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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

WESTERN ORGANIZATION OF RESOURCE COUNCILS; MONTANA ENVIRONMENTAL INFORMATION CENTER; POWDER RIVER BASIN RESOUCE COUNCIL; NORTHERN PLAINS RESOURCE COUNCIL; SIERRA CLUB; and NATURAL RESOURCES DEFENSE COUNCIL,

Plaintiffs,

vs.

U.S. BUREAU OF LAND MANAGEMENT; RYAN ZINKE; MICHAEL NEDD; and KATHERINE MACGREGOR,

Defendants,

and

CLOUD PEAK ENERGY, INC.; PEABODY CABALLO MINING, LLC; and STATE OF WYOMING,

Intervenor-Defendants.

Case No. CV-16-21-GF-BMM

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO FEDERAL DEFENDANTS' AND INTERVENOR-DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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GLOSSARY OF TERMS

BLM	U.S. Bureau of Land Management
CO_2	Carbon Dioxide
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
GHG	Greenhouse Gas
GWP	Global Warming Potential
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act
ORV	Off Road Vehicle
RMP	Resource Management Plan

INTRODUCTION

In updating the Buffalo and Miles City Resource Management Plans ("RMPs" or "the plans"), the Bureau of Land Management ("BLM") established a blueprint for developing coal, oil, and gas in the Powder River Basin for the next two decades. Because this region currently accounts for nearly 40 percent of all domestic coal production and generates great quantities of oil and gas, BLM's planning efforts for these landscapes carry significant consequences for climate and air quality. BLM anticipates that, under the revised plans, BLM lands will produce 11 billion tons of coal and generate 18,000 oil and gas wells.

BLM argues that the plans merely perpetuate the status quo. But NEPA requires BLM to confront the fact that perpetuating the status quo leaves the world on a path to devastating climate change. BLM turned a blind eye to these impacts, denying that it had the opportunity, in revising these plans, to adopt alternatives to help the U.S. avoid the worst climate impacts. Conservation Groups challenge BLM's complete failure to consider alternatives that would reduce climate impacts, and BLM's failure to take a "hard look" at the direct, indirect, and cumulative climate impacts of continued large-scale fossil fuel development in the Powder River Basin.

Assessing these impacts at the planning stage is legally required and sound policy, as climate impacts are inherently cumulative rather than site specific. While BLM would apparently prefer to postpone confronting the reality of these impacts, the National Environmental Policy Act ("NEPA") requires that impacts be considered as early as possible, and here, the record unequivocally demonstrates that BLM had the tools to assess these impacts, and reasonable alternatives that would lessen them, at the planning stage.

Here, BLM misled the public by improperly concealing the true climate impacts of BLM's planning-level choices. BLM erred in its discussion of direct, indirect, and cumulative climate impacts in ways that exclusively and significantly diminished the plans' contribution to climate change. By wholly omitting any discussion of combustion-related greenhouse gas emissions from burning fossil fuels, BLM underreported the impact of the plans by at least 80-fold. Further, by refusing to analyze the combined impact of its planning decisions—for example, by isolating the climate impact of each of the eight plans approved on the same day in the same record of decision—BLM failed to take the cumulative perspective NEPA requires and split its contributions into far smaller portions. Finally, by relying on outdated science and considering only century-long timescales, BLM drastically understated the climate impact of methane emitted.

Conservation Groups' members live, work, and recreate in the planning areas, and have provided declarations demonstrating how perpetuation of the status quo impairs their interests in clean air and landscapes around their homes and on the public lands they use. Conservation Groups therefore readily meet the test for Article III standing.

ARGUMENT

I. Conservation Groups Have Standing.

The Ninth Circuit has squarely rejected BLM's argument that RMPs themselves never cause injuries sufficient to support standing, or that these particular RMPs do not cause such injury because they do not change the legal status of the lands at issue. *See, e.g.*, *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992). BLM mistakenly argues that RMPs are not "implementation decision[s]," and that injuries only result from actual implementation, implying that no plan can be subject to judicial challenge. Doc. 79 at 9-10. But the plans "pre-determine[] the future" by setting boundaries on what will, or will not, be permitted at the implementation stage, and courts have held that a plaintiff may therefore bring a NEPA challenge to a plan when it is adopted. *Idaho Conservation League*, 956 F.2d at 1516; *see also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998). Here, Conservation Groups were injured by

the fact that these particular plans forewent an opportunity to *close* additional areas to leasing or provide other protections; courts have repeatedly held that, in procedural rights cases such as this one, this injury suffices, and the fact that the plans did not open new areas to leasing is irrelevant.[1] Doc. 79 at 7-8. Conservation Groups have standing because, if the plans are remanded, BLM will be required to undertake further NEPA analysis that "*could*" spur BLM to protect their "concrete interests." *Cottonwood Envtl. Law Ctr. v. USFS*, 789 F.3d 1075, 1082-83 (9th Cir. 2015), *cert denied*, 137 S. Ct. 293 (2016) (emphasis in original) (quoting *NRDC v. Jewell*, 749 F.3d 776, 783 (9th Cir. 2014)).

The Ninth Circuit has further held that a plaintiff can establish "standing to challenge programmatic management direction without also challenging an implementing project that will cause discrete injury." *Cottonwood*, 789 F.3d at 1081.[2] "[A] procedural injury is complete after [a management plan] has been

[1] *See, e.g.*, *Cent. Sierra Envtl. Res. Ctr. v. USFS*, 916 F. Supp. 2d 1078, 1087 (E.D. Cal. 2013) (finding standing to challenge travel management plan even though plan does not "reduce[] the total mileage in trails available for" motorized use, and even though approved trails "already were accessible" to motorized users); *see also Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1341 & n.3 (9th Cir. 1995) (holding that plaintiffs do not need to show a change in land use, "but only that the agency's illegal action" will have continuing adverse effects on the plaintiff's members).

[2] *Accord Citizens for Better Forestry v. DOA*, 341 F.3d 961, 975 (9th Cir. 2003) ("[W]e reaffirm…that environmental plaintiffs have standing to challenge not only site-specific plans, but also higher-level, programmatic rules that impose or

adopted, so long as it is fairly traceable to some action that will affect the plaintiff's interests." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1179 (9th Cir. 2011) (per curiam). Conservation groups were not required to provide any evidence regarding specific implementation decisions taken under the revised Plans; the NEPA violation "is complete even before an implementing project is approved." *Id.* at 1179-80. Nonetheless, here, as in *Sherman*, Conservation Groups' identification of site-specific projects already moving forward underscores the reasonableness of their members' concerns, *id.*, as does BLM's prediction that it will approve 28 new coal leases in Wyoming and more than 18,000 oil and gas wells in the Powder River Basin during the planning period. Doc. 72-2 ¶¶ 13-14, 18-19.

Conservation Groups' members have established "regular" and "continuing" use of the planning areas that is sufficient to provide standing, as well as specific plans to return to the affected areas. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1148-49 (9th Cir. 2000) (citing *Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000)). The facts here are nothing like those in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), or *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), both of which represent exceptional cases. As the Ninth Circuit has

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remove requirements on site-specific plans."); *Idaho Conservation League*, 956 F.2d at 1516.

explained, *Lujan* concerned "habitats of certain endangered species halfway around the world," and plaintiff's members "had no specific plans to travel the huge distances involved" in visiting those areas again. *Ecological Rights*, 230 F.3d at 1148 & n.7. Thus, *Lujan* was "not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis." *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring). In contrast, the Ninth Circuit has held that assumptions of regular use are reasonable where, for example, plaintiffs' members lived in the county where a challenged lumber mill was located; they had repeatedly, though not frequently, visited the creek that was being polluted by the mill; and they had "expressed an interest in participating in recreational activities in and around Yager Creek in the future." *Ecological Rights*, 230 F.3d at 1141, 1150-51. Numerous other cases have found standing on the basis of similar inferences.[3] Here, as in *Ecological Rights*, Conservation Groups' members live in and regularly use and

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[3] *Accord Dugong v. Gates*, 543 F. Supp. 2d 1082, 1094 (N.D. Cal. 2008) (finding standing where plaintiffs asserted continuing use of area for wildlife viewing, without specifying date of planned future use); *Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d 1151, 1162 (W.D. Wash. 2004) (finding standing for plaintiffs who "live [in] and use" affected area, without specifying future date of planned use); *Sierra Club v. FWS*, 235 F. Supp. 2d 1109, 1126-27 (D. Or. 2002) (finding standing where plaintiff lived close to affected area, repeatedly used area, and expressed general intent to return to area); *Nat'l Wildlife Fed'n v. Babbitt*, 128 F. Supp. 2d 1274, 1290 (E.D. Cal. 2000) (finding standing where plaintiffs asserted "regular[]" and "ongoing" use of area, without specifying date of planned future use).

visit the areas affected by the management plans. Doc. 72-3 ¶¶ 2, 5-6; Doc. 72-4 ¶¶ 2, 4; Doc. 72-5 ¶¶ 3-10; Doc. 72-6 ¶¶ 1, 4; Doc. 72-7 ¶¶ 1, 4.

The declarations here also go far beyond the scant declaration at issue in *Summers*, which the Ninth Circuit has routinely distinguished. The pertinent declaration in *Summers* did not address the procedural regulation at issue, much less explain how application of that regulation to any particular site would injure the declarant. *Cottonwood*, 789 F.3d at 1080-81 (distinguishing *Summers*); *accord Sherman*, 646 F.3d at 1178; *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707-08 (9th Cir. 2009); *Citizens for Better Forestry v. DOA*, 632 F. Supp. 2d 968, 975-80 (N.D. Cal. 2009). Here, Conservation Groups' members have demonstrated that they use lands within the planning areas, and that the plans cause injury by failing to adequately limit fossil fuel development of those areas.

Contrary to BLM and Intervenors' assertions, the Conservation Groups' members have specific plans to return to these affected areas. Doc. 72-1 at 5-6; Byron Supp. Decl. ¶ 3.[4] For example, BLM argues that Shannon Anderson's declaration fails to provide a "temporally-specific averment," Doc. 79 at 11; however, Anderson alleges that she visits public lands near Powder River Basin

[4] *See Idaho Conservation League v. USFS*, No. 2:12-CV-00004-REB 2014 WL 912244 at *2 (D. Idaho Mar. 10, 2014) (declarations allowed in a combined response-reply brief); *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068-69 (9th Cir. 1997) (accepting declarations submitted with reply brief).

coal mines "regularly," "at least 3 to 4 times per year," most recently in July 2017, and intends to continue such visits in the future. Doc. 72-5 ¶¶ 8, 10. One of the declarants whom BLM criticizes (Doc. 79 at 12-13) for failing to provide specific plans to return is in fact a Montana rancher whose land and home is within sight of areas affected by the challenged management plans. Doc. 72-3 ¶¶ 2, 5-8. As long-time residents of and visitors to areas throughout the Powder River Basin, Conservation Groups' members plainly have "such a 'personal stake' in the outcome" of BLM's programmatic planning decision to assure a live controversy and establish standing. *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (quoting *Baker v. Carr*, 369 U.S. 83 (1962)).

Finally, Intervenors and Amici incorrectly contend that Conservation Groups cannot establish standing to raise claims related to climate change. Doc. 81 at 8-12; Doc. 85 at 8-9; Doc. 88 at 8. Conservation Groups do not have to establish standing for each NEPA argument they advance. As the Ninth Circuit explained:

> Although Appellants' claims of procedural error relate to the government's alleged failure to consider climate change effects, Appellants' injuries which resulted from that error need not. For standing, it matters only whether the challenged governmental action would cause the plaintiff a concrete and redressable injury. Once such injury is established, the plaintiff may seek to invalidate the action that caused it "by identifying all grounds on which the agency may have failed to comply with its statutory mandate."

MEIC v. BLM, 615 Fed. App'x 431, 432 (9th Cir. 2015) (internal citations omitted) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006)); *accord Sierra Club v. FERC*, No. 16-1329, 2017 WL 3597014, at *3 (D.C. Cir. Aug. 22, 2017); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306-307 (D.C. Cir. 2013). Amici's focus on *Amigos Bravos v. BLM*, 816 F. Supp. 2d 1118 (D.N.M. 2011), and *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), is entirely misplaced, as Conservation Groups do not assert injuries based on increases in greenhouse gas emissions, but rather from the local impacts caused by BLM's plans.

II. BLM Failed to Consider Reasonable Alternatives.

A. BLM Considered Only Identical Coal Alternatives.

BLM is required to consider a range of alternatives for managing public resources. This is particularly crucial where, as here, those plans manage the largest fossil-fuel producing region in the nation—and therefore play a large role in the worsening state of our climate. Nevertheless, BLM confined its consideration to identical and harmful business-as-usual management scenarios—failing to consider *any* alternative that would limit the amount of coal extracted or greenhouse gas pollution emitted—in violation of NEPA.

BLM's entire defense rests with the proposition that it could maintain the status quo and ignore any other alternatives in defiance of NEPA's mandate. BLM does not dispute that each alternative made identical amounts of land and coal reserves available to leasing, or that each alternative predicted the same amount of coal development. Doc. 79 at 16.

First, BLM argues it was somehow exempt from considering a range of coal-management alternatives on the basis that there was no new information to warrant updating its decades-old analyses that, collectively, made 110 billion tons of coal available for leasing. Doc. 79 at 16-18; Doc. 72-2 ¶¶ 23, 27. BLM fails to explain why climate impacts do not constitute new information. In fact, climate impacts were not addressed in the prior analyses, but now affect nearly all resources in the planning areas. Doc. 72-2 ¶¶ 9, 26, 28; *cf. id.* ¶¶ 9-10; *see also* Doc. 79 at 16-17.

Second, BLM claims that Conservation Groups waived their coal alternatives argument. Doc. 79 at 17. To the contrary, Conservation Groups repeatedly asked BLM to consider management that would reduce coal development to protect the climate; objected to BLM's failure to consider any coal alternatives; and insisted that BLM's decades-old coal-management analyses were "stale" and "extremely out of date." Doc. 72-2 ¶¶ 21, 31; MCFO:683-24415 to -24416; MCFO:681-24383 to -24384. These "clearly expressed concern[s]" about

BLM's lack of coal alternatives preserved this argument. As explained in *Vermont Yankee Nuclear Power Corp. v. NRDC*, NEPA plaintiffs "must bring sufficient attention to the issue to stimulate the [agency's] consideration of it." 435 U.S. 519, 550 (1978) (quotation omitted). "Plaintiffs need not state their claims in precise legal terms, and need only raise an issue with sufficient clarity to allow the decision maker to understand and rule on the issue raised." *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1065 (9th Cir. 2010) (quotation omitted).[5] Further, no waiver can occur when the agency has "independent knowledge of the issues that concern petitioners," which, here, BLM unquestionably had. *Barnes v. DOT*, 655 F.3d 1124, 1132 (9th Cir. 2011); BUF:1961-128278 (internal BLM email asking whether there was any specific response to the comment requesting an alternative that leased less coal).

Third, BLM argues it was not required to consider any range of coal alternatives because the planning decision was programmatic—which fundamentally misapprehends the purpose of BLM's management planning obligations. BLM must determine at the programmatic planning stage what land to make available to leasing by considering, among other things, competing multiple-use values. 43 C.F.R. § 3420.1-4(e)(3). This is "*the major* land use planning

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[5] *Accord Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 965-66 (9th Cir. 2002) (comments need not cite specific regulations).

decision concerning the coal resource." *Id.* § 3420.1-4(e) (emphasis added). BLM cannot cite to any authority supporting its deferral of this analysis to the leasing stage. By failing to assess coal development alternatives *at the programmatic* level—as regulations demand—on the promise that such analysis is deferred to subsequent review of industry-nominated leases, BLM unlawfully cuts the public out of the programmatic coal planning process. *Id.*

The cases BLM cites in support of its position are inapposite. In *Western Watersheds v. Abbey,* BLM had no legal obligation to consider grazing practices, and hence a reduced grazing alternative, at the land use planning stage because the governing legal authority—a national monument proclamation—mandated that the agency's existing grazing policies "shall continue to apply," which BLM interpreted to "exclude programmatic changes to grazing." 719 F.3d 1035, 1039, 1046-47 (9th Cir. 2013). The Court upheld the agency's decision to exclude "changes to its grazing practices from the scope and purpose" of its management plan and, accordingly, exclude consideration of a reduced grazing alternative on those narrow grounds. *Id.* at 1046-47. Here, by contrast, regulations *require* BLM to assess what amount of coal to make available for leasing at the "land use planning" stage. 43 C.F.R. § 3420.1-4(e). Moreover, BLM does not dispute that a reduced coal alternative would meet the plans' purpose and need of addressing

changed conditions and reducing greenhouse gas emissions. *Compare* Doc. 72-2 ¶¶ 7-11, *with* Doc. 79 at 16-18.

BLM's reliance on *Western Watersheds v. Kenna*, 610 F. App'x 604, 606 (9th Cir. 2015), and *High Sierra Hikers Ass'n v. DOI*, 848 F. Supp. 2d 1036, 1052 (N.D. Cal. 2012), is similarly misplaced. Unlike here, the agencies in both cases considered a range of alternatives. *See Kenna*, 610 F. App'x at 606 (noting that agency's five alternatives considered "different allowances for grazing"); *High Sierra*, 848 F. Supp. 2d at 1052 (noting that agency considered five alternatives for stock use in parks, "ranging from a no-stock approach to a number of options"). Here, BLM failed to consider varied levels of land available for coal leasing or a no-leasing option. Instead, as BLM concedes, each plan considered identical options. Doc. 79 at 16; *see Or. Natural Desert Ass'n v. BLM* ("*ONDA*"), 625 F.3d 1092, 1123-24 (9th Cir. 2008) ("'uncritical[]' privileging" of one alternative violates NEPA) (quoting *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982)).[6]

BLM submits that eliminating coal deposits from leasing consideration at the planning stage would not protect any specific resources. Doc. 79 at 17. On the contrary, such coal deposits would no longer be subject to development, and the

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[6] *See also Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800, 813 (9th Cir. 1999) ("virtually identical alternatives" violate NEPA); *Abbey*, 719 F.3d at 1051 (alternatives with "no meaningful difference" violate NEPA).

carbon they hold would not be emitted, protecting both the land where these mines sit and the climate. Additionally, BLM acknowledged that planning decisions can reduce greenhouse gas emissions—because each plan identified the goal to "reduc[e]" "greenhouse gases." Doc. 80 ¶ 28.

Intervenors raise additional arguments, contending that BLM in fact considered an adequate range of alternatives in the Buffalo Plan: first because of limitations placed on exploration, and second because ranges of alternatives related to other resources were included. Doc. 82 at 13-14; Doc. 85 at 10-11.

Although Peabody admits the Buffalo environmental impact statement ("EIS") did not analyze differing acres open to coal leasing, it claims BLM's range was sufficient because one alternative modestly reduced the area open for coal *exploration*, and that that could indirectly affect coal leasing. Doc. 85 at 11-12.[7] In *ONDA*, the court rejected a similar claim from BLM, which argued that nearly identical alternatives that failed to close a significant portion of the planning area to off-road vehicles ("ORVs") were sufficient because they considered "a wide range of use allocations between open and limited ORV designations." 625 F.3d at 1124. The Ninth Circuit held "[a] limited designation, even with the possibility of

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[7] In the Buffalo EIS, BLM did not conclude that limited exploration would lead to lower levels of coal leasing. On the contrary, in all alternatives BLM anticipated an identical number of coal leases and identical coal production. Doc. 72-1 at 9.

closure, does not provide the protection equivalent to a straightforward closure." *Id.*[8] Similarly, as here, limitations on coal exploration are not equivalent to "straightforward closure" of areas to future coal leasing.

On the other hand, Wyoming contends that BLM's failure to consider distinct coal alternatives was permissible because it considered alternatives affecting other resources. Doc. 82 at 13. Such consideration is not transferable. The Ninth Circuit requires agencies preparing land management plans to consider a reasonable range of alternatives across distinct resource areas. *See, e.g.*, *ONDA*, 625 F.3d at 1124 (failure to consider ORV alternatives violated NEPA). As detailed above, Wyoming's reliance on *Kenna* is misplaced because, unlike here, the agency there actually considered a range of alternatives.

Courts resoundingly recognize an agency's duty to consider a reasonable range of alternatives when making programmatic decisions. *See, e.g.*, *Block*, 690 F.2d at 768 (agency failed to consider alternative allocating greater percentage of planning area to Wilderness); *see* Doc. 72-1 at 9 n.5 (collecting cases). BLM's failure to do so here violated NEPA.

[8] *Accord Abbey*, 719 F.3d at 1051 (cosmetic differences between alternatives that do not change the "same underlying action" do not satisfy NEPA alternatives requirement).

B. BLM Failed to Consider Alternatives to Reduce Methane Emissions.

BLM also violated NEPA by failing to consider any alternative requiring use of viable and cost-effective measures to control methane pollution. *See NRDC v. Evans*, 168 F. Supp. 2d 1149, 1160 (N.D. Cal. 2001), *order aff'd in part, vacated in part on other grounds*, 316 F.3d 904 (9th Cir. 2003) (finding alternatives analysis insufficient where agency failed to address any of commenter's proposed alternatives or explain its failure to do so, and did not offer any appropriate alternatives of its own). For both EISs, Conservation Groups called on BLM to include a methane mitigation alternative requiring operators to use measures such as "low bleed" or "no bleed" pneumatic devices and frequent leak detection and repair on oil and gas wells. Doc. 72-2 ¶ 33.

BLM argues that it was not required to consider an alternative requiring specific methane mitigation measures because both the Miles City and Buffalo EISs included the "general goal of reducing the impact of GHG emissions in the planning area." Doc. 79 at 20. However, the EISs' adoption of this goal underscores, rather than excuses, the need to consider reasonable alternatives that would further this goal. *See New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 709 (10th Cir. 2009) (judging reasonableness of the range of alternatives "with reference to an agency's objectives for a particular project").

BLM cannot defer this analysis to a later stage. As explained in Conservation Group's opening brief, "[i]f it is reasonably possible to analyze the environmental consequences in an EIS for an RMP, the agency is required to perform that analysis." *Kern v. BLM*, 284 F.3d 1062, 1072 (9th Cir. 2002), *see also* 40 C.F.R. § 1501.2 (requiring analysis at "the earliest possible time"). Inherent in this analysis of environmental consequences is an analysis of alternatives that would reduce impacts. 40 C.F.R. § 1502.14. Contrary to BLM's claim that deferring analysis of mitigation measures to the project-level stage "is how RMP planning is supposed to work," Doc. 79 at 20, "NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment." *Kern*, 284 F.3d at 1072.

BLM does not dispute that analysis of methane mitigation measures is "essential to making a 'reasoned choice'" about whether, where, and how to allow drilling in the planning areas, and that BLM therefore must perform this analysis eventually. *Block*, 690 F.2d at 767. BLM has not identified any reason why it is not "reasonably possible" to provide this evaluation now, rather than waiting until project-level analysis. *Kern*, 284 F.3d at 1072. Such measures can be uniformly applied across the planning areas, and BLM has not argued that there is anything "site specific" about evaluation of the methane control technologies identified by

Conservation Groups and EPA. Not only has BLM failed to meet *Kern*'s "reasonably possible" standard, BLM has not identified any benefit that would arise from delaying this analysis. On the other hand, evaluation and application of methane mitigation measures at the RMP-stage provides numerous benefits, including increased operator certainty (facilitating, for example, the implementation of infrastructure to capture methane emissions, or contracts with midstream oil and gas processing, storage, and transportation companies); uniformity in obligations for all operations in a field office; and increases in BLM efficiency by avoiding case-by-case analysis and application of mitigation measures at the project level. Indeed, as Conservation Groups explained prior to adoption of the plans, BLM's Tres Rios field office recently evaluated and required methane mitigation measures as part of a plan revision, and BLM offered no explanation for divergence from Tres Rios here. Doc. 72-2 ¶ 34.

By failing to consider an alternative requiring methane mitigation, BLM prevented itself and the public from accessing the full scope of required environmental information that would have enabled a reasoned choice. *New Mexico*, 565 F.3d at 715-16.

III. BLM Failed to Take a Hard Look at Greenhouse Gas Emissions and Misled the Public Regarding the Climate Impacts of the Buffalo and Miles City Plans.

NEPA's mandate is unambiguous: federal agencies must analyze direct, indirect, and cumulative impacts. 40 C.F.R. § 1502.16(b), 1508.7, 1508.8; *see also Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 96 (1983) (recognizing analysis as NEPA's "key requirement"). Here BLM made crucial errors in its NEPA analyses, improperly concealing the true climate impacts of BLM's plans from decisionmakers and the public.

A. BLM Failed to Take a Hard Look at the Indirect Emissions of Greenhouse Gases from Combustion of Fossil Fuels Produced Under the Plans.

While purporting to analyze the plans' climate impacts, BLM refused to disclose the vast majority of carbon dioxide emissions—which occur when the coal, oil, and gas developed under these plans is burned—even though these emissions are foreseeable and quantifiable with simple multiplication based on information BLM already has. BLM provides two excuses for its failure: first, that emissions from combustion are "remote and speculative," Doc. 79 at 23; and, second, that it could lawfully delay quantification of these emissions to the leasing stage. Doc. 79 at 24. Neither excuse has merit.

First, contrary to BLM's claim that indirect emissions are speculative, BLM can reasonably estimate how much fossil fuel will be produced, how it will be used, and the greenhouse gas emissions that will result. BLM prepared "reasonably foreseeable development" scenarios estimating how much coal, oil, and gas will be produced under the plans. Doc. 72-2 ¶¶ 12-14. BLM now argues that these are "necessarily uncertain." Doc. 79 at 23 n.2.

BLM has already determined that the reasonably foreseeable development forecasts are sufficiently reliable to inform its NEPA analysis and, in fact, used them to quantify direct emissions from mining and drilling. Doc. 72-1 at 17-18, & 18 n.9. These forecasts can similarly be used to analyze indirect emissions from combustion. Indeed, BLM discussed the robust nature of these forecasts at length. For example, in the Buffalo plan BLM noted that it was likely that all of the expected coal production would come from twelve existing mines, rather than from new facilities. Doc. 72-2 ¶¶ 15-16. BLM reviewed the current reserves of those mines and examined U.S. Energy Information Administration estimates for future nationwide coal demand. *Id.* ¶ 47. Based on this information, BLM forecast the amount of land (106,400 acres), number of leases (28), and amount of coal (10.2 billion tons) it expected these mines would develop during the planning period. *Id.* ¶ 13. Having concluded that 10.2 billion tons of coal would foreseeably be mined,

BLM cannot now argue—for the first time—that it is not reasonably foreseeable that 10.2 billion tons of coal will be burned.[9]

BLM acknowledged that "[a]lmost all of this coal is used to generate electricity," BUF:6-1789,[10] belying BLM's present claim that it cannot foresee "which specific uses will be made of those minerals." Doc. 79 at 23. BLM also knows how much carbon dioxide will be emitted when those fossil fuels are inevitably burned.[11] BLM routinely makes these calculations at the coal leasing stage based on emissions factors, and can do so for natural gas as well. Doc. 72-2 ¶¶ 46-53. Any uncertainty as to "the exact geographic area covered by [mineral] leases," Doc. 79 at 23, is irrelevant to estimates of greenhouse gases emitted from foreseeable production volumes, because nothing about that analysis is site specific. *Cf. N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 973 (9th Cir. 2006).

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[9] BLM's brief argues that various post-decisional events demonstrate the uncertainty of these scenarios. Doc. 79 at 23 n.2. "Reasonable forecasting and speculation is implicit in NEPA," *Kern*, 284 F.3d at 1072 (quoting *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 n.6 (9th Cir. 1984)). BLM has not shown that these forecasts were unreasonable when they were adopted and has not argued that actual coal production has deviated from BLM's forecasts.

[10] *See Sierra Club*, 2017 WL 3597014, at *8 (requiring quantification of carbon dioxide from burning natural gas carried by a pipeline construction project because "this is not just 'reasonably foreseeable,' it is the project's entire purpose.").

[11] Conservation Groups note that indirect emissions would be more than 80 times the amount of direct greenhouse gas emissions that BLM disclosed. Doc. 72-2, ¶ 52; BUF:1996-130444.

Second, BLM's argument that it can defer analysis until the leasing stage is equally meritless. Doc. 79 at 24. As detailed above, deferring analysis when it can reasonably be completed is unlawful. *Kern*, 284 F.3d at 1072. BLM has neither attempted to distinguish *Kern* nor provided contrary authority. *Native Village of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014), cited by BLM, supports Conservation Groups' arguments in that it affirms *Kern*'s holding that agencies must "analyze environmental consequences as soon as it is 'reasonably possible' to do so." *Id*. at 498 (quoting *Kern*, 284 F.3d at 1072).

The various other excuses offered by BLM and Intervenors are similarly unavailing. BLM alleges it "explained why additional modeling or analysis was impractical," Doc. 79 at 22 (citing Doc. 80 ¶¶ 31-38, 74-82), but the cited paragraphs say nothing about quantifying downstream emissions; instead, they refer to "modeling on a global scale" to "assess[] the impacts of GHG emissions on global climate change," ¶ 38, and "forecast[ing] climate change at local scales." Doc. 80 ¶ 82. The remaining paragraphs do not address additional analysis at all. These assertions about difficulty in forecasting the physical impacts of climate change have no bearing on Conservation Groups' request that BLM use two pieces of currently available information—BLM's reasonably foreseeable development

scenarios for each plan, and the conversion factors used in leasing EISs—to account for and disclose foreseeable greenhouse gas emissions. Doc. 72-1 at 19.

Similarly, BLM's unsupported hypothesis that "technological changes ... can occur" between adoption of the plans and when combustion occurs has already been rejected as "anything but a hard look." Doc. 79 at 23 n.2; *High Country Conservation Advocates v. USFS*, 52 F. Supp. 3d 1174, 1197 (D. Colo 2014). Rightfully, "[t]he agency cannot rely on unsupported assumptions that future mitigation technologies will be adopted." *Id.*

Peabody's argument, that BLM had no ability to prevent Powder River Basin coal from being extracted, and thus no obligation to consider impacts from that extraction, is incorrect. Doc. 85 at 16. Peabody's citation to *Department of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004), is inapposite. Here, BLM plainly has authority to reduce areas available for coal development through the management planning process based on, among other things, potential impacts to "nationally important" resources. 43 C.F.R. § 3420.1-4(e); *accord Sierra Club*, 2017 WL 3597014 at *8-9.

Finally, BLM's reliance on *WildEarth Guardians v. USFS* is misplaced. Doc. 79 at 24. There—unlike here—BLM did, in fact, estimate the downstream combustion emissions of the leased coal. 120 F. Supp. 3d 1237, 1270 (D. Wyo.

2015) (noting BLM estimated approximately 749.6 million metric tons of carbon dioxide would be emitted from combustion).

B. BLM Failed to Take a Hard Look a Cumulative Climate Impacts.

BLM arbitrarily confined its analysis of greenhouse gas emissions to individual planning areas, without ever analyzing the cumulative climate impact of BLM's fossil fuel management on a broad scale. As explained in the opening brief, BLM had the data and tools to estimate, at a minimum, foreseeable emissions resulting from the plans approved in the Record of Decision here. Doc. 72-1 at 24-25.

BLM has not provided any rational justification for failing to provide an estimate of the cumulative climate impacts of its decisions. Both EISs recognized that greenhouse gas emissions impact the climate worldwide, BUF:6-2093, MC:7-3078, and BLM agrees that "traditional cumulative effects" principles accordingly require a broad analysis. Doc. 79 at 25, *see* BLM NEPA Handbook, H-1790-1, BUF:227-22721; *Hall v. Norton*, 266 F.3d 969, 978 (9th Cir. 2001). While BLM now contends that a truly "worldwide" analysis "would be impossible," Doc. 79 at 26, BLM offers no explanation as to why it would be "impractical" to estimate and discuss cumulative emissions from BLM's *own* activity—whether from the two Powder River Basin plans, the eight Rocky Mountain regional plans BLM

concurrently revised, or from BLM's management of 700 million acres of federal mineral estate. *Cf. Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (recognizing that showing of infeasibility may warrant narrowing cumulative effects analysis). More broadly, BLM's contention that "traditional" cumulative effect principles are inapplicable to climate analysis has been squarely rejected by the Ninth Circuit, which identified "[t]he impact of greenhouse gas emissions on climate change [a]s precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1217 (9th Cir. 2008).

BLM's reliance on *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003), in support of its request for deference is unavailing. Doc. 79 at 27. *Selkirk* does not grant BLM unfettered discretion in determining the geographic scope of cumulative effects analysis. Instead, *Selkirk* holds where an agency determines that activities in two areas will not have overlapping effects, courts will defer to that factual conclusion and the corresponding decision not to include both actions or areas in a cumulative effects analysis. 336 F.3d at 958. Here, BLM argues that it decided to limit the Buffalo cumulative effects analysis to the state of Wyoming, Doc. 79 at 27, but BLM fails to provide any explanation for this decision or supporting citations to the record. Courts cannot "defer to a void." *ONDA*, 625

F.3d at 1121. Moreover, the facts here are exactly the opposite of *Selkirk.* Here, BLM affirmatively determined that emissions from the planning area *would* impact areas outside of Wyoming, and that emissions outside Wyoming would impact the planning area. BUF:6-2093.

BLM incorrectly argues that its analysis of the cumulative impact of its own actions was implicitly "subsumed" within the general discussion of climate change—including BLM's evaluation of GHG emissions as a percentage of state, national, and global emission levels. Doc. 79 at 26-27. But BLM's approach fails to provide the public with an assessment of BLM's contribution to climate change. BLM's observation that the emissions attributed to the individual plans are a small portion of emission levels is simply a statement about the nature of climate change; it provides no insight into whether altering BLM's management of the planning areas to lessen the contribution to cumulative impacts is warranted. *Ctr. for Biological Diversity,* 538 F.3d at 1217; *Muckleshoot*, 177 F.3d at 810 (finding EIS informs determination as to "whether, or how, to alter" action "to lessen cumulative impacts."). These comparisons misleadingly imply that any individual action BLM might take to lessen climate change would ultimately be meaningless, but NEPA requires candid acknowledgment of the contribution of cumulative BLM actions to these totals. *Ctr. for Biological Diversity*, 538 F.3d at 1217 (holding that although

individual rule promulgated by the agency would have minor impact on climate, NEPA required analysis of cumulative impact of all agency rulemakings).

The cases cited by BLM and Intervenors do not establish a rule that comparison of individual project emissions with state and national inventories is a sufficient cumulative effects analysis. Although in *WildEarth Guardians*, 738 F.3d 298, the D.C. Circuit held that comparison with such inventories "suffice[d]," and that NEPA did not require a more detailed analysis of the cumulative effects of eleven specific proposed leases, because those leases were in their "infancy" and not "reasonably foreseeable," 738 F.3d at 310, it does not call into question Conservation Groups' argument that cumulative BLM emissions are foreseeable here. Insofar as *WildEarth Guardians* is persuasive at all, it at most supports discussing the impact of cumulative BLM emissions by comparing them to state and national totals. As the Ninth Circuit explained, agencies must specifically address their own foreseeable cumulative actions. *Ctr. for Biological Diversity,* 538 F.3d at 1217; *see also Hall*, 266 F.3d at 378. A case cited by Cloud Peak, Doc. 88 at 13, *Barnes v. DOT*, did not concern a claim about quantifying cumulative greenhouse gas emissions. Instead, the court upheld comparison to state and national inventories as a measure of the intensity of a proposed project. 655 F.3d 1124, 1135, 1139 (9th Cir. 2011).

NEPA required BLM to analyze and disclose the cumulative emissions resulting from BLM's planning and management of fossil fuel extraction. Providing cumulative BLM emissions would provide additional information that is absent from the plans, but was necessary to inform BLM's analysis. Moreover, once BLM provided these cumulative emission totals, BLM should have addressed whether this cumulative perspective would provide a foundation for additional analysis. Both EISs limited their discussion of climate impacts to disclosing direct emission totals, and concluded that it was impossible to determine the physical impacts of emissions from individual planning areas. BUF:6-2093, MC:7-3078. As Conservation Groups explained, the cumulative perspective, including indirect emissions from burning fossil fuels extracted from BLM-managed lands, facilitates additional analyses that could illustrate the impacts of BLM's fossil fuel management, including use of "carbon budgets" and the "social cost of carbon." Doc. 72-1 at 25-27. BLM arbitrarily ignored these measures—and every other methodology—that would have allowed the decisionmaker and public to understand the magnitude and severity of cumulative emissions, as NEPA demands. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989); *ONDA*, 625 F.3d at 1099-1100.

C. BLM Failed to Take a Hard Look at Methane Emissions.

BLM failed to disclose the true impact of methane emissions from the Buffalo and Miles City plans by ignoring near-term impacts and knowingly using old data that underestimates methane's long-term impacts. These failures resulted in a severe underrepresentation of climate impacts. Methane is a powerful greenhouse gas, with a far greater global warming potential ("GWP") than carbon dioxide and with effects that are strongest in the first few decades following emission. Doc. 72-2 ¶¶ 66, 68; MC:7-3065-66; BUF:1407-91731. Yet neither the Buffalo nor Miles City plans address this near-term impact, Doc. 79 at 30; MC:7-2712-13; BUF:6-2091, violating NEPA regulations requiring consideration of short-term effects. 40 C.F.R. § 1508.27(a). Accounting for 20-year impacts using recent scientific evidence increases the impact of methane emissions, relative to carbon dioxide, to levels more than four times those disclosed by BLM, *i.e.*, from 21 to 87. BLM also used indefensibly low estimates of methane's GWP in disclosing the long-term impacts of methane emissions. By BLM's own admission, the GWP it used for methane had been repeatedly superseded,[12] and BLM thus

[12] Even on the 100-year timeframe, the value accepted in 2007, the GWP of 25, is 20% greater than BLM's estimate here, and more recent generally accepted estimates published prior to completion of the EISs are up to 70% greater (comparing GWPs of 36 and 21). *See* Doc. 72-1 at 31; Doc. 72-2 ¶ 69.

ignored NEPA regulations that mandate "[a]ccurate scientific analysis." *Id.* § 1500.1(b).

Using only the 100-year GWP fails to meaningfully account for near-term impacts, because all available estimates of 20-year impacts (whether published in 1996, 2007, or 2013) have concluded that methane's ability to cause warming, relative to carbon dioxide, is much greater in the short-term than in the long-term. *See* Doc. 72-2 ¶¶ 69(b)-(e)[13]; Doc. 80 ¶ 76; MC:7-2712, MC:816-33719; BUF:1996-130451. Even as to long-term impacts, BLM admits that more recent estimates of methane's potency were available. Doc. 79 at 30, n. 5; MC:7-2712. BLM chose to ignore this information and relied on a "stale" estimate of 100-year GWP that had already been superseded before BLM initiated scoping for these plan revisions, and which was superseded again prior to finalization of the EISs. Doc. 72-2 ¶ 69(e), *cf. City of Carmel-by-the-Sea v. DOT*, 123 F.3d 1142, 1151 (9th Cir. 1997) (distinguishing *Seattle Audubon Soc. v. Espy*, 998 F.2d 699 (9th Cir. 1993)). BLM's response did not dispute that its chosen 100-year GWP of 21 is

[13] Conservation Groups' SOF, Doc. 72-2 ¶ 69(e) contains a typographical error: the 2013 values are 36 and 87. MC:816-33719; BUF:1996-130451.

neither the "best available science"[14] nor an accurate representation of the impact of methane emissions. 40 C.F.R. § 1500.1(b).

BLM also does not dispute that it could have performed the near-term impacts analysis for methane, but instead relies exclusively on the claim that its chosen 100-year GWP of 21 was used for comparison with external emission inventories, and that this choice deserves deference. Doc. 79 at 30-31. However, this is not a "dispute[] between scientists," *id*. (quotation omitted), warranting deference. There is no "conflicting evidence" as to whether BLM's GWP estimate is accurate; nor does BLM contend that the 100-year GWP of 21 accurately reflects the impact of methane emissions in the near term. *Cf. City of Carmel*, 123 F.3d at 1151 (court deferred where experts at different agencies disagreed as to whether certain lands were wetlands). Instead, BLM arbitrarily chose to apply a single, outdated 100-year GWP looking only at long-term impacts, to the exclusion of other more recent and available data, including data that facilitated the calculation

[14] BLM has interpreted NEPA to require "best available science." Doc. 72-1 at 28. BLM's response neither disputes nor disavows this interpretation. Intervenor Cloud Peak, in arguing that NEPA does not require best available science, solely cites cases concerning other agencies not subject to BLM's interpretation or guidance. Doc. 88 at 24.

of methane's potent short-term impacts.[15] Interpreting NEPA's command to address short-term impacts is a legal question, not a scientific one, on which BLM receives no deference. *See Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002). BLM's outright omission of methane's short-term impacts is arbitrary.

BLM further argues that it used the 100-year GWP of 21 (rather than best available and current estimates) because BLM sought to facilitate comparison with existing state emission inventories.[16] Doc. 80 at 31; MC:7-2712; BUF:6-2093. NEPA's central command, however, is to use accurate science to analyze and disclose the effects of the agency's proposed action. 40 C.F.R. § 1502.1. BLM cannot understate impacts—disregarding the regulatory obligation to provide "accurate" analysis—simply because BLM believes that comparison to external inventories would be useful. BLM was free to include such comparisons based on outdated estimates if properly caveated and offered *in addition* to accurate assessment of these plans' actual near- and long-term impacts.[17] BLM was not,

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[15] BLM conducted other analyses in the FEISs using the 20-year planning period. *See, e.g.*, Doc. 79 at 23 n.2; *see also* Doc. 72-2 ¶¶ 66, 68 (methane's impact concentrated in first years after emission).

[16] BLM's outdated GWP does not meaningfully facilitate comparison to national inventories, which are calculated using recent GWPs. Doc. 72-1 at 30.

[17] This is, in effect, what EPA does in its national emission inventories; calculating emissions using the outdated value required by United Nations protocols while also providing calculations using what EPA regards as the best available science. Doc. 72-2 ¶ 74.

however, free to omit entirely more recent, better accepted estimates demonstrating more severe impacts without explanation.

Nor do BLM's unexplained citations to EPA reporting rules justify BLM's reliance on outdated data. Doc. 79 at 30. As Conservation Groups explained, these rules do not reflect EPA's scientific judgment, Doc. 72-1 at 29, a fact BLM does not dispute. Even if EPA's regulations were relevant, BLM offers no justification for its refusal to rely on the more current EPA regulation that was in effect at the time these plans were finalized. *See* 78 Fed. Reg. 71904, 71911 (Nov. 29, 2013) (adopting 2007 estimate and explaining that "each successive [IPCC] assessment provides more accurate GWP estimates").

Finally, BLM cannot excuse its arbitrary choice of GWP by arguing that the public could perform a substitute analysis using an accurate value. Doc. 79 at 31; MC:7-2712. The burden is on BLM, not the public, to provide "[a]ccurate scientific analysis." 40 C.F.R. § 1500.1(c). Leaving it to the reader to conduct this analysis violates *both* of NEPA's core purposes: to "take a 'hard look' at how the choices before [the agency] affect the environment, and then to place [the agency's] data and conclusions before the public." *ONDA*, 625 F.3d at 1099-1100.

IV. BLM Failed to Adequately Consider Cumulative Impacts to Air Quality.

BLM's defense of its cumulative air quality analysis is unconvincing. While BLM relies on the use of national ambient air quality standards ("NAAQS") as a means to evaluate air quality impacts on human health, Doc. 79 at 31-33, it fails to respond to Conservation Groups' argument that these health-based standards provide the public with no information on impacts to other air quality concerns, such as visibility and vegetation. Doc. 72-1 at 33; Doc. 72-2 ¶ 79. Having chosen to disregard this argument, BLM has waived the issue. *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1122 (9th Cir. 2017).

BLM similarly fails to justify the void in analyzing the combined impacts of the plans with existing emissions from nearby power plants, inside and outside of the planning areas. As Peabody helpfully notes, in responding to comments, BLM unequivocally stated that the Buffalo plan "does not address emission sources that the BLM has no authority or responsibility for managing, such as existing power plants." Doc. 86 ¶ 17 (quoting BUF: 6-4100). As Conservation Groups explained, this omissions is significant, both because "coal-fired power plants in the [Buffalo] planning area emit … nearly 10 times more [CO_2] than BLM's asserted baseline," BUF:1996-130437, and because BLM omitted emissions from nearby power plants located outside of the planning area—including Colstrip, located directly north of

the planning area in Montana, and the Dave Johnston plant, located directly south of the planning area near Glenrock, Wyoming. BUF:1996-130438.

BLM's only response is that it should be afforded "broad discretion" in setting the geographic scope of cumulative-impacts analysis. Doc. 79 at 33. However, agency discretion is not limitless. "An agency must provide support for its choice of analysis area, and must show that it considered the relevant factors." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002). No such support was provided here, and *Selkirk* offers no reprieve. Doc. 79 at 33. There, the court accepted the agency's conclusion that a nearby project would not add cumulative impacts because a ridgeline created a physical barrier that separated the projects' respective impacts into different watersheds, different viewsheds, and with distinct impacts to wildlife. *Selkirk*, 336 F.3d at 958-59. BLM offers no evidence suggesting that air emissions from nearby power plants are similarly segregable, or that other significant environmental impacts isolate themselves along BLM field office boundaries. *See* Doc. 34 at 21, 24 (noting "significant transboundary and cumulative environmental impacts to air, water, lands" and concluding that "the Miles City RMP and Buffalo RMP address neighboring jurisdictions that overlap in terms of landscape-level realities.").

CONCLUSION

For the reasons stated above, Conservation Groups ask that the Court find that BLM violated NEPA in approving the Buffalo and Miles City Resource Management Plans.

Respectfully submitted this 8th day of September, 2017.

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