

Hollow Promises in Our Land of Enchantment



*Why the Bureau of Land Management
Can't Be Trusted to Protect
Otero Mesa*

*Report of the Coalition for Otero Mesa
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Executive Summary

This report illustrates why the U.S. Bureau of Land Management (BLM) can't be trusted to safeguard the fragile ecological and economic values of Otero Mesa. Drawing from the agency's track record elsewhere in New Mexico, we show that the BLM has played a shell game with the public regarding its environmental analysis of the impacts from oil and gas drilling. The agency continually puts off meaningful environmental analysis until the well permitting stage, at which time it usually rubberstamps drilling, claiming that it cannot prevent lessees from developing their leases.

The shell game continues with Otero Mesa. While the BLM argues that the impacts of drilling will leave a footprint of only 1,589 acres, this figure fails to account for the full ecological impacts created by a spider web of roads, wellpads, and pipelines across this wild mesa. Similarly, the agency's claim that only 5% of a leased parcel will be disturbed at a time is little solace when oil companies move on to the next 5%, leaving rubble in their wake, with little to no likelihood that they will reclaim disturbed areas. The BLM's promise that it will use satellite imagery to enforce grassland protection is vague and likely too expensive to keep.

The BLM also assures the public that it will diligently enforce mitigations to restore the natural state of the land. Lessons learned in the northwest and southeast areas of the state reveal that these promises are hollow. In Farmington, the agency allows seasonal closures aimed at protecting mule deer and elk to be ignored through back-door deals with the oil and gas industry. In Carlsbad, the BLM has broken its promise to protect lesser prairie-chickens from disturbance during their breeding season hundreds of times. The endangered northern aplomado falcon, for which Otero Mesa provides key habitat, will likewise suffer if its fate is left in this agency's hands. The BLM has already demonstrated its willingness to permit oil and gas operators to negotiate less stringent standards out of public view, which will lead to the detriment of the natural values of Otero Mesa.

If the BLM's drilling plan survives legal challenges from Governor Bill Richardson's administration and conservationists, the agency will likely rubberstamp new wells, without conducting adequate environmental review, as it is increasingly doing in New Mexico, our Land of Enchantment, and across the West. BLM is now approving new wells so quickly that the oil and gas industry can't keep up. In New Mexico in 2004, 1,321 wells were approved by the BLM, yet only a little over half of that number (726 wells) were drilled. And the agency's fast-track leasing program is proceeding with little or no compliance with federal laws aimed at ensuring public participation and safeguarding natural values.

With the BLM increasingly turning public lands over to oil and gas companies, the industry's history in the state deserves scrutiny. Oil and gas operations have contaminated groundwater at 1,400 sites across New Mexico, and the industry is already challenging the meager mitigations BLM has proposed for Otero Mesa. Its disregard for federal land surface management extends to private lands, where it resists attempts to

provide protection for surface owners who are suffering the impacts of unchecked and unaccountable oil and gas operations.

One particularly egregious offender is the Harvey E. Yates Company (HEYCO), which is pushing harder than any other company for increased access to Otero Mesa. HEYCO stands out as an operator that resists even the most minor legal protections for natural values. The company has fought protective measures for Otero Mesa and other Yates companies have objected to reasonable measures to safeguard the Land of Enchantment's Bitter Lake National Wildlife Refuge and areas near Carlsbad Caverns. Otero Mesa in HEYCO's hands is a frightening specter.

There are some places too valuable and too vulnerable to be industrialized by oil and gas companies. With its massive Salt Basin aquifer underlying incomparable wild desert grasslands, Otero Mesa is such a place.

Introduction: Why Otero Mesa Deserves to be Safeguarded

The situation facing Otero Mesa forces the debate: Are there some areas that should be off limits to fossil fuel development? Do increasing demands for oil and gas oblige us to open up some of our last best places to oil rigs and pumpjacks? What if those special places yield only enough fuel to sustain our nation's energy habit for a few days or



Pronghorn USFWS photo

weeks? Should we make the transition to cleaner energy with a smaller footprint before or after destroying our Land of Enchantment? With its windswept vistas and echoes of earlier times, Otero Mesa should inspire thoughtful answers to these questions.

Historically, the Chihuahuan Desert was blanketed with rich black grama grassland, populated with healthy herds of pronghorn, prairie dog villages, mule deer, and aplomado falcons. The Chihuahuan Desert was an arid but ecologically robust land. Over the last two centuries, the Chihuahuan Desert has lost almost all of these natural and unique grasslands. Human activity has killed off large swaths of native grasses. Fragile topsoil is blown away when stripped of the native vegetation designed to hold it in place. The loss of topsoil and disturbance of native vegetation allowed invasive plant species to gain a foothold, which, once established, quickly became dominant. Today, there remain few locations where healthy Chihuahuan Desert ecosystems thrive.

One such place does exist right here in New Mexico. About one hour's drive northeast of El Paso, Texas, Otero Mesa encompasses approximately 1.2 million acres of Chihuahuan Desert, half of which contains increasingly rare desert grassland. Drought-resistant blue

Find Out More...

Read the January 2006 report by the Southwest Environmental Center on the Biological Richness of Otero Mesa.

Visit: www.wildmesquite.org

and black grama grasses dominate the landscape, and some grasses found on Otero Mesa, such as New Mexico stipa and hairy grama, are rare in the region.

In addition to the relatively intact floral communities present on Otero Mesa, the fauna is equally impressive. Otero Mesa's pronghorn herd is one of only a few native herds in New Mexico. Black-tailed prairie dog villages abound throughout Otero Mesa. Prairie dogs are a keystone species on which many other creatures depend, including burrowing owls, grassland birds, and a variety of carnivores and raptors. Approximately 140 species benefit from prairie dogs and the underground towns they create.¹

Otero Mesa may provide a perfect opportunity to re-establish populations of animals that have disappeared from the region. If allowed to expand, the numerous prairie dog villages could provide the prey base needed for reintroduction of black-footed ferrets. Because of the largely unfragmented and intact ecosystem, areas on and immediately adjacent to Otero Mesa have been identified as potential reintroduction sites for desert bighorn sheep. Further, based on the number of recent, well-documented sightings of aplomado falcons on Otero Mesa, there is good reason to believe this endangered species is already repopulating the area on its own – if, indeed, it ever left.

Below Otero Mesa's splendid surface lies a hidden treasure: a large freshwater source, the Salt Basin Aquifer. While the full extent of the aquifer is not yet known or fully understood, preliminary studies by the State of New Mexico and Sandia Labs indicate the water quality in the basin is unsullied and the amount of water is enormous. For anyone living in the arid southwest, where an estimated 90% of the public depends on groundwater for drinking water, the benefits of a large, pure water source cannot be

Public support for protection

Sixty-three percent of New Mexicans support Governor Richardson's plan to protect Otero Mesa versus the BLM's drilling plan, which only twenty-three percent of New Mexicans support.

Source: Random poll of 400 New Mexicans conducted by Research and Polling Inc. (Albuquerque, NM), commissioned by Campaign to Protect America's Lands, released July 8, 2004.

overstated. The risk to this precious water from oil and gas development is also clear. Because contaminants from the surface will travel very quickly into the aquifer, and groundwater in some areas is stored just a few feet below the surface, the vast water resource below Otero Mesa is extremely vulnerable to contamination from oil and gas operations.

Otero Mesa is an area abundant in wildlife and wildlands, rich in native vegetation and even in water. What Otero Mesa does not have, by all accounts, is a significant

amount of oil and gas. New Mexico BLM State Director Linda Rundell summed up the

¹Kotliar, Natasha B., Bruce W. Baker, April D. Whicker, Glenn Plumb. 1999. "A critical review of assumptions about the prairie dog as a keystone species." *Environmental Management* 24 (2): 177-192; Kotliar, Natasha B. 2000. "Application of the new keystone-species concept to prairie dogs: how well does it work?" *Conservation Biology* 14(6): 1715-1721; Miller, Brian, Rich Reading, John Hoogland, Tim Clark, Gerardo Ceballos, Rurik List, Steve Forrest, Lou Hanebury, Patricia Manzano-Fischer, Jesus Pacheco, and Dan Uresk. 2000. "The role of prairie dogs as a keystone species: response to Stapp." *Conservation Biology* 14(1): 318-321.

agency's belief about the oil and gas resources on Otero Mesa, stating: "I think there's a huge question mark about whether there's ever going to be an economically viable resource that anyone will want to produce...It's really pretty small potatoes."

The energy industry and its allies optimistically estimate that the amount of natural gas underlying Otero Mesa would supply current national demand for approximately 16 days. Even if this estimate is accurate, the gas would arrive in the marketplace piecemeal, over a 20-30 year period. The amount of energy that the industry estimates is available beneath Otero Mesa could easily be saved by increasing the fuel efficiency of cars and energy suppliers or through the development and use of clean, renewable energy sources such as wind and solar power.

In contrast to the "small potatoes" in fossil fuels beneath Otero Mesa, protection of natural values such as wilderness quality and wildlife populations can provide significant and sustainable economic benefits. Protecting the quality of the natural environment is essential to attracting new residents and businesses. The environment is the engine propelling the regional economy. A letter to President Bush from 100 economists concludes "The West's natural environment is, arguably, its greatest, long-run economic strength...A community's ability to retain and attract workers and firms now drives its prosperity. But if a community's natural environment is degraded, it has greater difficulty

A Nature Based Economy

- ◆ A recent report by the Sonoran Institute found that protected lands have the greatest influence on economic growth in rural isolated counties that lack easy access to larger markets. From 1970-2000, real per capita income in isolated rural counties with protected land grew more than 60 percent faster than similar counties without any protected lands (Rasker et al. 2004).
- ◆ The recreation opportunities provided by wilderness quality lands also yield direct economic benefits to local communities. According to the U.S. Fish & Wildlife Service (2002), in 2001, New Mexico residents and non-residents spent \$1 billion on wildlife recreation in the state. In addition, local communities that protect wildlands reap measurable benefits in terms of employment and personal income.
- ◆ Other "non-market" economic values arise from the ability of wildlands to contribute to recreation and recreation-related jobs, scientific research, scenic viewsheds, biodiversity conservation, and watershed protection (Morton 1999, Loomis 2000, Pickton & Sikorowski 2004). These economic benefits are dependent upon adequate protection of the wilderness characteristics of the lands.

Sources: ◆ Loomis, J. 2000. "Economic values of wilderness recreation and passive use: what we think we know at the turn of the 21st century." In McCool, S.F.; Cole, D.N.; Borrie, W.T.; O'Loughlin, J., comps. *Wilderness Science in a Time of Change Conference*, Vol. 2: Wilderness within the context of larger systems; 1999 May 23-27; Missoula, Mt. Proceedings RMRS-P-15-VOL 2. Ogden, UT: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station. 307 p. ◆ Morton, P. 1999. "The Economic Benefits of Wilderness: Theory and Practice." *Denver University Law Review* 76 (1999):465-518. ◆ Pickton, T. and L. Sikorowski. 2004. "The Economic Impacts of Hunting, Fishing, and Wildlife Watching in Colorado." Final Report prepared by BBC Research and Consulting for the Colorado Division of Wildlife. Denver, CO. ◆ Rasker, Ray, Ben Alexander, Jeff van den Noort, and Rebecca Carter. 2004. "Prosperity in the 21st Century West: the Role of Protected Lands." Sonoran Institute publication, July 2004. et al. ◆ U.S. Department of the Interior, Fish and Wildlife Service and U.S. Department of Commerce, U.S. Census Bureau. "2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation."

retaining and attracting workers and firms.”² The natural amenities of the rural West attract business and economic opportunities.³

BLM could have acknowledged the importance of Otero Mesa’s natural values by limiting the lands available for oil and gas development and protecting other sensitive resources. Instead, the BLM’s Record of Decision (ROD), released in January 2005, opens 95% of the 2.1 million-acre planning area to oil and gas drilling.⁴ This report reveals that the BLM’s promises to protect this special area ring hollow.

Otero Mesa is not the answer to our nation’s energy needs. It is, however, the last great example of Chihuahuan Desert grassland in the U.S., with unique and sensitive wildlife and a vast underground water supply. These natural values are extremely fragile and may well be destroyed if a search for an inconsequential oil and gas supply is given priority. Otero Mesa’s greatest value can only be realized if its grasslands, wildlife, water and wilderness qualities are protected. Relying on BLM’s unsupported promises of protection to justify exposing Otero Mesa to the risks of oil and gas development is unacceptable and dangerous.

I. BLM’s Shell Game: the Wager is our Land of Enchantment

Across New Mexico, the BLM continually defers environmental analysis of the full impacts of oil and gas drilling. Within the Resource Management Plans (RMPs) for the seven field offices in the state, the agency assures the public it will assess environmental impacts and adopt suitable mitigations during the leasing and project stages. BLM then fails to conduct any formal review of impacts at the leasing stage, again asserting that more site-specific analysis will occur at the project level, when new wells and pipelines are proposed. By the time the agency considers whether to approve individual wells, it often considers *only* the option of approving the well, sometimes stating that it cannot deny a lessee the right to develop the lease (Table 1).

²Whitelaw, Ed (editor). 2003. A letter from economists to President Bush and the governors of eleven western states regarding the economic importance of the west's natural environment. Dated December 3, 2003.

³Lorah, P. 2001. “Population growth, economic security and cultural change in wilderness counties.” In Cole, David N., and McCool, Stephen F. 2000. *Proceedings: Wilderness Science in a Time of Change*. Proc. RMRS-P-000. Ogden, UT: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station; Rasker, R. 1994. “A new look at old vistas: the economic role of environmental quality in western public lands.” *University of Colorado Law Review* 52(2): 369-399; Johnson, J. and R. Rasker. 1993. “The role of amenities in business attraction and retention.” *Montana Policy Review* 3 (2); Johnson, J. and Rasker, R. 1995. “The role of economic and quality of life variables in rural business location.” *Journal of Rural Studies* 11(4): 405-416; Rudzitis, G.; Johansen, H. E. 1989. “Amenities, Migration, and Nonmetropolitan Regional Development.” Report to Nat. Science Foundation, Dept. of Geography, Univ. of Idaho; Rudzitis, G. and Johansen, H. E. 1991. “How important is wilderness? Results from a United States survey.” *Environmental Management* 15(2): 227-233.

⁴The planning area spans 2.1 million acres of BLM surface and subsurface lands in Sierra and Otero Counties.

Table 1. The Shell Game: BLM avoids meaningful environmental analysis on oil and gas drilling.

Field Office	Resource Management Plan Stage	Leasing Stage	Well stage
Farmington	Mitigations will be applied through lease stipulations (RMP Record of Decision at p. 13); site-specific analysis and approval required before permitting new wells (RMP Record of Decision at p. 4).	No National Environmental Policy Act review and public process, no Endangered Species Act consultation	EAs often have only two alternatives: 1) Alternative A - No Action: “This alternative would deny the approval of the proposed application”; and 2) Alternative B: well approval. Alternative A is never chosen.
Carlsbad	Surface use and occupancy requirements will be applied to new leases or for proposed activities following NEPA analysis (RMP at p. 4).		
Roswell	Surface use and occupancy requirements will be applied to new leases or for proposed activities following NEPA analysis (RMP at p. 4).		
Taos	The BLM is responsible for preparing environmental documentation necessary to satisfy the National Environmental Policy Act requirements and provide any mitigation measures needed to protect the affected resource values (RMP at p. C-7).		
Las Cruces	{Note: This Field Office includes Otero Mesa, the RMP Amendment for which is discussed in next section}. ⁵ BLM has found the 1986 White Sands RMP evidences a “lack of direction” in its outdated “guidelines for fluid mineral leasing and management,” which required amendment.		
Rio Puerco	Special stipulations are conditions of lease issuance which provide additional, more stringent environmental protection by allowing for restrictions of operations within the terms of the lease contract (RMP at p. 24).		
Socorro	Site-specific decisions regarding lease issuance and the attachment of appropriate stipulations will be based on the following special fluid leasing stipulations [plan then reviews several stipulations] (RMP at p. 2-11).		

⁵The Caballo, Mimbres, and White Sands Resource Areas were combined to form the Las Cruces Field Office.

The Shell Game on Otero Mesa

In the Otero Mesa drilling plan and associated documents, BLM acknowledges that it lacks site-specific information about key resources and natural values on Otero Mesa but instead of committing to obtain important data before opening areas to oil and gas development, the agency simply defers this analysis to later stages. Unfortunately, as demonstrated in Table 1, at these later stages it is harder to ensure that a sufficient analysis of environmental consequences is conducted and best efforts are made to avoid or mitigate those consequences.

BLM confirms that for Otero Mesa it does not have complete information on water quality or quantity, stating:

Information on water quality and quantity within the basins has been gathered from various sources and is more extensive for some basins than others. Additionally, not all basins have had basin-wide studies conducted but rather smaller studies on local groundwater occurrence. Final Environmental Impact Statement (FEIS), p. 3-14.

However, instead of delaying its decisions, the agency proceeds with decisions and delays analysis of the cumulative impacts of oil and gas development, stating:

At this level of analysis and the uncertainty of the location(s) of the potential fluid mineral activities, it is difficult to define the functional, temporal, and spatial relationships between potential fluid mineral activities and other past, present, and reasonably foreseeable future actions. Therefore, past, present, and potential reasonably foreseeable future actions are addressed generally, and subsequent action such as lease nominations and applications for permit to drill will be reviewed and evaluated to ensure compliance with NEPA. FEIS, p. S-4.

The fallacy in this approach is that the RMP specifies the stipulations that will be applied to leases, and BLM generally does not develop new stipulations after parcels are nominated for leasing. Once a lease has been issued, BLM generally takes the position that it cannot impose significant restrictions on timing or location of drilling, relying on 43 C.F.R. § 3131.1-2 (Surface Use Rights).⁶ At the time of applications for permit to drill, BLM may impose conditions of approval, but these will be substantially limited and are unlikely to have sufficiently broad application to address the cumulative impacts of oil and gas development. By deferring analysis of environmental impacts, BLM necessarily defers the development and imposition of mitigation measures and, for Otero Mesa, such deferral equates to failure to comply with the commitments to protection in the ROD and the agency's legal obligations.

The BLM argued in federal district court in Albuquerque on January 24, 2006 that the agency retains full discretion to prohibit development of a lease after it is issued. This legal point was emphasized in arguments by the government that the BLM's plan to open up the largest

⁶This regulation states: "At a minimum, [reasonable] measures shall be deemed consistent with lease rights granted provided that they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year."

remaining tract of Chihuahuan Desert Grassland was environmentally defensible.⁷ The government stated that the BLM had full discretion to say to an oil and gas company holding a lease, “Sorry, you cannot develop that APD at all.”⁸

The government subsequently filed a brief providing only two examples where the BLM had denied an APD.⁹ The first example was in 1994, when BLM denied eight APDs because of “‘potential impacts from injection wells and water flooding’ relating to the Waste Isolation Pilot Plant (“WIPP”) near Carlsbad.” However, the APD denials were based on specific legislation¹⁰ which has no bearing on Otero Mesa and is therefore not valid evidence of BLM’s authority or practice of denying APDs for the Otero Mesa area or elsewhere in the state.

The second example cited by the government also occurred in 1994, where BLM prohibited surface occupancy on existing leases in a Cave Protection Zone because of impacts to the Lechuguilla Cave near Carlsbad Caverns. However, for the APD at issue – Diamondback Federal #1 – the oil and gas company, Yates Energy Corporation, was only required to move the well 300 meters. In addition, BLM established a Cave Protection Zone, prohibiting surface occupancy on existing leases.¹¹ Yates sued BLM on the grounds that the agency’s action amounted to a taking of its property right, in violation of the 5th Amendment to the U.S. Constitution. BLM then settled the case for \$2.2 million, and allowed Yates to drill on the periphery of the cave zone at issue.¹²

In sum, the BLM has produced no valid evidence to support its claim that it can and will deny lessees permission to develop their leases. Once areas are leased, they will likely be opened to drilling, notwithstanding irreplaceable natural values, such as those on Otero Mesa, which will be harmed by oil and gas activities.

II. Poor planning by BLM: Lease First, Ask Questions Later

Poor Planning on Otero Mesa

BLM claims that it will be able to protect Otero Mesa because it will conduct leasing through a strategic leasing approach and will require unitization agreements¹³ that contain key provisions. In order to make use of unitization agreements, the BLM must identify units and approve the governing agreements. However, to date, BLM has not moved forward with these actions and, instead, has proceeded with new leasing.

⁷See, e.g., p. 46 of transcript in *State of New Mexico, et al., vs. BLM, et al.* Case No. CV 05-460, for hearing conducted on January 24, 2006.

⁸*Id.* at p. 47.

⁹See “Federal Defendants Reply to Plaintiff’s Response to Notice of Continued Deferral of Lease for Bennett Ranch Unit Parcel,” dated February 23, 2006.

¹⁰The legislation was the Waste Isolation Pilot Plant Land Withdrawal Act, Public Law 102-579, Section 4(b)(5). This legislation has no bearing outside of the WIPP area.

¹¹U.S. Bureau of Land Management. 2004. Dark Canyon Final Environmental Impact Statement Record of Decision. Dated January 1994.

¹²Bureau of Land Management. 1996. “BLM Settlement Enforces Cave Protection Zone.” Press Release issued by Roswell, NM Field Office. NM-060-1120 News Release No. 96-01-06.

¹³Unitization agreements entail operators holding leases to jointly explore and then develop an area, known as a unit, which is then operated as if it is one lease, subject to a written agreement governing operations.

More than 250,000 acres in Otero County were nominated for oil and gas leasing prior to the commencement of this RMP Amendment in 1998. ROD, p. 11. In order to address this volume of nominations, BLM claims it will

...develop a lease strategy that will take into account such factors as industry interest, natural resource concerns, and ongoing exploration and/or development. BLM will offer leases in blocks over time, monitor exploration and production activity and determine the conditions under which additional lease parcels will be offered. ROD, p. 11.

However, the ROD contains no actual commitment that BLM will conduct staged leasing and current BLM guidance (IM 2004-110) requires justifications for deferring nominated parcels from upcoming lease sales. Further, the ROD does not provide any details regarding how and when BLM will actually develop the plan, what thresholds will be monitored to determine when more leasing is appropriate, or how the public will be able to review and comment on the strategic leasing plan.

The ROD also lacks detail on how unitization agreements will be handled. BLM's reliance on these agreements to implement the protective measures in the ROD is clearly stated:

...the RMPA requires new lessees to form exploratory units prior to commencing drilling activity. This special protection measure will allow the BLM to manage the surface in an orderly way, as well as to control the rate of reservoir development. The BLM has the authority to approve Unit Agreements... ROD, p. 12.

However, to date, BLM has neither provided additional detail nor taken steps to draft the agreements or provide information to the public regarding the expected central terms.

Despite the BLM's failure to implement either of the key steps cited in the ROD for protecting Otero Mesa, the agency nevertheless offered a lease on Otero Mesa in the first quarterly lease sale after the ROD was signed, in July 2005. The 1,600-acre parcel was located in the heart of desert grassland on Otero Mesa and in a priority area for aplomado falcons.¹⁴ The lease was sold for \$2.00 per acre to HEYCO.¹⁵ At this time, an agreement has been reached as part of the pending lawsuit challenging the ROD to delay further leasing – otherwise, it seems most likely that BLM would continue to lease without a lease strategy or sufficient unitization agreements.

Lessons from the San Juan Basin

Elsewhere in New Mexico, BLM has been unwilling to engage in rational planning that would help to balance fossil fuel extraction with protection of natural values. For example, the agency approved an eight-mile pipeline in October 2005 through the Carracas Mesa Recreation/Wildlife Area Specially Designated Area in the Farmington Field Office. Carracas Mesa provides

¹⁴The parcel is located at T26S, R12E, all or parts of sections 15, 22, and 23, within the Bennett Ranch unit, which has long been the subject of interagency wrangling over the presence of aplomado falcon habitat. Part of the impetus for the Sierra and Otero Counties RMPA came from ESA consultation during the 1990s on the adverse impacts to the falcon of wells and a pipeline proposed on the Bennett Ranch unit.

¹⁵U.S. Bureau of Land Management. 2005. Lease Sale Results for July 2005 Quarterly Lease Sale. Parcel No. 1.

important habitat for herds of mule deer and elk that migrate south from Colorado into New Mexico to spend the winter and calve. The pipeline was also routed through buffer areas of Bald Eagle Areas of Critical Concern, located in Bancos Canyon, along the eastern arm of Navajo Reservoir. Bancos Canyon has the highest Bald Eagle visitation within the field office.¹⁶

The justification for this pipeline project was that both existing and future gas wells would require a higher capacity pipeline than existed in the area. BLM refused to adopt an approach that would plan for those new wells in a manner that reduced their impact through methods such as twinning wellpads and requiring directional drilling. In addition, in a behind closed doors process shielded from public view the agency allowed the pipeline company, Williams Field Services, to construct the pipeline in a prime elk calving area during a seasonal closure. The public was not provided with the environmental assessment for the project until after construction had already begun. Because the agency failed to examine reasonable mitigations for the



Bald Eagle USFWS photo

pipeline, the Interior Board of Land Appeals enjoined the project and ordered a new environmental assessment.¹⁷

As a result of BLM's poor planning in the Carracas Mesa area, habitat conditions for mule deer and elk continue to deteriorate, with cheatgrass proliferation, pinyon pine and juniper overbrowsed due to a lack of alternative forage, and extensive stands of dead sagebrush. The former grazing permittee for the Rosa Allotment, located in Carracas Mesa, gave up his grazing permit because of oil and gas operations which contaminated water sources and depleted forage.¹⁸

One of the clearest ways that BLM resists rational oil and gas planning is by dismissing directional drilling as a feasible development alternative. Direction drilling allows companies to access fossil fuel reserves from existing wellpads, often by drilling at an angle, thereby reducing the footprint of new extraction. This approach has been demonstrated to be cost-effective in some circumstances.¹⁹ Yet, BLM routinely passes up opportunities for directional drilling, even within Areas of Critical Environmental Concern. The agency sometimes never even considers this option, and often dismisses it due to concerns about expenses to industry. In the developed fields of the San Juan Basin, there are high densities of existing wells which increase the feasibility of reducing further ecological harm by twinning wellpads and directionally drilling, yet the agency permits new gas wells, pipelines, and roads to proliferate across the landscape.

¹⁶U.S. Bureau of Land Management. 2002. "Biological Assessment, Impacts to Threatened and Endangered Species Related to the Resource Management Plan Revision, BLM Farmington Field Office." Dated September 2002. See p. 5-41.

¹⁷IBLA 2006-84 orders dated February 22 and May 22, 2006.

¹⁸IBLA 2006-84, Declaration of Chris Velasquez, Attachment 2 to Appellants' Statement of Reasons, dated February 2006.

¹⁹Molvar, E.M. 2003. "Drilling smarter: Using minimum-footprint directional drilling to reduce oil and gas impacts in the Intermountain West." Laramie, WY: Biodiversity Conservation Alliance, 32 pp. Report Issued February 18, 2003. Online at: <http://www.voiceforthewild.org/general/pubs.html>.

III. BLM's Dropped Mitigations: Reneging on Promises

Promised Mitigations on Otero Mesa

The Otero ROD relies primarily upon two measures to find that oil and gas development can proceed without a significant impact to the values of Otero Mesa:

- (1) Restricting surface disturbance on leases in the Chihuahuan Desert grassland, including an Otero Mesa grassland unit, to no more than five percent (5%) at one time; and
- (2) Providing that if the projected surface disturbance of 1,589 acres total over the life of the RMP is likely to occur, then BLM will conduct further environmental analysis as part of the site-specific analysis.

Setting aside the currently unanswered questions of whether the 5% limitation will provide necessary levels of protection for the fragile grasslands and whether the BLM's "further environmental analysis" will result in any additional limitations or protection, both of these requirements depend upon the BLM's effective monitoring and enforcement. As the ROD states, "Careful tracking of leasing and development activities will allow the BLM to ensure its planning documents remain valid and the RFD is not exceeded." ROD, p. 10. Unfortunately, there are significant questions and concerns regarding the BLM's ability and intent to enforce the key mitigation measures in the Otero ROD.

Risky Monitoring & Enforcement Proposal

Monitoring and enforcement would require a new, resource-intensive approach that is not detailed in the ROD and that the BLM has not previously attempted. In order to monitor and then enforce the surface disturbance limitations in the ROD, the BLM needs to determine when and how surface disturbance and subsequent restoration have occurred in a timely and reliable manner. In the ROD, BLM depends upon "satellite imagery, global positioning system mapping, and geographical information systems (GIS) analysis." ROD, p. 12. In general, we applaud BLM's effort to apply these technologies to enhance the effectiveness of their land management programs. However, other than a statement that the agency "has created a GIS tracking database" (ROD, p. 12), there is no specific information on how this approach will actually be implemented. Although satellite imagery could theoretically be analyzed to quantify the amount of disturbance from roads and well pads, high-resolution commercial imagery would be needed to do so accurately. This imagery is expensive to purchase and requires specialized software and trained personnel to make use of it. None of these factors are described in the ROD.

The ROD defines successful reclamation as "when healthy, mature perennials are established with a composition and density that closely approximates the surrounding vegetation as prescribed by the BLM, and the reclamation area is free of noxious weeds." ROD, p. 13. Even if the BLM could obtain sufficient funding and personnel, existing types of satellite imagery collect insufficient spectral information to operationally depict whether vegetation growing on previously disturbed areas is a native plant or a noxious weed. Verification of reclamation would require personnel in the field to determine whether the correct types and density of vegetation have successfully matured and that there are no noxious weeds present.

The use of additional, trained personnel is also implied by the ROD's mention of a global positioning system (GPS) and, of primary importance, would be necessary to enforce these mitigation provisions. For instance, if satellite image analysis determined that a given unit had reached or exceeded the 5% surface disturbance limitation, then agency personnel would be needed to alert the operator and ensure that no further surface disturbance occurs. Similar action would be required to enforce a halt on surface-disturbing activities in the event that the 1,589-acre threshold for the RMP is reached, and the BLM decides to stop further activities pending further environmental analysis. A significant number of personnel would be required to adequately conduct monitoring and enforcement over a planning area of more than two million acres.

The central mitigation measures set out in the Otero ROD cannot be effective unless substantial needs for equipment, training, experienced personnel and funding are met. However, there is no detail in the ROD regarding how the BLM will meet these needs. Further, there is no detail in the ROD regarding any plan to obtain the needed equipment, training, personnel, or funding, or regarding any other aspect of implementing the plan. In light of the BLM's lack of experience in developing and implementing the methodology needed to enforce the mitigation measures set out in the ROD, along with the BLM's historic challenges in obtaining sufficient funding and personnel, there is little reason to have confidence in the BLM's ability to enforce the key protections in the ROD.

Will the BLM Renege on Promises of Mitigation on Otero Mesa?

Alongside feasibility concerns, there is a high risk that BLM will simply fail to enforce mitigation measures promised in the Otero Mesa ROD out of deference to operators. Based on the agency's response to comments made during the RMP process, there are significant questions as to the BLM's intent to actively enforce the mitigation measures in the ROD. As noted previously, the workability of the 5% limit on surface disturbance in grassland areas depends upon the BLM not permitting new surface disturbing activities until restoration of the existing disturbance has been completed. Prior to setting out the reclamation standard set out above, the ROD provides that the "reclamation plan will be part of the Surface Use Plan of Operation (SUPO)." ROD, p. 13. The Draft, like the ROD, addresses revegetation and specifies that it will be included in the SUPO. The Draft also discussed the need for "proper" reclamation and the potential for imposing additional measures based on the conditions existing at the time of abandonment. Draft RMP/EIS, Appendix A-III (Surface Use and Best Management Practices).²⁰

In commenting on the reclamation and revegetation requirements set out in the Draft RMP, the Independent Petroleum Association of New Mexico (IPANM) stated:

After many years of negotiation, BLM and the industry established that the industry will make two good faith attempt [*sic*] to reseed a site. All words should be reseeded and the word revegetated deleted on page A-III-13. In New Mexico grass will grow if it rains

²⁰Because the Draft did not include the 5% approach (for limiting surface disturbance at any one time) and simply limited the places for disturbance, the Draft only addressed reclamation for those areas not needed for ongoing operations.

and nothing else will speed up the process. The draft is full of plans for the industry to write. We are not in the planning business. These plans are for the file at BLM and have no other valid purpose. References to plans must be deleted. Proposed RMP/FEIS, p. G-I-222.

In response, instead of reiterating the importance of these requirements and its authority to impose them, the BLM states,

...the best management practices described should not be construed as rigid requirements applicable to every situation but, rather, are ideas and examples that have been successful, from which site-specific applications can be developed. The operator and surface-management agency working together can develop the best approach to achieve the management objectives in each situation. Proposed RMP/FEIS, p. G-I-222.

In essence, the BLM's response indicates that these types of practices are not definitive and will be subject to negotiation with the operator in the preparation of the Surface Use Plan, which is typically not made public. It is also likely that BLM will be challenged on its interpretation of monitoring data and will need to require compliance by a given operator.

While the BLM may well be instructing operators to cease further surface-disturbing activities, the ROD does not set out, or include in the lease stipulations, any specific penalties that will be assessed to ensure that the operator will immediately comply or any other details related to how the agency intends to enforce the limitations on lease development activity. For instance, will industry receive a preliminary assessment from the BLM and then have a chance to appeal or otherwise argue with BLM's findings? The answer is unclear from planning documents.

In addition, the ROD does not include any mandatory best management practices (BMPs) that could protect the area, such as directional drilling or closed loop systems. While some BMPs are identified in an appendix, none are required and the most effective BMPs may only be considered after less restrictive alternatives are considered. In actual practice, BLM will need to rely on the oil and gas operators to cooperate with monitoring of surface disturbance, to agree to use BMPs and to negotiate a surface use plan that addresses important issues such as locations of disturbance and reclamation standards.

Even though the protective measures included in the ROD will require active enforcement and are likely to prove controversial with operators, the BLM has failed to develop and include in the ROD any specific enforcement mechanism. The BLM's failure to provide for enforcement, taken in conjunction with BLM's inclination to permit oil and gas companies to negotiate less stringent standards out of public view, are likely to severely undermine the effectiveness of the ROD in safeguarding the values of Otero Mesa.

Lessons Learned from New Mexico's Developed Fields

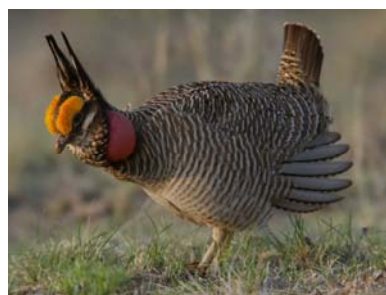
Examples abound where BLM has promised mitigations to protect natural values, then reneged on those promises in order to expedite development. The Carlsbad Field Office adopted a RMP Amendment in 1997, which addressed oil and gas development. The RMPA provided a timing

stipulation designed to protect Lesser Prairie-Chickens from disturbance during breeding activities.²¹ Carlsbad has subsequently issued over 500 waivers from this wildlife protective stipulation, which constitutes more waivers from wildlife protection than any other field office in the West.

Reneging on the promise to protect Lesser Prairie-Chickens from disturbance takes a tremendous toll on these rare birds. The species has almost completely vanished from the Carlsbad Field Office, despite the area being an historic stronghold. In particular, the noise and commotion from construction activity, pumpjacks, and compressors can prevent the females from hearing the males booming on lek sites.

A July 2004 report by the Carlsbad Field Office of the BLM indicated that one of the two leks documented was detected only because a gas compressor happened to shut off during the course of the prairie-chicken survey. The report's author noted that, "Had the compressor not shut off, LPC [Lesser Prairie-Chicken] would not have been confirmed as present there." In addition, the report recorded noise sources heard during the course of the survey. According to the agency's data, on BLM lands in the Carlsbad Field Office, one is 16 times more likely to hear a pumpjack or gas compressor than to hear a coyote howl or a birdsong. One is 19 times more likely to hear a pumpjack or gas compressor than to hear the wind.²²

The Lesser Prairie-Chicken's Plight



When it comes to Lesser Prairie-Chickens, the BLM has reneged on its promise to protect them from oil and gas more than 500 times. The result is increased imperilment for this southern plains bird, whose cousin, the Heath Hen, went extinct in 1932.

At the opposite corner of the state, in the Farmington Field Office, the BLM issued an RMP in September 2003. Among the mitigations provided in the plan were seasonal closures for key mule deer and elk areas. Within two months of finalizing the RMP, the BLM issued "Procedures for Requesting an Exception to Seasonal Drilling Restrictions," which allows for these seasonal closures to be breached.²³ In October 2005, the BLM authorized a pipeline company to proceed with construction in an elk calving area. The pipeline company's request took the form of a phone call and one-paragraph email to BLM. The agency approved the request the very same day, without any notice to the public, thus reneging on a promise made in its RMP through a back-door process with industry.²⁴

²¹U.S. Bureau of Land Management. 1997. Carlsbad Approved Resource Management Plan Amendment and Record of Decision at p. AP1-4.

²²Allen, Ty. 2004. "2004 Lesser Prairie-Chicken Report and Recommendations." Carlsbad Field Office, U.S. Bureau of Land Management. Memo dated July 29, 2004.

²³U.S. Bureau of Land Management, Farmington Field Office. 2003. "Procedures for Requesting an Exception to Seasonal Drilling Restrictions." Dated November 2003.

²⁴See email from John Hansen, Farmington Field Office of the BLM, to Bob Seitzinger of Williams Field Services, dated November 2, 2005.

Rubberstamping new wells

Regarding the increased use of categorical exclusions, under which oil and gas wells evade environmental review, BLM State Director Linda Rundell stated in October 2005: “The premise is to provide one-stop-shopping to make the whole APD process smoother” and to “help us as far as getting our permits out quicker.”

IV. BLM Flouts Federal Law

BLM permits oil and gas at the expense of other resources and responsibilities

The BLM has historically failed to fulfill its responsibility to manage the public lands to protect their multiple uses and instead has prioritized oil and gas development, often at the expense of complying with both the National Environmental Policy Act and the Federal Land Policy & Management Act. Once a RMP or RMP Amendment is completed, the BLM has significant discretion regarding the amount of NEPA analysis that will occur prior to leasing and prior to granting an

application for permit to drill (APD), which conditions of approval will apply to an APD, and whether to permit public comment on an APD. *See, e.g.*, 40 C.F.R. § 1501.4(2).

Unfortunately, BLM has not and likely will not exercise this discretion to meet its obligations to take a “hard look” at environmental consequences, identify and apply mitigation measures, or permit the public participation and scrutiny that is considered “essential to implementing NEPA.” *See, e.g.*, 40 C.F.R. § 1500.1(b); 40 C.F.R. § 1502.14. BLM has been issuing record numbers of APDs. In fact, so many APDs have been issued that industry cannot drill them all and has a substantial surplus of approved wells. Of the 26 million acres of public land currently leased, 60% are not in production. Over the past decade, BLM has approved in excess of 32,000 drilling permits, while industry has drilled about 25,000 new wells, resulting in a cumulative surplus of more than 7,000 drilling permits.²⁵ In New Mexico in 2004, while 1,321 wells were approved by the BLM, only a little over half of that number (726 wells) – were drilled.²⁶

BLM’s lack of attention to activities other than permitting oil and gas development was documented in a June 2002 report issued by the General Accounting Office (GAO) entitled: “Oil and Gas Development: Increased Permitting Activity Has Lessened BLM’s Ability to Meet Its Environmental Protection

The Rush to Drill

- ◆ In New Mexico in 2004, while 1,321 wells were approved by the BLM, only a little over half of that number (726 wells) – were drilled.
- ◆ Yet, under pretense of the need to “streamline,” the BLM adopted a policy in September 2005 that greatly expands its use of Categorical Exclusions, which entail little environmental analysis and no public comment.
- ◆ Even where environmental analyses are completed, BLM usually looks at only two alternatives: 1) approving a new oil or gas well; or 2) “no action” – not approving the new well. In many instances, BLM states that it cannot choose the “no action” alternative, as it would violate a lessee’s “right” to develop their lease: in effect, a rubberstamp.

²⁵U.S. Department of Interior, Bureau of Land Management, Public Lands Statistics (for 1994 -1997) and Automated Fluid Minerals Support System (AFMSS) (for 1998-2004).

²⁶*Ibid.*

Responsibilities.” As indicated by the title, the GAO found that the increased volume of APDs has resulted in more BLM staff resources devoted to issuing permits with less attention being paid to monitoring and enforcing compliance with environmental standards that apply to the activities conducted under the permits.

The Energy Policy Act of 2005 will only exacerbate BLM’s continued focus on permitting oil and gas development at the expense of environmental protection. Section 365 of the Energy Policy Act identified seven pilot project offices, which will receive additional personnel and funding dedicated to processing permits. Two of these offices are in New Mexico – the Farmington and Carlsbad Field Offices. The New Mexico State Director of the BLM announced in October 2005 that 35 additional staff were being hired to speed well approvals in these two field offices.²⁷ Notably, none of the additional funding or personnel will address monitoring or enforcement. Section 390 of the Energy Policy Act set out five new categorical exclusions from NEPA to further speed approval of oil and gas development activities and reduce environmental analysis.

Why would things be different on Otero Mesa?

The Otero Mesa ROD is also dependent upon BLM conducting NEPA analysis and taking proactive steps to protect the fragile grassland ecosystem. Based on BLM’s historic conduct, there is little reason to believe that BLM will prioritize public oversight or environmental protection.

The Preferred Alternative in the Draft RMP Amendment addressed protection of the grasslands and prevention of habitat fragmentation through a lease stipulation limiting oil and gas development activities to within 150 meters of existing roads in core habitat and buffer areas. The stipulation was not subject to waivers, exceptions or modifications. Draft RMP, p. A-VI-14. However, when the Proposed RMP Amendment was issued, the Preferred Alternative had been completely changed to remove these protections and to rely on the 5% limitation now in the ROD. The public was not given an opportunity to comment or provided with any scientific basis to support the agency’s claim that this new approach would protect the grasslands. NEPA requires the BLM to prepare a supplemental EIS (SEIS) if “the agency makes substantial changes in the proposed action that are relevant to environmental concerns.” 40 C.F.R § 1502.9(c)(1)(i). An SEIS must be circulated for comment before a final decision is made. 40 C.F.R. § 1502.9(c)(4). BLM refused to provide this opportunity or even any additional information on the basis for the approach in the ROD, undermining the role of the public.

In preparing the RMP Amendment and EIS, BLM failed to comply with its obligation under NEPA to take a “hard look” at the environmental consequences of drilling on Otero Mesa. As discussed above, BLM did not consider or mitigate the potential effects of drilling on groundwater, deferring it to some later date without putting protections in place for the water supply beneath Otero Mesa. Similarly, the BLM refused to regard significant new information provided during the planning process regarding wilderness quality lands. The New Mexico Wilderness Alliance provided a detailed inventory showing over 520,000 acres deserving of protection, which was not previously considered by the BLM. Nonetheless, in violation of

²⁷Soussan, Tania. 2005. “Offices to Help Speed Oil, Gas Permits.” *Albuquerque Journal* October 4, 2005.

NEPA, the BLM refused to analyze the potential damage to these wilderness values from oil and gas development or to apply protective management that could limit such damage.²⁸

Enforcement of the 5% grassland stipulation and the limitation on total surface disturbance in the ROD will require the BLM to take the initiative to control industry behavior, even though the ROD does not specify a method for doing so or explicitly commit the agency to stopping development if these thresholds are reached. The only commitment that the ROD actually contains regarding the total surface disturbance limitation is to potentially conduct additional environmental analysis before permitting more oil and gas development. There is no clear commitment in the ROD to actually halt further development. Further, the lease stipulation setting out these limits is presumably subject to exception, modification or waiver. Similarly, the ROD does not specifically provide for the BLM to unilaterally stop operations if disturbance limitations are exceeded. BLM will also exercise discretion regarding the amount of public participation in development of the leasing strategy and in reviewing APDs.

BLM's track record shows that there is little foundation for relying on this agency to actively consider potential environmental damage, permit public review, and develop protective measures.

Violations of the Endangered Species Act

Aplomado Falcons on Otero Mesa



USFWS photo; not taken on Otero Mesa.

There have been seven sightings of falcons on Otero Mesa from January 2005 to July 2006, more than any eighteen-month period on record. In the past decade, falcon pairs, adults, and young falcons have all been observed in the area. This is despite the difficulties of detecting falcons in their grassland terrain, particularly in areas of low road density, such as Otero Mesa.

Sources: FWS and BLM credible falcon sighting reports.

In the Otero Mesa planning process, BLM violated the Endangered Species Act by refusing to formally consult with the U.S. Fish and Wildlife Service (FWS) over the impacts of the drilling plan to the northern aplomado falcon, a federally endangered species.²⁹ Impacts to this rare raptor from oil and gas activity include habitat fragmentation, which harms both falcons and the grassland birds on which they prey. Both BLM and FWS have acknowledged these threats.³⁰ According to FWS, Otero Mesa is a "high priority recovery area for the falcon because of the combination of its overall size, relatively unfragmented natural

²⁸This is a violation of 40 C.F.R. § 1502.9.

²⁹The northern aplomado falcon is an endangered subspecies of the broader ranging aplomado falcon.

³⁰U.S. Fish and Wildlife Service. 1999. Comments on proposed resource management plan amendment for fluid minerals leasing and development in Sierra and Otero Counties. October 27, 1999; Bureau of Land Management. 2003. "Biological Assessment of the Effects of Oil and Gas Development on the Northern Aplomado Falcon in the Carlsbad Field Office, Bureau of Land Management." October 2003.

condition, and its proximity to breeding aplomado populations in nearby Mexico.”³¹ There is more evidence than ever before of falcon use of this area.

While the Chihuahuan Desert may be the most biodiverse desert ecoregion in the world, intact remnants of desert grassland, such as those on Otero Mesa, are increasingly rare. Whether considering the variety of birds, cacti, or butterflies, this area is a biological gem. The northern aplomado falcon’s rarity mirrors that of the habitat on which it depends. Also in decline are grassland breeding birds that comprise much of the falcon’s diet.

While in April 2003, BLM determined that the Otero Mesa drilling plan was likely to adversely affect the falcon, less than five months later BLM reversed its determination, finding that the drilling plan would not adversely affect the falcon. This flip-flop was not based on any new evidence or analysis. Rather, the agency ignored suspected risks to the falcon and obstacles to this raptor’s recovery in favor of expediting development. The BLM claimed that its set-asides of approximately 35,000 acres would protect falcons on Otero Mesa, but an expert biologist has estimated that 180,000-330,000 acres may be required to protect a viable population of falcons in the area.³²

In the shell game BLM plays with the public on oil and gas, the agency argues that important values, such as falcon habitat, will be safeguarded in subsequent policy analysis. Yet, at the leasing stage, BLM routinely fails to protect northern aplomado falcons from oil and gas. The agency has leased more than 200,000 acres of falcon habitat in the past three years. In almost all cases, the BLM fails to conduct consultation, as required under the ESA, prior to leasing. In one case where site-specific consultation was conducted, in the Hope Grasslands west of Artesia, a two-day windshield survey of an area sprawling over 482,000 acres was relied on to find that oil and gas drilling would not jeopardize the falcon, on account of no falcons being detected.³³ In its leasing program, the New Mexico state office of the BLM has also failed to conduct consultation over the following listed species: bald eagle, jaguar, Mancos milkvetch, Mesa Verde cactus, Roswell springsnail, Pecos assiminea, Pecos gambusia, Noel’s amphipod, Koster’s springsnail, and Arkansas River shiner, thereby violating the ESA.

³¹U.S. Fish and Wildlife Service 1999.

³²Tafinelli, Robert. 2003. “Review of proposed resource management plan amendment for fluid minerals leasing and development in Sierra and Otero Counties.” December 2003.

³³U.S. Bureau of Land Management 2003.

Blind Leasing: Tour of the July 2006 Quarterly Lease Sale

Every quarter, the BLM leases tens of thousands of acres in the Land of Enchantment to oil and gas companies. In the July 2006 lease sale, the agency demonstrated striking disregard for the state's special places and natural values:

♦**Rio Chama Wild River.** Nearly 15,000 acres were leased in roadless areas east of the Rio Chama and Chama River Canyon Wilderness. The leased area has outstanding wilderness, recreation, and scenic qualities that will be degraded by oil and gas drilling.

♦**Lordsburg roadless areas.** Over 37,000 acres were offered for lease in and near the Peloncillo Mountains and Lordsburg Playas Citizen Wilderness Proposal areas in southwest New Mexico. Rugged and remote, the area is home to many endangered species, including Mexican wolves and possibly jaguars.

♦**Areas of Critical Environmental Concern (ACECs).** Parcels were proposed for leasing in the middle of three ACECs – the Overflow Wetlands ACEC, established to protect endangered aquatic wildlife, the Hogback ACEC, established to protect rare plants, and the Largo School/Hooded Fireplace Ruins ACEC, which contains important indigenous cultural sites.

♦**Endangered species habitats.** Thousands of acres of aplomado falcon, American burying beetle, and Arkansas River shiner habitat were offered in the sale, in disregard for the federal protections provided to these imperiled species under the Endangered Species Act.

The BLM was forced by a citizen challenge to remove some of these ecologically and culturally vibrant areas from the sale.

V. Trust the oil and gas industry to protect Otero Mesa?

The BLM is relying on the oil and gas industry's good behavior to protect Otero Mesa. As noted above, the restoration requirements will be defined in a surface use plan negotiated by BLM and the operator, while the limitations on surface disturbance will require industry cooperation with the monitoring and enforcement needed for successful implementation. In the Final EIS, the BLM is even more explicit, concluding that there will be no significant impacts because of the likelihood that industry's operations simply will not pollute the environment.

For the construction phase, BLM concludes that because many of the impacts would occur only if the "regulations fail to protect the resources, the impact is not quantifiable." FEIS, p. 4-15. This conclusion is apparently based on agency's assumption that the company performing the construction will comply with all regulations, despite historical problems with abandoned wells and contamination in other parts of the state and the county. During the production phase, BLM dismisses the likelihood of cross-contamination of groundwater supply aquifers because of the manner of expected well construction and monitoring of produced and injected water volumes. FEIS, p. 4-17. This approach to assessing damage - waiting until the monitoring results are collected and analyzed – does not necessarily prevent cross-contamination.

BLM acknowledges that accidental spills of produced water or leaks from evaporation ponds could impact shallow groundwater, but concludes that this will not be a significant impact "due

to the probably low volumes of spills or leaked materials and localized geographic extent of spills and leaks.” FEIS, p. 4-17. Once again, BLM is concluding that the spills will not be excessive, instead of assessing the risks to the groundwater or applying real protections for this vital resource.

Not only does this approach violate the BLM’s obligations to assess and consider ways to mitigate environmental damage, as discussed above, but it also relies on an industry that has shown neither the commitment nor the ability to protect the environment in our Land of Enchantment.

The oil and gas companies cannot be trusted to protect Otero Mesa

During the preparation of the RMP Amendment for Otero Mesa, the oil and gas industry has consistently argued against the need for protections, even going so far as to recommend that the BLM remove the word “revegetated” from the reclamation requirements, so as not to place such a “high” burden on the companies to restore the lands that they damage.

The intent of the oil and gas industries to avoid commitments to environmental protection and responsible use of private property was exemplified in their response to the Surface Owners Protection Act, which was introduced in the New Mexico legislature in late 2005. The oil and gas industry worked to gut the bill so that it would: permit oil and gas companies to begin drilling operations by simply posting a bond of only \$2,500 and without providing adequate notice or negotiating a surface use agreement with a landowner; no longer provide for courts to assess penalties in the event that a bad operator drills a well without providing the required notice of 35 days or without posting a bond; and limit damages to those caused directly by oil and gas operations (“dirt turned”) instead of requiring compensation for use and for damages such as diminished land value and lost use of and access to the land.³⁴

What would the industry be willing to agree to do? Nothing definite. In response to perceived “image problems” and a new rule proposed by the New Mexico Oil Conservation Division (OCD) to prohibit the use of unlined pits for storing or disposing of potentially dangerous by-products, the New Mexico Oil and Gas Association (NMOGA) introduced its “Good Neighbor Initiative,” which was touted as the industry’s commitment to compliance and public concerns. In actuality, the initiative is structured around the rather empty “promise” that: “Companies will listen to the landowner, lessee permittee, and/or resident concerns and respond appropriately.” There is no detail regarding what an “appropriate” response would be or any reason to believe that such a response might involve curtailing operations. The initiative generally only discusses respecting private property owners and protecting the environment in terms of complying with “applicable” laws, “seeking” to understand and address concerns, and “practicing good housekeeping.”³⁵

³⁴Oil and gas industry representatives’ testimony and proposed amendments to New Mexico H.B. 437 (Surface Owners’ Protection Act), 2006 legislative session.

³⁵New Mexico Oil and Gas Association powerpoint presentation on the Good Neighbor policy. Online at: <http://www.nmoga.org/nmoga/NMOGA%20Good%20Neighbor%20Initiative.pdf#search=%22nmoga%20good%20neighbor%20policy%22>.

These broad statements do not translate into any real commitments to even comply with the terms of the BLM's plan for Otero Mesa, especially in light of the concurrent efforts of the industry to stop the OCD from finalizing the new pit rules. As the Director of the New Mexico OCD stated,

The industry is playing a duplicitous game on this proposal, fighting these rules while also claiming at their annual meeting in Santa Fe to be "good neighbors." Good neighbors don't fight sensible proposals, contaminate groundwater or leave the cleanup and expense for someone else.³⁶

There is no reason to believe that the oil and gas industry will be willing to take responsibility for protecting Otero Mesa.

Oil & Water Don't Mix

Given the BLM's lack of enforcement and the industry's lack of interest in compliance, it is not surprising that history shows that oil and gas development activities are likely to contaminate natural resources. The industry has been responsible for overwhelming and widespread groundwater contamination in New Mexico. In October 2005, the New Mexico OCD compiled



Dead bird in oil

information regarding groundwater impacts from leaks, spills and releases resulting from oil and gas operations, although this data does not include all such impacts or all sources associated with oil and gas development and operations. There are close to 1400 groundwater contamination instances in the OCD's database that are attributed to oil and gas activities, with more than 400 from pits, highlighting the risks posed by oil and gas operations. Other sources of contamination include leaky pipelines, storage tanks, and batteries. But these figures do not do justice to the actual on-the-ground effects of each one of these contaminating events. Some highlights:³⁷

North Monument Pipeline (NAVAJO REFINING COMPANY). In 2002, a leak was discovered in a 6-inch crude oil gathering line near Monument in southeast New Mexico. Approximately 2100 barrels of oil leaked from seven leaks in the pipeline, contaminating five acres of soil and polluting groundwater with hydrocarbons (benzene, toluene, ethylbenzene and total xylenes). The pipeline was only two years old.

Maverick Refinery and Tank Farm/Caribou Refinery (MAVERICK COUNTRY STORES). A petroleum refinery abandoned in 1982, located near water wells, irrigation ditches, and the San Juan River, continues to cause area water contamination. The alluvial aquifer and at least three down-gradient wells were contaminated, and the contaminant plume runs toward the San Juan River. In 2005, a Kirkland resident brought suit against Maverick on account of pollution in his water well resulting from refinery activities twenty years ago.

³⁶Editorial by Mark Fesmire, Director of NM OCD, entitled "Good Neighbors' Would Support New Pit Rules," online at: <http://www.emnrd.state.nm.us/emnrd/MAIN/OCDop-ed.swf>.

³⁷Summaries of the profiled cases are based on OCD groundwater contamination records.

Bloomfield Refinery (GIANT REFINING CO). Hydrocarbon contamination from this fifty-year-old refinery was discovered in 1989. The refinery sits atop a bluff, with the San Juan River located less than ¼ mile down-gradient. Altogether, it has spilled approximately 156,282 gallons of petroleum products. Surface water, groundwater, and soil have all been contaminated. There are at least nine incidents where nearly 400 barrels of material were not recovered following spills at the refinery. Drinking water for the city of Farmington is taken downstream of the refinery. The San Juan River is also very valuable to the region's economy as a tailwater trout fishery.

PCA Junction (CONOCOPHILLIPS).³⁸ In 1995, contamination was documented in Eddy County, resulting from a leaky condensate³⁹ storage tank. Two feet of condensate were detected in a monitor well onsite. Recently, there has been as much as 300 gallons of recoverable condensate in the groundwater.

Lattion Pit (YATES PETROLEUM). At one of four contaminated pits controlled by Yates Petroleum and located nine miles south of Artesia in Eddy County, the company argued that contamination levels were natural, although they were hundreds of times higher than contamination standards: chloride levels were 81,535 ppm versus the contamination standard of 250 ppm and background rates for chlorides in the area is 400-600 ppm. While this contamination was detected in October 2000, an abatement plan was not submitted until August 2005.

Spotlight on Yates

Yates Petroleum Corporation, Yates Energy Corporation, and Harvey E. Yates Petroleum Company (HEYCO) have stood out as companies that disregard environmental harms from their operations, and HEYCO is the oil and gas company pushing hardest for increased access to drill on Otero Mesa. In 2002, the BLM issued an Environmental Assessment providing for drilling in the source water area for the Bitter Lake National Wildlife Refuge. With its unique hydrological features, the refuge hosts a variety of aquatic wildlife found nowhere else on earth. In a modest attempt to protect the groundwater, BLM required the use of steel tanks (rather than pits) and special cement casing in this vulnerable area. Yates Petroleum has fought these minor mitigations,⁴⁰ even arguing that the BLM should not consult with FWS on the impacts of oil and gas drilling to four invertebrates

Otero Mesa in Yates' Hands?

Yates companies have a long history of fighting environmental safeguards, and it pays politicians to do the same. The Yates oil and gas family donated nearly \$115,000 to the Republican Party in 2005, which is more than half of all contributions to the New Mexico Republic Party from oil and gas companies and associations.
 Source: Linthicum, Leslie. 2006. "N.M. Oil Family Gave Generously to N.M. Republican Party." *Albuquerque Journal*, May 20, 2006.

³⁸PCA Junction, owned and operated by ConocoPhillips, includes two 500-barrel tanks (one for water and one for natural gas condensate) and is at the intersection of two natural gas pipelines.

³⁹Natural gas condensate is a by-product of natural gas processing composed of pentane, hexane, cyclohexane, benzene, heptane, toluene, octane, ethylbenzene, xylene, all of which may have severe negative affects on groundwater and soil quality.

⁴⁰IBLA 2005-185.

listed under the Endangered Species Act, three of which are only found on the Bitter Lake refuge.⁴¹

But if anyone knows the refuge is vulnerable to contamination, it's Yates. In May 1994, Yates' drilling caused a spill of brine onto the refuge. The water had a chloride content of 5,999 ppm, a level twenty times higher than the contamination standard.⁴² The Bitter Lake National Wildlife Refuge staff described the spill as a tragedy, given potential dangers to the refuge's endangered wildlife, springs, ponds, associated wetlands, and underground water sources.⁴³

Undeterred, in February 2006, Yates sought to drill two wells within the refuge, one of them just a quarter-mile away from the visitor's center. Due to pressure from state and federal agencies, the company withdrew its request in April. But Yates has a long history of disregard for this special place. In 1982, it caused a national controversy by bulldozing a road and drilling a gas well in the wilderness portion of Bitter Lake, in violation of federal law. Activists blockaded the drilling site, and Yates was ordered to stop drilling until it complied with environmental laws.⁴⁴

Yates Energy Corporation has drilled for oil and gas near the fragile and unique Carlsbad Caverns. When BLM required the company to move the Diamondback Federal #1 well 300 meters, in order to protect Lechuguilla Cave, Yates sued the agency on property rights grounds. In a sweetheart settlement, Yates received a \$2.2 million payment from the federal government.⁴⁵

HEYCO has a long history of protesting environmental protections on Otero Mesa. In 1998, the company complained about the need to do surveys for migratory birds before drilling during nesting season.⁴⁶ Senator Pete Domenici and the late Rep. Joe Skeen intervened on HEYCO's behalf, pressuring the BLM to speed up approval of new drilling and a pipeline on Otero Mesa in 2000, despite the lack of an approved RMP providing for this development.⁴⁷ In 2001, HEYCO's lawyers warned that



HEYCO sign

⁴¹See consolidated case IBLA 2003-159 & 2005-185, "Yates Petroleum Corporation's Motion for Reconsideration of Order Dated September 22, 2005," dated November 18, 2005.

⁴²U.S. Fish and Wildlife Service. 1994. Annual Report for Bitter Lake National Wildlife Refuge.

⁴³*Id.*

⁴⁴Reese, April. 2006. "Energy company stakes out wildlife refuge." *High Country News HOTLINE*. March 6, 2006.

⁴⁵Supra Note 12.

⁴⁶Correspondence from Douglas Lunsford, attorney representing HEYCO attorney, to Tim Sanders, BLM, dated November 23, 1998.

⁴⁷Correspondence from Sen. Pete Domenici and Rep. Joe Skeen to Bruce Babbitt, Interior Secretary, dated October 18, 2000.

“further delay is not acceptable” for their proposed pipeline while it was undergoing endangered species consultation,⁴⁸ despite the consultation being within the regulatory timeframe.⁴⁹

Between November 27 and December 8, 2000, a period of less than two weeks, HEYCO’s Vice-President wrote the BLM fifteen times regarding the draft Otero Mesa drilling plan. Many of these letters and emails included complaints that BLM was unfairly restricting oil and gas drilling through controlled surface use stipulations. HEYCO described the BLM’s proposed requirements for directional drilling as “silly,” referred to the agency as “Big White Chief,” questioned why BLM was concerned about Otero Mesa’s pronghorn herd, and urged a more lenient plan.⁵⁰

HEYCO is the company likely to be drilling in the heart of Otero Mesa, should the BLM’s drilling plan survive a court challenge from the State of New Mexico and conservationists. The scenario of this fragile and beautiful wild place in the hands of HEYCO is a frightening one: Yates companies have a history of fighting environmental protections, rather than embracing them as part of responsible oil and gas operations in our Land of Enchantment.

VI. Conclusion: Don’t Drill Otero Mesa.

Some places should not be drilled, and Otero Mesa is one of those places. It contains irreplaceable natural values and important economic resources that are not compatible with industrialization by oil and gas companies. The shift to clean, renewable energy is inescapable and it should be made before our most ecologically valuable remaining places are squandered for a temporary profit boost for oil companies that does nothing to address our country’s addiction to fossil fuels.

Despite its promises, the BLM has not shown the will or capacity to protect our Land of Enchantment’s natural values from the impacts of drilling. The agency’s track record is abysmal when it comes to following through on mitigation efforts or even conducting environmental review of this land use. Evidence is mounting that unrestrained oil and gas development, facilitated by a federal land management agency acting at industry’s behest, is taking its toll. At stake are wild places and wildlife, and the precious water that is our region’s lifeline.

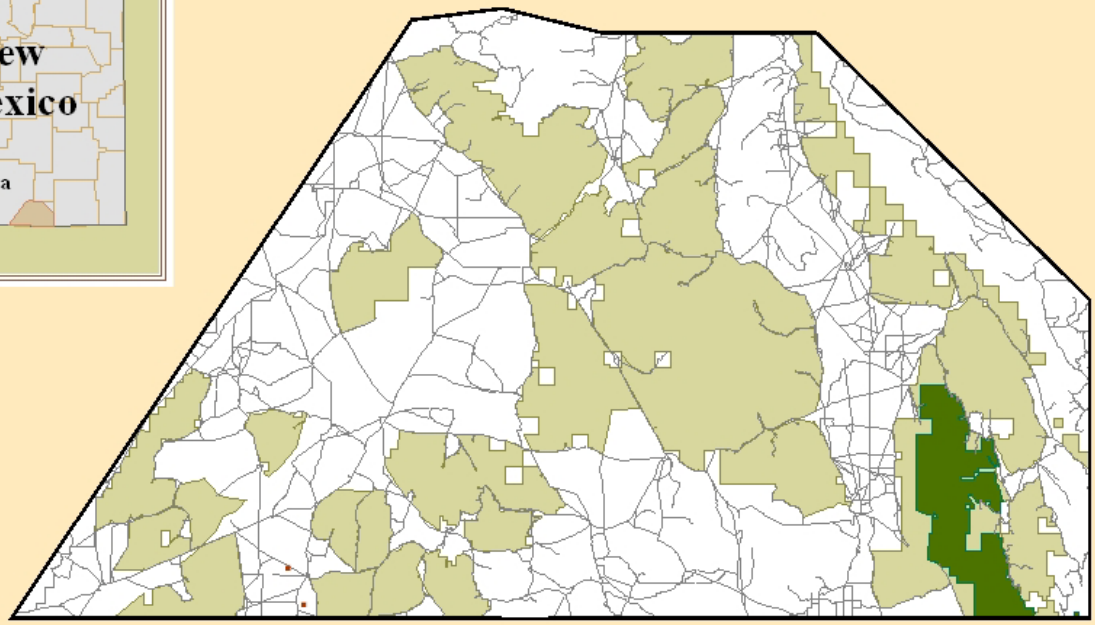
Given the hollowness of the BLM’s promises and the values at stake, Otero Mesa must not be imperiled in the vague hope that it might yield a small amount of gas. Otero Mesa should be permanently withdrawn from fluid mineral leasing and drilling.

⁴⁸Correspondence from James M. Hudson, attorney representing HEYCO, to Amy Lueders, BLM, dated May 16, 2001.

⁴⁹Correspondence from Amy Lueders, BLM, to James M. Hudson, attorney representing HEYCO, dated May 22, 2001.

⁵⁰December 2003 RMPA/FEIS Vol. II at pp. G-I-7 to 21.

Otero Mesa - Current Situation



Data Provided By: ESRI, BLM, Earth Justice

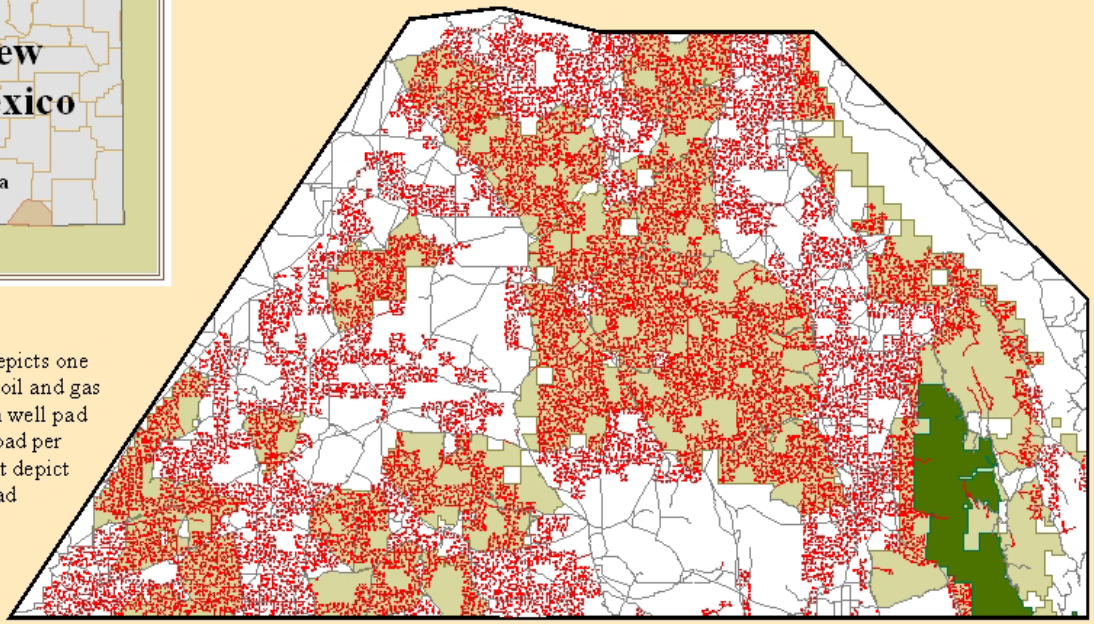
-  Otero Mesa Planning Area
-  NMWA Wilderness Proposals
-  Wilderness Study Area (WSA)
-  Current Inventoried Route
-  Existing Active Well Pad









Otero Mesa - 40 Acre Well Pad Spacing*




* Note - This map depicts one possible scenario of oil and gas development using a well pad density of one well pad per 40 acres and may not depict exact well pad or road location.

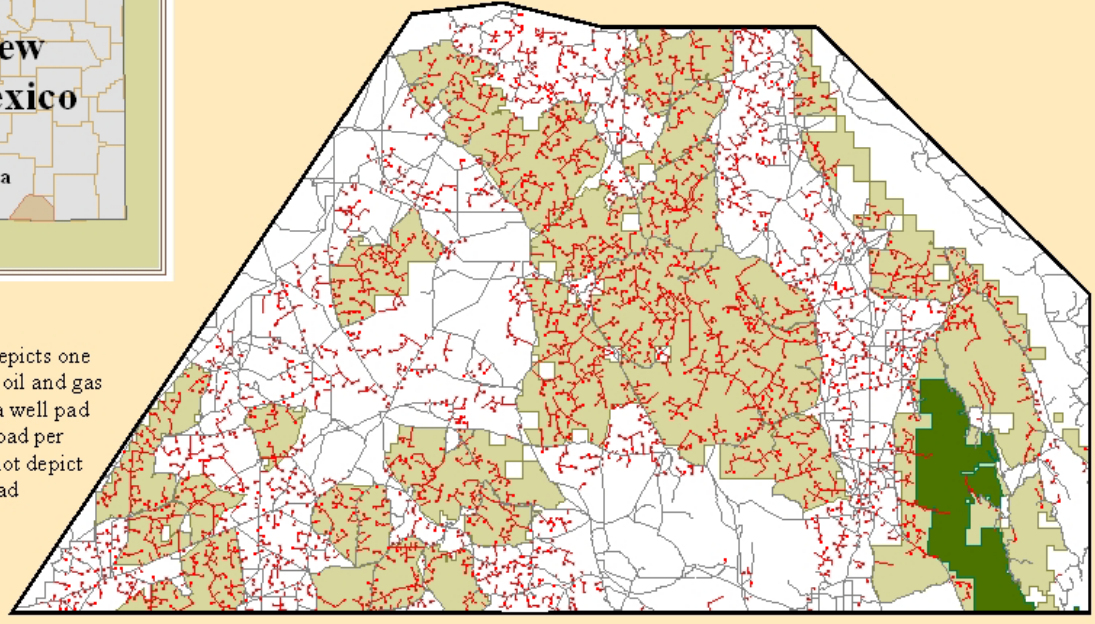


Data Provided By: ESRI, BLM, Bird's Eye View

 Otero Mesa Planning Area	 NMWA Wilderness Proposals	 Potential New Roads
 Wilderness Study Area (WSA)	 Current Inventoried Route	 Potential New Well Pads









Otero Mesa - 160 Acre Well Pad Spacing*



* Note - This map depicts one possible scenario of oil and gas development using a well pad density of one well pad per 160 acres and may not depict exact well pad or road location.

Data Provided By: ESRI, BLM, Bird's Eye View

-  Otero Mesa Planning Area
-  NMWA Wilderness Proposals
-  Potential New Roads
-  Wilderness Study Area (WSA)
-  Current Inventoried Route
-  Potential New Well Pads

