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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

WILDEARTH GUARDIANS and GRAND CANYON TRUST,	) Case No. 2:16-cv-00168-DN
Plaintiffs,	) **PLAINTIFFS' MOTION TO ADD DOCUMENTS TO THE ADMINISTRATIVE RECORD AND AUTHORIZE LIMITED DISCOVERY**
v.	)
S.M.R. JEWELL, *et al.*	) DISTRICT JUDGE DAVID NUFFER
Defendants,	)
State of Utah and Canyon Fuel Company, LLC,	)
Intervenor Defendants.	)

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INTRODUCTION

In 2002, the U.S. Bureau of Land Management (BLM) and U.S. Forest Service completed an environmental impact statement (EIS) analyzing a proposal to expand the Skyline coal mine in central Utah by issuing a lease to mine the neighboring Flat Canyon area. Years passed. And then in July 2015, with the Forest Service's consent, BLM issued the lease without updating the EIS. This lawsuit asserts, among other claims, that the agencies' failure to prepare a "supplemental" EIS violated the National Environmental Policy Act (NEPA).

Judicial review of claims like this is enabled by the Administrative Procedure Act (APA), which usually calls on courts to conduct their review on the administrative record—the documents underlying an agency's decisionmaking process. But there is a fundamental problem with applying that principle to Plaintiffs' NEPA-supplementation claim: Because the agencies failed to analyze new information that Plaintiffs contend they should have analyzed in a supplemental EIS, none of that information is included in the two records the agencies compiled.

That is not the only problem with the administrative records. Some documents are missing from the records even though the agencies say they considered them. The records also reveal that in 2012, the agencies made an about-face on a critical issue—the question of whether to supplement the EIS—but there is no explanation of why the agencies reversed course.

This motion asks the Court to resolve these and other deficiencies in the agencies' records. Well-developed rules authorize the Court to order Federal Defendants to "complete" and "supplement" the administrative records. And under a separate line of authority, the Court should adjudicate Plaintiffs' third claim for relief—a "failure to act" claim—without confining its review to the records. For these reasons, Plaintiffs request that the Court: (1) order Federal

Defendants to add documents to the administrative records; (2) allow Plaintiffs to conduct limited discovery to fill gaps in the records; and (3) adjudicate Plaintiffs' "failure-to-act" claim without limiting the scope of review to the administrative records.

BACKGROUND

I. The Flat Canyon Lease

In 1998, the owner of the Skyline mine, intervenor Canyon Fuel Company LLC, sought to expand the mine by asking BLM to auction off federal coal reserves in the adjacent Flat Canyon lease tract.[1] Because the Flat Canyon lease area is in the Manti-La Sal National Forest, BLM could not issue the lease without the Forest Service's consent.[2] And because of the likely significant environmental impacts of expanding the Skyline mine, NEPA required the agencies to prepare an EIS to assess the environmental and other impacts of issuing the lease.[3]

The agencies finished the EIS in early 2002 and, not long after, both published a record of decision documenting their determination to offer the lease for sale. But Canyon Fuel lost interest in bidding on the lease and asked BLM to hold off on the auction.[4] So, the Forest Service did not consent to the lease, and BLM did not offer it for sale. With the agencies' decisions in limbo, it was unclear to the public whether BLM would ever auction the lease.

Eight years went by. Then, in April 2010, Canyon Fuel sent BLM a letter asking the agency to resuscitate the Flat Canyon proposal.[5] In response, both BLM and the Forest Service

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[1] Ex. 1 at FS14.
[2] 30 U.S.C. § 201(a)(3)(A)(iii); 43 C.F.R. § 3425.3(b); § 3427.1.
[3] 42 U.S.C. § 4332 (requiring federal agencies to prepare environmental impact statements for "major Federal actions significantly affecting the quality of the human environment…")
[4] Ex. 2 at BLM2882.
[5] Ex. 3 at FS9817.

initially agreed that they needed to supplement the 2002 EIS,[6] an unsurprising conclusion given that almost a decade had lapsed and federal regulations insist that agencies "[s]hall prepare supplements" to an EIS whenever there is "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[7]

For reasons the agencies' records do not explain, however, the agencies reversed course in mid-2012. Instead of preparing a supplemental EIS, the Forest Service completed a short Supplemental Information Report (SIR) in February 2013, concluding that a supplemental EIS did not need to be prepared.[8] The agency then consented to the lease. Two years later, BLM drafted a Determination of NEPA Adequacy (DNA) reaching the same conclusion.[9] Whereas a supplemental EIS is subject to public notice and comment,[10] neither agency notified the public about the SIR or DNA, nor did they ask for public comments on whether there was significant new information about the environmental impacts of the Flat Canyon lease. WildEarth Guardians nonetheless learned of the proposed lease sale and sent both agencies a letter in May 2015 urging the agencies to supplement the EIS to account for significant new information and circumstances that had arisen since 2002 about climate change, air quality, other regional coal lease sales,

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[6] Ex. 4 at FS9797; Ex. 5 at BLM2906; Ex. 6 at BLM2646.
[7] 40 C.F.R. § 1502.9(c)(1).
[8] Ex. 7 at FS5815–31. According to the Forest Service, "[an] SIR is not a NEPA document and therefore cannot be used to fulfill the requirements for a revised or supplemental [environmental assessment] or EIS. A SIR cannot repair deficiencies in the original environmental analysis or documentation, nor can it change a decision." Forest Service, NEPA Handbook, 1909.15, § 18.1 *available at* http://www.fs.fed.us/im/directives/fsh/1909.15/wo_1909.15_10.doc.
[9] Ex. 8 at BLM850–73.
[10] BLM's NEPA Handbook provides: "A supplemental EIS must … give the public and other agencies an opportunity to review and comment on the analysis of the changes or new information." NEPA Handbook 1790-1, § 5.3 *available at* http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/NEPS.Par.95258.File.dat/h1790-1-2008-1.pdf.

greater sage-grouse, and other matters.[11] The agencies declined. Instead, on July 31, 2015, BLM issued the Flat Canyon lease to Canyon Fuel.[12]

II. This Lawsuit

In their first three claims for relief, Plaintiffs allege that BLM and the Forest Service violated NEPA by authorizing the Flat Canyon lease sale.[13] The first claim asserts that the agencies' analysis in the 2002 EIS was inadequate. The second and third claims allege that the agencies violated NEPA by failing to supplement the 2002 EIS before issuing the Flat Canyon lease in July 2015. The fourth claim asserts that BLM violated its coal-leasing regulations by failing to ensure that leasing Flat Canyon would not be contrary to the public interest.[14]

On July 1, 2016, BLM and the Forest Service served their administrative records on Plaintiffs.[15] After reviewing the two records, Plaintiffs informed Federal Defendants that they believed the records to be deficient and identified about 90 documents that should be added.[16] After conferring, Federal Defendants agreed to add some documents to the records and correct some errors, and they confirmed that some omissions were due to the fact that the agencies did not address certain issues.[17] But the parties were unable to resolve several fundamental issues, and those are raised in this motion.

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[11] FS9830–33.
[12] Ex. 16 at BLM2549.
[13] First Am. Petition for Review Agency Action ¶¶ 92–106 (Nov. 30, 2015), ECF No. 13-1.
[14] ECF No. 13-1 ¶¶ 107–111; *see also* 43 C.F.R. § 3425.1-8(a).
[15] *See* ECF No. 59.
[16] *See* Ex. 14.
[17] For example, Federal Defendants explained that they had no documents setting forth BLM's public-interest finding—the finding at issue in Plaintiffs' fourth claim—because BLM does not make public-interest determinations unless a lease application is rejected.

ARGUMENT

Documents in addition to those Federal Defendants included in the record should be considered in this case for two reasons: (1) review of Plaintiffs' third claim should not be confined to the records because it challenges the agencies' failure to act as NEPA requires; and (2) regardless, adding documents will enable the Court to properly evaluate Plaintiffs' claims.

I. Review of Plaintiffs' third claim should not be limited to the administrative records.

Under section 706(1) of the APA, reviewing courts "shall compel agency action unlawfully withheld or unreasonably delayed."[18] Judicial review under this provision of failures to act, unlike other agency actions, cannot be confined to an administrative record, because failures to act, by their very nature, do not entail a particular agency decision for which there is an underlying administrative record. Courts accordingly have held that judicial review of failure-to-act claims should not be limited to the record.[19] This principle has been applied to NEPA claims, including those challenging an agency's failure to supplement an EIS.[20]

Plaintiffs' third claim asserts that BLM and the Forest Service failed to prepare a supplemental EIS as NEPA requires.[21] The Court's review of this failure-to-act claim should not

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[18] 5 U.S.C. § 706(1).
[19] *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (In failure-to-act claims, "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record."); *WildEarth Guardians v. FEMA*, 2011 WL 905656, *2–3 (D. Ariz. Mar. 15, 2011) ("The Ninth Circuit's treatment of record supplementation in failure-to-act cases strongly suggests that [such] cases are … an independent exception to the record review rule."); *see also Envtl. Def. Fund v. Reilly*, 909 F.2d 1497, 1503 (D.C. Cir. 1990) (For a failure to act, "there would be no record upon which [judicial] review could be based, and therefore a *de novo* procedure is essential to provide the opportunity to develop such a record.") (quoting S.Rep. No. 698, 94th Cong., 2d Sess. 13 (1976)).
[20] *Dombeck*, 222 F.3d at 560.
[21] Plaintiffs have sought leave to amend their complaint to clarify that their third claim is asserted both under 5 U.S.C. § 706(2) and under 5 U.S.C. § 706(1), as a failure-to-act claim. ECF No. 58.

be confined to the agencies' administrative records, and the Court thus should allow: (1) the parties to offer admissible, extra-record evidence when briefing the merits of this claim; and (2) limited discovery as to the matters identified below in Section II.B.[22]

II. The administrative records are incomplete and should be supplemented.

A. Legal Standards

When judicial review is presumptively based on the administrative record compiled by the agency, documents nonetheless may be added to the record in at least two circumstances. First, documents that the agency directly or indirectly considered but that were omitted from the record should be added to "complete" the record.[23] This principle ensures that agencies do not omit evidence they considered, even if it is contrary to the agency's position.[24]

Second, the record may be "supplemented" with extra-record documents that the agency did not consider but that are necessary for the court to conduct a "thorough, probing, in-depth review" of an agency's decision.[25] The Tenth Circuit has identified at least five circumstances in which administrative records should be supplemented, three of which are relevant here: (1) "the agency action is not adequately explained and cannot be reviewed properly without considering [additional] materials; (2) the record is deficient because the agency ignored relevant factors it

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[22] *See, e.g.*, *Sierra Club v. U.S. Dep't of Transp.*, 245 F.Supp.2d 1109, 1119–20 (D. Nev. 2003) (granting plaintiff's motion to compel federal defendants to respond to plaintiff's requests for production of documents in case involving failure to act).

[23] *See Ctr. for Native Ecosystems v. Salazar*, 711 F.Supp.2d 1267, 1274–75 (D. Colo. 2010).

[24] *See, e.g.*, *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (whole record consists of all documents considered, "including evidence contrary to the agency's position"); *WildEarth Guardians v. U.S. Forest Serv.*, 713 F.Supp.2d 1243, 1256 (D. Colo. 2010).

[25] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

should have considered in making its decision; [and] (3) … evidence coming into existence after the agency acted demonstrates the actions were right or wrong."[26]

Moreover, as the Tenth Circuit has recognized, NEPA cases, by their very nature, sometimes cannot be decided without supplementing the administrative record:[27]

> As … other circuits have explained, … an initial review [of extra-record evidence] may illuminate whether an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism ... under the rug.[28]

Among the cases cited by the Tenth Circuit for this observation was a leading Second Circuit opinion that explained, "in NEPA cases, ... a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored."[29] Accordingly, administrative records may be supplemented to help courts identify gaps or inadequacies in agencies' compliance with NEPA.

B. Discovery should be allowed into why the agencies changed their position about preparing a supplemental EIS.

When Canyon Fuel expressed renewed interest in the Flat Canyon lease around 2010, both the Forest Service and BLM initially believed that a supplemental EIS should be prepared. In February 2011, BLM staff reasoned:

> After a lot of work was done, the [lease] was never fully approved and now the BLM wants to take it off the table for further action. If the company comes back

[26] *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001).
[27] *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004).
[28] *Lee*, 354 F.3d at 1242 (internal quotation omitted).
[29] *Suffolk Cnty. v. Sec'y of Int.*, 562 F.2d 1368, 1384 (2d Cir. 1977) (internal citation omitted).

> and wants this [lease] later, the BLM feels NEPA and everything else needs to be done all over again as if it is a new [lease] because it has been so long ago.[30]

And in a meeting among agency personnel later that year, the "preliminary consensus was that the 2002 EIS would not be adequate for leasing without a supplement being prepared."[31]

The Forest Service, if not also the BLM, maintained this stance through mid-2012. On June 14, 2012, BLM asked the Forest Service to "confirm that it still feels that the EIS is inadequate and inform the BLM of how the Forest Service would like to proceed in this matter to be able to carry on with the leasing …."[32] The Forest Service responded on July 9, 2012:

> [N]o leasing action has been made by the BLM; and now, the [NEPA] analysis and decision previously made is 'stale' due to changes in the resource conditions. To consent to leasing in the future, *a supplement Environmental Impact Statement (EIS) will need to be prepared ….*[33]

A few days later, however, the Forest Service reversed course, and it is apparent that BLM had changed its mind by then too. On July 11, 2012, BLM staff sent an e-mail to Forest Service personnel suggesting that BLM could proceed with the lease based on the Forest Service's 2002 record of decision.[34] BLM also noted that it had received the Forest Service's July 9 letter indicating that "new supplemental NEPA would be required…," but suggested that "[o]f course, the Forest Service can alter this as needed."[35]

And so the Forest Service did. Rather, than prepare a supplemental EIS, on July 17, 2012, the Forest Service wrote BLM a new letter to say it would undertake a process for determining

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[30] Ex. 11 at BLM2877; *see also* Ex. 5 at BLM2906.
[31] Ex. 4 at FS9797.
[32] *Id.*
[33] Ex. 6 at BLM2646 (emphasis added) (suggesting supplement would take "2.5 to 3 years").
[34] Ex. 12 at BLM2647.
[35] *Id.*

whether a supplemental EIS was necessary.[36] Though the Forest Service had just eight days earlier stated unequivocally that a "supplemental [EIS] will need to be prepared,"[37] the agency now "wish[ed] to evaluate whether or not there is significant new information or if there are changed circumstances that would warrant a supplemental environmental analysis…."[38]

Something happened between July 11 and July 17, 2012 that caused the Forest Service to change its position about whether it needed to prepare a supplemental EIS. And something motivated BLM around the same time, or in the preceding months, to do the same. However, no documents in the records explain why the agencies made an about-face on whether a supplemental EIS was required. When Plaintiffs pressed Federal Defendants about this omission, Federal Defendants asserted that no relevant documents exist—no letters, no e-mails, no internal memoranda, no meeting notes, no documents at all that shed any light on this significant and, at least for the Forest Service, sudden change in whether a supplemental EIS was needed.[39]

Discovery should be allowed to fill this significant gap in the agencies' records.[40] The agencies' reasons for changing their initial conclusion that a supplemental EIS had to be prepared are likely to be highly probative of whether there were significant new circumstances or

[36] Ex. 13 at BLM2648–49.
[37] Ex. 6 at BLM2646.
[38] Ex. 13 at BLM2648.
[39] *See* Ex. 14 at 2 (requesting, in items No. 3 and 4, that documents be added to the records pertaining to the agencies' changed position); Ex. 15 at 2 (explaining that "[o]n items 3 and 4 … neither BLM nor the Forest Service has anything responsive…").
[40] *See NRDC v. Train*, 519 F.2d 287, 292 (D.C. Cir. 1975) (Plaintiffs "are entitled to an opportunity to determine, by limited discovery, whether any other documents which are properly part of the administrative record have been withheld."); *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (where agency action is unexplained, remedy is to "obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary"); *Sierra Club*, 245 F.Supp.2d at 1118–20 (permitting discovery, in part, to enable "thorough, probing, in-depth" review of agency's decision).

information requiring preparation of a supplemental EIS. After all, the agencies must have changed their view either because they made some assessment of the significance of new information (and concluded that the need for supplementation was uncertain) or because of some unrelated reason. And either scenario will shed light on which of the agency's conclusions is better reasoned—the initial conclusion that the EIS had to be supplemented, or the subsequent conclusion that it did not. Accordingly, Plaintiffs request that the Court issue an order permitting Plaintiffs to conduct limited discovery, including depositions of agency personnel, into why the agencies abandoned their initial conclusions that a supplemental EIS had to be prepared.

C. BLM's fair-market-value analysis should be added to the record.

Before leasing federal coal reserves, BLM is required to prepare an analysis of the fair market value of those reserves.[41] For Flat Canyon, that analysis was completed by a consultant to BLM between January 23 and April 29, 2015.[42] But it is not in BLM's record.

When Plaintiffs asked that it be added to the record, BLM declined on the grounds that it post-dated the February 2013 SIR and February 2015 DNA.[43] Yet the agency action being challenged in this case is BLM's issuance of the Flat Canyon lease, which occurred on July 31, 2015.[44] And because the agencies had a duty to supplement the EIS at least until that "major Federal action" occurred,[45] the record should include documents the agencies generated until then, including the fair-market-value analysis.

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[41] 43 C.F.R. § 3422.1.
[42] Ex. 16 at BLM2550.
[43] Ex. 15 at 2.
[44] ECF No. 13-1 ¶ 3.
[45] *Marsh v. Or. Natural Resources Council*, 490 U.S. 360, 374 (1989).

Regardless, it is plain from BLM's record that the fair-market-value analysis was directly considered by the agency in deciding whether to issue the lease. The lease sale was not announced until May 2015, after the fair-market-value analysis was finished.[46] And BLM must have considered the fair-market-value analysis before issuing the lease, given that the agency is *prohibited* from issuing a lease for less than its fair market value.[47] Thus, to complete the record, BLM should be ordered to add its fair-market-value analysis.

D. Air quality permits and related documents should be added to the records.

In the 2002 EIS, the agencies chose not to analyze in detail how mining coal from Flat Canyon would affect air quality.[48] To justify this decision, the EIS asserted that air emissions from the mine complied with a State air-quality permit and "air quality standards."[49] In the 2013 SIR, the Forest Service repeated the decision not to assess air quality impacts in detail, relying in part on "[t]he air quality permit."[50] But no such permits, nor any air-emission data related to compliance with those permits, were included in the records.

When Plaintiffs asked Federal Defendants to add these items to the records, the agencies asserted they had "nothing responsive."[51] Yet, the agencies' conclusory statement that mine emissions would not impact air quality because they complied with "[t]he air quality permit"

[46] *See* 80 Fed. Reg. 28002-02, 28,002–03 (May 15, 2015).
[47] 43 C.F.R. § 3422.1(c)(1) ("The authorized officer shall not accept any bid that is less than the fair market value as determined by the Department.").
[48] Ex. 17 at BLM123 (concluding that effects to air quality do not warrant a detailed review).
[49] Ex. 17 at BLM123 ("Emissions at the Skyline Mine … currently meet air quality standards and the Permit-to-Construct issued by the Utah Department of Air Quality. The proposed action would not lead to additional emissions but would extend the life of operations.").
[50] Ex. 7 at FS5820 ("The air quality permit is primarily concerned with dust deriving from how much coal is moved on the surface of the mine in a given year, and that will not change if this decision is implemented.").
[51] Ex. 15 at 3, 5 (stating agencies have nothing responsive for items 9, 17, and 18); *see also* Ex. 14 at 2–3 (in items No. 9, 17, and 18, asking that air-quality documents be added to record).

cannot be reviewed properly without considering the permits, for the EIS, SIR, and DNA fail to explain what the permits require, what air-emissions data shows compliance with those requirements, and how compliance would ensure that air quality is not impacted. The Court accordingly should require Federal Defendants to supplement the record with the referenced permits and air-emission data, as well as identify the air-quality standards against which the mine's compliance was purportedly judged.[52]

E. The records should be supplemented to enable the Court to properly review Plaintiffs' NEPA-supplementation claims.

Plaintiffs' second and third claims allege that Federal Defendants' violated NEPA by failing to supplement the EIS before issuing the Flat Canyon lease. Federal agencies must supplement an EIS when major federal action remains to occur and "new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered."[53] When agencies are confronted with potentially significant new information or circumstances after preparing an EIS, they must take a "hard look" at these new matters to determine whether a proposal's impacts will be significant or significantly different than those already considered.[54]

Under these standards, a key question on the merits in this case will be whether there were "significant new circumstances or information relevant to environmental concerns and

[52] Alternatively, because the SIR and EIS indicate that the permits were indirectly considered by the agencies even though they are missing from the agencies' files, they should be added to complete the records.
[53] *Marsh*, 490 U.S. at 374 (quoting 42 U.S.C. § 4332(2)(C)); 40 C.F.R. § 1502.9(c).
[54] *See Dombeck*, 222 F.3d at 557–558 ("When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require [supplementation]"); *Marsh*, 490 U.S. at 378 (Courts must "carefully review[] the record and satisfy[] themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information.").

bearing on" Federal Defendants' proposal to lease the Flat Canyon tract.[55] The records should be supplemented so that the Court may properly evaluate that question.[56]

Plaintiffs intend to assert on the merits that documents omitted from the records reveal that significant new information arose between 2002 and 2015 about climate change, other federal coal-leasing decisions, and greater sage-grouse conservation measures. So that the Court may evaluate whether the new information is indeed significant, Plaintiffs seek to add these documents to the record, along with others that provide context about the significance of the information at issue and how the Federal Defendants could have analyzed that information. Many of these documents, moreover, reveal that the agencies ignored relevant factors in the SIR and DNA, or that the SIR or DNA are otherwise inadequate, and the records should be supplemented with these documents on that basis as well.

1. Climate Change

Though the U.S. Environmental Protection Agency admonished BLM and the Forest Service to "disclose that researchers have found coal combustion to be a significant source of CO_2, a greenhouse gas which contributes to global warming," the 2002 EIS said almost nothing about climate change.[57] In response to this and other comments, BLM and the Forest Service asserted that scientific conclusions about the causes and effects of climate change were uncertain, and concluded that "[t]he issues of climate changes and global warming from combustion of fossil fuels are considered beyond the scope of this analysis."[58]

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[55] *See* 40 C.F.R. § 1502.9(c)(1)(ii); *Marsh*, 490 U.S. at 374.
[56] *See Sabine River Auth. v. DOI*, 951 F.2d 669, 678 (5th Cir. 1992); *Friends of Cap. Crescent Trail v. Fed. Transit Admin.*, --- F.Supp.3d ---, 2016 WL 4132188, *3 (D.D.C. Aug. 3, 2016).
[57] Ex. 17 at BLM121.
[58] Ex. 17 at BLM122–23.

A decade later, the Forest Service backed away from this prior claim of uncertainty.[59] But the agency came up with a new reason not to analyze climate change: It is difficult to do. The agency observed that "[e]ffects from fossil fuel [greenhouse gases] may not be measurable for decades or centuries," and argued that attributing changes in the global climate and natural systems to a single emitter of greenhouse gases was impossible.[60] "Therefore," the agency claimed, as if to imply a logical relationship where none exists, "the effects of this [Flat Canyon leasing] decision on climate change were addressed in the original FEIS analysis…." New information about climate change, the Forest Service found, was accordingly not significant.[61] In its DNA, BLM echoed this conclusion, relying solely on a citation to the SIR to assert that the "analysis" of climate change in 2002 EIS was adequate and did not need to be updated.[62]

Because the agencies paid the issue of climate change little heed, their administrative records have few documents discussing climate change. As a result, Plaintiffs seek to add 14 documents to the record to help the Court assess whether significant new information about climate change arose after 2002 that the agencies should have addressed in a supplemental EIS.

i. Attributing Climate Change Effects to Individual Actions

Exhibits 18, 19, and 20. These technical support documents, first published in 2010, describe a metric, called the social cost of carbon, prepared by a federal interagency working group for estimating the monetary cost of climate-change damages attributable to small incremental increases in carbon emissions in a given year. According to the working group, the

[59] "Global warming," said the SIR, "is unequivocal" and mostly human caused. Ex. 7 at FS5820.
[60] Ex. 7 at FS5821 ("Predicting the degree of impact any single emitter of [greenhouse gases] may have on global climate change, or on the changes to biotic and abiotic systems that accompany climate change, is not possible at this time.").
[61] Ex. 7 at FS5821.
[62] Ex. 8 at BLM856–57.

social cost of carbon "is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services due to climate change."[63] The purpose of the metric is to enable federal agencies to estimate the climate-change cost of "regulatory actions that have small, or 'marginal,' impacts on cumulative global emissions."[64]

Plaintiffs intend to argue on the merits that the social cost of carbon estimate described in Exhibits 18–20,[65] is significant information developed after the 2002 EIS but well before Federal Defendants issued the Flat Canyon lease in 2015. Federal Defendants could have used the social cost of carbon to compare the climate-change costs of leasing the Flat Canyon tract with alternatives to leasing, such as leaving the coal in the ground.[66] Instead, both agencies, in their SIR and DNA, swept aside the issue of climate change by asserting that climate-change impacts could not be attributed to a single emitter of greenhouse gases even though the social cost of carbon would have allowed the agencies to do just that.

ii. *Key Research and Analysis of Climate Change Since 2002*

The following documents are examples of significant research and analysis of climate change published or undertaken after the agencies prepared the 2002 EIS and before they issued the Flat Canyon lease in July 2015.

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[63] Ex. 18 at 1.
[64] Ex. 18 at 1.
[65] The 2013 and 2015 revisions update the estimates by using new versions of the underlying climate-damage models and correcting errors in the model calculations. *See* Exs. 19, 20.
[66] *See, e.g.*, EA: Little Willow Creek, 81–84 (Feb. 2015) (using the social cost of carbon to estimate climate-change costs) *available at* https://eplanning.blm.gov/epl-front-office/projects/nepa/39064/55133/59825/DOI-BLM-ID-B010-2014-0036-EA_UPDATED_02272015.pdf.

Exhibits 21 and 22. The "Our Changing Planet" reports published by the U.S. Global Change Research Program provide an annual highlight of significant, recent advancements in understanding climate change. As the fiscal year 2016 report explained, the Global Change Research Program "coordinates and integrates scientific research across 13 Federal agencies whose missions include understanding changes in the global environment and their implications for society."[67] Each report summarizes the Research Program's "significant advancements toward achieving its scientific goals … and building a knowledge base that effectively informs human responses to global change."[68]

Exhibit 25. This version of the National Climate Assessment summarizes the foremost research as of May 2014 about the impacts of climate change in the United States. It was "the result of a three-year analytical effort by a team of over 300 experts, overseen by a broadly constituted Federal Advisory Committee of 60 members. … It was subjected to extensive review by the public and by scientific experts in and out of government …. This process of unprecedented rigor and transparency was undertaken so that the findings of the National Climate Assessment would rest on the firmest possible base of expert judgment."[69]

Exhibit 26. The 2014 Synthesis Report: Summary for Policymakers prepared by the Intergovernmental Panel on Climate Change (IPCC) summarizes the key findings of three working groups of the IPCC, an international body created to assess the science related to climate change. It describes the IPCC's primary conclusions about observed changes in the climate system, the causes for those changes, the impacts of those changes on natural and human

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[67] Ex. 21 at iv.
[68] Ex. 21 at iv.
[69] Ex. 25 at iii.

systems, future predicted changes to the climate and the associated risks, and pathways to mitigate climate change and adapt to its impacts.

Exhibits 27 and 28. These reports prepared by the U.S. Environmental Protection Agency provide a comprehensive and detailed inventory of the primary human sources and sinks of greenhouse gases as of 2012 and 2013. They show, for example, that the single largest source category of greenhouse gas emissions in the United States in each year was combustion of coal to generate electricity.[70]

Exhibit 29. This is a widely cited paper that models the amount of fossil fuels that must remain in the ground to have at least a 50% chance of keeping global temperatures from rising more than 2 degrees Celsius above pre-industrial levels (a figure the IPCC has reported as a general benchmark to avoid the most serious risks from climate change, including food-security risks, species extinction, catastrophic sea level rise and temperature increases). For the United States, the authors predicted that over 90% of hard coal reserves must not be burned, even if carbon-capture-and-storage technology is deployed.[71]

Plaintiffs seek to add Exhibits 21–29 to the record because they summarize and characterize the importance of developments in climate-change research and analysis that post-dates the 2002 EIS and pre-dates the 2015 lease. For example, the Our Changing Planet reports summarize major research in the years before BLM issued the Flat Canyon lease that reveals that the United States has suffered a record-breaking number of weather disasters and wildfires, increased temperatures, and increased drought.[72] Similarly, the 2014 National Climate

[70] Ex. 27 at 1-15 to 1-18; Ex. 28 at 1-16 to 1-19.
[71] Ex. 29 at 189.
[72] *See, e.g.*, Ex. 24 at 8–9.

Assessment explains, for example, that "observations unequivocally show that climate is changing and that the warming of the past 50 years is primarily due to human induced emissions of heat-trapping gases. These emissions come mainly from burning coal, oil, and gas, with additional contributions from forest clearing and some agricultural practices."[73] It contains, among other information pertinent to the Flat Canyon lease, a summary of present and likely future impacts of climate change in the U.S. Southwest, which observes that "[t]he decade 2001-2010 was the warmest in the 110-year instrumental record, with temperatures almost 2°F higher than historic averages, with fewer cold air outbreaks and more heat waves."[74]

Federal Defendants did not evaluate any of this information when determining whether to supplement the EIS, and it should be added to the record so that the Court can assess whether the agencies should have supplemented the EIS to account for it.

iii. Guidance for Evaluating Climate Change

Exhibits 30 and 31. This draft guidance was issued by the White House Council on Environmental Quality in February 2010, Ex. 30, and updated in December 2014, Ex. 31,[75] to advise federal agencies about how to analyze climate-change issues under NEPA. Federal Defendants' treatment of climate change in the SIR and DNA diverges from the guidance in several important ways. First, though the guidance instructs agencies to do otherwise, Federal Defendants did not describe at all the connection between greenhouse gas emissions and climate change impacts, nor did they analyze whether or how greenhouse gas emissions from burning

[73] Ex. 25 at 2.
[74] Ex. 25 at 464.
[75] The update clarified and supplemented the 2010 draft by, for example, encouraging the use of the social cost of carbon in any cost-benefit analysis performed. *See* Ex. 31 at 16.

coal mined from Flat Canyon could be reduced, offset, or otherwise mitigated.[76] Second, Federal Defendants completely ignored the question of how climate change may affect the agencies' analysis of impacts associated with mining the Flat Canyon tract or alternatives to mining, though the guidance calls on agency's to perform that analysis.[77]

These draft guidance documents should be added to the record because they provide a benchmark for assessing how federal agencies could have approached climate-change issues under NEPA at the time Federal Defendants prepared the SIR and DNA.[78] The guidance will help illuminate whether Federal Defendants' treatment of climate-change issues in the SIR and DNA, and their decision not to supplement the EIS, swept aside the "stubborn problems" affiliated with climate change. For example, the guidance explains that federal agencies should not do what Plaintiffs contend Federal Defendants did in this case:

> [T]he statement that emissions from a government action or approval represent only a small fraction of global emissions is more a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether to consider climate impacts under NEPA.[79]

2. Other Regional Coal Leases

NEPA mandates that federal agencies evaluate the cumulative effects of their actions.[80] Cumulative effects are the impacts of a proposed action "when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or

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[76] Ex. 30 at 3.
[77] Ex. 30 at 6–7.
[78] The draft guidance also sheds light on the significance of several other documents that Plaintiffs seek to add to record—including the social cost of carbon, U.S. Global Change Research Program reports, national climate assessments (Exs. 18–25)—by identifying those documents as useful sources of information about climate change. *See* Ex. 31 at 16, 6–7, 27.
[79] Ex. 31 at 9.
[80] 40 C.F.R. § 1508.27(b)(7); *see Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1172 (10th Cir. 2002).

person undertakes such other actions."[81] A cumulative impact analysis should identify:

> (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.[82]

In the EIS, SIR, and DNA, BLM and the Forest Service failed to assess the cumulative effects of mining and burning coal from Flat Canyon, the Skyline mine, and from other leases in Utah and the surrounding region. The agencies failed to evaluate cumulative greenhouse gas emissions, among other effects, and their resulting climate-change impacts. So that the Court may conduct a thorough and probing review of the agencies' 2002 EIS (Claim 1) and failure to supplement the EIS (Claims 2 and 3), the records should be supplemented with approval documents for other coal leases. These documents—mostly NEPA EISs and EAs—describe the amount of coal to be produced from each lease and the resulting greenhouse gas emissions from mining activities and coal combustion (often expressed in terms of carbon-dioxide equivalents).

The documents show improvement after 2002 in the agencies' ability to estimate and evaluate greenhouse gas emissions and climate change impacts. Although Plaintiffs may dispute the sufficiency of the analysis in some of the documents, the documents nonetheless reveal significant new information the agencies failed to consider when leasing Flat Canyon—information about the volume of greenhouse gas emissions associated with new coal leases and the type of analysis the agencies are capable of preparing. With this information about related

[81] 40 C.F.R. § 1508.7.
[82] *Grand Canyon Trust v. FAA,* 290 F.3d 339, 345 (D.C. Cir. 2002) (quoting petitioner's brief).

coal leases, the Court can assess whether the agencies failed to consider significant new information and should have prepared a supplemental EIS for the Flat Canyon lease.[83]

i. Skyline Mine Approvals – The Winter Quarters Lease

In the Flat Canyon EIS, BLM and the Forest Service described impacts of Skyline mine's operations that had been ongoing since 1980 under other leases, though they did not identify the leases.[84] One, however, was the 1996 Winter Quarters lease—a 3,300-acre lease containing about 24.1 million tons of coal. In 2011, the agencies approved a modification to the Winter Quarters lease, adding 770 acres and 6.9 million tons of coal.[85] BLM and the Forest Service jointly reviewed this lease modification under NEPA through an environmental assessment (EA). One impact identified in this EA was climate change,[86] and the agencies disclosed how much carbon dioxide would be emitted from mining and burning coal from the Winter Quarters lease.[87] The EA stated that annual emissions from just this lease tract (excluding the rest of the mine) account for 6.6% of Utah's carbon-dioxide emissions.[88] Yet the agencies failed to disclose cumulative carbon emissions or climate-change impacts on a statewide or regional basis, despite observing that "[i]mpacts associated with climate change are cumulative."[89]

Plaintiffs intend to assert on the merits that the agencies, having failed to perform that

[83] Because these NEPA documents are voluminous, Plaintiffs have cited to federal-government websites where they may be found.
[84] Ex. 17 at BLM102–03, 366.
[85] Environmental Assessment: Modification of Winter Quarters Federal Coal Lease, 5 (Nov. 2011) ("Winter Quarters EA") *available at* https://www.blm.gov/ut/enbb/files/20111123_Tt_BLM_FS_Final_Skyline_Liz_EA.pdf
[86] Winter Quarters EA at 15 (stating Winter Quarters lease directly, indirectly and cumulatively contributes to climate change).
[87] Winter Quarters EA at 28–29 (Nov. 2011).
[88] *Id*. at 29.
[89] *Id.*

analysis in the Winter Quarters EA, should have supplemented the Flat Canyon EIS with that analysis. The records should be supplemented with the Winter Quarters EA so that the Court may evaluate that argument and determine whether the EA contains significant new information about the cumulative impacts of Skyline mine that the agencies should have analyzed.

ii. Other New Utah Coal Leases: Greens Hollow, Alton, and Williams Draw

The Flat Canyon EIS did not discuss other coal mines on BLM- and Forest Service-administered land in Utah.[90] The SIR and DNA likewise said nothing of the cumulative effects of contemporaneous Utah coal leases. In particular, three new leases—Greens Hollow, Alton, and Williams Draw, all located in central Utah—have either been under evaluation or were issued after the 2002 EIS for Flat Canyon.

BLM began preparing a supplemental EIS for the Alton lease in July 2012 and released a draft for public comment in June 2015. The lease contains 44.9 million tons of coal[91] and is expected to yield about 2 million tons annually, which would emit 5.6 million tons of carbon dioxide when burned.[92] Unlike the NEPA documents for Flat Canyon, the Alton draft supplemental EIS recognized that BLM needed to analyze how the lease would "add to the cumulative effect of carbon emissions on global warming."[93]

BLM and the Forest Service have been processing the Greens Hollow lease since 2009. The agencies completed a final EIS in December 2011 and a final supplemental EIS in February 2015. This lease could produce up to 10 million tons of coal annually, which when burned,

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[90] *See* Ex. 17 at BLM101 (limiting scope of analysis "to the specific proposal to lease the Flat Canyon Federal Coal Lease Tract").
[91] Alton Coal Tract: Supp. Draft EIS, Exec. Summ. at ES-1, *available at* http://www.blm.gov/ut/st/en/prog/energy/coal/alton_coal_project/AltonCoalSupplementalDEIS.html.
[92] *Id*. at Chapter 4, Environmental Impacts at 4-73.
[93] *Id*. at ES-5.

would emit 24 million tons of carbon dioxide.[94]

BLM has received an application for the Williams Draw coal lease, and is currently deciding whether to prepare an EA or an EIS. The mining proposed would occur on 4,200 acres of federal land and recover about 32 million tons of coal.[95]

Plaintiffs intend to argue on the merits that the NEPA documents for these leases contain significant new information about carbon-dioxide emissions and climate-change impacts that should have prompted the agencies to supplement the Flat Canyon EIS. The SIR for Flat Canyon asserted that it is not possible to analyze how a single source of greenhouse gases contributes to climate change.[96] Even if that were true (which it is not), NEPA is a vehicle, if not a mandate, to consider the *cumulative* impact of multiple Utah coal leases so that a meaningful analysis of climate change is presented.[97] A statewide cumulative impacts analysis addressing greenhouse gas emissions and climate change impacts within Utah is appropriate because all Utah BLM-lands are managed as a unit and nearly all the coal is sent to coal-fired power plants in Utah.[98] So that the Court may properly review that argument on the merits, the Alton, Greens Hollow, and Williams Draw NEPA documents should be added to the record.

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[94] Final Supp. EIS for Leasing and Underground Mining of Greens Hollow Federal Coal Lease Tract, 286 (Feb. 2015), *available at* http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/50297_FSPLT3_2423442.pdf.
[95] BLM, "BLM Seeks Public Comment" *available at* http://www.blm.gov/ut/st/en/info/newsroom/2013/may/blm_seeks_public_comment.html.
[96] *See* Ex. 7 at FS5821.
[97] *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) ("[W]hen … proposals for coal-related actions that will have cumulative … environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.").
[98] *See, e.g.*, Final EIS for Buckskin Mine Hay Creek II Lease at 4-122 (July 2011) (estimating greenhouse gas emissions from proposed lease "as well as from the forecast coal production from all coal mines in the Wyoming [Powder River Basin]"), *available at* http://www.blm.gov/style/medialib/blm/wy/information/NEPA/cfodocs/haycreekii/feis.Par.88691.File.dat/00FEIS.pdf

iii. Other Intermountain-West Coal Mines

Plaintiffs also assert in their NEPA-supplementation claims that BLM and the Forest Service should have analyzed the cumulative climate-change impacts of coal mining that the agencies have approved in the Intermountain West since 2002. The cumulative contribution to climate change from the region's new coal leases in Colorado, Wyoming and Montana is far greater than any one individual lease, and the impacts over this region are felt in a comparable manner and to a similar extent. The agencies could meaningfully consider the climate-change impacts of regional coal mining in a supplemental EIS for Flat Canyon and mitigate those impacts through the Flat Canyon lease.[99] Accordingly, the record should be supplemented with the NEPA documents for the following coal-mining proposals and approvals.

In Colorado, BLM and the Forest Service approved a lease modification for the West Elk mine in 2012, authorizing 10.1 million tons of coal to be mined.[100] In 2013, BLM approved the Blue Mountain lease for the Deserado coal mine in northwestern Colorado, authorizing 21.3 million tons to be mined—all of which is burned at Utah's nearby Bonanza Power Station.[101] In February 2014, BLM issued an 8-million ton lease, called Spruce Stomp, expanding the Bowie No. 2 mine, which is also in western Colorado.[102] And in March 2015, BLM announced it was

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[99] *See Marsh*, 490 U.S. at 372.
[100] Final EIS, Federal Coal Lease Modifications COC-1362 & COC 67232 (Aug. 2012), Vol. I at 51 *available at* http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/68608_FSPLT2_264086.pdf.
[101] BLM, EA for the Blue Mountain Energy Coal Lease Application, 4, 7 (Feb. 2013) *available at* http://www.blm.gov/style/medialib/blm/co/information/nepa/white_river_field/completed_fy2014_documents.Par.4839.File.dat/doiblmco11020120023ea_combined%20EA.FONSI.DR.pdf.
[102] EA: Spruce Stomp Coal Lease by App., 1–2 (Sep. 2013) *available at* http://www.blm.gov/style/medialib/blm/co/information/nepa/uncompahgre_field/fy2014_nepa_docs.Par.15038.File.dat/13-10%20EA%20Bowie%20Spruce%20Stomp%20Final%20EA.pdf.

preparing an EA to expand the Foidel Creek mine in western Colorado, authorizing mining of 340,000 tons of coal.[103]

In Wyoming, ten coal leases were issued after 2002 that BLM and the Forest Service should have considered in a supplemental EIS for Flat Canyon. In July 2011, BLM published an EIS for the Hay Creek II lease, which would yield about 25 million tons of coal per year.[104] BLM approved the lease in May 2013.[105] In August 2009, BLM published an EIS covering four Wyoming leases.[106] In that EIS, BLM calculated the total carbon-dioxide-equivalent emissions that would result from mining activities on each lease and the adjacent mines.[107] In 2010, BLM authorized the West Antelope lease after completing an EIS.[108] That lease has about 430 million tons of coal, which will be mined at a rate of about 36–42 million tons per year.[109] And in July 2010, BLM approved six more coal leases through an EIS known as the Wright Area EIS.[110]

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[103] BLM, Press Release (Mar. 3, 2015) *available at* http://www.blm.gov/co/st/en/BLM_Information/newsroom/2015/the_blm_seeks_public.html. BLM published the EA in December 2015 *available at* https://eplanning.blm.gov/epl-front-office/projects/nepa/41852/67560/73502/DOI-BLM-CO-N010-2014-044-EA.pdf.

[104] Final EIS for the Buckskin Mine Hay Creek II Coal Lease App., 3-221 (July 2011), *available at* http://www.blm.gov/style/medialib/blm/wy/information/NEPA/cfodocs/haycreekii/feis.Par.88691.File.dat/00FEIS.pdf.

[105] BLM, "Hay Creek II Coal Lease App." *available at* http://www.blm.gov/wy/st/en/info/NEPA/documents/hpd/HayCreekII.html.

[106] Final EIS, S. Gillette Area Coal Lease Apps., Vol. I, (Aug. 2009) *available at* http://www.blm.gov/style/medialib/blm/wy/information/NEPA/hpdo/south_gillette/feis.Par.57426.File.dat/vol1.pdf.

[107] *Id.* at 3-266 to 269; 4-117 to 118.

[108] BLM, "West Antelope II Coal Lease App." *available at* http://www.blm.gov/wy/st/en/info/NEPA/documents/cfo/West_Antelope_II.html.

[109] Final EIS for the W. Antelope II Coal Lease App., Exec. Summ., ES-1, ES-4 (Dec. 2008) *available at* http://www.blm.gov/style/medialib/blm/wy/information/NEPA/cfodocs/westantelope/feis.Par.7431.File.dat/vol1.pdf.

[110] BLM, "Wright Area Coal Lease Apps." *available at* http://www.blm.gov/wy/st/en/info/NEPA/documents/hpd/Wright-Coal.html.

In Montana, BLM approved four coal leases associated with the Spring Creek mine in 2007, authorizing the production of 151 million tons of coal.[111] In April 2010, BLM completed an EA for the Spring Creek lease modification, which authorized the production of an additional 50.8 million tons of coal.[112] In December 2012, the Spring Creek mine owner filed an application to lease another 170 acres containing 7.9 million tons of coal,[113] and in February 2013, the owner filed yet another application to mine 198.2 million tons.[114]

3. Sage Grouse

Though greater sage-grouse had been identified as a Utah state sensitive species by at least 1997 due to declining populations and limited distributions,[115] the 2002 EIS contained no discussion whatsoever of whether and how issuing the Flat Canyon lease would impact sage grouse. Then, in 2010, while the EIS sat on the shelf, the U.S. Fish and Wildlife Service (FWS) concluded that greater sage-grouse should be listed as a threatened or endangered species under the Endangered Species Act.[116] The SIR and DNA mentioned this development, but both concluded that the EIS nonetheless did not need to be supplemented because the lease area

[111] EA for Spring Creek (MTM94378), 1 (Nov. 2006) *available at* http://www.blm.gov/style/medialib/blm/mt/field_offices/miles_city/coal.Par.88925.File.tmp/springcreekEA.pdf.
[112] EA for Spring Creek Lease Mod. MTM-069782, 1-1 (Apr. 2010) *available at* http://www.blm.gov/style/medialib/blm/mt/field_offices/miles_city.Par.15531.File.dat/springcreekEA.pdf.
[113] Cloud Peak, Lease by Mod. (MTM-094378), at 4 (Dec. 18, 2012) *available at* http://www.blm.gov/style/medialib/blm/mt/blm_programs/energy/coal.Par.23834.File.dat/SCC%20LBM%20Application.pdf.
[114] Cloud Peak, App. at 3 (Feb. 8, 2013) *available at* http://www.blm.gov/style/medialib/blm/mt/blm_programs/energy/coal.Par.60997.File.dat/CPE%20File%201%20Application.pdf.
[115] Ex. 32 atBLM2065.
[116] 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13,910 (Mar. 23, 2010).

lacked suitable sage-grouse habitat.[117]

That conclusion, however, is directly contradicted by the BLM's 2002 record of decision, which observed that sage grouse were among the "primary wildlife species on the [Flat Canyon] tract."[118] And regardless, as the DNA acknowledged, the Flat Canyon tract contains habitat that has been designated as a "priority area for conservation" (PAC), a FWS land-management classification that identifies "key areas that states have identified as crucial to ensure adequate representation, redundancy, and resilience for conservation of its associated population…."[119] Yet the agencies undertook no analysis of whether leasing the area for coal mining would negatively affect its status as a PAC, regardless of the State of Utah's conclusion that the area should be classified as "non-habitat" under State land-management criteria.

Plaintiffs assert in their second and third claims that Federal Defendants should have supplemented the EIS to consider significant new information developed since the 2002 EIS concerning threats to greater sage-grouse and measures that could be taken to mitigate those threats. The record should be supplemented with two key documents that Federal Defendants did not consider to help the Court assess whether significant new information and circumstances existed that should have prompted Federal Defendants to supplement the EIS:

Exhibit 34. FWS published this Conservation Objectives report in March 2013 to describe the threats facing greater sage-grouse and establish range-wide conservation objectives for the grouse. It explains, for example, that "[s]age-grouse populations can be significantly

[117] Ex. 8 at BLM857 (explaining that BLM "determined that there would be no negative effects' on greater sage-grouse in reliance on the Utah Division of Wildlife Resource's conclusion that the lease area "should be classified as non-habitat for greater sage-grouse…."); Ex. 7 at 5818.
[118] Ex. 33 at BLM2526.
[119] Ex. 34 at 13.

reduced, and in some cases locally extirpated, by non-renewable energy development activities, even when mitigative measures are implemented," and that underground mining activities can negatively impact sage grouse and its habitat.[120] The report urges that "[t]he appropriate level of management must continue to effectively conserve all current PACs," and establishes as a conservation measure: "[a]void energy development in PACs."[121]

Utah Greater Sage-Grouse Draft Land Use Plan Amendment and Draft EIS. In October 2013, the Forest Service and BLM published these documents analyzing threats to the greater sage-grouse in Utah and alternative measures for protecting the grouse.[122] The EIS contains a wealth of information that was assembled and analyzed after 2002 about threats to greater sage-grouse in Utah and measures to mitigate those threats.[123] It observes, for example, that the major threats to greater sage-grouse in Utah include fragmentation of habitat due to mineral exploration and development.[124] It also identified alternatives for mapping "preliminary priority management areas" having the highest conservation value for greater sage-grouse, including designating part of the Flat Canyon lease area as such an area.[125] It then proposed alternative measures for conserving those areas, such as prohibiting or minimizing surface disturbance associated with underground coal mining.[126]

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[120] Ex. 34 at 10, 49.
[121] Ex. 34 at 32, 43.
[122] BLM and U.S. Forest Service, Utah Greater Sage-Grouse Draft Land Use Plan Amendment and Draft Environmental Impact Statement (Oct. 2013) *available at* http://www.blm.gov/ut/st/en/prog/planning/SG_RMP_rev/deis.html ("Draft EIS").
[123] *See generally* Draft EIS, Ch. 3.
[124] Draft EIS, Executive Summary at ES-4 *available at* http://www.blm.gov/style/medialib/blm/ut/natural_resources/SageGrouse/deis.Par.69173.File.dat/Vol1ExecSumDEIS.pdf.
[125] *Id.* at ES-10. *See also* Ch. 2 Maps, Habitat Maps, Alternatives B, C, and D *available at* http://www.blm.gov/ut/st/en/prog/planning/SG_RMP_rev/deis.html.
[126] Draft EIS, Ch. 4 at 4-51, 4-63.

These two documents—the Conservation Objectives report and the Draft Land Use Plan and EIS—contain a considerable amount of new information about sage grouse that the BLM and Forest Service did not consider when determining whether to supplement the Flat Canyon EIS. These documents should be added to the administrative record so that the Court may determine on the merits whether the agencies should have considered them.

CONCLUSION

Federal Defendants' administrative records reveal that the agencies initially concurred with a common-sense conclusion: By 2012, the decade-old Flat Canyon EIS was out of date and needed to be supplemented to account for the wealth of significant new information and circumstances that had arisen. But because the agencies reversed course for reasons unknown, none of that information is in their records. This, and the other deficiencies in the records, should be corrected so as not to frustrate a "thorough, probing, in-depth review" on the merits.

Plaintiffs accordingly request that the Court: (1) order Federal Defendants to add the foregoing documents to the administrative records; (2) allow Plaintiffs to conduct limited discovery, including depositions, into why the agencies abandoned their initial conclusion that a supplemental EIS had to be prepared; and (3) find that Plaintiffs' third claim should be adjudicated without confining the Court's review to the administrative records.

Respectfully submitted this 29th day of September, 2016.

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