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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

POWDER RIVER BASIN RESOURCE COUNCIL, *et al.,*

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.,*

Defendants,

and

STATE OF WYOMING, *et al.,*

Intervenor-Defendants.

Case No. 1:22-cv-02696-TSC

**STATE OF WYOMING'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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Administrative Procedure Act ..... APA

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United States Bureau of Land Management .....Bureau

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Wyoming Department of Environmental Quality..... WDEQ

Wyoming Game and Fish Department .....WGFD

**GLOSSARY cont'd.**

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Wyoming Oil and Gas Conservation Commission ..... WOGCC

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## INTRODUCTION

Like many oil and gas projects in Wyoming, the Converse County Oil and Gas Project is set against the backdrop of intermingled private (fee), State, and federal lands. For decades, the federal government, the State of Wyoming, local authorities, and landowners have worked across fence lines to regulate oil and gas development and ensure that Wyoming's natural resources remain protected. The Groups' motion for preliminary injunction, however, leads this Court to believe that the Bureau shoulders the whole weight of regulating oil and gas wells regardless of where that development may occur. The Groups' one-sided depiction of the regulatory landscape in Wyoming naively ignores the State's historic role in regulating oil and gas operations, the rights of landowners, and the State's sovereign authority to regulate State trust lands.

The Groups' motion challenges the Project on two fronts. First, the Groups challenge the Bureau's fee/fee/fed policy, which reiterates the longstanding practice of cooperation amongst federal land managers, the State, and landowners when making site-specific drilling decisions. (Dkt. 64-1 at 15-27). Second, the Groups challenge the Bureau's environmental analysis that evaluated the environmental consequences of the Project. (*Id.* at 28-36). The Groups' arguments, however, rely on the myth that the Bureau "disclaimed" all authority over fee/fee/fed wells, when in fact it recognized that its regulatory jurisdiction was only limited. (*See id.* at 26).

The Groups are not likely to prevail on the merits of their claims because their interpretation of the Bureau's regulatory authority has no basis in federal law and conveniently ignores relevant provisions in federal law that provide otherwise. The Groups' claim that the Bureau's authorization for the Project and its subsequent site-specific decisions violated NEPA is also premature because the limited record before this Court reveals that the Bureau did consider the environmental impacts associated with fee/fee/fed wells.

Despite challenging several hundred federal APDs, the Groups have not alleged irreparable harms associated with any one of these permits. Finally, should this Court balance the equities of enjoining the Project, the substantial public consequences that an injunction will have on Converse County, the public services it provides with oil and gas revenue, and the impact an injunction will have on the State weighs strongly in favor of denying the motion. For the following reasons, the State asks this Court to deny the Groups' motion for preliminary injunction.

## LEGAL BACKGROUND

This Court ordered that the State "must endeavor to coordinate with Federal Defendants and Defendant-Intervenors to incorporate by reference applicable law and facts, join arguments when appropriate, and avoid duplicative arguments." (Minute Order, Jan. 17, 2023). Accordingly, the State incorporates by reference the Federal Defendants' legal background section including its summary of the applicable provisions in the APA, FLPMA, NEPA, and the MLA.

## FACTUAL BACKGROUND

The State incorporates by reference the Federal Defendants' background sections describing the Project, the FEIS, ROD, and site-specific federal APD decisions.

### I. State Regulation of Oil and Gas Operations in Wyoming

The WOGCC regulates all oil and gas wells on federal, fee, and State trust lands in Wyoming. Wyo. Stat. Ann. § 30-5-104; (Kropatsch Decl. at ¶10). In addition to any required federal APD, oil and gas operators must also secure a state permit from the WOGCC before beginning any well pad construction and drilling operations. *Rules, Wyo. Oil & Gas Conservation Comm'n* ch. 3, § 8. The WOGCC also enforces rules for protecting public safety and the environment. (Kropatsch Decl. at ¶15). For example, WOGCC requires setback requirements from occupied buildings and approves plans for mitigating noise, light, dust, and traffic. (*Id.* at ¶15). It

enforces well casing requirements, regulates horizontal drilling and hydraulic fracturing, requires baseline groundwater monitoring on all wells, and authorizes venting and flaring. (*Id.* at ¶¶16-19). The WOGCC also regulates pits, disposal wells, the underground injection of waste water, well-site conditions, and maintains mandatory reporting requirements for spills, accidents, or fires. (*Id.* at ¶¶20-22). It oversees the abandonment and reclamation of well sites. (*Id.* at ¶¶23-24). Finally, WOGCC implements State sage-grouse protections by approving permit conditions with respect to timing stipulations, and density and disturbance caps. (*Id.* at ¶25).

In addition to WOGCC, other State agencies and local governments have jurisdiction over oil and gas activities in Wyoming. (PIR0158-0159).[1] The WDEQ Air Quality Division is authorized to enforce the CAA under an EPA-approved SIP for regulating criteria pollutants. 40 C.F.R. § 52.2620. (Vehr Decl. at ¶¶6-9). All oil and gas operations in Wyoming, aside from those on tribal lands not at issue in this case, are subject to State air quality permitting requirements. (Vehr Decl. at ¶9). Similarly, the WDEQ Water Quality Division possesses EPA approval to issue and enforce federal NPDES permits, Section 401 certifications, and shares regulatory jurisdiction with WOGCC over the disposal of oil field waste materials and spills. *See Rules, Wyo. Dep't of Env't Quality, Water Quality*, ch. 2, §§ 4-6; (Kropatsch Decl. at ¶¶14, 20). The State Engineer's Office issues water well permits and authorizes the appropriation of water used for industrial purposes. *See* Wyo. Stat. Ann. § 41-3-938. WGFD manages wildlife and coordinates with the Wyoming Department of Agriculture to control noxious weeds. (PIR0158-159); *see also* Wyo. Stat. Ann. § 23-1-103. Finally, Converse County permits oversize loads and has assumed responsibility for mitigating dust on county roads. (Willox Decl. at ¶¶26, 28).

[1] Citations beginning with "PIR" are to the documents attached as exhibits to Plaintiffs' Motion for Preliminary Injunction, Dkt. 64. The State included an index to those exhibits. (*See* Index at xii).

## II. State Trust Lands in Wyoming

When Congress admitted the State of Wyoming into the Union, it conveyed certain lands to the State "for the support of common schools." Act of 1890 § 4, 26 Stat. 664, 222-23 (1890). These State trust lands are regulated by the State and the proceeds from the sale and use of these lands are used for "educational purposes." Act of 1890 § 5, 26 Stat. 664 at 223. Congress expressly provided that these State trust lands "shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only." *Id.*. State trust lands are managed through OSLI and it collects revenue from oil and gas development and livestock grazing to fund its public education system. Wyo. Stat. Ann. § 36-6-101; (Scoggin Decl. at ¶¶4-5).

The Project Area includes 101,012 acres of State trust land. (PIR0004). The State holds title to the surface and mineral estate of these lands. (Scoggin Decl. at ¶18). The Bureau's fee/fee/fed policy applies to wellbores that produce Federal minerals from well pads located on non-federal land. (PIR4664). The fee/fee/fed policy explains that a "non-Federal landowner may also be a non-Federal governmental entity." (*Id.*). Thus, the fee/fee/fed policy applies to wells located on State trust lands when the subsurface wellbore produces from Federal minerals. (Scoggin Decl. at ¶11). The Bureau, however, does not have legal authority to regulate State trust lands. (*Id.* at ¶13). Moreover, the federal lease area is typically limited to the confines of the federal mineral estate and does not apply to "off-lease" activities. (*See* Kropatsch Decl. at ¶11). Although OSLI occastionally coordinates with the Bureau regarding fee/fee/fed wells on State trust lands, ultimately, State law applies to all development on State trust land. (Scoggin Decl. at ¶¶14-16).

## STANDARD OF REVIEW

To prevail on a motion for a preliminary injunction, the movant must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations omitted). In addition to a likelihood of success on the merits, the moving party must demonstrate some injury, as "[t]he basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)). If a party makes no showing of irreparable injury, the court may deny the motion without considering the other factors. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995).

## ARGUMENT

### I. The Groups are not likely to prevail on the merits because the Bureau's fee/fee/fed policy is lawful.

The Groups argue that the Bureau's "disclaimer" of jurisdiction over non-federal lands was an error of law. (Dkt. 64-1 at 15). This mischaracterizes the Bureau's fee/fee/fed policy which plainly states that its jurisdiction over non-federal lands is "limited." (PIR4664). Regardless, the Groups advance three novel legal theories in support of their motion. First, they argue that "general statutory delegations" give the Bureau the authority to regulate non-federal lands. (Dkt. 64-1 at 16). Second, the Groups contend that FLPMA renders the fee/fee/fed policy unlawful. (*Id.* at 20). Finally, the Groups argue that the MLA authorizes the Bureau to regulate surface operations on adjoining fee and State trust land. (*Id.* at 20-21).

Each of the Groups' arguments require this Court to either insert language into federal law that does not exist, or require the Court to ignore clear statutory direction from Congress that reserves State police power to regulate oil and gas operations. Accordingly, this Court should find that the Groups' challenge to the fee/fee/fed policy is not likely to prevail on the merits because their legal theories contravene well-settled principles of statutory interpretation.

**A. The Bureau's authority comes from Congress, not the Constitution.**

The Groups argue that the Bureau's authority over fee/fee/fed wells is "grounded in the Property Clause of the U.S. Constitution." (Dkt. 64-1 at 16). This argument is misleading because the Property Clause does not expressly convey any authority to the Bureau.

The Property Clause entrusts **Congress** with the power to regulate "Property belonging to the United States." U.S. Const. art. IV, sec. 3, cl. 2 (emphasis added). Thus, this Court's review of the Bureau's authority must first consider what Congress has enacted. *See Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) (stating that court's must remain mindful that determinations under the Property Clause are entrusted "primarily to the judgment of Congress"). The Groups then contend that Congress' authority under the Property Clause is "without limitations." (Dkt. 64-1 at 16) (citing *Kleppe*, 426 at 539). But the U.S. Supreme Court subsequently reiterated that "we made clear that the State is free to enforce its criminal and civil laws on federal land so long as those laws do not conflict with federal law." *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (citation and internal quotation marks omitted). Therefore, this Court's review of the fee/fee/fed policy must consider both what Congress has expressly enacted and applicable State laws that govern oil and gas operations.

**B. General statutory delegations do not authorize federal regulation of non-federal lands.**

The Groups' argue the Bureau's authority to regulate non-federal lands rests squarely in "general statutory delegations" in 43 U.S.C. §§ 2, 1457, and 1457(c). (Dkt. 64-1 at 18). But general statutory provisions are just that – generic – and do not confer or suggest that Congress intended the Bureau to regulate oil and gas activities on non-federal land.

The Groups cite 43 U.S.C. § 2, which was first adopted in 1836. July 4, 1836, ch. 352, § 1, 5 Stat. 107. The plain language reads that the Secretary,

> shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

43 U.S.C. § 2. This provision granted the General Land Office, the administrative precursor to the Bureau, with executive duties relating to the transfer of title of public lands to private individuals under early settlement laws. *See, e.g.,* Rev. Stat. § 453, Feb. 18, 1875, ch. 80, § 1, 18 Stat. 317; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 60 Stat. 1100. A vestige of the homesteading era, the plain language of this provision does not support the Group's argument that the Bureau is empowered to regulate oil and gas activities on non-federal land.

Courts have consistently applied 43 U.S.C. § 2, in the context of the Secretary's "general managerial powers" to resolve title disputes on public lands. *See Boesche v. Udall,* 373 U.S. 472, 476 (1963) (reviewing the Secretary's authority to cancel an invalid mineral lease on public land); *Corp. of the Catholic Bishop of Nesqually v. Gibbon*, 158 U.S. 155, 166 (1895) (citing Rev. Stat. § 453 as a basis for the Secretary to resolve a title dispute over public domain claimed by a mission); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-36 (1963); *and Cameron v. United States*, 252 U.S. 450, 455-57 (1920) (both reviewing the Secretary's authority to resolve

the validity of a mining claims on public land through administrative proceedings); *Silver State Land, LLC v. Schneider*, 843 F.3d 982 (D.C. Cir. 2016) (upholding the Secretary's termination of a public land sale). The Secretary's regulations promulgated under 43 U.S.C. § 2, confirm that this generic provision relates strictly to her administrative functions. *See, e.g.,* 43 C.F.R. Part 1822 (procedures for filing documents with the Bureau); 43 C.F.R. Part 1824 (procedures for publishing Bureau notices); and 43 C.F.R. § 3833.2 (procedures for amending the location of a mining claim).

The plain language of 43 U.S.C. § 2, the judicial interpretations of it, and the federal regulations promulgated under it all demonstrate that this "general" statute governs the Secretary's authority to resolve title disputes on federal land. This case does not involve a question over contested ownership of federal land, it involves the Bureau's regulatory jurisdiction. (Dkt. 44 at ¶¶6, 76). Regardless, the Groups insist that it is "immaterial" that 43 U.S.C. § 2 does not mention fee/fee/fed lands. (Dkt. 64-1 at 19). Statutory construction, however, does not permit a court to "insert convenient language to yield to the court's preferred meaning." *Borden v. United States*, — U.S. —, —,141 S.Ct. 1817, 1829 (2021). Thus, the Groups' suggestion that this Court can read 43 U.S.C. § 2 as granting the Bureau authority to regulate non-federal lands is contrary to the plain language of the law, judicial interpretations of that provision, and settled canons of statutory interpretation.

The Groups' reliance on 43 U.S.C. §§ 1457 and 1457c is equally dubious. (*See* Dkt. 64-1 at 18). These enactments recognize the Secretary's supervision over sub-agencies within the Department and authorize her to generally enforce unrelated provisions of Title 43. *See* 43 U.S.C. §§ 1457, 1457c. Moreover, this Circuit has rejected the argument that 43 U.S.C. § 1457c constitutes a specific authorization of secretarial authority. *See Wilderness Soc'y v. Morton*, 479 F.2d 842, 867 n.54 (D.C. Cir. 1973) (gleaning a specific authorization from 43 U.S.C. § 1201, now

codified at 43 U.S.C. § 1457c, "requires a leap of faith [the court] cannot make") (alteration added). Therefore, the Bureau's conclusion that it has limited authority over non-federal lands was not an error of law.

### C. FLPMA does not authorize the Bureau to regulate non-federal land.

The Groups also argue that two "specific" authorities in FLPMA confirm the Bureau's jurisdiction to regulate surface activities on non-federal land. (Dkt. 64-1 at 20, 23). First, they contend that language in FLPMA requiring the Bureau to regulate the use and development of "public lands" applies to fee and State trust land. (*Id.* at 20). Next, the Groups argue that the Bureau's statutory direction to prevent undue degradation on "public lands" includes non-federal lands. (*Id.* at 23). Both arguments are flawed because the Groups' argument contravenes the definition of "public lands" that Congress adopted in FLPMA.

#### i. The Bureau's authority under FLPMA is limited to public lands.

Congress defined "public lands" in FLPMA as "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership[.]" 43 U.S.C. § 1702(e). The Groups do not explain how this definition possibly authorizes the Bureau to regulate surface operations on lands owned entirely by private individuals or the State. (*See* Dkt. 64-1 at 20). The Groups' inability to identify any express language that authorizes the Bureau to regulate non-federal land should not surprise this Court. The plain language of the Property Clause limits Congress' authority to make needful regulations pertaining to "Property of the United States." U.S. Const. art. IV, sec. 3, cl. 2. Recognizing that Congress' constitutional authority rests in governing federal land, the Tenth Circuit Court of Appeals has rejected the argument that federal jurisdiction extends to adjoining State trust lands under broad mandates in federal land

management statutes. *Utah Native Plant Soc'y v. U.S. Forest Serv.*, 923 F.3d 860, 866-67 (10th Cir. 2019) ("the Property Clause's plain language is not self-executing and does not itself grant [a federal land management agency] authority over [ ] State lands adjacent to the [National Forest].)"

Tellingly, FLPMA also draws clear distinctions that demonstrate that the Bureau's authority is limited to federal interests. Section 1712(c)(8) recognizes that federal land planning should consider state air, water, noise, or other pollution standards that are applicable to federal lands. 43 U.S.C. § 1712(c)(9). Section 1732(b) also recognizes the role of states in managing wildlife resources as a function of their traditional state police powers. 43 U.S.C. § 1732(b); *Def. of Wildlife v. Andrus*, 627 F.2d 1238, 1249-50 (D.C. Cir. 1980) ("It is unquestioned that the States have broad trustee and police powers over wild animals within their jurisdictions[.]") (citation omitted).

Above all, FLPMA is a land use planning statute that governs the Bureau's landscape management of federal lands and does not authorize any specific federal action. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 504 (D.C. Cir. 2010) ("[FLPMA] does not, however, include a decision whether to undertake or approve any specific action.") (citing 43 C.F.R. § 1610.0-5(n)). The Bureau's fee/fee/fed policy correctly explained that "FLPMA does not authorize BLM to manage non-Federal lands" because Congress did not, and could not, extend its reach beyond federal land. (PIR2408). Therefore, this Court should reject the Groups' argument that the fee/fee/fed policy was an error in law. (*See* Dkt. 64-1 at 20).

**ii. The Groups' "undue degradation" claim lacks merit.**

The Groups also argue that the Bureau violated FLPMA's mandate to "prevent unnecessary or undue degradation" of public lands when it issued federal APDs under the fee/fee/fed policy. (Dkt. 64-1 at 23-24). To support their argument, the Groups rely on regulations that are either

repealed or do not apply to oil and gas development. In essence, the Groups ask this Court to make a *prima facie* determination that decisions by the Bureau to approve oil and gas development alone violated FLPMA.

But this Circuit's precedent does not support their argument. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011) (explaining that the Bureau "will often, if not always," fulfill FLPMA's requirement to prevent undue degradation by following its multiple-use mandate which anticipates both mineral extraction and conservation of the environment). Under the correct legal standard, the Groups have not met their burden of showing that the Bureau acted arbitrarily when it relied on its project-level analysis and the Casper RMP when it issued the challenged federal APDs.

The Groups argue that several federal regulations "confirm" that the Bureau's actions under the fee/fee/fed policy caused undue degradation of public lands. (Dkt. 64-1 at 23). The first regulation that the Groups cite, 43 C.F.R. § 2800.0-5(x), applied to right-of-way decisions and was repealed eighteen years ago. 70 Fed. Reg. 20970, 20979 (Apr. 22, 2005). None of the remaining authorities cited by the Groups relate to oil and gas development. *See* 43 C.F.R. § 3715.0-5 (mining occupancy); 43 C.F.R. § 3802.0-5(l) (mining exploration); 43 C.F.R. § 3809.5 (mining surface management). The Secretary's onshore oil and gas regulations provide no definition for "undue or unnecessary degradation." *See* 43 C.F.R. § 3100.0-5 (definitions for Onshore Oil and Gas Leasing: General); *and* § 3160.0-5 (definitions for Onshore Oil and Gas Operations). Therefore, this Court should reject the Groups' argument that the approval of oil and gas operations, in and of itself, constitutes undue or unnecessary degradation. (*See* Dkt. 64-1 at 23-24); *see also Biodiversity Conservation All.*, 174 IBLA 1, 5 (2008) (In light of the Secretary's multiple-use mandate in 43

U.S.C. § 1732, "Congress thus recognized that the mere act of approving oil and gas development does not constitute unnecessary or undue degradation under FLPMA[.]").

The proper question before this Court is whether the Bureau acted arbitrarily or capriciously in approving federal APDs under the Project EIS, ROD, and applicable Casper RMP. *See Salazar*, 661 F.3d at 76-77 (applying arbitrary and capricious standard). Here, the Groups offer no argument as to how the Bureau's permitting decisions, that relied on the applicable land use plan and project-level analysis, were arbitrary and capricious. (*See* Dkt. 64-1 at 23-24). The Casper RMP states that the Bureau's goal is to manage "leasable minerals without compromising the long-term health and diversity of public lands." (Fed. Ex. 2 at 2-15). Consistent with this goal, the Bureau determined it will approve drilling subject to site-specific Conditions of Approval. (PIR0005). Notably, the Bureau recognized that State and local agencies regulate various aspects of oil and gas development across all federal, state, and fee lands. (PIR0155).

The Groups also argue that the Bureau's permitting decisions may result in degradation to public lands through harms associated with air, dust, invasive species, groundwater, and wildlife. (Dkt. 64-1 at 23-24). However, the Bureau identified that state permits or local regulations apply to each of these concerns. (*See* PIR0158-60). As this Circuit explained, "unnecessary and undue degradation" means the occurrence of "something more than the usual effects anticipated" from development. *Salazar*, 661 F.3d at 76. In this case, the construction and operational surface disturbance from the Bureau's proposed action is estimated to only occupy 1.6 to 3.5 percent of the entire Project Area. (PIR0025). The Groups do not contend that the Bureau's approval of APDs with site-specific Conditions of Approval, backstopped by existing state and local regulatory mechanisms, are insufficient to prevent degradation of adjoining federal lands in the project area. *See Salazar,* 661 F.3d at 76 ("Our inquiry, then, is whether the record supports the Bureau's

determination that the [decisions] will implement sufficient measures to prevent degradation unnecessary to, or undue in proportion to, the development of the [permitted activities].”). Instead, the Groups have simply chosen to turn a blind eye to the State protections that apply on both non-federal and federal lands.

The Groups are not likely to succeed on the merits of their undue degradation claim because they have not met their burden of demonstrating that the Bureau has failed to meet its broad mandates under FLPMA. Specifically, the Groups have not offered any evidence to show that the Bureau acted arbitrarily when it approved the challenged APDs under the applicable Project, EIS, ROD or the Casper RMP. *See, e.g., Gardner v. BLM*, 638 F.3d 1217, 1222 (9th Cir. 2011) (rejecting argument that federal lands will suffer undue degradation in absence of evidence to the contrary). Additionally, the Groups have not demonstrated that the Bureau’s mitigation measures—combined with existing State permitting requirements—will result in “unnecessary” degradation to public lands beyond that typically associated with oil and gas development. *See Biodiversity Conservation All. v. BLM*, No. 09-cv-08-J, 2010WL3209444, at *27-28 (D. Wyo. June 10, 2010) (unpublished) (finding the Bureau properly balanced interests consistent with its mandate under FLPMA through mitigation measures). Therefore, this Court should reject the Groups’ argument that the authorization of the challenged APDs alone violated FLPMA.

**D. Congress reserved state police powers over oil and gas activities in the MLA.**

Next, the Groups’ argue that the MLA “*requires* BLM to regulate Fee/Fee/Fed wells, including their surface operations.” (Dkt. 64-1 at 20). The fee/fee/fed policy clearly states that the Bureau has jurisdiction over the federal mineral interest which ensures that federal royalties are properly accounted for from fee/fee/fed wells. (PIR4664-65). But the Groups advocate for a policy that extends beyond the federal mineral interest and would require the Bureau to regulate surface

operations on fee and State trust lands. (Dkt. 64-1 at 21). Their interpretation of the MLA, however, does not read the statute in its entirety and conveniently ignores Sections 187 and 189 that reserve state police power over oil and gas operations. The Groups' argument also conflicts with Congress' recognition that the State exercises sovereign authority over its State trust lands.

**i. The MLA does not create exclusive federal jurisdiction over oil and gas development.**

The MLA includes two savings clauses that demonstrate Congress did not intend the Bureau to exercise exclusive federal jurisdiction over oil and gas operations. *See* 30 U.S.C. §§ 187, 189. Section 187 relates to the Bureau's leasing authority, identifies conditions that each federal lease shall include, and states "[n]one of such provisions shall be in conflict with the laws of the State in which the leased property is situated." 30 U.S.C. § 187. Next, Section 189 of the MLA, in its entirety, reads:

> The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter. Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

30 U.S.C. § 189. Judicial interpretations of Sections 187 and 189 confirm that Congress did not intend for the Bureau to exercise complete control over oil and gas development under the MLA. *Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 406 F.2d 1303, 1304 (10th Cir. 1969) ("[T]he court could find nothing in the statutes indicating a Congressional intent to assert exclusive control of federal lands leased for oil and gas development.") (per curium); *Gulf Oil Corp. v. Wyo. Oil & Gas Conservation Comm'n*, 693 P.2d 227, 235 (Wyo. 1985) ("[Sections 187 and 189] indicate an absence of congressional intent to assert exclusive control over federal lands leased for mineral

development."). The rulings in *Texas Oil & Gas Corporation* and *Gulf Oil Corporation* demonstrate that the Bureau's fee/fee/fed policy correctly concluded that it has "limited" jurisdiction in fee/fee/fed scenarios. (*See* PIR4664).

In particular, *Gulf Oil* reveals how State regulation of surface activities coexists with the MLA both on federal and non-federal land. In *Gulf Oil*, an oil and gas company challenged the WOGCC's approval of a state drilling permit on federal land that imposed conditions on surface activities and access across adjoining private land. *See Gulf Oil Corp.*, 693 P.2d at 230. The Wyoming Supreme Court considered two relevant questions: (1) whether the MLA preempted the WOGCC's regulation prohibiting unreasonable surface damage; and (2) whether the WOGCC lacked authority to regulate access to the site through adjoining fee property. *Id.* at 232. The court found that Congress did not intend to assert exclusive federal control over regulating environmental protections and mineral development on federal land. *Id.* 235-38 (citing 30 U.S.C. §§ 187, 189). It also concluded that the WOGCC's regulation did not conflict with federal law. *Id*. The court ultimately dismissed the company's argument relating to the WOGCC's authority to regulate activity on adjoining private property on procedural grounds but noted that Wyoming law gives the WOGCC regulatory jurisdiction over development activities involving private property. *Id.* at 238-9 (citing Wyo. Stat. Ann. § 30-5-104(a)).

*Gulf Oil* shows that there are inherent limits to the Bureau's jurisdiction under the MLA because Congress included Sections 187 and 189. *Gulf Oil* also recognized the State's role in regulating oil and gas activities on both federal and non-federal surface lands as long as those efforts do not conflict with federal law. *See id.* at 238. In this case, *Gulf Oil* reinforces the Bureau's conclusion in the fee/fee/fed policy that certain surface interests are appropriately handled by the State, local agencies, or the landowner. (PIR4674).

**ii. Federal management is limited to the federal "lease area."**

The Groups also argue that Section 226(g) of the MLA requires the Bureau to regulate surface activities on non-federal land. (Dkt. 64-1 at 20-21). Their argument, however, fails again to read the statute in its entirety and disregards language that Congress included in Section 226(g) that relates to "the lease area." *See, e.g.,* 30 U.S.C. § 226(g). In other words, the plain language of the MLA refutes the Groups' construction of the statute and their interpretation disregards foundational principles of statutory interpretation.

Section 181 of the MLA only applies to "lands containing [oil and gas] deposits owned by the United States." 30 U.S.C. § 181 (alteration added). The Groups do not identify any specific language in the MLA that allows the Bureau to regulate non-federal land. Notably, Congress did not even make all federal lands subject to federal mineral leasing. Under the MLA, minerals subject to disposition on lands owned by the United States include "national forests" but exclude acquired lands, communities within national parks and monuments, and lands within the naval petroleum and oil-shale reserves. *Id.*

Citing Section 181, this Circuit has consistently recognized that the MLA applies only to federal land. *See Amoco Prod. Co. v. Watson*, 410 F.3d 722, 725 (D.C. Cir. 2005) (recognizing Secretary's authority to lease and authorize natural gas extraction from "government land"); *Orion Rsrvs. Ltd. P'ship v. Salazar*, 553 F.3d 697, 699 (D.C. Cir. 2009) (recognizing Secretary's authority to regulate mining on "federal lands"); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013) (Secretary's authority to offer leases on "federal land"). This Court has treated federal oil and gas development under the MLA no differently – Section 181 governs resources on "federal land." *See WildEarth Guardians. v. Bernhardt*, 502 F.Supp.3d 237, 241

(D.D.C. 2020) (recognizing the MLA's general mandate to govern oil and gas development on federal land).

Despite a body of law to the contrary, the Groups contend that this Court must now read Section 226(g) in isolation as the primary authority in the MLA for the Bureau to regulate surface activities on non-federal lands. (Dkt. 64-1 at 20). First, the Groups argue that Congress did not "restrict" the terms "surface disturbance" and "surface resources" and that constitutes evidence that the Bureau can regulate non-federal land. (*Id.* at 21). However, the Groups' argument conflicts with the plain language in Section 181 pertaining to the Bureau's authority over lands "owned by the United States." 30 U.S.C. § 181.

The Groups' reliance on *Rotkiske* is also misplaced because in that case the court considered whether it could read a discovery rule into the applicable statute of limitations. (*See* Dkt. 64-1 at 21) (citing *Rotkiske v. Klemm*, — U.S. —, —, 140 S.Ct. 355, 361 (2019)). There, the court rejected supplementing the purported omission from the statutory text and warned that "absent provision[s] cannot be supplied by the courts." *Id.* at 360-61. Yet, that is exactly what the Groups intend to do here. If Congress intended to regulate adjoining fee and State trust lands under the MLA, it would have said so. *See Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 330 (D.C. Cir. 2020) (Explaining that "[t]he preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'") (citation omitted) (alterations in original).

Second, the Groups argue that the use of the phrase "conservation of surface resources" in Section 226(g) applies to fee/fee/fed wells because the term encompasses values related to preventing "environmental harm." (Dkt. 64-1 at 21). With this argument, the Groups disregard language in Section 226(g) that confines the Bureau's authority to "activities within the lease area"

and "activities on any lease." *See* 30 U.S.C. § 226(g). Congress' inclusion of the term "within the lease area" limits the Bureau's authority to the four corners of the federal mineral lease. When interpreting a statute, the Court is "obliged to give effect, … to every word Congress used." *Mineral Pol'y Ctr. v. Norton*, 292 F.Supp.2d 30, 42 (D.D.C. 2003) (citation omitted).

The Groups interpret Section 226(g) incorrectly because they give no effect to the terms "lease area" and "activities on any lease." For example, the Groups challenged numerous federal APDs that include "off-lease" fee minerals with activity on non-federal surface. (*See* Dkt. 44 at 56) (APDs 232-39); (*see* Kropatsch Decl. at ¶11). In these instances, the federal "lease area" does not include the non-federal surface. (Kropatsch Decl. at ¶11); (Scoggin Decl. at ¶17). Therefore, the Groups' interpretation of Section 226(g) improperly renders language in the MLA as superfluous.

Considering the context of Section 226(g), the fee/fee/fed policy correctly recognized that the Bureau has limited jurisdiction over surface activities on non-federal land. The Bureau explained that it has the authority to ensure the accountability of federal production royalties from the federal mineral interest. (PIR4664-65). However, when new surface disturbances occur "off-lease" on non-federal surface the Bureau's authority is limited. (PIR4667-68); (*see also* Kropatsch Decl. at ¶11). The Bureau's fee/fee/fed policy is also consistent with longstanding federal regulations for onshore oil and gas operations that define the Bureau's jurisdiction. *See* 43 C.F.R. § 3161.1. That regulation recognizes that the Bureau's authority over onshore operations extends only to federal lands but for site security and measurement requirements which are necessary to ensure proper accountability of produced federal minerals. 43 C.F.R. § 3161.1(a)-(b).

Finally, the Groups' cite *Hoyl* and *Copper Valley* to assert that the Bureau can invoke a conservation interest to regulate non-federal lands. (*See* Ex. 64-1 at 21) (citing *Hoyl v. Babbitt*,

129 F.3d 1377, 1380 (10th Cir. 1997); *Copper Valley Mach. Works, Inc. v. Andrus*, 653 F.2d 595, 600 n.7 (D.C. Cir. 1981)). But *Hoyl* and *Copper Valley* are inapplicable here because both cases rely on an unrelated section in the MLA that involves the suspension of federal coal leases and federal land within the federal lease area. (*See id; see also* 30 U.S.C. § 209). The Groups provide no example of the Bureau applying the "in the interest of conservation" language in Section 226(g) to oil and gas operations on non-federal land since the provision was enacted in 1987. (*See* Dkt. 64-1 at 20-21). Accordingly, this Court should respect the Bureau's interpretation in the fee/fee/fed policy because it is consistent with the MLA and its jurisdictional statement in 43 C.F.R. § 3161.1. *See, e.g., Nat. Res. Def. Council v. Berklund*, 458 F.Supp. 925, 935 (D.D.C. 1978) (deferring to the Secretary's interpretations of the MLA).

**iii. The Bureau does not have authority to regulate State trust lands.**

Congress expressly recognized in Wyoming's Statehood Act that the State trust lands it conveyed to the State are not subject to preemption or federal land laws. *See* Act of 1890 § 5, 26 Stat. 664, at 223. The Groups are not likely to succeed on the merits because their argument that the MLA "*requires*" the Bureau to regulate State trust lands contravenes Wyoming's Statehood Act and ignores Section 184a of the MLA. (*See* Dkt. 64-1 at 20).

The Project Area includes 101,012 acres of State trust lands managed by the State of Wyoming. (PIR0004). The challenged fee/fee/fed policy unequivocally applies to "non-Federal" landowners which "may also be a non-Federal governmental entity." (PIR4664). The Groups' amended complaint challenges federal APDs where the proposed surface disturbance occurs on State trust land. (*See* Dkt. 44 at 39, 56); (Scoggin Decl. at ¶18); (Kropatsch Decl. at ¶11).

When the State of Wyoming was admitted to the Union in 1890, Congress conveyed land to the State "for the support of common schools." Act of 1890 § 4, 26 Stat. 664 at 222-23. These

State trust lands are subject to regulation by the State for the purpose of collecting proceeds from the sale and use of State trust lands for "educational purposes." Act of 1890 § 5, 26 Stat. 664 at 223. Congress unambiguously stated that State trust lands in Wyoming "**shall not be subject to preemption**, homestead entry, **or any other entry under the land laws of the United States**, whether surveyed or unsurveyed, but shall be reserved for school purposes only." *Id.* (emphasis added). The State collects revenue from oil and gas development on State trust lands to support its public education system. (Scoggin Decl. at ¶¶5, 19-20); *see also* Wyo. Stat. Ann. § 36-6-101.

The MLA also respects the State's exclusive jurisdiction over its State trust lands by recognizing that development involving both federal interests and State interests requires State consent. For example, Section 184a provides,

> [A]ny State owning lands or interests therein acquired by it from the United States may consent to the operation or development of such lands or interests, or any part thereof, under agreements approved by the Secretary of Interior made jointly or severally with lessees or permittees of lands or mineral deposits of the United States or others, for the purpose of more properly conserving the oil and gas resources within such State.

30 U.S.C. § 184a.

Section 184a also states that "[s]uch agreements may provide for the cooperative or unit operation or development of part or all of any oil or gas pool, field, or area … and, with the consent of the State, for the modification of the terms and provisions of State leases for lands operated and developed thereunder[.]" *Id.* The Secretary's regulations on the "Inclusion of non-Federal lands" reinforce the MLA provisions,

> Where State-owned land is to be unitized with Federal lands, approval of the agreement by appropriate State officials must be obtained prior to its submission to the proper BLM office for final approval. When authorized by the laws of the State in which the unitized land is situated, appropriate provision may be made in the agreement, recognizing such laws to the extent that they are applicable to non-Federal unitized land.

43 C.F.R. § 3181.4(a).

The Groups' argument that the fee/fee/fed policy is unlawful is irreconcilable with Congress' clear statutory determination that the federal government cannot preempt the State's sovereignty over State trust lands. (*See* Dkt. 64-1 at 22-23). The Group's interpretation of the Bureau's jurisdiction also disregards Section 184 of the MLA and its implementing regulations that requires the State's consent to enforce federal terms of conditions on State trust lands. *See* 30 U.S.C. § 184a; 43 C.F.R. § 3181.4(a); (*see also* Scoggin Decl. at ¶¶13-16). Accordingly, this Court should reject the Groups' argument that the fee/fee/fed policy was unlawful because their interpretation of the Bureau's regulatory jurisdiction diminishes a sovereign right that the State received at statehood.

**iv. The State exercises police powers over oil and gas development in Wyoming.**

The Groups challenge to the fee/fee/fed policy does not address, let alone acknowledge, existing regulatory mechanisms that the State enforces on both federal and non-federal lands. In particular, the Groups contend that the fee/fee/fed policy fails to adequately protect surface resources from heavy traffic, impaired soundscapes, invasive plants, and loss of wildlife habitat. (*See* Dkt. 64-1 at 23-24).

The State possesses police power to regulate its natural resources. *See, e.g.*, *Wall v. Midland Carbon Co.*, 254 U.S. 300, 313-16 (1920) (upholding the State's police power to regulate natural gas). The State exercises this authority by regulating oil and gas activity on fee, State, and federal land in Wyoming. *Big Piney Oil & Gas Co. v. Wyo. Oil & Gas Conservation Comm'n*, 715 P.2d 557, 563 (Wyo. 1986); *see also* Wyo. Stat. Ann. § 30-5-104(a) (The WOGCC "has jurisdiction and authority over all persons and property, public and private," related to oil and gas development.). The WOGCC oversees drilling, production activities, well spacing, and enforces provisions to prevent the contamination of underground water. Wyo. Stat. Ann. § 30-5-104(d)(ii). In order to meet its

statutory obligations, the WOGCC enacted regulations and enforces standards for drilling, producing, surface use, and groundwater protection. *Id.* at (d)(v)-(vi).

The Groups contend that the Bureau "abdicated" its responsibilities in the fee/fee/fed policy and suggest that oil and gas activity will occur without any mitigation. (*See* Dkt. 64-1 at 22-24). But the Groups' argument paints an incomplete picture by leaving out the State's role in regulating oil and gas activity.

In addition to any required federal APDs, operators must also secure an approved State APD for every well drilled in Wyoming on federal, fee, or State trust land. *Rules, Wyo. Oil & Gas Conservation Comm'n* ch. 3, § 8. For example, the WOGCC enforces surface setbacks for operations located near occupied structures and requires well site selection to consider noise, light, dust, and traffic in plans submitted for state drilling permits. *Id.* at ch. 3, § 47. All State APDs require the operator to submit groundwater baseline sampling and a groundwater monitoring plan. *Id.* ch. 3, § 46. State APDs require operators to meet WOGCC's drilling and casing requirements for protecting groundwater, use blowout preventers, submit information and obtain approvals before performing well stimulation (hydraulic fracturing),[2] and secure approval before conducting directional drilling. *See, e.g.,* ch. 3, §§ 22, 23, 25, 45. Finally, WOGCC requires operators to post surety bonds that guarantee each production site is properly managed, does not damage the environment, is properly abandoned, and meets reclamation standards, including those at the landowner's request. *Id.* at ch. 3, § 4(a).

The fee/fee/fed policy also correctly recognized that on non-federal lands "final reclamation of a well site is the responsibility of the state, operator and the landowner." (PIR4674).

[2] The State of Wyoming was one of the first states to regulate hydraulic fracturing and its regulations are used as model standards for other states. *See* Francis Gradijan, State Regulations, Litigation, and Hydraulic Fracturing, 7 Envt'l & Energy L. & Pol'y J 47, 64-66 (2012).

In addition to filing an abandonment notice with the Bureau, State law requires the operator to meet specific abandonment and reclamation requirements. *See* Wyo. Stat. Ann. § 30-5-104(d); *Rules, Wyo. Oil & Gas Conservation Comm'n* ch. 3, §§ 4, 15. Within one year of abandonment, operators must reclaim sites by removing equipment and replant vegetation to the contour of adjoining lands. *See id.* at ch. 3, § 4(a)(iii)-(iv). Operators must also complete any additional reclamation obligations in the surface use agreements they negotiate in advance with landowners. *See* Wyo. Stat. Ann. § 30-5-402(f); (Boner Decl. at ¶15). The agreements that oil and gas companies negotiate in advance with landowners also protect surface resources, provide for the management of noxious weeds and reclamation, and include stipulations to protect livestock. (Boner Decl. at ¶¶4-9); (Magagna Aff. at ¶¶12-14).

In light of existing State authorities that regulate oil and gas activities in Wyoming, the Bureau was not arbitrary and capricious when it concluded that the final reclamation of a fee/fee/fed well "is the responsibility of the state, operator, and landowner." (Dkt. 64-7 at 11; PIR4674); *see also* 5 U.S.C. § 706(2)(A). Therefore, this Court should find that the Groups' are not likely to succeed on the merits of their claim that the fee/fee/fed policy violated the APA. *See, e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F.Supp.3d 4, 32 (D.D.C. 2016) (finding that the Corps' review was not arbitrary and capricious by recognizing that it did not have jurisdiction over certain portions of a project and denying preliminary injunction as not likely to succeed on the merits).

## II. Plaintiffs fail to demonstrate that they are likely to succeed on the merits of their air claims.

The Groups seek to enjoin the ROD and challenged federal APDs because they argue the Bureau incorrectly concluded that it lacked the authority to require certain air quality mitigation measures. (Dkt. 64-1 at 24-25). The Groups, however, are not likely to succeed on the merits

because: (1) this Court has previously rejected the Groups' FLPMA argument and the Bureau's action was consistent with the Casper RMP; (2) air quality controls are regulated by EPA and state agencies, not the Bureau; (3) the Bureau was not required to impose air quality mitigation measures as a matter of law; and (4) the Bureau's decision was consistent with its longstanding policy.

The Groups string together language from two separate provisions of FLPMA to argue that the law requires the Bureau to regulate air quality. (Dkt. 64-1 at 26) ("FLPMA expressly requires that BLM 'regulate … the use [and] … development' of federal minerals, 43 U.S.C. § 1732(b), 'in a manner' that protects 'air and atmospheric' values, *id.* § 1701(a)(8)."). The Groups' interpretation of FLPMA is not only tortured but was rejected by this Court on two previous occasions. *WildEarth Guardians v. BLM*, 8 F.Supp.3d 17, 37-38 (D.D.C. 2014) (finding argument that the Bureau has a duty under FLPMA to ensure compliance with federal air quality standards in a Wyoming federal coal leasing decision was meritless); *WildEarth Guardians v. Salazar*, 880 F.Supp.2d 77, 94 (D.D.C. 2012) (rejecting argument that the Bureau violated FLPMA by failing to "ensure that its leasing decisions would comply with the NAAQS [criteria].") (alteration added).

This Court has no reason to deviate from its prior rulings. FLPMA only requires the Bureau to "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans" during the land use planning process. 43 U.S.C. § 1712(c)(8); *see also* 43 C.F.R. § 2920.7(b)(3) (stating land use plans shall include terms that require compliance with air and water quality standards established pursuant to applicable federal and state law). Here, the Bureau met its obligation under FLPMA because the applicable land use plan provides for compliance with state and federal air quality standards and that language is reflected in the subsequent project-level decision. (*See* Fed. Ex. 2 at 2-10) (Casper

RMP); (PIR0158) (EIS identifying CAA and WDEQ permitting requirements); (PIR0020) (ROD identifying measures subject to EPA and State permitting).

The Groups then argue that the Bureau is required to "impose air quality mitigation measures" under the MLA. (Dkt. 64-1 at 26). This argument conveniently ignores the unique framework that Congress created for regulating air quality. When Congress enacted the CAA in 1970 it adopted a comprehensive federal law that regulates air emissions under the auspices of the EPA. *Wyoming v. Dep't of Interior*, 493 F.Supp.3d 1046, 1064 (D. Wyo. 2020) (citing 42 U.S.C. § 7401 *et seq.*). The CAA instructs the EPA to establish primary and secondary NAAQS for each air pollutant "which may reasonably be anticipated to endanger public health or welfare." *Maryland v. EPA*, 958 F.3d 1185, 1189 (D.C. Cir. 2020) (quoting 42 U.S.C. § 7408(a)(1)(A)). The CAA does not provide the Bureau any authority to set or enforce federal air quality standards.

The CAA also establishes "a joint state and federal program for regulating the nation's air quality." *New Jersey v. EPA*, 989 F.3d 1038, 1042 (D.C. Cir. 2021) (citations omitted). States are required to develop SIPs, which describe how the state will achieve and maintain NAAQS. *See id.* Once EPA approves the SIP, states are tasked with enforcing the emission limits they adopt and must regulate all stationary sources located in that state. 42 U.S.C. § 7410(a)(2)(C). Thus, the EPA does not typically regulate individual sources of emissions, instead, decisions regarding how to meet NAAQS are left to individual states. *Wyoming,* 493 F.Supp.3d at 1065 (citing 42 U.S.C. § 7410(a)(2)(C)). Once again, the CAA does not provide the Bureau with similar authority to create implementation plans for enforcing air quality standards.

The State of Wyoming has an EPA-approved SIP for regulating the criteria pollutants at question in this case. 40 C.F.R. § 52.2620; (Vehr Decl. at ¶¶7-8); (*see also* Dkt. 44 at ¶77). In Wyoming, the WDEQ Air Quality Division is responsible for compliance with the CAA and state

air quality standards. *See, e.g.,* Wyo. Stat. Ann. § 35-11-110. All oil and gas activities in Wyoming are subject to State permitting requirements. Wyo. Stat. Ann. § 35-11-204; *see also Rules, Dep't of Env'l Quality, Air Quality Div.,* ch. 6. In addition to securing a State APD and any necessary federal APD, oil and gas operations must also secure the required state air quality permit from WDEQ. *See Rules, Wyo. Oil & Gas Conservation Comm'n* ch. 4, § 1(c); (*see also* Vehr Decl. at ¶9). Here, the Bureau's decision to authorize the Project explained that oil and gas operations must meet both federal and state air quality standards. (PIR0155, PIR0158, PIR0231).

Despite this Court's previous interpretations of the Bureau's responsibilities under FLPMA and the counterweight of the regulatory mechanisms that Congress enacted in the CAA for regulating air quality, the Groups continue to insist that the MLA requires the Bureau to impose air quality measures. (*See* Dkt. 64-1 at 26-27). To support their argument the Groups cite 30 U.S.C. § 187 and *Berklund* as a purported interpretation of that provision. (Dkt. 64-1 at 27). However, Section 187 makes no mention of air quality. *See* 30 U.S.C. § 187. Even if this Court found that Section 187 creates a duty for the Bureau to regulate air quality, it must address the limiting language in that provision which reads "[n]one such provisions shall be in conflict with the laws of the State in which the lease property is situated." *Id.*

The Groups' reliance on *Berklund* is also unpersuasive. (*See* Dkt. 64-1 at 27) (citing case as stating the "broad language" of Section 187 requires lease terms "to protect air, water quality, and wildlife."). A complete reading of what this Court actually said was "[a]s [Defendants] readily concede, **NEPA** mandates that broad discretion be exercised in the setting of lease terms to prevent mining where reclamation is not attainable and to protect air, water quality and wildlife." *Berklund*, 458 F.Supp. at 936 (emphasis added). In *Berklund*, this Court unambiguously addressed the Bureau's obligations under **NEPA** and not the MLA.

Furthermore, this Court should give little weight to the footnote in *Berklund*, which cobbles NEPA and the MLA together to purportedly create an obligation for the Bureau to impose air quality standards in lease terms in name of the "public welfare." *See id.* at n.17. The Supreme Court has subsequently held that under NEPA "there is a fundamental distinction between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated and a substantive requirement that a complete mitigation plan be actually formulated and adopted[.]" *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333, 352-53 (1989). This Circuit also recognizes that "NEPA imposes no substantive requirement that mitigation measures actually be taken." *Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177, 1187 (D.C. Cir. 2018) (citing *Robertson*, 490 U.S. at 353 n.16). Thus, this Court should reject the Groups' argument that the MLA creates a duty to impose mitigation measures that rests on abrogated law buried in an archaic footnote.

Finally, the Groups contend that the Bureau's "disclaimer" of its authority to impose mandatory air quality measures was inconsistent with past practices. (Dkt. 64-1 at 27-28). The Groups cite no authority to support their argument that it is the Bureau's "longstanding" policy to require air quality measures. (*See id.*). The Bureau's guidance actually demonstrates that its approval of the challenged federal APDs was consistent with past practices. For example, the Bureau's Air Resource Manual states its practice is to "recommend" appropriate emission control standards and to ensure compliance with state and federal air quality standards. BLM Manual 7300 – Air Resource Management Program at 7300.02(C).[3] As a matter of law, the Groups cannot prevail on their claim that the Bureau's decision was an unexplained reversal in policy without first showing that the Bureau's policy required it to mandate air quality mitigation measures in its

[3] https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual7300.pdf

oil and gas decisions. *See, e.g., Friends of Animals v. Pendley*, 523 F.Supp.3d 39, 56 (D.D.C. 2021) (finding that the Bureau did not unlawfully reverse its policy when past practices were merely recommended).

The Groups also reference NEPA documents from previous Bureau decisions that allegedly "imposed" air quality related measures on oil and gas operations. (*See* Dkt. 64-1 at 27-28). But these examples do not demonstrate that these air quality measures were required by the Bureau. For example, the ROD for the Normally Pressured Lance Project recognizes that some resource protection measures considered in that decision are "guidelines for voluntary compliance" by the operator. (PIR4728; PIR4706). With respect to the air quality measures, the ROD clearly identifies them as "operator-committed measures" as opposed to mandatory or required measures. (PIR4794). Consistent with its past practice, the Bureau also noted in that instance that "[d]evelopment activities on all lands would be conducted in accordance with all appropriate federal, state, and county laws, rules, and regulations." (*Id.*).

Even if this Court finds the unrelated Bureau decisions persuasive, it should take pause before relying on excerpted materials from outside the administrative record as a basis for ruling on the probability of success on the merits. *See, e.g., Am. BioScience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001) ("We hold only that the court, before assessing [plaintiffs'] probability of success on the merits, should have required the [agency] to file the administrative record[.]") (alterations added). This Court can consider outside evidence for the three prongs of the test for issuance of a preliminary injunction, but with respect to the likelihood of success on the merits, the Court "may not–absent unusual circumstances … depart from the administrative record[.]" *Friends of Animals v. BLM*, 548 F.Supp.3d 39, 56-57 (D.D.C. 2021). The Groups have offered no

explanation for how past oil and gas decisions from a completely different area of Wyoming or decisions in Utah or Montana conceivably belong in the administrative record for this case.

This Court should find that the Groups are unlikely to succeed on the merits of their air quality claim because the Bureau's decision complied with the applicable Casper RMP and air quality controls regulated by the EPA and WDEQ, not the Bureau. No combination of FLPMA, the MLA, or NEPA **require** the Bureau to impose air quality controls, and the Bureau's actions did not constitute an unexplained reversal in policy because agency guidance explains that its practice is to "recommend" and not require air quality mitigation measures. (*See* FN 3).

## III. The Groups' NEPA claims are not likely to succeed on the merits.

The Groups claim that the environmental analysis supporting the Project violated NEPA in three ways. First, they argue that the FEIS did not account for the "unregulated nature" of fee/fee/fed wells. (Dkt. 64-1 at 28-29). Second, the Groups argue that the FEIS failed to adequately examine the cumulative effects of the Project by underestimating existing and future oil and gas development. (*Id.* at 30-34). Third, they contend that the Bureau failed to appropriately quantify GHG emissions. (*Id.* at 34-36). The Groups' NEPA claims are not likely to succeed on the merits because their arguments rely on two factual errors: (1) that fee/fee/fed wells are unregulated; and (2) that the Bureau incorrectly estimated the rate of existing oil and gas development. (*Id.* at 28-31). This Court need only look at existing State regulations to dispel the baseless assertion that fee/fee/fed wells are unregulated. Furthermore, the Groups' challenge to the Bureau's assumed rate of development in the FEIS relies on inaccurate and duplicative data.

### A. The Bureau took a "hard look" at the impacts of the Project.

The Groups' argument that the FEIS failed to "account" for "the unregulated nature" of fee/fee/fed wells rests on a foundation of sand. (*See* Dkt. 64-1 at 28-29). As previously explained,

fee/fee/fed wells in Wyoming are not "unregulated." *See Argument I.D.iv*. In addition to what the Bureau may require to protect its federal interests, every oil and gas well in Wyoming requires multiple state permits. (*Id.*). The FEIS provided a five-page summary of all the applicable federal and state permits required for operating in the Project Area. (PIR0156-60). This Court should reject the Groups' false characterization that fee/fee/fed wells are unregulated.

The Groups' argument also improperly assumes that the Bureau's analysis in the FEIS was confined to the federal land and mineral interests within the Project Area. (*See* Dkt. 64-1 at 28-29). But the Bureau did not discriminately draw lines around non-federal lands when it conducted its air quality, traffic, and wildlife analysis. Instead, the Bureau's analysis included the entire Project Area, and when appropriate, the region. (*See, e.g.,* PIR0231) (analysis area for air impacts includes the Project Area and region); (PIR0833) (analysis area for transportation impacts includes roads within the Project Area as well as federal and state roads providing access to the Project Area); (PIR0897) (analysis area for wildlife impacts represents a combination of geographic areas based on individual species habitat and management factors).

The Groups also contend that the FEIS failed to adequately consider potential impacts on sage-grouse because the Bureau did not prohibit the development of fee/fee/fed wells within a 0.6-mile lek buffer. (Dkt. 64-1 at 29). The FEIS analysis, however, was correct because the WOGCC, not the Bureau, enforces a 0.6-mile lek buffer for fee/fee/fed wells in its State APD process. (*See* PIR0627; PIR1091-92) (recognizing the State also implements sage-grouse protections); (Kropatsch Decl. at ¶25). Contrary to what the Groups' contend, the Bureau did not improperly limit its analysis by ignoring impacts to non-federal land.

The Groups then assert that the Bureau failed to adequately analyze the "efficacy" of the Project's mitigation measures in relation to fee/fee/fed wells. (Dkt. 64-1 at 29). This Court should

reject their argument for two reasons. First, the Groups' argument conflicts with this Court's existing precedent on analyzing mitigation measures under NEPA. Second, the Bureau's landscape approach to mitigation in the FEIS considered fee/fee/fed wells.

NEPA does not "demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act" or a "detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts of a proposed action[.]" *Robertson*, 490 U.S. at 353 (emphasis in original). This Circuit similarly recognizes that "NEPA not only does not require agencies to discuss any particular mitigation plans that they might put in place, it does not require agencies—or third parties—to effect any." *Citizens Against Burlington*, *Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991). Applying these two cases, this Court explains that an agency's discussion of mitigation measures in an EIS need only include "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Nat'l Parks Conservation Ass'n v. Jewell*, 965 F.Supp.2d 67, 75 (D.D.C. 2013) (citation omitted). In essence, the Group's seek injunctive relief on grounds beyond what NEPA actually requires, such as, an evaluation of "how the prevalence of fee/fee/fed wells will affect the overall efficacy of the Project's mitigation measures[.]" (Dkt. 64-1 at 29). This Court should not allow the Groups to generate NEPA obligations out of thin air.

Regardless, the Groups do not demonstrate that the FEIS failed to discuss the proposed mitigation measures in sufficient detail. *See Nat'l Parks Conservation Ass'n*, 965 F.Supp.2d at 75 (applying the "hard look" standard on agency's mitigation measure analysis in an EIS). The FEIS included whole sections discussing "mitigation and mitigation effectiveness" with respect to each of the natural resource concerns that the Groups raise. (*See* Dkt. 64-1 at 29); *compare with* (PIR0678-79) (air quality); (PIR0839) (transportation); (PIR0910) (general wildlife). The FEIS

meets NEPA's "hard look" standard by discussing the proposed measures in the context of the anticipated environmental consequences. *See Nat'l Parks Conservation Ass'n*, 965 F.Supp.2d at 76 (finding FEIS did not violate NEPA's mandate to discuss possible mitigation measures). Additionally, the plain text of the FEIS disputes the Groups' argument that the Bureau did not consider fee/fee/fed wells. (*See* PIR1075-81). In the Mitigation Chapter, the FEIS explained that it took a "landscape-scale mitigation approach" and discussed the unique fee/fee/fed ownership within the Project Area. (PIR1075; *see also* PIR1076). Accordingly, the Bureau took the requisite "hard look" at the effects of mitigation measures associated with the Project.

The FEIS also identified the stand-alone permits that operators must secure from other federal and state agencies before proceeding with oil and gas development on fee/fee/fed lands. (PIR0155-60). For example, the FEIS reviewed relevant state permits for air quality, water quality, drilling, water well use, and wildlife consultations for state designated species. (*Id.* at 0158-60). The Bureau's examination of both proposed mitigation measures and the relevant permits that operators must secure before drilling fee/fee/fed wells complied with the Secretary's regulation on analyzing mitigation measures. *See* 43 C.F.R. § 46.130(b) (NEPA analysis must consider "ameliorative design features" such as stipulations, conditions, or best management practices, and required measures that "conform to applicable legal requirements.").

The Groups are not likely to succeed on the merits because they have not met their burden of showing that the Bureau failed to take the requisite hard look at proposed mitigation measures in the FEIS. *See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 36 (D.C. Cir. 2015) ("NEPA requires the federal government to identify and assess in advance the likely environmental impact of its proposed actions, including its authorization or permitting of private actions.").

Accordingly, this Court should reject the Groups' argument that the Bureau failed to consider impacts associated with fee/fee/fed wells.

**B. The Groups' cumulative impact argument relies on wildly incorrect data.**

The Groups contend that the cumulative impact analysis in the FEIS "grossly misstated" the scale of existing and future oil and gas development in relation to the Project. (Dkt. 64-1 at 30). They do not argue that the Bureau failed to conduct a cumulative impact analysis of past, present, and future effects. (*See id.* at 30-34). Instead, their chief complaint is that the Bureau's baseline estimates were wrong. (*Id.*) (asserting that 3,854 new wells started production in the Project Area between 2016 and 2019). The unrefined data that the Groups presented to the Bureau and now pile before this Court—that purportedly shows that 3,854 new wells "started producing" in the Project Area between 2016 and 2019—is inaccurate, misleading, and not sufficient for this Court to find that the Bureau's cumulative impact assumptions violated NEPA.

When evaluating whether an agency's analysis of cumulative impacts satisfied NEPA, this Circuit considers the following:

> [A] meaningful cumulative impact analysis must identify five things: (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.

*TOMAC v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006) (citation and internal quotation marks omitted). Cumulative impacts refer to those outside of the project in question, or in other words "it is a measurement of the effect of the current project along with any other past, present, or likely future actions in the same geographic area." *Id.* (citing 40 C.F.R. § 1508.7).

The Groups' allege that the WOGCC website shows "there are 3,854 horizontal wells that have started producing in Converse County since January 1, 2016." (Dkt. 64-1 at 31) (citing PIR1809-10). They then reference 500 pages of disorganized data that was submitted in the FEIS process that supposedly support their argument. (*Id.*) (citing PIR1809-10; PIR1827-2394). This Court need only consider a sample of that data to demonstrate that the Groups erroneously applied WOGCC data.

The very first well that the Groups identify in their mountain of attachments is Armor Federal 1H, API No. 920653.[4] (PIR1828). This well, Armor Federal 1H, was first drilled in 1974 and was re-entered in 2006 to drill a horizontal bore. (Kropatsch Decl. at ¶28). In no fashion is Armor Federal 1H a **new** well that **started** production between 2016 and 2019. (*Id.*). To ensure that this Court has no doubt, WOGCC reviewed the next nine wells on the Groups' list and found that all were initially drilled on or before the year 2001. (Kropatsch Decl. at ¶28). WOGCC analyzed their data and confirmed that approximately 426 new wells were drilled in the area between 2016 and 2019. (*Id.*). After reviewing the Groups' well data, WOGCC also noted that some wells are duplicates repeated five times over. (*Id.*).

The FEIS projected a baseline drilling rate of approximately 110 wells per year using WOGCC historical data. (PIR0187; PIR0189). With the benefit of hindsight, WOGCC substantiated and confirmed that the Bureau's baseline 110 wells per year estimate was accurate. (Kropatsch Decl. at ¶28). Setting aside the Groups' wildly inaccurate well numbers, they give no reason for this Court to find that the Bureau's baseline estimates used to develop its cumulative impact analysis violated NEPA. *See Conservation Law Found. v. FERC*, 216 F.3d 41, 46 (D.C.

[4] The Court can review WOGCC data for each listed well by API Number at: http://pipeline.wyo.gov/legacywogcce.cfm (select *Wells*, then under *Well Lookup* select *By API Number*).

Cir. 2000) ("Baseline or no baseline, the question is whether the [agency] has fully examined options calling for greater or lesser environmental protection.") (alteration added). Here, the Bureau's baseline was not only reasonable, history proved that it was accurate.

The Groups also take issue with the Bureau's allegedly arbitrary January 9, 2015, date that the Bureau selected to represent current conditions for its cumulative impact analysis. (Dkt. 64-1 at 30). This date fell after the Bureau started the scoping process for the Project and as the Bureau explained it "was selected as a fixed point in time to represent information that is continuously changing. While the BLM recognizes there is a gap between this point in time and the publication of [the FEIS], the information provides a consistent basis for evaluation of the Project alternatives." (PIR0187; PIR0097). Even so, the Groups do not explain how this date used for the no action alternative impaired the environmental impact analysis in the FEIS. Recognizing that conditions were subject to change during the five year period it took to prepare the FEIS, the Bureau's environmental consequences section followed up on the issue and explained that at the time of publication "an estimated 1,663 wells remained to be drilled on 361 new well pads in addition to the 1,520 existing wells in the [Project Area.]." (PIR0649). The fact that Project development has occurred at the projected rate only bolsters the adequacy of the Bureau's cumulative impact analysis in the FEIS.

The Groups' challenge to the Bureau's cumulative impact analysis in the FEIS relies exclusively on the Bureau's baseline estimates. (*See, e.g.,* Dkt. 64-1 at 33). The Groups, importantly, do not challenge the area of analysis or the Bureau's outcomes other than on the misguided opinion that its baseline assumption for oil and gas development was incorrect. *See TOMAC,* 433 F.3d at 864 (listing factors to consider when reviewing the adequacy of cumulative impact analysis). The FEIS includes a thorough analysis of the cumulative impacts on land use,

noise, recreation, socioeconomics, soil resources, transportation, vegetation, visual resources, water, wetlands, and wildlife. (*See* PIR0997-1069). Courts have refused to enjoin agency action absent a finding that the cumulative impacts are too speculative or hypothetical to meaningfully contribute to NEPA's goal of informed decision making. *See S. Utah Wilderness All. v. Bernhardt*, 512 F.Supp.3d 13, 20-22 (D.D.C. 2021); *Zeppelin v. Fed. Highway Admin.*, 305 F.Supp.3d 1189, 1204-06 (D. Colo. 2018) (citing *TOMAC*, 433 F.3d at 864). This Court should similarly find that the Groups are not likely to prevail on the merits of their cumulative impact claim.

**C. The FEIS correctly quantified cumulative GHG emissions.**

The Groups argue that the Bureau did not properly quantify the cumulative GHG emissions from the Project. (Dkt. 64-1 at 34-35). The Groups concede that the FEIS did compare the Project's GHG emissions with existing local, state, and national inventories. (*Id.* at 35). Specifically, their argument is that the FEIS did not adequately quantify the Project's GHG emissions with other projects listed in Table 5.2-1. (*Id.*) (citing PIR1002).

The Groups' argument overlooks the relevant analysis in the FEIS. In the local context, the FEIS explained that the GHG emissions from the Project was compared to emissions "calculated for all active wells in the [Casper Field Office]." (PIR1020). The Groups do not mention that most, if not all of the sources identified in Table 5.2-1 fall within the Casper Field Office's jurisdiction and fell within the Bureau's local cumulative impact analysis. (*See* PIR1020; *see, e.g.*, PIR0186; PIR1026; PIR1044; PIR1071; PIR1077). The FEIS then quantified the Project's no action and proposed action GHG emissions in this local context using percentages. (PIR1020). With respect to statewide comparisons, the FEIS compared the Project's GHG emissions to both all statewide inventoried emissions and reported statewide oil and gas GHG emissions in percentage form. (PIR1021). Finally, the FEIS compared the project to national emission totals. (*Id.*). Notably, the

FEIS concluded that the Project is expected to contribute approximately 0.09 percent of the gross total of direct GHG emissions for the United States using 2017 estimates. (*Id.*).

Despite this comparative analysis, the Groups make an entirely different, but unsubstantiated argument — that the Bureau's comparisons did not include projects that had "come online in recent years." (Dkt. 64-1 at 35). The Groups' amended complaint and brief do not identify which other projects the Bureau's analysis did not take into consideration or why those projects are "reasonably foreseeable." (*See* Dkt. 64-1 at 35); (Dkt. 44 at ¶¶104, 107, 125); *see also* 40 C.F.R. § 1508.7 (2019) (defining "cumulative impact"). This Court cannot rule that the Groups are likely to prevail on the merits of their cumulative GHG claim if they cannot even identify which other projects the FEIS supposedly failed to quantify in its GHG emission analysis. *See Nat'l Parks Conservation Ass'n v. United States*, 177 F.Supp.3d 1, 27 (D.D.C. 2016) (finding agency was not required to "speculate" about potential cumulative impacts); *see also Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (NEPA "requires a reasonably close causal relationship between the environmental effect and the alleged cause[.]") (citation omitted).

The Groups then cite this Court's prior rulings in *Guardians I* and *Guardians II* as confirming their argument. (Dkt. 64-1 at 35) (citing *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41 (D.D.C. 2019) (*Guardians I*); *and WildEarth Guardians v. Bernhardt*, 502 F.Supp.3d 237 (D.D.C. 2020) (*Guardians II*)). These cases do not support the Groups' argument in this case because the plaintiffs in *Guardians I* had presented "reasonably foreseeable" actions that were not speculative and the Bureau should have considered in its cumulative GHG emission analysis. *See Guardians I,* 368 F.Supp.3d at 76-77 (identifying other lease sales for the Bureau's comparative analysis). Additionally, *Guardians II* recognized that "evaluat[ing] GHG emissions as a percentage of state — and nation-wide emissions" sufficed when the other proposed actions had uncertain

futures. *See Guardians II,* 502 F.Supp.3d at 250 (citing *WildEarth Guardians v. Jewell*, 738 F.3d 298, 310 (D.C. Cir. 2013)). Not only have the Groups failed to present this Court with other "reasonably foreseeable" projects that the Bureau allegedly did not consider in its cumulative GHG emission analysis but they have not demonstrated that the Bureau's analysis in the FEIS comparing the Project's GHG emissions to local, state, and national inventories in percentage form was flawed in this instance. This Court should find that the Groups are not likely to succeed on the merits of their GHG emission claim. *See N. Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980) (rejecting argument that agency's cumulative impact analysis was inadequate because the analysis provided sufficient notice in the decisionmaking process of the action's impacts).

**D. Review of the Bureau's site-specific determinations warrants the full record.**

The Groups seek injunctive relief on the basis that the Bureau improperly applied categorical exclusions and DNAs to several hundred individual federal APDs. (Dkt. 64-1 at 36-39). The State incorporates by reference the Federal Defendants' response to the Groups' argument on its site-specific authorizations. Moreover, this Court does not yet have the benefit of the complete administrative record and the Groups only provide a selective sample of the documents supporting these individual decisions. (*See* Dkt. 64-12 through 64-15). This Court should consider deferring its judgment with respect to this claim because baseing its decision on a limited portion of the administrative record would "violate a fundamental tenet of administrative law." *See Friends of Animals*, 548 F.Supp.3d at 65 (deferring preliminary injunction ruling in the absence of the complete administrative record) (citing *Am. Bioscience*, 243 F.3d at 582).

**IV. The Groups have not demonstrated that they will suffer irreparable harm.**

The Groups' motion should be denied because they have not shown a likelihood of irreparable injury absent a preliminary injunction. The Groups' argument for injunctive relief turns

on the flawed assumption that fee/fee/fed wells within the Project Area are "unregulated" and operate under no oversight. (*See* Dkt. 64-1 at 40). The Groups also do not explain how existing state and federal regulatory protections do not mitigate the harms they allege. Accordingly, the Groups' alleged irreparable harms are speculative, not imminent, and not likely to occur.

"The standard for irreparable harm is particularly high in the D.C. Circuit." *Fisheries Survival Fund v. Jewell*, 236 F.Supp.3d 332, 336 (D.D.C. 2017). Plaintiffs have the "considerable burden" of proving that their purported injuries are "certain, great and actual—not theoretical—and imminent, creating a clear and present need for extraordinary equitable relief to prevent harm." *Power Mobility Coal. v. Leavitt*, 404 F.Supp.2d 190, 204 (D.D.C. 2005) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)) (internal quotation marks and emphasis omitted). In addition, "the certain and immediate harm that a movant alleges must also be truly irreparable in the sense that it is 'beyond remediation.'" *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 15 F.Supp.3d 32, 44 (D.D.C. 2014) (citation omitted). Plaintiffs must provide some evidence of irreparable harm: "the movant [must] substantiate the claim that irreparable injury is likely to occur" and "provide … proof indicating that the harm is certain to occur in the near future." *Wis. Gas Co.*, 758 F.2d at 674 (internal quotation marks and citation omitted). This is because "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (citation omitted).

The Groups alleged harms focus primarily on air quality, public health, and safety concerns. (Dkt. 64-1 at 40). As previously explained, oil and gas companies in Wyoming must secure air quality permits before proceeding with any development. (Vehr Decl. at ¶9); *see also Rules, Dep't of Env'l Quality, Air Quality Div.,* ch. 6; *and* (PIR0158-59). State air quality permits

regulate the same criteria pollutants that the Groups express concern about in their brief and complaint. (*See* Vehr at ¶¶8, 10); (*See also* Dkt. 44 at ¶¶77, 93, 153). The Groups ignore existing regulatory protections, do not explain how applicable state and federal air quality standards are insufficient to address their harms, and only cite generalized air quality concerns, some of which are unrelated to the Project they seek to enjoin. (*See* Dkt. 64-5 ¶9) (citing air pollution from "coal mining and other industrial development"); (64-3 at ¶21) (citing a local air quality warning that coincided with wildfire activity in Montana); (Vehr Decl. at ¶¶29-30). One local declarant acknowledges she is not even aware of the existing state and federal air quality standards that apply to the Project. (*See* Dkt. 64-4 at ¶13). Although the Groups' declarants are entitled to their concerns about the natural environment, the proper question for this Court is whether an irreparable injury is "*likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. (emphasis in original).

Although the EPA noted that the FEIS modeling predicted that emissions from the Project will exceed federal NAAQS standards, it explained that WDEQ has an approved Clean Air Act permit program that allows the State to "proactively manage this airshed" in the interests of protecting Wyoming residents. (PIR1677). The WDEQ maintains continuous air monitoring sites within and adjacent to the Project Area and in the two and a half years since the Project was authorized it has not detected the estimated exceedances. (PIR0241); (Vehr Decl. at ¶¶24-26).

Furthermore, if WDEQ records emissions that approach or exceed applicable federal standards, it can require operators to use different equipment, change equipment settings, require emission offsets, or take other more stringent measures. (Vehr Decl. at ¶28). Thus, the Groups generalized air quality concerns fail to establish how a *potential* air quality violation in any one of the regulated pollutants constitutes an irreparable harm. *See City of Tempe v. FAA*, 239 F.Supp.2d 55, 65 (D.D.C. 2003) (finding no "firm factual basis" for finding plaintiffs were irreparably harmed

by particulate matter from runway project); *see also Sierra Club v. Atlanta Reg'l Comm'n*, 171 F.Supp.2d 1349, 1360-61 (N.D. Ga. 2001) (same for traffic-related ozone).

In similar circumstances, this Court has also deemed it "appropriate" to defer to the judgment of air quality officials because Congress assigned Clean Air Act enforcement responsibilities to state and federal officials. *Citizens Ass'n of Georgetown v. Washington*, 370 F.Supp. 1101, 1109-10 (D.D.C. 1974) (denying motion for preliminary injunction because plaintiffs' air quality concerns did not constitute an irreparable harm in the absence of an ambient air quality violation). This Court should also find that the Groups have not met their burden of establishing irreparable harm because their alleged air quality harms are not "immediate" or certain to occur. (*See* Vehr Decl. at ¶¶29-30).

Next, the Groups assert that the Project will result in various development related harms that threaten the health and safety of those living within the Project Area. (*See* Dkt. 64-1 at 39-40) (*e.g.*, noise, lights, drilling equipment, traffic, dust). This Court should consider the state regulatory programs that are designed to prevent the Groups' alleged injuries. *See Seeger v. U.S. Dep't of Defense*, 306 F.Supp.3d 265, 291 (D.D.C. 2018) (finding defendants' actions to mitigate the potential harm "lessens the likelihood of irreparable harm"); *Manzanita Band of Kumeyaay Nation v. Wolf*, 496 F.Supp.3d 257, 264-65 (D.D.C. 2020) (finding plaintiffs' irreparable harm argument was "undermined by … measures in place" to "mitigate" such harm).

For example, WOGCC regulations require operators to adhere to setback requirements from buildings, provide advance notice of development plans, and submit proposed mitigation measures to the WOGCC for review which include practices for addressing noise, lighting, traffic, and visual aesthetics. *See Rules, Wyo. Oil & Gas Conservation Comm'n* ch. 3, § 47; (Kropatsch Decl. at ¶15). WOGCC also regulates venting and flaring, which must also be conducted in

compliance with WDEQ air quality rules. *Id.* at § 39; (Kropatsch Decl. at ¶19) (noting that only 0.18% of all natural gas produced in Wyoming in 2021 was vented or flared). Finally, WOGCC regulates hydraulic fracturing, requires groundwater monitoring, and regulates well completions to protect groundwater *Id.* at §§ 22, 45, 46; (Kropatsch Decl. at ¶¶16-18). These State-implemented regulatory checks are measures that effectively mitigate the alleged public health harms. *See, e.g., W. Watersheds Project v. Bernhardt*, 468 F.Supp.3d 29, 49 (D.D.C. 2020) (finding that the risk of taking a protected grizzly bear did not constitute irreparable harm because "there are many checks in the process" to avoid such takings).

Local leaders have also implemented steps to address traffic-related safety concerns and dust. (*See* Willox Decl. at ¶¶26, 28). The Converse County Commission adopted a permitting process for oversize/overweight industry loads, prioritized paving highly-utilized county roads, and purchased additional equipment to treat gravel roads to mitigate dust. (*Id.*). In addition to operator committed mitigation measures explained in the FEIS, this Court should consider these local government measures that provide residents with additional protections from alleged traffic-related nuisances. (*See* PIR1093) (detailing operator committed speed limits on access roads to reduce airborne fugitive dust); *see also Macht v. Skinner*, 715 F.Supp. 1131, 1137 (D.D.C. 1989) (considering State mitigation measures to address traffic-related harms). Again, the Groups provide no evidence that these measures are ineffective, and more importantly, do not explain how the alleged nuisances are an "immediate" harm to local residents. *See Citizens Ass'n of Georgetown*, 370 F.Supp. at 1109 (finding alleged nuisance did not pose an "immediate and irreparable harm").

The Groups also contend that the Project will disrupt their connection with the land. (Dkt. 64-1 at 41). Despite the fact that the Groups seek to enjoin several hundred federal APDs, the

Groups do not identify a specific well or wells that will impair their use of the lands within the 1.5 million acre Project Area. *See Wisc. Gas Co.*, 758 F.2d at 674 ("Injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time") (internal quotations and citation omitted). One declarant visits sites along a public road outside the Project Area but does not explain how enjoining any one of the challenged site-specific federal APDs is necessary to preserve her enjoyment of this area. (*See* Dkt. 64-3 at ¶9). For this Court to find irreparable harm, the alleged injury must be "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Nat. Res. Def. Council v. Kempthorne*, 525 F.Supp.2d 115, 125 (D.D.C. 2007) (citation and internal quotation marks omitted). To this effect, the Groups do not explain how enjoining any one of the federal APDs will in fact prevent the alleged harms they seek to prevent. Accordingly, this Court should find that the Groups' alleged harms do not warrant an injunction.

## V. The public interest disfavors injunctive relief.

The Groups' failure to demonstrate a likelihood of success on the merits and irreparable harm is reason enough to deny their motion for a preliminary injunction. However, should this Court proceed to weighing the public interest factors, it should consider the significant harms that enjoining the Project will cause to the State and its local communities.

Courts are instructed to pay "particular regard for the public consequences of employing the extraordinary remedy of injunction." *Winter,* 555 U.S. at 24. Here, an injunction will result in devastating effects on local communities and threaten funding for the public services that support Wyoming residents. This Court has found that providing access to public services and protecting investments made in supporting public services weigh heavily in balancing the equities of a preliminary injunction. *See Bellinger v. Bowser*, 288 F.Supp.3d 71, 89-90 (D.D.C. 2017).

Converse County worked with the Bureau as a "cooperating agency" to ensure the Project promoted a consistent level of development so the community could accommodate the Project. (Willox Decl. ¶¶8-9, 14). Revenue from oil and gas development also constitutes a significant portion of Converse County's budget. (*Id.* at ¶14). Ad valorem taxes collected from oil and gas activity currently constitutes 74% of all property taxes paid in Converse County and amounts to an average of $25 million a year. (*Id.* at ¶18).

Converse County collects ad valorem taxes on a monthly basis, and its local leaders estimate that an injunction will result in an immediate 10% reduction in revenue and will result in a 50% reduction over a two-year period.[5] (*Id.* at ¶19). An injunction will substantially decrease County revenue for local services. (*Id.* at ¶20). Specifically, an injunction will threaten the existing funding streams used to support senior services (including on-site meals and the Meals-on-Wheels program), as well as social programs the County funds with oil and gas revenue such as Youth Development Services, the Humane Society, multiple Boys and Girls Clubs, the local domestic violence program, libraries, and mental health programs. (*Id.* at ¶¶21-22). An injunction will also impair the County's ability to continue funding several multi-year investments it has already made in anticipation of the Project including its new Justice Center and Jail and leases for road and bridge equipment needed to pave county roads. (*Id.* at ¶¶25-26).

Surrounding communities and landowners also support the Project and explain that an injunction will harm their socioeconomic wellbeing, substantially impact local businesses, and curtail employment opportunities. (Faber Decl. at ¶¶21, 29, 40) (Campbell County, Wyoming); (Pexton Decl. at ¶¶4-5, 10-11) (Douglas, Wyoming); (Roumell Decl. at ¶6) (Glenrock, Wyoming); (Boner Decl. ¶13) (landowners). These surrounding communities similarly rely on revenue from

[5] The Groups recognize that the merits briefing will likely not start until 2024. (Dkt. 64-1 at 39 n.13).

oil and gas revenue associated with the Project to fund public services including hospitals, fire protection, soup kitchens, domestic violence services, and addiction treatment programs. (*See* Faber Decl. at ¶¶35-38); (Pexton Decl. at ¶¶7-8); (Roumell Decl. at ¶¶4-5).

An injunction will also impact services and public schools across Wyoming. First, the State will not receive its 48% share of the federal mineral royalties from the enjoined federal APDs. *See* 30 U.S.C. § 191. Second, enjoining the fee/fee/fed wells within the Project Area also means that oil and gas development cannot proceed on certain State trust lands and the State will not collect revenue from these wells. (Scoggin Decl. at ¶19). In Fiscal Year 2022, the State's mineral leasing program collected fifty-nine million in royatlies from oil and gas production on State trust lands in Converse County alone. (*Id.* at ¶20).

Locally, the Converse County School District, which supports 1,700 students, will suffer two blows. (*See* Holt Decl. at ¶5). The local school district will not receive the expected State trust land revenue from the Project, but more significantly, an injunction will reduce the revenue that the Converse County School District receives through mill levies to support its at-risk student programs, youth literacy programs, and technical education programs. (*See id.* at ¶¶8-15).

The Bureau spent several years working with State agencies and local governments to prepare its decision to authorize the Project. (*See* PIR0097; PIR0151). The investments in time and resources, as well as the significant public consequnces of an injunction, all weight against enjoining further oil and gas development in Converse County.

## CONCLUSION

For the reasons stated above, this Court should deny the Groups' motion for preliminary injunction.

Dated this 24th day of April, 2023.

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