UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 15-8109

WILDEARTH GUARDIANS, et al.,

Petitioners - Appellants,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT,

Respondent - Appellee,

and

WYOMING MINING ASSOCIATION, et al.,

Intervenors - Appellees,

STATE OF WYOMING, et al.,

Respondents – Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING (Case No. 2:13-cv-00042-ABJ)
(JUDGE ALAN B. JOHNSON)

Oral Argument is Requested

PETITIONERS-APPELLANTS' OPENING BRIEF

Nathaniel Shoaff
Nathan Matthews
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5610
nathaniel.shoaff@sierraclub.org
nathan.matthews@sierraclub.org

Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto St.
Santa Fe, NM 87501
(505) 401-4180
sruscavagebarz@wildearthguardians.org

Attorneys for Petitioners-Appellants

RULE 26.1(a) CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(a), neither of the Appellants, Sierra Club and WildEarth Guardians, have a parent company nor have they issued publicly held stock.

Date: January 29, 2016

s/Nathaniel Shoaff
Nathaniel Shoaff
Attorney for Petitioners-Appellants
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5610
nathaniel.shoaff@sierraclub.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the addendum.

GLOSSARY

BLM	Bureau of Land Management
EIA	Energy Information Administration
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
GHG	Greenhouse Gas
NEPA	National Environmental Policy Act
NEMS	National Energy Modeling System
PRB	Powder River Basin
ROD	Record of Decision

PRIOR OR RELATED APPEALS

None.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question) and the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. This Court's jurisdiction is founded upon 28 U.S.C. § 1291.

This is an appeal from the final order and judgment of the U.S. District Court for the District of Wyoming dated August 17, 2015, which disposed of all of Appellants' claims. The district court's decision is reported as *WildEarth Guardians et. al. v. United States Forest Service*, 2015 WL 4886082 (D. Wyo. Aug. 17, 2015). The notice of appeal in this case, No. 15-8109, was timely filed on October 7, 2015.

STATEMENT OF ISSUES

This appeal concerns the Bureau of Land Management's ("BLM's") authorization of the "Wright Area" leases, which allow the two largest coal mines in the country to mine an additional 2 billion tons of coal—more than double the amount of coal burned by electric utilities in the United States in 2010. The only issue in this appeal is whether BLM acted arbitrarily in assuming that issuance of these massive leases would have zero impact on the total amount of coal mined and burned in the United States, and thus on the total amount of carbon dioxide emitted from the U.S. electricity generating sector.

STATEMENT OF THE CASE

I. INTRODUCTION

The four Wright Area coal leases, located in the Powder River Basin in northeastern Wyoming, are among the largest coal mining expansions ever approved on public lands. Appellants Sierra Club and WildEarth Guardians (together, "Conservation Organizations") seek review of BLM's authorizations of these four coal leases. Together the leases would generate more than 2 billion tons of coal. If all 2 billion tons were burned to generate electricity, which BLM admitted was the likely result of the agency's decision, it would release more than 3.3 billion tons of heat-trapping carbon dioxide into the atmosphere. On an annual basis, the leases would dominate the U.S. marketplace by generating up to 230 million tons of coal per year during overlapping production, an amount equivalent to more than twenty percent of all coal burned in the U.S. to generate electricity in 2010, when BLM authorized the leases.

Although BLM quantified the amount of carbon dioxide that would result from mining and burning the Wright Area coal, and provided a general overview of the state of the science around climate change, the agency arbitrarily concluded that an equivalent amount of coal would be mined and burned regardless of whether BLM issued the leases. Thus, BLM asserted that its decision to issue the leases would have zero impact on the amount of carbon dioxide emitted from the

U.S. electricity generating industry. According to BLM, if it were to reject the Wright Area leases, coal from other mines would perfectly substitute for one-hundred percent of Wright Area coal in the marketplace. Stated differently, BLM assumed that despite the enormous amount of coal at stake, if the agency were to reject the Wright Area leases in favor of the no action alternative (as advocated by Conservation Organizations) that coal-fired power plants and other coal purchasers would buy the same amount of coal from other mines. This assumption is contradicted by record evidence and has been rejected by the courts.

BLM based this assumption principally on introductory information contained in an Energy Information Administration ("EIA") report that predicted a slight increase in coal demand over the next twenty years. EIA's prediction that that coal demand may increase over time, however, does not logically lead to BLM's conclusion that other coal is a perfect substitute for abundant and low-cost coal from the Powder River Basin. Indeed, other parts of the EIA study (not cited by BLM) explicitly and unequivocally contradict BLM's perfect substitution assumption. Based on the results of detailed modeling, the EIA report demonstrates that the coal market functions similarly to most markets: decreases in coal supply tend to increase price; and increases in coal prices will lead to decreases in coal demand. The EIA study goes even further, however, and flatly contradicts BLM's perfect substitution assumption by providing quantitative

predictions of the increase or decrease in coal demand that would result from specific increases or decreases in coal price. As BLM explained throughout the record, Powder River Basin coal enjoys significant price advantages over coal from other regions, which is more expensive to mine. A massive reduction in Powder River Basin supply here would increase coal prices, as 'substitute' coal would be more expensive, thereby suppressing nationwide coal demand.

BLM's bare assertion contradicted record evidence in the very EIA report upon which BLM relied. BLM also unlawfully ignored the fact that the Surface Transportation Board had successfully used the EIA's computer model to analyze the market and environmental impacts of a similar proposal years earlier. BLM's flawed assumption, based on its misreading of the EIA's market analysis, combined with its refusal to use available tools to study the issue, subverted the purposes of NEPA by leading the agency to understate the climate impacts of its proposal and improperly skew the analysis of alternatives in favor of its preferred course.

II. STATUTORY BACKGROUND

"[NEPA] is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA does not set out substantive mandates on federal action. Instead, the protections secured by NEPA are realized through the statute's exacting procedural requirements. NEPA requires federal agencies to analyze and

disclose the potential environmental impacts of a proposed course of action, as well as alternatives to that action, before committing to a decision. These procedural provisions are "action-forcing," requiring agencies to carefully "consider detailed information concerning significant environmental impacts" prior to making a decision and to disseminate such information to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1177-78 (10th Cir. 2008). To that end, NEPA directs federal agencies to prepare an environmental impact statement ("EIS") for each proposed "major Federal action[]" that could "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4.

> [B]y requiring agencies to take a 'hard look' at how choices before them affect the environment, and then place their data and conclusions before the public, NEPA relies upon democratic processes to ensure—as the first appellate court to construe the statute in detail put it—that the 'most intelligent optimally beneficial decision will ultimately be made.'

Or. Nat. Desert Ass'n v. BLM, 625 F.3d 1092, 1099-1100 (9th Cir. 2010) (quoting *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)).

A thorough consideration of available alternatives is the "heart" of any NEPA analysis. 40 C.F.R. § 1502.14. Agencies must "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply

defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.* Further, NEPA requires agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives" and to "[d]evote substantial treatment to each alternative considered." *Id.* at § 1502.14(a)-(b). As part of this rigorous evaluation of alternatives, federal agencies must analyze direct, indirect, and cumulative impacts. *See* 42 U.S.C. § 4332(2); 40 C.F.R. §§ 1508.7, 1508.8. Indirect impacts "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).

NEPA affirmatively requires "reasonable forecasting," and requires agencies to provide information that is "essential to a reasoned choice among alternatives," where the cost of obtaining the information is not exorbitant. 40 C.F.R. § 1502.22(a); *Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

"Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action." 40 C.F.R. § 1500.1(c).

III. FACTUAL BACKGROUND

A. The Wright Area Leases

The North Antelope Rochelle and Black Thunder mines, located in northeastern Wyoming, are the two largest coal mines in the country, and their impact on the U.S. coal market is unrivaled. App. 1007, 1030.[1] Although there are more than 1,000 coal mines in the United States,[2] on an annual basis these two mines currently produce more than twenty percent of the coal used to generate electricity in this country. App. 267-268.

This case concerns the four "Wright Area" leases, which would allow the Black Thunder and North Antelope Rochelle mines to expand with four of the largest leases in the history of BLM's federal coal leasing program. Larger than any single approval since at least 1990, App. 1007, 1030, the Wright Area leases allow these mines to produce more than 2 billion tons of taxpayer-owned coal on approximately 16,000 acres of currently un-mined federal land, much of it located in the Thunder Basin National Grassland in the Powder River Basin in Wyoming. App. 803. The North Porcupine and South Porcupine leases would allow the North Antelope Rochelle mine to produce approximately 95 million tons of coal per year

[1] References to documents included in the Appendix to this brief will appear as "App. [page number]."

[2] *See* ENERGY INFO. ADMIN., ANNUAL COAL REPORT Table 1 (2013), http://www.eia.gov/coal/annual/pdf/table1.pdf (noting total number of mines in the U.S.).

for more than eleven years. App. 986. The North Hilight and South Hilight leases would allow the Black Thunder Mine to produce up to 135 million tons per year over approximately seven years. App. 986. BLM acknowledges that it is a near certainty that all 2 billion tons of this coal will be burned in coal-fired power plants to produce electricity, App. 983, and that this combustion would result in approximately 3.3 billion tons of carbon dioxide emissions. App. 986-988.

On an annual basis, the Wright Area leases would dominate the U.S. coal market. The 230 million tons of annual coal production that could be produced during years of overlapping operations on these leases would be more than twenty percent of the 980 million tons of coal consumed by U.S. electric utilities in 2010. App. 267-268, 987.

B. BLM's Consideration of the Climate Impacts of Its Decisions

Although the four leases at issue here were authorized in separate BLM actions (Records of Decision, or "RODs"), BLM consolidated its NEPA review of the four into a single final environmental impact statement, ("FEIS" or "Wright Area FEIS") finalized in July 2010.[3] App. 744, 748. The FEIS acknowledged that mining and burning coal emits carbon dioxide and other greenhouse gases that harm the climate, App. 982-983, that coal from other regions lacked "the cost, environmental, or safety advantages" of the Wright Area coal, App. 988, and that

[3] The Wright Area EIS also included the West Hilight and West Jacobs Ranch lease tracts, which are not at issue in this case.

burning the more than 2 billion tons of coal contained in the Wright Area leases would emit 3.387 billion tons of carbon dioxide.[4] App. 987.

The FEIS also acknowledged, in a general sense, the harms caused by greenhouse gas emissions and climate change. BLM provided a general overview of the known causes of climate change and some of the anticipated impacts of climate change in the western U.S., including changes in stream flow and snowfall patterns, increases in invasive species and pest populations, and increased fire frequency and severity. App. 980-981. BLM acknowledged burning coal is a major source of climate-harming greenhouse gases, that climate change is a significant problem, and that moving toward cleaner energy sources "not reliant on carbon fuels" and "[r]educing human-caused GHG emissions" would be a positive step that "would help to lessen any harmful effects that they may be causing to global climate." App. 1057.

Although BLM concluded that *mining and burning coal* harms the climate, it asserted that *issuance of the coal leases here* would not. BLM based this counter-intuitive conclusion on the premise that if the Wright Area leases were not sold (*i.e.*, if the no action alternative were selected), "other coal mines will produce the same quantity of coal as would have been produced [by the Wright Area leases] . . . to meet annual demand for electricity generation." App. 988. BLM

[4] BLM used a conversion factor that allows the agency to translate "tons of coal mined" into "tons of carbon dioxide emitted during combustion." App. 987.

stated that coal "continues to be projected as the largest portion of the domestic electric fuel mix" and that "many mines outside of the [Powder River Basin] have the capacity to replace the coal production generated by" the Black Thunder and North Antelope Rochelle mines. App. 1057-1059, 1080-1082, 1105-1107, 1151-1153.

BLM supported its conclusion primarily by citing a portion of an EIA study that predicted a slight increase in coal demand over the next two decades. App. 1057, 1081, 1106, 1152. That same EIA study, however, also provided instructive modeling results that show coal demand is directly affected by changes in coal supply and coal prices. App. 580-581. Specifically, the EIA study concluded that increases in coal prices would reduce coal demand and lead some utilities or other coal purchasers to buy less coal and more natural gas, wind, or solar power. *Id.* Not only did the study reveal the general nature of this interaction between supply and demand in the coal market, it actually quantified the change in coal demand that would occur as a result of specific changes in coal price. *Id.* BLM did not disclose this information in its FEIS or RODs that authorize the Wright Area leases.

Echoing the logic of the EIA study, Conservation Organizations submitted comments putting this issue squarely before the agency, explaining that even if other sources of coal *could* completely substitute for the coal provided by the

Wright Area leases, the lack of cost advantages meant that they *would not* actually do so. App. 725, 726. Conservation Organizations explained that demand for coal from utilities (the dominant coal consumers) is elastic and price sensitive. *Id.* Demand for coal from the Wright Area leases would therefore be greater than the demand for 'subtitute' coal from other mines that lacked the Wright Area coal's numerous advantages. Specifically, these comments explained that:

> A higher per-ton price for coal would make coal-fired electricity more expensive, which in turn would make other sources of electricity—in particular renewable energy sources such as wind and solar—more competitive with coal. A shift to non-coal sources of electricity, whether it is natural gas, wind and solar, or nuclear, would result in a significant decrease in CO_2 emissions. Thus, the no-lease alternative would likely result in lower climate change impacts . . . .

App. 726. Conservation Organizations acknowledged that *some* substitution was likely—that denial of the leases would not reduce future U.S. coal consumption by the more than 2 billion tons of coal made available by Wright Area leases, but rather by some fraction of that amount. *Id.*

BLM failed to modify its "zero impact" perfect substitution assumption in its FEIS. Instead, the FEIS and Records of Decision continued to hold fast to the idea that demand for coal, and thus the amount of coal burned nationwide, is a fixed quantity wholly unaffected by price or other characteristics of the available coal supply. App. 1057-1059, 1081-1083, 1106-1108, 1152-1154. Without any discussion – or even

acknowledgement – of EIA's conclusion that coal use is influenced by coal availability and price, BLM concluded that "[i]t is not likely that selection of the No Action alternatives would result in a decrease of U.S. CO_2 emissions attributable to coal mining and coal-burning power plants in the longer term." App. 988.

C. District Court Litigation and this Appeal

In 2012, Conservation Organizations challenged BLM's authorization of the Wright Area leases in Federal District Court in Wyoming, asserting that BLM failed to adequately analyze the leases' climate and air quality impacts under NEPA.[5] Conservation Organizations also asserted that BLM's issuance of the leases violated the Federal Land Policy Management Act, 43 U.S.C. § 1701 *et seq.* (case no. 13-cv-42-ABJ). Along with Powder River Basin Resource Council, Appellants also challenged the Forest Service Records of Decision consenting to the North and South Porcupine leases (case no. 13-cv-85-ABJ). Powder River Basin Resource Council brought a separate action challenging BLM's analysis of

[5] Because portions of the Wright Area leases are located in the Thunder Basin National Grassland, the Forest Service's "consent" was required before BLM could authorize the leases. Although Conservation Organizations challenged the Forest Service's decision in the underlying District Court case, the Forest Service's decision is not at issue in this appeal.

reclamation issues (case no. 13-cv-90-ABJ). All three cases were consolidated for purposes of briefing.

On August 17, 2015, the District Court issued its Opinion and Order Affirming Agency Actions. App. 418-482. Although the District Court Opinion and Order upheld each of the challenged agency decisions, it did not specifically address the arguments that Conservation Organizations raise in this appeal. Conservation Organizations put the issue directly before the District Court by raising it in their Opening Brief, Response Brief, and Notice of Supplemental Authority, below. App. 112-113, 373-383, 408-414. On October 7, 2015, Conservation Organizations timely filed the Notice of Appeal in this matter seeking review of BLM's decision to authorize the Wright Area leases in case number 13-cv-42-ABJ. App. 483-485.

STANDARD OF REVIEW

The District Court's ruling affirming BLM's leasing decisions is a question of law that this Court reviews *de novo* with no deference to the district court's legal conclusions. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704-05 (10th Cir. 2009).

BLM's actions challenged under NEPA are reviewed under a familiar "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Agency action is unlawful and must be set aside where it "fails to meet statutory, procedural or

constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (internal quotations omitted).

Under this standard a reviewing court "must ensure that the agency 'decision was based on a consideration of the relevant factors' and examine 'whether there has been a clear error of judgment.'" *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1167 (10th Cir. 1999) (citations omitted). Agency action will be set aside if:

> [T]he agency . . . relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Though this standard is ultimately a narrow one, the court's review must nevertheless be "searching and careful," "thorough, probing, and in-depth." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 416 (1971). An agency's decision under NEPA can be upheld, if at all, based on "only the agency's reasoning at the time of decisionmaking," not "post hoc rationalizations concocted by counsel." *New Mexico ex rel. Richardson*, 565 F.3d at 704 (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002)).

SUMMARY OF THE ARGUMENT

BLM's perfect substitution assumption is demonstrably untrue. It is directly refuted by modeling that BLM overlooked in the very EIA study upon which BLM relied. App. 580-581. This Court has stated that it will not blindly defer to an agency's "unanalyzed, conclusory assertion[s]" and that where evidence "points uniformly in the opposite direction from the agency's determination, we cannot defer to that determination." *New Mexico ex rel. Richardson*, 565 F.3d at 707, 715. Here, as in other cases where land management agencies misinterpreted a third party economic report, "[i]naccurate economic information may defeat the purpose of an EIS by 'impairing the agency's consideration of the adverse environmental effects' and by 'skewing the public's evaluation' of the proposed agency action." *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) (quoting *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996)).

Both the Eighth Circuit, *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 550 (8th Cir. 2003), and more recently the District of Colorado, *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F.Supp. 3d 1174, 1197-98 (D.Colo. 2014) have rejected similar unsupported assumptions of perfect substitution in essentially identical contexts. Additionally, BLM's perfect substitution assumption defies even a basic understanding of market economics,

made all the more remarkable by the fact that, together, the Wright Area leases represent one of the largest expansions of coal mining on public land that the agency has ever approved. App. 716, 717, 1007, 1030

In the face of this evidence, NEPA required BLM to conduct a thorough study of the likely market and climate impacts of its decision. The economic models necessary to inform that study were readily available and have been used by both the Surface Transportation Board and U.S. Forest Service to analyze similar proposals. Had BLM conducted the type of thorough evaluation of the reasonably foreseeable market and climate impacts of this massive proposal, decisionmakers could have made an informed decision between competing alternatives.

Here, BLM unlawfully assured decisionmakers and the public that the leases would have no impact on the climate, but BLM failed to provide any analysis or evidence that would support this conclusion. Instead, evidence in the record plainly demonstrates that the leases will almost certainly lead to an increase in coal use and carbon dioxide emissions. BLM's analysis therefore undermined the reasoned consideration of alternatives that is the heart of the EIS process and was thus arbitrary and capricious and must be set aside. Moreover, BLM was required to do more than merely acknowledge the likelihood of such an impact. BLM was

also required to use available tools to predict its extent, as agencies have done in other closely related cases.

ARGUMENT

I. Sierra Club and WildEarth Guardians Have Standing.

The Conservation Organizations have organizational standing because their members have standing, the claims are germane to their organizational purposes, App. 24-25, and participation by individual members is not required to secure the relief sought. *Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 445, 447 n.3 (10th Cir. 1996); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

The Conservation Organizations each have members with standing to challenge BLM's issuance of the leases because the members have demonstrated (1) an injury in fact; that is (2) fairly traceable to the challenged action; and (3) likely to be redressed by a favorable decision. *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1264-65 (10th Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

"[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000). The proposed leases would expand the North Antelope Rochelle and Black

Thunder coal mines onto more than 12,000 acres of the Thunder Basin National Grasslands for periods of 7 and 11 years, respectively. Jeremy Nichols, a member of both Conservation Organizations, regularly hikes and backpacks through these grasslands near the proposed leases, and plans to continue to do so. App. 202-230. Nichols Decl. ¶¶ 7, 9, 10, 13-15. During his visits, Mr. Nichols has observed effects of the existing Black Thunder and North Antelope Rochelle coal mines, including machinery, haze, dust clouds, and orange clouds caused by nitrogen oxides, *id*. ¶¶ 16-23, all of which lessen his aesthetic and recreational enjoyment of the area. *Id*. ¶18. The leases and related mine expansions will compound these effects and injure Mr. Nichols' by reducing his future enjoyment of these areas.

"In the context of a [NEPA] claim," once a plaintiff establishes injury in fact, "to establish causation . . . the plaintiff need only trace the risk of harm to the agency's alleged failure to follow [NEPA] procedures." *Rio Hondo*, 102 F.3d at 451, 452. A favorable decision here will set aside the BLM decisions authorizing the proposed leases until the agency can adequately analyze and disclose the environmental consequences of the proposed action, thus satisfying the redressability requirement. *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d at 1265-66. It is well settled that the types of aesthetic and recreational injuries alleged here will be redressed by success on a NEPA claim even where the alleged NEPA deficiency concerns consideration of climate, rather than recreational or aesthetic,

impacts. *See Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 79 (1978) (rejecting the argument that "a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury."). The D.C. Circuit Court, the D.C. District Court, the federal District Court in Colorado, and the federal District Court in Wyoming (in the decision appealed here) have all specifically affirmed that the Conservation Organizations can establish standing to challenge an agency's climate change analysis under NEPA solely on the basis of non-climate aesthetic and recreational injuries caused by the expansion of coal mines onto public lands. App. 439-441; *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306-07 (D.C. Cir. 2013); *High Country*, 52 F.Supp. 3d at 1186-87; *WildEarth Guardians v. BLM*, 8 F.Supp.3d 17, 30 (D.D.C. 2014); *WildEarth Guardians v. U.S. Forest Serv.*, 828 F.Supp.2d 1223, 1235 (D.Colo. 2011).

II. BLM Failed to Take a Hard Look at the Climate Impacts of the Wright Area Leases By Assuming That the Same Amount of Coal Would Be Mined and the Same Amount of Greenhouse Gases Would Be Emitted Under the No Action and Preferred Alternatives.

NEPA compels BLM to take a "hard look" at every significant aspect of the environmental consequences of its decision to authorize the Wright Area leases, including climate consequences. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). In authorizing the Wright Area leases, BLM violated NEPA's procedural mandate under 42 U.S.C. § 4332(2)(C) to fully

analyze and disclose to the public and decisionmakers the environmental impacts of its decision. *See* 42 U.S.C. § 4332(2)(C). The U.S. Supreme Court has called the disclosure of impacts the "key requirement of NEPA" and held that agencies must "consider and disclose the actual environmental effects" of a proposed project in a way that "brings those effects to bear on [an agency's] decisions." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 96 (1983). NEPA regulations require agencies to provide "a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14.

Under NEPA, agencies have a duty to "insure the professional integrity" of the analyses in an EIS, 40 C.F.R. § 1502.24, and must present "high-quality" information and "[a]ccurate scientific analysis." 40 C.F.R. § 1500.1(b). Courts "cannot accept at face value an agency's unsupported conclusions," *Rocky Mountain Wild v. Vilsack*, No. 09-CV-01272-WJM, WL 2013 3233573, at *3 n.3 (D. Colo. June 26, 2013), and must reject "unanalyzed, conclusory assertion[s]." *New Mexico ex rel. Richardson*, 565 F.3d at 707.

BLM does not dispute that impacts from coal combustion and any changes to the amount of coal burned are indirect effects that fall within the scope of BLM's required NEPA analysis. App. 982-983. NEPA analysis must include "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but still reasonably foreseeable." 40 C.F.R. § 1508.8(b).

Indirect effects include "growth inducing effects and other effects related to induced changes in the pattern of land use . . . or growth rate, and related effects on air," water, and ecosystems. *Id.*

BLM's failure here is not in the amount of information presented about the general causes and consequences of climate change, but rather in its misunderstanding of the market impact of its proposal and how that market impact translates into environmental consequences. The assumption that there would be perfect substitution from other coal mines defies the most basic understanding of market economics, lacks any support in the record beyond BLM's own conclusory statements, and fails to meet the standard of professional analysis that NEPA demands. In responding to Conservation Organizations' comments, BLM did not argue that the tools necessary to conduct a robust market analysis examining changes to demand for coal, natural, gas, and renewable energy sources were unavailable; that the cost of using them would be exorbitant; or that their predictions would not be informative. Nor would the record support such arguments: BLM based its assumption almost entirely on the EIA's 2008 Annual Energy Outlook report, which is itself based on precisely that type of market analysis.

BLM thus violated NEPA by approving the leases on the basis of the unsupportable premise that the leases would not lead to increased carbon dioxide

emissions from coal combustion. The failure to accurately disclose the climate impacts resulting from market forces corrupted the agency's evaluation of alternatives, making the action and no action alternatives seem identical from a climate standpoint. NEPA required BLM to not only acknowledge the possibility that the leases would increase coal use; NEPA required BLM to use available tools to estimate the effect and impact of this increase. BLM's failure to do so here was arbitrary and capricious.

A. BLM's Assumption That the Wright Area Leases Would Have No Effect Whatsoever on Nationwide Coal Demand and Greenhouse Gas Emissions Was Arbitrary and Capricious.

If BLM were to select the no action alternative, it would remove more than 2 billion tons of coal from the market that otherwise would have been made available by the Wright Area leases – coal that BLM acknowledged has "cost, environmental, [and] safety advantages" over other potential sources of coal. App. 988. BLM specifically notes the cost savings of Powder River Basin coal several times throughout the FEIS and individual RODs. *See, e.g.*, App. 983 (stating that Powder River Basin coal enjoys "competitive mining costs when compared to delivered costs of coal from other coal producing regions"); *id.* (noting Powder River Basin coal has "lower mining and reclamation costs"); App. 1107 (stating that substitute coal "is more costly") App. 1107; *see* App. 1059, 1082, 1153 (same). Nonetheless, BLM contends that selecting the no action alternative would

have absolutely no effect on the amount of coal demanded because coal consumers would procure an equal supply of coal from other mines, despite the fact that the substitute coal would cost more or would have other disadvantages. App. 988, 1058, 1080, 1105, 1151.

BLM's assumption that other coal would perfectly substitute for all 2 billion tons of Wright Area coal in the market has no support in the record. It is flatly contradicted by the EIA study that BLM relies on for support; it eviscerates fundamental economic principles of supply and demand without any substantive discussion of relevant factors; and it ignores the fact that more than a decade ago the Surface Transportation Board, in reviewing a similar project that would increase low-cost access to Powder River Basin coal, used an existing model and determined that the project would increase coal demand and use.

1. BLM's perfect substitution assumption directly contradicts the EIA report that BLM relied on for support.

BLM's conclusion that coal demand and use will be unaffected by the availability of Powder River Basin coal is refuted by the very document BLM cited in purported support of this conclusion: the EIA's 2008 Annual Energy Outlook. In each ROD for the four Wright Area leases, BLM relied on the Annual Energy Outlook report for the notion that over the next two decades coal's percentage of the U.S. energy portfolio was expected to increase slightly from 2010 levels. App. 1058, 1081, 1106, 1152. BLM then assumed that since the EIA predicted that coal

demand would increase through the time period that the Wright Area leases would operate, that if BLM were to reject the leases in favor of the no action alternative, other mines would necessarily increase production in order to meet one-hundred percent of EIA's predicted level of coal demand. According to BLM, "[n]umerous mines located outside of the PRB extract and produce coal . . . . In order to supply reliable power for the country's electrical demands, many mines outside of the Powder River Basin have the capacity to replace the coal" produced at these two mines. App. 1106-1107; *see* App. 1058-1059, 1081-1082, 1152-1153. BLM concluded that rejecting the Wright Area leases "would deny the mine operator the ability to compete with other operators in an open market *for a future coal demand that is projected to continue until at least 2035*." *Id.*

BLM misreads the EIA Annual Energy Outlook report in two crucial ways. First, BLM treats the Outlook's energy forecasts as inescapable destiny. But coal demand is not a fixed threshold that must be met, and there is nothing mandatory about EIA's demand projections. Economic demand is a relationship among economic parameters that ultimately lead to certain levels of consumption. Richard Posner, ECONOMIC ANALYSIS OF THE LAW 5-6 (9th Ed. 2014). The EIA's report explicitly does *not* set forth how much coal the U.S. definitely will consume, as the statements in BLM's RODs suggest. Rather, EIA aptly explained that the Outlook presents "long-term projections of energy supply, demand, and prices"

that are "highly dependent on the data, methodologies, model structures, and assumptions used," App. 549, and that its projections "are *not* statements of what will happen but of what might happen, given the assumptions and methodologies used." App. 492 (emphasis added). [6]

Second, BLM relied on a projection from the report's "Overview" section indicating a slight increase in future coal demand, App. 506, but completely overlooked the report's detailed modeling that showed that changes in coal supply affect the price and demand for coal. App. 580-581. In the "Market Trends" section, the Outlook displayed the results of three scenarios modeling what happens to coal demand when there are three different inputs for coal costs: a high coal cost scenario, a low coal cost scenario, and a "reference case," to serve as a baseline to measure against. App. 581. This modeling confirmed that coal markets function in the same general manner as the market for most other goods: when the price of coal goes up, less coal will be consumed; similarly, when coal prices go down, more coal will be consumed. *Id*. *See infra* section II.A.2. EIA concludes that "[a]lternative assumptions for coal mining and transportation *costs affect delivered coal prices and demand*." App. 581 (emphasis added).

[6] The EIA forecast the availability and price of coal in individual coal producing regions, including, specifically, the Powder River Basin. *See* App. 580 (projecting increased availability of coal in the PRB, "which is by far the most important coal-producing area in the West"), and App. 708 (illustrating fact that the Outlook incorporates forecasts for individual coal producing regions).

The Outlook report not only explained this inverse relationship between coal price and coal demand, it quantified the magnitude of the expected changes and found that changes in coal demand affect the demand for other sources of energy such as natural gas, wind, and solar:

> In the high coal cost case, the average delivered coal price. . . [is] 52 percent higher than in the reference case. *As a result,* U.S. coal consumption is . . . (16 percent) lower than in the reference case in 2030, ***reflecting both a switch from coal to natural gas, nuclear, and renewables*** . . . .
>
> In the low coal cost case, the average delivered price . . . [is] 29 percent lower than in the reference case—and total coal consumption is . . . (7 percent) higher than in the reference case.

Id. (emphasis added).

Thus, the EIA Outlook report explicitly rejects the notion that coal demand would remain static in the face of significant changes in coal supply and coal price, as BLM assumed in its RODs for each of the four Wright Area leases. In fact, EIA's modeling documented precisely the opposite: as the price of available coal increases, demand for coal decreases; and as price decreases, demand for coal increases.

Courts have long recognized the connection between market impacts and environmental effects, and have set aside agency decisions for violating NEPA's "hard look" mandate where the agency misunderstood basic economic principles or a third-party's economic report. "Inaccurate economic information may defeat

the purpose of an EIS by 'impairing the agency's consideration of the adverse environmental effects' and by 'skewing the public's evaluation' of the proposed agency action." *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) (quoting *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446-48 (4th Cir. 1996)). *See also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F.Supp.2d 1143, 1157 (D. Wash. 2002) ("An EIS that relies upon misleading economic information may violate NEPA if the errors subvert NEPA's purpose of providing decisionmakers and the public an accurate assessment upon which to evaluate the proposed project.").

In *NRDC v. U.S. Forest Service*, the Ninth Circuit invalidated a Forest Service EIS because the agency misinterpreted a third-party report describing the market demand for Tongass National Forest timber. 421 F.3d at 802. The Forest Service interpreted the report to mean there was double the actual demand for the timber and used this misinformation to gauge the relative benefits of the alternatives. *Id.* at 807. There, as in the case before this Court, the agency "presented to decision makers and to the public a comparison of alternatives based on an economic forecast that relies on a flawed view of the market." *Id.* at 813. The Ninth Circuit held that "the market-demand error was sufficiently significant that it subverted NEPA's purpose," that the agency's EIS "presented misleading economic effects of [the project] significant to [the Forest Service's] evaluation of

alternatives," and that "the public was similarly misled." *Id.* at 812-13. Here too, BLM's inaccurate and uncorroborated view of the market's response to its proposal misled decisionmakers and the public on a significant environmental impact—the climate impact of increased coal mining—and thus assumed away a potentially significant difference between the no action alternative and the agency's preferred alternative. By failing to take the hard look required and skewing the evaluation of alternatives, BLM misled the public and violated NEPA.

2. Federal courts have rejected BLM's perfect substitution assumption as arbitrary and capricious.

BLM's deeply flawed approach is further undermined by the fact that federal courts have required the Surface Transportation Board and the U.S. Forest Service to specifically analyze the market responses to other proposals aimed at facilitating coal mining on publicly-owned lands. In *Mid States Coal. for Progress v. Surface Transp. Bd.*, the Surface Transportation Board approved a new railroad line that would have provided a shorter route to deliver Powder River Basin coal to power plants in the Midwest. 345 F.3d 520, 532, 550 (8th Cir. 2003). The Surface Transportation Board argued that the rail line would not cause an increase in the use of Powder River Basin coal, since the project would merely provide a shorter and straighter route to power plants for coal mines that already served those plants through existing railways. *Id.* at 549. The Eighth Circuit rejected the unsupported notion that demand would remain unaffected in the face of a proposal that

increased the availability and decreased the price of approximately 100 million tons of coal per year coal:

> [T]he proposition that the demand for coal will be unaffected by an increase in availability and a decrease in price . . . *is illogical at best*. The increased availability of inexpensive coal will at the very least make coal a more attractive option to future entrants into the utilities market when compared with other potential fuel sources, such as nuclear power, solar power, or natural gas. . . . [The railroad] will most certainly affect the nation's long-term demand for coal.

Id. at 549. The Eighth Circuit then concluded that even if the "*extent*" of the increase in coal use was not reasonably foreseeable, the "*nature*" of the effect was, and that in this circumstance, "the agency may not simply ignore the effect." *Id.* (citing 40 C.F.R. §1502.22).

A recent decision applied *Mid States* to facts closely analogous to those here, although lacking the dramatic scale of the Wright Area leases: an agency that had concluded that providing access to hundreds of millions of tons of low-cost coal would not effect coal demand and use, based on the fact that the EIA's Annual Energy Outlook predicted a rise in total national coal consumption. *High Country*, 52 F.Supp.3d at 1197 (Forest Service action enabling mining of 347 million tons of coal in Colorado's North Fork Valley).[7] There, as here, the Forest Service simply

[7] Although the District Court's decision does not cite the specific amount of coal at issue, the Federal Register notice accompanying the Forest Service's proposed rule states it was an additional 347 million tons. *See* 77 Fed. Reg. 39,576, 39,602 (July 3, 2012) ("The final rule will increase access to an estimated 347 million tons of coal reserves over the 2001 Roadless Rule (the baseline condition) . . . .").

assumed there would be "perfect substitution" of supply from other coal sources, rather than using available models to study the market effect. *Id.* at 1197. The Forest Service in *High Country*, like BLM here, argued that "if the coal does not come out of the ground in the North Fork consumers will simply pay to have the same amount of coal pulled out of the ground from somewhere else—overall [greenhouse gas] emissions from combustion will be identical under either scenario." *Id.* The court in *High Country* held that the Forest Service's FEIS was deficient, relying in large part on the Eighth Circuit's decision in *Mid States*, concluding that the increased supply made possible by the Forest Service's decision would "impact the demand for coal relative to other fuel sources" and that "[t]his reasonably foreseeable effect must be analyzed." *Id.* at 1198.

The logic of *Mid States* and *High Country* apply forcefully here. In *Mid States* and *High Country* the agencies' decisions would have led to a predictable increase in the supply of coal to U.S. power plants; here, BLM's approval of the Wright Area leases will add an unprecedented amount of coal to the market—approximately seven times the amount of coal at stake in *High Country* and, in some years, more than double the amount at issue in *Mid States*. As is the case with the Wright Area leases, the proposed railroad in *Mid States* was one of the largest proposals ever before the agency. 345 F.3d at 550; App. 1007, 1030. In *Mid States* and *High Country* the agency's decisions would have foreseeably

lowered the price of coal and increased its use; here, the same basic economic principles instruct us that BLM's approval of the Wright Area leases will similarly lower the overall price of coal and increase its use compared to the no action alternative. In both *Mid States* and *High Country* the lead agency was required to redo its NEPA analysis to study these predictable market impacts and the attendant environmental effects. As the Eighth Circuit concluded, "[w]e believe that it would be irresponsible for the Board to approve a project of this scope without first examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption." *Mid States*, 345 F.3d at 550. Like the Surface Transportation Board's decision in *Mid States* and the Forest Service's assumption in *High Country*, BLM's assumption that the Wright Area leases would have zero effect on coal demand and absolutely no impact on the amount of emissions that result from burning coal was arbitrary and capricious.

Both the Eighth Circuit in *Mid States* and the District Court in *High Country* invalidated the agency action based on the same fundamental economic principles at issue here, and did so without relying on expert testimony. These rulings are based in large part on "straightforward, intuitive premises:" "[i]f quantity falls, price will rise . . . [i]f price rises, quantity falls because consumers buy less of the good." Richard A. Posner, ECONOMIC ANALYSIS OF LAW 5 (9th Ed. 2014); *see also Airlines for Am. v. Transp. Sec. Admin.*, 780 F.3d 409, 410-11 (D.C. Cir.

2015) (basing standing on injury "inferable from [the] generally applicable economic principle[]" that "increasing the net price for airline tickets" will "reduc[e] demand for those tickets."). Agencies, like courts, must acknowledge "the fundamental principle that increasing the price of an activity will decrease the quantity of that activity in the market" in the absence of specific reasons to believe a particular market will not obey this principle. *Branton v. F.C.C.*, 993 F.2d 906, 912 (D.C. Cir. 2012) (citing Richard Posner, ECONOMIC ANALYSIS OF LAW 5 (4th Ed. 1992)) (enumerating reasons why imposing additional costs might not alter public radio newscaster's behavior in case at issue). Here, BLM has entirely failed to address these principles and offered no justification as to why the market response to a decision on the Wright Area mines would differ from the way EIA has shown markets to respond to coal price and availability generally.

B. BLM Violated NEPA By Failing to Use Available Tools to Evaluate the Market Impacts of the Wright Area Leases on Nationwide Coal Use and Associated Carbon Dioxide Emissions and Thus Failed to Include Information "Essential to a Reasoned Choice Among Alternatives."

BLM further violated NEPA by failing to take a hard look, informed by available tools, at the extent to which the leases would increase nationwide coal use. There are multiple energy-economy models that could reasonably inform BLM's analysis of the likely changes to the coal market – and indeed that have been used by other agencies to study similar issues in the past – but BLM failed to

use any of them. In order to comply with NEPA, BLM had an obligation to prepare a thorough study of the market impacts and how the various alternatives considered would affect overall demand for coal, natural gas, and renewable resources such as wind and solar. Further, this study should have quantified how those alternatives differed in the quantity of greenhouse gas emissions they would generate. Instead, BLM's intransigent assumption on perfect substitution caused it to gloss over potentially significant climate impacts and prevented the agency from "providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. No matter how well BLM described the general science around climate change, by not adequately studying the market effect of its proposal BLM failed to provide information that was "essential to a reasoned choice among alternatives." 40 C.F.R. § 1502.22(a). NEPA affirmatively requires "reasonable forecasting," *Scientists' Inst. for Pub. Info.*, 481 F.2d at 1092, and at least one economic model had been used by the Surface Transportation Board years earlier to predict market impacts of a similar proposal.

BLM's sister federal agency, the Department of Energy, has a computer model created by the EIA that has been in use since 1994,[8] and it could have been used to undertake precisely the kind of analysis that would have been useful to

[8] *See* ENERGY INFO. ADMIN., THE NATIONAL ENERGY MODELING SYSTEM: AN OVERVIEW 1 (2009), http://www.eia.gov/forecasts/aeo/nems/overview/pdf/0581(2009).pdf.

decisionmakers here. EIA's NEMS model is an energy-economy model that projects future energy prices, supply, and demand and can be used to isolate variables such as changes in coal supply and variations in delivered coal price. App. 492, 580-581. *See supra* section II.A.1. In fact, EIA's 2008 Annual Outlook Report – which BLM cites so frequently – expressly states that it was "based on results from [NEMS]." App. 492.

BLM should have used NEMS or another available energy model in order to understand the market impacts of its proposal and the climate differences among alternatives in the Wright Area FEIS. In 2006 the Surface Transportation Board used NEMS to evaluate the market effect of a proposed rail line connecting Powder River Basin mines with coal-fired power plants. 2006 was the year *before* BLM published a notice of intent to prepare the Wright Area EIS in the Federal Register and *four years before* BLM issued its FEIS. App. 713-715. On remand from the Eighth Circuit in *Mid States*, the Surface Transportation Board chose EIA's NEMS model "because it not only forecasts coal supply and demand but also quantifies environmental impacts." *Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 555 (8th Cir. 2006). As expected, the NEMS model documented the increased coal use that would result from the proposed railroad, and this allowed the Board to make an informed comparison between the impacts of the no action and preferred alternatives. *Id.* Unlike the Board's previous approach of simply

assuming that there would be no market impact, the Eighth Circuit upheld the revised analysis based on the agency's use of NEMS under NEPA. *Id.* at 556.[9]

Where climate impacts are central to the discussion – and here they clearly are – knowing the relative amount of carbon dioxide emissions for two alternatives is crucial information. The Wright Area leases are among the largest federal coal leases in history. App. 716, 717, 1007, 1030. Conservation Organizations opposed issuance of the Wright Area leases primarily because of the massive climate emissions that would result. App. 716, 717, 721, 1007. And yet BLM did not use the tools available to it, even though the Department of Energy had created a robust energy-economy model that could predict market impacts, the Surface Transportation Board had used that model to analyze and disclose the market

[9] Nearly a decade ago *Mayo* affirmed NEMS' analysis of market impacts and its projected increase in coal demand as a result of a proposed railroad. 472 F.3d at 550. Nothing suggests that coal markets have changed such that they would no longer respond in this way. Indeed, on remand from the *High Country* District Court, the U.S. Forest Service recently used ICF International's Integrated Planning Model to study market impacts and concluded that "the mix of energy sources used to generate the electricity *will change*" in response to a proposal to open up 172 million tons of coal from public lands in Colorado, and that "[t]hese shifts in the mixtures of energy used to generate electricity . . . *will change carbon dioxide emissions*." 80 Fed. Reg. 72,665, 72,668 (Nov. 20, 2015) (emphasis added). This Court may take judicial notice of these findings under Federal Rule of Evidence 201. *See New Mexico ex rel. Richardson*, 565 F.3d at 702 n.22 (taking judicial notice of information on government websites that is not subject to reasonable dispute).

impacts of a similar proposal, and the use of that model in the NEPA context had been upheld by the Eighth Circuit. *Mayo Found.*, 472 F.3d at 555.

Therefore, BLM violated NEPA by glossing over critical market impacts without adequately analyzing and disclosing those impacts in a market-analysis study. Those market impacts are reasonably foreseeable given the massive amount of coal at stake, and understanding climate impacts is central to evaluating the tradeoffs between approving or rejecting one of the largest proposals for coal mining in the history of the federal coal leasing program. App. 716, 717, 721, 726, 726. As articulated by this Court, "NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide these from the public." *New Mexico ex rel. Richardson*, 565 F.3d at 707.

Both before and after BLM's approval of the Wright Area leases, when agencies actually take a hard look at the impact of increasing the supply of low-cost coal from public lands, they have predicted that the result will be will be more coal mined, more coal burned, and more carbon dioxide emitted from the electricity generating sector. By failing to adequately address this issue, BLM has "neglect[ed] the fundamental nature of the environmental problem at issue." *Id.* at 706.

C. Deference Cannot Save BLM's Unsupported and Explicitly Contradicted Assumption of Perfect Substitution.

In simply assuming there would be no market impact as a result of its decision, and without using any of the available tools to test that assumption, BLM reached an arbitrary result that is not only unsupported but explicitly contradicted by the record. BLM failed to examine all relevant factors, including, for example, the degree to which changes in coal supply affects coal price, and how changes in coal price affect coal demand. The agency failed to mention—much less use—any of the available energy models that could have been used to predict these changes.[10] *See supra* Section II.B. BLM never discussed any of these factors in the FEIS or the RODs at issue here, and "a court cannot defer when there is no analysis to defer to . . . and cannot accept at face value an agency's unsupported conclusions." *Rocky Mountain Wild*, 2013 WL at *3 n.3; *see Or. Nat. Desert Ass'n*, 625 F.3d at 1121 ("We cannot defer to a void.").

Although courts generally will not delve into competing scientific methodologies, in the past this Court has asked "whether the challenged method had a rational basis," *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 782 (10th Cir. 2006) (quotation omitted), and whether the agency

[10] Although the Surface Transportation Board and more recently the Forest Service have used these models to study the impact of a proposal on coal demand, it does not appear that BLM has *ever* conducted the type of thorough market analysis that would be helpful to decisionmakers here, much less done so with sufficient frequency to develop a specialized expertise in the matter.

demonstrated "a rational connection between the facts found and the decision made." *Colo. Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006). Here, BLM used no discernible methodology to analyze the likely impact on the coal market. BLM relied almost exclusively on the EIA's Annual Energy Outlook report, which BLM badly misinterpreted. The EIA report explicitly rejects BLM's view that coal demand would remain unchanged in the face of significant changes in supply. As noted above, the EIA report provides extensive modeling showing that as the cost of producing and transporting coal goes up, demand for coal goes down, with the result being "a switch from coal to natural gas, nuclear, and renewables in the electricity sector." App. 581.

The mere fact that coal demand is expected to increase slightly in the coming years does *not* mean that coal buyers could find the same amount of coal available at the same price despite massive changes in supply, as BLM implies. The Wright Area leases would generate more than 2 billion tons of low-cost coal. During years of overlapping production, the leases could generate up to 230 million tons of coal—more than twenty percent of U.S. coal used to generate electricity based on 2010 annual production figures. App. 267-268. Conservation Organizations do not dispute that there would likely be *some* coal substitution that would replace a portion of the 2 billion tons of Wright Area coal if BLM were to select the no action alternative. But BLM claimed that there would be *perfect*

substitution. App. 988, 1058, 1080, 1105, 1151. In other words, BLM concluded that taking twenty percent of the country's coal off the market in some years would have no impact on the price or use of coal. This is a staggering assertion that is wholly unsupported in the record. Accordingly, BLM's decisions authorizing the Wright Area leases are arbitrary and capricious and must be set aside.

CONCLUSION

For the reasons stated above, Appellants Sierra Club and WildEarth Guardians respectfully request that this Court (1) declare that BLM violated NEPA in issuing the Wright Area Final EIS and Records of Decision for the North Hilight, South Hilight, North Porcupine, and South Porcupine leases; and (2) vacate each BLM's authorization, sale, and issuance of the North Hilight, South Hilight, North Porcupine, and South Porcupine leases, including the Wright Area Final EIS and individual Records of Decision challenged here.

STATEMENT REGARDING ORAL ARGUMENT

Because this case involves complex issues regarding NEPA, Sierra Club believes that oral argument would be beneficial.

Respectfully submitted on this 29th day of January, 2016.

s/Nathaniel Shoaff
Nathaniel Shoaff
California Bar No. 256641
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5610
nathaniel.shoaff@sierraclub.org

s/Nathan Mattews
Nathan Mattews
California Bar No. 264248
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5695
nathan.matthews@sierraclub.org

s/Samantha Ruscavage-Barz
Samantha Ruscavage-Barz
New Mexico Bar No. 23276
516 Alto Street
Santa Fe, NM 87501
(505) 401-4180
sruscavagebarz@wildearthguardians.org

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,415 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Version 14.0.7165.5000 (2010), in size 14 Times New Roman.

Date: January 29, 2016

s/Nathaniel Shoaff
Nathaniel Shoaff
Attorney for Petitioners-Appellants
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5610
nathaniel.shoaff@sierraclub.org

CERTIFICATE OF SERVICE

I, Nathaniel Shoaff, hereby certify that on January 29, 2016, a true and correct copy of the foregoing PETITIONERS-APPELLANTS' OPENING BRIEF was served on the following counsel of record through the Court's ECF system:

Beau Bryan Bump
Holland & Hart LLP
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, WY 82003-1347
bbbump@hollandhart.com

Michael R. Drysdale
Dorsey & Whitney
50 South Sixth Street
Suite 1500
Minneapolis, MN 55402-1498
drysdale.michael@dorsey.com

Andrew C. Emrich
Holland & Hart LLP
6380 South Fiddlers Green Circle
Suite 500
Greenwood Village, CO 80111
acemrich@hollandhart.com

Peter Glaser
Merril Hirsh
Troutman Sanders
401 9th Street, NW
Suite 1000
Washington, DC 20004-2134
peter.glaser@troutmansanders.com
merril.hirsh@troutmansanders.com

Michael Thomas Gray
US Department of Justice
c/o US Army Corps of Engineers,
Office of Counsel
701 San Marco Boulevard
Jacksonville, FL 32207
michael.gray2@usdoj.gov

James Kaste
Michael McGrady
Erik Petersen
Office of the Attorney General
for the State of Wyoming
2320 Capitol Avenue
Cheyenne, WY 82002
james.kaste@wyo.gov
mike.mcgrady@wyo.gov
erik.petersen@wyo.gov

John Most
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 663
Washington, DC 20044-0663
john.most@usdoj.gov

Richard A. Mincer
Thomas A. Nicholas III
Hirst Applegate, LLP
1720 Carey Avenue, Suite 400
P.O. Box 1083
Cheyenne, WY 82003
rmincer@hirstapplegate.com
nicholas@hirstapplegate.com

Kristina R. Van Bockern
Holland & Hart
555 17th Street, Suite 3200
Denver, CO 80202
trvanbockern@hollandhart.com

Date: January 29, 2016

s/Nathaniel Shoaff
Nathaniel Shoaff
Attorney for Petitioners-Appellants
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5610
nathaniel.shoaff@sierraclub.org

CERTIFICATE OF DIGITAL SUBMISSION

I, Nathaniel Shoaff, hereby certify that with respect to the foregoing:

1) all required privacy redactions have been made pursuant to 10th Cir. R. 25.5;
2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
3) the ECF submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Symantec Endpoint Protection, version 12.1.5337.5000, updated January 29, 2016), and, according to the program, are free of viruses.

s/Nathaniel Shoaff
Nathaniel Shoaff
Attorney for Petitioners-Appellants
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5610
nathaniel.shoaff@sierraclub.org

ADDENDUM

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WILD EARTH GUARDIANS, POWDER RIVER BASIN RESOURCE COUNCIL, and SIERRA CLUB, Petitioners, vs. UNITED STATES FOREST SERVICE, UNITED STATES FOREST SERVICE CHIEF, in his official capacity also known as Tom Tidwell, UNITED STATES FOREST SERVICE ACTING REGION II FORESTER, in her official capacity also known as Maribeth Gustafson, UNITED STATES FOREST SERVICE ACTING REGION II DEPUTY FORESTER, in his official capacity also known as Glenn Casamassa, Respondent. STATE OF WYOMING, BTU WESTERN RESOURCES, INC., NATIONAL MINING ASSOCIATION, WYOMING MINING ASSOCIATION, Respondents-Intervenors.	)	Case No. 12-CV-85-ABJ

WILDEARTH GUARDIANS and SIERRA CLUB, Petitioners, v. UNITED STATES BUREAU OF LAND MANAGEMENT, Respondent. STATE OF WYOMING, BTU WESTERN RESOURCES, INC., NATIONAL MINING ASSOCIATION, and WYOMING MINING ASSOCIATION, Respondents-Intervenors.	Case No. 13-CV-42-ABJ

POWDER RIVER BASIN RESOURCE COUNCIL, Petitioner, v. UNITED STATES BUREAU OF LAND MANAGEMENT, a federal agency within the United States Department of Interior, SALLY JEWELL, in her official capacity as United States Secretary of the Interior, Respondents. STATE OF WYOMING, BTU WESTERN RESOURCES, INC., NATIONAL MINING ASSOCIATION, and WYOMING MINING ASSOCIATION, Respondents-Intervenors.	Case No. 13-CV-90-ABJ

OPINION AND ORDER AFFIRMING AGENCY ACTIONS

This matter comes before the Court for decision upon the merits of these three administrative appeals. The Court previously consolidated the cases for purposes of review. Case No. 12-CV-85-ABJ has been designated as the lead case. The petitioners have filed three separate opening briefs for consideration. The federal respondents (collectively identified as "United States" unless otherwise specifically stated) have filed a single opposition brief to the petitioners' three opening briefs; the respondents-intervenors (collectively "intervenors") have filed a single joint response to these three briefs; petitioners have filed three separate replies. All submissions will be considered in this Opinion and Order, with distinctions made between the three separate appeals as required by context and necessity for clarity. The Court has reviewed the administrative record, the parties' written submissions, and applicable law. In these administrative appeals, review is confined to the administrative record.

Background and Facts

The three cases identified in the caption above have been consolidated for review. These cases all concern approval of issuance of two large coal leases within the Powder River Basin in Wyoming, portions of which are located within the Thunder Basin National Grassland. The Bureau of Land Management ("BLM") authorized coal leases in areas identified as the North Hilight ("NH"), South Hilight ("SH"), North Porcupine ("NP"), and

South Porcupine ("SP") coal lease tracts (sometimes "the leases"), which would expand the North Antelope Rochelle and Black Thunder mines in the Powder River Basin.

In Case No. 13-CV-42-ABJ, petitioners WildEarth Guardians ("WEG") and Sierra Club challenge the BLM decisions approving the leasing of these tracts, asserting they do not comply with the requirements of federal law protecting air quality and climate. The Wright Area Final Environmental Impact Statement ("FEIS")[1] was issued July 2010 approving six coal leases including NH and SH, which will expand the Black Thunder Mine, and the NP and SP leases, expanding the North Antelope Rochelle Mine.[2] AR 179. The petitioners assert violations of 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*. They seek review of the BLM's actions under the arbitrary and capricious standard of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Petitioners contend that the BLM failed to comply with NEPA when it did not take a hard look at local air quality impacts resulting from coal mining, including direct and cumulative air quality impacts of ozone, direct effects of 24-hour PM_{10} emissions and 24-hour and annual $PM_{2.5}$ emissions, and direct and cumulative effects of short-term nitrogen dioxide (NO_2) emissions on air quality. Further, petitioners contend the BLM failed to take a hard look at climate impacts, including direct, indirect and cumulative impacts to climate caused by carbon dioxide (CO_2)

---

[1]The entire FEIS is in the record before the Court, North Porcupine Record at 1 *et seq.* The Court will refer to the FEIS as AR ___, unless otherwise specified.

[2]Two other lease tracts were addressed in the Wright FEIS, including the West Hilight and West Jacobs Ranch tracts. Neither tract is at issue here.

emissions from coal mining and combustion. They assert that climate impacts will not change under the No Action Alternative. They further contend that the agency failed to address a reasonable range of alternatives with respect to emissions and climate change.

In Case No. 13-CV-90-ABJ, petitioner Powder River Basin Resource Council ("PRBRC") similarly challenges BLM decisions to approve the BLM's NP and SP Lease(s) by Application ("LBAs"), sought by BTU, a subsidiary of Peabody Energy Corporation, for the 9,607 acre expansion of the North Antelope Rochelle Mine. PRBRC also challenges the BLM's NH LBA, applied for by Ark Land Company, a wholly owned subsidiary of Arch Coal, Inc., for a 4,530 acre expansion of the Black Thunder Mine. These particular leasing decisions were analyzed as part of the BLM Environmental Impact Statement for the Wright Area FEIS, and approved by three separate Records of Decision ("RODs"). PRBRC asserts the BLM violated NEPA, by failing to take a hard look at critical reclamation reports from cooperating agencies on the FEIS, relying on inaccurate or misleading reclamation data, failing to take a hard look at contemporaneous reclamation at the Black Thunder and North Antelope Rochelle Mines and in the Powder River Basin, and by failing to include in the NEPA analysis compliance with Mineral Leasing Act ("MLA") requirements that no corporation may hold or control at one time coal leases on an aggregate of more than 75,000 acres in any one state and no greater than an aggregate of 150,000 acres in the United States.

In Case No. 12-CV-85-ABJ, petitioners WEG, PRBRC, and Sierra Club challenge the United States Forest Service's ("USFS") approval of two coal leases within the Thunder

Basin National Grassland ("Grassland"), a unit of the National Forest System,[3] including the NP and SP coal leases. Because the two tracts are partially located on Grassland, USFS must consent to the leases before the BLM can approve leasing of the tracts. The petitioners argue that as the agency charged with protecting land and resources in the Grassland, USFS was required to take a hard look at environmental consequences of the leases before consenting to approval of issuance of the leases by the BLM and did not do so. USFS relied heavily on the BLM's Wright Area EIS in issuing its RODs approving the leases. Petitioners claim the Wright Area FEIS and USFS RODs are deficient, in that USFS failed to consider reasonable alternatives to the leases, failed to consider measures to mitigate the effects of the mines on the area's groundwater supply, and failed to analyze an array of air quality impacts likely to result from the leases.

As to all three cases, the United States disagrees and in turn asserts the actions of the BLM and USFS satisfied requirements of NEPA. It argues that the climate change claims lack merit. The BLM took the required hard look at climate change impacts and the FEIS analysis of all alternatives, including the No Action Alternative was reasonable. Further, the FEIS properly considered direct and indirect air quality impacts of leasing, including those affecting ozone, particulate matter, nitrogen dioxide, as well as the impacts of coal combustion. As to groundwater and reclamation, the United States says the FEIS

---

[3]"In general, the BLM sets the terms for and manages coal leases on Forest Services lands under the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.* The Forest Service must consent to any mining activities on its lands and may impose conditions to protect forest resources. 30 U.S.C. § 1272." *Wild Earth Guardians v. United States Forest Service*, 828 F. Supp.2d 1223, 1227 n. 1 (D.Colo. 2011).

properly addressed these considerations. It further asserts the FLPMA, NFMA, and MLA claims lack merit.

The intervenors suggest the petitioners do not have standing to bring this action. They contend that petitioners have not carried the NEPA burden of showing the BLM did not take a hard look at potential impacts. Flowing from that discussion, the intervenors further contend that petitioners have failed to show that the USFS violated the NFMA or NEPA. Their contentions essentially echo those set forth by the United States.

Background

National Environmental Policy Act "(NEPA")

NEPA is a declaration of a "broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 347, 109 S.Ct. 1835, 1844 (1989). "To ensure that this commitment is 'infused into the ongoing programs and actions of the Federal Government, the act also establishes some important 'action-forcing' procedures." *Id.* The statutory scheme directs federal agencies to prepare an Environmental Impact Statement, which must take a "hard look" at the potential impacts of the agency's proposed action. *Id.* at 350; 42 U.S.C. § 4332(2)(C). See also *High Country Conservation Advocates v United States Forest Service,* 52 F. Supp.3d 1174, 1181, 2014 WL 2922751 (D. Colo. 2014), citing *Robertson* and *New Mexico ex rel Richardson v. Bureau of Land Management*, 565 F.3d 683, 713 (10th Cir. 2009). The preparation of an environmental impact statement serves NEPA's action forcing in two

ways: "it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and "it also guarantees that the relevant information will be made available to the larger audience that may also play a role both in the decision making process and the implementation of that decision." *Robertson*, 490 U.S. at 349. NEPA provides for transparent and informed decisionmaking by an agency and ensures public participation throughout the entire process.

> "The EIS must also 'rigorously explore and objectively evaluate all reasonable alternatives' to a proposed action in comparative form, so as to provide a 'clear basis for choice among the options.'" *WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp.2d 1223, 1236 (D. Colo. 2011) (quoting 40 C.F.R. § 1502.14). "Reasonable alternatives are those which are 'bounded by some notion of feasibility,' and, thus, need not include alternatives which are remote, speculative, impractical, or ineffective. *Id.* at 1236–37 (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1172 (10th Cir. 2002) and citing *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1039–40 (10th Cir. 2001)). "The EIS also must briefly discuss the reasons for eliminating any alternative from detailed study." *Id.* (citing 40 C.F.R. § 1502.14(a)). To determine whether alleged deficiencies in an EIS merit reversal, the Court applies "a rule of reason standard (essentially an abuse of discretion standard)." *Utahns for Better Transp.*, 305 F.3d at 1163.
>
> NEPA does not require an explicit cost-benefit analysis to be included in an EIS. 40 C.F.R. § 1502.23 ("[T]he weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations"); *see also Oregon Natural Res. Council v. Marsh*, 832 F.2d 1489, 1499 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377; *North Carolina Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp.2d 661, 692 (M.D. N.C. 2001). However, where such an analysis is included it cannot be misleading. *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446–48 (4th Cir. 1996) ("it is essential that the EIS not be based on misleading economic assumptions"); *Johnston v. Davis*, 698 F.2d 1088, 1094–95 (10th Cir. 1983)(disapproving of misleading statements resulting in "an unreasonable

comparison of alternatives" in an EIS).

High Country Conservation Advocates v. United States Forest Service, 52 F. Supp.3d at 1181-1182. See also *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C.Cir. 2013). The rule of reason standard, which is essentially an abuse of discretion standard, is applied to decide whether claimed deficiencies in an EIS are significant to defeat the goals of NEPA. *Wild Earth Guardians v. United States Forest Service*, 828 F. Supp.2d 1223, 1236-1237 (D.Colo. 2011)(quoting *Utahns for Better Transp.*, 305 F.3d at 1163.)

Standing to Challenge Actions

Whether petitioners have standing to bring these challenges to agency action is a threshold issue. The exercise of judicial power is limited by the Constitution to cases and controversies. *Wild Earth Guardians v. United States E.P.A.*, 759 F.3d 1196, 1204-1205 (10th Cir. 2014). The standing doctrine restricts judicial power to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of the law. *Id.*, quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 492, 129 S.Ct. 1142, 1148 (2009).

The petitioners have the burden of establishing the Article III standing elements. To do so, petitioners must

> ... have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]" . . . Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third

> party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." . . .

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 2136 (1992) (citations omitted).

The United States Supreme Court makes clear that petitioners bear the burden of showing that they have standing for each type of relief sought. *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009), 129 S.Ct. 1142, 1149 (2009). In the Tenth Circuit, a petitioner must "com[e] forward with evidence of specific facts which prove standing." *Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814, 821 (10th Cir. 1999).

> It is common ground that the respondent organizations can assert the standing of their members. To establish the concrete and particularized injury that standing requires, respondents point to their members' recreational interests in the National Forests. While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice. *Sierra Club v. Morton*, 405 U.S. 727, 734–736, 92 S.Ct. 361, 31 L.Ed.2d 636 (1972).

Summers v. Earth Island Institute, 555 U.S. at 494, 129 S.Ct. at 1149.

Where, as here, petitioners are citizen environmental groups suing to protect the interests of their members from climate change and accompanying environmental harms, they must demonstrate members would have standing to sue in their own right:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect [through the action] are germane to the organization's purpose; and (c) neither the claim nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)[.]

WildEarth Guardians v. Jewell, 738 F.3d 298, 305 (10th Cir. 2013); *Amigos Bravos v. United States Bureau of Land Management*, 816 F. Supp.2d 1118, 1124 (D.N.M. 2011).

Petitioners here assert procedural violations by the BLM and USFS with respect to the FEIS issued in this case related to the decisions to offer the tracts for coal leasing. Where a petitioner is asserting procedural rights under NEPA, requirements for redressability are relaxed. *Massachusetts v. EPA*, 549 U.S. 497-518, 127 S.Ct. 1438 (2007). The district court in *Amigos Bravos v. United States Bureau of Land Management*, 816 F. Supp.2d at 1124-1125 stated:

> The Supreme Court and the Tenth Circuit have concluded that where a plaintiff is asserting his procedural rights under NEPA the normal requirements for the redressability element are relaxed. *Mass. v. EPA*, 549 U.S. 497, 518, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996) (concluding that the redressability prong is relaxed).
>
> Nevertheless, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S.Ct. 1142, 1151, 173 L.Ed.2d 1 (2009). In other words, unless a plaintiff can show an injury-in-fact that is (a) actual or imminent and (b) concrete and particularized, the Court must dismiss for lack of standing.
>
> > [D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing. Only a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.
>
> *Summers*, 129 S.Ct. at 1151. Thus, while a procedural right "can loosen the strictures of the redressability prong of our standing inquiry," it does not

> loosen a plaintiff's burden to show a concrete and particularized injury-in-fact. *Id.*; see also *Defenders of Wildlife*, 504 U.S. at 580–81, 112 S.Ct. 2130.

Where the injury claimed is one of process rather than result, requirements for Article III standing are somewhat relaxed or at least conceptually expanded. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n. 7, 112 S.Ct. 2130 ((1992).

> First, for an injury in fact WildEarth "need not establish with certainty that adherence to the procedures would necessarily change the agency's ultimate decision." *Utah v. Babbitt*, 137 F.3d 1193, 1216 n. 37 (10th Cir. 1998). It suffices that the procedures "are designed to protect some threatened concrete interest of [the person] that is the ultimate basis of standing." *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1234 (10th Cir. 2010) (emphasis and internal quotation marks omitted). "[W]here plaintiffs properly allege a procedural violation affecting a concrete interest[,] ... the injury results not from the agency's decision, but from the agency's uninformed decisionmaking." *Id.* at 1234 (emphasis and internal quotation marks omitted). Thus, WildEarth need show only that compliance with the procedural requirements could have better protected its concrete interests. Similarly, to establish redressibility it need show only that the injury—lack of an informed decision—could be redressed by requiring the agency to make a more informed decision. See *id.* at 1235 ("[T]he fact that [the agency] refused to issue an updated recommendation also satisfies the causation and redressability prongs—[the agency]'s recalcitrance caused an allegedly uninformed decision, and this could be redressed by a favorable court decision, even if the Secretary's ultimate decision was the same.")
>
> Petitioners need not establish with certainty that adherence to the procedures would change the agency's ultimate decision. *Utah v. Battie*, 137 F.3d 1192, 1216 n. 37.

WildEarth Guardians v. United States E.P.A., 759 F.3d at 1205.

The challenged procedures must be designed to protect some threatened concrete interest of the person who provides the ultimate basis of standing. *Id.*, quoting *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d

1227, 1234 (10th Cir. 2010). Where a procedural violation is allegedly affecting a concrete interest, the injury results from the agency's uninformed decisionmaking rather than from the agency's decision. *Id.* Therefore here, as in *WildEarth Guardians v. United States EPA,* the petitioners need show only that compliance with the procedural requirements *could* have better protected its concrete interests. *Id.*

There is little dispute here that the various petitioners will have associational standing if one of their members has standing under Article III. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 705 (2000).

A number of declarations have been offered to support the petitioners' claims of standing to bring these actions. In Case No. 13-CV-42-J, petitioners are WEG and Sierra Club. By way of example, the declaration of Jeremy Nichols states he is a resident of Golden, Colorado, and is a member and employee of WEG. He describes WEG as a non-profit environmental organization dedicated to protecting and restoring wildlife, wild places and wild rivers throughout the American West. He is a director of WEG's Climate and Energy Program. The Program advocates for clean energy solutions seeking to shift away from the use of fossil fuels to safeguard climate, clean air and communities. He is a Sierra

Club member, a national non-profit organization which, by way of example, is dedicated to exploring, enjoying and protecting wild places of the earth, practicing and promoting the responsible use of the earth's ecosystem and resources, educating and enlisting humanity to protect and restore the quality of the natural and human environment, using lawful means to carry out these objectives. He is familiar with the NP, SP, NH, and SH leases, the BLM's decisions approving sale and issuance of the leases, the BLM's Records of Decision and the Wright Area FEIS. He commented on behalf of WEG and the Sierra Club on the DEIS and the FEIS. He has frequently visited, and continues to visit, the area where the two mines are located for recreational purposes, including hiking, wildlife viewing, rockhounding and other activities. His declaration offers examples and photographs documenting observations he has made regarding the impact of the mining operations on aesthetics and scenic beauty, air quality and pollutants, including haze, dust clouds, the "orange cloud" related to blasting activities, and particulate matter emissions. He asserts these harms impact his ability to fully enjoy the public lands and scenery of these areas on his visits. He offers a discussion of air quality related harms and scientific study indicating that shifts in global climate are occurring, much of which is attributed to human activities and increases and releases of greenhouse gases (GHGs)[4],[5] into the

---

[4]AR 138: "Greenhouse gases (GHGs) are an issue because of global warming and climate change. Global warming is a theory that certain gases in the atmosphere impede the radiation of heat from the earth back into space, trapping heat like the glass in a greenhouse. This raises the average temperature of the surface of the earth and the lower atmosphere, which contributes to climate change. Among these GHGs are carbon dioxide, methane, water vapor, ozone, nitrous oxide, hydrofluorocarbons, perflurorcarbons and (continued...)

atmosphere. This is not a comprehensive outline of Mr. Nichols' declaration.

Other declarations have been submitted as well. Percy Angelo, a member of the Sierra Club, is a resident of Florida, active in various committees, and concerned by the impacts of increased global warming and GHGs affecting climate immediately and in years to come. He understands the climate is becoming warmer and weather patterns are erratic

---

[4](...continued)
sulfur hexafluoride. GHGs are not currently regulated, but there is a consensus in the international community that global climate change is occurring and that it should be addressed in governmental decision making."

[5]It is also worth mention here that on August 3, 2015 President Obama announced the Clean Power Plan, which will implement EPA regulations addressing climate change, with companion goals of reducing carbon emissions into the atmosphere and development cleaner sources of energy. The President's remarks, which can be viewed at https://www.whitehouse.gov/the-press-office/2015/08/03/remarks-president-announcing-clean-power-plan, noted that existing power plants are the source of about a third of America's carbon pollution. He stated: "That's more pollution than our cars, our airplanes and our homes generate combined. That pollution contributes to climate change, which degrades the air our kids breathe. But there have never been federal limits on the amount of carbon that power plants can dump into the air. Think about that. We limit the amount of toxic chemicals like mercury and sulfur and arsenic in our air or our water -- and we're better off for it. But existing power plants can still dump unlimited amounts of harmful carbon pollution into the air."

"For the sake of our kids and the health and safety of all Americans, that has to change. For the sake of the planet, that has to change."

"So, two years ago, I directed Gina and the Environmental Protection Agency to take on this challenge. And today, after working with states and cities and power companies, the EPA is setting the first-ever nationwide standards to end the limitless dumping of carbon pollution from power plants."

The Clean Power Plan Final Rule, a massive 1,560 page document, is available on the EPA's website, http://www2.epa.gov/cleanpowerplan/clean-power-plan-final-rule.

Undoubtedly, this rule may significantly alter the nation's energy landscape and will impact the future development and transformation of the coal industry in the near future. It would not be a stretch to assume that protracted litigation regarding the Clean Power Plan is likely.

as a result of increased GHGs in the atmosphere. He asserts that reduction of GHGs could help protect Florida's landscape and ecosystems. He is aware coal-fired plants are among the largest industrial sources of GHGs and that nearly all coal mined in the PRB is burned in coal-fired power plants. The single largest source of coal in the United States is the PRB. Notwithstanding knowledge that massive amounts of carbon dioxide ($C0_2$) emissions result from PRB coal production, the BLM continues to issue new coal leases in the PRB without analyzing environmental impacts, including impacts of CO_2 emissions resulting from coal leasing. He understands the BLM authorized the sale and execution of the Wright Area leases in the Wyoming PRB, which have the potential to produce approximately 2 billion tons of coal, resulting in more than 3 billion tons of CO_2 emissions when burned. He worries that GHG emissions from coal mined from the Wright Area leases and other coal leases in the PRB will make climate change impacts more severe, difficult and expensive to address. It will exacerbate the effects of the presently-experienced global warming in Florida.

Greg Auriemma, a Sierra Club member in Ocean County, New Jersey, discloses that he has coastal property in Brick, New Jersey, an estuary on Barnegat Bay. He too speaks to familiarity with environmental issues in the New Jersey coastal areas, including climate change, its causes, and potential adverse impacts on public health, welfare and the environment. He is concerned that elevated GHGs, including CO_2, have potential to cause climate and environmental changes, increased temperatures, rising sea levels, glacier melt, and increases in frequency and intensity of extreme weather events. As a

result of Superstorm Sandy, he lost property and suffered damages as a result of that storm. He too says the BLM has failed to adequately analyze impacts of increased CO_2 emissions and climate changes resulting from burning coal mined and produced by these and other leases in the PRB which will damage the quality of life and exacerbate the effects of global warming.

Declarations much to the same effect have been offered by Sierra Club members Nancy Devlin, of Corpus Christi, Texas, Margaret J. DiClemente of Corpus Christi, Texas who has lived on Padre Island, Jeremy Nichols, Kathryn Phillips, Connie Wilbert, and Joel D. Fedder of Longboat Key, Florida. Edward Mainland, a Senior Conservation Fellow at the Sierra Club and Co-Chair of the Energy Climate Committee of the California-Nevada Regional Conservation Committee (CNRCC), a resident of Novato, California, a lagoon community on the shores of San Francisco Bay, has offered a declaration as well. His declaration addresses carbon emissions and climate change, direct and harmful effects on the community, rising sea levels, extreme weather and shore erosion, increases in flood insurance costs and other costs. He observes that climate change has altered ecosystems in the Sierra and Cascade Ranges, including weather and climate pattern changes, more intense forest fires, and reduced snow pack. He and his family have observed more beach and cliff erosion. He, as the others, and with his review of literature and reports, is confident that such changes are at least partially attributable to climate change, and have been drastically accelerated due to human-caused GHGs and activities. He and the Sierra Club, advocate for reduction of GHG emissions. His declaration states that coal

combustion is a major cause of carbon emissions and climate change and should be phased out as soon as possible.

The declaration of Michael C. MacCracken is offered. He has a B.S. in Engineering from Princeton University and M.S. and Ph.D. degrees in Applied Science from the University of California, Davis. He has been employed as a physicist at the University of California Lawrence Livermore National Laboratory, leading scientific projects relating to natural and human influences on regional air pollution and global climate. He served in advisory capacities for climate change research programs managed by the Department of Energy, and has participated in numerous other professional activities related to climate change and impact on the environment. From 1993 to 2002, he was assigned to serve as senior scientist on global change in the interagency office of U.S. Global Change Research Program in Washington D.C., serving as its first executive director from 1993 to 1997. The global change research programs is with ten separate federal agencies, including the Department of Interior U.S. Geological Survey, Department of Energy, National Science Foundation, Environmental Protection Agency, National Oceanic and Atmospheric Administration, NASA, and others. He lists many similar professional activities in various capacities related to study and research in the area of climate change impacts. He participated in assessments prepared by the Intergovernmental Panel on Climate Change (IPCC). Since he retired from Livermore National Laboratory in September 2002 after completing his assignment with the USGCRP, he has served pro bono as Chief Scientist for Climate Change Programs with the Climate Institute in Washington, D. C., a 13-

member Assessment Integration team of the 8 National Arctic Climate Impacts Assessment. He has served as President of the International Association of Meteorology and Atmospheric Sciences, the U.S. National Academy of Sciences Committee facilitating participation of U.S. scientists with international associations for atmosphere, oceans, cryosphere, hydrology, and more. He was the international atmospheric sciences representative on the executive committee of the Scientific Committee on Oceanic Research. He has offered expert declarations in several cases related to climate change. He has authored books, reports and peer-reviewed journal articles relating to climate change. He does not belong to either the Sierra Club or WEG.

His declaration outlines four key points to consider here. He asserts the FEIS for the Wright Area Coal lease applications seriously misrepresents scientific understanding and stated policies of the Administration; emissions from and associated with combustion of coal, petroleum and natural gas cause climate change and consequent environmental and societal impacts; emissions resulting from mining, transporting and combustion of coal to be extracted from the proposed leases will lead to significant emissions into the atmosphere of warmth-inducing substances, the emissions of which the government has pledged to reduce; and that on-going and prospective climate change is already affecting those living in the United States and around the world, and that climate change impacts will intensify significantly in the decades ahead.

The expert declaration of Michael Power is offered, discussing the intersection of natural resource economics and regional economics. He work has included study of the

economics of energy, and coal in particular. Many of his professional activities, study and publications are outlined in the declaration. They include studies that have considered the role that mining industries may play in state and regional economics, and energy economics. His declaration outlines four general points regarding the economics of BLM's coal leasing program in the PRB. He indicates that almost half of all coal in the United States is sub-bituminous coal from the PRB. The primary source of sub-bituminous coal is in the PRB in Montana and Wyoming, representing 93% of sub-bituminous coal production in the United States, according to USDOC EIA 2020 data on coal production. The coal leasing program has a significant impact on the American coal market. PRB coal reduces the cost of using coal for electricity generation because of low sulfur content, providing a way for generators to meet acid rain requirements, and making it valuable in lowering sulfur dioxide pollution, and competitive mining costs when compared to delivered costs of coal from other coal producing areas. He says the leases have a significant impact on coal consumption, increasing the level of coal combustion, and GHG emissions. He discusses the BLM's FEIS explanations of the cost advantages of PRB coal. His economic analysis discusses the use, supply, demand, production costs as it relates to coal production in the PRB, specifically the Black Thunder and North Antelope Rochelle mines. He is critical of the analysis and data used in the EIS and details extensively his discussion and evaluation of the FEIS..

In 12-CV-85-ABJ, petitioners offer the supporting declaration of Leland J. Turner, a resident of Campbell County, Wyoming, and owner of a 10,000 acre sheep and cattle

ranch near Wright, Wyoming. He and his wife are members of the PRBRC, because the organization represents their interests in having a clean and healthful environment in northeastern Wyoming, including their interests in protecting air quality, healthy soils and rangeland. He regularly visits areas impacted by current mining operations and areas that will be impacted by the additional leases. He cares for his livestock, visits the Grassland, enjoys viewing elk, antelope, and other wildlife and also hunts. He has observed air pollution from the mines which creates regional haze and decreases air quality. He believes that present and future mining activities contribute to air pollution in the area and that the health of his family and livestock will be further impacted by the proposed coal leases.

He is also concerned about water impacts from future coal mining activities and nearby coalbed methane. He depends on groundwater at the ranch and in his lease areas in the Grassland. Dewatering of aquifers and reduction of available water is a significant concern. Some wells are no longer usable; some water holes are completely dried up. He struggles with the mining impacts to the water supply. He is concerned about reclamation at North Antelope Rochelle and other mines in the area. Great amounts of land are disturbed every year because of mining operations and very little land actually gets reclaimed. He supports the PRBRC's challenge to the USFS consent to the BLM decision to lease the SP and NP tracts. Better analysis of the reclamation status may be required and may lead to better reclamation practices.

Jeremy Nichols, whose background is outlined above, offers a declaration in this

case as well regarding the USFS consent to the issuance of coal leases. As noted above, he visits the affected areas, primarily for recreational purposes and enjoys its scenic, conservation and educational values. He shares his observations and experiences from his visits to the area. He expresses concerns about air quality and pollution, which diminish his enjoyment of recreational opportunities in the area. He maintains that the FEIS fails to adequately analyze these impacts. When the USFS consented to issuance of the leases, it did not accurately disclose expected air quality impacts, failed to analyze and assess impacts of emissions from burning NP and SP coal, failed to assess reasonably foreseeable impacts of coal-fired power plant emissions connected with the NP and SP leases around the Laramie River Station, the Martin Drake Power Plant, and the Ray Nixon Power Plant. He challenges the USFS consideration of alternatives and environmental harms, which results in an uninformed decision and harm to his, Sierra Club's and WEG's interests.

In Case No. 13-CV-90-J, PRBRC offers the declarations of Leland Turner and Dave Clarendon, which are to the same effect as the declarations described above. Leland Turner's declaration, AR BLM 31757, tracks the declaration offered with respect to Case No. 12-CV-85-J. He and his wife ranch and are active members of the PRBRC. He visits the area impacted by mining operations and owns active grazing permits within the Grassland. The concerns expressed in this declaration address air pollution, including regional haze and decreased air quality. The coal dust and other air pollution impact enjoyment of recreational opportunities in the area, such as hunting, as well as his

ranching business. Again, he is particularly concerned about water impacts. His ranching operations depend on groundwater at the ranch and in the lease areas in the Grassland. Dewatering of aquifers caused by coal mining negatively impacts his ranching operations. He has spent large amounts of money investing in water supply systems of deep wells, pipelines and tanks and has experienced reduced availability of water and drawdown of the aquifer. He remains concerned about reclamation at mines in the area, stating that large amounts of land are disturbed every year because of mining but little land ever gets reclaimed. This results in significant loss of grazing pastureland on the Grassland; none has been returned. He believes that better analysis of the reclamation status of the mines, air quality, aquifer drawdown, and the spread of noxious weeds is required and may lead to better practices.

The declaration of Dave Clarendon, a long-time member of the PRBRC and rancher in Sheridan County Wyoming, expresses similar concerns about water. He discusses the shorter growing season and lack of rainfall in the area, and the impact on his ability to grow hay and water his cattle. Snowpack is on a downward trend and fails to generate the same amount of water as in the past. He refers the reader to the USGSINRCS website for data in this regard. (He formerly worked as a snow surveyor for Soil Conservation Service, now called the Natural Resource Conservation Service.) He notes vegetative changes he has observed. He is concerned that increased GHGs from mining activities and CO_2 emissions resulting from burning coal that will be produced after lease in the Wright area lease area will exacerbate the detrimental effects on water production and runoff. He states,

"although I am not completely against coal mining, I believe that the BLM should consider climate mitigation options and alternatives that will reduce greenhouse gas emissions of coal mining and coal-fired plants." AR BLM 31761.

The *WildEarth Guardians v. Jewell* opinion, 738 F.3d 298, issued by the D.C. Circuit on December 24, 2013, presented a challenge to the BLM's decision to approve for leasing the West Antelope II tracts, adjacent to Antelope Coal's existing mine in the PRB. The petitioners in that case were the same as in these consolidated cases, WEG, Sierra Club, PRBRC, and also Defenders of Wildlife. The argument there was that the ROD, dividing a tract of federal land adjacent to North Antelope Coal's existing mine (Antelope II tracts), and the corresponding FEIS were deficient and violated NEPA, the MLA, and FLPMA. The alleged deficiencies included a failure to consider certain environmental concerns, such as increase in local pollution and global climate change caused by future mining before authorizing the leasing of the West Antelope II tracts.

The petitioners in *Jewell* claimed standing based on the effects of global climate change and separate injury including harm to members' recreational and aesthetic interests from local pollution not caused by global climate change. *Jewell*, 738 F.3d at 307. The circuit court acknowledged relaxed redressability and imminence requirements for a plaintiff claiming procedural injury, quoting *Summers v. Earth Island Institute,* 555 U.S. 488, 497, 129 S.Ct. 1142 (2009), and stated that "'the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.'" *Jewell*, 738 F.3d. at 305. "A procedural injury claim therefore must be tethered to some concrete interest adversely

affected by the procedural deprivation: '[A] procedural right *in vacuo*, . . . is insufficient to create Article III standing." *Id.,* quoting *Summers,* 555 U.S. at 496.

Environmental groups have standing to challenge most agency decisions. In this case, except for the objection raised by the intervenors, no serious challenge or objection to standing exists. However, the intervenors assert that plaintiffs lack standing to challenge the agency actions as to claims that the agencies failed to adequately consider climate change or analyze impacts to the environment from GHG emissions. The argument, as posited by intervenors, is that plaintiffs must trace the concrete injury they claim to have suffered to the particular legal theory petitioners have advanced. Said otherwise, intervenors believe the petitioners should demonstrate why the purported inadequate analysis of climate change will cause harm to their personal recreational interests. Intervenors urge that the petitioners cannot connect the dots between the deficiencies and the harms they face. The Court finds that this argument is not persuasive. The discussion in *High Country Conservation Advocates v. United States Forest Service* is helpful:

> This attempt to raise the bar on standing by requiring additional proof beyond injury, causation, and redressability has been rebuffed by other courts including the U.S. Supreme Court. The Court of Appeals for the D.C. Circuit rejected an identical argument last year. In that case, the district court
>
> > found [that plaintiffs] lacked standing to raise the argument because they could not demonstrate a link between their members' recreational and aesthetic interests, "which are uniformly local, and the diffuse and unpredictable effects of [greenhouse gas] emissions." The district court therefore seemed to require that the specific type of pollution causing the Appellants' aesthetic injury—here, local pollution—be the same type that was inadequately considered in the FEIS. In this respect, we think it sliced the salami too thin.

> *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306–07 (D.C.Cir. 2013) (internal citations omitted) (citing *Duke Power Co. v. Carolina Envtl. Study Grp. Inc.*, 438 U.S. 59, 78–79, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978) (holding that, except in taxpayer standing cases, a plaintiff who has otherwise demonstrated standing need not demonstrate a nexus between the right asserted and the injury alleged)). The court went on to explain that vacatur of the allegedly deficient FEIS would redress the plaintiff's injury regardless of the "specific flaw" in the agency's decision. *Id.* at 307; see also *WildEarth Guardians*, 828 F. Supp.2d at 1235 (D.Colo. 2011) (rejecting the idea that a plaintiff in a similar challenge to an agency coal leasing decision "must specifically allege a personalized injury resulting from climate change, rather than from the project itself"). Like these other courts, I find that requiring High Country Conservation Advocates to prove more than injury, causation, and redressability would be inappropriate and lacks precedential support. I find that plaintiffs have standing to challenge the CRR even if their argument that the rule failed to adequately analyze climate change impacts does not share a nexus with the concrete injury to their recreational interests.

High Country Conservation Advocates v. United States Forest Service, 52 F. Supp.3d at 1187.

This Court will join with those courts who reject the argument that petitioners lack standing when they assert that coal leasing in the areas of concern would impact global climate change and would in turn threaten their members' enjoyment of the at-issue areas. The petitioners allege procedural failures in the agencies' considerations of the proposed lease expansions. They have produced evidence of personal injury to their members' enjoyment and use of these lands. This injury is not conjectural nor hypothetical and is fairly traceable to the respondents' action. The viewpoint that the associations must allege a personal injury resulting from climate change, rather than the lease expansion authorizations, is not supported by law or persuasive authority. As the Colorado United States District Court indicated, standing need not be so narrowly construed for NEPA

purposes. *WildEarth Guardians v. United States Forest Service*, 828 F. Supp.2d 1223, 1235 (2011) [(quoting *Larson v. Valente*, 456 U.S. 228, 244, n. 15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury."). The procedural failure asserted here is the allegedly inadequate consideration of alternatives, which influenced the decision whether to approve the project, thereby creating the harm alleged. The Court is satisfied that WildEarth has standing to assert its claims.")].

In step with the courts noted above, this Court will not slice the salami so thin. The petitioners' alleged injuries would be redressed by vacatur of a deficient FEIS. This is consistent with the notion that a plaintiff must demonstrate standing for **each form of relief** sought. *See Summers v. Earth Island Institute*, 555 U.S. at 493. Petitioners have standing to challenge the FEIS even if their argument that the FEIS failed to adequately analyze climate change impacts has no common nexus with the concrete injury to recreational interests. The vacatur of an allegedly deficient FEIS would redress the petitioners' injuries regardless of the "specific flaw" in the agency's decision. *High Country Conservation Advocates v. United States Forest Service.*, 52 F. Supp.3d at 1187. Even though petitioners have asserted more than one theory in support of their claims that the FEIS is deficient, they do not seek more than one form of relief. The Court finds petitioners have standing.

Standard of Review

Because neither NEPA nor FLPMA create a private right of action, the Court reviews the challenge to the final agency actions under the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 et seq. *See Hillsdale Environmental Loss Prevention, Inc. v United States Army Corps of Eng'ineers*, 702 F.3d 1156, 1165 (10th Cir. 2012); *New Mexico ex rel Richardson v. BLM*, 565 F.3d 683, 719 (10th Cir. 2009). The Court's inquiry under the APA "must be thorough, but the standard of review is very deferential to the agency. A presumption of validity attaches to the agency action and the burden of proof rests with the parties who challenge such action." *Hillsdale Environmental Loss Prevention, Inc.*, 702 F.3d at 1165 (internal quotations and citations omitted); and *see Western Watersheds Project v. Bureau of Land Management*, 721 F.3d 1264, 1273 (10th Cir. 2013).

The governing standard of review was reiterated recently in *WildEarth Guardians v. United States Office of Surface Mining, Reclamation & Enforcement*, _____F.3d_____, Text at 2015 WL 2207834, *5 (D.Colo. 2015):

> Judicial review of agency compliance with NEPA is deferential. See *Marsh*, 490 U.S. at 377, 109 S.Ct. 1851. By law, this Court may only set aside an agency's decision if, after a review of the entire administrative record, the Court finds that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see also *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002).
>
> An agency's decision is arbitrary and capricious if the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment. Deficiencies ... that are mere "flyspecks" and do not defeat NEPA's goals of

informed decisionmaking and informed public comment will not lead to reversal.

New Mexico ex rel. Richardson, 565 F.3d at 704 (internal quotation marks and citations omitted).

The plaintiff bears the burden of proof on the question of whether an agency's decision was arbitrary or capricious. See *Krueger*, 513 F.3d at 1176 (explaining that the agency's decision is presumed valid). This Court cannot substitute its own judgment for the agency's judgment. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 555, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). "[D]eference to the agency is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1246 (10th Cir. 2011)(quoting *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 691 (10th Cir. 2010)).

However, the Court must make a searching review of the basis for the agency's decision. And, if the agency simply has not acted, such as the claim that the OSM provided no public notice or opportunity for public involvement with respect to its actions on the two mining plan revisions, the Court may not "defer to a void." *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010).

Petitioners' Claims

The petitioners' claims in all of the three consolidated cases share commonality in that they assert the agencies, BLM and USFS, failed to comply with federal law by failing to consider a reasonable range of alternatives in making the decisions authorizing leasing of these tracts, and failed to consider direct and indirect air quality impacts, hydrological and groundwater impacts, mitigation and reclamation, and global climate impacts. With these failures, petitioners argue that the requirements of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 et seq., the Federal Land Policy Management Act,

("FLPMA"), 43 U.S.C. § 1701 et seq., the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 et seq., the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1270 et seq., and the Mineral Leasing Act ("MLA"), 39 U.S.C. §§ 181 et seq., have not been satisfied.[6] As a result, the FEIS was misleading and incomplete, and could not be used to justify decisions made and reflected in the FEIS and RODs.

The primary focus in addressing petitioners' claims will be on the BLM's assessments, as the agency preparing and publishing the Wright Area FEIS. The USFS also relied on the BLM's work in consenting to authorization of leasing in the Grassland, as embodied by the USFS RODS for the NP and SP leases, and the RODs for each of the four tracts, NP, SP, NH, and SH. It is also worth another reminder here that NEPA does not fix substantive outcomes of agency actions. It requires informed decisionmaking, with opportunities for public participation and comment, and is crafted to ensure the agency takes the requisite hard look at the potential environmental consequences of its action. NEPA does not require that environmental concerns be elevated over other appropriate considerations. *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S., 97-98, 103 S.Ct. 2246, 2252 (1983).* Where an agency must make predictions within its area of expertise, and "at the frontiers of science," a reviewing court must be at its "most deferential." *Id.*, 462 U.S. at 103; 103 S.Ct. at 2255.

With this as the yardstick by which the agencies' decisions should be measured, the

---

[6]The MLA authorizes the Secretary of Interior to offer leases on tracts of federal land suitable for coal mining and to award such leases based on a competitive bidding process. 30 U.S.C. § 201(a)(1).

Court finds that the decisions with respect to the proposed LBAs for the North Porcupine, South Porcupine, North Hilight and South Hilight tracts were not arbitrary and capricious or in conflict with the law.

The two agencies here have statutory mandates for land use that observe the principle of multiple use. The Federal Land Policy and Management Act requires that the BLM manage public lands according to principles of multiple use management. 43 U.S.C. §§ 1701, 1712. The BLM is to design land use plans to strike "a balance among the many competing uses to which the land can be put." *Western Watersheds Project v. Bureau of Land Management*, 721 F.3d at 1268 (citing *State of New Mexico ex rel. Bill Richardson v. BLM,* 565 F.3d 683, 690 n. 3 (10th Cir. 2009).[7] The USFS is governed by a similar multiple use mandate as well. 16 U.S.C.§ 528.

---

[7] 43 C.F.R. § 1601.0-5(i):

> (i) Multiple use means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the lands for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some lands for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the lands and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

The BLM manages coal leases underlying Forest Service Land pursuant to the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.*, which authorizes the Secretary of Interior to dispose of federal coal deposits to citizens of the United States, or to associations or such citizens, or to any corporation organized under the laws or the United States, or if any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. . . ." Because the USFS retains management authority over the surface lands within the National Forest System overlying these leases, the BLM is required to obtain consent of the USFS before approving leases. 30 U.S.C. § 201, 207(a); 43 C.F.R. § 3425.3.[8]

---

[8]30 U.S.C.A. § 201:

> **(iii)** Leases covering lands the surface of which is under the jurisdiction of any Federal agency other than the Department of the Interior may be issued only upon consent of the other Federal agency and upon such conditions as it may prescribe with respect to the use and protection of the nonmineral interests in those lands.

43 C.F.R. § 3425.3:

> (b) For lease applications involving lands in the National Forest System, the authorized officer shall submit the lease application to the Secretary of Agriculture for consent, for completion or consideration of an environmental assessment and for the attachment of appropriate lease stipulations, and for the making of any other findings prerequisite to lease issuance. (43 CFR 3400.3, 3461.1(a)).

43 C.F.R. § 3432.3:

> (a) The terms and conditions of the original lease shall be made consistent with the laws, regulations, and lease terms applicable at the time of modification except that if the original lease was issued prior to August 4, 1976, the minimum royalty provisions of section 6 of the Federal Coal Leasing Amendments Act of 1976 (30 U.S.C. 207; 43 CFR 3473.3–2) shall not apply to any lands covered

(continued...)

Before giving its consent, USFS is authorized to impose conditions to protect Forest Service resources. *Id.* The two agencies, USFS and BLM, are subject to the same dual-agency permitting process. *Id.*; *High Country Conservation Advocates v. United States Forest Service*, 52 F. Supp.3d at 1183. Although the agencies do speak to whether properties should be leased, neither agency issues mining permits.

On July 24, 2007, a public scoping meeting was held in Gillette, Wyoming, seeking public input on issues relating to leasing of the tracts. AR 202, 796. The scoping period was extended from July 3 through September 3, 2007, during which BLM received 9 comment letters. *Id.*, BLM28553-28930 (scoping comments.) June 26, 2009, a notice of availability of the Wright Area DEIS was published and public comment period was opened. AR 203, 1543. Another public hearing was held in Gillette on July 29, 2009

---

[8](...continued)

> by the lease prior to its modification until the lease is readjusted.
>
> (b) Before a lease is modified, the lessee shall file a written acceptance of the conditions imposed in the modified lease and a written consent of the surety under the bond covering the original lease to the modification of the lease and to extension of the bond to cover the additional land.
>
> (c) Before modifying a lease, BLM will prepare an environmental assessment or environmental impact statement covering the proposed lease area in accordance with 40 CFR parts 1500 through 1508.
>
> (d) For coal lease modification applications involving lands in the National Forest System, BLM will submit the lease modification application to the Secretary of Agriculture for consent, for completion or consideration of an environmental assessment, for the attachment of appropriate lease stipulations, and for making any other findings prerequisite to lease issuance.

seeking public input on the DEIS and on the fair market value and maximum economic benefit of the proposed leases. *Id.* The BLM received written comments from 17 individuals, agencies, businesses and organizations and over 500 emails from other interested parties during the comment period. AR 204, 1208-1369; BLM24000-BLM24832; BLM30164-31376 (DEIS comments). The comments were considered and responded to in the FEIS. AR 1370-1416. After the FEIS was published and a 30 day comment period, the BLM issued four separate RODs for the tracts. BLM25277 (South Highlight ROD, March 1, 2011); BLM 25051 (North Hilight ROD, February 1, 2012); BLM 26189 (South Porcupine ROD, August 10, 2011); BLM 25656 (North Porcupine ROD, October 17, 2011). The USFS issued its consent decisions, in accordance with 43 C.F.R. § 3400.3-1. The only USFS consent decisions challenged by petitioners are those addressing the NP and SP tracts. AR 1890 or BLM26117 (USFS ROD for South Porcupine, July 14, 2011), AR 1 (USFS ROD for North Porcupine, September 30, 2011).

The FEIS consists of two volumes, including more than 1,300 pages of analysis of direct, indirect and cumulative impacts on air quality, water quality, climate change, wetlands, soils, vegetation, wildlife, land use, recreation, cultural resources, visual resources, socio-economic considerations and transportation. AR 75 *et seq.* The FEIS was prepared after an extensive period of study, with notice to the public with multiple opportunities for comment. The FEIS ultimately culminated in the decisions reflected in the RODs for the four at-issue tracts, issued in 2011 and 2012.

Reasonable Range of Alternatives

The agencies' decisions were made with certain assumptions providing a basic framework that had been used in the preparation of the FEIS. It was assumed that Ark Land, an Arch Coal subsidiary, and BTU, a Peabody subsidiary, would be the successful bidders, as the LBA applicants proposing the projects, and that coal from the various tracts would be mined, processed and sold pursuant to existing mining operations. FEIS Executive Summary 000108. Indeed, these two business entities are the companies that currently own the leases in the North Antelope Rochelle Mine and the Black Thunder Mine and are the entities seeking to expand existing mines, as proposed in the LBAs. After completing the EIS process, the BLM issued separate RODs for each LBA tract, approving the applications and permitting the tracts to be offered for lease by competitive bidding. Leasing, however, does not authorize mining. Successful bidders must then submit mine permit applications, to the Wyoming Department of Environmental Quality/Land Quality Division ("WDEQ/LQD") for review, which must include detailed mining, monitoring, mitigation, and reclamation analysis. Operators are also required to submit a Resource Recovery and Protection Plan ("R2P2") to the BLM for review. Before any mining operations may begin in a new tract, the permit must be approved by WYDEQ/LQD, and the Mineral Leasing Act mining plan must be approved by the Assistant Secretary of the Department of Interior. Further, modifications to an existing mine must be permitted by the WYDEQ/Air Quality Division ("WDEQ/AQD"). The Executive Summary in the FEIS discloses that other agencies, including the Office of Surface Mining, use these analyses

to make leasing and coal mining decisions pertinent to the specific tracts. Cooperating agencies participating in the preparation of the Wright Area FEIS included WDEQ, Office of Surface Mining Reclamation and Enforcement ("OSM"), the USFS, Wyoming Department of Transportation and the Converse County Board of Commissioners.[9] FEIS, Executive Summary at 000089.

Five alternatives were considered by the BLM and USFS in the FEIS, summarized in the Executive Summary of the FEIS, with more detailed analysis in the topical chapters of the FEIS. See FEIS Executive Summary 000092. The alternatives analyzed in detail included the "Proposed Action" alternative. Under this alternative, for each LBA tract the BLM would hold a competitive coal lease sale and issue a maintenance lease to the successful bidder for the NH, SH, NP and SP fields. Estimates of coal reserves, lease area and surface disturbances were identified and considered, as were future estimates of coal production, remaining mine life and employment. Potential economic and environmental consequences for each tract are discussed throughout the FEIS. If there is a decision to lease the proposed LBA tracts, BLM then conducts an independent evaluation of volume and quality of coal resources as part of the fair market value determination. This estimate is to be published in the sale notice if a tract is to be offered

---

[9]Wyoming DEQ regulates surface coal mining operations on federal and non-federal lands in Wyoming under a cooperative agreement with OSM. 30 U.S.C. §§ 1234-1328 (2006) (Surface Mining Control and Reclamation Act, referred to as SMCRA). Wyoming DEQ regulates air quality emissions under the Clean Air Act, 42 U.S.C. §§ 7401-7671q (2006) and surface water discharge under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1987), with oversight provided by the EPA.

for sale.

The BLM's approach to each of the LBAs was consistent throughout. In addition to the "Proposed Action," Alternative 1 "No Action Alternative" was considered. This alternative was recognized as the environmentally preferable alternative calling for rejection of the applications. Under this alternative the LBA tracts would not be leased and the existing leases at the mines would simply be developed according to existing mining plans. This alternative would not preclude future applications to lease the tracts. Alternative 2 (the "Selected Alternative") would reconfigure the tract, hold a competitive lease sale for the reconfigured tract, and issue a maintenance lease to the successful bidder for a tract that is larger than the applied-for tract. This is the BLM's Preferred Alternative for each of the LBAs.[10] FEIS Executive Summary, AR 92-105.

Two other alternatives were not analyzed in detail, including (1) holding competitive coal lease sales, issuing leases for one or more of the LBA tracts to the successful bidder (not the applicants) for the purpose of developing new stand-alone mines; (2) delaying the competitive sales of one or more of the LBA tracts as applied for to increase the benefit to the public afforded by higher coal prices and/or to allow more complete recovery of the potential coal bed natural gas (CBNG) resources in the tracts prior to mining. The new mine start alternative was not analyzed in detail because the BLM believed it would be unlikely a new mine would start up and lease the tracts. Future coal reserves might be

[10]A third alternative is also discussed in the FEIS, but that particular alternative is specific to the West Hilight Field LBA Tract which is not at issue here. FEIS at 000238.

limited in the area and insufficient to support a new sustainable, active mining operation. A new mine would also require initial substantial capital investment and expense, development of new mining and reclamation plans, and new employees. It was likely a new mine would create a new source of air quality impacts. Difficulty in obtaining air quality permits in the PRB discourages new mine starts. Thus, development of new mines was considered unlikely.

The sale-delay option was also not considered in detail. The alternative assumed that tracts might be developed later as a new mine or as maintenance tracts at a later date. Impacts of delayed sale for a maintenance tract would be similar to the proposed action and the reconfigured tract option. New mine starts would be expected to have greater environmental impacts than if the tracts were mined as extensions of existing mines. The consideration of this alternative did recognize that delaying the sale might allow CBNG to be more fully recovered before mining, and if market prices were higher in the future, bonus and royalty payments to the government might be higher. However, lease provisions provide for rentals and royalties to increase if and when coal prices in the market go up. The sale delay alternative was not viewed as an alternative requiring further detailed analysis. Section 2.7 "Alternatives Considered But Not Analyzed in Detail" identifies alternatives including Section 2.7.1, Alternative 4, New Mine Start and Section 2.7.2, Alternative 5, "Delaying the Sale." AR 269-274. Chapter 2 of the FEIS provides a thorough consideration of potential direct, indirect and cumulative impacts of various alternatives. Table 2 provides a summary comparison of the impacts for the alternatives

by resource, magnitude and duration. AR 275-307. While the latter two options were not analyzed in detail, unquestionably, the alternatives were in fact considered. The EIS must briefly discuss reasons for eliminating alternatives from detailed study. This requirement was satisfied. *High Country Conservation Advocates v. United States Forest Service,* 52 F. Supp.3d at 1181-1182. The determinative question is whether options were considered, not whether the BLM and USFS were persuaded by these options. *WildEarth Guardians v. United States Forest Service,* 828 F. Supp.2d at 1237.

USFS participated in the development of the Wright Area LBA FEIS and was a cooperating agency. USFS was required to give consent to the BLM prior to leasing these lands in the Grassland. 43 C.F.R. § 3420.4-2. The USFS ROD consented to leasing the 1,637.61 acres in the Grassland in the SP field. SP Litigation Record Index AR 1 ("SP AR"). The USFS ROD consented to leasing 5,120.67 acres of National Forest System land in the Grassland in the NP field. AR 1. For both LBAs, the selected alternative was Alternative 2, with reconfigured tracts and as described in the FEIS. The USFS RODs for the NP and SP fields devoted effort to respond to comments the agency had received regarding the project proposals. USFS noted that the comments had been previously addressed in the DEIS and FEIS and would be carried forward in the USFS consent decisions. AR 1, 44-74 and SP AR 1, 42-72. The applicable regulations permit an agency to adopt an FEIS provided the statement or portions thereof meet the standards for an

adequate statement under these regulations. 40 C.F.R. § 1506.3.[11]

The BLM, with the input of all cooperating agencies, including USFS, did consider a reasonable range of alternatives, those alternatives as discussed above and in the FEIS. The FEIS and ROD for each proposed lease provide extensive analysis of factors that were considered in choosing the selected action, approving the LBAs, with reconfigured, larger tracts. The process and study resulting in the FEIS encompassed several years. The BLM responded to comments with explanation about the range of alternatives considered and the reader was referred to Chapter 2 of the FEIS describing the proposed action and alternatives for the LBA applications evaluated in the FEIS. See AR 1371. Comments were also invited, received and considered before the RODs issued. See e.g., BLM28553-BLM31406 for a collection of comments and supporting materials received and

---

[11]40 C.F.R. § 1506.3 provides:
§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

considered by the agencies as they worked on completing the FEIS and in turn, issuing RODS. The petitioners participated in the NEPA process at all steps along the way, including scoping, and commenting on the DEIS and FEIS. All comments received by the agencies were reviewed and responded to by BLM and USFS during the NEPA process. The range of alternatives considered was reasonable and consistent with NEPA.

Air Quality Considerations

Petitioners in 12-CV-85 and 13-CV-42 have asserted that the FEIS did not adequately consider the impacts of coal leasing on air quality. The objections are framed to challenge NEPA compliance regarding formation of ozone, particulate emissions ($PM_{2.5}$ and PM_{10}), nitrogen dioxide (NO_2), sulfur dioxide (SO_2) and mercury. The FEIS analysis with respect to air quality commences in Chapter 3 at 3.4, summarizing affected environment in the Wright analysis area and potential air quality impacts of the LBA tracts which are to be leased and mined. AR 354.

Air quality regulatory programs are identified in Appendix F. The FEIS advises that "[i]n Wyoming, air pollution impacts are managed by the Wyoming Department of Environmental Quality/Air Quality Division (WDEQ/AQD), under the Wyoming Air Quality Standards and Regulations (WAQSR) and the U.S. Environmental Protection Agency (EPA)-approved State Implementation Plan (SIP)." AR 355. Air quality conditions and potential emission sources are identified and discussed. Simply by way of example, sources of fugitive dust particles and gaseous emissions related to oil and gas

development in the basin may include coal mining activities from emissions from large mining equipment, specific coal mining activities such as blasting, excavating, loading and hauling of overburden and coal, wind erosion of disturbed and unreclaimed mining area. Emissions may include carbon monoxide, particulate matter, dust clouds containing nitrogen dioxide, nitrogen oxides, sulfur dioxide, volatile organic compounds, and ozone. Standards, monitoring and exceedances over time are identified; environmental consequences for various particulates are discussed and analyzed, with respect to the proposed action and Alternatives 2 and 3 for each of the LBA tracts. AR 364-380. Regulatory compliance, mitigation and monitoring for particulate emissions are considered, recognizing that control of emissions at all PRB mines is accomplished with a "variety of measures." AR 380. WYDEQ/AQD permits impose requirements for control of particulate emissions. AR 380-383. Other means of controlling emissions are also discussed, including implementation and compliance with a Natural Events Action Plan (NEAP), a joint effort with WDEQ/AQD and PRB mining stakeholders designed to minimize exceedances and emissions. Modeling studies are discussed providing input into the FEIS decision and consideration of various alternatives. Environmental consequences for visual air quality impacts, water and lake acidification caused by acid pollutants which are primarily the result of emissions from burning fossil fuels, are all discussed. AR 364-406. Other air quality mitigation and monitoring programs in the PRB are outlined, with references to links on the WDEQ/AQD's website for more information. Cumulative impacts of leasing on air quality are presented. AR 679-690. Appendix F to the FEIS provides additional

supplemental air quality information, including regulatory frameworks for air quality, regional conditions, and modeling methodologies. AR 917-936. Through all of this analysis, the FEIS examined the various pollutants. Section 3.4.3 examines emissions of nitrogen oxides and ozone, states whether there have been exceedances at monitoring sites, describes sources of nitrogen oxides (NO_x) and long-term modeling used to make projections about the impacts of these emissions and environmental consequences that might flow from them. Health risks are examined for ozone, which has NO_x as one of its main components in the formation of ground-level ozone.

The Court finds that the agency considered relevant factors and made appropriate disclosures with respect to air quality, emissions including ozone and No_x, and particulate matter pollution. It is an unlikely case where analysis cannot be more thorough or based upon better modeling at some point in time, or simply more comprehensive. However, in this case, measured, monitored and predicted concentrations for particulate matter and other emissions affecting air quality, directly and indirectly, were considered and identified. Perfection is not required. At this point, it is also important to recall that this is not the end of the activities that will be required for these projects to proceed. New air quality permits must be issued before the leased tracts may be mined. AR 366. The future activities, if the lease is put up for a competitive sale, are subject to multiple considerations that will more than likely fill the analytical voids that the petitioners claim exist. Continued assessment and evaluation of accurate data, controlling production rates if exceedances indicate that is appropriate action, and the active regulatory role assumed by WDEQ/AQD ensuring air

quality compliance were all factors playing a significant role in the FEIS analysis and RODs. New information, new study, new analytical tools, new modeling, or even new regulatory schemes may alter the landscape that undergirds this particular FEIS. Lease stipulations will also be required terms of any leases. With respect to the numerous arguments advanced by the petitioners' complaining about the depth and detail in the agencies' analyses of air quality issues, NEPA does not require that level of detail, but rather, that the agencies take a hard look at relevant data.

Direct adverse effects, caused by the action and occuring at the same time and place, 40 C.F.R. § 1508.8(a),[12] would include data addressing the impacts of particulate matter from surface mining operations and emissions of nitrogen oxides, an essential element in the formation of ozone. Standards for particulate matter pollutants are identified. Monitoring data is required by WDEQ/AQD documenting air quality at all PRB mines. Data

---

[12] 40. C.F.R. § 1508.8 provides:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

was considered relating to occurrences of exceedances of air quality standards in the PRB and for each LBA tract. Environmental consequences relating to particulate emissions were analyzed. The FEIS recognized particulate emissions as being linked to respiratory-related illness and adverse health effects, causes of visibility impairment and haze. Emissions of nitrogen dioxide, nitrogen oxides and ozone are specifically analyzed, SO_2, lake acidification for each alternative are considered for the various tracts. AR 385-407. The flyspeck analysis petitioners want is not required to fulfill NEPA's goals of informed decisionmaking and informed public comment. *WildEarth Guardians v. National Park Service*, 703 F.3d 1178, 1183 (10th Cir. 2013).

The petitioners argue the FEIS included insufficient analysis of the indirect effects of NO_2, SO_2, $PM_{2.5}$, PM_{10}, and mercury emissions caused by the combustion of coal mined from the Wright area lease tracts. The FEIS reflects the contrary. It recognized that coal mined in the PRB is used by coal-fired power plants to generate electricity. AR 764. It discussed emissions and by-products of coal combustion in the FEIS, AR 764, 787-92, causing the agency to conclude that the LBA applicant mines account for about 0.2 of global mercury emissions, which would be extended for about 22.8 years under the selected alternative. AR 787-90. Analysis of cumulative effects resulting from existing development in the PRB and how they would change if the Wright LBA tracts are leased and mined is set out at length in Chapter 4 of the FEIS. The level of analysis regarding the effects of coal combustion is sufficient to satisfy NEPA. The analysis here is intricately tied to the climate change/GHG analysis, which will be discussed in subsequent portions of this

Opinion and Order.

Water Resources

The FEIS did address adverse environmental consequence of the projects on hydrological resources and included discussion of steps that could be taken to mitigate those adverse effects. The Tenth Circuit has stated:

> To be sure, an EIS must assess whether there are "[p]ossible conflicts between the proposed action and the objectives of Federal ... use plans," 40 C.F.R. § 1502.16(c), and then discuss "steps that can be taken to mitigate [a project's] adverse environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). This requirement is "[i]mplicit in NEPA's demand that an agency prepare a detailed statement on 'any adverse environmental effects which cannot be avoided should the proposal be implemented.'" *Id.* at 351–52, 109 S.Ct. 1835 (quoting 42 U.S.C. § 4332(C)(ii)). Accordingly, the EIS must discuss "mitigation ... in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Id.* at 352, 109 S.Ct. 1835. An agency is required to "discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b) (1987), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c)." *Id.* "It is not enough to merely list possible mitigation measures." *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir.1999).
>
> But NEPA does not contain "a substantive requirement that a complete mitigation plan be actually formulated and adopted." *Robertson*, 490 U.S. at 352, 109 S.Ct. 1835. An EIS's discussion of mitigation measures need be only "reasonably complete." *Id.* It need not present a mitigation plan that is "legally enforceable, funded or even in final form to comply with NEPA's procedural requirements." *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 681 n. 4 (9th Cir. 2000).
>
> > "[T]he line between an EIS that contains an adequate discussion of mitigation measures and one that contains a 'mere listing' is not well defined." *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 476 (9th Cir. 2000). The essential

> test is reasonableness. See *Robertson*, 490 U.S. at 352, 109 S.Ct. 1835 (discussion need be only "reasonably complete"). And the detail that reasonableness requires can depend on the stage of the approval process at which the EIS is prepared.
>
> Detailed quantitative assessments of possible mitigation measures are generally necessary when a federal agency prepares an EIS to assess the impacts of a relatively contained, site-specific proposal. See *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380–81 (9th Cir. 1998); *The Wilderness Soc'y v. Bosworth*, 118 F.Supp.2d 1082, 1106–07 (D.Mont. 2000). But requiring such detail would often not be appropriate when the EIS concerns a large-scale, multi-step project and the risks to be mitigated cannot be accurately assessed until final site-specific proposals are presented. For the EIS to analyze in detail every possible site proposal could take enormous time and resources, much of which would be wasted on potential proposals that would never materialize. Thus, NEPA regulations allow for "tiering" of environmental reviews:
>
> > Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.
>
> 40 C.F.R. § 1508.28. Tiering can "eliminate repetitive discussions of the same issues and [allows the agency] to focus on the actual issues ripe for decision at each level of environmental review," *id.* § 1502.20, while "exclud[ing] from consideration issues already decided or not yet ripe," *id.* § 1508.28(b); see *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1215 (11th Cir. 2002).

San Juan Citizens Alliance v. Stiles, 654 F.3d 1036, 1053-1054 (10th Cir. 2011).

Chapter 3 of the FEIS included analysis of direct and indirect impacts to the groundwater system resulting from mining the LBA tracts. The FEIS discussed mitigation measures imposed on mine operators by SMCRA, state law, and mining permits for the

Wright area tracts. Mine operators are required by SMCRA and Wyoming regulations to provide the owner of a water right whose water source is interrupted, discontinued, or diminished by mining with water of equivalent quantity and quality. Mines are required to monitor water levels and water quality in the overburden, coal, interburden, underburden, and backfill, which are dynamic programs subject to modification through time. SMCRA and state regulations also require surface coal mines to maintain the essential hydrologic functions of the streams and alluvial groundwater systems that are disturbed by mining, which means mines are typically required to salvage and stockpile the stream laid alluvial materials during mining and replace them upon reclamation. AR 439-440. The FEIS includes studies and modeling analyses used to predict the impacts of coal mining on groundwater resources in the PRB. AR 690-708. Likewise, cumulative environmental consequences are considered in the FEIS with respect to surface water. AR 708-718. The analysis was also mindful that more detailed, quantitative analysis of mitigation measures would be designed and implemented by WDEQ during later permitting processes. "BLM does not authorize mining permits nor regulate mining operations with the issuance of a BLM coal lease. WDEQ is the agency that permits mining operations and has authority to enforce mining regulations. In Wyoming, WDEQ has entered into a cooperative agreement with the Secretary of the Interior to regulate surface coal mining operations. Mitigation and other requirements are developed as part of the mining and reclamation permit. These must be approved by WDEQ before mining operations can occur on leased federal coal lands." AR 605.

The United Supreme Court instructs in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-353, 109 S.Ct. 1835, 1847 (1989):

> There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. In this case, the off-site effects on air quality and on the mule deer herd cannot be mitigated unless nonfederal government agencies take appropriate action. Since it is those state and local governmental bodies that have jurisdiction over the area in which the adverse effects need be addressed and since they have the authority to mitigate them, it would be incongruous to conclude that the Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigating measures they consider necessary. Even more significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms -- as opposed to substantive, result-based standards -- to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act. Cf. *Baltimore Gas & Electric Co.*, 462 U.S., at 100, 103 S.Ct., at 2254 ("NEPA does not require agencies to adopt any particular internal decisionmaking structure").

The Court finds that the discussion of water resources and groundwater mitigation measures in the FEIS satisfies NEPA.

Reclamation

Again, the Court finds that the FEIS did take a hard look at impacts of land disturbance associated with the Wright Area leasing decisions and did consider reclamation activities in the PRB. The petitioners' arguments regarding other options suggest that lease sales should be delayed pending completion of reclamation activities by mines in the PRB. In the FEIS, information about the status, ownership and production levels for existing surface coal mines as of 2007 is included. Some area has been on full

reclamation bond release; changes in post-mining land use had been requested for changes in land use siting for other projects on reclaimed land. Projections of cumulative coal mine disturbances for disturbance areas were of three types: areas which are or were projected to be permanently reclaimed; areas which are or are projected to be undergoing active mining or which have been mined but not yet reclaimed, and areas which are or are projected to be occupied by mine facilities, haul roads, stockpiles, and other long-term structures, and which are therefore unavailable for reclamation until mining operations are completed. AR 640-647. Coal development impacts and activities in the region provided a backdrop for the BLM's analysis. The FEIS includes discussions of impacts to topography from ground disturbance, including removal of overburden and coal, and eventual replacement of overburden, total acreage disturbed in the region, areas reclaimed and unreclaimed, with indications of portions attributable to mining, and annual projections based on production scenarios. The FEIS analysis discloses, based upon this data, that reclamation is far outpaced by surface disturbance and that some areas cannot be reclaimed until there is no active mining. AR 672-718. Reclamation was considered by the agencies and NEPA's requirements and purposes have been satisfied.

Climate Change Impacts/Greenhouse Gas Emissions

In a comment in the record from another interested party, Center for Biological Diversity, there is a section heading entitled "The Proper Context for an Analysis of the Wright Area Project is the Climate Crisis." BLM30778. Although cursory, this comment

succinctly sums up why petitioners believe the agencies failed in their mission to prepare an FEIS that satisfies NEPA. The comments of petitioners and others paint a bleak future and because of a sense of urgency, they believe that more detailed consideration of the effects of climate change when making decisions regarding coal leasing and mining on public lands is required. Petitioners contend that the FEIS has failed to consider the impacts of the decisions to lease the Wright area LBA tracts on climate change. Their submissions to the agencies addressed these concerns in numerous aspects and provided detailed supporting materials, scientific references and reports, and argument. However, the Court disagrees with the assertion that climate change was not considered sufficiently to satisfy NEPA and the record also belies that claim. Climate change impacts are discussed extensively in the FEIS at Chapter 3, "Affected Environment and Environmental Consequences," and Chapter 4, "Cumulative Environmental Consequences."

In Chapter 3, the FEIS acknowledges "considerable scientific investigation and discussion as to the causes of recently increasing global mean temperatures and whether a warming trend will continue. This section will address greenhouse gas (GHG) emissions as specifically related to the Black Thunder ... and North Antelope Rochelle mines[.]" AR 630. GHGs are identified, and the FEIS states that "there is a consensus in the international community that the global climate change is occurring and that it should be addressed in governmental decision making. If the coal in the [LBA fields] is leased and mined, so-called GHG emissions from the mining operations would be released into the atmosphere. A discussion of emissions and by-products that are generated by burning

coal to produce electricity, and a more complete discussion of the global warming and climate change phenomena is included in Section 4.2.14." *Id.* The use of coal after it is mined is unknown at the time of leasing; it is known that nearly all coal mined in the PRB is used by coal-fired power plants for generation of electricity. The current mining plans estimated tons of recoverable coal, estimated annual production rates and the predicted extended life of the mines. Inventories of sources of emissions from some PRB surface coal mines (including some but not all of the LBA applicants) include all types of carbon fuels used in mining operations, electricity used on site for lighting for facilities and roads, operations, electrically powered equipment and conveyers, and mining processes, such as blasting, coal fires caused by spontaneous combustion and methane released from exposed coal seams. Estimates of emissions resulting from transport of coal by rail, onsite and in moving coal to buyers were not included in the emissions for the applicant mines because of a lack of information. AR 631-632. CO_2 emissions resulting from activities in Wyoming were estimated by the Center for Climate Strategies to account for approximately 60.3 million tonnes of gross CO_2e [carbon dioxide equivalent] emissions in 2010 and 69.4 million tonnes in 2020. AR 632-633. Section 4.2.14 assesses cumulative impacts related to GHGs, and how each of the action alternatives considered contribute to these impacts. Section 4.2.3 "Air Quality," AR 679, states scientific evidence that "increased atmospheric concentrations of greenhouse gases (GHGs) and land use changes are contributing to an increase in average global temperature. (IPCC 2007)." *Id.* Modeling approaches for projecting levels of emissions from expected levels of development are described, as are

modeled impacts on ambient air quality. Section 4.2.14 addresses coal mining and coal-fired power plant related emissions and by-products, with specific consideration of GHGs, global warming and climate change in Section 4.2.14.1. AR 765. The FEIS recognizes a consensus in the scientific community that GHG concentrations have increased, resulting in increases in average global temperatures. Findings of NOAA, IPCC and the National Academy of Sciences confirm the findings, but computer modeling predictions also indicate increases in temperature will not be equally distributed, and are likely to be accentuated at higher latitudes. AR 767-768. Various climate change models for predicting or projecting future climate change are discussed, resulting in some consistency in predictions of climate warming under GHG increases. AR 765-770. The cumulative effects of combustion of PRB coal by power plants are considered in Section 4.2.14.2. Relatively little PRB coal is burned in Wyoming; most coal is sold in an open coal market and is shipped nationwide. Approximately 451.7 million tons of coal were produced from Wyoming PRB coal mines in 2008. It was estimated that approximately 749.6 million metric tons of CO_2 would be generated from combustion of all the coal (before applying CO_2 reduction technologies), based on Btu values of 8,600 per pound of Wyoming coal and using a CO_2 emission factor of 212.7 pounds of CO_2 per million Btu. The estimated 749.6 million tonnes of CO_2 represents approximately 35.3 percent of estimated 2,125.2 million tonnes of U.S. CO_2 emissions from coal combustion in 2008. AR 771-773. In 2008, Wyoming PRB mine production accounted for approximately 38.5 percent of coal produced in the United States. Wyoming PRB coal production represented 43.4 percent of coal used for power generation

in 2008, translating to mean that combustion of Wyoming PRB coal to produce electric power was responsible for about 12.8 percent of estimated U.S. CO_2 emissions in 2008. *Id.* The FEIS stated at AR 774:

> It is not possible to accurately project the level of CO_2 emissions that burning the coal from the six WAC LBA tracts would produce due to the uncertainties about what emission limits would be in place at that time or where and how the coal in these LBA tracts would be used if they are leased and the coal is mined. Furthermore, the rate of mining and the timing of when coal removal from the tracts would actually begin are only the applicant mines' best estimate. As shown in Tables 2-2 through 2-13, under the No Action alternatives the mines are projecting that after 2008 approximately 10 to 11 years of currently permitted mine life remains. Therefore, coal removal from these six proposed maintenance lease tracts would not begin until approximately 2018 or 2019. More rapid improvements in technologies that provide for less CO_2 emissions, new CO_2 mitigation requirements, or an increased rate of voluntary CO_2 emissions reduction programs could result in significantly lower CO_2 emissions levels than are projected here.
>
> Although the effects of GHG emissions and other contributions to climate change in the global aggregate are estimable, given the current state of science it is impossible to determine what effect any given amount of GHG emissions resulting from an activity might have on the phenomena of global warming, climate change, or the environmental effects stemming from it. It is therefore not currently possible to associate any particular action and its specific project-related emissions with the creation or mitigation of any specific climate-related effects at any given time or place. However, it is known that certain actions may contribute in some way to the phenomenon (and therefore the effects of) climate change, even though specific climate-related environmental effects cannot be directly attributed to them.

AR 777-778.

The FEIS discussed concerns associated with burning coal for electricity generation to include mercury, coal combustion residues and other by-products. EPA estimates of 50-70 percent of then-current (2006) global anthropogenic atmospheric emissions came from

fuel combustion and much of that from international sources, such as China and India. AR 787-788. This case is distinguishable from *High Country Conservation Advocates v. United States Forest Service,* 52 F. Supp.3d 1174, where the district court was critical of the agencies' failures to quantify costs.

The FEIS discussion regarding GHGs is by necessity shortened here and likely fails to include discussion of matters of equal significance. But, it is sufficient to demonstrate that GHG emissions were evaluated and attempts to quantify as a percentage of state and nationwide emissions were made. NEPA requires that foreseeable effects of proposed actions be disclosed and evaluated. See also, GHG entries, BLM32841-32861. It is worthy to note that petitioners participated extensively in the NEPA process, commenting on the DEIS and FEIS prior to issuance of the RODs and all comments received responses from the agencies. See e.g., BLM30197-30358 (DEIS), 30717-30760 (FEIS) (Jeremy Nichols, WEG); BLM30765-30776 (DEIS); BLM31377-31398 (FEIS) (PRBRC). The NP litigation record index includes 347 pages of comments to the USFS consent decision and the Wright Area FEIS. AR 4249-4596. In the FEIS, the BLM responses to comment letters regarding the DEIS are comprehensive, commencing at AR 1370-1416. The USFS ROD for the NP field includes responses to comments in Appendix C, NP AR 44-74; USFS ROD for SP field includes comment responses at Appendix C, SP AR 42-72.

The FEIS adequately disclosed the effects of GHG emissions. Based on the then-available information, BLM explored and discussed impacts of global climate change, but indicated that the impacts of the proposed LBA leases could not be reliably calculated with

precision. Factors of significance were identified, particularly the fact that coal from the PRB and these mines was destined for sale in the open market and was not delivered to, for example, a single power plant where the same variables might permit quantification of climate impacts with greater precision. The agencies reasonably discussed GHG emissions, climate change and the role of the LBA applicants and mines in the open global coal market. Other unknown variables were identified which prevented more meaningful prediction of impacts of the projects on global climate change, including by way of example, unknown naturally occurring events such as volcanic eruptions and variations in solar activities, or transportation of coal by rail. The evidence offered by petitioners during the NEPA process regarding climate change, modeling and the state of scientific study was considered by BLM/USFS. The FEIS provided a statement that the information regarding the precise impact on global warming was not then available and, "given the current state of science, it is not yet possible to associate specific actions with the specific climate impacts."[13] Even if the analysis in the FEIS was imperfect and could have been better,

---

[13] 40 C.F.R. § 1502.22 provides:
When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

> (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(continued...)

and today the analysis likely could have been better given the development and acquisition of new knowledge and continuing scientific study, the agencies considered the effects of climate change, recognized benefits and costs of mining coal in the Wright area tracts. The record reflects that the agencies did not ignore the effects of coal combustion, GHGs

---

[13](...continued)

> (b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within 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. For the purposes of 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.
>
> (c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the Federal Register on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

and climate change in reaching the decisions it made. Risks of harm were considered.

> Agencies need not have perfect foresight when considering indirect effects, which are by definition are later in time or farther removed in distance from direct ones. "[W]hen the *nature* of the effect is reasonably foreseeable but its *extent* is not . . . the agency may not simply ignore the effect." (citation omitted).

WildEarth Guardians v. United States Office of Surface Mining, Reclamation and Enforcement, ___ F. Supp.3d ___, 2015 WL 2207834, *14. And, here, the coal is entering the free marketplace, which diminishes the agencies' abilities to foresee the effects of coal combustion. It is not known where the coal may be sold; there is uncertainty as to the location and the method or timing of the combustion. *Id.*, *15 (coal mined solely for use by the Craig Power Plant); *Diné Citizens Against Ruining Our Environment v. United States Office of Surface Mining Reclamation & Enforcement*, ___ F. Supp.3d ___, No. CV 12-CV-01275-JLK, 2015 WL 996605, dat *6 (D.Colo. Mar. 2, 2015)(all coal mined would be combusted at the Four Corners Power Plant).

The Court is restricted to a very deferential review of agency action. A reviewing court is not required to find that the agency's decision is the only reasonable decision that could be made or even that it is the result the court would have reached if the question had arisen in the first instance in judicial proceedings. *WildEarth Guardians v. Salazar*, 880 F. Supp.2d 77, 81-82 (D.D.C. 2012). It is not even enough for the agency decision to be incorrect; as long as there is some rational basis, the court must uphold the decision. *Id.* "At bottom, the reviewing court is not entitled to substitute its judgment for that of the agency." *Id.* Here, the analysis was sufficient to satisfy the goals of NEPA, public

participation and informed decisionmaking, and thus, the agencies' actions are not arbitrary and capricious.

FLPMA

Under FLPMA's regulatory provisions governing land use authorization, 43 C.F.R. § 2920.7(b) provides:

> (b) Each land use authorization shall contain terms and conditions which shall:
>
> > (1) Carry out the purposes of applicable law and regulations issued thereunder;
> >
> > (2) Minimize damage to scenic, cultural and aesthetic values, fish and wildlife habitat and otherwise protect the environment;
> >
> > (3) Require compliance with air and water quality standards established pursuant to applicable Federal or State law; and
> >
> > (4) Require compliance with State standards for public health and safety, environmental protection, siting, construction, operation and maintenance of, or for, such use if those standards are more stringent than applicable Federal standards.

43 C.F.R. § 1610.5-3(a) provides:

> (a) All future resource management authorizations and actions, as well as budget or other action proposals to higher levels in the Bureau of Land Management and Department, and subsequent more detailed or specific planning, shall conform to the approved plan.

Exemplary leases are included in the pertinent RODs. The pertinent language of the coal lease, at Sec. 14, SPECIAL STATUTES, provides:

> This lease is subject to the Clean Water Act (33 U.S.C. 1252 et seq.), the

> Clean Air Act (42 U.S.C. 4274 et seq.), and to all other applicable laws pertaining to exploration activities, mining operations and reclamation, including the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.).

See e.g., AR at BLM 25088 (ROD BLM NH field LBA), BLM 25313 (ROD BLM SH field LBA). The statements in the leases are sufficient to demonstrate compliance with the regulation.

Arguments that the BLM did not comply with the Buffalo RMP are not persuasive. The Approved Resource Management Plan is in the AR at 6484. With respect to Air Quality Management Decisions, the RMP provides:

> Management objective: Maintain or enhance air quality, protect public health and safety and sensitive natural resources, and minimize emissions that could result in acid rain, violations of air quality standards, or reduced visibility.
>
> Management decisions: Any BLM-initiated actions or authorization that result in air quality or visibility deterioration are conditioned to avoid violating Wyoming and national air quality standards. This is done by coordinating BLM-managed activities with the Wyoming Department of Environmental Quality (WDEQ) and the U.S. Environmental Protection Agency (EPA).

AR 6491. The leases include provisions requiring compliance with applicable law. Further, when the BLM developed the FEIS in cooperation with the WDEQ and EPA, its obligations under the RMP were satisfied. As discussed above, air quality standards and potential emissions were fully considered in the FEIS.

NFMA

Petitioners have claimed the USFS violated NFMA by approving the leases because

they were inconsistent with air quality standards in the Land and Resource Management Plan (LRMP) for the Grassland. The Act requires the Secretary of Agriculture to develop resource management plans for national forest units, 16 U.S.C. § 1604(a). 16 U.S.C. 1604(i) provides:

> (i) Consistency of resource plans, permits, contracts, and other instruments with land management plans; revision
>
> Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.
>
> The Grassland LRMP providing standards and guidelines for air must:
>
> 1. Meet state and federal air quality standards, and comply with local, state, and federal air quality regulations and requirements, either through original project design or through mitigation, for such activities as prescribed fire, mining, and oil and gas exploration and production. (See Appendix A) **Standard**
>
> 2. Meet requirements of the Prevention of Significant Deterioration (PSD), State Implementation Plans (SIP), and applicable Smoke Management Plans. **Standard**
>
> * * * *

AR 21013. The FEIS considered impacts of the leases on air quality and emissions. As discussed above and in the FEIS, leases must require compliance with the Clean Air Act, ands all other applicable laws pertaining to exploration activities, mining operations and reclamation. The lease ensures compliance with the NFMA.

MLA

Petitioners contend that the BLM violated NEPA by failing to analyze whether leasing the Wright area tracts would lead to violations of the MLA, particularly 30 U.S.C. § 184(a), which provides:

> (a) Coal leases
>
> No person, association, or corporation, or any subsidiary, affiliate, or persons controlled by or under common control with such person, association, or corporation shall take, hold, own or control at one time, whether acquired directly from the Secretary under this chapter or otherwise, coal leases or permits on an aggregate of more than 75,000 acres in any one State and in no case greater than an aggregate of 150,000 acres in the United States: Provided, That any person, association, or corporation currently holding, owning, or controlling more than an aggregate of 150,000 acres in the United States on the date of enactment of this section shall not be required on account of this section to relinquish said leases or permits: Provided, further, That in no case shall such person, association, or corporation be permitted to take, hold, own, or control any further Federal coal leases or permits until such time as their holdings, ownership, or control of Federal leases or permits has been reduced below an aggregate of 150,000 acres within the United States.

PRBRC asserts that BLM should have considered the holding size question in the EIS analysis. However, as the federal defendants here have noted, this statute is not one imposed for the protection of the environment, but rather is an antitrust measure. In *WildEarth Guardians v. Salazar*, 880 F. Supp.2d 77 (D. D.C. 2012), PRBRC had advanced arguments that whether 30 U.S.C. § 184(a) was imposed for the environment was simply irrelevant. That court stated:

> Contrary to what PRBRC may think, the conceded fact that 30 U.S.C. § 184(a) was not imposed for the protection of the environment is anything but "irrelevant." PRBRC's [86] Mem. at 18. PRBRC's irrelevancy argument turns on its interpretation of 40 C.F.R. § 1508.27(b)(10) as a two-prong

> inquiry requiring responsible officials to consider "whether the action threatens a violation of Federal, State, or local law," on the one hand, or "requirements imposed for the protection of the environment," on the other hand. 40 C.F.R. § 1508.27(b)(10). Stated somewhat differently, PRBRC suggests that the phrase "imposed for the protection of the environment" modifies only "requirements" and not "Federal, State, or local law." See PRBRC's [86] Mem. at 17–18. This is a specious and untenable reading of the regulation. Such a construction would require responsible officials to contemplate whether a proposed action might threaten a violation of any federal, state, or local law regardless of its subject or purpose, but the regulation quite clearly speaks to the factors responsible officials should consider when evaluating the environmental impacts of agency action. The most natural reading of the regulation is that the threatened violation must relate to a law or requirement that is "imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10); see also *Coal. on Sensible Transp. Inc. v. Dole*, 642 F. Supp. 573, 590 (D.D.C. 1986) (characterizing 40 C.F.R. § 1508.27(b)(10) as "requir[ing] consideration of whether a project threatens a violation of federal, state, or local environmental laws.") (emphasis added), aff'd, 826 F.2d 60 (D.C.Cir.1987). Indeed, the United States Court of Appeals for the District of Columbia Circuit has interpreted a similar regulation in this way. See *City of Los Angeles v. NHTSA*, 912 F.2d 478, 490 (D.C.Cir.1990) (interpreting 49 C.F.R. § 520.5(b)(6)(i)), *overruled on other grounds by Fla. Audubon*, 94 F.3d at 669.
>
> Because it is conceded that 30 U.S.C. § 184(a) was not imposed for the protection of the environment, and because 40 C.F.R. § 1508.27(b)(10) only requires responsible officials to consider whether a proposed action threatens a violation of laws imposed for the protection of the environment, there was no need for BLM's NEPA analysis to address whether leasing the WAII tracts would comply with 30 U.S.C. § 184(a). PRBRC's claim that BLM acted arbitrarily and capriciously by failing to analyze compliance with Section 184(a) is without merit.

WildEarth Guardians v. Salazar, 880 F. Supp.2d at 93.

The same reasoning obtains here and the agencies were not required to consider in the NEPA analysis whether leasing of the Wright area tracts would violate 30 U.S.C. § 184(a) of the MLA.

Conclusion

These cases, like many others, demonstrate that the NEPA process "involves an almost endless series of judgment calls,' and 'the line-drawing decisions necessitated by the NEPA process are vested in the agencies, not the courts.'" *Jewell*, 738 F.3d at 312 (citations and quotations omitted). The analysis and assessments set forth in the FEIS are sufficient to satisfy NEPA. The agencies' decisions to authorize leases for the Wright area tracts are not arbitrary, capricious or contrary to law and must be affirmed in their entirety. The relief sought by petitioners will be denied. It is therefore

ORDERED that the Petitions for Review of Agency Action filed in the three above-captioned cases shall be, and are, **DENIED. It is further**

ORDERED that the agency actions are hereby **AFFIRMED.**

Dated this 14th day of August 2015.

ALAN B. JOHNSON
UNITED STATES DISTRICT COURT

ACRONYMS

APA	Administrative Procedures Act
AR	Administrative Record
BLM	Bureau of Land Management
DEIS	Wright Area Draft Environmental Impact Statement
FEIS	Wright Area Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
GHGs	Greenhouse Gases
Grassland	Thunder Basin National Grassland
LBA	Lease by Application
MLA	Mineral Leasing Act
NEPA	National Environmental Policy Act
NH	North Hilight
NP	North Porcupine
PRB	Powder River Basin
PRBRC	Powder River Basin Resource Council
ROD	Record of Decision
SH	South Hilight
SP	South Porcupine
USFS	United States Forest Service
WEG	WildEarth Guardians

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WILD EARTH GUARDIANS, POWDER RIVER BASIN RESOURCE COUNCIL, and SIERRA CLUB,	)	
Petitioners,	)	
vs.	)	Case No. 12-CV-85-ABJ
UNITED STATES FOREST SERVICE, UNITED STATES FOREST SERVICE CHIEF, in his official capacity also known as Tom Tidwell, UNITED STATES FOREST SERVICE ACTING REGION II FORESTER, in her official capacity also known as Maribeth Gustafson, UNITED STATES FOREST SERVICE ACTING REGION II DEPUTY FORESTER, in his official capacity also known as Glenn Casamassa,	)	
Respondent.	)	
STATE OF WYOMING, BTU WESTERN RESOURCES, INC., NATIONAL MINING ASSOCIATION, WYOMING MINING ASSOCIATION,	)	
Respondents-Intervenors.	)	

WILDEARTH GUARDIANS and SIERRA CLUB, Petitioners, v. UNITED STATES BUREAU OF LAND MANAGEMENT, Respondent. STATE OF WYOMING, BTU WESTERN RESOURCES, INC., NATIONAL MINING ASSOCIATION, and WYOMING MINING ASSOCIATION, Respondents-Intervenors.	)	Case No. 13-CV-42-ABJ

POWDER RIVER BASIN RESOURCE COUNCIL, Petitioner, v. UNITED STATES BUREAU OF LAND MANAGEMENT, a federal agency within the United States Department of Interior, SALLY JEWELL, in her official capacity as United States Secretary of the Interior, Respondents. STATE OF WYOMING, BTU WESTERN RESOURCES, INC., NATIONAL MINING ASSOCIATION, and WYOMING MINING ASSOCIATION, Respondents-Intervenors.	)	Case No. 13-CV-90-ABJ

JUDGMENT

The Court has entered its separate "Opinion and Order Affirming Agency Actions," in the above captioned matters, affirming the agency actions and denying the relief requested by petitioners. Pursuant to Fed. R. Civ. P. 54 and 58(a), therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the agency actions shall be, and are, **AFFIRMED in Civil Action No. 12-CV-85-J, Civil Action No. 13-CV-42-J, and Civil Action No. 13-CV-90-J.**

Dated this 14th day of August 2015.

ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted **Limitation Recognized by** Krafsur v. Davenport, 6th Cir.(Tenn.), Dec. 04, 2013

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (3572)

5 U.S.C.A. § 706, 5 USCA § 706
Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted **Limitation Recognized by** Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 11th Cir.(Fla.), Sep. 15, 2010

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)
Subchapter I. Policies and Goals (Refs & Annos)

42 U.S.C.A. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

Currentness

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

CREDIT(S)

(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13352

<Aug. 26, 2004, 69 F.R. 52989>

FACILITATION OF COOPERATIVE CONSERVATION

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

Sec. 2. Definition. As used in this order, the term "cooperative conservation" means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

Sec. 3. Federal Activities. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

Sec. 4. White House Conference on Cooperative Conservation. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

Sec. 5. General Provision. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH

Notes of Decisions (4470)

Footnotes

1 So in original. The period probably should be a semicolon.

42 U.S.C.A. § 4332, 42 USCA § 4332

Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1500. Purpose, Policy, and Mandate (Refs & Annos)

40 C.F.R. § 1500.1

§ 1500.1 Purpose.

Currentness

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (26)

Current through Jan. 21, 2016; 81 FR 3686.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1501. NEPA and Agency Planning (Refs & Annos)

40 C.F.R. § 1501.4

§ 1501.4 Whether to prepare an environmental impact statement.

Currentness

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and Executive Order 11514, Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (1355)

Current through Jan. 21, 2016; 81 FR 3686.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.14

§ 1502.14 Alternatives including the proposed action.

Currentness

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (1385)

Current through Jan. 21, 2016; 81 FR 3686.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.22

§ 1502.22 Incomplete or unavailable information.

Currentness

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within 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. For the purposes of 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.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the Federal Register on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

Credits
[51 FR 15625, April 25, 1986]

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (152)

Current through Jan. 21, 2016; 81 FR 3686.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.24

§ 1502.24 Methodology and scientific accuracy.

Currentness

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (44)

Current through Jan. 21, 2016; 81 FR 3686.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

40 C.F.R. § 1508.7

§ 1508.7 Cumulative impact.

Currentness

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (366)

Current through Jan. 21, 2016; 81 FR 3686.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

40 C.F.R. § 1508.8

§ 1508.8 Effects.

Currentness

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (118)

Current through Jan. 21, 2016; 81 FR 3686.

End of Document

77 FR 39576-01
RULES and REGULATIONS
DEPARTMENT OF AGRICULTURE
Forest Service
36 CFR Part 294
RIN 0596-AC74

Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado

Tuesday, July 3, 2012

AGENCY: Forest Service, USDA.

***39576** ACTION: Final rule and record of decision.

SUMMARY: The U.S. Department of Agriculture (USDA or Department), is adopting a State-specific final rule to provide management direction for conserving and managing approximately 4.2 million acres of Colorado Roadless Areas (CRAs) on National Forest System (NFS) lands. The final Colorado Roadless Rule is a rule that addresses current issues and concerns specific to Colorado. The State of Colorado and Forest Service, working in partnership, have found a balance between conserving roadless area characteristics for future generations and allowing management activities within CRAs that are important to the citizens and economy of the State of Colorado.

DATES: This rule is effective July 3, 2012.

FOR FURTHER INFORMATION CONTACT: Colorado Roadless Rule Team Leader Ken Tu at (303) 275-5156. Individuals using telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a m. and 8 p.m. Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: This preamble states the basis and purpose of the rule, which includes responses to comments received on the proposed rule, and serves as the record of decision for this rulemaking. The preamble is organized into the following sections:

- Executive Summary
- Background
- Purpose and Need
- Decision
- Decision Rationale
- Public Involvement
- Tribal Involvement
- Alternatives Considered
- Environmentally Preferable Alternative
- Roadless Area Inventories

The Department has considered this final rule under the requirements of Executive Order 13132 issued August 4, 1999 (E.O. 13132), Federalism. The Department has made an assessment that the final rule conforms with the Federalism principles set out in E.O. 13132; would not impose any compliance costs on the State; and would not have substantial direct effects on the State, on the relationship between the national government and the State, nor on the distribution of power and responsibilities among the various levels of government. Therefore, the Department concludes that this rule does not have Federalism implications. This rule is based on a petition submitted by the State of Colorado under the Administrative Procedure Act at 5 U.S.C. 553(e) and pursuant to Department of Agriculture regulations at 7 CFR 1.28. The State's petition was developed through a task force with the involvement of local governments. The State is a cooperating agency pursuant to 40 CFR 1501.6 of the Council on Environmental Quality regulations for the development of the supporting environmental impact statement. State and local governments were encouraged to comment on the final rule, in the course of this rulemaking process.

No Takings Implications

The final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630 issued March 15, 1988. It has been determined that the rule does not pose the risk of a taking of private property.

Civil Justice Reform

The final rule has been reviewed under Executive Order 12988, Civil Justice Reform. After adoption of this rule, (1) all State and local laws and regulations that conflict with this rule or that would impede full implementation of this rule will be preempted; (2) no retroactive effect would be given to this rule; and (3) this rule would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the Department has assessed the effects of this final rule on State, local, and tribal governments and the private sector. This rule does not compel the expenditure of $100 million or more by State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Energy Effects

Based on guidance for implementing Executive Order 13211 (E.O. 13211) of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use, issued by Office of Management and Budget (Memorandum for Heads of Executive Departments and Agencies, and Independent Regulatory Agencies (M-01-27), July 13, 2001), this final rule does not constitute a "significant energy action" as defined in E.O. 13211 because projected changes in oil, gas, and coal production under the final rule are not sufficient to cause exceedance of criteria for significance.

Projections of natural gas production are discussed in the FEIS and the "Minerals and Energy: Analysis of Alternatives—Oil and Gas" and "Distributional Effects: Economic Impacts" sections within this report. Based on those projections, it has been determined that natural gas production from the combined roadless analysis area varies across alternatives for only two National Forests (Grand Mesa, Uncompahgre, Gunnison National Forests and White River National Forest). For the San Juan National Forest, production occurs within roadless areas but does not vary across alternatives for that National Forest. It has also been determined that there is no appreciable difference in projected natural gas production between Alternatives 1 and 2 or Alternative 4. The difference in potential average annual natural gas production between Alternatives 1, 2, or 4 (35 billion cubic feet per year) and Alternative 3 for the Grand Mesa, Uncompahgre, Gunnison and White River National Forests (39 billion cubic feet per year) is a decrease of about 4 bcf/year, or 4 million mcf/year, which is well below the E.O. 13211 criterion for adverse effects of 25 million mcf/year.

Projected oil production ranges from approximately 50,000 barrels under 2001 Roadless Rule, final rule, and Alternative 4 to approximately 110,000 barrels under Alternative 3 over a period of 15 to 30 years. The corresponding reduction in oil production per day under the 2001 Roadless Rule, final rule, or Alternative 3 is inconsequential compared to the ***39602** E.O. 13211 criterion of 10,000 barrels per day.

Natural gas pipeline mileage across roadless areas is projected to be similar for the final rule, Alternative 4, and the 2001 Roadless Rule, implying that gas distribution costs are also projected to be similar across these alternatives (i.e., distribution costs will not increase under the final rule compared to the 2001 Roadless Rule). Average annual coal production is projected to be greater under the final rule (and Alternative 4) compared to the 2001 Roadless Rule, implying that economic impacts associated with coal are positive under the final rule, compared to the 2001 Roadless Rule. The final rule will increase access to an estimated 347 million tons of coal reserves over the 2001 Roadless Rule (the baseline condition) and could extend coal mining activity in the North Fork Valley by as much as 34 years. It should be noted that one of the existing mining companies in the North Fork Valley has announced plans to shift its operations to BLM and private lands once currently leased reserves under NFS lands have been recovered. This shift would occur regardless of roadless area alternatives considered.

Approximately 53% of all coal produced from Colorado in 2010 (25.2 million tons) was exported to other States, suggesting that regional markets and prices are likely to be heavily influenced by national prices, supplies, and market trends.

The impacts of a number of other factors affecting energy markets and national market trends may outweigh the effects of implementing 2001 Roadless Rule.

No novel legal or policy issues regarding adverse effects to supply, distribution or use of energy are anticipated beyond what has already been addressed in the FEIS, or the Regulatory Impact Analysis (RIA). None of the proposed corridors designated for oil, gas, and/or electricity under Section 368 of the Energy Policy Act of 2005 are within CRAs.

The final rule does not restrict access to privately held mineral rights, or mineral rights held through existing claims or leases, and allows for disposal of mineral materials. The final rule does not prohibit future mineral claims or mineral leasing in areas otherwise open for such. The rule also provides a regulatory mechanism for consideration of requests for modification of restrictions if adjustments are determined to be necessary in the future. Based on the evidence above, criteria for "significance" under E.O. 13211 are not exceeded for the final rule. The final rule is therefore not considered a significant energy action.

List of Subjects in 36 CFR Part 294

National forests, Recreation areas, Navigation (air), State petitions for inventoried roadless area management.

Therefore, for the reasons set forth in the preamble, the Forest Service is amending part 294 of Title 36 of the Code of Federal Regulations by adding subpart D to read as follows:

PART 294—SPECIAL AREAS

Subpart D—Colorado Roadless Area Management

Sec.

294.40 Purpose.

294.41 Definitions.

294.42 Prohibitions on tree cutting, sale, or removal.

294.43 Prohibition on road construction and reconstruction.

294.44 Prohibition on linear construction zones.

294.45 Environmental documentation.

294.46 Other activities.

294.47 Modifications and administrative corrections.

294.48 Scope and applicability.

294.49 List of designated Colorado Roadless Areas.
Authority: 16 U.S.C. 472, 529, 551, 1608, 1613; 23 U.S.C. 201, 205.

Subpart D—Colorado Roadless Area Management
36 CFR § 294.40

§ 294.40 Purpose.
The purpose of this subpart is to provide, within the context of multiple use management, State-specific direction for the protection of roadless areas on National Forest System lands in Colorado. The intent of this regulation is to protect roadless values by restricting tree cutting, sale, and removal; road construction and reconstruction; and linear construction zones within Colorado Roadless Areas (CRAs), with narrowly focused exceptions. Activities must be designed to conserve the roadless area characteristics listed in § 294.41, although applying the exceptions in § 294.42, § 294.43, and § 294.44 may have effects to some roadless area characteristics.
36 CFR § 294.41

§ 294.41 Definitions.
The following terms and definitions apply to this subpart.

At-Risk Community: As defined under section 101 of the Healthy Forests Restoration Act (HFRA).

Catchment: A watershed delineation beginning at the downstream point of occupation of native cutthroat trout and encompassing the upstream boundary of waters draining in the stream system.

Colorado Roadless Areas: Areas designated pursuant to this subpart and identified in a set of maps maintained at the national headquarters office of the Forest Service. Colorado Roadless Areas established by this subpart shall constitute the exclusive set of National Forest System lands within the State of Colorado to which the provisions 36 CFR 220.5(a)(2) shall apply.

Colorado Roadless Areas Upper Tier Acres: A subset of Colorado Roadless Areas identified in a set of maps maintained at the national headquarters office of the Forest Service which have limited exceptions to provide a high-level of protection for these areas.

Community Protection Zone: An area extending one-half mile from the boundary of an at-risk community; or an area within one and a half miles from the boundary of an at-risk community, where any land:

(1) Has a sustained steep slope that creates the potential for wildfire behavior endangering the at-risk community;

(2) Has a geographic feature that aids in creating an effective fire break, such as a road or a ridge top; or

(3) Is in condition class 3 as defined by HFRA.

Community Wildfire Protection Plan: As defined under section 101 of the HFRA, and used in this subpart, the term "community wildfire protection plan" means a plan for an at-risk community that:

(1) Is developed within the context of the collaborative agreements and the guidance established by the Wildland Fire Leadership Council and agreed to by the applicable local government, local fire department, and State agency responsible for forest management, in consultation with interested parties and the Federal land management agencies managing land in the vicinity of the at-risk community;

(2) Identifies and prioritizes areas for hazardous fuel reduction treatments and recommends the types and methods of treatment on Federal and non-Federal land that will protect one or more at-risk communities and essential infrastructure; and

(3) Recommends measures to reduce structural ignitability throughout the at-risk community.

Condition Class 3: As defined under section 101 of the HFRA the term "condition class 3" means an area of Federal land, under which:

(1) Fire regimes on land have been significantly altered from historical ranges;

(2) There exists a high risk of losing key ecosystem components from fire;

***39603** (3) Fire frequencies have departed from historical frequencies by multiple return intervals, resulting in dramatic changes to:

(i) The size, frequency, intensity, or severity of fires; or

(ii) Landscape patterns; and

(4) Vegetation attributes have been significantly altered from the historical range of the attributes.

Fire Hazard: A fuel complex defined by volume, type, condition, arrangement and location that determines the ease of ignition and the resistance to control; expresses the potential fire behavior for a fuel type, regardless of the fuel type's weather influenced fuel moisture condition.

Fire Occurrence: One fire event occurring in a specific place within a specific period of time; a general term describing past or current wildland fire events.

Fire Risk: The probability or chance that a fire might start, as affected by the presence and activities of causative agents.

Forest Road: As defined at 36 CFR 212.1, the term means a road wholly or partly within or adjacent to and serving the National Forest System that the Forest Service determines is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources.

Hazardous Fuels: Excessive live or dead wildland fuel accumulations that increase the potential for intense wildland fire and decrease the capability to protect life, property and natural resources.

Linear Construction Zone: A temporary linear area of surface disturbance over 50-inches wide that is used for construction equipment to install or maintain a linear facility. The sole purpose of the linear disturbance is to accommodate equipment needed

80 FR 72665-01
PROPOSED RULES
DEPARTMENT OF AGRICULTURE
Forest Service
36 CFR Part 294
RIN 0596-AD26

Roadless Area Conservation; National Forest System Lands in Colorado

Friday, November 20, 2015

AGENCY: Forest Service, USDA.

***72665** ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The U.S. Department of Agriculture (USDA) is proposing to reinstate the North Fork Coal Mining Area exception of the Colorado Roadless Rule. The Colorado Roadless Rule is a State-specific rule that provides direction for conserving and managing approximately 4.2 million acres of Colorado Roadless Areas (CRAs) on National Forest System (NFS) lands within the state of Colorado. The North Fork Coal Mining Area exception allowed for temporary road construction for coal exploration and/or coal-related surface activities in an area defined as the North Fork Coal Mining Area, which was inadvertently reported as 19,100 acres in 2012, and was actually 19,500 acres. The Forest Service, on behalf of the Department, has prepared a supplemental environmental impact statement (SEIS) addressing specific environmental disclosure deficiencies ***72666** identified by the District Court of Colorado. In addition, the Department is proposing to correct certain CRA boundaries associated with the North Fork Coal Mining Area based on updated information. The Forest Service invites written comments on both the proposed rule and supplemental draft environmental impact statement.

DATES: Comments on this proposed rule must be received in writing by January 4, 2016. Comments concerning the supplemental draft environmental impact statement contained in this proposed rule must be received in writing by January 4, 2016.

ADDRESSES: Comments may be submitted electronically via the internet to go.usa.gov/3JQwJ or to www.regulations.gov. Send written comments to: Colorado Roadless Rule, 740 Simms Street, Golden, CO 80401.
All comments, including names and addresses, will be placed in the project record and available for public inspections and copying.

The public may inspect comments received on this proposed rule at USDA, Forest Service, Ecosystem Management Coordination Staff, 1400 Independence Ave. SW., Washington, DC, between 8 a.m. and 4:30 p m. on business days. Those wishing to inspect comments should call 202-205-0895 ahead to facilitate an appointment and entrance to the building. Comments may also be inspected at USDA, Forest Service Rocky Mountain Regional Office, Strategic Planning Staff, 740 Simms, Golden, Colorado, between 8 a.m. and 4:30 p m. on business days. Those wishing to inspect comments at the Regional Office should call 303-275-5156 ahead to facilitate an appointment and entrance to the building.

FOR FURTHER INFORMATION CONTACT: Ken Tu, Interdisciplinary Team Leader, Rocky Mountain Regional Office at 303-275-5156.
Individuals using telecommunication devices for the deaf may call the Federal Information Relay Services at 1-800-877-8339 between 8 a m. and 8 p.m. Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

In July 2012, the USDA promulgated the Colorado Roadless Rule, a State-specific regulation for conserving and managing approximately 4.2 million acres of CRAs on NFS lands. The Rule addressed State-specific concerns while conserving roadless area characteristics. One State-specific concern involved continued exploration and development of coal resources in the North Fork Valley area of the Grand Mesa, Uncompahgre, and Gunnison (GMUG) National Forests. The Colorado Roadless Rule addressed this State-specific concern by defining an area called the North Fork Coal Mining Area and developing an exception that allowed temporary road construction for coal-related activities within that defined area.

In July 2013, High Country Conservation Advocates, WildEarth Guardians, and Sierra Club challenged the Forest Service consent decision to the Bureau of Land Management (BLM) modifying two existing coal leases, the BLM's companion decision to modify the leases, the BLM's authorization of exploration in the lease modification areas, and the North Fork Coal Mining Area exception of the Colorado Roadless Rule. In June 2014, the District Court of Colorado found the environmental documents supporting the four decisions to be in violation of NEPA. The deficiencies identified by the Court associated with the Colorado Roadless Rule included: Failure to disclose greenhouse gas emissions associated with potential mine operations; failure to disclose greenhouse gas emissions associated with combustion of coal potentially mined from the area; and failure to address a report about coal substitution submitted during a public comment period. In September 2014, the District Court of Colorado vacated the exploration plan, the lease modifications, and the North Fork Coal Mining Area exception of the Colorado Roadless Rule (36 CFR 294.43(c)(1)(ix)) but otherwise left the Rule intact and operational.

The final 2012 Colorado Roadless Rule was developed collaboratively between the USDA, Forest Service, State of Colorado, and interested publics. The North Fork Coal Mining Area exception was developed by a 13-member, bipartisan task force established under Colorado Revised Statute § 36-7-302 to make recommendations to the Governor regarding management of roadless areas in Colorado national forests. Between June 8, 2005, with the signing of Colorado Senate bill 05-243 which created the Roadless Task Force and November 13, 2006, with then Governor Owen signing the Colorado State Petition, the task force held nine public meetings throughout the State and six deliberative meetings of the task force members that were open to the public, and reviewed and considered over 40,000 public comments. Comments were both supportive and opposed to coal extraction. The task force recommended a Colorado Roadless Rule not apply to about 55,000 acres of roadless areas in the GMUG National Forests for activities related to and in support of underground coal mining.

On November 13, 2006 then-Governor Bill Owens submitted a petition to the USDA to develop a State-specific roadless rule. The petition reflected the task force recommendations and included the North Fork Coal Mining Area exception. Governor Owens stated that the petition weighed Colorado's interests and reflected the concerns of the entire State. The 2006 petition attempted to strike a balance between those that supported coal extraction and those that opposed it by proposing that a roadless rule not apply to the North Fork Valley. Potential coal resources within roadless areas on the Pike-San Isabel, Routt, White River, and San Juan National Forests were not included in the petition.

After Governor Owens submitted the State's petition, Bill Ritter, Jr. was elected Governor of Colorado. In April 2007, then-Governor Ritter resubmitted the petition with minor modifications. Governor Ritter supported the concept of having the Colorado Roadless Rule not apply to the North Fork Coal Mining Area but explicitly asked the area remain in the Colorado roadless inventory. In 2010, John Hickenlooper was elected Governor of Colorado. Governor Hickenlooper also supported having a North Fork Coal Mining Area exception.

Throughout the development of the Colorado Roadless Rule, the USDA, Forest Service, and State of Colorado attempted to strike a balance between those that support and oppose coal mining in CRAs. The North Fork Coal Mining Area reflects this effort to find common ground. In November 2006, Governor Owens petitioned approximately 55,000 acres be considered as the North Fork Coal Mining Area, which included all or portions of Currant Creek, Electric Mountain, Flatirons, Flattops-Elk Park, Pilot Knob, and Sunset CRAs. In July 2008, the North Fork Coal Mining Area was reduced to approximately 29,000 acres

in the proposed rule and included all or portions of Currant Creek, Electric Mountain, Flatirons, Pilot Knob, and Sunset CRAs. In April 2011, the North Fork Coal Mining Area was further reduced to approximately 20,000 acres in the revised proposed rule and included all or portions of Currant Creek, Electric Mountain, Flatirons, Pilot Knob, and Sunset CRAs. In July 2012, the North Fork Coal Mining Area was reported in error as 19,100 acres in the final rule. The actual acreage was 19,500, and included all or portions of Flatirons, Pilot Knob, and Sunset CRAs. The changes made to the North Fork ***72667** Coal Mining Area were a direct result of public comments and the desire to balance economic concerns with roadless values.

Throughout the rulemaking process, a total of five formal comment periods were held by the State and Forest Service resulting in 24 public meetings and over 312,000 comments. In addition, five meetings open to the public were held by the Roadless Area Conservation National Advisory Committee, which provided recommendations to the Secretary of Agriculture. The USDA believes there is an appropriate balance between conserving roadless area characteristics and the state-specific concerns in the continued exploration and development of coal resources in the July 2012 final rule where less than 0.5 percent of the CRAs were designated as the North Fork Coal Mining Area.

Need for Rulemaking

The State of Colorado maintains that coal mining in the North Fork Coal Mining Area provides an important economic contribution and stability for the communities of the North Fork Valley. USDA and the Forest Service are committed to contributing to energy security, and carrying out the government's overall policy to foster and encourage orderly and economic development of domestic mineral resources.

All existing Federal coal leases within CRAs occur in the North Fork Valley near Paonia, Colorado on the GMUG National Forests. Coal from this area meets the Clean Air Act definition for compliant and super-compliant coal, which means it has high energy value and low sulphur, ash and mercury content. There are two mines currently holding leases within CRAs. One is operating, producing approximately 5.2 million tons of coal annually. The second is currently idle due to a fire and flood within their mine operation. The final rule accommodates continued coal mining opportunities within the North Fork Coal Mining Area. At approximately 19,500 acres, this area is less than 0.5% of the total 4.2 million acres of CRAs. The North Fork Coal Mining Area exception allows for the construction of temporary roads for exploration and surface activities related to coal mining for existing and future coal leases. The reinstatement of this exception does not approve any future coal leases, nor does it make a decision about the leasing availability of any coal within the State. Those decisions would need to undergo separate environmental analyses, public input, and decision-making.

Supplemental Environmental Impact Statement

A Supplemental Environmental Impact Statement (SEIS) has been prepared to complement the 2012 Final EIS for the Colorado Roadless Rule. The SEIS is limited in scope to address the deficiencies identified by the District Court of Colorado in High Country Conservation Advocates v. United States Forest Service (13-01723, D. Col), correction of boundary information, and to address scoping comments. In conjunction with the 2012 Final EIS, the SEIS discloses the environmental consequences of reinstating the North Fork Coal Mining Area exception into the Colorado Roadless Rule.

Three alternatives are addressed in detail in the SEIS. Alternative A is the No Action Alternative, and would continue the current management under the Colorado Roadless Rule without a North Fork Coal Mining Area exception. Alternative A would manage the 19,500 acres of CRA within the vacated North Fork Coal Mining Area as non-upper tier roadless. Alternative B (proposed action), would reinstate the North Fork Coal Mining Area exception, allowing temporary road construction for coal mining related activities on 19,700 acres of NFS lands within CRAs. Alternative C (exclusion of "wilderness capable" lands) would establish the North Fork Coal Mining Area exception, but exclude lands identified as "wilderness capable" during the 2007 GMUG Forest Plan revision process. Alternative C would allow temporary road construction for coal mining activities on 12,600 acres of NFS lands within CRAs.

In addition, all alternatives include boundary correction of CRAs based on more accurate inventory of forest road locations obtained since the promulgation of the 2012 Colorado Roadless Rule. These corrections will add 65 acres into the CRAs, and subtract 35 acres from CRAs along the existing road system. The court identified deficiencies were addressed in the SEIS in the following manner:

1. Failure to disclose greenhouse gas emissions associated with potential mine operations—The SEIS estimates greenhouse gas emissions associated with mining of the coal based on three potential production levels (low, average and air quality permitted). Table 1 displays results for Alternative B (proposed action).

Table 1—Estimated Annual Gross Lifecycle Greenhouse Gas Emissions From Potential Coal Mining for Alternative B Under Three Production Scenarios, in Annual Tons of Carbon Dioxide Equivalents

Alternative B	Low scenario	Average scenario	Permitted scenario (max air quality permit values)
Coal Production (annual tons)	5,300,000	10,000,000	15,500,000
(02)carbon dioxide equivalents			
Carbon dioxide—extraction	100,000	200,000	300,000
Methane—extraction	1,200,000	4,200,000	6,300,000
Nitrous oxide—extraction	0	0	0
Total	1,300,000	4,400,000	6,600,000

2. Failure to disclose greenhouse gas emissions associated with combustion of coal potentially mined from the area—The SEIS includes a lifecycle analysis of greenhouse gas emissions that includes downstream effects of combustion of coal based on three potential production levels. Table 2 displays results for Alternative B (proposed action).

Table 2—Estimated Annual Gross Lifecycle Greenhouse Gas Emissions From Potential Transportation and Combustion of Coal for Alternative B Under Three Production Scenarios, in Metric Tons of Carbon Dioxide Equivalents

Alternative B	Low scenario	Average scenario	Permitted scenario (max air quality permit

			values)
Coal Production (annual tons)	5,300,000	10,000,000	15,500,000
(02)carbon dioxide equivalents			
Carbon dioxide—combustion	11,600,000	22,000,000	34,500,000
All—rail transport	600,000	1,200,000	1,800,000
Carbon dioxide—overseas shipping	100,000	200,000	300,000
Total	12,300,000	23,400,000	36,600,000

3. Failure to address a report about coal substitution submitted during a public comment period—The SEIS includes a lifecycle analysis of greenhouse gas emissions that includes the downstream effects of substituted energy sources if the North Fork Coal Mining Area exception is not reinstated (Alternative A).

Changes in gross production and consumption of coal from the North Fork Coal Mining Area are expected to have an effect on production and consumption of other fuel sources, including alternative supplies of coal, natural gas, and other energy supplies such as renewables, especially in later years of the analysis. The SEIS characterizes market responses and substitution effects in order to estimate net changes in energy production and consumption. The ICF International's Integrated Planning Model (IPM[supreg]) was used to predict how production and consumption of other sources of coal and natural gas, as well as alternative sources of energy (e.g., renewables, bio/waste fuel) respond to, substitute, or offset for changes in the supply of low sulfur bituminous coal from the North Fork Coal Mining Area.

Assuming that total gross production of underground coal from the North Fork Coal Mining Area increases by 172 million tons over the period 2016 to 2054 for Alternative B, compared to Alternative A, production from other substitute sources of underground coal around the nation are likely to decrease, in many cases, in response to an increase in North Fork Coal Mining Area underground coal production. These decreases in other underground coal mining would offset, in part, some of the 172 million tons of underground coal production from the North Fork Coal Mining Area, resulting in net domestic underground coal production of 91 million tons. These results are estimated using response coefficients derived from IPM[supreg] modeling results.

Production of substitute sources of surface coal and natural gas across the country are estimated to decrease by 23 million tons and 271 BCF, in response to increases in North Fork Coal Mining Area coal production. Total electricity generation is assumed to remain constant across the three alternatives, so change in total electricity generation is equal to zero for Alternative B, compared to A. However, the mix of energy sources used to generate the electricity will change, in response to increases in North Fork Coal Mining Area coal production.

These shifts in the mixtures of energy used to generate electricity, as well as the production of different types of energy will change carbon dioxide emissions. Total carbon dioxide emissions is estimated to increase by 131 million tons under Alternative B, compared to Alternative A.

4. The SEIS addresses the social cost of carbon as related to the Colorado Roadless Rule. A social cost of carbon calculation was completed as part of the present net value analysis considering the 2010, 2013, and 2015 Technical Update of the social cost of carbon for Regulatory Impact Analysis Under Executive Order 12866—Interagency Working Group on social cost of carbon.

Social cost of carbon estimates represent global measures because emissions of greenhouse gasses from within the U.S. contribute to damages around the world. The total social cost of carbon values therefore account for global damages caused by

greenhouse gas emissions. The SEIS discusses greenhouse gas estimates in the context of (i) total or global social cost of carbon estimates and (ii) domestic (U.S.) estimate represented by applying 7 percent to 23 percent of social cost of carbon estimates, and (iii) a forest estimate for the GMUG national forest boundary.

Discussion of these accounting stances is intended to help the decision maker and the public understand the relative importance of considering greenhouse gas damages as a global problem, in comparison to the more traditional domestic benefit cost stance adopted for regulatory impact analysis and NEPA effects analysis for public land management decision-making.

Present net value results, which include the social cost of carbon calculation, estimated under the global view are primarily negative, with values as low as negative $12 billion in net damages to positive $1.9 billion in net benefits for Alternative B, compared to Alternative A. Present net value ranges from negative $6.8 billion to positive $1.3 billion for Alternative C, relative to Alternative A. Midpoint present net value estimates range from negative $0.8 to negative $3.4 billion in net damages for Alternatives B and C, compared to Alternative A.

Regulatory Considerations

Regulatory Planning and Review

USDA consulted with the Office of Management and Budget and determined this proposed rule does not meet the criteria for a significant regulatory action under Executive Order 12866.

Regulatory Flexibility Act and Consideration of Small Entities

USDA certifies the proposed regulation, if promulgated, will not have a significant economic impact on a substantial number of small entities as determined in the 2012 Regulatory Flexibility Analysis. Therefore notification to the Small Business Administration's Chief Council for Advocacy is not required pursuant to Executive Order 13272.

72669** ***Energy Effects

The Colorado Roadless Rule and the North Fork Coal Mining Area exception do not constitute a "significant energy action" as defined by Executive Order 13211. No novel legal or policy issues regarding adverse effects to supply, distribution, or use of energy are anticipated beyond what has been addressed in the 2012 FEIS or the Regulatory Impact Analysis prepared in association with the final 2012 Colorado Roadless Rule. The proposed reinstatement of the North Fork Coal Mining Area exception does not restrict access to privately held mineral rights, or mineral rights held through existing claims or leases, and allows for disposal of mineral materials. The proposed rule does not prohibit future mineral claims or mineral leasing in areas otherwise open for such. The rulemaking provides a regulatory mechanism for consideration of requests for modification of restriction if adjustments are determined to be necessary in the future.

Federalism

USDA has determined the proposed rule conforms with the Federalism principles set out in Executive Order 13132 and does not have Federalism implications. The rulemaking would not impose any new compliance costs on any State; and the rulemaking would not have substantial direct effects on States, on the relationship between the national government and the states, nor on the distribution of power and responsibilities among the various levels of government.

The proposed rule is based on a petition submitted by the State of Colorado under the Administrative Procedure Act at 5 U.S.C. 553(e) and pursuant to USDA regulations at 7 CFR 1.28. The State's petition was developed through a task force with local government involvement. The State of Colorado is a cooperating agency pursuant to 40 CFR 1501.6 of the Council on Environmental Quality regulations for implementation of NEPA.