

**UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
BOARD OF LAND APPEALS**

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WILDEARTH GUARDIANS,	)	Appeal of the Record of Decision for
SIERRA CLUB,	)	the West Antelope II Coal Lease
and DEFENDERS OF WILDLIFE	)	Applications, WYW163340 and
	)	WYW177903, Campbell and
Appellants	)	Converse Counties, Wyoming
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**NOTICE OF APPEAL AND PETITION FOR STAY**

Pursuant to 43 C.F.R. §§ 4.21, 4.410, and 4.413, WildEarth Guardians, the Sierra Club, and Defenders of Wildlife (hereafter “Appellants”) hereby file this Notice of Appeal and Petition for Stay of a decision made by Bureau of Land Management (“BLM”) Wyoming State Office Director, Don Simpson, to offer the West Antelope II Coal Leases in Campbell and Converse Counties, Wyoming for sale and execution. This decision was documented in a Record of Decision (“ROD”) signed on March 23, 2010, notice of which was published in the Federal Register on April 1, 2010. *See* 75 Fed. Reg. 16502 (April 1, 2010). The ROD actually authorizes the sale of two coal leases: the West Antelope II North lease (WYW163340), which comprises 350,263,000 tons of coal, and the West Antelope II South lease (WYW177903), which comprises 56,356,000 tons of coal (hereafter “West Antelope II Leases”). The ROD adopts Alternative 2 based on information and analysis presented in a Final Environmental Impact Statement (“FEIS”).

## I. INTRODUCTION

On September 14, 2009, Interior Secretary Ken Salazar proclaimed, “[t]he realities of climate change require us to change how we manage the land, water, fish and wildlife, and cultural heritage and tribal lands and resources we oversee.” Interior Secretary Ken Salazar, Secretarial Order No. 3289, “Addressing the Impacts of Climate Change on America’s Water, Land, and Other Natural and Cultural Resources,” Section 4(b) (September 14, 2009), *available at* <http://www.doi.gov/climatechange/SecOrder3289.pdf> (last visited May 3, 2010). The Secretary proceeded to call for the development of a “unified greenhouse gas emission reduction program” among Department of Interior agencies, a call bolstered by President Obama, who on October 5, 2009 called on all federal agencies to “measure, report, and reduce their greenhouse gas emissions from direct and indirect activities.” President Obama, Executive Order No. 13514, “Federal Leadership in Environmental, Energy, and Economic Performance,” Section 1 (October 5, 2009), *available at* <http://edocket.access.gpo.gov/2009/pdf/E9-24518.pdf> (last visited May 3, 2010).

Despite these unprecedented calls for action, however, the BLM made no efforts to address the climate change impacts associated with leasing more than 406,619,000 tons of coal as part of the West Antelope II Leases. This was not a minor oversight. Even the BLM agreed that:

[M]ovement toward electric generation capacity not reliant on carbon fuels is positive. Carbon fuels are a finite resource and will likely become more costly and rare. Having more non-carbon instead of carbon-based electric generation would assist in decreasing human-caused greenhouse gas (GHG) emissions. Reducing human-caused GHG emissions would help to lessen any harmful effects that they may be causing to global climate.

ROD at 7. In spite of this acknowledgment, the Agency refused to make any effort to address the indirect release of 743,795,607 tons (674,759,995 metric tons) of heat-trapping carbon dioxide emissions that would result from issuing the West Antelope II Leases.<sup>1</sup>

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<sup>1</sup> According to the BLM, carbon dioxide emissions from Powder River coal can be estimated based on an average Btu factor of 8,600 per pound of coal and using an emission factor of 212.7 pounds of carbon dioxide per million Btu. See BLM, DRAFT ENVIRONMENTAL IMPACT STATEMENT, WRIGHT COAL LEASE APPLICATIONS (August 2009) at 4-118. This excerpt is attached as Exhibit 1. Based on this methodology, it is estimated that the 406,619,000 tons of coal authorized for sale through the West Antelope II Leases would release 735,146,821.1 tons of carbon dioxide when burned, or 666,913,977.76 metric tons (Because greenhouse gas inventories are usually stated in metric tons, we provide both the ton and metric ton values. One ton equals 0.90718474 metric tons). This calculation is also set forth on pages 12-13 of the attached declaration of Jeremy Nichols. See Exhibit 2.

This oversight is monumental. Increases in the release of greenhouse gases by human activities have intensified the greenhouse effect, leading to climate change. According to the U.S. Global Change Research Program:

Observations show that warming of the climate is unequivocal. The global warming observed over the past 50 years is due primarily to human-induced emissions of heat-trapping gases. These emissions come mainly from the burning of fossil fuels (coal, oil, and gas) with important contributions from the clearing of forests, agricultural practices, and other activities.<sup>31</sup>

See Karl, T.R., *et al.*, eds., GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES. Cambridge University Press (2009) at 9, available at <http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf> (last visited May 3, 2010). This report is attached as Exhibit 3. It is reported that since 1900, global average temperatures have increased by 1.5 degrees Fahrenheit and that by 2100, temperatures will rise another 2 to 11.5 degrees Fahrenheit. The U.S. Global Change Research Program reports that, “The U.S. average temperature has risen by a comparable amount and is very likely to rise more than the global average over this century[.]” *Id.*

According to the U.S. Supreme Court, “The harms associated with climate change are serious and well recognized.” *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007). In light of this, the Administrator of the U.S. Environmental Protection Agency (“EPA”) most recently found that “six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations.” 74 Fed. Reg. 66496 (Dec. 15, 2009). The Administrator expounded:

The body of scientific evidence compellingly supports this finding. The major assessments by the U.S. Global Climate Research Program (USGCRP), the Intergovernmental Panel on Climate Change (IPCC), and the National Research Council (NRC) serve as the primary scientific basis supporting the Administrator’s endangerment finding. The Administrator reached her determination by considering both observed and projected effects of greenhouse gases in the atmosphere, their effects on the climate, and the public health and welfare risks and impacts associated with such climate change. The Administrator’s assessment focused on public health and public welfare impacts within the United States. She also examined the evidence with respect to impacts in other world regions, and she concluded that these impacts strengthen the case for endangerment to public health and welfare because impacts in other world regions can in turn adversely affect the United States.

*Id.* at 66496, 66497. Among the six greenhouse gases that the Administrator of the EPA found endangered public health and welfare: carbon dioxide.

The release of carbon dioxide in particular has been “the principal factor causing warming over the last 50 years.” Karl *et al.* (2009), Exhibit 3 at 14. Since the start of the industrial revolution, the concentration of carbon dioxide in the atmosphere has increased by

thirty-five percent. *See id.* Over the past several decades, eighty percent of all human-related carbon dioxide emissions came from the burning of fossil fuels. *See id.*

In 2008, the U.S. emitted 7668.43 million tons (6,956.8 million metric tons) of greenhouse gases, based on carbon dioxide equivalency, a fourteen percent increase since 1990. EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS, 1990-2008, EPA 430-R-10-006 (April 15, 2010), at 2-1 *available at* [http://www.epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-2010\\_Report.pdf](http://www.epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-2010_Report.pdf) (last visited May 3, 2010).<sup>2</sup> Excerpts of this report are attached as Exhibit 4. This comprised nineteen percent of human created greenhouse gases released globally. *See id.* at 3-1. Of this total, carbon dioxide comprises more than eighty-five percent of total U.S. greenhouse gas emissions, or 6,526.9 million tons (5,921.2 million metric tons). *See id.* at ES-4—ES-6.

The electricity generation sector is the largest source of greenhouse gases in the U.S., largely due to carbon dioxide emissions. *See* U.S. EPA (2010), Exhibit 4 at 3-1. The EPA reports, “The process of generating electricity is the single largest source of CO<sub>2</sub> [carbon dioxide] emissions in the United States, representing 40 percent of total CO<sub>2</sub> emissions from all CO<sub>2</sub> emissions sources across the United States.” *Id.* at 3-10. Coal-fired power plants release more than eighty percent of all greenhouse gases from the electricity generation sector, including more than 2.17 billion tons (1.96 billion metric tons) of carbon dioxide—nearly thirty percent of the nation’s total greenhouse gas inventory and thirty-three percent of all carbon dioxide released in the U.S. *Id.* at 3-8. This makes coal-fired power plants the largest single source of carbon dioxide in the country.

As the largest producer of coal in the U.S., coal mining in the Powder River Basin is therefore linked to more greenhouse gas emissions than almost any other activity. According to the BLM, “Coal production from the Wyoming PRB [Powder River Basin] represented approximately 42 percent of the coal used for power generation in 2006, which means that Wyoming PRB surface coal mines were responsible for about 13.9 percent of the estimated U.S. CO<sub>2</sub> carbon dioxide emissions in 2006.” West Antelope II Leases FEIS at 4-104. This amounts to forty percent of all carbon dioxide released by U.S. coal-fired power plants. No other region in the United States produces as much coal or contributes as much carbon dioxide.

The role of the Powder River Basin as the largest contributor to U.S. carbon dioxide emissions is intensified by the fact that subbituminous coal from the region inherently releases more carbon dioxide on a Btu basis than most coal mined elsewhere in the U.S. Subbituminous coal from the Powder River Basin of Wyoming releases 212.7 pounds per million Btus, higher than the U.S. average for subbituminous coal and higher than all but one other subbituminous

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<sup>2</sup> Carbon dioxide equivalency refers to the global warming potential of a greenhouse gas, where CO<sub>2</sub> has a potential of “1” and, for example, methane has a potential of “21.” *See* U.S. EPA (2010), Exhibit 4 at ES-2—ES-3; *see also*, U.S. EPA, “Glossary of climate change terms,” *available at* <http://www.epa.gov/climatechange/glossary.html> (last visited May 3, 2010). Therefore, one ton of methane equals 21 tons of CO<sub>2</sub> equivalent. One metric ton equals approximately 1.1 tons. *See id.*, “Glossary of climate change terms.”

coal producing state—Alaska. See Hong, B.D. and E.R., Slatick, *Carbon Dioxide Emission Factors for Coal*, QUARTERLY COAL REPORT, *January-April 1994*, DOE/EIA-0121(94/Q1) (1994) at 1-8, available at [http://www.eia.doe.gov/cneaf/coal/quarterly/co2\\_article/co2.html](http://www.eia.doe.gov/cneaf/coal/quarterly/co2_article/co2.html) (last visited May 3, 2010). This report is attached as Exhibit 5. Subbituminous coal from the Powder River Basin also releases more carbon dioxide than any bituminous coal mined in the U.S. Bituminous coal, which is mined primarily in the eastern U.S., is the next most widely used coal type and emits on average 205.3 pounds of carbon dioxide per million Btus. *Id.*

The West Antelope II Leases therefore promise both to continue and exacerbate, the Powder River Basin's role as a key source of greenhouse gases in the U.S. and a key U.S. contributor to climate change. This conclusion is bolstered by the attached report, "UnderMining the Climate," which was released by WildEarth Guardians in November 2009. This report, attached as Exhibit 6, shows that together with other pending lease by applications, the West Antelope II Leases will contribute to the release of up to 10.6 billion tons of carbon dioxide (9.63 billion metric tons)—more than was released by all fossil fuel combustion in the U.S. in 2007. See WildEarth Guardians, UNDERMINING THE CLIMATE (November 2009), Exhibit 6 at 24.

The BLM signed its ROD based on an FEIS that purportedly "evaluates the potential impacts of mining the West Antelope II because mining is a logical consequence of issuing a lease...[.]" ROD at 2. However, notwithstanding the Agency's recognition that mining is a logical consequence of issuing the West Antelope II Leases, the BLM made little to no effort to fully account for significant environmental impacts associated with the next logical step after coal mining—burning of coal for electrical power generation. Thus BLM provides only a superficial analysis of climate change impacts, and fails to address, through mitigation or other means, such impacts as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, and the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701, *et seq.*

The West Antelope II Leases are described as "maintenance tracts" (ROD at 1), yet there is nothing in the BLM's applicable coal leasing regulations that even mentions the term "maintenance tracts." It is a "make believe" term, much like the framework for the Agency's current leasing program in the Powder River Basin of Wyoming. In truth, the West Antelope II Leases are "Leases by Applications." Yet Lease by Applications are only allowed to be utilized "where an emergency need for unleased coal deposits is demonstrated, or in areas outside coal production regions or outside eastern activity planning areas." 43 C.F.R. § 3425.0-2. The area in which the West Antelope II Leases are located is not within "eastern activity planning areas." Furthermore, the BLM has not asserted that "an emergency need" exists to offer the West Antelope II Leases. Instead, the BLM asserts that the Powder River Basin of northeastern Wyoming is not a "coal production region." This assertion does not begin to pass the laugh test as the Powder River Basin is the single largest coal production region in the United States. According to the U.S. Energy Information Administration ("EIA"), the Powder River Basin of northeastern Wyoming and southeastern Montana produced more than forty-two percent of the Nation's coal in 2008, more than any other region of the country. See EIA, COAL PRODUCTION AND NUMBER OF MINES BY STATE AND MINE TYPE (2009), <http://www.eia.doe.gov/cneaf/coal/page/acr/table1.html> (last visited May 3, 2010).

The BLM continues to operate under an outdated and arbitrary claim that the Powder River Basin has been “decertified” as a coal production region. This decertification was originally rendered in 1990 by former Director of the BLM, Cy Jamison. *See* 55 Fed. Reg. 784-785 (Jan. 9, 1990). While it is doubtful whether the decertification was appropriate in 1990, it is abundantly clear today, as applied through the present ROD at issue in this appeal, that failure to consider the Powder River Basin as a coal production region is ludicrous and contrary to the BLM’s coal leasing regulations at 43 C.F.R. § 3400, *et seq.* Put simply, to offer leases by application relying on the assumption that the Powder River Basin is not a coal production region is to rely on make believe.

The decertification of the Powder River Basin is not an issue of semantics. The decertification has allowed the BLM to sidestep leasing procedures at 43 C.F.R. § 3420, procedures critical to ensuring the regional environmental impacts of coal leasing are adequately addressed. Worse, the decertification appears to have precluded meaningful competition for coal leases. According to data from the BLM, out of a total of twenty-one leases by application issued in the Powder River Basin since 1990, only three have had more than one bidder. *See* “UnderMining the Climate,” Exhibit 6 at 17-19. The BLM does not deny this outcome. Indeed, in the case of the West Antelope II Leases, the Agency states, “Under Alternative 2, it is assumed that the applicant [Antelope Coal Company] would be the successful bidder on the West Antelope II LBA tracts[.]” ROD at 6. BLM actually has the audacity to assert that coal lease sales are “always competitive, even if there is only one bidder.” Response to FEIS Comments at 3.

Even assuming that the decertification of the Powder River Basin may be appropriate, the BLM still failed to meet applicable requirements. Importantly, the Agency made no effort to assess or document whether execution of the West Antelope II Leases was in the public interest in accordance with 43 C.F.R. 3425.1-8(a), and therefore failed to appropriately assess whether the lease should be granted. The Agency appears to be operating under the presumption that the sale and execution of the West Antelope II Leases is inherently in the public interest. Such presumption is without merit and fails to give force and effect to clear regulatory language.

This Notice of Appeal to the Interior Board of Land Appeals and Petition for Stay before the Board follows the BLM’s decision. A stay is wholly appropriate in this case. As will be explained, Appellants are parties that are adversely affected by the issuance of the ROD. Further, the criteria for a stay are more than demonstrated, both by the BLM’s own disclosures in the FEIS and ROD, or lack thereof, and in Appellants’ members’ declarations, which demonstrate the relative harms strongly favor a stay and that Appellants will suffer immediate and irreparable harm. Finally, Appellants are both likely to succeed on the merits and the granting of a stay will serve the public interest.

## **II. APPELLANTS ARE PARTIES THAT ARE ADVERSELY AFFECTED**

To be granted a stay, Appellants must demonstrate that they can maintain an appeal. *See* 43 C.F.R. § 4.21(a)(2). To maintain an appeal, Appellants must (1) be a party to the case; and

(2) be adversely affected by the decision being appealed. 43 C.F.R. § 4.410(a); *National Wildlife Federation v. BLM*, 129 IBLA 124, 125 (1994).

WildEarth Guardians is a registered non-profit corporation whose purpose is the conservation of natural resources. With more than 4,500 members in the United States, WildEarth Guardians' mission is to protect and restore the wildlife, wild places, and wild rivers of the American West. WildEarth Guardians is headquartered in Santa Fe, New Mexico, but has offices in Denver, Colorado and Phoenix, Arizona. Through its Climate and Energy Program, WildEarth Guardians works to safeguard the climate, clean air, and communities of the American West by promoting a sensible transition to renewable energy.

The Sierra Club is a national nonprofit organization of approximately 1.3 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass climate change, air quality impacts, water quality, wildlife, and other environmental concerns. The Sierra Club's highest national priority campaign is its "Move Beyond Coal" Campaign, which aims to transition the nation away from coal and toward clean energy solutions. The Wyoming Chapter of the Sierra Club has approximately 1,029 members in the state of Wyoming.

Defenders of Wildlife is a national non-profit organization with over 1,000,000 members and supporters nationwide. Defenders of Wildlife is one of the country's leading science-based wildlife conservation organizations, and its mission includes the protection and restoration of America's native wildlife and the safeguarding of natural habitats and public lands.

As will be explained, WildEarth Guardians, the Sierra Club, and Defenders of Wildlife are parties to this case who are adversely affected.

#### **A. Appellants are Parties**

To be a party to the case, a person or group must have actively participated in the decision-making process regarding the subject matter of the appeal. *See* 43 C.F.R. § 4.410(b). Here, WildEarth Guardians and the Sierra Club submitted comments to BLM regarding the West Antelope II Leases during the public comment periods provided by the Agency. WildEarth Guardians submitted comments on the Draft Environmental Impact Statement ("DEIS") on April 8, 2008 and together with the Sierra Club, filed comments on the Final Environmental Impact Statement ("FEIS") on January 20, 2009, with supplemental comments filed on February 23, 2009. These comments are attached as Exhibits 7, 8 and 9, respectively. Defenders of Wildlife also submitted comments on the DEIS on April 8, 2008. These comments are attached as Exhibit 10. Thus, WildEarth Guardians, the Sierra Club, and Defenders of Wildlife satisfy the "party to a case" qualification. *See id.* ("party to a case" includes "one who has ... participated in the process leading to the decision under appeal ... by commenting on an environmental document").

## **B. Appellants are Adversely Affected**

To demonstrate that it will “be adversely affected by the decision being appealed,” a party must demonstrate a legally cognizable “interest” and that the decision appealed has caused or is substantially likely to cause injury to that interest. *Glenn Grenke v. BLM*, 122 IBLA 123, 128 (1992); 43 C.F.R. § 4.410(d). This requisite “interest” can be established by cultural, recreational, or aesthetic uses as well as enjoyment of the public lands. *Southern Utah Wilderness Alliance*, 127 IBLA 325, 326 (1993); *Animal Protection Institute of America*, 117 IBLA 208, 210 (1990). The IBLA does not require a showing that an injury has actually occurred. Rather, a colorable allegation of injury suffices. *Powder River Basin Resource Council*, 124 IBLA 83, 89 (1992).

Moreover, it is not necessary for parties to show that they have actually set foot on the impacted parcel or parcels to establish use or enjoyment for purpose of demonstrating adverse effects. Rather, “one may also establish he or she is adversely affected by setting forth interests in resources or in other land or its resources affected by a decision and showing how the decision has caused or is substantially likely to cause injury to those interests.” *The Coalition of Concerned National Park Retirees, et al.*, 165 IBLA 79, 84 (2005).

Attached as Exhibit 2 is the declaration of Jeremy Nichols. It shows he is a member and employee of WildEarth Guardians. His declaration shows he personally uses and enjoys the areas adjacent to the West Antelope II Leases, as well as areas and resources that will be affected by the Leases, for recreational, aesthetic, and conservation purposes, and that he intends to return to these areas for enjoyment. Mr. Nichols’ declaration establishes that the BLM’s decision to sell and execute the West Antelope II Leases will adversely affect his recreational, aesthetic, and conservation interests, which are legally cognizable, in these areas through increased air pollution and other environmental impacts. Mr. Nichols’ declaration establishes that WildEarth Guardians will be adversely affected by BLM’s decision to approve the West Antelope II Leases.

Also attached as Exhibit 11 is the declaration of Brad Mohrmann. It shows he is a member of the Sierra Club. His declaration shows he resides near and regularly recreates in the area that will be affected by the West Antelope II Leases and intends to return to the area for recreational reasons. Mr. Mohrmann’s declaration establishes that the BLM’s decision to sell and execute the West Antelope II Leases will adversely affect his recreational, aesthetic, cultural and conservation interests, which are legally cognizable. Mr. Mohrmann’s declaration highlights the adverse effects of the BLM’s decision to the Sierra Club with regards to climate change, air quality, and other adverse effects. Mr. Mohrmann’s declaration establishes that the Sierra Club will be adversely affected by BLM’s decision to approve the West Antelope II Leases.

Finally, attached as Exhibit 12 is the declaration of Jonathan Proctor. It shows he/she is a member of Defenders of Wildlife. His declaration shows he regularly recreates in the area that will be affected by the West Antelope II Leases. Mr. Proctor has even taken a tour of the Antelope Mine. Mr. Proctor’s declaration establishes that the BLM’s decision to sell and execute the West Antelope II Leases will adversely affected his/her recreational, aesthetic, and conservation interests, which are legally cognizable. Mr. Proctor’s declaration highlights the adverse effects of the BLM’s decision to Defenders of Wildlife with regards to climate change,



the organization's conservation interests, particularly with respect to wildlife, and other adverse environmental impacts. Mr. Proctor's declaration establishes that Defenders of Wildlife will be adversely affected by BLM's decision to approve the West Antelope II Leases.

### **III. REQUEST FOR STAY**

Pursuant to 43 C.F.R. § 4.21(b)(1), Appellants respectfully request the IBLA grant its request for a stay of the ROD issued by BLM Wyoming State Director, Don Simpson, and the sale of the West Antelope II Leases. As argued below, the relative harms to Appellants favors a stay, Appellants will suffer immediate and irreparable harm if the stay is not granted, Appellants are likely to succeed on the merits, and granting of a stay will serve the public interest. We begin by addressing the likelihood of success on the merits:

#### **A. Appellants are Likely to Succeed on the Merits**

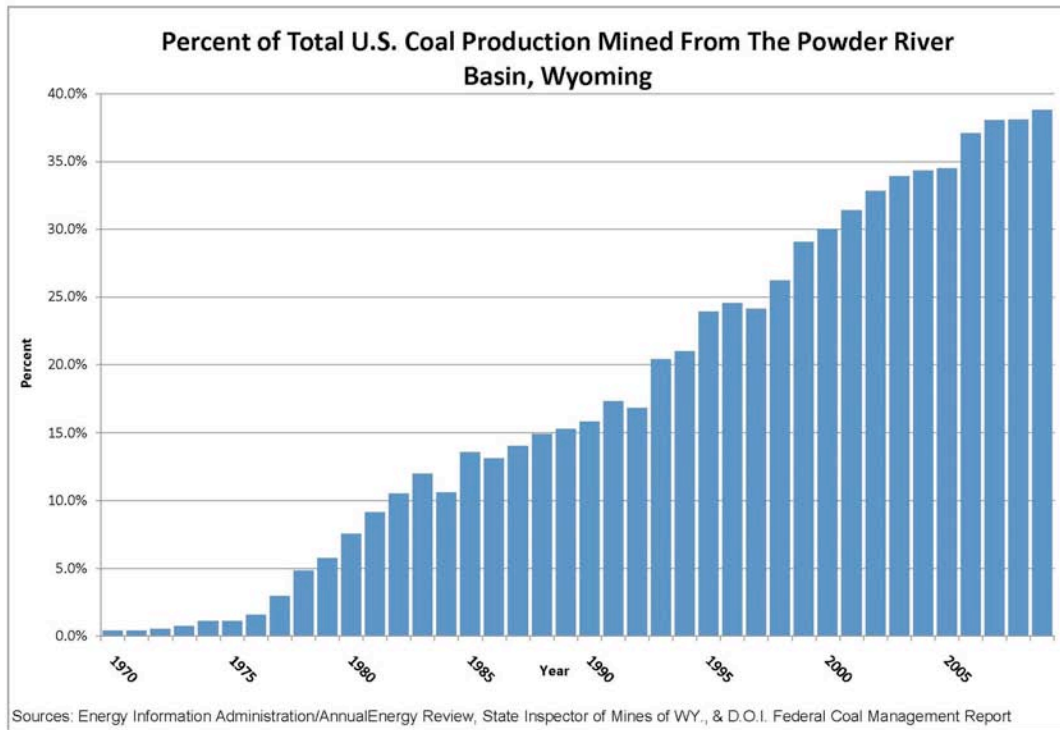
##### **1. The Decertification of the Powder River Basin is Contrary to BLM's Coal Leasing Regulations**

The decision to offer the West Antelope II Leases for sale implements the 1990 decision decertifying the Powder River Basin as a coal production region. This continuing decertification is contrary to BLM's coal leasing regulations at 43 C.F.R. § 3400, *et seq.* The present West Antelope II Leases implementing the decertification decision are also contrary to BLM's coal leasing regulations.

In 1990, the BLM decertified the Powder River Basin as a coal production region. *See* 55 Fed. Reg. 784-785 (Jan. 9, 1990). This decision, signed by former BLM Director Cy Jamison, declared that the Powder River Basin was no longer a "coal production region" under 43 C.F.R. § 3400.5. This decertification has allowed the BLM to utilize the streamlined lease by application process set forth under 43 C.F.R. § 3425, rather than the regional leasing process under 43 C.F.R. § 3420. This consequence was not only intended by the BLM, it seems to have been the driving force behind the decertification. Indeed, the rationale for the decertification had nothing to do with actual coal production levels or capacity; at the time, the region produced fifteen percent of all coal in the U.S. and production was increasing. *See* Figure 1 below. As the BLM freely admits, the lease by application process was simply "deemed more appropriate" in order to facilitate expansion of existing coal mines. *See* BLM, "Powder River Basin Briefing." BLM Wyoming State Office (1999) at 2. This briefing is attached as Exhibit 13.

Yet the lease by application process is only to be used where there is an "emergency need for unleased coal" or in areas "outside coal production regions." 43 C.F.R. § 3425.0-2. It is a streamlined process meant to facilitate leasing in areas outside coal production regions, or where a genuine emergency need for unleased coal exists within coal production regions. Federal regulations do not allow the process to be used to facilitate expansion of existing mines. Indeed, when BLM proposed the current lease by application regulations in 1981 and finalized them in 1982, nowhere did the Agency mention or imply that the lease by application process could be used simply because it was deemed more convenient. *See* Coal Management; Federally Owned

Coal; Amendments to Coal Management Program Regulations, Proposed Rulemaking, 46 Fed. Reg. 61390 (Dec.16, 1981); Coal Management; Federally Owned Coal; Amendments to Coal Management Program Regulations, Final Rulemaking, 47 Fed. Reg. 33114 (July 30, 1982). The BLM nevertheless pushed ahead with decertification of the Powder River Basin, essentially a backdoor scheme to utilize the lease by application process.



**Figure 1.** BLM, “Percent Total U.S. Coal Production Mined from the Powder River Basin, Wyoming” (February 11, 2010), available at <http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/energy/coal/prb.Par.5321.Image.-1.-1.1.gif> (last visited May 3, 2010).

There is no explicit definition of “coal production region” in BLM’s current coal leasing regulations, but when the Agency originally designated the Powder River Basin as a coal production region in 1979, it elaborated on the meaning of the term. Ultimately, the BLM explained that coal production regions served three main purposes:

First, they are the geographic areas for which the Secretary, guided by the coal production goals of the Department of Energy, establishes regional Federal coal leasing targets. Second, they represent the administrative regions within which the BLM, with guidance from regional coal teams, will conduct coal activity planning to identify potential lease tracts and schedule competitive lease sales....Third, the coal production regions serve to identify those areas in which the Department may offer competitive coal leases for sale after land use planning, activity planning, and environmental analysis have been completed.

44 Fed. Reg. 65196 (Nov. 9, 1979). In delineating the Powder River Basin as a coal production region, the BLM stated that it considered “1. Similarly in type and situation of coal; 2. General transportation and markets; 3. Broad economic and social-cultural similarities; 4. Administrative efficiency; and 5. Presence of Federal leases, preference right lease applications, and other indications of industry interest in Federal coal.” *Id.* Notably, the BLM stated that in delineating coal production regions, it included counties within which “substantial [coal] production may occur[.]” *Id.* at 65197.

BLM has never assessed the appropriateness of decertifying the Powder River Basin as a coal production region in light of the considerations enumerated in the original 1979 designation. If BLM utilized the aforementioned factors to certify coal production regions in 1979, it is reasonable to require the Agency to rely on these same factors to decertify any coal production region. Here, BLM does not appear to have relied on these factors at all. Instead, the BLM decertified the region simply because it wanted to utilize the lease by application procedures in order to facilitate the expansion of existing mines. Based on BLM’s prior rationale, this is not a valid reason to decertify a coal production region and is wildly inconsistent with the ordinary meaning of the phrase “coal production region.”

Moreover, under the BLM’s current coal leasing regulations, however, it appears that the 1990 decertification was not supported. Although the BLM may have discretion to “change” a coal production region or alter boundaries in accordance with 43 C.F.R. § 3400.5, the Agency’s coal leasing regulations are clear that coal production regions are to be used to identify, rank, analyze, select, and schedule lease tracts (i.e., the “activity planning” aspect of the coal management program) where areas acceptable for further consideration for leasing have been identified by land use planning. *See* 43 C.F.R. § 3420.3-1(a); *see also* 43 Fed. Reg. 33114, 33116 (July 30, 1982) (clarifying that coal production regions are “the areas in which regional coal lease sales will be conducted”). In light of this, it stands to reason that the BLM would only be able to decertify a coal production region if activity planning was deemed to be inappropriate. In this case, although the lands of the Powder River Basin have been identified as acceptable for further consideration for leasing through land use plans, the BLM did not make a determination that activity planning was inappropriate.

Even from a common sense standpoint, the BLM’s 1990 decertification decision is fundamentally flawed. If any region of the United States is a coal production region, it must be the Powder River Basin. Although BLM may have discretion to change a coal production region or alter boundaries, the Agency cannot render the term so utterly meaningless as to strip all meaning and force from its coal leasing regulations. A coal production region either is or it isn’t. If it isn’t, the BLM must have some explanation as to why it believes a region is not producing coal, or does not qualify as a coal production region. In this case, the 1990 decertification does not even attempt to assert that the Powder River Basin is not producing coal, or that the region does not qualify as a coal production region. Instead, the BLM simply asserts that decertification would lead to a more desirable leasing process. Not only does this undermine the force and effect of the Agency’s own coal leasing regulations at 43 C.F.R. § 3420, it is simply inconsistent with the Powder River Basin’s distinction as the nation’s largest coal production region.

Underscoring the inappropriateness of the decertification is the fact that the BLM continues to allow the Powder River Regional Coal Team to operate and continues to heed the Team's recommendations. Under BLM regulation, Regional Coal Teams are established only for coal production regions. *See* 43 C.F.R. § 3400.4(a). Because the Powder River Basin has been "decertified" as a coal production region, the Regional Coal Team is not legally allowed to exist or function in any of the capacities set forth under BLM's coal leasing regulations at 43 C.F.R. §§ 3400 and 3420. Indeed, the BLM's lease-by-application regulations 43 C.F.R. § 3425, do not even mention, let alone provide for, the involvement of a Regional Coal Team in the process and regulations at 43 C.F.R. § 3400 correspondingly do not reference or set forth any duties required under 34 C.F.R. § 3425.

The BLM actually attempts to claim that the Powder River Regional Coal Team does not operate under the auspices of 43 C.F.R. § 3400.4, and therefore its formation is appropriate. Response to FEIS Comments at 4. This is incorrect. The Charter of the Powder River Regional Coal Team explicitly states that "The team is to provide advice and guidance to the State Directors of Montana and Wyoming and the Director of the Bureau of Land Management (BLM), regarding the Federal coal management program in accordance with the provisions of Title 4 of the Code of Federal Regulations Part 3400 (43 C.F.R. 3400)," even though the Powder River Coal Production Region has been decertified. *See* Charter, Powder River Basin Regional Coal Team (October 24, 1995) at 1, attached as Exhibit 14. The Agency freely admits that the Powder River Regional Coal Team performs many of the functions that a Regional Coal Team is required to perform under 43 C.F.R. § 3400.4, such as:

- The Regional Coal Team is "bound to use the public participation procedures (43 C.F.R. 1784.4-2, 43 C.F.R. 1784.4-3, and 43 C.F.R. 1784.5), which are also required by 43 C.F.R. § 3400.4(g). *See* Response to FEIS Comments at 4;
- If BLM chooses not to accept the Regional Coal Team's recommendations, "a written explanation of the reasons will be prepared by the BLM Director's authorized representative and provided to the team and the public," which is also set forth by 43 C.F.R. § 3400.4(d)(2). *Id.*; and
- The BLM has "presented lease by applications to the RCT and has considered their advice on how to proceed with those applications," a function similarly set forth at 43 C.F.R. § 3400.4(d). *See* Response to FEIS Comments at 3.

The Charter of the Powder River Regional Coal Team is clear that even under the lease by application process, the Team will "serve as the forum for consultation and Federal-State cooperation in all major coal management decisions in the region." Charter, Powder River Basin Regional Coal Team (October 24, 1995) at 2. This statement appears verbatim at 43 C.F.R. § 4300.4(c).

Accordingly, it is clear that, contrary to BLM's assertions otherwise, the Powder River Regional Coal Team is a Regional Coal Team in both form and substance. In accordance with 43 C.F.R. § 4300.4, the Regional Coal Team's involvement in coal leasing is therefore limited to leasing decisions in coal production regions, including all phases of the coal activity planning

process described at 43 C.F.R. §§ 3420.3 through 3420.3-4 and other major coal management decisions in a coal production region. It is not limited in such a manner, however, underscoring the fact that the BLM has created an arbitrary coal leasing system that is contrary to regulation.

The BLM has concocted a leasing program in the Powder River Basin that is inconsistent with its own coal leasing regulations and at best arbitrary. As implemented through the West Antelope II Leases, the 1990 decertification decision must be overturned.

**a. The Environmental Implications of the BLM’s Illegal Decertification as Applied to the West Antelope II Leases Compel IBLA Review and Reversal**

The impacts of the 1990 decertification decision are not abstract. The decertification has prevented the BLM from appropriately analyzing and assessing the environmental impacts of leasing, and from setting appropriate leasing, or activity, levels based on a consideration of those environmental impacts. This underscores the fact that as implemented, or applied, by the West Antelope II Leases, the 1990 decertification decision must be overturned.

Indeed, BLM’s coal leasing regulations prescribe a number of requirements and procedures that are normally followed when leasing occurs in a “coal production region.” For instance, 43 C.F.R. § 4320.2 requires, among other things, that regional leasing levels be established, that a regional leasing environmental impact statement be prepared, and that the Secretary of the Interior take into account environmental effects when setting regional leasing levels. Further, activity planning at 43 C.F.R. § 3420.3-1 requires that alternative leasing levels be analyzed in the regional leasing EIS, and that the tract ranking process at 43 C.F.R. § 3420.3-4(a)(1) also requires consideration of environmental effects when the regional coal team sets tract rankings. The regulation states, “Three major categories of consideration shall be used in tract ranking: coal economics; *impacts on the natural environment*; and socioeconomic impacts” (emphasis added). If the Powder River Basin was appropriately certified as a coal production region, the BLM would be required to prepare a regional lease sale EIS “on all tract combinations selected by the regional coal team for the various leasing levels” and consider “[t]he site-specific potential environmental impacts of each tract being considered for lease sale” and “[t]he *intraregional cumulative environmental impacts* of the proposed leasing action and alternatives, and other coal and noncoal development activities.” 43 C.F.R. § 3420.3-4(c) (emphasis added).

In other words, if the Powder River Basin was a coal production region, the BLM would not only be required to set regional leasing levels based on a consideration of environmental impacts, but would prepare a comprehensive EIS addressing the impacts of all lease tracts, both individually and cumulatively, before moving to lease coal in the Powder River Basin. The BLM does not undertake such actions currently. Indeed, regional leasing levels are currently limited only by the amount of coal applied for by coal companies, not on a consideration of environmental impacts by the BLM. Furthermore, the last time the BLM prepared a regional leasing EIS was in 1984, and even then it was not even prepared in final form. See BLM, “Powder River Coal Draft Environmental Impact Statement” (1984), *available at*

[http://www.blm.gov/pgdata/etc/medialib/blm/wy/information/NEPA/cfodocs/pr\\_coal\\_deis.Par.17352.File.dat/PR\\_CoalDEIS.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wy/information/NEPA/cfodocs/pr_coal_deis.Par.17352.File.dat/PR_CoalDEIS.pdf) (last visited May 3, 2010).

In the context of the West Antelope II Leases, this is particularly problematic in light of the climate change and air quality impacts of coal leasing in the Powder River Basin. Put simply, the BLM has both failed to address the regional climate change and air quality impacts of coal leasing in the Powder River Basin and failed to establish regional leasing levels based on a consideration of climate change and air quality impacts. As will be explained in later sections in this Petition for Stay, the West Antelope II Lease pose serious air quality and climate change impacts. To put it succinctly, “but for” the 1990 decertification of the Powder River Basin, these impacts would be adequately addressed and would not adversely affect the Appellants.

#### **b. Appellants’ Petition for a Stay on the Decertification Issue is Mature for Review**

It may be argued that WildEarth Guardians’ challenge to the 1990 decertification is either time-barred or that the IBLA lacks authority to review the decision. Such defenses are unfounded.

With regards to the timeliness of WildEarth Guardians’ challenge, it is true that the IBLA’s requirement that a Notice of Appeal and Petition for Stay be filed within 30 days of a decision applies in accordance with 43 C.F.R. §§ and 4.21(a)(2) and 4.411(a). However, the 30-day deadline does not apply in the case of the 1990 decertification because the action was not ripe, or mature for challenge, at the time.

To this point, the IBLA has been clear that “[a]n appellant will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by the decision.” *Salmon River Concerned Citizens, et al.*, 114 IBLA 344, 348 (1990). In that case, the IBLA dismissed an appeal on the basis that an ROD issued by the BLM had yet to pose any adverse effects, holding such an appeal was premature. This ruling hinged upon BLM’s statements that subsequent decisions would be issued relating to the implementation of the ROD at issue in the appeal.

Similar to *Salmon River Concerned Citizens*, it would have been inappropriate to challenge the decertification when it was issued. Notably, the decertification did not commit to the leasing of any coal, and therefore did not commit the BLM to authorizing the attendant and “logical consequence” impacts of coal mining activities that give rise to the adverse effects at issue in this Petition for Stay. The 1990 decertification was simply a change in the designation of the Powder River Coal Production Region. It therefore would have been premature to challenge the decertification. It is only as applied, such as through the West Antelope II Leases, that one could challenge the decertification. Therefore, such a challenge is now mature and appropriately before the IBLA.

Such a conclusion is consistent with related IBLA decisions. Appellants’ challenge to the 1990 decertification as applied through the West Antelope II Leases is akin to requesting the IBLA’s review of the adequacy of Resource Management Plans as adopted under FLPMA.

Although the IBLA lacks authority to directly review the adequacy of RMPs, the Board has recognized that “in the context of its application to a specific action by BLM... such review is appropriate.” *Salmon River Concerned Citizens, et al.*, 114 IBLA 344, 351 (1990); *see also, Wilderness Society, et al.*, 90 IBLA 221, 235 (1986) (reversing District Manager’s decision approving RMP as applied through recreation management plan). This finding is bolstered by the very definition of an RMP, which provides that an RMP “is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations.” 43 C.F.R. § 1601.1-5(k). In this vein, while the IBLA lacked authority to directly review the 1990 decertification when it was issued, which was clearly not a final implementation decision, in the context of its implementation through the West Antelope II Leases, “such review is appropriate.” *Id.*

That the 1990 decertification was not ripe, or mature, for challenge is also underscored by a corollary principle of federal administrative law, which is that an agency rule is not “ripe” for judicial review under the Administrative Procedure Act (“APA”) until applied to a final agency action. Speaking to this issue, the U.S. Supreme Court has held a rule is, “not ordinarily considered the type of agency action ‘ripe’ for judicial review under the APA until the scope of the controversy has been reduced to more manageable portions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens to harm him.” *Lujan v. National Wildlife Federation*, 497, U.S. 871, 891 (1990).

The APA defines a rule as, “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]” 5 U.S.C. § 551(4). In this case, the decertification was clearly a rule in that it was an agency statement of particular applicability and future effect that was ostensibly designed to implement 43 C.F.R. § 3400.5. Thus, the ability to challenge to the 1990 decertification under the APA would have hinged upon whether the “scope of the controversy has been reduced to more manageable portions, and its factual components fleshed out, by some concrete action applying the regulation” in a manner that harms or threatens to harm a challenging party. To this end, it appears clear that any direct challenge to the 1990 decertification would have failed. Not only had the scope of controversy not been reduced to manageable portions, but the factual components of the decertification as applied to a specific coal lease or leases that harmed or threatened harm to a party were far from fleshed out. It is only as applied to the West Antelope II Leases that the environmental harms facing Appellants have become apparent and real. Thus, it is only through the West Antelope II Leases that a challenge to the 1990 decertification is “ripe,” or mature for review by the IBLA.

### **c. The Decertification Decision is Properly Before the IBLA**

Finally, it may be argued that the IBLA is barred from reviewing the decertification decision on the basis that it may have been made by the Secretary of Interior. This argument does not appear to withstand analysis. It is true that the IBLA has previously asserted that this decertification decision was issued by the Secretary of the Interior, and was therefore unreviewable pursuant to 43 C.F.R. § 4.410(a)(3). *See Powder River Basin Resource Council, et al. v. BLM*, 124 IBLA, 83, 90 (1992). However, the 1990 Federal Register notice was not only

signed by former BLM Director, Cy Jamison, but there is also no reference or mention of the Secretary of Interior within the notice. This is consistent with BLM's regulations, which expressly state that a change or alteration in a coal production region is a duty delegated to the BLM (*see* 43 C.F.R. § 3400.5, stating "***The Bureau of Land Management shall*** establish by publication in the Federal Register coal production regions." (emphasis added)). It does not appear that the IBLA is barred from reviewing the decertification pursuant to 43 C.F.R. § 4.410(a)(3).

## **2. Even if the Lease-by-Application Process May be Found Appropriate, BLM Still Failed to Demonstrate the Lease Would not be Contrary to the Public Interest**

Even if the IBLA upholds the BLM's 1990 decision to decertify the Powder River Basin as a coal production region, the decision to offer the West Antelope II Leases for sale must still be overturned on the basis that the Agency failed to ensure leasing was in the public interest in accordance with 43 C.F.R. 3425.1-8(a)(3).

BLM's coal leasing regulations require that an application for a coal lease "shall be rejected in total or in part if the authorized officer determines that...leasing of the lands covered by the application, for environmental or other sufficient reasons, would be contrary to the public interest." 43 C.F.R. 3425.1-8(a)(3). Despite this explicit requirement, nowhere in its ROD or the FEIS for the West Antelope II Leases is there any assessment, or any discussion for that matter, as to whether the sale and execution of the West Antelope II Leases would be contrary to the public interest.

The IBLA has ruled in similar applications of "public interest" standards under BLM coal leasing regulations. In *Belco Petroleum Corp.*, 96 IBLA, 126, 132 (1987), the IBLA set aside a decision by the BLM to deny a coal lease exchange over the Agency's failure to evaluate whether it was in the "public interest," as required by 43 C.F.R. § 3435.0-1. Holding that "[t]he phrase 'public interest' is given meaning by 43 C.F.R. 3435.0-1," the IBLA held that "the standard by which BLM should have evaluated Belco's exchange request was whether granting Belco's request was in the public interest." *Id.*

*Belco Petroleum Corp.* could not be more relevant to the West Antelope II Leases. The phrase "public interest" is clearly given meaning at 43 C.F.R. § 3425.1-8(a)(3), which explicitly links it to the question of environmental impacts. Despite this clear direction, the requirements of 43 C.F.R. § 3425.1-8(a)(3) are neither disclosed nor referenced in either the ROD or the FEIS for the West Antelope II Leases. In fact, the phrase "public interest" does not even appear in the ROD, the FEIS, or in the BLM's response to comments on both the DEIS and the FEIS.

This is particularly problematic in light of the environmental impacts of the West Antelope II Leases. The decision to offer the West Antelope II Leases poses a number of adverse environmental impacts, particularly air quality and climate change impacts, which Appellants elaborate upon below. BLM's coal leasing regulations explicitly state that a determination as to whether a lease by application should be rejected must be based on a consideration of "environmental" reasons. In this case, the BLM did not consider whether the



sale and execution of the West Antelope II Leases would be in the public interest, particularly with regards to air quality and climate change impacts, and therefore, the IBLA must overturn the ROD.

### **3. The BLM Failed to Adequately Analyze and Assess Climate change Impacts and Consider Alternatives to Address Such Impacts**

Congress enacted NEPA to, among other things, “encourage productive and enjoyable harmony between man and his environment” and to promote government efforts “that will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. To fulfill this goal, NEPA requires federal agencies to prepare an EIS for all “major Federal actions significantly affecting the environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The Agency must describe “any adverse environmental effects which cannot be avoided should the proposal be implemented.” 42 U.S.C. § 4332(C)(ii). Overall, an EIS must “provide [a] full and fair discussion of significant impacts” associated with a federal decision and “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

In an EIS, the federal Agency must analyze and assess the significance of the direct, indirect, and cumulative impacts of a major Federal action. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.16, 1508.7, and 1508.8. NEPA requires federal agencies, including BLM, to include within an EIS “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis is the “heart” of a NEPA document, and the statute’s implementing regulations emphasize an Agency’s duty to “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.16. NEPA also requires that agencies mitigate the adverse environmental impacts of their actions. *See* 40 C.F.R. §§ 1502.14(f) and 1502.16(h). Mitigation includes avoiding impacts, minimizing impacts, rectifying impacts, or compensating for impacts. 40 C.F.R. § 1508.20.

In this case, the BLM failed to adequately analyze and assess the climate change impacts of West Antelope II Leases and failed to consider alternatives to address these impacts, including alternatives explicitly suggested by Appellants. As explained already, this oversight is monumental. In authorizing the sale of 406,619,000 tons of coal, the Agency has in turn authorized the release of more than 735,000,000 tons of carbon dioxide (more than 666,000,000 metric tons) resulting from the combustion of that coal. This is a significant amount of carbon dioxide. According to the EPA, this amount of carbon dioxide equals:

- The annual greenhouse gas emissions from 127,491,540 passenger vehicles;
- The amount of carbon dioxide emissions from 75,003,459,449 gallons of gasoline;
- The amount of carbon dioxide emissions from 1,550,652,917 barrels of oil;
- The carbon dioxide emissions from the electricity use of 80,919,994 homes for one year;

- The amount of carbon that can be sequestered by 17,096,942,423 tree seedlings grown for ten years;
- The amount of greenhouse gas emissions that are avoided by recycling 224,505,305 tons of waste instead of sending it to the landfill; and
- The annual carbon dioxide emissions of 173 coal-fired power plants.

See EPA, GREENHOUSE GAS EQUIVALENCIES CALCULATOR, <http://www.epa.gov/RDEE/energy-resources/calculator.html#results> (last visited May 3, 2010). The BLM already discloses that coal from the Antelope Mine accounts for one percent of the nation's total carbon dioxide emissions, and that coal from the Powder River Basin as a whole is responsible for more than 13 percent of the nation's carbon dioxide emissions. See FEIS at 4-104, 4-108. The West Antelope II Leases promise to maintain, if not exacerbate, the role of both the Powder River Basin and the Antelope Mine as a major contributor to climate change in the United States. Despite this, and despite the BLM's own recognition that, "Reducing human-caused GHG [greenhouse gas] emissions would help to lessen any harmful effects that they may be causing to global climate" (ROD at 7), the Agency made no effort to address these impacts under NEPA. In failing to adequately address these impacts, the Agency's FEIS is fatally flawed and cannot support the decision to offer the West Antelope II Leases.

**a. The BLM did not Analyze and Assess the Impacts of Carbon Dioxide Emissions that Would Result from the West Antelope II Leases**

To begin with, the BLM simply failed to analyze and assess the indirect carbon dioxide emissions that would result from the West Antelope II Leases. The BLM discloses that the coal mined as a result of the West Antelope II Leases would be "utilized by coal-fired power plants to generate electricity for U.S. consumers." FEIS at 4-99. Such impacts are indirect in that they "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). It is not disputed that the combustion of coal is a "logical consequence" of offering the West Antelope II Leases. Indeed, the BLM states in its ROD that it believes that the West Antelope II Leases are necessary to meet U.S. energy needs. See *e.g.*, ROD at 9 (stating belief that "extraction of coal is currently necessary in order to meet the nation's energy needs."). Furthermore, together with other past, present, and reasonably foreseeable impacts, these impacts are cumulative in accordance with 40 C.F.R. § 1508.7.

Under NEPA regulations, an EIS is required to include an analysis and assessment of impacts, including a discussion of "indirect effects and their significance." 40 C.F.R. § 1502.16(b). Effects include "cumulative impacts." 40 C.F.R. § 1508.8. In this case, although the BLM recognized that offering the West Antelope II Leases for sale would lead to the release of carbon dioxide emissions, the Agency did not adequately analyze these effects, nor did the Agency assess their significance in accordance with 40 C.F.R. § 1502.16(b).

This failure is significant. As Appellants have pointed out, using a basic method of estimation that the BLM itself has utilized, the carbon dioxide emissions resulting from the West

Antelope II Leases would amount to 735,146,821.1 tons (666,913,977.76 metric tons). The BLM discloses that the West Antelope II Leases would extend mining operations at the Antelope Mine for a nine to eleven year period (*see* ROD at 11), which would lead to an emission rate of 66,831,529-81,682,980 tons of carbon dioxide per year (60,628,543.26-74,101,552.97 metric tons per year), more than 1.2 percent of all U.S. carbon dioxide emissions, as reported in the EPA's 2008 greenhouse gas inventory. *See* U.S. EPA (2010), Exhibit 4. Cumulatively, this would amount to more than seven percent of the Powder River Basin's total contribution to U.S. carbon dioxide emissions, which already account for more than thirteen percent of the nation's total carbon dioxide emissions. Unfortunately, the BLM made no effort to similarly analyze the indirect carbon dioxide emissions associated with the West Antelope II Leases, either individually or on a cumulative basis.

BLM does make qualitative statements regarding the potential carbon dioxide emissions from the West Antelope II Leases, stating that producing the coal included in the Leases “would extend CO<sub>2</sub> emissions related to burning coal from Antelope Mine for up to 13 additional years beyond 2018.” FEIS at 4-109. However, BLM then asserts that, “[i]t is not possible to project the level of CO<sub>2</sub> emissions that burning the coal in the West Antelope II LBA tract would produce due to uncertainties about what emission limits will be in place at that time or where and how the coal in the West Antelope II LBA tract would be used after it is mined.” *Id.* We are confused, to say the least. Although BLM may be “uncertain about what emission limits will be in place” in the future, this uncertainty does not overshadow the certainty that exists today, which is that there are currently no limits on carbon dioxide emissions from coal-fired power plants—a fact stated by the BLM in its FEIS. *See* FEIS at 4-105. This perceived “uncertainty” about the future does not absolve the Agency of complying with its duties under NEPA in the present.

BLM appears to rest its analysis on its belief that the carbon dioxide emissions from the West Antelope II Leases would simply come from other coal sources. The BLM asserts that if the West Antelope II Leases are not authorized, the coal will simply be produced by other mines outside the Powder River Basin, in essence arguing that the carbon dioxide emissions simply do not matter. The Agency claims, for instance, that “[n]ot offering the West Antelope II Federal coal for lease is unlikely to affect changes in the national electric generation portfolio” and that “many mines outside of the PRB have the capacity to replace the coal production generated by Antelope Mine.” ROD at 7-8; *see also* FEIS at 4-109 (“It is not likely that selection of the No Action Alternative would result in a decrease of U.S. CO<sub>2</sub> emissions attributable to coal burning power plants in the long term.”). While there is no analysis or information presented or cited to support this assertion, this position appears baseless and undermined by reality.

Indeed, the Antelope Coal Mine is the fifth largest coal producer in the United States, and among the largest mines in the Powder River Basin. *See* EIA, COAL PRODUCTION AND NUMBER OF MINES BY STATE AND MINE TYPE (2009), <http://www.eia.doe.gov/cneaf/coal/page/acr/table9.html> (last visited May 3, 2010). In 2008, it was reported that the mine produced 35,777,489 tons of coal. *Id.* Only four other mines, all of which are also located in the Powder River Basin, produced more coal. *Id.* It is unclear how the production capacity of the Antelope Mine could be replaced given that, with the exception of only four other mines in the Powder River Basin, no other mine is producing as much coal as the

Antelope Mine. It is further difficult to understand the basis for the BLM's assertion in light of the fact that the Powder River Basin produces more coal than any other region of the country and has for a number of years. In 2008, the region produced a record 495,964,000 tons of coal, 1.25 times more coal than the entire Appalachian Region of the United States and more than three times the amount of coal produced by the rest of Western United States. *Id.* The Antelope Mine produced more than seven percent of the of the Powder River Basin's total coal production. It is unclear how more than seven percent of the coal produced in the largest coal producing region in the country could reasonably be replaced.

Regardless, BLM's position is tenuous because it ignores the cumulative effects of offering the West Antelope II Leases together with other pending lease by applications in the Powder River Basin. As the BLM states in its ROD, "There are 12 pending maintenance lease applications in the Wyoming portion of the PRB....As applied for, the pending coal lease applications include approximately 35,605 acres and 4.474 billion tons of Federal coal." ROD at 3. On a cumulative basis, there is no way the BLM could reasonably assert that the 406,619,000 tons of coal from the West Antelope II Leases, together with the 4.474 billion tons proposed to through the 12 pending lease by applications in the Powder River Basin, would simply be "replaced" by coal from other regions. The total amount of coal to be leased—nearly 5 billion tons—is more than seven times the total amount of coal produced outside the Powder River Basin in 2008. *See* EIA, COAL PRODUCTION AND NUMBER OF MINES BY STATE AND MINE TYPE (2009), <http://www.eia.doe.gov/cneaf/coal/page/acr/table9.html> (last visited May 3, 2010).

Moreover, the BLM cannot simply ignore its duty to analyze impacts simply because it believes similar impacts may occur from other similar activities. This fundamentally undermines the Agency's duties under NEPA, which requires a hard look at the impacts of the major Federal action proposed for authorization, including the indirect and cumulative impacts. Simply because another activity may pose similar impacts does not let the BLM off the hook in terms of culpability for its own actions. This is particularly true in this case given that, with the exception of the 12 pending coal lease by applications in the Powder River Basin, there does not appear to be any single action likely to be responsible for more carbon dioxide emissions in the United States.

Regardless, the BLM's unsupported assertion that the carbon dioxide emissions simply would be "replaced" by other coal sources if the West Antelope II Leases were not authorized highlights the fact that the BLM failed to assess the significance of the carbon dioxide emissions. NEPA regulations clearly require not only an analysis of impacts, but also an assessment of the significance of indirect impacts. *See* 40 C.F.R. § 1502.16(b). Under NEPA, significance is defined in terms of "context" and "intensity." *See* 40 C.F.R. § 1508.27. In this case, BLM did not at all assess the significance of carbon dioxide emissions associated with the West Antelope II Leases, further undermining the Agency's implication that carbon dioxide emissions from the West Antelope II Leases do not matter.

The failure to assess significance is particularly troublesome in light of context and intensity of the likely carbon dioxide emissions associated with the West Antelope II Leases. As already explained, the level of carbon dioxide emissions appears to be significant in a number of regards, both in terms of context and intensity. Although the BLM asserted it was "not possible"

to project potential carbon dioxide emissions, the Agency did disclose that the West Antelope II Leases will at least maintain the current level of associated carbon dioxide emissions for 13 additional years. This would mean that the BLM's decision to offer the West Antelope II Leases would maintain at least one percent of the nation's total carbon dioxide emissions over an extended time period. Although one percent may seem small, this is one percent of all the carbon dioxide released by all coal-fired power plants, vehicles, and all other activities in the United States. This is certainly not an insignificant amount of carbon dioxide and indeed, we are hard pressed to think of any BLM decision that would result in such a large amount of carbon dioxide emissions.

The context of the associated carbon dioxide emissions bolsters our concerns. As discussed earlier in this Petition for Stay:

- Carbon dioxide emissions make up more than eighty-five percent of the United State's total greenhouse gas emissions;
- Coal-fired power plants release thirty-two percent of total carbon dioxide emissions, more than any other source in the nation;
- The Powder River Basin produces forty two percent of all coal burned in coal-fired power plants in the United States, more than any other region of the country;
- When burned, coal from the Powder River Basin produces 13.9 percent of all carbon dioxide emissions in the United States, more than any other region of the country; and
- The West Antelope II Leases would lead to the mining of more than 400,000,000 tons of coal from the Powder River Basin, which would in turn lead to the release of more than 700,000,000 tons of carbon dioxide, more than ten percent of the nation's current inventory of carbon dioxide emissions. With the exception of the 12 pending Powder River Basin coal lease by applications before the BLM, there is probably no single BLM decision or action resulting in such a large amount of greenhouse gas emissions.

The context could be summed up this way: the West Antelope II Leases would maintain the Powder River Basin as the leading source of coal for coal-fired power plants and the leading source of carbon dioxide in the United States. The significance of the West Antelope II Leases was not assessed in this context, further demonstrating that the BLM failed to comply with NEPA.

Ultimately, not only did the BLM fail to adequately analyze the carbon dioxide emissions associated with the West Antelope II Leases, the Agency also failed to assess their significance. Given that the BLM itself recognized that, "Reducing human-caused GHG [greenhouse gas] emissions would help to lessen any harmful effects that they may be causing to global climate," the failure to analyze and assess such impacts is not a minor oversight.

**b. The BLM did not Analyze or Assess the Potential Climate change Impacts**

Our second concern addresses the failure of the BLM to analyze and assess how the direct, indirect, and cumulative greenhouse gas emissions associated with the West Antelope II Leases will influence climate change. As the BLM indicates in its ROD, it can be assumed that the release of greenhouse gases associated with the West Antelope II Leases will contribute to climate change. *See* ROD at 7. Despite this, the BLM made no attempt to analyze and assess such impacts and the magnitude of contribution to climate change. This is particularly disconcerting in light of the duties set forth by Secretarial Order 3226, which require that agencies within the Department of Interior “shall, in a manner consistent and compatible with their respective missions...[c]onsider and analyze potential climate change impacts when...making major decisions affecting DOI [Department of Interior] resources.” Secretarial Order 3226, Amendment 1, Section 4(a) (January 16, 2009).

In response to comments, the BLM asserted that, “Given the state of the science, it is not possible to associate specific actions with the specific global impacts such as potential climate effects.” Response to FEIS Comments at 3. We are skeptical of this assertion, particularly in light of BLM’s statement that, “Reducing human-caused GHG [greenhouse gas] emissions would help to lessen any harmful effects that they may be causing to global climate.” ROD at 7. And indeed, BLM neither cites nor presents information or analysis in the FEIS or ROD demonstrating that the “state of the science” is such that an analysis of climate change impacts is impossible for the West Antelope II Leases. We are further skeptical given that the Secretary of the Interior himself has directed the BLM, to “consider and analyze potential climate change impacts” associated with major decisions affecting Department of Interior resources. The leasing of more than 400,000,000 tons of coal appears to be a major decision affecting Department of Interior resources, meaning the BLM was affirmatively obligated to meet the Secretary’s directive.

However, even assuming the BLM may be correct, its assertion does not satisfy NEPA’s disclosure requirements. NEPA regulations require that an Agency “evaluate reasonably foreseeable significant environmental effects on the human environment,” even where information relevant to making this evaluation is “incomplete or unavailable.” 40 C.F.R. § 1502.22. If, as the BLM asserts, tools are “not available” to analyze climate impacts, the Agency must clearly show that the information is “lacking” by providing what credible scientific information it does have on these reasonably foreseeable impacts and making an effort to analyze these impacts based on this information. *Id.* Specifically, even if “the means of obtaining the information are unknown, the agency shall [still] include in the environmental impact statement”:

- (1) A statement that such information is incomplete or unavailable;
- (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;
- (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and
- (4) the agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

40 C.F.R. § 1502.22(b). Under this section, reasonably foreseeable “includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.” *Id.*

Despite the BLM’s claim that tools are unavailable to analyze and assess the climate change impacts associated with the West Antelope II Leases, nowhere in the FEIS or the ROD is it apparent that the requirements of 40 C.F.R. § 1502.22 have been met. In fact, neither document even reference 40 C.F.R. § 1502.22. Of particular concern is that the BLM made no effort to evaluate climate change impacts using theoretical approaches or research methods generally accepted by the scientific community in accordance with 40 C.F.R. § 1502.22(b)(4). The BLM did not even prepare a qualitative assessment of climate change impacts, which could have at least provided information to the public and the decisionmaker regarding the potentially significant impacts. Put simply, the BLM made no effort to evaluate climate change using the credible scientific information available to the Agency. In short, the Agency made no effort to do the best it could with the information it had. Instead, the Agency just asserts an analysis of climate change impacts is impossible.

This failure to comply with NEPA is particularly troublesome given the apparent significance of the indirect and cumulative greenhouse gas emissions associated with the West Antelope II Leases, as well as the BLM’s general disclosure regarding the impacts of climate change. As it stands, the BLM failed to comply with NEPA with regards to the analysis and assessment of the climate change impacts associated with the West Antelope II Leases.

**c. The BLM Failed to Analyze in Detail a Range of Alternatives to Address Greenhouse Gas Emissions and Climate change Impacts**

BLM simply failed to analyze in detail a range of alternatives to address the indirect and cumulative carbon dioxide emissions and the likely climate change impacts associated with the West Antelope II Leases. In particular, BLM failed to consider alternatives to mitigate adverse climate change impacts in accordance with 40 C.F.R. §§ 1502.14(f) and 1502.16(h), including alternatives raised by Appellants. *See* WildEarth Guardians and Sierra Club January 20, 2009 Comments, Exhibit 8 at 7 and 13; Defenders of Wildlife April 20, 2009 Comments, Exhibit 10 at 10-11.

It is unclear exactly why BLM did not consider in detail alternatives to specifically address significant impacts and public concern related to greenhouse gas emissions. The BLM did not assert that such alternatives were outside the purpose and need for the project. Furthermore, the BLM did not assert that such alternatives were speculative. In response to comments on this issue, the BLM seems to raise three primary arguments: 1) That the Agency did consider a range of alternatives; 2) That such alternatives are best considered “at the place where the coal is consumed rather than at the sources of supply; and 3) That regardless, the greenhouse gas emissions tied to the West Antelope II Leases did not vary among alternatives.

On the latter point, the BLM's assertion appears rooted in its rehashed argument that, because electricity demand is projected to increase, any attempt to address greenhouse gas emissions through the West Antelope II Leases will not lead to any actual impacts on overall U.S. greenhouse gas emissions. The BLM asserts, "If the mines in the PRB are not able to produce coal for the marketplace in the future, the expected result is that there would be less PRB coal available to electric generating facilities and more non-PRB coal would be sold in the market and used." Response to FEIS Comments at 6. As explained, already, this assertion is dubious given that the Powder River Basin far outproduces any other coal production region in the nation. Here, both individually through the West Antelope II Lease and cumulatively with regards to the 12 pending lease by applications in the Powder River Basin, it appears that the BLM could, in fact, have a meaningful impact on nationwide coal demand. Nevertheless, the BLM provides no analysis or information supporting any assertion that coal from the Powder River Basin is capable of being replaced.

Regardless, the BLM assertion is undermined by the fact that if the Agency altered the leases of the West Antelope II Leases, such as through their acreage, tonnage, and the length of time that they would produce coal, the amount of indirect and cumulative carbon dioxide emissions associated with the West Antelope II Leases would be influenced. This is a truth that the BLM strives at great lengths to turn into fiction, yet that is an unavoidable consequence. To this issue, WildEarth Guardians and the Sierra Club specifically requested the BLM consider alternatives that "limit annual coal production to contribute to reductions in greenhouse gases from coal combustion." WildEarth Guardians and Sierra Club Comments, Exhibit 8 at 7. The BLM made no such effort to limit production in order to address the indirect and cumulative carbon dioxide emissions associated with the West Antelope II Leases.

With regards to the second point, the BLM asserted, "Examining the options available to reduce GHG releases from burning coal is best applied at the place where the coal is consumed rather than at the sources of supply." Response to FEIS Comments at 6. This statement is probably the most confusing. The BLM is essentially stating its preference that addressing carbon dioxide emissions is best applied at coal-fired power plants, yet this is not a legally justified reason for rejecting alternatives under NEPA. Indeed, under NEPA, the BLM is only allowed to reject alternatives that do not accomplish the "stated goal of a project," or alternatives that are "too remote, speculative, impractical, ineffective or repetitive." See *Bristlecone Alliance et al.*, 179 IBLA 51, 65 (2010). In this case, the BLM's assertion that "Examining the options available to reduce GHG releases from burning coal is best applied at the place where the coal is consumed rather than at the sources of supply," was not rooted in any finding that such options were not within the stated goal of the West Antelope II Leases, nor any finding that such options were "too remote, speculative, impractical, ineffective, or repetitive." With all due respect to what the BLM prefers, the Agency's preferences do not absolve the Agency of its duties to give full consideration to alternatives that both address significant environmental issues and are within the stated goal of the project.

In this case, it is certainly questionable whether any alternatives to address indirect and cumulative carbon dioxide emissions would not accomplish the stated goals of the project. As the BLM states, the purpose of the FEIS is to "decide whether to hold a competitive, sealed-bid lease sale for the tract as applied for, hold a competitive, sealed-bid lease sale for a modified



tract, or reject the current lease by application and not offer the tract for sale at this time.” FEIS at 1-10. Necessarily, to meet this purpose, the BLM would have to make its decisions on the basis of “environmental considerations,” among other factors, as required by 43 C.F.R. § 3425.1-8(a)(3). Furthermore, although the BLM asserts that there is a need to produce coal to meet U.S. electricity needs, this need does not appear to be undermined by alternatives presented by Appellants. For example, WildEarth Guardians and the Sierra Club both requested the BLM consider an alternative that would “require[e] the successful [bidder] to obtain carbon offsets before undertaking coal mining activities.” WildEarth Guardians and Sierra Club Comments, Exhibit 8 at 7. Securing carbon offsets would be a means to both allow coal production to proceed, as requested by the Antelope Coal Company, and also reduce indirect and cumulative carbon dioxide emissions. Unfortunately, BLM did not even address the issue of carbon offsets in its ROD, FEIS, or Response to Comments on the FEIS. Ultimately, BLM ignored the fact that Appellants asked for specific alternatives that were within the Agency’s stated “reasonable alternative options available for BLM to review.” ROD at 7.

Finally, the BLM overarchingly asserts, “The EIS does address a full range of alternatives to the lease by application submitted by the lease applicant.” Response to FEIS Comments at 7. Yet this assertion is undermined by the Agency’s own admission that the range of alternatives only represents “lands that include coal reserves that are comparable to those applied for, which may be efficiently recovered with the LBA [lease by application], which may enhance competitive interest in the tract, and which could be bypassed if not leased.” *Id.* In other words, the BLM did not consider a range of alternatives to address significant environmental impacts, but rather only considered a range of alternatives that it perceived would enhance competitive interest in the West Antelope II Leases. This is wholly inappropriate. The Agency was not limited to consider alternatives that only varied with regards to the related competitive interest. This is entirely evident given that 43 C.F.R. § 3425.1-8 explicitly states that the BLM “shall” reject a lease by application, in total or in part, if it is found that “leasing the lands covered by the application, for environmental or other sufficient reasons, would be contrary to the public interest.” In other words, the BLM is not bound only to consider alternatives on the basis of their economic payback. To be sure, BLM is required to ensure fair market value in accordance with 43 C.F.R. § 3422.1. However, this duty is tempered by other requirements of the lease by application process, namely the requirement to protect the public interest in the context of environmental protection.

#### **4. The BLM Failed to Adequately Analyze and Assess Air Quality Impacts**

The BLM further failed to adequately analyze and assess air quality impacts associated with the West Antelope II Leases in accordance with NEPA and CEQ NEPA regulations. This oversight is significant given not only the public health and welfare ramifications of air pollution, but given the BLM’s own disclosure that the West Antelope II Leases will exacerbate air quality impacts.

##### **a. Ozone**

Ozone is a harmful gas for which the EPA has established NAAQS in order to protect public health. *See* 40 C.F.R. § 50.15. The BLM explains:

Potential health risks associated with inhalation of ground level ozone...include acute respiratory problems, aggravated asthma, decreases in lung capacity in some healthy adults, inflammation of lung tissue, respiratory-related hospital admissions and emergency room visits, and increased susceptibility to respiratory illnesses, including bronchitis and pneumonia (EPA 2007d).

FEIS at 3-39. Currently, the NAAQS limit ozone concentrations to no more than 0.075 parts per million over an eight hour period. *See* Response to FEIS Comments at 12. According to the EPA, an exceedance of the standard occurs whenever ambient ozone concentrations reach 0.076 parts per million or higher and a violation occurs whenever the three year average of the fourth highest annual eight-hour ozone concentrations is 0.076 parts per million or higher. *See* 40 C.F.R. § 50.15.

Appellants raised concerns over the impacts of the West Antelope II Leases to ambient ozone concentrations in the region. The BLM acknowledged that ozone is an issue of concern, stating that, “Ozone has been included in discussions on emissions of nitrogen oxide (NO<sub>x</sub>) since NO<sub>x</sub> is one of the main ingredients involved in the formation of ground level ozone.” Response to FEIS Comments at 12. Unfortunately, the Agency prepared no analysis or assessment of the impacts of the West Antelope II Leases to ambient ozone concentrations. The BLM seemed to imply that ozone is not an issue with regards to the West Antelope II Leases. However, this is contradicted by the Agency’s own disclosures and by monitoring data from the region.

The BLM appeared to assert that the region where the West Antelope II Leases are located is in compliance with the ozone NAAQS, and therefore an analysis or assessment of impacts is not warranted. This assertion ignores the fact that numerous exceedances of the NAAQS have occurred in the region, and that the region is nearly violating the NAAQS.

Indeed, according to monitoring data available from the EPA, ozone monitors in Campbell County, Wyoming have exceeded the ozone NAAQS on 16 occasions since 2001. Two monitors are in operation in Campbell County, one in the Thunder Basin National Grassland and the other in southern Campbell County. *See* EPA, MONITOR VALUES REPORT, CAMPBELL COUNTY, WYOMING, 2001-2008, *available at* <http://iaspub.epa.gov/airsdata/adaqs.monvals?geotype=co&geocode=56005+56009&geoinfo=co~56005+56009~Campbell+Co%2C+Converse+Co%2C+Wyoming&pol=O3&year=2008+2007+2006+2005+2004+2003+2002+2001+2000&fld=monid&fld=siteid&fld=address&fld=city&fld=county&fld=stabbr&fld=regn&rpp=25> (last visited May 3, 2010). This monitoring data is also attached as Exhibit 15. *See also* table below. According to this data, eight-hour ozone concentrations have peaked as high as 0.088 parts per million. According to this data, the three year average of the fourth highest annual eight hour ozone readings for the years 2006-2008 is 0.067 parts per million at the South Campbell County Monitor and 0.072 parts per million at the Thunder Basin Monitor—ninety-six percent of the NAAQS and only 0.004 parts per million away from violating the NAAQS.

**Table 1.** Number of days above ozone NAAQS at Campbell County, Wyoming Ozone Monitors. Peak ozone concentration in parentheses (in parts per million). *See Exhibit 15.*

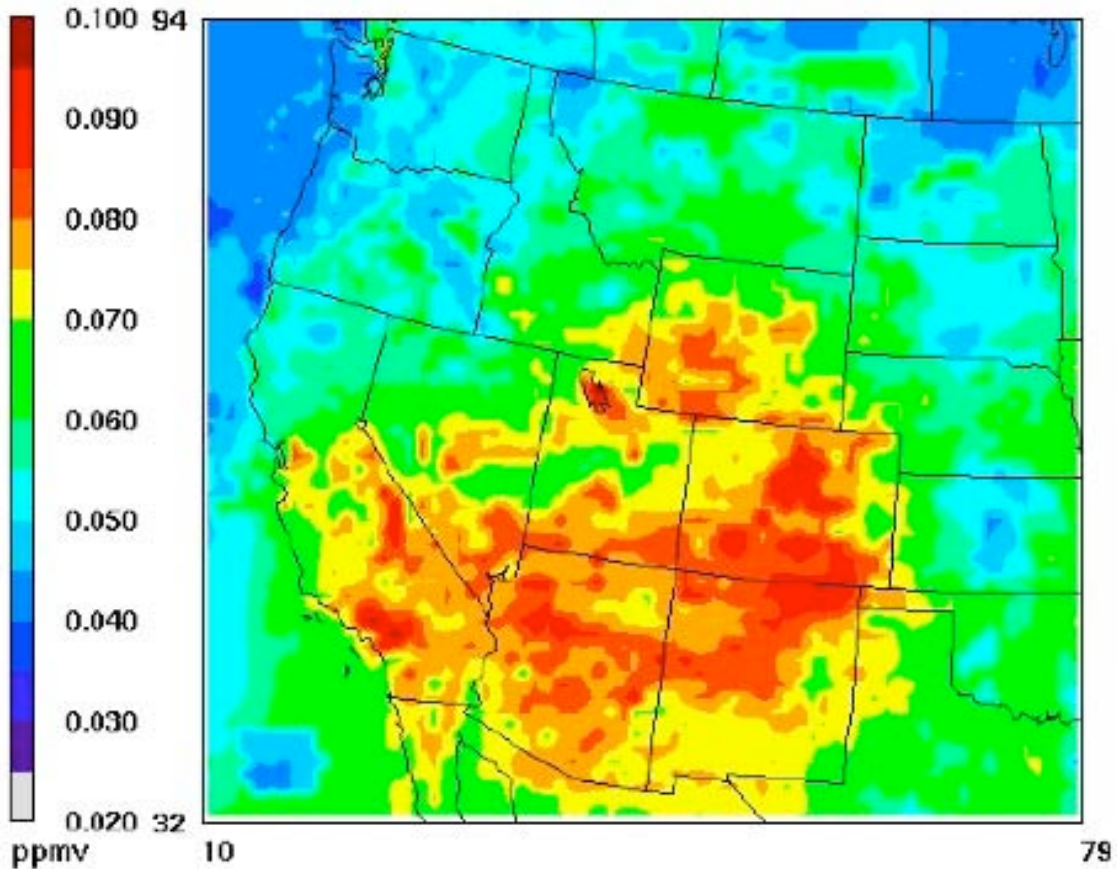
<b>Monitor</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>
Thunder Basin National Grassland	0	1 (0.088)	2 (0.085)	0	0	0	3 (0.081)	3 (0.078)
South Campbell County	--	--	6 (0.083)	0	0	0	1 (0.076)	0

Even the BLM recognized that ozone concentrations have exceeded the NAAQS. In response to comments, the Agency noted that in 2003, the fourth highest eight-hour ozone concentration recorded at the South Campbell County Monitor reached 0.077 parts per million. *See Response to FEIS Comments at 12.* It is unclear why the agency did not disclose the full extent of the ozone monitoring data that exists for the region.<sup>3</sup> It is further unclear why the Agency did not respond to this data by analyzing the direct, indirect, and cumulative ozone impacts that would be expected to occur as a result of the “logical consequence” of offering the West Antelope II Leases for sale.

The likelihood of high ozone levels in the region is consistent with recent modeling prepared for the Western Regional Air Partnership (“WRAP”), which indicates that large areas of the Rocky Mountain West, including northeastern Wyoming, are projected to exceed and/or violate the ozone NAAQS by 2018. In 2008 presentation given at a WRAP Technical Analysis Meeting in Denver, Colorado, it was reported that the modeling “predicts exceedance of the 8-hour average ozone standard in much of the southwestern US, mostly in spring.” Tonnesen, G., Z. Wang, M. Omary, C. Chien, Z. Adelman, and R. Morris, et al., REVIEW OF OZONE PERFORMANCE IN WRAP MODELING AND RELEVANCE TO FUTURE REGIONAL OZONE PLANNING, presentation given at WRAP Technical Analysis Meeting (July 30, 2008) at unnumbered slide 30, *available at* [http://wrapair.org/forums/toc/meetings/080729m/RMC\\_Denver\\_OzoneMPE\\_Final2.pdf](http://wrapair.org/forums/toc/meetings/080729m/RMC_Denver_OzoneMPE_Final2.pdf) (last viewed May 3, 2010). This presentation is attached as Exhibit 16. The image below from the WRAP presentation shows areas projected to exceed and/or violate the current and future ozone NAAQS. This same image was presented by WildEarth Guardians and the Sierra Club in comments on the FEIS. *See Exhibit 8 at 11.*

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<sup>3</sup> The BLM’s disclosure is further confusing because the agency presents ozone data in terms of micrograms/cubic meter. *See e.g.*, 3-24. However, the NAAQS are expressed as a parts per million concentration, not as a microgram/cubic meter. This is due to the fact that ozone is a gas.



**Figure 2.** Projected 2018 annual fourth maximum ozone concentrations. Orange and red indicate exceedances and/or violations of the ozone NAAQS of 0.075 parts per million. See Exhibit 16 at unnumbered slide 28.

Although a violation of the ozone NAAQS has yet to occur, the duty to analyze and assess air quality impacts does not hinge upon an area falling into violation of ambient air quality standards. This duty is all the more imperative in the Powder River Basin in light of signs that the region could violate the NAAQS as a result of the West Antelope II Leases. These signs include monitored exceedances of the NAAQS, the fact that the three year average of the fourth highest annual eight hour ozone concentrations at the Thunder Basin National Grassland ozone monitor is 0.072 parts per million, within ninety-six percent of the NAAQS, and the fact that regional modeling projects exceedances and/or violations of the ozone NAAQS in the near future. In light of this, the BLM’s failure to analyze and assess the impacts of the West Antelope II Leases to ambient ozone concentrations represents a fatal flaw in the agency’s analysis and ROD and a fundamental violation of NEPA and CEQ NEPA regulations.

**b. Nitrogen Dioxide**

The BLM failed to analyze and assess the potentially significant impacts to the current NAAQS for nitrogen dioxide. On February 9, 2010, the EPA finalized revisions to the nitrogen dioxide NAAQS, supplementing the current annual standard of 53 parts per billion with a 1-hour

standard of 100 parts per billion. *See* Primary National Ambient Air Quality Standards for Nitrogen Dioxide, Final Rule, 75 Fed. Reg. 6474-6537 (Feb. 9, 2010). These NAAQS were originally proposed on July 15, 2009. *See* Primary National Ambient Air Quality Standards for Nitrogen Dioxide, Proposed Rule, 74 Fed. Reg. 34404-34466 (July 15, 2009). These NAAQS became effective on April 12, 2010.

Nowhere did the BLM attempt to analyze the degree to which the West Antelope II Leases would affect nitrogen dioxide concentrations on an hourly basis. In fact, in the FEIS, the BLM claims, “Neither the EPA nor the WDEQ have established NAAQS for NO<sub>2</sub> for averaging times shorter than one year.” FEIS at 3-39. This is disconcerting not only in light of what the NAAQS require, but in light of the BLM’s disclosure regarding the danger of nitrogen dioxide. As the Agency states, “[N]itrogen dioxide (NO<sub>2</sub>)...is a highly reactive, reddish brown gas that is heavier than air and has a pungent odor. NO<sub>2</sub> is by far the most toxic of several species of NO<sub>x</sub>.” FEIS at 3-38. The BLM continues to note that nitrogen dioxide “may cause significant toxicity because of its ability to form nitric acid with water in the eye, lung mucous membranes, and skin,” “may cause death by damaging the pulmonary systems,” and “may exacerbate pre-existing respiratory conditions, or increase the incidence of respiratory infections.” *Id.* The BLM discloses, “there is concern about the potential health risk associated with short-term exposure to NO<sub>2</sub> from blasting emission.” FEIS at 3-40.

Although the BLM may assert that voluntary mitigation measures will address any potentially significant short-term nitrogen dioxide impacts, the agency provides no analysis, including any air quality analysis, or assessment to support such an assertion in its FEIS. *See* FEIS at 3-42—3-45. Indeed, there is no assessment of the effectiveness of any mitigation measures, voluntary or otherwise, to address short-term nitrogen dioxide impacts in the context of the NAAQS. Furthermore, to the extent that the BLM relies on voluntary measures to address any potentially significant nitrogen dioxide impacts, such measures cannot serve to mitigate impacts given that they are unenforceable.

### **c. Visibility**

The BLM disclosed that visibility would be further impaired in a number of special areas, including Class I areas under the Clean Air Act and other sensitive Class II areas. For instance, the BLM notes that, Unfortunately, the BLM made no effort to assess the significance of these impacts in accordance with NEPA.

This oversight is significant, particularly in the context of Class I areas under the Clean Air Act. The BLM discloses that nationally, the Clean Air Act has set a goal of “prevent[ing] any future, and remedy[ing] any existing, impairment of visibility in mandatory Federal Class I areas that result from manmade pollution.” FEIS at 3-45. EPA regulations state that the term “visibility impairment” is defined as “any humanly perceptible change in visibility (light extinction, visual range, contrast, coloration) from that which would have existed under natural conditions.” 40 C.F.R. § 51.301. The regulations state that “[a] single source that is responsible for a 1.0 deciview change or more should be considered to ‘cause’ visibility impairment” and

that “determining whether a source ‘contributes’ to visibility impairment should not be higher than 0.5 deciviews.” 40 C.F.R. § 51 Appendix Y, Section III A. 1.<sup>4</sup>

The BLM discloses that, even under a low production scenario, the West Antelope II Leases will increase the number of additional days in which visibility impacts will be greater than 1.0 deciview at 17 Class I areas, including Badlands National Park, Bob Marshall Wilderness Area, Bridger Wilderness Area, Fitzpatrick Wilderness area, Fort Peck Indian Reservation, Gates of the Mountain Wilderness area, Grand Teton National Park, North Absaroka Wilderness Area, North Cheyenne Indian Reservation, Red Rock Lakes, Scapegoat Wilderness Area, Teton Wilderness Area, Theodore Roosevelt National Park, UL Bend Wilderness Area, Washakie Wilderness Area, Wind Cave National Park, and Yellowstone National Park. *See* FEIS at 4-38. In the case of Badlands and Theodore Roosevelt National Parks, the number of additional days where visibility impacts will be greater than 1.0 deciview will be 19 and 15, respectively, the highest of any Class I area.

Despite these disturbing disclosures, the BLM did not make any attempt to assess the significance of these projected visibility impacts or to otherwise address such impacts through mitigation or other measures. It is as if the Agency simply disclosed the potential impacts, then did nothing more. This is utterly contrary to NEPA, which not only requires an analysis, but an assessment of the significance of impacts to ensure informed decisionmaking. *See* 40 C.F.R. §§ 1502.16, 1508.7, and 1508.8.

The failure of the BLM to assess visibility impacts arising from the West Antelope II Leases is especially disconcerting in light of the fact that the State of Wyoming has done nothing to address such impacts. Indeed, the EPA has officially declared that Wyoming, among many other states, has failed to submit rules to address visibility impacts from sources of air pollution within the State. *See* Finding of Failure to Submit State Implementation Plans Required by the 1999 Regional Haze Rule, 74 Fed. Reg. 2392-2395 (Jan. 15, 2009). Thus, BLM has no reasonable basis upon which to rely on the State of Wyoming to address visibility impacts under NEPA.

#### **d. PM<sub>10</sub>**

Particulate matter less than 10 microns in diameter, or PM<sub>10</sub>, is a harmful pollutant for which the EPA has established NAAQS in order to protect public health. *See* 40 C.F.R. § 50.10. The BLM explains:

Particulates, especially fine particles, have been linked to numerous respiratory related illnesses and can adversely affect individuals with pre-existing heart or lung diseases (EPA 2007a). They are also a major cause of visibility impairment in many parts of the United States. While individual particles cannot be seen with the naked eye, collectively they can appear as black soot, dust clouds, or gray hazes.

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<sup>4</sup> The BLM explains a deciview is a “general measure of view impairment (13 deciviews equals a view of approximately 60 miles) caused by pollution. A 10 percent change in extinction corresponds to 1.0 dv.” FEIS at 7-3.

FEIS at 3-28. Currently, the NAAQS limit PM<sub>10</sub> concentrations to no more than 150 micrograms/cubic meter, although Wyoming ambient air quality standards also limit PM<sub>10</sub> concentrations to no more than 50 micrograms/cubic meter. *See* FEIS at 4-34.

In analyzing the impacts of the West Antelope II Leases, the BLM did not deny that a number of exceedances of the 24-hour PM<sub>10</sub> NAAQS have occurred in the region of the Antelope Mine. As the Agency states, “Between 2001 and 2006, there were 29 monitored exceedances of the 24-hour PM<sub>10</sub> standard at seven operating mines in the Wyoming Powder River Basin (WDEQ/AQD 2006a). In early 2007, nine exceedances were monitored at four mines.” FEIS at 3-28. Nor did the BLM deny that the West Antelope II Leases would contribute to future exceedances of the 24-hour PM<sub>10</sub> NAAQS. As the Agency discloses in the FEIS, the cumulative impacts of the West Antelope II Leases would lead to exceedances of the 24-hour PM<sub>10</sub> NAAQS, leading to concentrations as high as 378.8 micrograms/cubic meter, even under a low production scenario. *See* FEIS at 4-34.

Despite these disclosures, the BLM concluded that the West Antelope II Leases would comply with the 24-hour PM<sub>10</sub> NAAQS. Unfortunately, what the BLM failed to do is prepare any analysis and assessment to support this finding. On the contrary, the Agency’s analysis and assessment seems to support an entirely opposite conclusion.

In the FEIS, BLM seemed to assert that compliance with State of Wyoming air quality permitting requirements would prevent exceedances of the 24-hour PM<sub>10</sub> NAAQS. This is a dubious statement, to say the least. Even under current air quality permits, exceedances of the NAAQS are occurring. This is significant because BLM discloses that, “monitoring results have been used in lieu of short-term (24-hour) modeling for assessing short-term coal mining-related impacts in the PRB.” FEIS at 3-32. In other words, only monitoring, not modeling has been used to ensure compliance with the NAAQS. In light of this, there is no indication that future permits will ensure compliance in light of monitored exceedances. This is underscored by the BLM’s own cumulative effects analysis, which shows that exceedances of the 24-hour PM<sub>10</sub> NAAQS will occur, even at similarly permitted production rates. The cumulative effects analysis is based on Antelope Coal Company’s proposal to “[use] the same mining methods and emission mitigation methods to recover the coal on the West Antelope LBA tract as they are currently using to recover the coal on the existing leases.” FEIS at 3-32.

The fact is that state air quality permitting requirements and rules do not always prevent exceedances or violations of the NAAQS. The Clean Air Act itself contemplates this and dedicates an entire Part to “nonattainment planning.” *See* Clean Air Act, Title I, Part D, 42 U.S.C. § 7501, *et seq.* Comments from the EPA also directly alluded to this. The EPA stated that emissions, even as currently permitted, “must be reduced before production at the 36 to 42 mmtpy [million tons/year] will comply with [the 24-hour] PM<sub>10</sub> standards.” EPA, Comments on Draft Environmental Impact Statement for West Antelope II Coal Lease Application (April 22, 2008) at 2. This comment letter is attached as Exhibit 17. To this end, there is no support for any BLM claim that state air quality rules and permitting requirements will assure compliance with the 24-hour PM<sub>10</sub> NAAQS.

Perhaps the BLM's failure to conduct an adequate analysis and assessment of PM<sub>10</sub> impacts stems from the Agency's assertion that, "BLM does not have the authority to mitigate air quality impacts." Response to FEIS Comments at 11. This assertion is baseless as FLPMA explicitly requires the BLM to, "provide for compliance with applicable pollution controls laws, including *State and Federal air*, water, noise, or other pollution *standard or implementation plans*." 43 U.S.C. § 1712(c)(8) (emphasis added). This is echoed by the Agency's regulations, which state that "each land use authorization" shall "*require compliance with air and water quality standards established pursuant to applicable Federal or State law*." 43 C.F.R. § 2920.7(b)(3) (emphasis added). Appellants discuss in more detail below the BLM's failure to meet these substantive requirements, but suffice it to say, the BLM clearly has authority to ensure that land use authorizations, such as the West Antelope II Leases, comply with air quality standards. To that end, the Agency clearly has the authority to mitigate air quality impacts emissions to ensure compliance with air quality standards.

### **5. The BLM Failed to Protect Air Quality Standards in Accordance with the Federal Land Policy and Management Act**

The BLM has a duty to ensure compliance with state and federal air quality standards in accordance with FLPMA. See 43 U.S.C. § 1712(c)(8). FLPMA specifically states that the BLM shall, "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standard or implementation plans." *Id.* Unfortunately, the BLM failed to ensure compliance with air quality standards in authorizing the sale of the West Antelope II Leases.

FLPMA provides that BLM's land use plans must "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." 43 U.S.C. § 1712(c)(8). Here, both of BLM's applicable land use plan—the Casper and Buffalo Resource Management Plans ("RMPs")—explicitly provide for such compliance. The Casper RMP states that BLM will "[c]omply with applicable state and federal AAQS [ambient air quality standards] for criteria pollutant concentration levels associated with management actions." BLM, RECORD OF DECISION AND APPROVED CASPER RESOURCE MANAGEMENT PLAN, (December 2007) at 2-10, *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps/casper/rod.Par.5152.File.dat/01\\_rod\\_armp.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps/casper/rod.Par.5152.File.dat/01_rod_armp.pdf) (last visited May 3, 2010). The Buffalo RMP states that BLM will "minimize emissions that could result in acid rain, violations of air quality standards, or reduced visibility," and that the Agency will ensure its decisions are "conditioned to avoid violating Wyoming and national air quality standards." BLM, APPROVED RESOURCE MANAGEMENT PLAN FOR PUBLIC LANDS ADMINISTERED BY THE BUREAU OF LAND MANAGEMENT BUFFALO FIELD OFFICE, (April 2001) at 3, *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps.Par.94672.File.dat/2001rmp\\_update.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps.Par.94672.File.dat/2001rmp_update.pdf) (last visited May 3, 2010).

FLPMA and BLM's regulations prohibit agency action that is inconsistent with the land use plan. See 43 U.S.C. § 1732(a) (mandating that the Secretary "shall manage the public lands ... in accordance with the land use plans"); see also 43 C.F.R. § 1610.5-3(a) ("resource management authorizations and actions" must conform to the applicable resource management



plan). *See also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004) (“The statutory directive that BLM manage ‘in accordance with’ land use plans, and the regulatory requirement that authorizations and actions ‘conform to’ those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan.”).

Moreover, FLPMA and BLM’s own regulations explicitly provide for protection of air resources. 43 U.S.C. § 1701(a)(8) (the public lands shall be “managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values”). BLM regulations mandate the “each land use authorization” shall “require compliance with air and water quality standards established pursuant to applicable Federal or State law.” 43 C.F.R. § 2920.7(b)(3). FLPMA’s requirement to ensure compliance with air quality standards is mandatory. *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987).

BLM’s actions in this case fell short of its legal obligations under FLPMA in two critical ways. First, BLM cannot fulfill its responsibility to ensure compliance with air quality protections without analyzing a critical part of the problem. BLM blindly approved the West Antelope II Leases without even making the effort to analyze certain air quality impacts

Second, BLM cannot approve the project knowing that its emissions when combined with existing and reasonably foreseeable emissions will result in significant deterioration of air quality. In this case the BLM’s own analysis shows as a result of offering the West Antelope II Leases for sale, a number of state and federal air quality standards will be exceeded, contrary to its duties under FLPMA. The BLM’s specific shortcomings are as follows:

**a. Ozone**

The BLM did not even attempt to analyze or assess the impacts of the West Antelope II Leases to ambient ozone concentrations, notwithstanding the fact that monitors in the region have detected numerous exceedances of the ozone NAAQS, that the Thunder Basin National Grassland monitor is within ninety-six percent of the NAAQS, and that modeling indicates ozone levels will exceed and/or violate the NAAQS. In failing to analyze or assess the impacts of the West Antelope II Leases to ambient ozone concentrations, there is no support for any assertion that the BLM complied with FLPMA’s substantive air quality standard protection requirements in authorizing the West Antelope II Leases for sale.

**b. Nitrogen Dioxide**

Similarly, the BLM did not analyze or assess the impacts of the West Antelope II Leases to the recently adopted hourly nitrogen dioxide NAAQS. As explained, these NAAQS were originally proposed in early 2009 and adopted in late 2010 and for the first time ever, established a short-term nitrogen dioxide NAAQS. The failure to analyze and assess the impacts of the West Antelope II Leases to the nitrogen dioxide NAAQS demonstrates that the BLM failed to comply with FLPMA in deciding to offer the West Antelope II Leases for sale.

**c. Visibility**

As discussed earlier, the BLM's FEIS indicates that visibility will be further degraded in a number of Class I areas and sensitive Class II areas, including a number of National Parks, National Monuments, Wilderness Areas, Indian Reservations, and even Mount Rushmore National Memorial. *See* FEIS at 4-39. In authorizing these impacts, the BLM appears to be directly undermining the requirements of both the Buffalo and the Casper RMPs.

The Casper RMP states that BLM will “[r]educe visibility-impairing pollutants in accordance with the reasonable progress goals and timeframes established within the State of Wyoming’s Regional Haze State Implementation Plan.” BLM, RECORD OF DECISION AND APPROVED CASPER RESOURCE MANAGEMENT PLAN, (December 2007) at 2-10, *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps/casper/rod.Par.5152.File.dat/01\\_rod\\_armp.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps/casper/rod.Par.5152.File.dat/01_rod_armp.pdf) (last visited May 3, 2010). Although this RMP requirement references the State of Wyoming’s Regional Haze State Implementation Plan, as we have mentioned, the State of Wyoming has failed to submit this plan. *See* Finding of Failure to Submit State Implementation Plans Required by the 1999 Regional Haze Rule, 74 Fed. Reg. 2392-2395 (Jan. 15, 2009). However, in light of FLPMA’s substantive air quality protection requirements, the failure of the State of Wyoming to submit a state implementation plan does not appear to absolve the BLM of its duty to reduce visibility impairing pollutants consistent with the Casper RMP. Given that the Clean Air Act establishes a goal of “prevent[ing] any future, and remedy[ing] any existing, impairment of visibility in mandatory Federal Class I areas that result from manmade pollution (FEIS at 3-45),” the Agency was still affirmatively obligated to ensure that its actions provided for compliance, particularly in light of its overarching duty to manage public lands “in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values.” 43 U.S.C. § 1701(a)(8)

The Buffalo RMP is clear that BLM will “minimize emissions that could result in acid rain, violations of air quality standards, or reduced visibility.” BLM, APPROVED RESOURCE MANAGEMENT PLAN FOR PUBLIC LANDS ADMINISTERED BY THE BUREAU OF LAND MANAGEMENT BUFFALO FIELD OFFICE, (April 2001) at 3, *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps.Par.94672.File.dat/2001rmp\\_update.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps.Par.94672.File.dat/2001rmp_update.pdf) (last visited May 3, 2010). In failing to minimize emissions that the BLM discloses *will* contribute to reduced visibility, the Agency clearly violated both the Buffalo RMP and FLPMA.

#### d. PM<sub>10</sub>

As discussed earlier, the BLM’s own FEIS shows that on a cumulative basis, the West Antelope II Leases will exceed various PM<sub>10</sub> standards and that numerous exceedances of the 24-hour PM<sub>10</sub> NAAQS have been recorded in recent years within the Powder River Basin. Even the EPA commented that, “either [Antelope Coal] mine emissions or other emissions must be reduced before production at the 36 to 42 mmtpy will comply with PM<sub>10</sub> standards.” Exhibit 17 at 2.

The BLM does not deny that exceedances of the 24-hour PM<sub>10</sub> NAAQS have been recorded, or that the FEIS projects exceedances of the NAAQS, but rather seems to assert that it simply has no authority to address these impacts (*see e.g.*, Response to FEIS Comments at 11,

“BLM does not have the authority to mitigate air quality impacts.”). Such an assertion is wholly misplaced in light of FLPMA’s crystal clear requirement that the Agency’s actions “provide for compliance with...Federal air...standards[.]” 43 U.S.C. § 1712(c)(8). This assertion is further without merit in light of the fact that the governing RMPs explicitly echo this requirement, stating that the BLM shall both comply with Federal air quality standards and minimize emissions. *See* BLM, RECORD OF DECISION AND APPROVED CASPER RESOURCE MANAGEMENT PLAN, (December 2007) at 2-10, *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps/casper/rod.Par.5152.File.dat/01\\_rod\\_armp.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps/casper/rod.Par.5152.File.dat/01_rod_armp.pdf) (last visited May 3, 2010); BLM, APPROVED RESOURCE MANAGEMENT PLAN FOR PUBLIC LANDS ADMINISTERED BY THE BUREAU OF LAND MANAGEMENT BUFFALO FIELD OFFICE, (April 2001) at 3, *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps.Par.94672.File.dat/2001rmp\\_update.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/planning/rmps.Par.94672.File.dat/2001rmp_update.pdf) (last visited May 3, 2010).

In authorizing the sale of the West Antelope II Leases, the BLM has authorized the “logical consequence” of exceedances of the 24-hour PM<sub>10</sub> NAAQS, in violation of FLPMA.

## **B. Relative Harm to WildEarth Guardians Favors a Stay**

The relative harm in this case favors the granting of a stay of the sale and execution of the West Antelope II Leases in accordance with 43 C.F.R. § 4.21(b)(1)(i). Not only will Appellants suffer harm, but those harms will far outweigh any harm that the BLM and the Antelope Coal Company may suffer.

### **1. Appellants Will Suffer Harm**

As established by the declaration of Mr. Nichols, Mr. Mohrmann, and Mr. Proctor, WildEarth Guardians, the Sierra Club, and Defenders of Wildlife will suffer harm to their interests. These harms will occur as a result of the increase in air pollution, adverse impacts to National Grasslands near the West Antelope II Leases, adverse impacts to waters in the region, and adverse impacts related to climate change that the BLM indicates are linked to carbon dioxide emissions, including emissions linked to coal mined from the Powder River Basin, including emissions linked to coal proposed to be mined through the West Antelope II Leases. These harms are a “logical consequence” of selling and issuing the Leases. The harm that WildEarth Guardians will suffer is further bolstered by the BLM’s own environmental analyses.

#### **a. Harm to air quality**

The BLM itself discloses that, based on the use of “[a] state-of-the-art, guideline dispersion model” (FEIS at 4-32), federal and state air quality standards, as well as other important air quality thresholds, will be exceeded on a cumulative basis as a result of issuing the West Antelope II Leases. For instance, using its “state-of-the-art” analysis, the Agency discloses in its FEIS that NAAQS, Wyoming Ambient Air Quality Standards, and Montana Ambient Air Quality Standards (“MAAQS”) for particulate matter less than 10 microns in diameter, or PM<sub>10</sub>, will be exceeded as a result of offering the West Antelope II Leases for sale. *See* FEIS at 4-34.

The FEIS also indicates visibility in nearby wild lands will be degraded on a cumulative basis as a result of the West Antelope II Leases. *See id.* at 4-38.

As established by the declarations of Mr. Nichols, Mr. Mohrmann, and Mr. Proctor, these impacts will adversely affect the interests of WildEarth Guardians, the Sierra Club, and Defenders of Wildlife by eroding recreational, aesthetic, scientific, educational, and professional enjoyment of lands and resources that will be directly, indirectly, and cumulatively affected by the West Antelope II Leases. *See e.g.*, Declaration of Mr. Nichols, Exhibit 2 at 4-9; Declaration of Mr. Mohrmann, Exhibit 11 at ¶¶ 7-11; Declaration of Mr. Proctor, Exhibit 12 at 2. Mr. Nichols testified that the West Antelope II Leases will increase the number of additional days in which visibility impacts will be greater than 1.0 deciview in areas that he has recreated within and plans to recreate within in the near future. For instance, Mr. Nichols testified that even under a low production scenario, the West Antelope II Leases will increase the number of additional days in which visibility impacts will be greater than 1.0 deciview by 15 days in Wind Cave National Park and 8 days in Yellowstone National Park, both of which are Class I areas under the Clean Air Act. The West Antelope II Leases will increase the number of additional days in which visibility impacts will be greater than 1.0 deciview by 22 days in the Black Elk Wilderness, 18 days in Jewel Cave National Monument, 25 days in Mount Rushmore National Memorial, and 15 days in the Wind River Reservation.

These harms are made worse by the BLM's failure to adequately analyze and assess the air quality impacts of the West Antelope II Leases and to ensure compliance with federal air quality standards in accordance with FLPMA. The BLM's failure to adequately analyze and assess the ozone impacts of the West Antelope II Leases to ensure compliance with the NAAQS is particularly harmful in light of the fact that the region is on the verge of violating the current NAAQS. The West Antelope II Leases could literally be the straw that breaks the camels back, pushing the region into violation of the ozone NAAQS and triggering greater federal oversight under the Clean Air Act and regulatory burdens on this region of Wyoming.

#### **b. Harm to the climate**

“The harms associated with climate change are serious and well recognized.” *Massachusetts v. EPA*, 549 U.S. 497, 521 (U.S. 2007). The BLM confirms this, disclosing in its FEIS that:

The National Assessment of the Potential Consequences of Climate Variability and Change, an interagency effort initiated by Congress under the Global Climate Change Research Act of 1990, Public Law 101-606, has confirmed that climate change is impacting some natural resources that the Department of the Interior has the responsibility to manage and protect (DOI 2001).”

FEIS at 4-100. The BLM further outlines the projected impacts of climate change, citing the recent IPCC Synthesis Report and stating:

According to the IPCC's synthesis report (Bernstein et al. 2007):

- “Global atmospheric concentrations of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), and nitrous oxide (N<sub>2</sub>O) have increased markedly as a result of human activities since 1750 and now far exceed pre-industrial values determined from ice cores spanning many thousands of years.”
- “Most of the observed increase in globally-averaged temperatures since the mid-20<sup>th</sup> century is very likely due to the observed increase in anthropogenic greenhouse gas concentrations. It is likely there has been significant anthropogenic warming over the past 50 years averaged over each continent (except Antarctica).”
- “There is high agreement and much evidence that with current climate change mitigation policies and related sustainable development practices, global greenhouse gas emission will continue to grow over the next few decades.”
- “Continued greenhouse gas emissions at or above current rates would cause further warming and induce many changes in the global climate system during the 21<sup>st</sup> century that would be very likely to be larger than those observed during the 20<sup>th</sup> century.”
- “There is high confidence that by mid-century, annual river runoff and water availability are projected to increase at high latitudes and in some tropical wet areas and decrease in some dry regions in the mid-latitudes and tropics. There is also high confidence that many semi-arid areas (e.g., Mediterranean Basin, western United States, southern Africa and northeast Brazil) will suffer a decrease in water resources due to climate change.”
- “Anthropogenic warming and sea level rise would continue for centuries due to the time scales associated with climate processes and feedbacks, even if greenhouse gas concentrations were to be stabilized.”
- “Anthropogenic warming and sea level rise could lead to some impacts that are abrupt or irreversible, depending upon the rate and magnitude of the climate change.”
- “There is high agreement and much evidence that all stabilization levels assessed can be achieved by deployment of a portfolio of technologies that are either currently available or expected to be commercialized in coming decades, assuming appropriate and effective incentives are in place for their development, acquisition, deployment and diffusion and addressing related barriers.”

The BLM continued:

The National Academy of Sciences has confirmed these findings, but also has indicated there are uncertainties regarding how climate change may affect different regions. Computer model predictions indicate that increases in temperature will not be equally distributed, but are likely to be accentuated at higher latitudes. Warming during the winter months is expected to be greater than during the summer, and increases in daily minimum temperatures are more likely than increases in daily maximum temperatures.

Increases in temperatures would increase water vapor in the atmosphere, and reduce soil moisture, increasing generalized drought conditions, while at the same time enhancing heavy storm events.

FEIS at 4-102—4-103. The BLM also outlines the impacts of climate change to the American West, stating:

If global warming trends continue into the foreseeable future, Chambers (2006) indicates that the following changes may be expected to occur in the West:

- The amount and seasonal variability of precipitation will increase over most areas. IPCC (2001) climate model scenarios indicate that by 2100, precipitation will increase about 10 percent in summer, about 30 percent in fall, and 40 percent in winter. Less snowfall will accumulate in higher elevations, more precipitation will occur as rain, and snowmelt will occur earlier in the spring because of higher temperatures.
- Streamflow patterns will change in response to reduced snowpacks and increasing precipitation. Peak flows in spring are expected to occur earlier and be of lower magnitude because of snowpack changes. Runoff from greater amounts of winter rainfall will cause higher winter flows. Summer flows will be lower, but with higher variability depending on the severity of storm events.
- Some populations of native plants, invasive species, and pests will expand. Increasing amounts of atmospheric carbon dioxide and precipitation during the growing season will provide favorable growth conditions for native grasses, perennial forbs, woody species, and invasive annuals such as cheatgrass. Insect populations also will likely increase because milder winter temperatures will improve reproduction and survival rates.
- Fire frequency, severity, and extent will increase because of the increased availability of fine fuels (grasses, forbs, and invasives) and accumulation of fuels from previous growing seasons. Higher temperatures will extend the length of fire seasons. Expansion of pinyon-juniper species and increasing tree densities could increase the number of high severity crown fires. Higher rates of insect damage and disease also may increase fuel accumulations.
- Sensitive species and overall biodiversity will be reduced. High-elevation habitats will shrink in area or disappear as lower-elevation plant communities expand. It is probable that some mammalian, avian, and other species that currently inhabit these high-elevation habitats may become extinct. Higher rates of disease and insect damage also may pose threats to other sensitive plant and animal species.

The declarations of Mr. Nichols, Mr. Mohrmann, and Mr. Proctor indicate that these very impacts, particularly in the American West, are presently occurring, already posing harm to their recreational, aesthetic, and conservation interests. *See e.g.*, Declaration of Mr. Nichols, Exhibit 2

at 9-13; Declaration of Mr. Mohrmann, Exhibit 11 at ¶¶ 11-12; Declaration of Mr. Proctor, Exhibit 12 at 2-3.

The BLM states that, “Reducing human-caused GHG emissions would help to lessen any harmful effects that they may be causing to global climate.” ROD at 7. Clearly in authorizing the West Antelope II Leases and at least extending the indirect and cumulative carbon dioxide emissions associated with the Leases, but most likely authorizing an increase in carbon dioxide emissions, the BLM is not reducing greenhouse gas emissions and therefore not lessening any harmful effects that they may be posing to global climate, particularly in the American West.

### **c. Other Environmental Harm**

Appellants are further harmed as a result of the BLM’s decision to issue the West Antelope II Leases under the auspices of the 1990 decertification decision. This 1990 decertification decision has prevented the BLM from preparing a regional leasing environmental analysis, to set leasing levels based on a consideration of environmental impacts, and to establish lease tracts based on a consideration of environmental impacts, consistent with 43 C.F.R. §§ 3420.2 and 3420.3. As established by the declaration of Mr. Nichols, Appellants are harmed by the 1990 decertification and the substantive implications of this decision. *See e.g.*, Declaration of Mr. Nichols, Exhibit 2 at 14. Indeed, the 1990 decertification decision and the BLM’s subsequent reliance on the lease by application process has denied Appellants assurances that regional leasing levels are based on a consideration of environmental concerns, including air quality and climate change concerns. Currently, leasing levels are limited only by the number of lease by applications received by the BLM. Furthermore, because an EIS of regional leasing levels has not been prepared in accordance with 43 C.F.R. § 3420.2(f), Appellants have no assurance that the BLM’s coal leasing program in the Powder River Basin is consistent with environmental considerations. The decision to sell and execute the West Antelope II Leases perpetuates the impacts of the decertification and therefore harms Appellants conservation interests.

## **2. The Balance of Harms Clearly Favors Granting a Stay**

While WildEarth Guardians, the Sierra Club, and Defenders of Wildlife will be harmed as a result of the West Antelope II Leases, the BLM, as well as the Antelope Coal Company, will suffer little to no harm the BLM will suffer little to no harm from the granting of a stay. In this case, the BLM clearly states in the ROD that the Antelope Mine will continue operating for 11 years, even absent approval of the West Antelope II Leases. *See* ROD at 8. The BLM states that if the Leases were rejected, the “mine would cease operations only after the current lease reserves were depleted (currently estimated at 11 years).” *Id.*

On the other hand, if the leases are sold, the BLM will execute the leases and transfer the rights to develop the West Antelope II Leases, allowing the leases to be developed accordingly. Given that 43 C.F.R. § 3475.5 requires “diligent development” of any coal lease, this development could happen soon after the sale and execution of the leases. Although BLM notes that the Antelope Coal Company will need to obtain a permit for any mining of the West Antelope II Leases (*see* FEIS at 1-11—1-12), there is no indication that this permit requirement

will not require the State of Wyoming to comply with NEPA, FLPMA, or to otherwise comply with BLM coal leasing regulations prior to issuing any permit with regards to the issues raised in the likelihood of success on the merits section of this Petition for Stay. Furthermore, there is no indication that this process will limit activities that will lead to the emissions of harmful air pollutants, including greenhouse gases, that pose harm to Appellants while Appellants appeal is being decided upon. In selling and executing the West Antelope II Leases, the BLM will foreclose opportunities to address environmental obligations that fall on the Agency's shoulders, as set forth in this Petition for Stay, not on the State of Wyoming or any other federal agency.

### **C. Appellants Will Suffer Immediate and Irreparable Harm if the Stay is not Granted**

If Appellants' petition for a stay is not granted, BLM will offer the West Antelope II Leases for sale. According to the BLM, the Agency plans to schedule a sale of the West Antelope II Leases after the appeal period ends. Once the leases are sold, the BLM will immediately issue the leases in accordance with 43 C.F.R. § 3422.4 to the highest bidder and, upon receiving a completed signed lease form and associated payments, the BLM is obligated to execute the lease. Any lease will be issued for a period of 20 years in accordance with 43 C.F.R. § 3475.2.

In executing the lease, Antelope Coal will be under an affirmative obligation to diligently develop the lease in accordance with 43 C.F.R. § 3475.5 and BLM will be obligated to not interfere with Antelope Coal's compliance with this duty. Appellants interpret this affirmative duty to mean that Antelope Coal Mine will be required to begin the operations analyzed and assessed in the BLM's FEIS for the West Antelope II Leases, including operations that will lead to the emissions of air pollutants, including greenhouse gases, and pose other adverse environmental impacts that, as noted by the declarations of Mr. Nichols, Mr. Mohrmann, and Mr. Proctor. *See e.g.*, Declaration of Mr. Nichols, Exhibit 2; Declaration of Mr. Mohrmann, Exhibit 11; Declaration of Mr. Proctor, Exhibit 12. After all, the BLM has stated that development of the West Antelope II Leases is a "logical consequence."

The declarations of Mr. Nichols, Mr. Mohrmann, and Mr. Proctor indicate that once the operations analyzed through the West Antelope II Leases begin, harm will be irreparable, particularly with regards to air quality. *See e.g.*, Declaration of Mr. Nichols, Exhibit 2 at 4-9; Declaration of Mr. Mohrmann, Exhibit 11 at ¶ 8; Declaration of Mr. Proctor, Exhibit 12 at 2-3. Fundamentally, once air pollution, including greenhouse gases, is released, it cannot be put back. Furthermore, once air quality standards, such as PM<sub>10</sub>, are violated, the impacts will be difficult to reverse. If a violation of the NAAQS occurs, the region will be designated nonattainment pursuant to section 107 of the Clean Air Act (*see* 42 U.S.C. § 7407(d)(1)(A)(i)), triggering a multi-year planning effort that will subject the State of Wyoming, coal mining companies, including Antelope Coal, and other interests in the region to more stringent federal oversight and air quality control requirements pursuant to sections 172, 173 and 189 of the Clean Air Act. *See* 42 U.S.C. §§ 7502, 7503, and 7513a. As EPA indicated, a PM<sub>10</sub> violation will only be prevented if BLM and Antelope Coal actually reduce emissions. *See* EPA Letter, Exhibit 17 at 2. As disclosed in the FEIS, the BLM has neither required any reduction in emissions and Antelope



Coal has not committed to any reductions, meaning a nonattainment designation is virtually a given.

Furthermore, as the declarations of Mr. Nichols, Mr. Mohrmann, and Mr. Proctor demonstrate, the harms associated with indirect and cumulative carbon dioxide emissions related to the West Antelope II Leases are likely to be irreparable, especially give the BLM's failure to ensure that these impacts were adequately analyzed and assessed and failure to consider alternatives that would address such impacts. *See e.g.*, Declaration of Mr. Nichols, Exhibit 2 at 9-13; Declaration of Mr. Mohrmann, Exhibit 11 at ¶¶ 11-12; Declaration of Mr. Proctor, Exhibit 12 at 2-3. These impacts include loss of forests to fires and insects, reduced water supplies, diminished recreational opportunities and enjoyment, and increased air pollution. Once greenhouse gas emissions are emitted in conjunction with development of the West Antelope II Leases, it will be impossible to capture and remove these greenhouse gases from the atmosphere and to prevent them from contributing to climate change. The adverse impacts of climate change are already occurring, as evidenced by the observations of Mr. Nichols, Mr. Mohrmann, and Mr. Proctor. *See e.g.*, Declaration of Mr. Nichols, Exhibit 2 at 9-13; Declaration of Mr. Mohrmann, Exhibit 11 at ¶¶ 11-12; Declaration of Mr. Proctor Exhibit 12 at 2-3. These adverse impacts are confirmed by the BLM's disclosure in the FEIS, as earlier explained. Thus, any additional greenhouse gases released as a result of the West Antelope II Leases will only exacerbate the irreparable impacts already occurring to the American West and particularly with regards to the interests of the Appellants.

#### **D. The Public Interest Favors Granting the Stay**

The public interest favors granting a stay for a number of reasons.

As already explained, BLM's proposal to issue a lease by application perpetuates a legally flawed decision to decertify the Powder River Basin Coal Production Region. It is not in the public's interest to allow the BLM to move forward with issuing the West Antelope II Leases until the question of whether the 1990 decertification decision was, in fact, appropriate and consistent with the BLM's coal leasing regulations.

It is particularly not in the public's interest given that the BLM's track record of competitive leasing under the decertification is less than stellar. As Appellants have noted, in the last 20 years, only three out of 21 coal lease sales have attracted more than one bidder, indicating that the value of coal has not been appropriately assessed or upheld. Although the BLM is required to ensure that any coal sold through the lease by application process meets fair market value standards, with little actual competition it is questionable whether this is occurring. According to the BLM's "Economic Evaluation of Coal Properties Manual," competition is a key component of ensuring fair market value. For example, the "salient features" of fair market value include, among other things:

- Fair market value is determined by reference to a competitive market rather than to the personal or inherent value of the property.
- And the property must be exposed to a competitive market for a reasonable time.

See BLM, ECONOMIC EVALUATION OF COAL PROPERTIES, *BLM Handbook*, H-3070-1 (April 7, 1994) at I-3. Additionally, the BLM's preferred process for appraising coal properties, the comparable sales approach, relies on comparable prices being determined in a competitive market. See *id.* at III-1. At the least, with only three truly competitive leases sales in the last 20 years, it is difficult to see how any assessment of fair market value could be based on valid comparable data

However, even under the lease by application process, the BLM failed to consider whether it was in the public interest to sell the West Antelope II Leases in accordance with 43 C.F.R. § 3425.1-8. It is not in the public's interest to allow the BLM to move forward in contravention of an explicit regulatory requirement obligating the Agency to consider the public interest before offering a lease by application for sale.

Furthermore, vindicating congressionally established environmental policies and standards, particularly as enumerated under NEPA and FLPMA, favors the requested stay. See *California ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1324 (9th Cir. 1985) (finding that public interest may be defined "by reference to the policies expressed in legislation") (citation omitted). In this case, it is clear that BLM fell short of meeting substantive statutory requirements under both NEPA and FLPMA. In doing so, the BLM both failed to adequately disclose and assess the climate change and air quality impacts of the West Antelope II Leases, but failed to ensure that such impacts would not jeopardize compliance with substantive air quality obligations under FLPMA and would not undermine opportunities to mitigate the impacts of climate change by reducing or limiting indirect and cumulative carbon dioxide emissions. Congress' purpose in passing NEPA was, "To declare a national policy which will encourage productive and enjoyable harmony between man and environment [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man[.]" And in passing FLPMA, Congress declared that, "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values[.]" Issuing the requested stay will certainly advance Congress' policies enumerated in NEPA and FLPMA.

To this end, no energy development project—no matter how rich the resource involved—should be permitted to proceed at the cost of the health and welfare of people or the severe degradation of air quality. As Wyoming's own federal district court recently stated:

The 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.

*Wyoming Outdoor Council v. U.S. Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1260 (D. Wyo. 2005).

Finally, although BLM may claim that the granting of a stay will delay the recovery of lease bonus payments, lease royalty payments, and tax payments by “the United States, the State of Wyoming, and its affected counties (*see* ROD at 9), this potential revenue will not be foregone. A stay will simply maintain the status quo, under which currently the United States, the State of Wyoming, and its affected counties receive no lease bonus payments, lease royalty payments, and other tax payments from the West Antelope II Leases. As the BLM indicates in its FEIS, a stay would mean that State, local, and Federal revenues related to coal mining at the Antelope Mine would continue; no loss would be endured. *See* FEIS at 3-160.

#### **IV. CONCLUSION**

For the aforementioned reasons, Appellants request that the IBLA grant a stay in this case. A stay is more than warranted in light of the fact that Appellants are likely to prevail on the merits of this appeal, in light of the balance of harms at issue in this case, in light of the fact that Appellants will suffer irreparable harm if a stay is not granted, and to protect the public interest. The issues raised in this Appeal are significant and warrant close review by the IBLA. A stay would not prejudice the BLM in this case, while it would provide important interim relief for Appellants as these significant issues are closely reviewed.

Respectfully submitted this 3<sup>rd</sup> day of May 2010

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## TABLE OF EXHIBITS

1. DRAFT ENVIRONMENTAL IMPACT STATEMENT, WRIGHT COAL LEASE APPLICATIONS (August 2009) at 4-118.
2. Declaration of Jeremy Nichols.
3. Karl, T.R., *et al.*, eds., GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES. Cambridge University Press (2009) at 9, *available at* <http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf> (last visited May 3, 2010).
4. Excerpts from EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS, 1990-2008, EPA 430-R-10-006 (April 15, 2010), at 2-1 *available at* [http://www.epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-2010\\_Report.pdf](http://www.epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-2010_Report.pdf) (last visited May 3, 2010).
5. Hong, B.D. and E.R., Slatick, *Carbon Dioxide Emission Factors for Coal*, QUARTERLY COAL REPORT, *January-April 1994*, DOE/EIA-0121(94/Q1) (1994) at 1-8, *available at* [http://www.eia.doe.gov/cneaf/coal/quarterly/co2\\_article/co2.html](http://www.eia.doe.gov/cneaf/coal/quarterly/co2_article/co2.html) (last visited May 3, 2010).
6. WildEarth Guardians, UNDERMINING THE CLIMATE (November 2009).
7. WildEarth Guardians Comments on West Antelope II Leases Draft EIS (April 8, 2008).
8. WildEarth Guardians and Sierra Club Comments on West Antelope II Leases Draft EIS (January 20, 2009).
9. WildEarth Guardians and Sierra Club Comments on West Antelope II Leases Draft EIS (February 23, 2009).
10. Defenders of Wildlife Comments on West Antelope II Leases Draft EIS (April 8, 2008).
11. Declaration of Brad Mohrmann.
12. Declaration of Jonathan Proctor.
13. BLM, "Powder River Basin Briefing." BLM Wyoming State Office (1999).
14. Charter, Powder River Basin Regional Coal Team (October 24, 1995).
15. EPA, MONITOR VALUES REPORT, CAMPBELL COUNTY, WYOMING, 2001-2008.
16. Tonnesen, G., Z. Wang, M. Omary, C. Chien, Z. Adelman, and R. Morris, et al., REVIEW OF OZONE PERFORMANCE IN WRAP MODELING AND RELEVANCE TO FUTURE REGIONAL

OZONE PLANNING, presentation given at WRAP Technical Analysis Meeting (July 30, 2008).

17. EPA, Comments on Draft Environmental Impact Statement for West Antelope II Coal Lease Application (April 22, 2008).

## CERTIFICATE OF SERVICE

I certify that on May 3, 2010, I served this Notice of Appeal and Request for Stay by certified mail, return receipt requested, upon:

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