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## A CASE FOR RANCHER-ENVIRONMENTALIST COALITIONS IN COAL BED METHANE LITIGATION: PRESERVATION OF UNIQUE VALUES IN AN EVOLVING LANDSCAPE.

*Robert Stepan\**

### I. AN EVOLVING LANDSCAPE: SETTING THE STAGE FOR CONFLICT.

The western United States presents a dynamic landscape. Moving westward across the Great Plains the scenery dramatically ascends from the pastoral farmlands of the Midwest to the looming presence of the Rocky Mountains. Small ranching communities have been the most visible human presence on much of the rural landscape of the Rocky Mountain West since the initial push of European settlers into the region more than a century ago. Basins once dominated by bison and native peoples became scenes of scattered herds of domestic cattle, cowboys and homesteads dotting the landscape. But the picture of that rural landscape is changing again. Now, rather than a cowboy and his horse, one is more likely to see ATV's, company trucks and bulldozers. Roads, destined for drill rigs and pads or second homes and weekend cabins, swallow once diminutive trails that were, not long ago, the exclusive terrain of hooved ungulates. In Wyoming's Powder River Basin, for example, pronghorn antelope and ranchers alike are being collectively displaced. Mineral developers searching for coal bed methane now form the herds of the plains. Heavy equipment does their bidding, and when they have pulled what they need from the ground, the remains lie scattered in the form of mechanical footprints memorialized like tank treads in the salty, fallow earth.

Much like the previous century, settlement of the West continues to be contentious. Scarcity of water, abundance of land, a wealth of marketable resources,

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and rugged natural beauty create fertile grounds for dispute. The dichotomy of richness and scarcity has coupled to push allocation, development, and settlement at an urgent, almost frantic, clip. At present, the urgency is nowhere more apparent than in the development of coal bed methane. Regulation and oversight in the development of this resource struggle to keep pace as do the traditional ways of life that only a few decades ago were the most obvious indication of civilization on the vast tracts of undeveloped land. Conflict about how best to manage the regions' resources, whether scarce or abundant, is ingrained in the landscape as part and parcel of western life. Ironically, ranchers and environmentalists, though adversarial to one another on many issues, are both left to endure the bitter aftertaste lingering when development consistently trumps regulation.

Until recently, ranchers and environmentalists have been at odds with one another in myriad resource disputes because of conflicting values regarding allocation, preservation and production. But new trouble is on the horizon for both groups, and failing to recognize common interests and pool their collective resources could spell the end of an already diminished way of life. Coal bed methane (CBM) drilling has commenced making the hum and hammer of machinery audible. Environmentalists and ranchers must make a choice. Are the drill rigs sounding out a drum roll call for collective action, or are they metering a death knell, sounding the opening notes of a requiem for the rural west?

Using coal bed methane development as its focus, this article investigates the ways in which National Environmental Policy Act (NEPA)<sup>1</sup> litigation conducted by a coalition of ranchers and environmentalists<sup>2</sup> in response to this new wave of mineral development is more effective than solitary efforts by either group. Specifically, this article evaluates the use of NEPA litigation to mitigate some of the effects of coal bed methane development in the Powder River Basin of Wyoming. This article also discusses other federal environmental laws relevant to the proposition that rancher-environmentalist coalitions are a very effective tool in protecting the values of small western communities such as those in the Powder River Basin. The discussion is broken into three parts: Section II describes the expanding scope of coal bed methane development in the Powder River Basin; Section III considers the importance and potential efficacy of rancher-environmentalist coalitions in relation to coal bed methane litigation; and Section IV addresses how to use the standards of NEPA to place tangible parameters around, as of yet, unrestrained development. Section V concludes that cooperative efforts are the best and perhaps only way to protect the values of the rural West.

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<sup>1</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-61 (2000).

<sup>2</sup> For the purposes of this analysis, agricultural interests when referenced in the collective will hereinafter be referred to as "ranchers" or "rancher" and parties with primary interests in wildlife, scenic, and ecosystem integrity will be referred to as "environmentalists." Applying these labels is overly simplistic and generalizations of this variety may indeed play an implicit part in the problem of divisiveness at which this paper is aimed; however, it is necessary for the sake of clarity and brevity.

## II. OVERVIEW OF COAL BED METHANE: PUSHING FOR DEVELOPMENT IN THE POWDER RIVER BASIN.

The Wyoming Oil and Gas Conservation Commission estimated in 2002 there are 31.8 trillion cubic feet of recoverable coal bed methane in the Powder River Basin of Wyoming.<sup>3</sup> The mining industry is no stranger to Wyoming, but recent numbers are staggering by any standard. For example, in 1995 there were 427 coal bed methane wells in Wyoming. As of 2004, in order to expedite the extraction of methane, the Bureau of Land Management catapulted the number of approved wells to 51,000, with 21,000 of those already in operation.<sup>4</sup>

Coal bed methane production affects the interests of both ranchers and environmentalists in striking ways. While not wholly unique in the world of mineral development, coal bed methane differs from historic and traditional mining practices in at least one important way. Similar to other extractive resource production, coal bed methane spawns a slew of potential conflicts because of the complexity of the legal and administrative framework that governs such activities.<sup>5</sup> Impacts on air, water, and land implicate regulation by a dozen or more local, state, and federal agencies. However, coal bed methane is unique because it requires that huge volumes of water be removed from the earth in order to release the methane from the coal seam. Naturally occurring water in the coal seams create pressure which holds the methane gas in place, either in the veins or bonded to the coal itself.<sup>6</sup> In order to extricate the methane, the water, too, must be pulled from the seams:

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<sup>3</sup> Kristin Keith, Jim Bauder & John Wheaton, *Coal Bed Methane Frequently Asked Questions, Water Quality and Irrigation Mgmt.*, The Dep't of Land Res. and Env'tl. Sciences, Montana State Univ.-Bozeman (2003), available at <http://waterquality.montana.edu/docs/methane/cbmfaq.shtml>. Coal bed methane is the naturally occurring gas that is trapped in coal seams. See *infra* notes 8-11.

<sup>4</sup> Statement of Kathleen Clarke—Director, Bureau of Land Mgmt., U.S. Dep't of Interior. House Resources Subcomm. on Energy and Mineral Res. Oversight Hearing on FY 2003 Energy and Minerals Budgets of BLM and Forest Serv. (Feb. 14, 2002), available at <http://www.blm.gov/nhp/news/legislative/pages/2002/te020214b.htm>; see also J.M. McCord, *Wastewater Goes Unwatched*, HIGH COUNTRY NEWS, Mar. 7, 2005, available at [http://www.hcn.org/servlets/hcn.Article?article\\_id=15335](http://www.hcn.org/servlets/hcn.Article?article_id=15335).

<sup>5</sup> Agencies involved include federal agencies (BLM, IBLA, EPA, Army Corps of Engineers), state regulatory commissions (Wyoming Oil and Gas Commission (WYOGC)), county commissions, and state water boards. Issues presented include water quality, air quality, roads, water rights, and access. Potential claims include trespass, nuisance, 5th amendment takings, section 1983, Clean Water Act, and NEPA claims. See generally Jan G. Laitos & Elizabeth H. Getches, *Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development*, 23 VA. ENVTL. L.J. 1 (2004); see generally Mary A. Throne, *Coalbed Natural Gas Development, Making Environmental Permitting More Efficient Without Sacrificing Environmental Protection*, 27 WYO. LAWYER 23 (June 2004).

<sup>6</sup> See *Newman v. RAG Wyo. Land Co.*, 53 P.3d 540, 543-44 (Wyo. 2002). This case involved issues concerning the lease of mineral rights, including coal bed methane, by private landowners for production. *Id.* at 541-42. Specifically, the court examined the language of the deed to determine which rights were retained by the landowners. See *id.* at 544-46, 550-51.

[e]ach well produces 5 to 20 gallons of water per minute. At 12 gallons per minute, one well produces a total of 17,280 gallons of water per day. It is common to have one well every 80 acres, and in the Powder River Basin, there are up to three methane-bearing coal seams. Therefore, there may be up to three wells per 80 acres.<sup>7</sup>

This wastewater needs to go somewhere.

There are several methods of disposal of the water produced by coal bed methane development. The cheapest and most favored by the industry involves discharging the water into surface containment ponds.<sup>8</sup> Other, more costly methods include re-injection of the subsurface water back into the ground.<sup>9</sup>

The sheer volume of the water that must be removed to produce coal bed methane, coupled with the number of proposed and already-producing wells, presents a number of concerns to environmentalists and ranchers alike. Foremost among those concerns are the uncertainties and potential impacts that, because of the dewatering process, accompany the production of coal bed methane.

CBM product water has a moderately high salinity hazard and often a very high sodium hazard based on standards used for irrigation suitability. With time, salts from the product water can accumulate in the root zone to concentrations which will affect plant growth. Saline conditions stunt plant growth because plants must work harder to extract water from the soil . . . Disposal of the quantities of CBM product water into stream channels and on the landscape poses a risk to the health and condition of existing riparian and wetland areas. High salinity and sodium levels in product water may alter riparian and wetland plant communities by causing replacement of salt intolerant species with more salt tolerant species. It is well recognized that encroachment of such noxious species as salt cedar, Russian olive, and leafy spurge is enhanced by saline conditions.<sup>10</sup>

In addition to water quality issues, CBM extraction raises concerns about water quantity. Accurate predictions of how dewatering a coal seam will affect groundwater quantity are hard to come by because of the site-specific characteristics of aquifers and the localized nature of groundwater movement. Thus, as a practical matter, the question of how coal bed methane mining will affect the overall water

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<sup>7</sup> Keith, Bauder & Wheaton, *supra* note 3.

<sup>8</sup> See Keith, Bauder & Wheaton, *supra* note 3.

<sup>9</sup> See Keith, Bauder & Wheaton, *supra* note 3.

<sup>10</sup> Keith, Bauder & Wheaton, *supra* note 3.

table is yet to be determined.<sup>11</sup> While testing does occur prior to drilling, the potential for decreasing the amount of available drinking water is a concern for a region that considers water one of its most valuable commodities. Because of the potentially devastating effects of coal bed methane production, and the unwillingness of agencies to adequately assess potential consequences, the burden of checking development falls on the communities that are targets of coal bed methane production.

### III. RANCHER-ENVIRONMENTAL COALITIONS: MAKING NEPA WORK.

NEPA is traditionally used to advance environmentally protective interests.<sup>12</sup> Emphasis, as a general rule, is on the impacts of a project on the physical environment.<sup>13</sup> However, NEPA requires attention to the social and economic impacts on the human environment as well. My contention is that NEPA is structured in such a manner that ranching and environmental objectives can coalesce to provide greater scrutiny for agency actions rather than scenarios which push conventional conceptions of environmental objectives alone. Such coalitions, formed from normally adversarial interest groups make the court more receptive to NEPA challenges in general and create powerful incentives for agencies to require Environmental Impact Statements (EISs'). With an increased level of judicial receptivity, cumulative impacts statements may be required more often and development of coal bed methane will be forced to proceed diligently, with due regard to the mandates of NEPA. On the other hand, a failure to realize the potential power of rancher-environmentalist alliances will leave the region vulnerable, in terms of both agricultural and recreational values, to the whims of outside development interests whose primary goal is expediting mineral development with little regard to other values.

This discussion is framed by an analysis of two recent Wyoming Cases, *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*<sup>14</sup> and *Greater Yellowstone Coalition v. Flowers*.<sup>15</sup> These two cases illustrate the power of coalitions to bring agency and

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<sup>11</sup> See Joshua Skov & Nancy Myers, *Easy Money, Hidden Costs: Applying Precautionary Economic Analysis to Coalbed Methane in the Powder River Basin*, 15-16 (June 2004), available at [www.sehn.org/pdf/cbm.pdf](http://www.sehn.org/pdf/cbm.pdf).

<sup>12</sup> See generally Sabrina C.C. Fedel, *Cause of Action Against the Federal Government Under the National Environmental Policy Act of 1969 (NEPA)*, 12 COA2d 321 (2004) (Causes of Action 2d series).

<sup>13</sup> *Id.* at § 5.

<sup>14</sup> *Wyo. Outdoor Council v. U.S. Army Corps. of Eng'rs*, 351 F. Supp. 2d 1232, 1260 (D. Wyo. 2005) (holding that, in light of the extensive administrative record containing the concerns of ranchers and environmentalists, the agency decision to issue drilling permits for coal bed methane was arbitrary and capricious because it did not properly address the concerns contained in the record).

<sup>15</sup> *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1274, 1277, 1279 (10th Cir. 2004) (holding the agency decision to issue permits for the construction of a housing development was not arbitrary and capricious in spite of the potential environmental impacts of that decision).

judicial scrutiny to CBM projects. The language employed by the district court in the former case (particularly in reference to the importance of cultural values that could be affected by coal bed methane development) supports the argument that cooperative efforts of ranchers and environmentalists can achieve a result that would not be available to either group standing alone. This argument also draws support, by way of contrast, from the *Flowers* case. Both cases originated in Wyoming and were heard by the same district court judge. Yet, separated by only two years, these cases represent significantly different outcomes in the respective applications of NEPA.<sup>16</sup> While these two cases are easily distinguishable on the facts, there are also important differences in the language that the court used, the methodology employed by the judge, and the ultimate message to be taken away from each case. Additionally, other Tenth Circuit law suggests further support for the position that rancher-environmental coalitions create a formidable alliance.

A. *Wyoming Outdoor Council v. U.S. Army Corps of Engineers:  
Fulfilling the Potential of NEPA.*

The Wyoming Outdoor Council (WOC), along with the Powder River Basin Resources Council and the Biodiversity Conservation Alliance, brought suit in Federal district court in Wyoming challenging a decision by the Army Corps of Engineers (Corps) to issue a general permit (GP 98-08) for discharge of dredge and fill materials associated with the development of coal bed methane.<sup>17</sup> The Corps issued a Combined Decision Document (CDD) with the permit in an attempt to comply with the requirements of both NEPA and the Clean Water Act (CWA). The general permit “authorizes discharge of dredge and fill materials associated with several activities related to oil and gas development in the State of Wyoming, including surveys, roads, well pads, utilities, reservoirs, erosion control, hazardous waste cleanup, and mitigation.”<sup>18</sup> The general permit covers *the entire state of Wyoming*, so long as permit specifications are met.<sup>19</sup> *WOC*

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<sup>16</sup> Both *WOC* and *Flowers* originated in the District of Wyoming. Judge Downes wrote *WOC* and the initial opinion in *Flowers*. *Flowers* was remanded to the district court for further inquiry after which Judge Downes’ decision was ultimately upheld by the Tenth Circuit Court of Appeals. Judge Downes did not actually order the Corps to prepare an EIS in *WOC*, but rather remanded to the agency for additional investigation and explanation. For the Court to order an EIS is “an extreme remedy”; more often than not, the Court will remand to the agency. This, however, does not undercut the proposition that rancher-environmental coalitions are effective in forcing Environmental Impact Statements. This is true because of the action-forcing mechanism of NEPA which allows for judicial review of agency actions. The heightened standard of review that these coalitions present to the Court works to make the agency more careful in its review of environmental impacts of a proposed project.

<sup>17</sup> The general permitting process allows for more efficient dissemination of permission to dredge and fill for projects that are alike in kind and not likely to produce significant impacts. *See infra*, note 19, for a better explanation.

<sup>18</sup> *WOC*, 351 F. Supp. 2d. at 1237.

<sup>19</sup> This permit is issued by the Corps (pursuant to the Clean Water Act, 33 U.S.C. § 1344(e) (1987)) and then the surface land management agency (i.e. BLM) administers the use of the general

addresses the attempt to use GP 98-08 to permit the release of dredge and fill materials from construction of reservoirs to hold the water released from coal bed methane production. The appeals court explains that the permit “was issued in large part to address the growing need for permits to discharge dredge and fill materials associated with the boom in development of coalbed methane gas . . . in the Powder River Basin of Wyoming.”<sup>20</sup> This broad permitting process essentially allowed the impacts of specific methane producing projects to be overlooked and subsumed into the general permit without individual review.

The Court of Appeals felt the Corps’ attempt to comply with NEPA and the CWA, through the general permit and CDD, was inadequate with respect to private landowners who would be affected by the issuance of these permits and the commensurate mineral development.<sup>21</sup> The record indicated that ranch owners were concerned about the impact of the permits.<sup>22</sup> After quoting several of the comments of the landowners, the Court explained the deficiency of the CDD:

[t]he Corps clearly failed to address the concerns of these private landowners in the CDD. The conclusions in the CDD, which are contrary to established Wyoming law, reflect indifference to the interests of surface owners of split-estates. Nowhere does the CDD express or demonstrate a consideration for those individuals whose livelihood depends on the vitality and sustainability of the land. The Court cannot accept the Corps’ summary dismissal of the reasonably foreseeable impacts to private ranchlands. Though the Corps need not provide an inordinate amount of detail on impacts to private ranchlands, neither can the Corps completely disregard those impacts in light of the comments of private surface owners. The Corps must at least recognize the

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permit “in conjunction with approval of surface use plans when the plan proposes discharge of dredge and fill material into waters of the United States on federal lands.” *WOC*, 351 F. Supp. 2d at 1238. However, on private land, the Corps itself administers the application of the permit. The conditions accompanying the permit were that the permittee must comply with the state water quality standards. For more complete descriptions of the permitting process see Throne, *supra* note 5, at 23-24.

<sup>20</sup> *WOC*, 351 F. Supp. 2d at 1237. The court noted that “the impacts to private lands [can not] be deemed trivial. In calculating the impacts to wetlands in the CDD, the Corps concludes that of the total number of CBM wells that could be drilled (34,560) during GP 98-08’s duration, approximately 70% (24,160) would be drilled on land where the surface is privately owned. Clearly, the development of CBM is not limited to federal lands, but has implications for private lands as well.” *WOC*, 351 F. Supp. 2d at 1247 n.5.

<sup>21</sup> *WOC*, 351 F. Supp. 2d at 1238.

<sup>22</sup> *Id.* at 1246-47.



reasonably foreseeable impacts and give a cogent reason why they are not significant. The Corps' failure to do so was arbitrary and capricious.<sup>23</sup>

The CDD issued by the Corps explained that on private land where the landowner also has mineral rights "oil and gas production cannot occur without the landowner's consent."<sup>24</sup> As such, the Corps concluded that "[i]t is anticipated that in most cases the landowner would not allow destruction of prime or unique farmland due to its high value."<sup>25</sup> These conclusory statements completely failed to consider the landowner who does *not* own the mineral estate. In Wyoming, as in most states, the rules of split estate provide the surface owner's estate is subject, and subservient, to the dominant mineral estate.<sup>26</sup> The administrative record reflected the concerns of private land owners who own the surface but not the mineral estate beneath their property; a non-unique situation for many landowners.<sup>27</sup>

Two letters from private land owners included in the administrative record were highlighted by the court.<sup>28</sup> These landowners explained that companies executing coal bed methane leases "refuse[d] to inform landowners or lessees about the plans for gas gathering or water discharge" and "gouge huge areas for roads and drilling sites."<sup>29</sup> Other concerns of private land owners included in the record were the "dewatering" which "damag[ed] the aquifer we depend on for domestic and livestock water," and the coal bed methane producers' failures 'at reclamation, controlling . . . water discharges, maintaining . . . roads' as well as 'interfering with ranch operations.'<sup>30</sup> The court found that the Corps' unwillingness to address these concerns was manifestly unacceptable.<sup>31</sup> The Corps had simply noted that "[a]dverse effects on livestock grazing could occur as a result of the changes in land use and water use, both of which are beyond the Corps' ability to control."<sup>32</sup> The

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<sup>23</sup> *Id.* at 1246-1247. The Court alluded to an abridgment of Wyoming law that pertains to water quality standards under the CWA and implemented according to state-specific standards. *See id.* at 1243-44.

<sup>24</sup> *Id.* at 1245.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (citing *Mingo Oil Producers v. Kamp Cattle Co.*, 776 P.2d 736, 741 (Wyo. 1989)). For specific coal bed methane discussion of the split estate *see Newman v. RAG Wyo. Land Co.*, 53 P.3d 540, 544-45 (Wyo. 2002), and Drake D. Hill, *Understanding Split-Estate Ownership*, 27 WYO. LAWYER 26 (June 2004).

<sup>27</sup> *See WOC*, 351 F. Supp. 2d at 1246.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *WOC*, 351 F. Supp. 2d at 1246 n.3 (evaluating public interest factors pursuant to 33 C.F.R. § 320.4(a)(2008)).

court viewed this explanation as patently unacceptable because “the Corps neither explains how such adverse effects could occur or why effects on livestock grazing are beyond its control. The statement does not reflect a realistic assessment of the possible significance of those impacts.”<sup>33</sup>

The emphasis in the court’s opinion put on the impacts to private ranchlands is critical to an understanding of the ways in which a rancher/environmentalist coalition is superior to a classic environmental approach. In fact, without a coalition effort, the result in this case could not be realized. While environmentalists have often tried to give a voice to nature in praying for relief, ranchers can speak for themselves, tell their story, and quantify how they have been affected. Because of the presence of ranchers in this litigation it was impossible for the Corps to give an accurate assessment of the impacts of coal bed methane mining while ignoring statements of those ranchers in the record. Classic environmental arguments have merit and should be presented, but standing alone they have failed in many cases.<sup>34</sup> In coal bed methane litigation, ranchers and environmentalists together are stronger than either on their own.

#### B. Greater Yellowstone Coalition v. Flowers: *Environmental Interests Standing Alone.*

The contrary results for the plaintiffs in *WOC* and *Flowers* illustrate that the formation of rancher-environmentalist coalitions can be an invaluable tool in forcing NEPA compliance, specifically in regard to coal bed methane development.

Tenth Circuit case law, as represented by these two cases, suggests rancher-environmentalist coalitions are more able to reach desirable results in coal bed methane litigation than solitary efforts by either group.<sup>35</sup> In *Greater Yellowstone*

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<sup>33</sup> *Id.* at 1246 n.3.

<sup>34</sup> Examples include *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990), *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) as well as the respective progeny of these cases. See Fedel, *supra* note 12 for a broad overview of cases involving litigation along these lines.

<sup>35</sup> *But see* Northern Plains Res. Council v. U.S. Bureau of Land Mgmt., 298 F. Supp. 2d 1017 (D. Mont. 2003). In *Northern Plains*, a resource council comprised of ranchers, farmers and environmentalists was unable to convince the District Court of Montana that the Bureau of Land Management had acted arbitrarily and capriciously in relying on older Resource Management Plans (RMP) and Environmental Impact Statements (EIS) for the leasing of federal ground for coal bed methane drilling. This case can be, however, distinguished on the facts. The court found that the RMP and EIS upon which the BLM relied to make the leasing decisions contemplated only limited coal bed methane drilling. The court explained that further development, specifically full field development of coal bed methane resources, had not been considered in the original EIS and that “regardless of BLM’s interpretation . . . a reading of the leases shows that [the leases] did not in fact convey development rights any greater than those authorized by the [original RMP/EIS].” *Id.* at 1023.

*Coalition v. Flowers*, plaintiffs Greater Yellowstone Coalition and Jackson Hole Conservation Alliance challenged the issuance of a dredge and fill permit authorizing construction of a housing development and golf course on the banks of the Snake River in northwest Wyoming. Although this case did not involve CBM development, it is equally germane for the ways in which it can be distinguished from *WOC*, considering factual similarities found in the two cases. The Army Corps of Engineers, the same agency at work in *WOC*, issued permits without preparing an EIS in spite of the fact that the development plan implicated the ESA through potential eradication of bald eagle nesting habitat.<sup>36</sup> Further, the Environmental Protection Agency (EPA) raised concerns about the impacts of the project on the Snake River corridor, and the U.S. Forest Service criticized the reports upon which the Corps relied in making the decision not to prepare an EIS because they were incomplete and conclusory.<sup>37</sup> The opposition by EPA and the Forest Service focused upon physical impacts of the project consistent with classic environmental challenges.

On the other hand one of the purported purposes of the development project in *Flowers* was to allow the River Bend Ranch to continue as a viable and operating ranch.<sup>38</sup> Mr. and Mrs. Edgecomb purchased the River Bend Ranch in 1994 and ran cattle there.<sup>39</sup> The opinion explains:

[r]esponding to the impact of tourism on the Teton County economy, the Edgecombs sold 286 acres of the Ranch to [the developer] Canyon Club in December 2000, intending the land to be converted into an eighteen hole golf course and residential development. According to Canyon Club, the Edgecombs needed the income generated by such a development in order to sustain the operation of the Ranch.<sup>40</sup>

Ranchers and farmers can demonstrate a tangible loss where environmentalists often can not. *Flowers* does not stand for the idea that *carte blanche* private interests are beyond the reach of federal statutes. Rather in those circumstances, the agency interpretation of federal statutory requirements was adequate. By way of comparison, the presentation of a united front, by way of a rancher-environmental coalition in *WOC* gives the court both sides of the argument, private property interests coupled with environmental concerns. Judge Downes explains in *WOC*:

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<sup>36</sup> Greater Yellowstone Coal. v. Flowers, 359 F.3d 1257, 1275 (10th Cir. 2004).

<sup>37</sup> *WOC*, 351 F. Supp. 2d at 1254.

<sup>38</sup> *Flowers*, 359 F.3d at 1263, 1275.

<sup>39</sup> *Id.* at 1263.

<sup>40</sup> *Id.*

[t]he Court is cognizant of the importance of mineral development to the economy of the State of Wyoming. Nevertheless, mineral resources should be developed responsibly, keeping in mind those other values that are so important to the people of Wyoming, such as preservation of Wyoming's unique natural heritage and lifestyle. The purpose of NEPA and the CWA is to require agencies, such as the [Army Corps of Engineers], to take notice of these values as an integral part of the decision making process. This Court will not rubberstamp an agency determination that fails to consider cumulative impacts, fails to realistically assess impacts to ranchlands, and relies on unsupported, unmonitored mitigation measures. NEPA and the CWA require more.<sup>41</sup>

Traditional ways of life were at stake in *WOC*, and Wyoming state law as it pertains to the CWA (sculpted in recognition of those values) has been abridged. *Flowers* is about birds, a handful of them.<sup>42</sup> To dismiss the result in this case as being only about birds may seem facetious and overly simplistic. However, normative judgments about whether *Flowers* should have come out differently ignore the practical reality of reaching desired results. Specifically, this is not to say that there should have been a housing development allowed in the Snake River corridor, but the defendants in *Flowers* illustrated a similar contention to the one laid out in by the coalition in *WOC*. In *WOC*, the court was willing to recognize the viability of the working ranch as dependent upon a particular course of action, or at least that the impact on a ranch's future was an impact requiring consideration. Here, it appears that the difficulty for the environmental interests is one of scale. Taking on developments one at a time has the effect of minimizing the impacts of development. That approach holds little promise that environmental groups will win every battle. On the other hand, when developments implicate private property interests and cultural values, in addition to wildlife and scenic values, a court has more to hang its hat on when questioning the sufficiency of agency compliance with NEPA. Thus, coalition efforts have the potential of creating synergistic momentum which serves to bolster independently valid arguments.

There are several ways in which the two cases can be distinguished on the facts. *Flowers* involves a smaller area (286 acres), and thus, the effects of the proposal were mostly insular and specific to a small area directly affecting only the discrete interests of the property owners in that spot.<sup>43</sup> Only the bald eagles were threatened; only this segment of river would have reputation houses and golf greens.<sup>44</sup> *WOC* was about a large scale plan, expansive in geographic

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<sup>41</sup> *WOC*, 351 F. Supp. 2d at 1260.

<sup>42</sup> *Flowers*, 359 F.3d at 1263.

<sup>43</sup> *See id.* at 1263-64.

<sup>44</sup> *See id.*

area, and multiple interests were affected by the decision.<sup>45</sup> *Flowers* was about environmental groups challenging the use of private property and the ways in which those uses affect public interests.<sup>46</sup> Ultimately, private property interests trumped environmental concerns.<sup>47</sup>

What cannot be distinguished away is that in those places where environmentalists and ranchers see eye to eye on bottom-line issues, ranching interests can help advance the environmental agenda. The coal bed methane boom looms over both ranchers and environmentalists, threatening both of their interests. In the face of this common threat, the two groups would be wise to swallow their collective pride, offer conciliatory gestures to their generations-old adversaries, and work together as allies to address the potential damage of large-scale CBM development.

### C. NEPA and Coal Bed Methane in the Powder River Basin

The presence of coal bed methane in the Powder River Basin of Wyoming has given rise to numerous complicated, and as yet unsettled, series of conflicts and disputes. These conflicts are multilayered, including many agency actions and decision making bodies, and also a variety of private interests.<sup>48</sup> While a plethora of agencies are involved in the overall scheme of regulating and monitoring coal bed methane development, there is a noticeable lack of cohesion between agencies, causing not only confusion on the part of the agency officials, but also opening the door for opportunistic profiteering on the part of the oil and gas industry. In Wyoming, there is an empirically low level of agency enforcement of existing, and sub-par rules concerning coal bed methane production.<sup>49</sup> But these concerns are not limited to Wyoming. Colorado, while not facing production of the magnitude being carried out in Wyoming, faces these dilemmas as well. “Between 1998 and 2003 natural gas production in Colorado increased by a factor of more than 16.”<sup>50</sup> As of 2005, the Colorado Oil and Gas Conservation Commission had never denied a permit.<sup>51</sup> When the state agency responsible for oversight of energy development willingly dispenses permits, the message is clear that facilitation of energy production is the state’s priority. As such, there is little or no recourse for private citizens to challenge permitting decisions other than through the courts.<sup>52</sup>

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<sup>45</sup> *WOC*, 351 F. Supp. 2d at 1260.

<sup>46</sup> *Flowers*, 359 F.3d at 1262.

<sup>47</sup> *See, e.g., id.* at 1278-79.

<sup>48</sup> *Laitos & Getches, supra* note 5, at 3.

<sup>49</sup> *McCord, supra* note 4, at 13.

<sup>50</sup> Jennie Lay, *State Laws—and Small Staff—Muzzle Would-be Watchdog*, HIGH COUNTRY NEWS, March 7, 2005, at 11, available at [http://www.hcn.org/servlets/hcn.Article?article\\_id=15333](http://www.hcn.org/servlets/hcn.Article?article_id=15333).

<sup>51</sup> *Id.*

<sup>52</sup> However, in Colorado, the BLM recently removed proposed energy leases from auction, citing environmental and wildlife concerns. This is noteworthy in spite of the leasing process being

It is fantastical to assume that there will be little or no impact to the land or communities in the Powder River Basin when coal bed methane mining and all of its accoutrements come to town, yet time and again that is the position of industry. The impacts are, in fact, already visible to the naked eye. So rooted in alternate reality are the claims of industry that one would have to look past the actual damage and to accompanying documentation to realize that there are no cumulative impacts:

[c]oalbed methane [ ]development, in particular, is increasingly affecting aquifers and surface water resources. In Wyoming's Powder River Basin alone, over 51,000 CBM wells have been proposed. These actions threaten both the treasured landscapes and the traditional lifestyles of the West. Yet, no overall assessment of the cumulative impacts of the new National Energy Plan has been conducted. In fact, BLM has not even assessed the combined effects of proposed wells in the Powder River Basin alone, having split the analysis for the area into two separate environmental impact analyses.<sup>53</sup>

As of this moment, coal bed methane development is being carried out without proper attention to the actual and potential impacts of that development.

*1. NEPA Challenges are Particularly Effective When Employed Cooperatively By Varied Local Interests.*

“The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.”<sup>54</sup> The court reviews federal agencies' compliance with NEPA under the Administrative Procedure Act (APA). Using these statutory guidelines the court is compelled to bar action by an agency that is “arbitrary, capricious, and [an] abuse of discretion, or otherwise not in accordance with the law.”<sup>55</sup> Under the arbitrary and capricious standard, the court “review[s] the *decision-making* process and determine[s] whether the [agency] examined all relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.”<sup>56</sup> As such, while NEPA is a statutory requirement of the agency itself, the proper application of the statute is ensured only by way of public comment because without involvement by the public, some degree of “relevant

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a technically distinct consideration from permitting. See *BLM Pulls Energy Leases From Auction*, CASPER STAR-TRIBUNE, November 1, 2007, at B5.

<sup>53</sup> Sharon Buccino, *NRDC Perspectives on NEPA*, SK008 ALI-ABA 593, 601 (2004).

<sup>54</sup> 40 C.F.R. § 1502.1 (2007); See 5 U.S.C. § 701, 706(2)(A) (2007).

<sup>55</sup> *Flowers*, 359 F.3d at 1274.

<sup>56</sup> *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1576 (10th Cir. 1994).

data” would likely escape the attention of both the agency and any reviewing court.

*a. Establishing a Comprehensive Administrative Record is Crucial to Successful NEPA Litigation.*

Coalitions consisting of recreational, environmental, and agricultural interests have important advantages over interest groups that stand alone. Presenting diverse concerns which are focused on a common goal (responsible development and preservation of aesthetic, recreational, agricultural, ecosystem, and cultural values) provides an important incentive for agencies, the legislatures, and ultimately the courts to weigh those concerns carefully in the decision-making process. This is true not only because of the obvious accountability that the agency and legislature have to their constituents, but also because when an agency’s NEPA decision reaches judicial review “the Court is also charged under an arbitrary and capricious standard with a plenary review of the record as it existed before the agency to determine whether the agency’s action was supported by substantial evidence.”<sup>57</sup> In *WOC*, the court’s review of the Corps’ issuance of GP 98-08 was largely based upon the public comment in the record. Specifically, the court “conclude[d] that the Corps was *arbitrary and capricious in . . . failing to consider impacts to private ranchlands in light of the concerns voiced in the record.*”<sup>58</sup>

While the requirements of NEPA, as well as the Supreme Court’s reading of those requirements seems fairly clear,<sup>59</sup> there is always a danger that the agency will fail to meet its obligations and proceed with uninformed impunity. This danger is especially acute when pressure for agency approval gets ahead of the agency’s ability to develop the necessary facts:

[t]oo often agencies are relying on old, out-dated information to justify new actions. For example, the BLM is relying on old—some as many as ten and twenty years old—resource management plans (RMPs) to justify coalbed methane development that was

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<sup>57</sup> *Wyo. Outdoor Council v. U.S. Army Corps. of Eng’rs*, 351 F. Supp. 2d 1232, 1239 (D. Wyo. 2005) (quoting in part *Olenhouse*, 42 F.3d at 1576) (internal quotations omitted).

<sup>58</sup> *WOC*, 351 F. Supp. at 1260 (emphasis added). The court also alludes to the insufficiency of the Corps’ response to the record in the agency’s reliance on mitigation measures. “The record is replete with comments from individuals who question whether the mitigation measures will be successful.” The court explained, “In the face of such concerns, it is difficult for this Court to see how the Corps’ reliance on mitigation is supported by substantial evidence in the record.” *Id.* at 1252 n.8.

<sup>59</sup> *Methow Valley*, 490 U.S. at 333. In *Methow Valley*, the Court explained that the eradication of the valleys’ entire mule deer population because of the impacts associated with the development of a ski area presented no bar to the project. Instead, the requirements of NEPA were only to recognize those impacts and report them as such.

never addressed in those plans nor the environmental analysis that accompanied them. While some new development may be appropriate, the BLM must involve the public in a meaningful way to determine how much and in what manner it occurs. BLM should not rely on old data to circumvent this public process.<sup>60</sup>

It is disingenuous to claim that NEPA requirements are satisfied by reliance on Environmental Impact Statements which did not even consider the impacts of the proposed activity on the scale contemplated by the leases, much less the cumulative effects of new development on top of prior development. NEPA may well be, in the parlance of industry, inefficient. From the industry perspective, anything that slows the development process and includes public comment on company decisions is inefficient. But business efficiency and expedited resource production is only one standard by which to judge an action. Preventing irreparable damage and complying with environmental laws are also important considerations. However, even NEPA does not guarantee the avoidance of adverse environmental impacts. What NEPA does allow is that the public be apprised of instances when agencies deem it appropriate to allow development even in the face of environmental damage and marginal compliance with the law. Public comment plays a vital role in highlighting potential impacts of proposed projects from a variety of perspectives.

*b. Adequate NEPA Analysis Requires Evenhanded Evaluation of Project Proposals.*

Evaluation of projects based solely upon the economic efficiency to the industry should be solely the providence of the industry interests. It is not an agency's job to accommodate economic interests with impunity, even to the detriment of other values. However, in light of recent developments in coal bed methane production, one might be tempted to conclude otherwise:

[b]ecause of industry's interest in natural gas development, including coalbed methane, the BLM continues to experience a significant increase in requests for oil and gas leases and subsequently in drilling permit filings. In 2003, the BLM [requested additional funding] to identify ways to *expedite the process of approving drilling permits*, with an emphasis on coalbed methane development [and to] review Bureau policies and practices to *facilitate development of coal and coalbed methane in areas of development conflict*.<sup>61</sup>

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<sup>60</sup> Buccino, *supra* note 53, at 602.

<sup>61</sup> Statement of Kathleen Clarke, *supra* note 5 (emphasis added). This statement concludes with a brief reference to "environmentally-sound recovery of the nation's mineral resources." *Id.*



If there is to be any meaningful effort to encourage industry accountability, the responsibility of spearheading those efforts falls to the public and the courts. The agency charged with monitoring CBM development has spoken and its position is clear. If directives, as that above, do not instill a little fear in both ranchers and environmentalists that their interests stand to be compromised by the ramifications of such policies, they certainly should. Without the public using the courts for agency review, there appears to be nothing standing between industry and unbridled development.

In particular, when talk turns to mineral development of the scale proposed in the Powder River Basin, there should be more than a modicum of caution in approving new projects. Industry certainly should not be allowed to proceed unchecked, but when the official agency policy is one of “expediting” and “facilitating” that is the practical reality. There is a historical rationale for this caution, but there is also the practical reality of mineral development. Extractive resource development is checked only by regulations administered by government agencies. Government agencies are necessarily accountable to a broad public comprised of many constituencies. At the very least, agencies are required to provide full disclosure of the reasons for, and results of decisions made by those agencies. NEPA does not require specific results, nor does it require wise decisions,<sup>62</sup> but it does require informed and somewhat transparent decisions. NEPA requires that the decision making process be pursued in a logical, reasoned, informed, and public manner. Furthermore, NEPA requires that agencies allow public comment so that damaging, hurried, and unduly-influenced decisions become a matter of public record. NEPA is a tool but it will not work on its own; in order to work it requires proper application and capable hands.

2. *Rural Coalitions Empower Communities and Help Preserve the Status Quo Until Impacts are Fully Assessed and Weighed.*

There is a legitimate need for local interests to be present in the decision-making process. Contrary to a strictly economic analysis to guide public land policy, these local interests offer specific understanding of what is at stake and intimate contact with the ramifications of decisions. Operating from a paradigm which allows far-removed economic interests to dictate to local governments and community residents creates a vacuum of responsible and wise decision-making. Well-intentioned guidelines cannot adequately substitute for well-informed policy. This is always a loss; the only question is who is forced to live with the consequences. When the decision-making and implementation processes move seamlessly towards predetermined development these impacts are felt by those who stand between industry and the resources they desire.

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<sup>62</sup> See *Methow Valley*, 490 U.S. at 333.

Coalbed methane production has proved to be a unique catalyst for creating new and powerful coalitions out of traditionally divergent interest groups. Since the West's tumultuous infancy as a frontier in the hands of the settlers, there has been conflict concerning the "best" use of the vast expanses of the western states. Difficulty in reconciling what have historically been viewed as incompatible uses is a theme that runs throughout history, from early discussions about homesteading and settlement, through the emergence of wide-scale development and the recent appearance of outdoor recreation as a valuable resource.<sup>63</sup>

There is a wealth of interests at work in the rural west.<sup>64</sup> A short list reveals conservationists, preservationists, environmentalists, ranchers, sheepmen, cattlemen, farmers, miners (both hardrock and coal), oil and gas drillers, timber companies, and real estate developers. The line between private and public property is often blurred because many of the extractive resource pursuits that worked to settle the West, most notably mining, timber, and ranching, all depend upon the use of the public domain for their continued viability.<sup>65</sup> These traditional uses of the public land, however, often find themselves at odds with new uses and users emerging only in the last several decades. Resolution of these conflicts is hindered by the presence of strong, disparate views from varied interest groups and the presentation of information with varying degrees of accuracy in support of those interests.<sup>66</sup>

*a. The Picture of the West Continues to Evolve: Recognizing New and Traditional Interests.*

The availability of an abundance of land and proportionally equal numbers of divergent ideals about what to do with that property has led to a conundrum. These circumstances play out in the human arena in stereotypically predictable ways. "Small-minded" traditional ranchers fight every change tooth and nail, while "small-minded" environmentalists make enemies of the ranchers by attempting to

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<sup>63</sup> U.S. DEP'T. OF AGRIC. NATIONAL REPORT ON SUSTAINABLE FORESTS 2003 FS-766 51(Feb. 2004), *available at* <http://www.fs.fed.us/research/sustain/documents/SustainableForests.pdf>.

<sup>64</sup> Pamela Case & Gregory Alward, PATTERNS OF DEMOGRAPHIC, ECONOMIC AND VALUE CHANGE IN THE WESTERN UNITED STATES, U.S. DEP'T OF AGRIC. FOREST SERV., REPORT TO THE WESTERN WATER POLICY REVIEW ADVISORY COMM'N 16 (Aug. 1997), *available at* [http://www.fs.fed.us/institute/news\\_info/jwwp\\_rc\\_report.pdf](http://www.fs.fed.us/institute/news_info/jwwp_rc_report.pdf). While the discussion in this report indicates that the West has an increasingly diverse economy, this is largely based upon the development of urban centers. "Rural areas show lower levels of economic diversity or, stated conversely, are more specialized and depend on a narrower spectrum of economic activities (often agricultural or extractive uses)." *Id.* at 35.

<sup>65</sup> George Cameron Coggins, Charles F. Wilkinson, and John D. Leshy, FEDERAL PUBLIC LAND AND RESOURCES LAW 12-13 (5th ed. Foundation Press 2002).

<sup>66</sup> The same could be said of this note, no doubt. The object and thesis here is not that the assertions of this note will resolve all of these contentious issues—rather that the some of the sources of conflict between ranchers and environmentalists are contrived and encouraged by mining interests.

minimize the important role that ranchers have played in the settlement of the west, as well as their preservation of open space that could have been developed. The dogmatic effort to “debunk the cowboy myth”<sup>67</sup> has done little but to drive a wedge between ranchers and environmentalists, thus diminishing the potential for cooperative, mutually beneficial decision-making.<sup>68</sup> Minimizing the knowledge, culture, and values embedded in the rural west has become a pastime and livelihood for much of the environmental community. The incongruous position of progressive xenophobia often accompanies much of the “forward” thinking, progress-minded preservation ideals of the environmental movement. Just the same, those with development ideals demonize and try to alienate the “radical environmentalists” of this country by dismissing their position as antiquated and untenable. The extreme polarization of these interests often leads to a less than honest discussion, particularly in relation to impacts that result from the concept of recreation as a replacement for ranching.

Recreation has taken center stage as the emerging use of the public lands.<sup>69</sup> In spite of the number of recreationists, this use of the public lands is lauded as being a less demanding, more sustainable use of the land. However, as the number of people seeking recreation on the public lands increases, the form of recreation takes on a constantly shifting persona. Recreation is proving, in many ways, to be as burdensome on the land as many of the “extractive uses” and therefore requires intensive management.<sup>70</sup> It becomes apparent that recreation, standing as the lone solution, will not alleviate the problems of resource allocation depletion and contention.

However, equally evident are the consequences of relying upon and encouraging isolationist or paternalistic paradigms that disregard new solutions

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<sup>67</sup> See Debra L. Donahue, *THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY* 112-13 (Univ. of Okla. Press 1999). Donahue emphatically asserts that removal of cattle from public lands is necessary and desirable to the ecological viability of western rangelands. A cornerstone of her argument is that the mythology of the cowboy ideal is responsible for furthering culturally false and environmentally damaging decision-making.

<sup>68</sup> Case & Alward, *supra* note 64, at 22-23. “Older people, particularly in rural areas, know more about the actual status of the environment and about management of natural resources . . . than people in mid-adulthood. Not surprisingly, analysis of the data seems to indicate this knowledge is acquired primarily through direct experience . . . Younger people (from any location in the West) score as high on overall knowledge as older, rural residents, but they appear to be more knowledgeable of ecology of the environment processes than they are of the actual condition of the environment.” *Id.* Thus, while these two groups (older, rural and young western) have the potential to be a powerful combination, they often find themselves at odds with one another because of lack of exposure and misunderstandings. Ranchers and Farmers on one side and Environmentalists on the other.

<sup>69</sup> Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 *ECOLOGY L.Q.* 140, 178, 184 (1999).

<sup>70</sup> Jeffrey L. Bleich, *Chrome on the Range: Off-Road Vehicles on Public Lands*, 15 *ECOLOGY L.Q.* 159 (1988).

to old, but increasing prevalent, sources of conflict in the West. Even a cursory perusal of the western states allows one to see that the logical sequence of events will lead to increased mineral development,<sup>71</sup> more recreation, less public grazing and large scale development of the private property adjacent to public property.<sup>72</sup> There is literally no ceiling on the potential consumption of western resources. Small ranching and farming operations, because they are “inefficient”<sup>73</sup> are in danger of being culled in the rural west to make way for development.

“Throughout the West, the livestock and logging industries have come under mounting attack. Environmental and economic pressures are driving the large parts of these industries that are mobile to shift their operations from public land in the West to private land in the South.”<sup>74</sup> Inattention to details of the large-scale trends in agriculture can cause one to miss important realities that accompany these trends so as to be deceptive and inaccurate. The public is led to believe that there is a relative stasis in agriculture when, in fact, the truth is more complex. Almost incomprehensible change has taken place. Taken as a whole, these statistics point out what is glaringly obvious to anyone living in the rural west: large corporate farms and ranches have displaced many smaller operations by buying out and consolidating those operations.<sup>75</sup> In some cases the operations have moved to the abundant private land of the East,<sup>76</sup> raising cattle on feedlots rather than grazing them on range and leaving rural western communities bereft and vulnerable. Because ranching operations are important components of many rural communities the loss of ranches effectively eviscerates the potential power of these communities to realize self-determined and environmentally sound decision-making. Without this cohesion and community structure, these rural locales are often rendered ineffective as an interest group. The same is true of environmental groups, working to protect their interests in the area, as they similarly lack the power structure and are rendered impotent but for their attempts to hold off development in the short term.

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<sup>71</sup> Statement of Kathleen Clarke, *supra* note 4.

<sup>72</sup> *Id.* at 30-31. While the study cited does not necessarily make these explicit claims they are derived from the demographic patterns of change not only in the West but in the nation as a whole.

<sup>73</sup> Donahue, *supra* note 67, at 250-63. This inefficiency is evidently a result of the huge numbers of cattle that can be raised in the infinitely small confines of private feedlots relative to the use of wide expanses on public lands. *Id.*

<sup>74</sup> Frank J. Popper & Deborah E. Popper, *The Reinvention of the American Frontier*, AMICUS, Summer 1991, at 4-7. The thrust of this article is that the Environmental movement has helped to propel extractive industry out of the rural West. These authors make the accurate observation that many families and communities which depended upon agriculture have been displaced. However, writing in 1991 they were less than clairvoyant in their assessment of the decline of extractive resources in the West as is evidenced by the unprecedented scale of mineral development now taking place in the Powder River Basin. See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-61 (2000).

<sup>75</sup> Case & Alward, *supra* note 64, at 23-26.

<sup>76</sup> Popper & Popper, *supra* note 74, at 7.

*b. Environmental Concerns are Increasingly Focused on Stalling Tactics.*

From a practical perspective, stalling by environmental groups comes about as a result of environmental groups having difficulty overcoming jurisdictional hurdles so that they may have access to the courts for substantive claims which would provide actual relief.<sup>77</sup> As a long term strategy, the efficacy of an environmental group holding out as long as possible in the face of apparently irresistible inertia in the direction of development seems tenuous at best. It is overwhelming when development is viewed as a force acting of its own volition. However, if we are able to set aside this inevitable overriding propensity to develop, then it becomes a much more tangible and manageable question of individual motivation. What are people looking for in the West? What will the future West look like, and how will those visions be sculpted? There are, no doubt, some that would have it look exactly as the eastern portion of the country looks now. Similar development patterns, mineral development, agriculture, recreation, and real estate. More people, more productivity. But the west has the unique benefit of foresight and opportunity to set aside public lands for the collective good. The interplay between the public and private land is important to recognize. What goes on in the public domain drastically affects the character and nature of adjacent private property.

Animosity towards historical uses of the public domain is prevalent in certain environmental academic circles.<sup>78</sup> Much of this disdain is couched in a concern for the land. However, the disagreement often comes down to differing concepts of the way that the land should be used. Discussion in these circles often focuses on the economically “marginal” nature of grazing or timber coupled with significant environmental impacts, compared to the supposedly benign physical impacts and positive economic benefits of the “non-extractive” recreational uses.<sup>79</sup> There is less often a discussion of the ways in which traditional interests,

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<sup>77</sup> Beyond the scope of this paper, but worth mentioning for the sake of documentation if not clarity, are the issues of standing, mootness, ripeness and attorneys fees that create a complex jurisdictional tapestry for environmental groups to unravel. While *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167 (2000), seemingly expanded the ability of environmental groups to overcome the standing requirements laid out in *Lujan v. Nat'l Wildlife Fed'n*, 504 U.S. 555 (1992), the court established that the environmental plaintiffs must make a showing of injury not just to the environment. Rather the plaintiffs must show that they were injured by the environmental damage in some specific way. See also *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Res.*, 532 U.S. 598 (2001) (discussing attorneys fees and mootness).

<sup>78</sup> Donahue, *supra* note 67, at 112.

<sup>79</sup> Dan Tarlock, *Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants*, 31 ARIZ. ST. L.J. 539, 582 (Summer 1999). It should be noted that this article supports cultural claims as a legitimate means for rural communities to preserve their unique characteristics. As a practical matter the author explains that in the absence of constitutional claims these cultural claims are important and, perhaps, necessary to the continued existence of these unique cultures. However, the paternalism that pervades much of academic explanation of rural community problem-solving is present in the tenor and conclusions of the article. I mention this only as a point of interest—even in spite of best efforts by the author to be sensitive to the nature,

ranching and timber for example, have staved off large scale development of the adjacent private property interests. Putting ranching and environmentalism at odds one with the other ignores the reality that, in many cases, these interests employ divergent methodology in preserving similar values of the West: the methods, not the ideology, are the true dividing point. In many cases ranchers and environmentalists want the same end: a stable and productive environment. They simply have different solutions to achieve that end.<sup>80</sup> The inability of ranchers and environmentalists to come together until recently has allowed for other interests (real estate developers and mining companies for example) to creep in and take advantage of the lack of local cohesion. One solution that has the potential to meet the wants and needs of both environmentalists and ranchers is for these groups to join forces and make NEPA much more than a minor inconvenience to industry and development interests. This requires an understanding of what NEPA was designed to do, what it has done, and most importantly, what NEPA is capable of accomplishing when used to its full potential.

#### IV. NEPA WITH TEETH: CULTURAL IMPACTS AND PRIVATE LANDOWNERS.

NEPA requires that agencies take a “hard look” at the cumulative environmental consequences of that agency’s plans or actions.<sup>81</sup> This begs the question: what are the agencies supposed to take a hard look at?

[NEPA] ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.<sup>82</sup>

##### A. *As a Practical Matter, Taking a “Hard Look” Includes Review of Public Comment and Responding to Concerns Included in Those Comments.*

Once individual concerns become a part of the administrative record, they are available for the court to use in evaluating the sufficiency of the agency response to those comments. Accordingly, the more complete the public comment, and thus

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structure and conscience of these communities there is an overarching theme that they are antiquated to the point that they are legitimized only in the recognition of their unique values, and not as a result of the presence of those values in, and of, themselves. For example, see Michelle M. Campana, *Public Lands Grazing Fee Reform: Welfare Cowboys and Rolex Ranchers Wrangling with the New West*, 10 N.Y.U. Envtl. L.J. 403 (2002); Laitos & Carr, *supra* note 69.

<sup>80</sup> Mark Dowie, *Notes From A Fence-Sitter*, HIGH COUNTRY NEWS, Apr. 10, 2000, at 13, available at [http://www.hcn.org/servlets/hcn.Article?article\\_id=5712](http://www.hcn.org/servlets/hcn.Article?article_id=5712).

<sup>81</sup> See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). A brief explanation of the *Kleppe* decision follows *infra*.

<sup>82</sup> See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

the administrative record, the closer we are to achieving the goals and standards of NEPA because “these procedures are almost certain to affect the agency’s substantive decision.”<sup>83</sup>

Coming back to the *WOC* decision, it stands to reason that presenting a diverse range of potential environmental impacts that are similarly focused is a powerful tool for ensuring full and effective compliance with NEPA.<sup>84</sup> There, environmental claims that methane mining had impacts beyond what the agency was willing to admit were reinforced by private landowners who demonstrated the tangible damage incurred on their property as a result of the mining.<sup>85</sup> It appears to be an elementary conclusion that if a project is impacting the environment on one level, then it is likely impacting it on other levels as well. But, much of the litigation strategy in this area does not reflect recognition of the potential for inclusion of more total claims in a single suit. Nor does it reflect awareness of the valuable potential found in substantively corroborative claims which are made possible by bringing ranchers and environmentalists together. This diverse range of impacts can be similarly focused either in terms of the concerns upon which they are collectively centered, or on a common goal that manifests by way of common values. When the record is fashioned in this way it creates a higher standard for review of the agency by the court because it forces the agency to justify its actions in the face of considerable, unified concerns presented collaboratively by diverse interest groups.

On the other hand, if an agency is presented with myriad competing self interests and a unified industry perspective, dissenters have made the agency’s decision an easy one. After all, the agency cannot please everyone all of the time, they may as well go with the utilitarian solution that seems to come from the development of the minerals in as rapid fashion as is possible. When, however, traditionally contrary interests come together in alliance for the preservation of the status quo, at least until all of their questions are answered, it is (or should be) more difficult for the agency to disregard these questions and concerns.

In 1976, the United States Supreme Court decision in *Kleppe v. Sierra Club* set the standard for much of the Courts’ NEPA analysis in *WOC*.<sup>86</sup> *Kleppe* concerned coal leases in basically the same geographic region as *WOC*. The Court in *Kleppe*

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<sup>83</sup> *Id.* at 350.

<sup>84</sup> This proposition is derived from analyzing similar fact patterns of cases with different outcomes where, in the case with a positive outcome, the administrative record has been fully developed by separate interest groups with a common goal. Compare, *Wyo. Outdoor Council v. U.S. Army Corps. of Eng’rs*, 351 F. Supp. 2d 1232, 1260 (D. Wyo. 2005), with *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257 (10th Cir. 2004). See also *supra* notes 15-17 and accompanying discussion.

<sup>85</sup> *WOC*, 351 F. Supp. 2d at 1246-47.

<sup>86</sup> *Kleppe*, 427 U.S. 390.

held the BLM had no obligation to perform regional environmental impact statements because there was not a “regional plan of development.”<sup>87</sup> Whether *WOC* and similar challenges fare better over the long-term remains to be seen, but there are indications that they could, particularly where, as in *WOC*, the plaintiffs are private land owners with tangible interests at stake. Additionally, the large scale development plans for the region make it more difficult for agencies to claim that there is no plan in this instance because of the approval of so many leases. The issuance of a sweeping general permit, GP 98-08, in anticipation of expediting the permitting process, contemplates a large scale plan. In *WOC*, and other coal bed methane litigation, one could argue that in light of the number of leases, the general permitting, and the push for full field development, in this case no plan constitutes poor planning and the agency must prepare both regional development plan and a regional EIS.<sup>88</sup> Incorporation of tangible injury into NEPA lawsuits can strengthen the argument for requiring EISs’, which then must adequately identify all of the potential impacts of a project. Showing how a project impacts people directly makes the argument for constraining the project more accessible and more effective. To state a truism, operating from an anthropocentric perspective is human nature. Judges are not impervious to this truth. No amount of logic or artful legal argument can circumvent the fact that showing direct human consequences is more tangible than explaining abstract environmental impacts.

Emphasizing an anthropocentric reading of NEPA can be particularly effective in litigation of this type. First, there is the actual harm done to the land, which also has an effect on the human environment, specifically land that was once viable for agricultural purposes is no longer available for either farming or ranching. On a large scale, coal bed methane mining threatens to destroy a way of life by marginalizing and potentially compromising the agricultural interests of an entire region. Second, there is a private property right at stake. Not only is the land being degraded but specific private property interests are implicated in that degradation. This particular farmer/rancher is suffering concrete, and very real, injury. Third, an anthropocentric argument does not foreclose the opportunity to assert an argument concerning the ecologically significant injury to the environment as well as wildlife and scenic values. Viewed in this light, NEPA can either continue to be relegated to superfluous status as either a single dimensional stalling tactic, an insulated and abstract legal obligation performed with perfunctory machination or; NEPA can be used as a multi-pronged tool to force sustainable development.

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<sup>87</sup> *Id.* at 401.

<sup>88</sup> Support for this proposition is found in a recent discussion of segmentation and cumulative impacts as they pertain to *Kleppe* in NEPA analysis. See *Florida Wildlife Fed. v. U.S. Army Corps of Eng.*, 401 F. Supp. 2d 1298, 1313 (S.D. Fla. 2005).



*B. NEPA's Cultural Impact Analysis and the 10th Circuit.*

The broad goal of NEPA according to the *WOC* court, in language borrowed from the statute itself, is to “encourage productive and enjoyable harmony between man and his environment: to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man: to enrich the understanding of the ecological systems and natural resources important to the Nation.”<sup>89</sup> The Tenth Circuit seems willing to recognize a higher standard for agency actions by way of an anthropocentric reading of NEPA which allows that coalitions involving farming and ranching interests are better situated as potential plaintiffs than those groups which include only environmental interests:

[i]mpacts to private lands should be considered in determining whether impacts are significant under NEPA. Significance requires an evaluation of both context and intensity. The Tenth Circuit has held that impacts to farmlands can lead to a finding of significance.<sup>90</sup>

The importance of this type of language coming from the Tenth Circuit is the way in which it establishes an effective standard for the question of “significant” as it relates to NEPA analysis. Where, as here, the threshold for significance of environmental assessments is tied to the viability of a valuable commodity (here irrigated farmland) there is a tangible standard for the court to rely upon when finding that a comprehensive EIS is required: “[g]iven the aesthetic, economic, ecological, and cultural value of agriculture to the region, even a loss of 2,000 acres of irrigated farmland is significant.”<sup>91</sup>

It is important to note while this type of significance finding may stand alone, it does not preclude and, in the context of a coalition effort, can reinforce a finding of significant environmental impacts of other kinds. This is true because of the potential to show a direct human injury as a result of the environmental harm.

While NEPA is not substantive in nature, using NEPA to create a tangible standard of what constitutes a “significant” impact comes close to establishing a substantive effect. In particular, under this standard, the agency must take into account that property is being used as farm or ranchland when determining whether an EIS is required because “NEPA is intended to guarantee that government agencies are informed of and fully consider environmental consequences when undertaking major Federal actions significantly affecting the quality of the *human*

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<sup>89</sup> 42 U.S.C. § 4321 (2000).

<sup>90</sup> *WOC*, 351 F. Supp. 2d at 1245.

<sup>91</sup> *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002). See *infra* notes 82-88 for a description of this case.

*environment.*”<sup>92</sup> Tenth Circuit case law is instructive as to the ways in which private farm and ranch land can factor into NEPA analysis.

The District of New Mexico, in *Middle Rio Grande Conservancy Dist. v. Norton*, found consequential impacts in the Draft Economic Analysis prepared by the Fish and Wildlife Service.<sup>93</sup> Specifically, the court recognized that “while the . . . analysis acknowledges that farming in the Middle Rio Grande valley is put at serious risk,” the agency “dismiss[es] the probability of a vast shift in New Mexico’s economy, culture, ecology and social life as wholly unremarkable.”<sup>94</sup>

In *Middle Rio Grande* the “[agency rule] will cause a substantial curtailment of irrigated agriculture in the Middle Rio Grande Valley and will result in vast, completely negative ecological, economic, aesthetic, cultural and social changes.”<sup>95</sup> Each of these negative changes is an “impact” within the meaning of NEPA and each should be recognized discretely as well as in aggregation. Thus, there are two ways in which a given impact should be dealt with under NEPA. First, impacts need to be recognized on an individual basis: the ways in which a project affects both cultural values and aesthetic qualities should be identified individually and with specificity. But the analysis does not end there, each of these impacts is important on its own, but they do not exist in a vacuum. Therefore, the second part of the analysis must consider all of the impacts in conjunction one with another. The second part of the analysis is important so that the synergistic effect these individual impacts have, when evaluated as a collective whole, is not overlooked.

The *WOC* decision adheres to an appropriate standard for the analysis that must take place in a truly “cumulative” impact statement.<sup>96</sup> The standard in *WOC* fully investigates the impacts of the project, as is required by NEPA, to the human

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<sup>92</sup> *Middle Rio Grande Conservancy District v. Babbitt*, 206 F. Supp. 2d 1156, 1174 (D.N.M. 2000) (quoting NEPA in part) (internal quotations omitted and emphasis added).

<sup>93</sup> *Id.* at 1180. The court, in *Middle Rio Grande*, was evaluating the sufficiency of a draft economic analysis in reference to the Endangered Species Act 16 U.S.C. § 1531 (ESA), which is not implicated in this discussion. However, the quotation is included to illustrate the deficiency in the cultural analysis on the part of the agency and the recognition of that deficiency by the court. While the court is establishing a failure to comply with statutory requirements that are not at issue here, it is the agency’s failure to address the impacts that could be applicable to a NEPA claim of the sort that is discussed here. So, while this case dealt with the Endangered Species Act, NEPA was implicated by the final agency action of the Secretary declaring a final rule as it pertained to water flow in support of the silvery minnow. The correlation to the sufficiency of an EA as it applies to an EIS is comparable, in particular, the requirements of NEPA to factor cumulative impacts as they relate to cultural considerations.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *WOC*, 351 F. Supp. 2d at 1238-41.

environment. Without consideration of the cultural impacts there is little hope that an Environmental Assessment will adequately satisfy even the plain language of NEPA, much less the congressional intent therein.

Maintaining the integrity of NEPA in relation to coal bed methane development in the Powder River Basin is dependent upon the cooperation of varied interest groups and the inclusion of private property interests. Circumvention of NEPA's requirements by operating on private lands should not be allowed.<sup>97</sup> "Impacts to private lands should be considered in determining whether impacts are significant under NEPA."<sup>98</sup> Property owners have a unique interest in maintaining the ability of the land to be viable agriculturally. Private property interests are well served by the Tenth Circuit in requiring that the effects of the proposed action account for the impacts on the private lands affected by the drilling. This adds another element into the argument for collective actions comprised of environmentalists and ranchers as private property interests that must be factored into the determination by the agency.

By incorporating and using to its full potential the administrative record in the agency decision not to perform an EIS there is potential for NEPA to achieve its purpose. Specifically, a full EIS will allow for public review of all of the potential impacts of a decision. That review is imperative in the consideration whether or not to apply public pressure to the agencies in position to make decisions on behalf of the people as a whole. This is an excellent opportunity for private and public interests to insure full disclosure on the part of agency and industry decision-makers. Without such information available to the public there is little opportunity for the public to hold those entities accountable for their decisions.

NEPA's requirements are not solely designed to inform the *Secretary* of the environmental consequences of his action. NEPA documentation notifies the *public and relevant government officials* of the proposed action and its environmental consequences and informs the *public* that the acting agency has considered those consequences.<sup>99</sup>

NEPA requires that the public be fully apprised of the impacts of industry and agency actions—that information is at once powerful, and crucial, in the people's role of demanding wise decisions.

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<sup>97</sup> *Id.* at 1245.

<sup>98</sup> *Id.* at 1245-46.

<sup>99</sup> *Middle Rio Grande*, 206 F. Supp. 2d at 1174 (quoting *Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996) (emphasis added)).

*C. Additional Advantages of Rancher-Environmental Coalitions: Forcing Sustainable Development.*

Rancher-environmentalist coalitions provide an opportunity to reduce the reactionary impact shifting which has traditionally dominated U.S. environmental policy. Reactionary approaches to environmental problems seek to remedy the immediately identifiable situations that are obvious upon first glance; remedial rather than preventative policies. This type of remedial perspective, which ignores root causes and seeks to placate rather than solve, has huge potential for creating unforeseen impacts because of the focus of resources on fixing problems that already exist. Rancher-environmentalist coalitions can create actual solutions to difficult environmental dilemmas. Recognition of the interconnected nature of the ecosystems that we are dealing with is an important starting point in an effort to ultimately arrive at a platform where truly informed decision-making takes place. Practically speaking, the environmental movement has been a long series of reactionary efforts that shift the burden of various types of development from one population to another rather than attempting to recognize and address the root of environmental problems.<sup>100</sup> On the other hand, ranching interests have long been averse to change, instinctually reacting to what are perceived as outsider threats to their way of life. These interests should cease to be resistant to the point of fault where they face the potential of breaking altogether rather than bending. Pooling resources and recognizing that compromise leads to workable results for both groups is crucial. Basically this comes down to a matter of pragmatic decision-making that can objectively evaluate potential consequences of development. In this case, neither ranchers nor environmentalists might get exactly what they want, but collectively they can work to shape the work in progress that is the rural western landscape.

*1. Rancher-Environmental Coalitions Present Unique Opportunities for Encouraging Sustainable Development.*

The ability of a landowner to bring damages claims enhances the possibility of forcing responsible development beyond general environmental claims that do not incorporate the possibility of actual damages. Further private property owners, because of the intertwined nature of private and public land in the west, make the requirements of NEPA into an effective tool in forcing wise decisions when it comes to development of natural resources.

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<sup>100</sup> It should be noted that the environmental movement has made incredible strides in the recognition and reduction of environmentally disparaging practices. However, the problem becomes that the burden of living in a consumer driven society is shifted to populations with either an inability to play a meaningful role in the *decision-making* process, or, to populations with more immediate concerns than the somewhat abstract concept of environmental protection.

The ability to bring multiple claims and cover the bases of litigation in a collective lawsuit is important. First, it promotes judicial economy. Second, collective actions equalize the resources on the playing field. Third, presenting a united front allows for the court, as well as the legislature, to find for a collective group of interested persons. Finally, when coalitions present a united front, corporate interests have less opportunity to employ tactics that are employed to divide potentially common interests by highlighting differences and minimizing similarities. Ranchers and environmentalists do not have to look hard to find an abundance of common ground. The alternative to cooperation between environmentalists and ranchers is that someone else will call the shots, and if that someone else is a mining company these two groups may well find out too late how relatively similar their vision of the West was. The reality is this difference in vision between in how to properly manage rangeland amongst ranchers and environmentalists pales in comparison to seeing that very rangeland eviscerated by well pads, roads, and containment ponds.

## 2. *The Clean Water Act; Employing State Law.*

Rancher-environmental coalitions are also useful in forcing responsible development of coal bed methane through the Clean Water Act (CWA).<sup>101</sup> Much of the west, including Wyoming, has state regulations that recognize the importance of water for agricultural uses. These standards are federally enforceable because “state standards are incorporated into a [National Pollutant Discharge Elimination System] NPDES permit . . . those standards [become] enforceable in a citizen suit under the CWA.”<sup>102</sup>

Citizen suits by landowners present an important additional facet of a potential CWA claim by presenting tangible, measurable injury. Environmental groups have long had difficulty in maintaining standing for citizen suits because of an inability to demonstrate injury and or state a claim upon which relief can be granted.<sup>103</sup> But partnered with a rancher whose ranch lies over, or adjacent to, a

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<sup>101</sup> *WOC*, 351 F. Supp. 2d at 1252-60.

<sup>102</sup> *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1271 (D. Wyo. 2002).

<sup>103</sup> *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). *See also* *Natural Res. Def. Council, Inc. v. Buford*, 716 F. Supp. 632 (D.C. 1988) (reviewing a challenge by environmental groups and residents of western states of Department of Interior rules governing leasing and mining of federally owned coal, where the district court found that the plaintiffs lacked standing to bring the suit). Specifically the D.C. circuit stated that, “In support of [their] claims of injury, plaintiffs have rested on the bare allegations in the complaint and upon one paragraph in a subsequent pleading which attempts to elucidate the nature of the injuries and the causal link to the defendants’ actions.” *Id.* at 636. The court conceded that, “[t]here is no dispute over the fact that surface mining of coal has many far-reaching environmental effects which are of concern to the plaintiffs. What has not been shown is that the regulatory program at issue here has injured or threatens to injure the plaintiffs.” *Id.* Finally the court explained that, “the total absence of support for plaintiffs’ claim that the challenged actions have injured them puts the court in the completely untenable position of having to speculate both as to injury and to the causal relationship. Such pure speculation is an

coal bed methane deposit, standing becomes a less ephemeral argument. A private property owner can demonstrate real and concrete injury. In *Swartz v Beach*, the plaintiff landowner brought suit under the citizen suit provision of the CWA, alleging that the producers of coal bed methane had violated state standards for water quality.<sup>104</sup> The state water quality standards were incorporated into the NPDES permit and therefore, violations of the state standards were enforceable. The pertinent statutory language reads:

Agricultural Water Supply. All Wyoming surface waters which have the natural water quality potential for use as an agricultural water supply shall be maintained at a quality which allows continued use of such waters for agricultural purposes. Degradation of such waters shall not be of such an extent to cause a measurable decrease in crop or livestock production. Unless otherwise demonstrated, all Wyoming surface waters have the natural water quality potential for use as an agricultural water supply.

In Wyoming, the inclusion of public waters as “agricultural waters” provides an avenue by which to arrive at a successful CWA claim, achieved only with the involvement of ranchers or farmers. Here as well, a combined effort between agricultural interests and environmentalists sets the stage for success in a way that cannot be duplicated by independent action by either group.

## V. CONCLUSIONS

Rancher-environmentalist coalitions are a pragmatic solution to checking reckless development. The ability of several groups to come together in an action brings to light the important and diverse interests at stake in situations such as coal bed methane production. The presence of both ranchers and environmentalists on the same side of an issue creates an impression of wrongdoing on the other side. Should an action arouse the animosity of both ranchers and environmentalists perhaps that in itself should give a court reason to pause. Further, collective action often can serve as a forum for opening avenues of dialogue that have traditionally and consistently been closed. Bringing together the collective views of different

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unacceptable basis upon which to ground a party's standing.” *Id.* at 639. The court, in its opinion, cited several other cases that support the contentions that 1) standing is often a difficult hurdle for environmental groups to overcome, and 2) a showing of a particularized injury, causation, and redressibility would allow many of these challenges to be heard on the merits. *See Sierra Club v. Morton*, 405 U.S. 727 (1972); *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988); *Wilderness Soc'y v. Griles*, 824 F.2d 4 (D.C. Cir. 1987).

<sup>104</sup> *Swartz*, 229 F. Supp. 2d at 1268-69.

<sup>105</sup> *Wyo. Water Quality Rules*, ch. 1 § 20 (quoting *Swartz*, 229 F. Supp. 2d at 1270).

groups in a non-adversary context provides for differences to be reconciled and similarities recognized. Thus, even if an arrangement has its roots in purely strategic motives, the progeny of that relationship can become an effective force in resisting unwise, hasty decision-making as a default.

Absent cohesion, sparsely populated communities are vulnerable to a variety of outside interests. This statement should not be taken out of context where it could be viewed as isolationist and xenophobic (which is antithetical both to the basic contention here and the reality of the situation facing these communities). The premise from which this observation operates is that there are inherent values in community, values which are accessible on different levels, to the population as a whole. Some of these values include open space, minimization of industrial or residential development, aesthetic qualities of the landscape, wildlife and recreation opportunities. The contention here is that often “outside” economic interests represent an attempt to commodify some part of the natural environment or inherent value that has been created by the very community that is now being displaced (the relative open space, for example, of agricultural communities) with little or no concern for maintaining those values beyond their initial economic value. This is particularly true with CBM development, where the outside interests bring promising economic growth, an influx of jobs, increased property values, and progressive development. Divergent interests acting in self-serving circles will be less effective in convincing either the court or the legislature that an agency should act in the best interests of the collective. It would be naive to believe that ranchers and environmentalists will always get along. However, it is not quixotic to believe that there is a fundamental good to cooperative, fully informed decision making.

Without cooperative efforts to check development, all of the values of the rural west are in jeopardy. Communities in the rural west constitute unique cultures and should be recognized and protected as such. The difficulty is that the necessary mechanisms to achieve this protection can only be actualized by community members who are willing to recognize both the scope, and the importance, of western culture, as well as to be open to new concepts and new partnerships. These coalitions stand as a metaphor for life in the west. Cooperation is crucial. Because of the abundance, and scarcity, of resources there are many opportunities for exploitation by those who have no stake in the cultural values of rural communities. In the case of coal bed methane development in the Powder River Basin there is little doubt that marching forward with little or no attention paid to the traditional, as well as emerging, western cultural values will have significant impacts. Allowing agencies, at the behest of industry, to roll over congressional mandates and the values that those rules were meant to give a voice to is legally, practically, and morally untenable.

The presence of outside influences that have no interest in the continued vitality, sustainability, or character of rural communities is dangerous.<sup>108</sup>

Particularly seductive are the promises of quick money, increased property values, jobs and influx of industry. There is an indispensable consideration that is largely overlooked in the analysis of western resource allocation, that is to whom is the sustainability of the community most important? There is incentive to create enemies of the entrenched interests, putting them at odds with one another. The commodity that is most valuable is the western way of life. There are differing opinions about what the “western way of life” entails. But it does not really matter whether you believe in the rich tradition of the cowboy culture, the recreationalist ideal of open spaces and the world as a playground, the individualism, collectivism, antidevelopment or development. Though there are different concepts of what exactly the west does, or should represent to individuals, there is a consistent theme of endless possibility constrained only by a sometimes harsh and sometimes fragile environment. This potential is the inherent value which exists in the West and it does not subscribe to a particular ideology.

Widespread development with little or no attention paid to potential ramifications puts this value of possibility at risk. As a result of widespread coal bed methane mining, development, and production, the West will be different. The Powder River Basin will be different. Whether or not that is a good thing is open to debate, but we live in a time that not only allows for the luxury of prior planning and evaluation of potential impacts before irreparable decisions are made but also requires such prior review by law. There is a distinction between careful cultivation of resources and rapid, myopic exploitation of the quick and dirty economic value of those resources. Resource values include, but certainly are not limited to, large tracts of undeveloped land (supporting not only the continuity and viability of ecosystems but also the aesthetic qualities of open spaces), deep community roots, sustainable economies, recreation values, and agriculture. They are all served by the collective efforts of ranchers and environmentalists. There is little doubt that areas of conflict exist between these two groups, however, there are increasing indications that there is more common ground than divergent views.

Given the looming potential of widespread development of coal bed methane there is a need to recognize collective goals and work together for a sustainable future. That sustainable future recognizes the wants/needs of society, appropriately assesses the West’s place in that equation and demands responsible development of those resources. Divisive interests on either side of this argument have no place in the discussion. An unwillingness to compromise and recognize the validity of the other’s argument is useful only to the outside interests who have time, resources and moral flexibility to wait until those with something to lose have fought it out amongst themselves, rendering the remaining opposition ineffectual.

The choice presents itself in no uncertain terms, cooperation and participation or complacency and subjugation. Environmentalists and ranchers alike must grasp the gravity of this situation, they must accept that values contained in both



the people and landscapes of the rural west are worth protecting. Recognizing that these values are more important than adherence to a particular ideology is a fundamental step towards realizing that protection. Coal bed methane is poised to change the rural West on a scale that is unprecedented. Rural communities whose residents depend upon the land for recreation, aesthetic comfort, or agriculture stand to lose as much or more than industry stands to gain. Collective action is the key. NEPA and the CWA provide avenues to achieve reasoned decision-making. There is much to be gained by working together to protect the prospect of infinite possibility that is the rural West.