapidly downward to groundwater.

62. Second, depth to groundwater in the central part of the basin is approximately 200 feet, but in many places can be as shallow as 100 feet.

63. Finally, recharge of the groundwater occurs from melting snow pack and flash flooding, which infiltrates the system. Recharging occurs in an alluvial aquifer, where depth to groundwater is most shallow. This makes the system susceptible to contamination from surface activities.

64. Based upon this testimony, the Commission concluded that additional restrictions are needed to protect the aquifer from contamination associated with oil and gas development on federal public lands.

D. Wilderness Quality Lands

65. Based upon a survey in 2002 by conservationists, over 520,000 acres within the plan area, including large portions of the remaining grasslands, are undeveloped and so plainly appropriate candidates for inclusion in the National Wilderness Preservation System. This information was presented to BLM in two documents: “Citizen’s Wilderness Proposal for the Greater Mesa-Crow Flats Region (June 2002)” and “BLM Wilderness Inventory Sierra and Otero Counties (May 2003).” These lands could also be included within a National Conservation Area, as called for by Governor Richardson.

BLM’s Resource Management Plan Amendment

A. Historical Oil And Gas Development.

66. Oil and gas exploration in Sierra and Otero Counties has been limited over the past 80 years.

67. In 1998, a wildcat well drilled on the Bennett Ranch near the southern portion of the Otero Mesa grassland found natural gas. This find prompted lease nominations from private oil and gas companies to BLM requesting that the agency put up for lease nearly 250,000 additional acres of public land, nearly all of which makes up the Otero Mesa, for the purpose of private natural gas exploration.

68. The exact size of any natural gas reserves underlying the plan area is unknown. Estimates contained in various oil and gas industry related publications suggest that the amount is not great – probably only enough to supply the nation’s existing natural gas needs for a two-week period. BLM determined that the potential for fluid mineral development was “low to moderate.” Further, the BLM New Mexico State Director has been quoted as stating that the likely amount of natural gas reserves in the area is really just “small potatoes.”

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B. The RMP Planning Process: The Draft Environmental Impact Statement (1998 – 2001).

69. On October 16, 1998, BLM announced in the Federal Register the agency's intent to prepare a Resource Management Plan Amendment ("RMPA") to the White Sands Resource Management Plan to address federal fluid minerals leasing and development on federally administered public lands in Sierra and Otero Counties in New Mexico. In this announcement, BLM stated that it would prepare a draft EIS to evaluate which public land and fluid minerals should be made available for leasing and development in Sierra and Otero Counties, and to determine what requirements or stipulations may be needed to protect other resource values.

70. BLM's announcement prompted federal and state wildlife biologists, the scientific community, and conservationists to stress the need to ensure the development of a responsible plan for oil and gas drilling that would protect the fragile ecosystems that make up the Otero Mesa.

71. On November 15, 2000, BLM announced in the Federal Register the availability of a draft RMPA and EIS. In the draft EIS, BLM proposed a preferred management alternative, identified as "Alternative A," that responded to many of the concerns raised by FWS and others about oil and gas drilling in the Otero Mesa and Nutt grasslands. Among other things, Alternative A proposed applying a "No Surface Occupancy" ("NSO") stipulation to large portions of the grasslands in order to prevent any unnecessary surface development, such as well pads, pipelines, or new roads, within these habitat areas.

72. Proposed Alternative A would have left much of the Otero Mesa and Nutt grasslands intact, and, according to the draft EIS, would have provided effective protections for wildlife.

73. Alternative A was selected as the preferred Alternative in the draft EIS by BLM expressly "to limit further fragmentation of this [grassland] habitat." In the draft EIS, BLM stated that two of its goals in designing Alternative A were "increasing protection of desert grassland habitat from fragmentation and increasing protection of special status species . . ."

74. BLM originally stated that it would accept public comment on the draft RMPA and EIS for 90-days between November 15, 2000 and February 20, 2001. The comment period was subsequently extended by BLM until June 22, 2001. BLM also held two sets of three public meetings on the draft RMPA and EIS in January and May 2001.

75. During the comment periods, BLM received hundreds of comments on its preferred Alternative A.

76. Some comments expressed concern over any oil and gas leasing in or near sensitive resource areas, such as the Otero and Nutt grasslands, and urged BLM to close additional areas to oil and gas exploration.

77. Others, including federal and state wildlife agencies, commented that protecting the grasslands with a NSO stipulation would provide significant protection to these areas. For example, in a comment letter from the FWS, the agency agreed with BLM on the importance of protecting the Otero Mesa and Nutt desert grasslands, stating in part that “[d]ue to its large size and relatively unfragmented, undeveloped condition, Otero Mesa is a unique example of Chihuahuan Desert grassland that would provide essential habitat for the recovery of the [northern Aplomado] falcon in the southwestern United States. Because of the importance of these areas, it is the [FWS’s] recommendation to protect these areas to the greatest extent possible, by minimizing further landscape and site-specific fragmentation that can result from projects such as roads and pipelines.”

78. Similarly, a comment letter from the New Mexico Department of Game and Fish stated that “the [draft] EIS recognizes that loss of grasslands from the clearing of roads would lead to habitat fragmentation and increased road access could have detrimental effects on pronghorn populations Because of the additional mitigation protections provided to big game, threatened and endangered species and important wildlife habitats, the Department supports implementation of the Preferred Alternative (Alternative A).”

79. The oil and gas industry responded very differently. In written comments, and during meetings with BLM officials, industry representatives criticized Alternative A. For example, industry representatives demanded that BLM “revise and rewrite the RMPA,” and that the agency stop “worrying about bird habitat, grass length, and such.” They further complained that there needed to be major changes with BLM’s management of public land so there would be “complete access” for them to federal public lands.

C. BLM Changes Course: The Final Environmental Impact Statement (2001 – 2003).

80. On January 9, 2004, BLM announced in the Federal Register the availability of the proposed RMPA and final EIS. As required by NEPA, the U.S. Environmental Protection Agency (“EPA”) similarly noticed in the Federal Register on January 9, 2004 the availability of the final EIS for public inspection.

81. In the January 9, 2004 proposed RMPA and final EIS, BLM made several changes to the preferred alternative, which BLM labeled “Alternative A modified.”

82. In Alternative A modified, BLM removed the stipulations in the draft EIS related to protection of fragile resources, such as the grasslands, that had received the approval of both FWS and the New Mexico Department of Game and Fish. Overall, BLM increased the aggregate amount of public lands in Otero and Sierra Counties to be opened to oil and gas leasing under BLM’s standard lease terms and conditions from 779,000 acres proposed in the draft EIS to 1.4 million acres in the Final EIS. BLM decreased the amount of land to be protected with a no surface occupancy stipulation from 160,435 acres in the draft EIS to 40,526 acres. Moreover, BLM removed the NSO stipulation that was to be applied to oil and gas development within most of the Otero Mesa and Nutt desert grasslands.

83. Alternative A modified proposed to allow oil and gas development within a significant portion of the grasslands. The modified proposal placed only two patches of the Otero Mesa grassland (consisting of 11,483 acres and 16,213 acres, respectively) off-limits to oil and gas development, and only one such patch (consisting of 8,094 acres) in the Nutt grassland. BLM

stated it would defer oil and gas leasing in these three small areas for an initial period of five years to study them as potential habitat for the northern Aplomado falcon.

84. Alternative A modified included two other provisions applicable to oil and gas exploration within the Otero Mesa and Nutt grasslands. First, surface disturbance is to be “no more than 5 percent of [a] leasehold at any one time.” Second, each lease would include general mitigation language that the leaseholder must prepare a “reclamation plan” to “restore” any disturbed grassland vegetation upon cessation of oil and gas activities.

85. In the final EIS, BLM did not explain or analyze how allowing oil and gas development within the grasslands under the terms of Alternative A modified would protect the fragile ecology of the Chihuahuan desert grasslands.

86. Before the final EIS was released to the public, FWS biologists commented internally to BLM that the EIS’s analysis of the “fragmentation effect” that the proposed plan, as modified, would have on the Otero Mesa grasslands was “completely lacking.” The final EIS did not cure this defect. The final EIS did not provide any information on the potential size of leases to be sold within the grasslands, the potential number of leases that would be available, or what the overall impact would be on the grasslands from exploration, road construction, drilling, production, and other oil and gas activities on these leases.

87. The final EIS did not discuss how BLM would ensure that disturbed grasslands would be fully restored by the oil and gas industry. In comments submitted to BLM as part of its review of the draft RMPA and EIS, FWS had previously noted that, with respect to reclamation, healthy remnant grasslands like those on the Otero Mesa are “rarely, if ever, restored.” Independent scientists, including one researcher from the New Mexico State University, also provided similar comments to BLM regarding the difficulty of restoring native desert grasslands once disturbed by human activity. These comments were not addressed in the final EIS.

88. The final EIS did not explain how BLM determined that deferring leasing in three areas within the Otero Mesa and Nutt grasslands would be protective of this fragile environment. For

example, BLM provided no rationale for why a plan that could transform a single 105,000 acre relatively pristine grassland complex into two much smaller, unconnected grasslands (of only 11,483 acres and 16,213 acres, respectively) is protective of the remaining Chihuahuan desert grasslands and the wildlife that depends on this habitat.

89. The final EIS also failed to examine whether proposed oil and gas development could diminish the unique, roadless character of the grasslands and other portions of the plan area that currently makes these lands appropriate for designation as wilderness, wilderness study areas, a National Conservation Area(s), or area(s) of critical environmental concern.

90. The final EIS also failed to disclose how BLM reduced the total amount of estimated surface disturbance from the 6,589.4 acres calculated in the draft EIS to 1589.4 acres. In a footnote in the final EIS, BLM stated that this reduction in total estimated surface impact from oil and gas development was because “geophysical exploration” activities are only “minimally intrusive” and should not be considered “surface-disturbing activities.” BLM’s assertion is inconsistent with statements elsewhere in the final EIS that geophysical exploration can cause disturbances to soil, vegetation, and wildlife.

91. Lastly, the final EIS did not include an examination of the potential impacts oil and gas drilling might have on the fresh water aquifer underlying the plan area. The final EIS failed to examine the characteristics of this aquifer, how it might be vulnerable to contamination from oil and gas development, where it might be most vulnerable, or what reasonable mitigation could be taken to protect it.

D. Administrative Protests And Governor Richardson’s Consistency Review.

92. On February 9, 2004, Plaintiffs submitted their joint Administrative Protest to BLM Director Clarke. The protest incorporated the comments of 6 scientific experts regarding the likely impacts of oil and gas development on the Mesa to wildlife, plant life, the aquifer, and to regional air quality. Plaintiffs argued that BLM was required to prepare a supplemental EIS to address changes made to the preferred alternative after the draft EIS was issued, to evaluate new

information made available to BLM after issuance of the draft EIS, and to remedy the inadequacies of the final EIS. Specifically, Plaintiffs explained that the BLM had not provided an adequate discussion regarding: (1) the environmental consequences of removing the no surface occupancy stipulation for the grasslands; (2) potential contamination of the Salt Basin aquifer; (3) methodologies to restore damaged grassland habitat; (4) impacts on the endangered northern Aplomado falcon; and (5) the potential impacts of the preferred alternative on designation of portions of the plan area as a wilderness, wilderness study area, or National Conservation Area. Plaintiffs also maintained that BLM had improperly failed to analyze a reasonable range of alternatives.

93. The New Mexico Energy, Minerals and Natural Resources Department, State of New Mexico Environment Department (Waste and Water Management Division), and the State of New Mexico Department of Game and Fish filed similar administrative protests with Director Clarke in February 2004.

94. On March 5, 2004, New Mexico Governor Bill Richardson submitted to BLM State Director Linda Rundell his “Consistency Review of and Recommended Changes to” BLM’s proposed RMPA and final EIS pursuant to FLPMA. The Governor identified numerous inconsistencies between BLM’s proposal to open up the area to oil and gas exploration and state laws, policies, programs and plans regarding protection of grassland vegetation, wildlife, groundwater resources, and cultural resources. The Governor also identified inconsistencies between BLM’s proposal and the State’s energy policy.

95. To resolve these inconsistencies, the Governor proposed an alternative plan to BLM’s proposed RMPA. The Governor recommended closing large portions of the Otero Mesa to leasing and placing a strict NSO stipulation on thousands of acres of Chihuahuan Desert grasslands. The Governor also proposed 12 mandatory stipulations that would apply to any oil and gas development under the RMPA.

96. The recommendations made by the Governor sought to better protect this fragile and biologically diverse desert for future generations. Specifically, the Governor proposed 640,000 acres as a conservation area, providing space for not only responsible oil and gas development, but also for ranchers, wildlife, and the ecosystem.

97. The Governor's recommendations, including many of the proposed mandatory stipulations, were also made as a means to better protect the Salt aquifer.

98. While some of the elements of the Governor's plan were drawn from alternatives in the draft RMPA and EIS, others were original proposals made by the Governor to address the State of New Mexico's interests in the Otero Mesa and its resources. Indeed, the core of the Governor's recommendation – conserving 640,000 acres and the creation of mandatory stipulations to ensure responsible oil and gas development on the remaining lands – was not included in any previous proposal by BLM.

99. After receiving the Governor's Consistency Review and Recommendations, BLM did not provide an additional opportunity for the public to comment on the Governor's proposed alternative plan.

100. On or about May 19, 2004, New Mexico State Director Rundell responded to the Governor by finding that he had not raised any inconsistencies that required BLM to make a change the preferred alternative – Alternative A modified -- in the proposed RMPA. The State Director did, however, change the RMPA to make the five year temporary closure for the three core grassland habitat areas permanent by applying a discretionary closure to these areas.

E. BLM's May 2004 Supplement.

101. On May 28, 2004, BLM noticed in the Federal Register a "Change to the Proposed Resource Management Plan" and made available a document entitled "Supplement to Proposed Resource Management Plan and Final Environmental Impact Statement for Federal Fluid Mineral Leasing and Development in Sierra and Otero Counties" ("Supplement").

102. The sole change BLM made in the Supplement was to include the proposal made in response to the Governor's consistency review – making the five year temporary closure for the three core grassland habitat areas proposed in the final EIS permanent. BLM also stated in the Federal Register notice that the Supplement provided “additional analysis” regarding Alternative A modified.

103. In a four-paragraph section in the Supplement entitled “Further Analysis of Existing Data,” BLM asserts that “there are no appreciable differences between the impacts of the proposal in the Draft EIS and the Final EIS.” BLM reaches this conclusion by arguing that under any scenario, the total disturbed land (1,600 acres) would be the same.

104. The Supplement did not consider the Governor's broader recommendations. Nor did it address whether oil and gas development could adversely impact groundwater.

105. BLM provided a 30-day public comment period on the Supplement.

106. Plaintiffs submitted comments on the Supplement to BLM State Director Rundell on June 25, 2004. Plaintiffs pointed out that the Supplement had not cured the final EIS's deficient analysis of Alternative A modified. Specifically, Plaintiffs noted that while “certainly BLM must disclose and evaluate the overall number of acres that will be disturbed, many significant impacts do not simply boil down to the total acreage of grassland that could be disturbed under various alternatives. Instead BLM must analyze and disclose the differences among the alternatives regarding the locations of the disturbances in the grasslands. It is both the amount and the location of such disturbance in the modified preferred alternative that will result in overall greater fragmentation of the grasslands than under the proposal in the Draft EIS . . . It is the likelihood of increased fragmentation and the adverse impacts that would have on the environment that has never been analyzed or disclosed by BLM in an EIS – Draft, Final, or Supplemental. For this reason the public has never had the opportunity to comment upon or critique BLM's analysis of potential adverse fragmentation of these grasslands.”

F. BLM's Section 7 Consultation.

107. On June 13, 2003, the BLM requested formal consultation with the FWS regarding the potential impact of oil and gas exploration in Otero and Sierra Counties on the endangered northern Aplomado falcon. In a biological assessment ("BA") forwarded to FWS, BLM determined that the activities under the proposed land use plan amendment were "likely to adversely affect" the northern Aplomado falcon. Before formal consultation was conducted, however, the BLM changed its mind. On September 8, 2003, the agency concluded in a modified BA that the proposed amendment was "not likely to adversely affect" the northern Aplomado falcon, primarily because BLM believed the falcon did not occupy any habitat on the Otero Mesa. BLM withdrew its request for formal consultation with the FWS. FWS concurred with BLM's revised determination on October 14, 2003.

108. BLM's revised determination on October 14, 2003 was made despite uncontradicted evidence that there have been in excess of ten verified sightings of the falcon on or near Otero Mesa since 1991. Indeed, because of these sightings, FWS previously required that the BLM engage in formal consultation on the northern Aplomado falcon in 1996 when the BLM last amended the White Sands Resource Management Plan.

G. BLM's Dismissal Of The Administrative Protests, The Governor's Appeal On His Consistency Review, And Issuance Of A Record Of Decision Adopting The RMPA.

109. On June 16, 2004, Governor Richardson appealed the State Director's decision not to accept his recommendation to change the proposed RMPA to BLM Director Clarke.

110. On or about August 13, 2004, BLM dismissed Plaintiffs' Administrative Protest, concluding that the BLM New Mexico State Director had followed all applicable procedures and laws in developing the RMPA and EIS, and that there was no basis to change the proposed plan as a result of Plaintiffs' protest letter.

111. On information and belief, Plaintiffs allege that on or about August 13, 2004, BLM also dismissed all of the Administrative Protests filed by the State of New Mexico, as well as approximately 21 others submitted by the public.

112. On January 24, 2005, BLM State Director Rundell signed the Record of Decision authorizing approval of the RMPA and the development of 141 new oil and gas wells on the Otero Mesa.

113. On January 25, 2005, BLM announced in the Federal Register that it was denying the Governor's appeal.

F. Public Support For The State Of New Mexico's Decision To File Suit In Federal Court Challenging The BLM's RMPA and Final EIS.

114. On April 22, 2005, the State of New Mexico and Governor Bill Richardson filed suit in U.S. District Court for the District of New Mexico challenging the BLM's adoption of the RMPA. In the Complaint, the State and Governor Richardson assert that the federal government failed to consider whether the oil and gas exploration proposed under the RMPA will degrade or destroy other resources of significant importance to the people of New Mexico, including wildlife, grassland habitat, and groundwater. Through this litigation, the State and Governor Richardson call upon the BLM to revise the RMP to ensure that only environmentally responsible oil and gas drilling occurs within the plan area.

115. Since the filing of the State's lawsuit, Secretary of the Interior Gale Norton has received in excess of 50,000 e-mails, facsimiles, and/or letters from people throughout the United States regarding the BLM's adoption of the RMPA. These e-mails, facsimiles and/or letters support the State of New Mexico and Governor Richardson's position that the most fragile and sensitive areas of the Otero Mesa must be protected for present and future generations to enjoy. Finally, these e-mails, facsimiles, and letters, ask Ms. Norton to use her legal authority to overturn the adoption of the RMPA.

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CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

(NEPA -- Failure to Analyze Environmental Impacts and Mitigation Measures)

116. Each and every allegation set forth in paragraphs 1 – 115 of this Complaint is incorporated herein by reference.

117. NEPA requires federal agencies, including BLM, to take a “hard look” in an EIS at the consequences of a proposed major federal action. 42 U.S.C. § 4332(C)(i). The Act’s implementing regulations require that an EIS discuss, analyze and evaluate the direct and indirect environmental effects of the alternatives, including the proposed action, as well as means to mitigate adverse environmental consequences (if not included in the alternatives). 40 C.F.R. §§ 1506.16(a), (b), (h).

118. The EIS does not adequately discuss, analyze and evaluate the serious environmental consequences of proposed oil and gas activities on the Otero Mesa. Among other things, the EIS does not analyze whether: (1) oil and gas activities proposed in the RMPA would further fragment, destroy, or degrade the Otero Mesa and Nutt desert grassland complexes; (2) additional loss of habitat could harm grassland-dependent species; and (3) oil and gas exploration will contaminate the aquifer underlying the plan area.

119. The EIS also fails to provide a reasonably thorough discussion of mitigation measures to reduce impacts to vegetation, wildlife, and groundwater. The EIS provides nothing more than a list of potential mitigation measures. Nowhere has BLM provided the required discussion regarding the implementation or anticipated effectiveness of proposed mitigation measures. For example, BLM included in the EIS a blanket statement that it will require industry to prepare a reclamation plan and to restore disturbed grassland vegetation. The EIS, however, does not examine or respond to the concerns of numerous scientists regarding whether or not the grasslands can ever recover from the surface disturbance associated with oil and gas development.

120. Lastly, the EIS failed to consider the impact oil and gas development would have on the recovery of the endangered northern Aplomado falcon in New Mexico and the southwestern United States.

121. Accordingly, Defendants have violated NEPA and its implementing regulations, and have acted arbitrarily, capriciously and otherwise not in accordance with law. See 5 U.S.C. § 706(2)(a).

SECOND CAUSE OF ACTION
(NEPA -- Failure to Analyze the Full Range of Reasonable Alternatives)

122. Each and every allegation set forth in paragraphs 1 – 115 of this Complaint is incorporated herein by reference.

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

124. BLM never considered an alternative that would prevent permanent impairment of the quality of the environment, including unnecessary and undue degradation of the area’s remaining desert grasslands and the area’s groundwater. For example, BLM failed to consider use of directional drilling of wells to explore within sensitive areas, such as the Otero Mesa and Nutt grasslands, as a feasible alternative for oil and gas exploration.

125. BLM also failed to considered an alternative that would permanently protect the Otero Mesa and Nutt grasslands as a wilderness study area, a National Conservation area, or an area of critical environment concern.

126. This failure to consider a full range of reasonable alternatives violated NEPA and its implementing regulations. See, e.g., 40 C.F.R. §§ 1502.14; 1502.16(h). Accordingly, BLM acted arbitrarily, capriciously and otherwise not in accordance with law. See 5 U.S.C. § 706(2)(a).

THIRD CAUSE OF ACTION
(NEPA – Failure to Supplement the EIS)

127. Each and every allegation set forth in paragraphs 1 – 115 of this Complaint is incorporated herein by reference.

128. NEPA directs that a draft EIS “must fulfill and satisfy to the fullest extent possible the requirements” applicable to a final EIS. 40 C.F.R. § 1502.9(a). If a draft statement is “so inadequate as to preclude meaningful analysis,” an agency “shall prepare and circulate a revised draft,” or a supplement. *Id. at* § 1502.9 (a) and (c). In addition, agencies are required to prepare supplements to either draft or final statements if the agency “makes substantial changes in the proposed action that are relevant to environmental concerns,” or there is “significant new ... information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id. at* § 1502.9(c)(1)(i), (ii).

129. BLM violated NEPA by failing to prepare a supplemental or revised EIS to examine the potential environmental impacts associated with the substantial changes made to Alternative A, the preferred alternative, after the draft EIS was circulated for public comment.

130. Since issuance of the draft EIS by BLM in November 2000, significant new information regarding the conservation value of several environmental resources found on the Otero Mesa was also presented to BLM, but was not addressed in a supplement or revised EIS. For instance, two documents developed by the New Mexico Wilderness Alliance using BLM’s own land use designation criteria concluded that 39 separate areas in Otero and Sierra Counties, encompassing some 523,000 acres in all, qualifies for designation as wilderness study area. Similarly, the Governor identified approximately 640,000 acres of such “biological, cultural, recreational and scenic importance” that should be protected within a designated conservation area.

131. BLM’s failure to supplement either of its final EISs or prepare new draft EISs to address this new information violated NEPA and its implementing regulations. See, e.g., 40 C.F.R. §§

1502.9(a) and (c)(1)(i), (ii). Accordingly, BLM acted arbitrarily, capriciously and otherwise not in accordance with law. See 5 U.S.C. § 706(2)(a).

FOURTH CAUSE OF ACTION
(Administrative Procedure Act)

132. Each and every allegation set forth in paragraphs 1 – 115 of this Complaint is incorporated herein by reference.

133. Under the federal Administrative Procedure Act (“APA”), a court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §§ 702, 706. An agency decision must be considered arbitrary and capricious if: “the agency . . . relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” See Friends of the Bow v. Thompson, 124 F.3d 1210, 1215 (10th Cir. 1997) (quoting Motor Vehicles Mfrs. Ass’n v. State farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)).

134. In this case, BLM’s ROD, which adopted Alternative A modified as a land use plan amendment, should be set aside as arbitrary and capricious under the APA for two reasons.

135. First, BLM’s conclusion that Alternative A modified is more protective of the Otero Mesa and its environment than Alternative A as originally proposed in the draft EIS ignores “important aspects of the problem.” Unlike in BLM’s evaluation of Alternative A in the draft EIS, BLM never evaluated – in any EIS – the significant consequences oil and gas development under Alternative A modified will have on the grasslands, wildlife, and groundwater.

136. Second, BLM’s conclusion that Alternative A more protective of the Otero Mesa and its environment than Alternative A as originally proposed in the draft EIS is not supported by the evidence in the record before the agency and is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” The record shows overwhelming that federal, state and private scientists regard oil and gas development under Alternative A modified

to have a high likelihood of adversely impacting the grasslands and grassland-dependant wildlife. Moreover, the record shows that these concerns were never addressed by the BLM.

FIFTH CAUSE OF ACTION
(BLM's Violation of Endangered Species Act)

137. Each and every allegation set forth in paragraphs 1 – 115 of this Complaint is incorporated herein by reference.

138. The ESA requires that federal agencies ensure that their actions are not likely to jeopardize the continued existence of endangered species such as the northern Aplomado falcon. 16 U.S.C. 1536(a)(2). As part of the consultation process to assist federal agencies in fulfilling their duties, a federal agency proposing an action that “may affect” a listed species must prepare and provide to FWS a biological assessment of the effects of the proposed action. 16 U.S.C. 1536(a)(2); 50 C.F.R. § 402.12(g). The federal agency must provide FWS with the best available scientific and commercial data. 16 U.S.C. § 1536(a)(2); 50 C.F.R. 402.14(d).

139. BLM’s actions in connection with the consultation on the northern Aplomado falcon violate the agency’s duty to avoid jeopardy to listed species. BLM failed to provide accurate and complete information, failed to use the “best scientific and commercial data available” in the biological assessment on the effect of oil and gas development on the northern Aplomado falcon, and failed to request formal consultation as it was required do by the ESA. Because BLM approved the Sierra/Otero RMP without conducting a formal consultation in compliance with the ESA, BLM failed to ensure that its actions are not likely to jeopardize the continued existence of the northern Aplomado falcon in violation of 16 U.S.C. § 1536(a)(2) and the ESA’s implementing regulations, particularly 50 C.F.R. § 402.14(d).

140. Accordingly, BLM’s actions and omissions were and are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the ESA.

SIXTH CAUSE OF ACTION
(FWS’s Failure To Comply With The Endangered Species Act)

141. Each and every allegation set forth in paragraphs 1 – 115 of this Complaint is incorporated herein by reference.

142. Section 7 of the ESA requires that federal agencies ensure that their actions are not likely to jeopardize the continued existence of endangered species. 16 U.S.C. § 1536. In order to assist federal agencies in this duty, federal agencies must consult with FWS regarding any action that may adversely affect an endangered species. Id.; 50 C.F.R. § 402.14.

143. FWS’s concurrence with the BLM determination that the northern Aplomado falcon is “not likely to be adversely affected” by adoption of Alternative A modified is contrary to the evidence in the record before both agencies. BLM based its determination on the presumption that the falcon was not present on the Otero Mesa. The record, however, shows that there have been in excess of ten verified sightings of the falcon on or near Otero Mesa since 1991. Primarily because of these sightings, FWS previously required that the BLM engage in formal consultation on the northern Aplomado falcon in 1996 when the BLM last amended the White Sands Resource Management Plan.

144. In concurring with BLM, FWS failed to use the “best scientific and commercial data available” as required by the ESA. See 16 U.S.C. § 1536(a)(2). FWS’s concurrence is also not supported by the record. Accordingly, the FWS’s action is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. See 5 U.S.C. § 706.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- (1) Declare that the BLM's actions are in violation of the National Environmental Policy Act and its implementing regulations, as set forth above;
- (2) Declare unlawful and set aside BLM's decision approving the amendment of the Resource Management Plan for Otero and Sierra Counties until such time as the Defendants have complied with the National Environmental Policy Act;
- (3) Declare that the BLM's actions are in violation of the Endangered Species Act and its implementing regulations, as set forth above;
- (4) Declare unlawful and set aside BLM's decision approving the amendment of the Resource Management Plan for Otero and Sierra Counties until such time as the Defendants have complied with the Endangered Species Act;
- (5) Declare BLM's decision to approving the amendment of the Resource Management Plan for Otero and Sierra Counties to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law under the APA;
- (6) Set aside the ROD under the APA;
- (7) Award preliminary and permanent injunctive relief preventing implementation of the amended Resource Management Plan for Otero and Sierra Counties, and preventing issuance of any oil and gas leases or drilling permits within the planning area until such time as the Secretary and the BLM have complied with the National Environmental Policy Act and Endangered Species Act;
- (8) Retain jurisdiction of this action to ensure compliance with its decree;
- (9) Award Plaintiffs the costs incurred in pursuing this action, including attorney's fees, as authorized by the Endangered Species Act, the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and/or other applicable provisions; and

(10) Granting such other and further relief as is proper.

Respectfully submitted,

Dated: May 26, 2005

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