January 22, 2019

Protest submitted via fax

U.S. Bureau of Land Management
Wyoming State Office
Attn. Mary Jo Rugwell, State Director
5353 Yellowstone Road
Cheyenne, WY 820039
Fax: 307-775-6203

Re: Protest of the Wyoming BLM’s Special February 2019 Competitive Oil and Gas Lease Sale

Dear State Director Rugwell:

Pursuant to 43 C.F.R. § 3120.1-3, WildEarth, the Center for Biological Diversity, and Western Watersheds Project (hereinafter “Conservation Groups”) submit the following protest of the U.S. Bureau of Land Management’s (“BLM’s”) decision to move forward with its special February 25-March 1, 2019 competitive oil and gas lease sale. The agency is offering for lease 568 publicly-owned land and mineral parcels comprising 768,942.13 acres across the state of Wyoming and within every Wyoming BLM field office except the Cody and Lander Field Offices.¹

This protest is filed on behalf of the Conservation Groups listed above and our members. The mailing address to which correspondence regarding this protest should be directed is as follows:

Rebecca Fischer, Climate Guardian
WildEarth Guardians
2590 Walnut Street
Denver, CO 80205

¹ The lease sale notice for the February 2019 sale is on the BLM’s website at: https://eplanning.blm.gov/epl-front-office/projects/nepa/117392/164581/200730/184Q-Feb19FinalNotice.pdf. The draft EA, FONSI, and decision record are available on ePlanning at: https://eplanning.blm.gov/epl-front-office/eplanning/projectSummary.do?methodName=renderDefaultProjectSummary&projectId=112234.
The Conservation Groups protest the inclusion of all 568 parcels, numbered sequentially WY-184Q-FEB19-001 through WY-184Q-FEB19-568, inclusive.

**INTERESTS OF PROTESTING PARTIES**

WildEarth Guardians is a nonprofit environmental advocacy organization dedicated to protecting the wildlife, wild places, wild rivers, and health of the American West. Guardians members live, work, and recreate in areas near or on many of the proposed lease parcels. Thus, on behalf of our members, Guardians has an interest in ensuring the BLM fully protects public lands and resources as it conveys the right for the oil and gas industry to develop publicly-owned minerals. More specifically, Guardians has an interest in ensuring the BLM meaningfully and genuinely takes into account the all of the implications of its oil and gas leasing decisions, including impacts to public health, air quality, water quality and quantity, and our climate from the release of more greenhouse gas emissions known to contribute to global warming.

The Center for Biological Diversity is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center also works to reduce greenhouse gas emissions to protect biological diversity, our environment, and public health. The Center has over 1.6 million members and on-line activists, including those living in Wyoming and neighboring states who have visited public lands management area for recreational, scientific, educational, and other pursuits and intend to continue to do so in the future, and are particularly interested in protecting the many native, imperiled, and sensitive species and their habitats that may be affected by the proposed oil and gas leasing.

Western Watersheds Project is a non-profit organization headquartered in Idaho with more than 5,000 members and supporters. WWP’s mission is to protect and restore western watersheds and wildlife through education, public policy initiatives and legal advocacy. Western Watersheds Project has staff and members in Wyoming who use and enjoy America’s lands and their wildlife, cultural and natural resources for health, recreational, scientific, spiritual, educational, aesthetic and other purposes. WWP also has a direct interest in mineral development that occurs in areas with sensitive wildlife populations and important wildlife habitat, as well as long-standing interests in preserving and conserving greater sage-grouse populations and habitat in Wyoming.

Because the BLM’s February 2019 lease sale includes many of the parcels originally noticed for sale in the December 2018, 4th Quarter sale, the Conservation Groups incorporate by reference the comments, protest, and exhibits submitted for the December sale, including comments on the draft EA for the initial set of parcels (submitted Sept. 12, 2018). These incorporated comments and exhibits offer detailed technical information, expert reports, and legal analysis that the agency is required to consider in its decisionmaking process for the proposed action. See Forest Guardians v. U.S. Fish and Wildlife Serv., 611 F.3d 692, 717 (10th Cir. 2010) (“The purpose behind NEPA is to ensure that the agency will only reach a decision on a proposed action after carefully considering the environmental impacts of several alternative courses of action and after taking public comment into account.”); see also California Trout v.
F.E.R.C., 572 F.3d 1003, 1016 (9th Cir. 2009) (“[T]he agency must ‘involve environmental agencies, applicants, and the public, to the extent practicable,’ and ‘[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures[.]’”) (internal citations omitted).


STATEMENT OF REASONS

I. The Conservation Groups Object to BLM’s Public Comment Process.

NEPA regulations require federal agencies to encourage and facilitate public involvement “to the fullest extent possible,” 40 C.F.R. § 1500.2, and identify public scrutiny as an “essential” part of the NEPA process. Id. § 1500.1(b); see also id. § 1501.4(b) (Agencies must “involve . . . the public, to the extent practicable”); id. § 1506.6 (“Agencies shall: . . . (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures”). They also provide that “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” Id. 1500.1(b). FLPMA section 309(e) similarly requires BLM to “give . . . the public adequate notice and an opportunity to comment upon . . . and to participate in . . . the management of[] the public lands.” 43 U.S.C. § 1739(e).

BLM’s continuation of the public comment period for the lease sale during the federal government shutdown violates the public participation provisions of NEPA and FLPMA. During the shutdown, the public cannot discuss posted lease sale parcels with the agency. The public cannot visit a BLM office in person to view the parcel list and any maps. The public cannot review and discuss associated NEPA documents with BLM staffers. And, no one in BLM is available to accept comments on the lease sales. In short, it is impossible for the public to inspect or otherwise provide meaningful feedback on the proposed lease sale parcels or NEPA analyses related to these. Instead, the public is entirely locked out of the process.

Within the public comment process is a wealth of information and perspective that will improve the quality of BLM’s decision-making. Moreover, BLM’s invitation of and consideration of public comment is required by law. We urge Wyoming BLM to revisit its commitment to public transparency, involvement, and feedback and extend the public comment deadlines for the lease sale.
II. **BLM Fails to Comply with the Clean Air Act and FLPMA.**

The Clean Air Act requires the Environmental Protection Agency (“EPA”) to set National Ambient Air Quality Standards (“NAAQS”) to protect public health and welfare. 42 U.S.C. § 7409. After EPA designates NAAQS, states are required to develop State Implementation Plans (“SIPs”) to implement, maintain, and enforce the NAAQS. *Id.* § 7410(a)(1).

Federal agency actions must comply with SIPs. Specifically, “[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity” that does not conform to an approved state SIP. 42 U.S.C. § 7506(c)(1). “The assurance of conformity . . . shall be an affirmative responsibility of the head of such . . . agency.” *Id.* Thus, federal agency actions must not 1) “cause or contribute to any new violation of any [air quality] standard,” 2) “increase the frequency or severity of any existing violation of any standard in any area,” 3) or “delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.” *Id.* § 7506(c)(1)(B).

The EPA has designated the Upper Green River Basin Area of Wyoming as in marginal nonattainment with the 2008 NAAQS for ozone.² EPA, 8-Hour Ozone (2008) Designated Area Partial County Descriptions, [https://bit.ly/2K3DyRW](https://bit.ly/2K3DyRW) (last visited Jan. 22, 2019); EA at 3-6. Thus, BLM, a federal agency, is prohibited from undertaking any activity this area that does not conform to Wyoming’s SIP. See 40 C.F.R. § 93.150(a); see also Wyoming SIP at 020-0002-008 Wyo. Code R. § 3.

To determine whether a formal conformity analysis is needed, BLM must first conduct an “applicability analysis” by calculating whether the proposed activity has direct and indirect emissions of ozone precursors: volatile organic compounds (“VOCs”) or nitrogen oxides (“NOx”) that equal or exceed 100 tons/year. 40 C.F.R. § 93.153(b)(1); see also United States Department of the Interior, BLM, Instruction Memorandum No. 2013-025: Guidance for Conducting Air Quality General Conformity Determinations (Dec. 4, 2012), [https://www.blm.gov/policy/im-2013-025](https://www.blm.gov/policy/im-2013-025). Direct emissions are defined as those emissions that are caused or initiated by the Federal action and occur at the same time and place as the action and “are reasonably foreseeable.” 40 C.F.R. § 93.152. Indirect emissions are defined as those emissions that are caused by the Federal action, but may occur later in time or distance, and are reasonably foreseeable, and which the Federal agency can practically control and will maintain control over. *Id.* “A Federal agency must make a determination that a Federal action conforms to

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the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.”  Id. § 93.150(b) (emphasis added).

In addition to the Clean Air Act, BLM must comply with FLPMA. FLPMA requires that “[t]he Secretary [of the Interior] shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands.” 43 U.S.C. § 1712(a).

BLM fulfills this mandate by developing Resource Management Plans (“RMPs”) for each BLM field office. In general, RMPs must be up-to-date. BLM’s Land Use Planning Handbook states that, “[RMP] revisions are necessary if monitoring and evaluation findings, new data, new or revised policy, or changes in circumstances indicate that decisions for an entire plan or a major portion of the plan no longer serve as a useful guide for resource management.” BLM Land Use Planning Handbook, H-1610-1, Section VII.C at 46. Furthermore, the Handbook provides that amendments are needed whenever there is a need to “[c]onsider a proposal or action that does not conform to the plan,” “implement new or revised policy that changes land use plan decisions,” “respond to new, intensified, or changed uses on public land,” or “consider significant new information from resource assessments, monitoring, or scientific studies that change land use plan decisions.”  Id. Section VII.B at 45.

When BLM issues a new RMP or amends a RMP, the agency must also comply with the requirements of NEPA. See 43 C.F.R. § 1601.0–6. Thus, BLM is required to issue an Environmental Impact Statement (“EIS”) with each RMP.  Id. Although BLM may tier its project-level analyses to a broader NEPA document, such as the EIS accompanying the RMP, 43 C.F.R. § 46.140, “[n]othing in the tiering regulations suggests that the existence of a programmatic EIS . . . obviates the need for any future project-specific EIS, without regard to the nature of magnitude of a project.”  League of Wilderness Defs.-Blue Mountains Biodiversity Proj. v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998). Furthermore, “[a] NEPA document that tiers to another broader NEPA document . . . must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions.”  Id. Put another way, “[t]o the extent that any relevant analysis in the broader NEPA document is not sufficiently comprehensive or adequate to support further decisions, the tiered NEPA document must explain this and provide any necessary analysis.”  Id. § 46.140(b).

Last but not least, the BLM is also required to “provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards[,]” in the development and revision of land use plans. 43 U.S.C. § 1712(c)(8).

A. BLM Fails to Conduct a Conformity Analysis or Revise the Pinedale and Rock Springs RMPs to Ensure Compliance with the Clean Air Act and FLPMA.

To start, although the BLM describes the conformity requirements imposed by the Clean Air Act, EA at 3-11, the agency fails to actually conduct an applicability analysis or conformity analysis as required by 40 C.F.R. § 93.153(b). Yet, there is no doubt that such an analysis is required. Thirty-nine parcels in the lease sale are located within Wyoming’s nonattainment area for the 2008 ozone NAAQS. Id. And, based on the heavily-developed nature of the Pinedale
area, leasing is clearly a cause of future, reasonably foreseeable emissions. Thus, BLM’s failure to conduct a conformity analysis violates the Clean Air Act.

EPA’s conformity regulations define “reasonably foreseeable” emissions as projected future direct and indirect emissions that are: (1) identified at the time the conformity determination is made; (2) the location of such emissions is known; and (3) are quantifiable as described and documented by the Federal agency based on its own information and after reviewing any information presented to the Federal agency. 40 C.F.R. § 93.152.

Here, all of these requirements are met. First, the location of the emissions is known because the location of the lease parcels is known. Second, direct emissions are identifiable and quantifiable because the Pinedale area is heavily developed and thus numerous federal reports provide information regarding existing emissions. Indeed, as shown below, the proposed lease parcels are directly within the Pinedale Anticline and next to a slew of active wells.

Producing gas wells as of 2017 next to the proposed parcels for the February 2019 lease sale (in red). The 2008 Ozone Nonattainment Designation Area is in light brown. The BLM field offices are divided by a dark brown line.

BLM’s job estimating emissions is made even easier by the existence of the Kleinfelder Report. The report estimates that a typical gas well in the Upper Green River Basin emits, on average, 14.6 tons of NOx and 5.2 tons of VOCs per year. See Exhibit 1 to Conservation Groups’ Sept. 12, 2018 comments, Kleinfelder, Air Emissions Inventory Estimates for a Representative Oil and Gas Well in the Western United States, 2–3 (Mar. 25, 2013) (report developed for the BLM). All BLM has to do is use this number and multiply it by the estimated number of wells on the proposed lease parcels to calculation emissions. Here, modestly assuming one well per lease,3

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3 In fact, there will likely be more wells because most of the proposed leases are within the “very high” development area, which estimates over 500 wells per township, the “high development” area, which estimates between 100-500
the 39 parcels within the Pinedale area could emit 569.4 tons of NOx per year and 202.8 tons of VOCs a year. Although it is unlikely that all 39 wells will be developed in the same year, even assuming development of 8 wells in the first year, BLM would still be required to conduct a conformity analysis for NOx. And, only 20 wells are required to be developed in the first year to exceed the de minimis levels for VOCs. In reality, the Pinedale Field Office sees more than 150 federal wells drilled per year. See BLM, *Reasonably Foreseeable Development Scenarios for Oil and Gas Activities on Federal Lands in the Pinedale Field Office, Wyoming*, 49, Figure 18 (2016), [https://eplanning.blm.gov/epl-front-office/projects/lup/63200/78639/90138/41Final_PFO_RFD_Figure_17&18.pdf](https://eplanning.blm.gov/epl-front-office/projects/lup/63200/78639/90138/41Final_PFO_RFD_Figure_17&18.pdf).

A similar analysis applies to the Rock Springs Field Office parcels. In the Rock Springs RFDS, the BLM has found that the area where the leases occur has “high” oil and gas occurrence potential. See BLM, *Final Reasonably Foreseeable Development Scenario for Oil and Gas, Rock Springs Field Office, Wyoming*, Figure 41 (2013), [https://eplanning.blm.gov/epl-front-office/projects/lup/13853/46225/49886/RSFO_RFD_FINAL-resized.pdf](https://eplanning.blm.gov/epl-front-office/projects/lup/13853/46225/49886/RSFO_RFD_FINAL-resized.pdf). High occurrence means that development will result in 100 wells per township will be drilled per year. Clearly, BLM has the tools to assess reasonably foreseeable emissions at the lease sale stage but has chosen to postpone its analysis until the APD stage in violation of conformity provisions.

Furthermore, even if the Kleinfelder report did not exist, the reasonably foreseeable nature of the lease parcels is underscored by the fact that the BLM’s own analyses calculate emissions from a *reasonably foreseeable* development scenario (“RFDS”). The agency has even estimated emissions for Pinedale Field Office where some of the parcels are located.4 BLM could also use these estimates to assess conformity.

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4 The FEIS for the Pinedale RMP is available at: [https://bit.ly/2FVg0wk](https://bit.ly/2FVg0wk). The emissions estimates are in Chapter 4 at 4-8, Figure 4-1.
To top it all off, BLM admits that the assumptions in its respective RFDSs are accurate, thereby making emissions even more reasonably foreseeable. EA at 4-4 (“Current APD permitting trends within the field offices confirm that the RFD assumptions are reasonably accurate.”). Based on this information, BLM must complete a conformity analysis.

In response, BLM argues first that emissions are not reasonably foreseeable. BLM Response to Comments at comment # 98. But, as outlined in depth above, emissions are reasonably foreseeable based on BLM’s own data as well as data from Exhibit 1. Thus, BLM’s argument must fail. BLM also argues that “[t]here are no direct effects from the proposed oil and gas lease sale because it is primarily an administrative action that only conveys the mineral rights to the potentially lessee.” EA at 3-11; BLM Response to Comments at comment # 98. But, as the BLM is well-aware, leasing conveys a right to develop, 43 C.F.R. § 3101.2, and is considered an irretrievable commitment of resources. New Mexico ex rel. Richardson, 565 F.3d 683, 717–18 (10th Cir. 2009). It is the point at which BLM commits to allowing development, and thus it is not merely an “administrative action.” Id. at 718. As the court held there, “[b]ecause BLM could not prevent the impacts resulting from surface use after a lease issued, it was required to analyze any foreseeable impacts of such use before committing the resources.” Id. (emphasis added). This mandate coupled with the language of the conformity regulations requiring an analysis before “approv[al] of any activity which does not conform to an applicable [state] implementation plan,” 40 C.F.R. § 93.150(a), makes it clear that BLM is required to conduct a conformity analysis now, at the lease sale stage.

Beyond the issue of reasonable foreseeability, BLM also completely fails to address whether the parcels within the nonattainment area will produce indirect emissions for conformity purposes. See id. § 93.153(b) (requiring a conformity analysis for federal actions which produce “direct and indirect emissions”) (emphasis added). Thus, even if BLM could assume that the lease sale will not produce direct emissions because leasing is “an administrative action,” a point we do not concede, the BLM cannot credibly argue that no indirect emissions will result from its
action. As a result, the BLM must analyze the conformity of the proposed leases as required by the Clean Air Act and NEPA at the lease sale stage.

Finally, the BLM’s failure to conduct an applicability analysis to determine conformity with the Clean Air Act also violates the plain language of FLPMA. As noted above, in the development and revision of land use plans, BLM must “provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards[.]” 43 U.S.C. § 1712(c)(8). The Pinedale RMP does not address the air quality issues presented by the Upper Green River Basin nonattainment area or otherwise conduct a conformity analysis. See generally Pinedale RMP/EIS, available at https://bit.ly/2FVg0wk. And, based on the date of the Rock Springs RMP (approved as the Green River RMP in 1997) there is no way it addresses the 2008 standard either. Indeed, a search of the Rock Springs RMP-EIS fails to location any analysis of the 2008 standard. This conclusion is supported by a glance at BLM’s Analysis of the Management Situation which demonstrates the BLM is recommending revisions to the RMP “to minimize contributions to ozone formation and greenhouse gases.” See BLM, Summary of the Analysis of the Management Situation: Rock Springs Resource Management Plan Revision 363 (2013), https://bit.ly/2HtyMLV.

Pursuant to 43 C.F.R. § 1610.5-6, BLM is required to revise underlying RMPs if “monitoring and evaluation findings, new data, new or revised policy and changes in circumstances affect[,] the entire plan or major portions of the plan[.]” 40 C.F.R. § 1610.5-6. As shown by the map below, the ozone nonattainment area covers almost all of the Pinedale Field Office and approximately one-fourth of the Rock Springs Field Office. Accordingly, BLM is required to revises its underlying RMPs to comply with the Clean Air Act.

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5 Notably, BLM does not respond to this argument in its Response to Comments.
In sum, the BLM cannot ignore its obligations under the Clean Air Act or FLPMA to 1) ensure compliance with federal air quality standards and 2) revise the Pinedale and Rock Springs RMPs based on new information which affects the entire plan. Thus, BLM is required to conduct a conformity analysis and amend both RMPs to “provide for compliance with applicable [air] pollution control laws” before approving actions that may impact attainment with the 2008 NAAQS.

III. BLM Fails to Comply with NEPA and FLPMA.

NEPA is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). The law requires federal agencies to fully consider the environmental implications of their actions, taking into account “high quality” information, “accurate scientific analysis,” “expert agency comments,” and “public scrutiny,” prior to making decisions. Id. § 1500.1(b). This consideration is meant to “foster excellent action,” resulting in decisions that are well informed and that “protect, restore, and enhance the environment.” Id. § 1500.1(c).

NEPA regulations explain that:

Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action. The NEPA process is intended to help public officials
make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

*Id.* § 1500.1(c).

To fulfill the goals of NEPA, federal agencies are required to analyze the “effects,” or impacts, of their actions to the human environment prior to undertaking their actions. *Id.* § 1502.16(d); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (holding that NEPA imposes “action forcing procedures . . . requir[ing] that agencies take a *hard look* at environmental consequences”). To this end, the agency must analyze the “direct,” “indirect,” and “cumulative” effects of its actions, and assess their significance. *Id.* §§ 1502.16(a), (b), and (d). Direct effects include all impacts that are “caused by the action and occur at the same time and place.” *Id.* § 1508.8(a). Indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8(b). Cumulative effects include the impacts of all past, present, and reasonably foreseeable actions, regardless of what entity or entities undertake the actions. *Id.* § 1508.7.

Generally, an agency may prepare an environmental assessment (“EA”) to analyze the effects of its actions and assess the significance of impacts. See *id.* § 1508.9; see also 43 C.F.R. § 46.300. Where impacts are not significant, an agency may issue a Finding of No Significant Impact (“FONSI”) and implement its action. See 40 C.F.R. § 1508.13; see also 43 C.F.R. § 46.325(2). But, where effects are significant, an agency must prepare an Environmental Impact Statement (“EIS”). See 40 C.F.R. § 1502.3.

Federal agencies determine whether direct, indirect, or cumulative impacts are significant by accounting for both the “context” and “intensity” of those impacts. *Id.* § 1508.27. Context “means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality” and “varies with the setting of the proposed action.” *Id.* § 1508.27(a). Intensity “refers to the severity of the impact” and is evaluated according to several additional elements, including: the unique characteristics of the geographic area such as ecologically critical areas; the degree to which the effects are likely to be highly controversial; the degree to which the possible effects are highly uncertain or involve unique or unknown risks; and whether the action has cumulatively significant impacts. *Id.* §§ 1508.27(b)(3), (4), (5), (7).

Within an EA or EIS, the scope of the analysis must include “[c]umulative actions” and “[s]imilar actions.” *Id.* §§ 1508.25(a)(2) and (3). Cumulative actions include action that, “when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” *Id.* § 1508.25(a)(2). Similar actions include actions that, “when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together.” *Id.* § 1508.25(a)(3). Key indicators of similarities between actions include “common timing or geography.” *Id.*
A. BLM’s Proposal to Lease Parcels in the Buffalo Field Office Violates FLPMA and NEPA.

First, because the validity of the Buffalo RMP and FEIS have been called in question by a recent legal ruling, the BLM’s proposal to lease 117 parcels within the Buffalo Field Office without a valid, underlying RMP or FEIS or site-specific EIS addressing the deficiencies identified by this ruling violates FLPMA and NEPA.


In the decision, the court ruled for plaintiff environmental groups on three out of the six claims under NEPA. On the first claim, the court held that “BLM’s failure to consider any alternative that would decrease the amount of extractable coal available for leasing rendered inadequate the Buffalo EIS and Miles City EIS in violation of NEPA.” Western Org. of Resource Councils, 2018 WL 1475470, at *9. On the third claim, the court held that because “[t]he Buffalo RMP ‘contained enough specifics’ to permit a ‘productive analysis’ of the downstream burning of the coal, oil and gas open to potential development under the RMP[s],” the BLM was required to consider these downstream emissions by supplementing the Buffalo FEIS. Id. at *13, *18. Finally, on the fifth claim, the court held that held “BLM’s failure [in the Buffalo RMP and FEIS] to acknowledge th[e] changing science [on the global warming potential of methane] . . . constituted an additional arbitrary decision that undermined the accuracy and integrity of the GWP analysis.” Id. at *16.

As a result of these flaws, the court indicated that the BLM must “conduct a new coal screening to consider climate change impacts,” and “must supplement the . . . Buffalo FEIS with an analysis of the environmental consequences of downstream combustion of coal, oil, and gas open to development under each RMP.” Id. at *17–18. Put simply, “the deficiencies identified in the Buffalo RMP . . . must be remedied through the preparation of a supplemental EIS[.]” Id. at *18. The court also held that the BLM must comply with its findings “at the lease-level and permit-level for any pending or future coal, oil, or gas developments in the Buffalo RMP . . . until BLM produces [] supplemental environmental analyses . . . that comply with NEPA and the APA.” Id. at *19. The court recently reaffirmed that its order “applies when issues any new pending lease of coal, oil, or gas resources in the Buffalo or Miles City planning areas until Federal Defendants produce remedial analyses that comply with its obligations under NEPA.” Exhibit 3 to Conservation Groups’ Sept. 12, 2018 Comments, Order, Western Org. of Resource Councils v. U.S. Bureau of Land Mgmt., CV 16-21-GF-BMM (D. Mont. July 31, 2018).

Despite this ruling, the BLM is still planning to lease approximately 117 parcels within the Buffalo Field Office at the February 2019 lease sale without completing a full NEPA analysis in compliance with Judge Morris’ decision. See map below.
Specifically, the BLM relies on the impacts analysis in the Buffalo RMP and FEIS in the lease sale EA. EA at 1-4 (tiering to the Buffalo RMP and EIS), BLM even refers readers to the greenhouse emissions section of the invalid Buffalo RMP/FEIS. Part 2 EA at 4-6 (“Please refer to the applicable RMP/FEIS, including . . . Section 4.1.1 (beginning on page 650) of the BFO ARMP for a discussion of potential impacts to air quality resulting from oil and gas development, including potential direct GHG emissions.”). But, because the Buffalo RMP and EIS is invalid, this approach cannot stand.

Although it is possible for the BLM to address this gap through the completion of a site-specific NEPA analysis, the EA for the lease sale does not provide the hard look required by NEPA for two reasons: 1) the BLM’s analysis of indirect greenhouse gas emissions fails to calculate emissions for the proposed action and 2) the BLM’s discussion of the global warming potential for methane still fails to acknowledge the changing science in this area.

On the former, the BLM fails to calculate downstream (indirect) greenhouse gas emissions for the proposed action. Instead, the agency uses statewide calculations from the respective RMPs/EISs to estimate indirect GHG emissions for field office wide emissions. See EA at 4-7 to 4-8. But this gives the BLM no information with which to weigh the impacts of leasing 117 Buffalo Field Office parcels or otherwise assess the significance of the proposed action. It also directly violates the ruling in another federal court decision, San Juan Citizens All. v. United States Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1244 (D.N.M. 2018). There, the court held that “BLM’s failure to estimate the amount of greenhouse gas emissions which will result from consumption of the oil and gas produced as a result of development of wells on the leased areas was arbitrary.” Id. (emphasis added). The BLM cannot ignore these binding legal
decisions, but because it does, a significant gap in the EA remains thereby rendering the BLM’s decision to move forward with the lease sale in violation of NEPA and Judge Morris’ order.

In response to this, BLM argues that downstream GHG emissions are not reasonably foreseeable. BLM Response to Comments at comment # 99. But, this assertion is directly contrary to a number of court cases which have found downstream GHG emissions to be reasonably foreseeable. See, e.g., Sierra Club v. Fed. Energy Regulatory Comm’n, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (holding that the Federal Energy Regulatory Commission must analyze downstream GHG emissions from three natural gas pipelines where it has already estimated how much gas the pipelines would transport); Western Org. of Resource Councils v. U.S. Bureau of Land Mgmt., CV 16-21-GF-BMM, 2018 WL 1456624, at *9 (D. Mont. March 23, 2018) (holding that the BLM must analyze downstream GHG emissions at the RMP stage where the underlying RMPs estimated the tons of coal produced); San Juan Citizens All. v. United States Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1244 (D.N.M. 2018) (holding that the BLM must analyze downstream GHG emissions for proposed oil and gas lease parcels).

Next, although the Conservation Groups appreciate the fact that the BLM includes additional information on the GWP of methane and the difference between the 20-year and 100-year GWPs, the agency’s assessment is still incomplete. For example, the BLM includes three different 20-year GWPs for methane: 28 as recommended by the EPA, EA at 3-16, 28 to 36, id., and 21, id. at 4-6. Furthermore, in the chart provided on 4-6, BLM seems to use a GWP of 25. Id. Although in response to comments, BLM admits that this was an error, BLM still fails to explain why it ignores a 2015 analysis of the greenhouse gas emissions associated with coal mine expansions in Colorado’s North Fork Valley, where the U.S. Forest Service, with the BLM as a Cooperating Agency, estimated that the carbon dioxide equivalency (CO₂e) of projected methane emissions should be based on a GWP of 36 based on a 100-year period. See Exhibit 4 to Conservation Groups’ Sept. 12, 2018 Comments, Excerpt from U.S. Forest Service, Rulemaking for Colorado Roadless Areas Supplemental Draft Environmental Impact Statement 34 (Nov. 2015). By ignoring this update, the BLM’s estimate of CO₂e associated with methane emissions fails to acknowledge the changing science on this issue, just as the Buffalo RMP/FEIS did in Western Organization of Resource Councils v. U.S. Bureau of Land Management. 2018 WL 1475470 at *16.

Perhaps more importantly, this assessment also omits any actual calculations of the GWP of emissions from the proposed action. Instead, all emissions are based on field office wide emissions. The Conservation Groups submit that for the BLM to most accurately disclose the greenhouse gas emissions associated with the proposed lease sale and have a full and fair discussion as required by NEPA, the agency must analyze CO₂e emissions from the proposed action, based on both the 20-year and 100-year global warming potentials for methane, which should be 84 and 36, respectively.

The Conservation Groups respectfully requests that the BLM withdraw all of the parcels within the Buffalo Field Office for the February 2019 sale and hold these parcels from further lease sales unless and until the BLM supplements the Buffalo RMP and EIS or completes a full site-specific analysis as required by Judge Morris’ decision.
B. BLM Must Prepare an EIS.

The BLM must also prepare an EIS for the lease sale. A federal agency must prepare an EIS when a major federal action “significantly affects the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.4. A federal action “affects” the environment when it “will or may have an effect” on the environment. 40 C.F.R. § 1508.3 (emphasis added); see also Airport Neighbors Alliance v. U.S., 90 F.3d 426, 429 (10th Cir. 1996).

Significance is gauged based on both the context and intensity of the proposed action. 40 C.F.R. § 1508.27. Context “means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” Id. § 1508.27(a). Intensity “refers to the severity of impact,” and is determined by weighing ten factors, including “[1] [t]he degree to which the proposed action affects public health or safety,” “[2] [u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas,” “[3] [t]he degree to which the effects on the quality of the human environment are likely to be highly controversial,” and “[4] [w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” Id. § 1508.27(b)(2)–(5), (7). For the latter factor, “[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” Id.

Finally, “[i]f an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a project’s impacts are insignificant.” Blue Mtns Biodiversity Proj. v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal quotations omitted) (finding that a timber salvage sale coupled with other salvage sales in the area could result in significant impacts); see also S. Utah Wilderness All. v. Norton, 457 F. Supp. 2d 1253, 1261 (D. Utah 2006), aff’d in part, appeal dismissed in part sub nom. S. Utah Wilderness All. v. Kempthorne, 525 F.3d 966 (10th Cir. 2008).

The first intensity factor under NEPA is “the degree to which the proposed action affects public health and safety.” As discussed more in Section E, there is no doubt the use of fracking impacts public health and safety. See BLM Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 161,128 (Mar. 26, 2015), https://www.gpo.gov/fdsys/pkg/FR-2015-03-26/pdf/2015-06658.pdf (noting that a final rule regulating fracking on federal land will “provide significant benefits to all Americans by avoiding potential damages to water quality, the environment, and public health”); see also Exhibit 5 to Conservation Groups’ Sept. 12, 2018 Comments, Concerned Health Prof’ls of NY & Physicians for Soc. Responsibility, Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction) (5th ed. 2018). Unfortunately, because BLM’s underlying RMPs/FEISs and the EA do not fully analyze the impacts of fracking, the BLM cannot conclude that impacts will be insignificant. For example, although the BLM provide a “Hydraulic Fracturing White Paper” in section 5.6 of the EA, this document is generalized and does not assess the impacts of fracking the specific lease parcels, especially the parcels within the Pinedale and Rock Springs area where increased emissions from fracking will likely worsen the ozone nonattainment area. Indeed, the BLM entirely defers any site-specific analysis of air
emissions from fracking to the APD stage. EA at 5-83 (“Emissions associated with a project, and HF if proposed, will be analyzed through a site specific NEPA document to ensure that the operation will not cause a violation of the Clean Air Act.”).

Ozone pollution is detrimental to public health and welfare, as documented by extensive scientific evidence compiled by the Environmental Protection Agency (“EPA”). Exposure to ozone can harm the respiratory system (the upper airways and lungs), aggravate asthma and other lung diseases, and is linked to premature death from respiratory causes. Studies show harmful health effects from both short-term exposures to ozone (hours to days) and long-term exposures (months to years). Because of this gap, the BLM’s conclusion in the FONSI that “public health or safety would be addressed by following lease stipulations and health and safety regulations, and through conditions of approval imposed as required following site-specific analysis,” is suspect. FONSI at #2. If BLM does not know what impacts may occur, it is questionable whether the agency will be able to remedy these at the APD stage.

A similar argument applies to NEPA’s second and third intensity factors, which require, respectively, a look at the degree to which impacts are highly controversial and the degree to which impacts are highly uncertain or involve unique and unknown risks. Indeed, the situation here is directly similar to the situation in Center for Biological Diversity v. U.S. Bureau of Land Management, where the court held that the BLM’s “unreasonable lack of consideration of how fracking could impact development of the disputed parcels . . . unreasonably distort[ed] BLM's assessment of at least three of the ‘intensity’ factors in its FONSI.” 937 F. Supp. 2d at 1157. There, the court reasoned that fracking was highly controversial based on the possibility of significant environmental degradation, public outcry, and potential threats to health and safety. Id. at 1157–58. Based on the proximity of the February 2019 lease sale parcels to Dinosaur National Monument, Fossil Butte National Monument, Fitzpatrick Wilderness, Bridger Wilderness, and numerous wilderness study areas, there is no doubt that significant environmental impacts and threats to natural resources, recreational opportunities, and public health and safety could occur. Yet, the BLM’s EA fails to address these issues. Thus, BLM again cannot conclude that the impacts from the proposed action will be insignificant.

Finally, as shown below, because the February 2019 lease parcels are directly adjacent to many of the Wyoming March 2019 lease parcels as well as the Colorado, Montana, an Utah March 2019 lease sale parcels, the fourth intensity factor, cumulative impacts, is also implicated by the lease sale, further underscoring the need for an EIS. According to NEPA regulations, “[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7). This latter sentence is particularly important here. As shown by the maps below, the February 2019 lease sale is not occurring in a vacuum. The BLM must study the cumulative impacts of these similar actions occurring within the same area through an EIS.

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6 Between 2008 and 2015, there were more than 1,000 new studies demonstrating the health and environmental harms of ozone. See U.S. Environmental Protection Agency, Fact Sheet, Overview of EPA’s Updates to the Air Quality Standards for Ground-Level Ozone (“2015 Ozone Standard Fact Sheet”), available at https://www.epa.gov/sites/production/files/2015-10/documents/overview_of_2015_rule.pdf.
The Wyoming March 2019 parcels are in brown orange.
GIS information obtained from the BLM.

But, the BLM fails to even mention that other lease sales are occurring in the same area. Instead, the BLM relies entirely on the cumulative impacts analysis in the RMPs for each field office.

Cumulative impacts are addressed in the underlying RMP FEIS’. No impacts beyond those identified in those documents from cumulative actions are expected. Items of special interest are addressed below. Attachment 5.6 includes a White Paper on Hydraulic Fracturing and water availability/use, and is incorporated by reference. Attachment 5.6 concludes that there are adequate water supplies available to support the projected oil and gas RFD on a field office and statewide basis.

EA at 4-22.

The BLM then includes specific cumulative impacts information on sage grouse and big game, but fails to include any analysis of other resource impacts, including impacts to air quality and cumulative climate impacts. This approach is completely in adequate. Now that the BLM knows the exact location of the lease parcels, it must take the cumulative impacts from leasing and developing these specific areas into account before an irretrievable commitment of resources is made. Without a full cumulative impacts analysis, the BLM cannot conclude that the impacts from the proposed lease sale will be insignificant, and the agency’s FONSI cannot stand.
In response to this, BLM argues that NEPA documents for each individual lease sale adequately analyzes cumulative impacts. But, this misses the point. BLM is failing to account for region-wide leasing impacts, which are not bounded by arbitrary lease sale boundaries or state lines. Where BLM’s March 2019 lease sales have parcels directly adjacent to each other but across state lines, no cumulative impacts analysis of cross-state leases occurs in direct violation of NEPA.

C. BLM Improperly Defers Its Site-Specific NEPA Analyses to the Application Permit to Drill Stage.

On a similar note, throughout the EAs for the lease sale, the BLM attempts to segment its analyses by claiming that it will conduct site-specific NEPA analyses at the Application Permit to Drill (“APD”) stage. See, e.g., EA at 1-3 (detailing the agency’s intent to defer site-specific impacts analysis), EA at 3-18 (deferring a site specific analysis of GHG emissions), EA at 4-2 (deferring a site specific analysis of impacts to wilderness), EA at 4-19 (deferring a site specific analysis of impacts to visual resource management). However, BLM’s deferral of comprehensive NEPA analysis at the lease sale stage ignores a crucial distinction—the scope of the action approved at the leasing stage (opening up almost 800,000 acres for oil and gas development) is much broader than the scope of the action approved at the APD stage (a single well). This approach also ignores relevant case law.

When a lease constitutes an irretrievable commitment of resources and impacts at the lease sale stage are reasonably foreseeable, an agency is required to analyze the site-specific impacts of a lease before its issuance. New Mexico ex. rel. Richardson v. U.S. Bureau of Land Mgmt., 565 F.3d 683, 717–18 (10th Cir. 2009); see also Blue Mountains Biodiversity Proj. v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998) (“Nothing in the tiering regulations suggests that the existence of a programmatic EIS for a forest plan obviates the need for any future project-specific EIS, without regard to the nature of magnitude of a project.”). Indeed, “NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment.” U.S. Bureau of Land Mgmt. v. Kern, 284 F.3d 1062, 1072 (9th Cir. 2002); see also 40 C.F.R. § 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”) (emphasis added). This is especially the case if postponing the analysis results in a piecemeal look at the impacts. See 40 C.F.R. § 1508.27 (“Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.”). Finally, as noted above, NEPA provides that the BLM must assess three types of actions: (1) connected actions, (2) cumulative actions, and (3) similar actions. 40 C.F.R. § 1508.25. Connected actions “are closely related and therefore should be discussed in the same impact statement.” Actions are connected if they, among other things: “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” Id.

All of the above requirements support the conclusion that the BLM must analyze the site-specific impacts from its decision to lease federal minerals at the lease sale stage. First, because drilling cannot occur without the BLM first leasing the minerals, leasing and drilling are interdependent, connected actions as defined by NEPA. 40 C.F.R. § 1508.25. Thus, the BLM must estimate the impacts of drilling these wells at the lease sale stage. Second, the Tenth Circuit
has explicitly held that NEPA requires that agencies prepare a site-specific EIS at the lease sale stage when two factors are met: 1) an irretrievable commitment of resources and 2) reasonably foreseeable impacts. New Mexico ex. rel. Richardson v. U.S. Bureau of Land Mgmt., 565 F.3d 683, 717–18 (10th Cir. 2009). First, the court held that issuance of an oil and gas lease without a no surface occupancy (“NSO”) stipulation constituted an irretrievable commitment of resources because the BLM could not completely avoid environmental impacts at the permitting stage without this stipulation. Id. at 718. Second, the court further reasoned that because the lease occurred in an area that had seen “considerable exploration” and “a natural gas supply [was] known to exist beneath the[] parcels,” the impacts from leasing were reasonable foreseeable. Id. at 718–19. Thus, the court concluded that the BLM was required to conduct a site-specific NEPA analysis of the impacts of lease “prior to its issuance.” Id.

Here, the situation is directly similar. First, the BLM admits that leasing is an irretrievable commitment of resources and fails to impose full NSO stipulations for any of the parcels. EA at 1-3. The BLM also admits that the leases are in areas that have seen extensive development. See id. at 4-5. Thus, BLM is required by law to conduct a site-specific analysis of the impacts from the issuance of its leases.

Unfortunately, the BLM uses outdated language from the Tenth Circuit’s decision in Park County Resource Council, Inc. v. U.S. Department of Agriculture, 817 F.2d 609 (10th Cir. 1987), to conclude that “[f]iling an APD is the initial point at which at site-specific environmental appraisal can be undertaken.” Id. at 1-3. But, the Tenth Circuit in New Mexico ex. rel. Richardson v. U.S. Bureau of Land Management, directly addressed the Park County decision and held that it in conjunction with the decision in Pennaco Energy v. U.S. Department of Interior, 377 F.3d 1147 (10th Cir. 2004), established that “there is no bright line rule that site-specific analysis may wait until the APD. Instead, the inquiry is necessarily contextual.” 565 F.3d at 717. The court then laid out two factors to determine whether a NEPA analysis was required at the lease sale stage: 1) whether an irretrievable had occurred and 2) whether environmental impacts were reasonably foreseeable.” Id. at 718. Here, both factors are met and thus the BLM is required to conduct a full site-specific analysis of the environmental impacts from the February 2019 lease sale.

Although BLM argues that when it “cannot determine at the leasing stage whether or not a nominated parcel will actually be leased, or if it is leased, whether or not the lease would be explored or developed[,]” EA at 1-3, this conclusion is undermined by the extensive oil and gas development which stretches across the state of Wyoming, as demonstrated by the map below. Additionally, BLM is not required to know every single detail before analyzing the environmental impacts. Instead, impacts must simply be reasonably foreseeable.
The February 2019 lease parcels are barely visible underneath existing oil and gas wells.

BLM also argues that the lease sale is an administrative action which does not result in direct resource impacts. But, this argument is undermined by BLM’s statement:

Once a parcel is sold and the lease is issued, the lessee has the right to use as much of the leased lands as is necessary to explore and drill for all of the oil and gas within the lease boundaries, subject to the stipulations attached to the lease, restrictions derived from specific nondiscretionary statutes, and other reasonable measures to minimize adverse impacts (see 43 § CFR 3101.1-2).

EA at 1-3. As recognized by the court, the lease sale is the point of no return for the BLM. *New Mexico ex. rel. Richardson*, 565 F.3d at 717–18. Thus, unless the BLM includes a NSO stipulation for the entire parcel, the agency is required to conduct a site-specific analysis.

Finally, the need to do a full NEPA at the lease sale stage is further supported by the fact that the BLM has frequently approves APDs without additional NEPA analysis. For example, the BLM has approved or is planning to approve:

In sum, unless BLM actually commits, through the imposition of a lease stipulation or stipulations, to conduct additional NEPA analysis at the drilling stage, it more often than not does not happen. This means that any commitment to address the impacts development of the proposed leases through subsequent NEPA is, at best, hollow, and at worst, a deliberate attempt to avoid accountability to addressing potentially significant, connected environmental impacts under NEPA.

D. BLM Fails to Analyze a Range of Reasonable Alternatives.

NEPA requires agencies to “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14 (emphasis added). An agency violates this provision of NEPA where it considers “essentially identical” alternatives.” Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1039 (9th Cir. 2008). Indeed, as noted above, a federal district court recently invalidated a BLM alternatives analysis because of “BLM’s failure to consider any alternative that would decrease the amount of extractable coal available for leasing[.]” Western Org. of Resource Councils v. U.S. Bureau of Land Mgmt., CV 16-21-GF-BMM, 2018 WL 1475470, at *9 (D. Mont. March 26, 2018). The court reasoned that because BLM’s statutory mandate included “tak[ing] into account the long-term needs of future generations for renewable and nonrenewable resources,” the agency could have eliminated coal from its available leasing. Id. at *7.

Here, similar to the Western Organization of Resource Councils case, the BLM has failed to consider any alternatives that significantly reduce the permitted development in order to address other resource concerns such as air quality or climate change. BLM preferred action alternative permits leasing of 584 parcels while BLM’s “lease all available parcels” alternative proposes to lease 674 parcels. EA at 2-1, 2-3. This all-or-nothing approach (lease 100% or 87%)

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7 It should be noted that this list of categorical exclusions only includes a handful of the CXs approved with the relevant BLM field offices.
leaves the BLM and the public without any basis with which to compare and contrast the various proposals or otherwise determine the best course of action.

In response to this, BLM notes that it has analyzed a no action alternative and that this is sufficient. But again, this misses the point. The Conservation Groups are requesting that BLM consider alternatives that reduce the level of development based on the impacts from fossil fuels. A no action alternative completely eliminates development and provides a limited basis with which to compare with.

Perhaps more importantly, the BLM also fails to consider an alternative that will reduce greenhouse gas emissions. As noted above, consideration of such an alternative is well within BLM’s statutory mandate. Western Org. of Resource Councils, 2018 WL 1475470, at *7. Indeed, various agencies policies, including guidance from the CEQ, note that, “[c]onsidering alternatives, including alternatives that mitigate GHG emissions, is fundamental to the NEPA process and accords with NEPA Sections 102(2)(C) and 102(2)(E).” See Exhibit 6 to Conservation Groups’ Sept. 12, 2018 Comments, CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews at 14 (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf. At a minimum, BLM must consider these alternatives and discuss why they do or do not meet the BLM’s statutory mandates.

E. BLM Fails to Analyze the Impacts of Multi-Stage Hydraulic Fracturing and Horizontal Drilling in Violation of NEPA and FLPMA.

BLM proffers to lease a number of parcels in the Newcastle Field Office area in the February 2019 lease sale. But, because the RMP/FEIS for this office, the New Castle Field Office Resource Management Plan (“Newcastle RMP”) and Final EIS, is severely out-of-date, fails to analyze the impacts of fracking and horizontal drilling, and the EA does not correct this deficiency, the BLM cannot lease these parcels.

Courts have held that when the BLM’s lease sale proposes parcels for fracking, the agency must analyze fracking either in the broader RMP or the EA. See, e.g., Ctr. for Biological Diversity v. Bureau of Land Mgmt., 937 F. Supp. 2d 1140, 1156 (N.D. Cal. 2013) (invalidating BLM lease sale because “the scale of fracking in shale-area drilling today involves risks and concerns that were not addressed by the PRMP/FEIS’ general analysis of oil and drilling development in the area”). Here, BLM has not analyzed the environmental impacts of this new extraction technology or provided even a general comparison of environmental impacts associated with conventional drilling vs. horizontal drilling/multi-stage fracturing.

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8 Although the Trump Administration has since revoked the CEQ’s August 2016 Climate Guidance, the BLM is still bound by the CEQ’s NEPA regulations and existing case law incorporating the requirements of the Guidance. See, e.g., Sierra Club v. Fed. Energy Regulatory Comm’n, 867 F.3d 1357, 1374 (D.C. Cir. 2017).


10 The term “fracking” refers to extraction methods using a combination of horizontal drilling and multi-stage fracturing.
BLM completed the Newcastle RMP and FEIS in 2000. But, the frequent use of multi-stage hydraulic fracturing coupled with horizontal drilling did not occur the early 2000s. See U.S. Energy Info. Admin., *Hydraulically Fractured Wells Provide Two-Thirds of U.S. Natural Gas Production* (2015), [https://www.eia.gov/todayinenergy/detail.php?id=26112](https://www.eia.gov/todayinenergy/detail.php?id=26112); EIA *Hydraulic Fracturing Accounts for About Half of Current U.S. Crude Oil Production* (2015), [https://www.eia.gov/todayinenergy/detail.php?id=25372](https://www.eia.gov/todayinenergy/detail.php?id=25372). In contrast, today, 67% of the U.S.’s natural gas comes from wells that use fracking, and 50% of the U.S.’s oil comes from wells that use fracking. *Id.* As the BLM is well aware, the use of multi-stage fracking coupled with horizontal drilling not only opened up vast areas of minerals that were previously uneconomical to extract, the process of fracking causes more intense impacts to our air, water, land, and wildlife. See Exhibit 5 to Conservation Groups’ Sept. 12, 2018 Comments, Concerned Health Prof’ls of NY & Physicians for Soc. Responsibility, *Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction)* (5th ed. 2018). Because the geographic range, the extraction technology, and the intensity of oil and gas development has changed significantly since 2000, the BLM must analyze these impacts in either a revised RMP and accompanying FEIS or an EA/EIS for the lease sale. Unfortunately for the BLM, neither the Newcastle RMP nor the EA for lease sale meet these requirements.

To start, a search of the Newcastle RMP and FEIS fails to uncover in a single mention of multi-stage hydraulic fracturing and horizontal drilling. See generally Newcastle RMP/FEIS. The EA for the February 2019 lease sale fails to correct this deficiency. The main information on fracking in the EA is a Hydraulic Fracturing White Paper in Appendix E. While the Conservation Groups appreciate the fact that the White Paper includes information on the process of fracking as well as a discussion of some of the impacts that will result from the use of multi-stage fracking and horizontal drilling, the white paper is not enough to satisfy BLM’s obligation under NEPA because the BLM fails to analyze the site-specific impacts of fracking for the lease parcels. For example, in the white paper, BLM notes that gas emissions may result from fracking but fails to discuss actual impacts from the February 2019 lease sale. Instead the agency punts on this issue and notes that “[e]missions associated with a project and HF if proposed will be analyzed through a site specific NEPA document to ensure the operation will not cause a violation of the Clean Air Act.” *EA* at 5-83. As noted above, the areas proposed for leasing are heavily developed, therefore there is no doubt that BLM could estimate emissions from fracking for the sale based on current drilling in the area. But, the BLM fails to do this here. The BLM’s discussion of potential impacts to water from fracking follows in a similar vein. See *id.* BLM calculates water use for fracking on a statewide level but nothing in the white paper discloses impacts from the proposed action at hand—issuance of leases for 568 parcels across the state—an action which could result in potentially significant impacts to water quality and quantity.

In response to this argument, BLM contends that the existing RMP and the EA white paper is sufficient and that development cannot be reasonably determined at the lease sale stage. But, as detailed above, the white paper omits key, site-specific information analyzing the impacts.
of fracking: quantification of air quality and water quality and quantity impacts. A federal district court recently reaffirmed that such an analysis is required at the leasing stage. *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.* No. 16-CV-376-MCA-JHR, 2018 WL 2994406, at *19 (D.N.M. June 14, 2018) (holding that “sufficient information is available at this stage to make estimates of potential water usage for the different methods of hydraulic fracturing, and thus BLM must use that information in deciding whether the action results in a significant impact.”). Additionally, as discussed above, the impacts from the sale are reasonably foreseeable because much of Wyoming is heavily developed. Thus, BLM can estimate likely development as it consistently does for its Reasonably Foreseeable Development Scenarios.

BLM’s lack of analysis on the impacts from fracking not only violates NEPA but also violates FLPMA. As noted above, FLPMA requires that the BLM amend an RMP whenever there is a need to “[c]onsider a proposal or action that does not conform to the plan,” “respond to new, intensified, or changed uses on public land,” or “consider significant new information from resource assessments, monitoring, or scientific studies that change land use plan decisions.” BLM Land Use Planning Handbook, H-1610-1, Section VII.B at 45. At a minimum, the use of multi-stage fracking coupled with horizontal drilling in the Newcastle Field Office constitutes a “new, intensified, or changed use[] on public land.” As a result, the BLM cannot move forward with leasing the parcels in this area until it either completes an amendment to the RMP or includes a full analysis of the impacts of fracking and horizontal drilling in a revised EA or EIS.

**F. BLM Fails to Properly Analyze the Direct Impacts of Greenhouse Gas Emissions that Would Result from Issuing the Proposed Lease Parcels.**

Although the Conservation Groups appreciate the fact that the Wyoming BLM included some information on indirect greenhouse gas emissions, unfortunately, the agency completely fails to calculate direct emissions and the indirect, site-specific emissions from the actual lease parcels.

For example, in order to calculate direct emissions for the Buffalo Field Office parcels, the BLM relies entirely on the GHG calculations from the Greater Sage Grouse RMP Amendment. EA at 4-6 (“Annual emissions for activities in the BFO, as analyzed in the Buffalo ARMP for 2024, are estimated to be 101,448 mt for natural gas, 110,721 mt for coalbed natural gas, 50,099 mt for oil, with a total 262,267 mt CO2e (RMP Table 4.24)”)). This information is based on field office wide emissions and not the specific lease parcels. Therefore, it gives the BLM no basis to determine whether or not to approve the proposed action.

BLM also arbitrarily concludes for each field office that “[t]he average number of oil and gas wells drilled annually in the [High Plains District] HPD and probable GHG emission levels, when compared to the total GHG emission estimates from the total number of Federal oil and gas wells in the state, represent an incremental contribution to the total regional and global GHG emission levels.” EA at 4-5. But, because BLM does not calculate lease sale emissions for the specific parcels, the BLM has no basis to support its conclusion. More importantly, as the CEQ has recognized, “a statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether or to what extent to
consider climate change impacts under NEPA.” Exhibit 6 at 11. Thus, such a statement is inappropriate and irrelevant to BLM’s analysis.

BLM’s omission of emissions calculations is particularly frustrating because there is no doubt that the BLM has the tools to estimate emissions from the specific lease parcels. For example, in the BLM’s Royal Gorge Field Office of Colorado, the agency contracted with URS Group Inc. to prepare an analysis of air emissions from the development of seven oil and gas lease parcels. See Exhibit 7 to Conservation Groups’ Sept. 12, 2018 Comments, URS Group Inc., “Draft Oil and Gas Air Emissions Inventory Report for Seven Lease Parcels in the BLM Royal Gorge Field Office,” Prepared for BLM, Colorado State Office and Royal Gorge Field Office (July 2013). This report estimated greenhouse gas emissions on a per well basis. See Exhibit 7 at 3, 5. This report was later supplanted by the Colorado Air Resource Management Modeling Study, or CARMMS, which estimated reasonably foreseeable emissions of greenhouse gases, criteria pollutants, and hazardous air pollutants associated with oil and gas development throughout Colorado, as well as part of New Mexico, and modeled air quality impacts. See Exhibit 8 to Conservation Groups’ Sept. 12, 2018 Comments, ENVIRON, “Colorado Air Resource Management Modeling Study (CARMMS) 2021 Modeling Results for the High, Low and Medium Oil and Gas Development Scenarios,” Prepared for BLM Colorado State Office (January 2015) (updated report available at https://on.doi.gov/2I7vGhZ).

As part of the CARMMS report, the BLM estimated annual per well emissions, including greenhouse gas emissions, as follows:

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<th>PM$_{2.5}$</th>
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<td>Conventional Construction</td>
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<td>0.64</td>
<td>0.05</td>
<td>0.23</td>
<td>0.72</td>
<td>0.02</td>
<td>108.1</td>
<td>0.00</td>
<td>0.00</td>
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</tr>
<tr>
<td>CBM Construction</td>
<td>3.37</td>
<td>0.44</td>
<td>0.03</td>
<td>0.12</td>
<td>0.36</td>
<td>0.01</td>
<td>56.58</td>
<td>4.06</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>Conventional Production</td>
<td>1.15</td>
<td>0.15</td>
<td>6.67</td>
<td>1.30</td>
<td>0.73</td>
<td>0.00</td>
<td>251.9</td>
<td>17.14</td>
<td>0.00</td>
<td>0.43</td>
</tr>
<tr>
<td>CBM Production</td>
<td>2.25</td>
<td>0.25</td>
<td>13.10</td>
<td>1.13</td>
<td>0.62</td>
<td>0.00</td>
<td>181.6</td>
<td>19.05</td>
<td>0.00</td>
<td>1.31</td>
</tr>
</tbody>
</table>

It is notable that, based on this estimate, total CO$_2$ emissions associated with construction and production of conventional (rather than “CBM” or coalbed methane) wells, could be as much as 360 tons per year. And, to top it off, this number would very likely increase for an unconventional oil or gas well, as shown by the Kleinfelder Report, which estimates emissions for representative oil and gas wells in the Uinta, Upper Green River, San Juan, Williston, and Denver Basins. See Exhibit 1.
Either way, the BLM has the capability to analyze direct emissions and cannot forgo a site-specific analysis at the lease sale stage.

**G. BLM Fails to Analyze the Cumulative Impacts That Will Occur as a Result of Greenhouse Gas Emissions from the Lease Sale.**

As noted above, The BLM’s analyses also completely fail to account for greenhouse gas emissions from cumulative and similar actions. Indeed, the BLM does not even attempt to estimate cumulative impacts from greenhouse gas emissions from the project and fails to actually include a section identifying cumulative impacts at all. See EA at 4-22. Thus, the BLM is essentially relying entirely on the various RMPs/FEISs, most of which are outdated and/or invalid, and all which fail to analyze the site-specific cumulative impacts.

According to NEPA, “[c]umulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* NEPA requires an agency to analyze the impacts of “similar” and “cumulative” actions in the same NEPA document in order to adequately disclose impacts in an EIS. *Id.* §§ 1508.25(a)(2) and (3). Similar actions are those which have “common timing and geography.” *Id.* § 1508.25(a)(3).

A demonstration of the scale of proposed development in Wyoming and surrounding states is made possible by looking at all past and pending BLM oil and gas leases sales within the last year. It is also notable that at the same time and in this same region, the BLM has sold, is selling, and will be selling thousands of acres of oil and gas leases, including:


BLM cannot ignore the impacts from these similar, cumulative federal lease sales. For example, as shown by the map included above, oil and gas lease parcels are intertwined geographically with all of the other lease sales occurring in 2019 in Wyoming.

A similar gap occurs with regard to future oil and gas projects. Although the BLM has in the past included a map of the lease parcels near certain projects, the BLM fails to do so here. The BLM also fails to quantify GHG emissions from these projects in conjunction with the lease or otherwise assess the significance of these actions.

The need to take into account “similar” and “cumulative” actions is underscored by the fact that the BLM acknowledges that the proper geographic area for analyzing and assessing the impacts of greenhouse gas emissions is on a statewide, regional, and global scale. See, e.g., EA at 4-5 (“The average number of oil and gas wells drilled annually in the HPD and probable GHG emission levels, when compared to the total GHG emission estimates from the total number of Federal oil and gas wells in the state, represent an incremental contribution to the total regional and global GHG emission levels.”). Although this assessment was apparently prepared to try to mislead the public into believing that emissions from the proposed development are not significant, it actually emphasizes the need for the BLM to not simply account for emissions from the proposed lease sales, but to also account for all greenhouse gas emissions associated with BLM-approved oil and gas projects and lease sales region-wide. The BLM cannot insinuate that emissions are insignificant in the context of state and regional emissions, but then fail to disclose the direct, indirect, and cumulative greenhouse gases that would result from all other “similar” and “cumulative” actions within the state and region. Clearly, this failure is in violation of the NEPA’s requirement to analyze cumulative and similar impacts with common timing and geography.

H. BLM Fails to Analyze the Costs of Reasonably Foreseeable Carbon Emissions Using Well-Accepted, Credible, GAO-Endorsed, Interagency Methods for Assessing Carbon Costs.

In addition to an incomplete cumulative impacts analysis, the agency omits a discussion on the social cost of carbon protocol, a valid, well-accepted, credible, and interagency-endorsed
method\(^\text{12}\) of calculating the costs of greenhouse gas emissions and understanding the potential significance of such emissions while simultaneously disclosing that monetary benefits will result from the lease sale. See EA at 2-1 (“Foregoing offering these lands could constrain local supplies and affect expected income in the form of royalty payments from production of the Federal minerals.”), EA at 4-2 (“The State of Wyoming, as well as many counties and communities within, rely on oil and gas development as an important part of their economic base. The employment and purchasing opportunities associated with developing and producing wells on these leases would also be foregone, as would the opportunity to provide oil and gas resources from these lease parcels to help meet the nation’s energy needs [should the agency choose the no action alternative]. Refer to the applicable RMP FEISs, including Section 4.11 of the Wyoming Greater Sage-Grouse Proposed Land Use Plan Amendment and FEIS (beginning on page 4-134) for additional discussion of potential socioeconomic impacts.”). Failure to use this best available science in the EA violates NEPA’s hard look mandate.

The social cost of carbon protocol for assessing climate impacts is a method for “estimat[ing] the economic damages associated with a small increase in carbon dioxide (CO2) emissions, conventionally one metric ton, in a given year [and] represents the value of damages avoided for a small emission reduction (i.e. the benefit of a CO2 reduction).” Exhibit 9 to Conservation Groups’ Sept. 12, 2018 Comments, U.S. Environmental Protection Agency (“EPA”), “Fact Sheet: Social Cost of Carbon” (Nov. 2013) at 1, formerly available online at https://www.epa.gov/climatechange/social-cost-carbon. The protocol was developed by a working group consisting of several federal agencies.


\(^{12}\) Although Executive Order 13,783 disbanded the Interagency Working Group, the entity which developed the social cost of carbon protocol, and withdrew the technical support documents discussed below, the protocol is still “generally accepted in the scientific community.” 40 C.F.R. § 1052.22(b)(4).

Depending on the discount rate and the year during which the carbon emissions are produced, the Interagency Working Group estimates the cost of carbon emissions, and therefore the benefits of reducing carbon emissions, to range from $10 to $212 per metric ton of carbon dioxide. See Chart Below. In one of its more recent update to the Social Cost of Carbon Technical Support Document, the White House’s central estimate was reported to be $36 per metric ton. Exhibit 14 at 4.


<table>
<thead>
<tr>
<th>Year</th>
<th>5% Average</th>
<th>3% Average</th>
<th>2.5% Average</th>
<th>High Impact (95th Pct at 3%)</th>
</tr>
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<tbody>
<tr>
<td>2010</td>
<td>10</td>
<td>31</td>
<td>50</td>
<td>86</td>
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<tr>
<td>2015</td>
<td>11</td>
<td>36</td>
<td>56</td>
<td>105</td>
</tr>
<tr>
<td>2020</td>
<td>12</td>
<td>42</td>
<td>62</td>
<td>123</td>
</tr>
<tr>
<td>2025</td>
<td>14</td>
<td>46</td>
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<td>138</td>
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<tr>
<td>2030</td>
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<td>2045</td>
<td>23</td>
<td>64</td>
<td>89</td>
<td>197</td>
</tr>
<tr>
<td>2050</td>
<td>26</td>
<td>69</td>
<td>95</td>
<td>212</td>
</tr>
</tbody>
</table>

Most recent social cost of carbon estimates presented by Interagency Working Group on Social Cost of Carbon. The 95th percentile value is meant to represent “higher-than-expected” impacts from climate change. See Exhibit 14.

Although often utilized in the context of agency rulemakings, the protocol has been recommended for use and has been used in project-level decisions. For instance, the EPA recommended that an EIS prepared by the U.S. Department of State for the proposed Keystone XL oil pipeline include “an estimate of the ‘social cost of carbon’ associated with potential increases of GHG emissions.” Exhibit 16 to Conservation Groups’ Sept. 12, 2018 Comments, EPA, Comments on Supplemental Draft EIS for the Keystone XL Oil Pipeline (June 6, 2011).
More importantly, BLM’s Billings Field Office, has also utilized the social cost of carbon protocol in the context of oil and gas approvals. For example, the Billings Field Office estimated “the annual SCC [social cost of carbon] associated with potential development on lease sale parcels.” Exhibit 17 to Conservation Groups’ Sept. 12, 2018 Comments, BLM, “Environmental Assessment for October 21, 2014 Oil and Gas Lease Sale,” DOI-BLM-MT-0010-2014-0011-EA (May 19, 2014) at 76, https://blm_prod.opengov.ibmcloud.com/sites/blm.gov/files/MT-DAKS%20Billings%20Oct%202014%20EA%20Protest.pdf. In conducting its analysis, the BLM used a “3 percent average discount rate and year 2020 values,” presuming social costs of carbon to be $46 per metric ton. Id. Based on its estimate of greenhouse gas emissions, the agency estimated total carbon costs to be “$38,499 (in 2011 dollars).” Id. In Idaho, the BLM also utilized the social cost of carbon protocol to analyze and assess the costs of oil and gas leasing. Using a 3% average discount rate and year 2020 values, the agency estimated the cost of carbon to be $51 per ton of annual CO$_2$e increase. See Exhibit 18 to Conservation Groups’ Sept. 12, 2018 Comments, BLM, “Little Willow Creek Protective Oil and Gas Leasing,” EA No. DOI-BLM-ID-B010-2014-0036-EA (February 10, 2015) at 81, https://eplanning.blm.gov/epl-front-office/projects/nepa/39064/55133/59825/DOI-BLM-ID-B010-2014-0036-EA_UPDATED_02272015.pdf. Based on this estimate, the agency estimated that the total carbon cost of developing 25 wells on five lease parcels to be $3,689,442 annually. Id. at 83.

To be certain, the social cost of carbon protocol presents a conservative estimate of economic damages associated with the environmental impacts climate change. As the EPA has noted, the protocol “does not currently include all important [climate change] damages.” Exhibit 9 at 1. As explained:

The models used to develop [social cost of carbon] estimates do not currently include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature because of a lack of precise information on the nature of damages and because the science incorporated into these models naturally lags behind the most recent research.

Id. In fact, more additional studies have reported significantly higher carbon costs. For instance, a report published in 2015 found that current estimates for the social cost of carbon should be increased six times for a mid-range value of $220 per ton. See Exhibit 17 to the Conservation Groups’ June 7, 2018 Comments, Moore, C.F. and B.D. Delvane, “Temperature impacts on economic growth warrant stringent mitigation policy,” Nature Climate Change 2 (January 12, 2015). And a report from 2017, estimated carbon costs to be $50 per metric ton, a value that experts have found to be the “best estimate of the social cost of greenhouse gases.” See Exhibit 19, Revesz, R. et al. “Best cost estimate of greenhouse gases,” 357 Science 655, 655 (Aug. 18, 2017). In spite of uncertainty and likely underestimation of carbon costs, nevertheless, “the SCC is a useful measure to assess the benefits of CO2 reductions,” and thus a useful measure to assess the costs of CO2 increases. Exhibit 9.

That the economic impacts of climate change, as reflected by an assessment of social cost of carbon, should be a significant consideration in agency decision making, is emphasized by a 2014 White House report, which warned that delaying carbon reductions would yield significant
economic costs. See Exhibit 20, Executive Office of the President of the United States, “The Cost of Delaying Action to Stem Climate Change,” (July 2014). As the report states:

[D]elaying action to limit the effects of climate change is costly. Because CO$_2$ accumulates in the atmosphere, delaying action increases CO$_2$ concentrations. Thus, if a policy delay leads to higher ultimate CO$_2$ concentrations, that delay produces persistent economic damages that arise from higher temperatures and higher CO$_2$ concentrations. Alternatively, if a delayed policy still aims to hit a given climate target, such as limiting CO$_2$ concentration to given level, then that delay means that the policy, when implemented, must be more stringent and thus more costly in subsequent years. In either case, delay is costly.

*Id.* at 1.

The requirement to analyze the social cost of carbon is supported by the general requirements of NEPA and is specifically supported in federal case law. Courts have ordered agencies to assess the social cost of carbon pollution, even before a federal protocol for such analysis was adopted. In 2008, the U.S. Court of Appeals for the Ninth Circuit ordered the National Highway Traffic Safety Administration to include a monetized benefit for carbon emissions reductions in an Environmental Assessment prepared under NEPA. *Center for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1203 (9th Cir. 2008). The Highway Traffic Safety Administration had proposed a rule setting corporate average fuel economy standards for light trucks. A number of states and public interest groups challenged the rule for, among other things, failing to monetize the benefits that would accrue from a decision that led to lower carbon dioxide emissions. The Administration had monetized the employment and sales impacts of the proposed action. *Id.* at 1199. The agency argued, however, that valuing the costs of carbon emissions was too uncertain. *Id.* at 1200. The court found this argument to be arbitrary and capricious. *Id.* The court noted that while estimates of the value of carbon emissions reductions occupied a wide range of values, the correct value was certainly not zero. *Id.* It further noted that other benefits, while also uncertain, were monetized by the agency. *Id.* at 1202.

In 2014, a federal court did likewise for a federally-approved coal lease. That court began its analysis by recognizing that a monetary cost-benefit analysis is not universally required by NEPA. See *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F.Supp. 3d 1174, 1193 (D. Colo. 2014) (citing 40 C.F.R. § 1502.23). However, when an agency prepares a cost-benefit analysis, “it cannot be misleading.” *Id.* at 1182 (citations omitted). In that case, the NEPA analysis included a quantification of benefits of the project, but, the quantification of the social cost of carbon, although included in earlier analyses, was omitted in the final NEPA analysis. *Id.* at 1196. The agencies then relied on the stated benefits of the project to justify project approval. This, the court explained, was arbitrary and capricious. *Id.* Such approval was based on a NEPA analysis with misleading economic assumptions, an approach long disallowed by courts throughout the country. *Id.* Furthermore, the court reasoned that even if the agency had decided that the social cost of carbon was irrelevant, the agency must still provide “justifiable reasons for not using (or assigning minimal weight to) the social cost of carbon protocol . . . .” *Id.* at 1193 (emphasis added). In August 2017, a federal district court in Montana cited to the


In response to this, BLM argues that because the Conservation Groups submit a social cost of carbon argument similar to what it has submitted in the past, the substance of the argument is irrelevant. BLM Response to Comments, comment # 107. But, this ignores the fact that BLM is undertaking a new decision to lease new areas of land. Additionally, BLM’s NEPA documents include misleading statistics about the benefits of leasing while ignore the costs. See EA at 4-20. BLM must address this issue and account for why it is ignore this tool to assess the significance of its action.

In sum, the social cost of carbon provides a useful, valid, and meaningful tool for assessing the climate consequences of the proposed leasing, and the BLM’s complete failure to include it while touting the economic benefits of the lease sale is arbitrary and capricious.

I. BLM Should Use Its Discretion Not to Lease the Proposed Parcels.

The BLM has broad discretion and remove the parcels from nomination. The agency’s chosen path of opening this vast swath of Wyoming up to oil and gas development would threaten our climate, clean air, clean water, wildlife, and communities. Quite simply, developing this area for oil and gas represents an unnecessary and avoidable risk that would threaten Wyoming’s other important multiple use resources.

BLM has broad discretion – and often the responsibility, though too often ignored – not to lease public lands for minerals development to safeguard other multiple use, environmental, and human health resources and values. See, e.g., Udall v. Tallman, 380 U.S. 1 (1965); Rocky Mountain Oil & Gas Ass’n v. U.S. Forest Serv. 157 F.Supp.2d 1142 (D. Mont. 2000). BLM’s authority to open these parcels to oil and gas development is derived from the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq. Nowhere does the Mineral Leasing Act (“MLA”) mandate that any particular lands be offered for lease. Rather, the Act states generally that “[a]ll lands
subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.” 30 U.S.C. § 226(a) (emphasis added). The Ninth Circuit has held that the “permissive word ‘may’ in § 226(a) allows the Secretary to lease such lands, but does not require him to do so…. [T]he Secretary has discretion to refuse to issue any lease at all on a given tract.” Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1975). The Supreme Court reached the same conclusion in Udall v. Tallman, 380 U.S. 1, 4 (1965), in which the Court declared that the Mineral Leasing Act “left the Secretary discretion to refuse to issue any lease at all on a given tract.” See also Bob Marshall All. v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988) (providing that refusal to issue leases constitutes a “legitimate exercise of the discretion granted to the Interior Secretary”); McDonald v. Clark, 771 F.2d 460, 463 (10th Cir. 1985) (“While the statute gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory.”); McTiernan v. Franklin, 508 F. 2d 885, 887 (10th Cir. 1975) (under § 226(a), the government “may refuse to issue any lease at all on a given tract”); Pease v. Udall, 332 F.2d 62, 63 (9th Cir. 1964) (finding that the MLA “has consistently been construed as leaving to the Secretary, within his discretion, a determination as to what lands are to be leased thereunder”); Pacific Legal Foundation v. Watt, 529 F.Supp. 982, 991 n.14 (D. Mont. 1982) (under § 226(a) “the Secretary has discretion either to issue or refuse to issue oil and gas leases”).

Indeed, BLM’s discretion over oil and gas leasing is so great that courts have held that the agency may decide not to allow leasing even after the lands have been offered for lease and a qualified applicant selected. In McDonald, the Tenth Circuit Court of Appeals provided: “The fact that land has been offered for lease does not bind the Secretary to actually lease the land, nor is the Secretary bound to lease the land when a qualified applicant has been selected.” 771 F.2d at 463. The Court continued, saying “the Secretary may withdraw land from leasing at any time before the actual issuance of the lease, even if the offer was filed long before the determination not to lease was made.” Id. (citing Arnold v. Morton, 529 F.2d 1101, 1106 (9th Cir. 1976); Schraier v. Hickel, 419 F.2d 663, 665-67 (D.C. Cir. 1969)).

Moreover, nothing in the Federal Onshore Oil and Gas Leasing Reform Act (“FOOGLRA”) requires BLM to open lands at the behest of the oil and gas industry. The MLA, as amended by FOOGLRA in 1987, 30 U.S.C. § 181 et seq., simply requires BLM to consider oil and gas leasing on land consistent with the RMP. As identified above, just because land is identified for leasing does not mean that it must be leased. If review of a potential lease proposed for sale reveals problems, or that other resources and values should be protected, the agency can decide not to lease, period, and in fact, may be duty-bound, pursuant to laws such as FLPMA, not to lease to ensure that other resources and values are protected. For example, in Marathon Oil Co., 139 IBLA 347 (1997), BLM removed parcels from a competitive lease sale for environmental reasons, even after they had been offered for sale pursuant to industry nomination. In that case, the IBLA held that “BLM enjoys considerable discretion to depart from its RMP in any specific case, and it may well be able to justify excluding these parcels from leasing for environmental purposes.” Id. at 356.

The MLA and FOOGLRA do not in any way restrict the factors that BLM may consider when exercising its considerable discretion under § 226(a). Therefore, even if the BLM bases its decision entirely on the public’s overwhelming opposition to oil and gas development in this
area, it has the authority to do so. Indeed, it would be irresponsible for BLM to propose these lease parcels for sale without first performing the necessary due diligence and environmental review to determine, on a site-specific basis, whether these lands should be conserved as is.

Based on this expansive authority and discretion, as well as the reasons outlined above, we implore BLM to reconsider its decision to lease the February 2019 parcels.

IV. Conclusion

In sum, the BLM’s EA and FONSI for the February 2019 competitive oil and gas lease in Wyoming violate the Clean Air Act, FLPMA, and NEPA, including failing to demonstrate compliance with Judge Morris’ order in Western Organization of Resource Councils v. U.S. Bureau of Land Management, 2018 WL 1475470. As a result, the Conservation Groups request that BLM defer all of the proposed parcels unless and until it corrects these deficiencies.

Sincerely,

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