

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

POWDER RIVER BASIN RESOURCE
COUNCIL and WESTERN WATERSHEDS
PROJECT,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR
and U.S. BUREAU OF LAND
MANAGEMENT,

Defendants,

and

STATE OF WYOMING, et al.,

Defendant-Intervenors.

Case No. 1:22-cv-2696

**PRIVATE INTERVENORS' OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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Private Intervenor file this Opposition to Plaintiffs’ Motion for Preliminary Injunction, ECF No. 64 (“PI Motion”).¹ Before reaching the PI Motion, the Court should first consider Private Intervenor’s Joint Motion to Dismiss, ECF No. 67, and Private Intervenor’s Joint Motion to Transfer Venue, ECF No. 68, because those motions address the threshold questions of whether the Court has the power to and should hear the case at all.

But even if the Court were to reach Plaintiffs’ PI Motion, the Court should deny it. Plaintiffs challenge a Record of Decision (“ROD”) issued after a comprehensive six-year environmental review process that was premised on a lawful, well-reasoned policy in place and widely applied since 2009, and that appropriately recognized the State of Wyoming as the primary regulator of surface impacts for an area that includes only 10 percent federally owned surface. The lawsuit’s scope is expansive, seeking to invalidate the ROD, the underlying agency policy, and over 400 drilling permits. If successful, the suit would eviscerate the principles of cooperative federalism underlying numerous environmental protection laws enacted by Congress. Despite the far-reaching impacts of these claims, Plaintiffs ask the Court to, without the benefit of an administrative record and full merits briefing, declare an early victory for Plaintiffs by issuing an injunction that would immediately halt hundreds of millions of dollars of economic activity, resulting in extensive job losses, substantial declines in tax revenues for the State and Converse County, and significant monetary losses for countless private landowners and mineral owners. In contrast to these substantial harms, Plaintiffs’ requested emergency relief is based on nothing more than a handful of self-serving declarations making generic, unprovable assertions of environmental injuries that will allegedly occur in the absence of an injunction.

¹“Private Intervenor” refers collectively to Defendant-Intervenor Continental Resources, Inc. (“Continental”), Devon Energy Production Company, L.P. (“Devon”), Anschutz Exploration Corporation (“AEC”), and Petroleum Association of Wyoming (“PAW”).

But the best indication that Plaintiffs will not suffer any real irreparable injury is that Plaintiffs have been in no hurry to file this lawsuit or move for injunctive relief. After the ROD issued on December 23, 2020, Plaintiffs waited nearly two years to file suit. All the while operators filed for and received hundreds of drilling permits (“APDs”).² It was not until 27 months after the ROD’s approval that Plaintiffs filed their PI Motion. Neither it nor its supporting declarations explain this delay or why Plaintiffs will only now suffer irreparable injury.

For example, no declarant mentions any new harm they might not have anticipated in December 2020. None asserts “I have been harmed by the Project in the past and am likely to be harmed again soon.” None asserts “I waited until now for preliminary relief because the first 407 APDs caused me no irreparable harm, but the next few certainly will.” Plaintiffs’ delay is utterly unexplained. For this reason alone, the Court should deny the PI Motion. *See, e.g., Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (44-day delay in seeking interim relief was “inexcusable”); *Save Jobs USA v. Dep’t of Homeland Sec.*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015) (Chutkan, J.) (holding that “if a party makes no showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors [for interim relief]”). Contrast Plaintiffs’ failure to show irreparable harm to the extensive credible evidence of substantial irreparable harms to be suffered by the Private Intervenors, the State, the United States, and other counties and citizens in Wyoming, placing the balance of equities and the public interest against the injunction. In addition, Plaintiffs have failed to show a substantial likelihood of success on the merits, largely because all their arguments are ultimately based on an unfounded view that the State has no role in regulating oil and gas operations or

²Pls.’ Compl., App. A, ECF No. 1.

environmental impacts on the lands in question. The Court should deny Plaintiffs' PI Motion.

FACTUAL BACKGROUND

Plaintiffs challenge the Bureau of Land Management's ("BLM") decision to approve the Converse County Oil and Gas Project ("Project"). The Project allows the development of 5,000 oil and natural gas wells in Converse County, Wyoming. PIR-0004. A group of five oil and gas operators, including Devon and Continental's predecessor-in-interest, proposed the Project to BLM to facilitate the exploration and production of oil.³ *See id.* Any operator developing oil and gas resources in Converse County can rely on the ROD's decisions and its associated final environmental impact statement ("FEIS") when permitting oil and gas wells. *See, e.g.,* PIR-2407 (approving development by AEC).

The Project covers 1.5 million acres in southeast Wyoming, an area roughly half the size of New Jersey. Mineral extraction and energy development have occurred in the Project area for decades. More than 1,500 oil and gas wells already operate in the Project area. PIR-0147; PIR-0327. Uranium development occurs in the Project area, and historically coal was mined there. PIR-0327. More recently, multiple centers for wind energy have been constructed within the Project area. *See id.*; PIR-0329. In addition to mineral extraction and energy development, cattle and sheep grazing is a significant land use in the Project area. PIR-0324. The Project will yield significant economic benefits to region, *see* PIR-0780–0815, without altering the balance of land uses in the area.

The Project is unique in three respects. First, the Project contemplates development of oil and natural gas through horizontally drilled wells. Horizontal wells are first drilled vertically to

³Ex. 1, Decl. of Rebecca A. Byram & David Broussard in Supp. of Private Intervenor-Defs.' Resp. to Pls.' Mot. for a Prelim. Inj. ¶ 28 ("Byram Decl.").

the target mineral formation and then turn and run parallel to the surface for one to two miles. PIR-0177; *see* Ex. 2, Illustration of Horizontal Well. Because of their length, these wells may traverse and develop multiple mineral estates. Depending on its location, a single well can develop minerals owned privately (i.e., in “fee”), federally, and by the State.⁴ Because of their length, several wells, each going in a different direction, can be drilled from a single well pad, thus reducing the surface footprint and associated impacts. *See* PIR-0191. Here, 5,000 wells will be drilled from 1,500 well pads dispersed throughout the 1.5 million-acre Project area. *See id.*

Second, about 90 percent of the Project surface area is owned privately or by the State. PIR-0099; PIR-0324. Thus, relatively little development will occur on federally owned surface. *See* Ex. 4, Map of Challenged APDs.⁵

Third, this combination of horizontal wells and limited federal surface ownership creates unique considerations when approving APDs. Some wells in the Project area that develop federal oil and gas leases will be drilled on fee lands above nonfederal minerals, outside of federal lease boundaries. PIR-0153. These wells are known as “Fee/Fee/Fed” wells. *Id.*; Illustration of Horizontal Well.

Largely based on their objections to BLM’s approval of Fee/Fee/Fed wells, Plaintiffs now ask the Court to preliminarily enjoin BLM from approving APDs associated with the Project and to suspend all APDs for which drilling has not commenced. PI Mot. at 1–2. Plaintiffs, however, have not met their burden for this extraordinary remedy.

⁴*See also* Ex. 3, Decl. of Ryan Baker in Supp. of Private Intervenor-Defs.’ Resp. to Pls.’ Mot. for a Prelim. Inj. ¶ 29 & Ex. B (“Baker Decl.”).

⁵This map identifies the approximate location of well pads from which wells authorized by the challenged APDs will be drilled. The well pads are not drawn to scale.

LEGAL STANDARD

A preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20–22 (2008). A plaintiff seeking a preliminary injunction must establish: (1) the plaintiff is likely to suffer irreparable harm in the absence of injunctive relief; (2) the plaintiff’s likelihood of success on the merits; (3) the balance of equities favors an injunction; and (4) an injunction is in the public interest. *Id.* When seeking a preliminary injunction, a plaintiff must show that “all four factors, taken together, weigh in favor of the injunction.” *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014).

ARGUMENT

Plaintiffs have not met their burden to establish that the extraordinary remedy of a preliminary injunction is warranted. First, Plaintiffs’ delay in filing this litigation and seeking an injunction fatally undermines their irreparable harm arguments. Second, Plaintiffs are not likely to succeed on the merits. Third, given the substantial harms that would flow from the injunction, the balance of the equities weighs against an injunction. Finally, the public interest disfavors an injunction given the significant harms the public will suffer.

I. PLAINTIFFS’ DELAY UNDERMINES THEIR CLAIM OF IRREPARABLE HARM.

Plaintiffs must “demonstrate that irreparable injury is likely in the absence of an injunction.” *Winter*, 555 U.S. at 22. Failing to prove a likelihood of irreparable harm is itself “grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus do not merit such relief.” *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 529 (D.C. Cir. 2019). The D.C. Circuit has “set a high standard for irreparable injury.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). A plaintiff

must demonstrate injury that is “*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) (emphasis in original) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). “[A] mere ‘possibility’ of irreparable harm will not suffice.” *Cal. Ass’n of Private Postsecondary Sch. v. Devos*, 344 F. Supp. 3d 158, 167 (D.D.C. 2018) (quoting *Winter*, 555 U.S. at 22). And to establish irreparable harm under a National Environmental Policy Act (“NEPA”) claim, Plaintiffs must demonstrate the likelihood of some concrete injury beyond the procedural NEPA injury. *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998). Plaintiffs have failed to meet these high standards for three main reasons—their request is untimely, existing mechanisms protect against their alleged harms, and they fail to demonstrate irreparable harm before this Court reaches the merits.

A. Plaintiffs’ PI Motion Is Too Late.

Plaintiffs waited 27 months—from December 23, 2020, when BLM signed the ROD, to March 13, 2023—to move for an injunction. That is ground enough to deny the PI Motion. *Fund for Animals*, 530 F.2d at 987 (denying preliminary relief because 44-day delay was “inexcusable”). In another suit brought by Plaintiff Western Watersheds Project, equity weighed against injunctive relief when Plaintiff delayed only a few months—far less than the 27 months here. *W. Watersheds Project v. Bernhardt*, 468 F. Supp. 3d 29, 49–50 (D.D.C. 2020) (Mehta, J.) (“These unexplained delays in seeking emergency relief undermine their contention that they will be irreparably harmed absent an injunction.”); accord *Reno-Sparks Indian Colony v. Haaland*, No. 3:23-cv-00070-MMD-CLB, slip op. at 17 (D. Nev. Mar. 23, 2023) (Exhibit 5) (denying preliminary injunction where plaintiffs “waited” nearly two years “to file [the] case, and then another two weeks to file the [PI] Motion”). “By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action[.]” *Lydo Enters., Inc. v. City of Las Vegas*, 745

F.2d 1211, 1213 (9th Cir. 1984) (denying preliminary injunction).

B. Regulations and Surface Use Agreements Protect Against Harms.

The activities Plaintiffs want enjoined are well-regulated to prevent the speculative, future harms Plaintiffs fear. Plaintiffs suggest that, if BLM does not regulate surface activities for Fee/Fee/Fed wells, then operators are free to produce federal oil and gas without any oversight. That is simply false and a disingenuous representation to the Court. Operations in Converse County do not occur in a regulatory vacuum. Operations on privately or state-owned surface are both heavily regulated by the State and Converse County and subject to explicit contractual operational restrictions in their agreements with the landowners to protect the land and environment.⁶

As Wyoming has explained, oil and gas operations are subject to rules and regulations from both the Wyoming Oil and Gas Conservation Commission (“WOGCC”) and the Wyoming Department of Environmental Quality (“WDEQ”). *See* State of Wyoming’s Opp. to Pls.’ Mot. for Prelim. Inj., ECF No. 77 (“Wyo. Br.”) at 2–3; Wyo. Stat. Ann. §§ 30-5-104(d), 30-5-401 to -410; WOGCC Rules & Regs. ch. 3, §§ 4, 8(a), 18, 20–22, 46; WDEQ Rules & Regs. chs. 1–3, 6, 7, 8, 11, 18, & 20. Additionally, Converse County oversees oil and gas operations. *See* Converse Cnty., Wyo., Resol. No. 07-12 (June 5, 2012). Where proposed activities deviate from the Converse County Land Use Plan or the goals identified by the Natural Resources Management Plan, Converse County Commissioners may request additional mitigation efforts. *See* Wyo. Stat. Ann. § 18-3-504(a)(v); Converse County Wyoming Land Use Plan, 5-6 (Apr. 7, 2015).⁷

⁶Byram Decl. at ¶¶ 26–28; Baker Decl. at ¶¶ 26–27.

⁷Available at <https://www.conversecountywy.gov/DocumentCenter/View/466/Converse-County-Land-Use-Plan-PDF>.

Additionally, the private landowners whose surface lands host oil and gas development have vested interests in keeping their land, air, and water as healthy as possible—stewardship that many families have undertaken for many generations.⁸ Not only do they benefit from government regulation and oversight of oil and gas development, but they exercise considerable power over how their land is used by contractually requiring oil and gas operators to undertake their own stewardship obligations.⁹ For example, surface use agreements (“SUAs”) between landowners and operators govern everything from pipeline easements to road use to using recycled water for well completion to protecting ranching, residential, recreational, and environmental values. *See* Ex. 9, Combined Decl. of Robert Boner et al. (“Boner Decl.”) ¶ 4; Tillard Decl. ¶¶ 9–17; Earthorne Decl. ¶¶ 13, 34–46 & Ex. A. SUAs typically contain provisions that: (1) restrict water use, Boner Decl. –4; (2) ensure topsoil conservation, *id.* ¶ 5; (3) require reclamation of all surface disturbances, including controlling noxious weeds, *id.* ¶¶ 5, 9; (4) prevent waste disposal and control dust, *id.* ¶ 6; (5) protect livestock and wildlife, *id.* ¶ 7; (6) ensure integrity and safety of oil and gas infrastructure, *id.* ¶ 8; and (7) acknowledge and encourage cooperation with BLM, the State, and Converse County to protect health and the environment, *id.* ¶ 10; *see also* Moore Decl. ¶¶ 6–14. Tillard Decl. ¶¶ 9–17; Earthorne Decl. ¶¶ 13, 34–46 & Ex. A. SUAs ensure that oil and gas development successfully coexists with and benefits the citizens of Converse County.

⁸Ex. 6, Decl. of Stephen A. Moore ¶¶ 2–3 (Apr. 7, 2023) (“Moore Decl.”); Ex. 7, Decl. of Frank Glenn Eathorne, Jr. (“Eathorne Decl.”) ¶¶ 9–11; Ex. 8, Decl. of Timothy Tillard (“Tillard Decl.”) ¶¶ 7–17.

⁹Entry upon land for oil and gas operations is conditioned upon the oil and gas operator attempting good-faith negotiations with a landowner. Wyo. Stat. Ann. § 30-5-402(c) (Lexis 2023). Wyoming statutes specifically encourage good-faith negotiations “for the protection of the surface resources, reclamation activities, timely completion of reclamation of the disturbed areas and payment for damages caused by the oil and gas operations.” *Id.* § 30-5-402(f).

The SUAs also do not exist in a regulatory vacuum. Private surface owners in Converse County recognize a cooperative relationship between themselves, BLM, and oil and gas operators. *See* Boner Decl. ¶ 10. And, these surface owners recognize the benefits of ensuring the federal and state permitting processes work:

Our families have been Converse County ranchers for five or more generations. We live on the land that is being developed for oil and gas resources. We have successfully balanced our personal and professional livelihoods with oil and gas development for decades and are well versed in the long-term preservation of the natural resources we are responsible for. It is important to us that the land be protected and that our quality of life be maintained. We routinely see to all of this by entering into surface use agreements, participating with the BLM in its APD process, and after an APD has been issued, then through constant monitoring of activities on the ground.

Id. ¶ 11; *see also* Tillard Decl. ¶¶ 7–8, 18; Eathorne Decl. ¶¶ 14–29. These families know the effects of oil and gas development, and they are unequivocal in their testimony that Plaintiffs’ conjectural allegations about the Project’s future effects are simply wrong. *See* Boner Decl. ¶¶ 13–14 (“The irreparable harm to landscape, air, water, and quality of life,” as well as the “[t]he adverse impacts of the oil and gas development as alleged by the Plaintiffs is inaccurate.”). These families confirm that this is true regardless of whether the well at issue is a Fee/Fee/Fed well or otherwise. *Id.* ¶ 15; *see also* Moore Decl. ¶¶ 15–19.

Moreover, the oil and gas operators themselves stake their success on being responsible corporate citizens—for obvious reasons. These companies, including Private Intervenor, consider it their duty to serve their land- and mineral-owner partners and the communities in which they operate by limiting their footprint as they produce the federal minerals they purchased from the government. *See, e.g.,* Ex. 10, Decl. of Joseph DeDominic (“DeDominic Decl.”) ¶¶ 5, 14–17; Ex. 11, Decl. of Pete Obermueller ¶¶ 17–20 (“Obermueller Decl.”). Operators want to maintain good relationships with the landowners they depend on, to comply with the law so that they can operate efficiently, spending money on environmental protections

and the community, rather than legal conflicts.¹⁰ See DeDominic Decl. ¶¶ 21–22, 31.; Obermueller Decl. ¶¶ 17–20.

This comprehensive regulatory and contractual network mitigates the environmental impacts from oil and gas development and protects against the harms that Plaintiffs allege.

C. Plaintiffs Otherwise Fail to Demonstrate Irreparable Harm.

Plaintiffs’ burden is to show their members will suffer irreparable harm before this Court rules on the merits, likely one year from now. Even if Project operations would eventually cause some environmental impacts, Plaintiffs have not demonstrated imminent harm to their members. As discussed in the standing section in Private Intervenor’s Motion to Dismiss, ECF No. 67, Plaintiffs not only fail to establish standing to bring this lawsuit, which is a threshold matter that the Court should decide before ruling on their PI Motion, *id.* at 5–17, but also fall short of proving a likelihood of imminent irreparable harm. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (“[A] party who seeks a preliminary injunction must show a substantial likelihood of standing.” (internal quotations omitted)). Plaintiffs’ declarations do not establish harm that is “*certain, great and actual*—not theoretical—and *imminent*, creating a clear and present need for extraordinary equitable relief to prevent harm.” *Power Mobility Coal.*, 404 F. Supp. 2d at 204 (quoting *Wis. Gas Co.*, 758 F.2d at 674) (emphasis in original). Unless they prove this harm, Plaintiffs fail.

1. Plaintiffs’ Reliance on Potential Impacts Disclosed in the FEIS Does Not Establish Irreparable Harm.

Plaintiffs do not allege that BLM’s approvals of the ROD or challenged APDs have caused or will cause actual injury to Plaintiffs or their members. Instead, they principally recite

¹⁰Private Intervenor’s also undertake voluntary environmental studies and implement voluntary measures to ensure the viability of their projects in concert with the requirements of federal, state, and local laws and regulations. See DeDominic Decl. ¶¶ 15–17.

the potential impacts BLM disclosed in the FEIS, claiming “BLM has acknowledged that the Converse County Project will inflict irreparable harm.” Mem. in Supp. of Pls.’ Mot. For Prelim. Inj., ECF No. 64-1 (“Pls.’ Mem.”) at 39–41; *see also, e.g.*, Pls.’ Ex. 2, Decl. of Maria Katherman, ECF No. 64-4 (“Katherman Decl.”) ¶¶ 13–14 (citing occasional “thermal inversions” in the atmosphere and increased haze). This argument would create an anomalous result. If every NEPA analysis that discloses a project’s impacts evidences irreparable harm, then preliminary injunctions would issue after every ROD.¹¹ But this is not the case. Merely pointing to “any potential environmental injury” is not enough for an injunction. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 474 (9th Cir. 2010). Moreover, by tethering their alleged harms to the potential impacts disclosed in the FEIS, Plaintiffs ignore that Project development—and any associated impacts—has occurred at less than half the rate analyzed in the FEIS. *Compare* PIR-0004; PIR-0192 (analyzing development of 500 wells per year) *with* First Am. Compl., ECF No. 44, ¶ 112 (stating that BLM has approved at least 407 wells between December 2020 and December 2022).

Further, Plaintiffs exaggerate the impacts disclosed in the FEIS. *See* Pls.’ Mem. at 2 (“Project operations will irreversibly alter the natural landscape, generate toxic air pollution, destroy wildlife habitat, spoil scenic viewsheds and recreation opportunities, threaten local water supplies, and impair the quality of life for local communities.”). These are generalized, grandiose, and hypothetical injuries, unsupported by the proof required to support the extraordinary relief they request. *See* PIR-0168. For these reasons, Plaintiffs have not demonstrated the Project will result in irreparable harm.

¹¹Furthermore, as described in section III, *infra*, Plaintiffs mischaracterize the potential impacts of the Project disclosed in the FEIS.

2. Plaintiffs' Declarations Do Not Establish Irreparable Harm.

Plaintiffs' declarants also do not demonstrate injuries that are irreparable. One declarant, Maria Katherman, should most be able to show irreparable harm because she lives at the southern edge of the Project area. But Ms. Katherman is unable. Her chief concern is from increased truck traffic on a gravel road near her ranch. Katherman Decl. ¶ 9. But increased truck traffic, at best, is a transient harm. *W. Ala. Quality of Life Coal. v. U.S. Fed. Highway Admin.*, 302 F. Supp. 2d 672, 684 (S.D. Tex. 2004) (finding temporary increased traffic and associated air impacts not to be irreparable harm). She has failed to show her "purported injuries are certain enough to justify emergency relief." *Save Jobs USA*, 105 F. Supp. 3d at 113.

The remaining declarants live outside the Project area—in three cases nearly 100 miles from the Project's borders.¹² PI Mot. Ex. 1, Decl. of Shannon R. Anderson, ECF No. 64-3 ("Anderson Decl.") ¶ 2; PI Mot. Ex. 2, Decl. of Donal O'Toole, ECF No. 64-7 ("O'Toole Decl.") ¶ 2; PI Mot. Ex. 3, Decl. of Leland Turner, ECF No. 64-5 ("Turner Decl.") ¶ 4; PI Mot. Ex. 4, Decl. of Erik Molvar, ECF No. 64-6 ("Molvar Decl.") ¶ 13. As a result, the harms they allege are either indirect (i.e., increased traffic outside of the Project boundary) or experienced from the 10 percent of federal lands within the Project area. None of these declarants allege they have rights to access the roughly 1.35 million acres of nonfederal lands within the Project area.

For example, Shannon Anderson, Erik Molvar, and Donal O'Toole assert they visit the Thunder Basin National Grasslands. Anderson Decl. ¶¶ 9–17; Molvar Decl. ¶ 18; O'Toole ¶¶ 9–10. But Ms. Anderson identifies no approved APDs with surface locations that will be visible from her vantage point.¹³ See Anderson Decl. ¶¶ 9–17. Mr. Molvar offers no details as to where

¹²Baker Decl. ¶ 29 & Ex. A.

¹³See Map of Challenged APDs (showing approved APD locations relative to the Thunder Basin National Grasslands). Further, given the 1.5 million-acre size of the Project area, any development

his favored sites in the vast Grasslands are relative to the upcoming drilling and, at best, suggests he *might* experience occasional disruptions to his recreational interests, depending upon when and where he visits the Grasslands and upon where future development occurs. Molvar Decl.

¶ 18. But the “injunction standard demands actual *proof* of injury, as opposed to the mere allegation of an injury sufficient to establish standing at the pleadings stage.” *Nat’l Parks Conservation Ass’n. v. U.S. Forest Serv.*, No. 15-cv-01582 (APM), 2016 U.S. Dist. LEXIS 9322, at *25 (D.D.C. Jan. 22, 2016). (emphasis in original). And, although Mr. O’Toole drives through the Thunder Basin National Grasslands, *see* O’Toole Decl. ¶¶ 9–10, his possibly disrupted enjoyment of the scenery in the Grasslands is not a harm that is “certain, imminent, great, and beyond remediation.” *Nat’l Parks Conservation Ass’n*, U.S. Dist. LEXIS 9322, at *24 (such a claim of scenic enjoyment may suffice for standing, but not for irreparable harm). Accordingly, Plaintiffs’ generalized allegations of harm are not imminent or irreparable.

Other allegations of harm are not imminent or traceable to the Project. Like Ms. Katherman, Ms. Anderson is concerned about road dust, but this harm is not irreparable. *See* Anderson Decl. ¶ 21. Similarly, Mr. Turner is concerned about existing air pollution and dust, but his concerns are generic. Turner Decl. ¶ 9 (“I fear these problems will only become worse”), 17 (“It’s only a matter of time before similar incidents pop up”). They are not tied to any specific development in the Project area. Mr. Molvar is “concerned that the imminent approval of drilling permits for the Converse County Project will result in significant decreases” in certain species of wildlife. Molvar Decl. ¶ 21. But that “imminent approval” began over two years ago. He offers no proof of harm from the upcoming wells. *See id.*

that would be visible from Ms. Anderson’s vantage point does not justify enjoining the ROD and all APDs that have not yet been developed.

Because Plaintiffs have failed to show certain, imminent, and great harm from the upcoming drilling, the Court could deny the PI Motion “without considering the other factors.” *Save Jobs USA*, 105 F. Supp. 3d at 112. The Court should do so.

II. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

Plaintiffs contend that BLM’s approvals of Fee/Fee/Fed APDs violate the Administrative Procedure Act (“APA”) and the Federal Land Policy and Management Act (“FLPMA”), and that BLM’s environmental analysis does not satisfy NEPA. To prevail on these claims, Plaintiffs must show that BLM’s decisions were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The Court’s review of BLM’s actions is “fundamentally deferential,” especially for “matters relating to [an agency’s] areas of technical expertise.” *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) (citation omitted). When analyzing agency action under this “narrow” standard of review, the Court must determine whether the challenged action was based on a “reasoned analysis.” *Motor Vehicle Mfrs. Ass’n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–42 (1983). Generally, an agency has engaged in this analysis when the administrative record indicates that it “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Plaintiffs have failed to meet these standards.

A. Plaintiffs Are Unlikely to Succeed on Their Fee/Fee/Fed Claims.

Plaintiffs’ characterizations of Fee/Fee/Fed development are incorrect. *See* Pls.’ Mem. at 12–14. Plaintiffs’ Figure 1, *id.* at 13, depicts Fee/Fee/Fed as a well pad placed on the property line between nonfederal surface and minerals on one side and those owned by the federal government on the other. The impression is that oil and gas operators strategically select well-

pad locations to avoid BLM regulation while drilling only a short distance into federally owned minerals. That is not reality. Horizontal wells may pass through multiple mineral estates. Indeed, many Fee/Fee/Fed wells involve no federally owned surface overlying any portion of the wellbores.¹⁴ Many Fee/Fee/Fed wells penetrate only small portions of federal minerals.¹⁵

Plaintiffs' call for BLM oversight of the surface locations from which Fee/Fee/Fed wells are drilled ignores the practical impossibilities of federal regulation of activities on nonfederal surface. Often, Fee/Fee/Fed wells are drilled from pre-existing well pads. PIR-4665–4666; *e.g.*, APD 1 (PIR-2408). Other times, new well pads will be constructed regardless of whether BLM approves a Fee/Fee/Fed well. *See* PIR-4668 (providing guidance when “the well pad would be constructed as proposed even if the Federal APD were not approved”). And, because nonfederal wells may also be drilled from these well pads, nonfederal wells may continue producing long after the Fee/Fee/Fed well has ceased production. Recognizing these complexities, President Obama's administration first addressed regulation of Fee/Fee/Fed scenarios in 2009,¹⁶ and that policy remains unchanged. BLM's Fee/Fee/Fed policy represents a cohesive approach to provide for certain federal and comprehensive State regulation of modern oil and gas development—not a policy to allow companies to skirt BLM oversight.

Plaintiffs argue that BLM has the law wrong in concluding it lacks authority to regulate oil and gas operations on nonfederal surface that sits directly above nonfederal minerals. *See* Pls.' Mem. at 15–24. Because BLM does not regulate these operations, Plaintiffs claim “Fee/Fee/Fed wells will result in greater impacts than wells subject to standard [BLM] mitigation

¹⁴*See* Baker Decl. ¶ 28 & Ex. A (depicting the Fee/Fee/Fed wells drilled from the Skunk Creek Fed 3772-6 SESW Pad in the Project area, which includes no federally owned surface in the spacing unit).

¹⁵*Id.*

¹⁶*See* Ex. 12, BLM Instruction Memorandum No. 2009-078 (Feb. 9, 2009); PIR-4668–4669.

requirements.” *Id.* at 24. These wells “will have essentially no federal oversight, and the entire project lacks the air quality controls EPA implored BLM to adopt.” *Id.* at 40. Here, candor should compel Plaintiffs to acknowledge the extensive state regulation over these operations, including state enforcement of EPA’s air quality controls.¹⁷ They prefer, instead, to portray surface operations as free of any oversight.

Their strawman argument starts from a well-settled point. Under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, Congress has the legislative power “to regulate purely private activities on nonfederal property *if they affect federal lands*.” Pls.’ Mem. at 16 (emphasis added). But from that uncontroversial point, their argument goes awry. Courts are to presume Congress did not intend for federal intrusion into state regulation, “unless that [was] the clear and manifest purpose of Congress.”¹⁸ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Neither FLPMA nor the Mineral Leasing Act (“MLA”) exhibit such “clear and manifest purpose.”

FLPMA is a land use planning statute in which Congress directed the Secretary of the Interior, through BLM, to manage the federal “public lands”—i.e., only lands owned by the United States. *See* 43 U.S.C. § 1701(a) (declaring congressional policy), § 1702(e) (defining “public lands”); *see generally Wyoming v. Dep’t of the Interior*, 493 F. Supp. 3d 1046, 1063 n.16 (D. Wyo. 2020) (“At its core, FLPMA is a land use planning statute.”). In FLPMA, Congress showed no clear intent to regulate neighboring lands near public lands. *See* 43 U.S.C. § 1702(e);

¹⁷*See, e.g.*, Byram Decl. ¶¶ 27–28 (outlining extensive State, non-BLM federal, Converse County, contractual commitments, and Applicant Committed Measures that either regulate or control oil and gas surface operations in fee/fee/fed scenarios); Baker Decl. ¶ 27; Tillard Decl. ¶¶ 11, 18; Eathorne Decl. ¶ 44; DeDominic Decl. ¶¶ 42–63.

¹⁸*See also* Def.-Intervenors, Cont’l Res., Inc. and Devon Energy Prod. Cop, LP’s Mot. for Partial J. on the Pleadings (Mar. 13, 2023), ECF No. 69; Def.-Intervenors, Cont’l Res., Inc. and Devon Energy Prod. Co., LP’s Mem. in Supp. of Their Mot. for Partial J. on the Pleadings (Mar. 13, 2023), ECF No. 69-1 (“MPJP Mem.”).

see also MPJP Mem. at 13–14. Similarly, the MLA allows BLM to regulate only “surface-disturbing activities *within the lease area*,” a phrase showing no clear intent to regulate outside the lease area. 30 U.S.C. § 226(g) (emphasis added); *see also* MPJP Mem. at 14–15.

Plaintiffs fail to cite, and accordingly fail to address, the “clear and manifest purpose” test.¹⁹ Instead, they follow a test of their own making: unless Congress has expressly forbidden federal regulation of adjoining lands, then federal regulation is required. For example, they cite the “undue degradation” clause of FLPMA: the Secretary shall “take *any action necessary* to prevent unnecessary or undue degradation of the [public] lands.” Pls.’ Mem. at 20 (quoting 43 U.S.C. § 1732(b)) (emphasis in original). Their argument wrongly presumes that the State’s regulation is inadequate to protect state and federal lands. As Plaintiffs acknowledge, the “undue degradation” standard is defined to refer to, among other things, “activities that exceed standards set by federal or *state law*.” Pls.’ Mem. at 23 (emphasis added). Plaintiffs err by not recognizing the State’s laws when considering “undue degradation,” because the State’s authority covers not only Fee/Fee/Fed lands but also federal lands within its borders. *Kleppe v. New Mexico*, 426 U.S. 529, 544 (1976); *see also* 43 U.S.C. § 1712(c)(8) (requiring that BLM land use plans “provide for compliance” with state “air, water, noise, or other pollution standards”). By ignoring the State’s authority, *see* Pls.’ Mem. at 23–24, they offer a meritless argument.

The same made-up test applies to Plaintiffs’ MLA interpretation. They argue, for example, that when the MLA says the Secretary “shall regulate all surface-disturbing activities

¹⁹ The “clear and manifest purpose” test is a rule of interpretation to avoid unintended federal intrusions on state sovereignty. If any ambiguity remains after the rule is applied, Plaintiffs still must show the Secretary’s regulations are unreasonable applications of the statutes, *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and her interpretations of the regulations are unreasonable under *Auer v. Robbins*, 519 U.S. 452 (1997). By failing to address any of these three authorities, Plaintiffs cannot succeed on the merits.

conducted pursuant to any [federal] lease,” 30 U.S.C. § 226(g), the Secretary must regulate neighboring surface, Pls.’ Mem. at 20–21. But surface operations on off-lease nonfederal lands are not conducted “pursuant to” the federal lease. The federal lease gives the lessee no right to use neighboring nonfederal surface.²⁰ Ironically, Plaintiffs concede the same subsection (g) is full of limitations tying authority to federal lands only. Pls.’ Mem. at 20–21 (quoting the subsection’s use of several phrases such as “within the lease area” and “within the boundaries of the lease”). But under their test—that congressional intent to regulate is presumed unless expressly forbidden—they argue that the one absence of such phrases around the term “surface resources” means BLM must regulate surface resources no matter what else subsection (g) says. *Id.*

Plaintiffs’ argument was persuasively rejected in *Utah Native Plant Society v. U.S. Forest Service*, 923 F.3d 860 (10th Cir. 2019). *See also* MPJP Mem. at 6, 16–17 (discussing *Utah Native Plant Soc’y*). There, the Tenth Circuit analyzed whether the Forest Service had authority to regulate the release of goats on state lands, where the goats might then migrate to neighboring federal lands that were subject to Forest Service regulation. *Utah Native Plant Soc’y*, 923 F.3d at 863–64. The Forest Service’s Organic Act empowered it to regulate the occupancy and use of “the national forests.” *Id.* at 867 (quoting 16 U.S.C. § 551). The court found that language insufficient to grant authority over state lands. Provisions to protect the “national forests,” hardly evidences a ‘clear and manifest’ purpose to encroach upon State sovereignty[.]” *Id.*; *see also U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1849–50 (2020) (where national trail system crosses “lands owned by States, local governments, and private landowners,” it would take a “clear congressional command” to work “the vast expansion of the

²⁰Byram Decl. ¶ 29.

Park Service’s jurisdiction”); *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2485, 2487–89 (2021) (per curiam) (rejecting reading that one statutory provision “in isolation” was adequate to allow a federal encroachment on the States’ areas of traditional authority).

Contrary to precedent, Plaintiffs would use the government’s limited surface ownership—a mere 10 percent of the Project area—as a springboard for federal power over the whole. Under the judicial test to find a clear and manifest purpose, it is not sufficient to point to one instance in 30 U.S.C. § 226(g) that does not expressly limit federal authority and ignore other indications that the intent to expand federal power over nonfederal lands is lacking. There is no clear and manifest intent to do so in either FLPMA or the MLA.

Finally, Plaintiffs unpersuasively cite a smattering of judicial decisions interpreting statutes other than FLPMA and the MLA to show circumstances where federal agencies have been authorized to regulate adjoining nonfederal property interests. Pls.’ Mem. at 18–19. In none of these cases was the federal agency, in the face of legislative silence, given full authority to regulate adjoining private fee lands. *See United States v. Jenks*, 22 F.3d 1513, 1517–18 (10th Cir. 1994) (allow, under the express terms of 16 U.S.C. § 3210(a), Forest Service regulation of access across forest lands to a private inholding, but with no claim to regulate the inholding itself); *United States v. Arbo*, 691 F.2d 862, 865 (9th Cir. 1982) (allowing federal forest inspectors to inspect sanitation facilities adjacent to forest lands, but with no claim to regulate mining operations); *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981) (upholding the express language of the Boundary Waters Canoe Area Wilderness Act, 92 Stat. 1649 (1978), to allow regulation of motorized transportation on state and federal lands within the external boundaries of the wilderness area); *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977) (enforcing statutory

restrictions on firearms expressly applying to state and federal areas within Voyageurs Park); *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979) (per curiam) (allowing, under 16 U.S.C. § 1271, to regulate a campfire on state land surrounded by forest lands); *United States v. Parker*, 761 F.3d 986, 990 (9th Cir. 2014) (upholding enforcement of a regulation requiring a special use permit for snowmobiles on a road right-of-way within a national forest); *Duncan Energy Co. v. U.S. Forest Serv.*, 50 F.3d 584, 589 (8th Cir. 1995) (upholding the Forest Service’s rights when it held the surface estate over private minerals); *Silver State Land, LLC v. Schneider*, 843 F.3d 982, 986 (D.C. Cir. 2016) (noting inconsistent with Plaintiffs’ position, that BLM’s general “plenary authority” over public lands is constrained by statutes such as FLPMA). None of Plaintiffs’ cases can be construed to mandate federal power over nonfederal surface overlying nonfederal minerals when Congress has not expressly directed BLM to do so.

Because preemption is “an extraordinary power in a federalist system[,] [i]t is a power that [the courts] must assume Congress does not exercise lightly.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). If Congress meant for BLM to infringe on the states’ inherent power and regulate nonfederal surface overlying nonfederal minerals under FLPMA and MLA, it had to “enact exceedingly clear language.” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (quoting *Cowpasture River Pres. Ass’n*, 140 S. Ct. at 1850). It has not. Thus, Plaintiffs have not shown error in BLM’s approach.

B. BLM Properly Deferred to the State to Manage Air Quality.

Plaintiffs’ air quality claims are factually and legally incorrect. Plaintiffs assert the Project will “churn out substantial air pollution,” Pls.’ Mem. at 8, when in fact, the Project is not expected to meaningfully impact air quality. Moreover, BLM properly looked to the State’s regulatory authority under the Clean Air Act to protect air quality.

1. Plaintiffs Overstate Predicted Impacts to Air Quality.

Consistent with NEPA, BLM modeled impacts to levels of criteria pollutants from the Project and contextualized predicted impacts to air quality. *See* PIR-0651–0696; *see generally* 42 U.S.C. § 7408; 40 C.F.R. pt. 50 (criteria pollutants); *TOMAC v. Norton*, 433 F.3d 852, 859 (D.C. Cir. 2006) (describing NEPA review of air quality impacts). Plaintiffs, however, improperly interpret the disclosed impacts to mean that the Project will degrade air quality.

(a) The Project Will Not Cause Exceedances of the Ozone Standard.

Plaintiffs erroneously assert that “the Project could result in exceedances of the 70 ppb ozone standard in certain areas.” Pls.’ Mem. at 9. In the FEIS, BLM modeled regional ozone impacts from the Project using two different methods, which provided highly refined predictions of where and when different ozone levels occurred throughout the region. PIR-0669; PIR-1411–1413; PIR-1417–1418. BLM determined that the models’ predicted maximum incremental impacts to ozone concentrations of 2.6 parts per billion (“ppb”) and 3.9 ppb from the Project, *see* PIR-0669, would not lead to exceedances of the ambient air quality standards. First, BLM observed that the maximum incremental contributions were predicted in areas with relatively low ambient ozone levels. PIR-1411–1412; PIR-1429. Second, BLM determined that, on the days with elevated regional ozone concentrations, the Project was predicted to have negligible incremental impacts to ambient ozone levels. *See* PIR-1411–1412; PIR-1417; PIR-1418. Based on this analysis, BLM determined that the model-predicted impacts from the Project “do not contribute to an exceedance” of the ozone ambient air quality standards. PIR-0669; *accord* PIR-1411–1412.

Despite BLM’s finding, Plaintiffs assert that the Project will cause exceedances of ozone air quality standards. Pls.’ Mem. at 8–9. Specifically, Plaintiffs allege that “the Project could result in exceedances of the 70 ppb standard in certain areas” because “[t]he Project will emit at

least 2.6-3.9 parts per billion (ppb) of ozone” and a maximum daily average ozone concentration of 67 ppb had once been observed in Converse County. *Id.* This assertion substitutes BLM’s ozone modeling and analysis for a rudimentary math exercise that fails to account for where or when maximum incremental contributions were predicted.

Plaintiffs also misunderstand BLM’s ozone modeling when they state BLM “concedes” that modeled ozone levels disclosed in the EIS “likely under-predict[]” impacts. *See id.* at 8 (citing PIR-0669 (tbl. 4.1-8); PIR-1396). Although models can under-predict ozone levels,²¹ BLM ensured the models did not. First, BLM utilized a tool that adjusts modeled concentrations and disclosed both the modeled and adjusted concentrations. *See* PIR-0657; PIR-1386–1387; PIR-1396; PIR-1412–1413. Second, and critically, BLM determined that the adjusted amounts “are systematically *lower* than absolute model results at all assessment areas.” PIR-1396 (emphasis in original). Therefore, Plaintiffs’ statement that modeled levels disclosed in the FEIS under-predict impacts has no factual basis. The FEIS simply does not predict that the Project will contribute to exceedances of the ozone ambient air quality standard.

(b) Plaintiffs’ Alarmist Rhetoric Mischaracterizes Air Quality Impacts.

Plaintiffs assert that “construction, completion, and production activities will result in exceedances of several human health-based National Ambient Air Quality Standards (NAAQS),” including PM₁₀, PM_{2.5}, and NO₂ standards, and that these exceedances “will impact human health and obscure skies.” Pls.’ Mem. at 8–9. Plaintiffs, however, dismiss BLM’s finding that criteria pollutants would remain below most ambient air quality standards.²² *See* PIR-1324–1326.

Potential exceedances of three standards are “expected to be localized in the immediate vicinity

²¹*See* PIR-1396 (“[I]t is possible that cumulative 2028 No Action Alternative ozone concentrations in 2028 could be higher than predicted by the model.”).

²²The model identified potential exceedances to the one-hour nitrogen dioxide (NO₂), 24-hour coarse particulate matter (PM₁₀), and 24-hour fine particulate matter (PM_{2.5}) NAAQS. PIR-0665.

of the construction and completion activities” and, further, that “after construction and completion activities stops (sic) *the impacts would end and concentrations would return to background levels.*” PIR-0666 (emphasis added). Moreover, the predicted air quality impacts do not consider that the Project proponents committed to certain mitigation measures to address potential impacts to PM₁₀ and NO₂.²³ See PIR-0008 (tbl. 3-1); PIR-0040.

Similarly, Plaintiffs state that the Project will cause “excessive” nitrogen deposition in the Northern Cheyenne Indian Reservation and other sensitive areas, Pls.’ Mem. at 9–10 (citing PIR-0680), but ignore that the FEIS expressly states that a “[nitrogen deposition threshold] *is not a threshold for evaluating impact severity.*” PIR-0677 (emphasis added). Plaintiffs also fail to recognize that, to mitigate predicted impacts to nitrogen deposition, the Project Proponents committed to use compressor engines below a specified NO_x factor. See PIR-0008 (tbl. 3-1). Plaintiffs’ allegations of air quality harms are unfounded.

2. BLM Properly Relied on the State to Regulate Air Quality.

Plaintiffs’ challenge to BLM’s decision not to impose certain air quality mitigation measures in the ROD is misplaced.²⁴ See PIR-0020–0022. BLM must defer to the agencies tasked with implementing the Clean Air Act to protect air quality, particularly when authorizing oil and gas development. See *WildEarth Guardians v. BLM*, 8 F. Supp.3d 17, 38 (D.D.C. 2014) (allowing BLM to condition oil and gas leases with compliance with air quality standards implemented by other agencies); *San Juan Citizens All. v. Stiles*, No. 08-cv-00144-RPM, 2010 U.S. Dist. LEXIS 43119, at *57 (D. Colo. May 3, 2010), *aff’d in part*, 654 F.3d 1038 (10th Cir.

²³Furthermore, modeled air quality impacts may be overstated. The FEIS expressly acknowledged that BLM’s modeling approach is “conservatively high.” PIR-1321.

²⁴Plaintiffs’ challenge to BLM’s decision not to require certain air quality measures is independent of their challenge to BLM’s determination that it lacks authority over Fee/Fee/Fed wells because BLM’s air quality decision applies to all wells, regardless of their location. See PIR-0020–0022.

2011) (if an oil and gas project “violates NAAQS or other regulations,” the Clean Air Act provides a remedy); *see generally Coal. for Responsible Mammoth Dev., et al.*, 187 IBLA 141, 231 (2016) (recognizing BLM “does not itself enforce the requirements of the CAA and its State equivalent”); *Wyo. Outdoor Council*, 176 IBLA 15, 26 (2008) (explaining that “ensuring compliance with Federal and State air quality standards falls under the administrative jurisdiction of [the state], subject to EPA oversight”) (citation omitted).

Moreover, BLM’s deference to the State’s regulation of air quality is required by both FLPMA and the MLA. FLPMA requires that BLM’s land use plans “provide for compliance with applicable pollution control laws, including State and Federal air . . . pollution standards or implementation plans.” 43 U.S.C. § 1712(c)(8); *see WildEarth Guardians*, 8 F. Supp. 3d at 38 (affirming that FLPMA does not obligate BLM to “impose concrete emission-reduction measures” and instead permits BLM to require compliance with air regulations implemented by other agencies). The Interior Board of Land Appeals, acting on behalf of the Secretary of the Interior, *see* 43 C.F.R. § 4.1 (2022), has recognized that FLPMA “imposes on BLM only an obligation to ‘provide for’ compliance with applicable air quality standards, not to ensure or insure it, and that [the state] is the entity that is responsible for regulating and enforcing compliance with such standards.” *Powder River Basin Res. Council*, 183 IBLA 83, 95 (2012). Likewise, to implement the MLA, BLM has adopted a regulation requiring oil and gas operators to comply with “applicable laws [and] regulations” in order to “protect[] the mineral resources, other natural resources, and environmental quality.” 43 C.F.R. § 3162.5-1(a). Accordingly, BLM appropriately relied on the State to regulate any air quality impacts from the Project.

3. BLM’s Reliance on the State’s Air Quality Regulation is Consistent with Prior Project Approvals.

Plaintiffs assert that BLM has a “common practice” of imposing air quality mitigation

measures and, in support, point to RODs for two different gas projects in Wyoming.²⁵ Pls.’ Mem. at 27. But Plaintiffs overlook that these RODs do not require air quality mitigation measures.

Plaintiffs first cite air quality mitigation measures listed in BLM’s ROD for the Normally Pressured Lance natural gas project in Wyoming. Pls.’ Mem. at 27. But the ROD lists these measures among other “resource protection measures” and states that “some measures *will be treated as guidelines for voluntary compliance*[.]” PIR-4728 (emphasis added). Similarly, Plaintiffs assert that the Jonah Infill Drilling Project ROD “imposed” air quality mitigation measures, *see* Pls.’ Mem. at 27–28, but overlook that this ROD labels these measures “Operator-Committed Practices.” *See* PIR-4794. Plaintiffs have failed to show that BLM has a practice of requiring air quality mitigation in Wyoming. Rather, the documents on which Plaintiffs rely reinforce that Wyoming BLM consistently relies on the State to require air quality mitigation measures.

C. Plaintiffs Are Not Likely to Succeed on Their NEPA Claims.

Plaintiffs advance two, flawed attacks on BLM’s NEPA analysis. First, Plaintiffs incorrectly argue that the FEIS neglected to analyze impacts from Fee/Fee/Fed wells. Second, Plaintiffs wrongly assert that the FEIS incorrectly estimated existing and future oil and gas development and did not quantify cumulative greenhouse gas emissions.

1. BLM Properly Accounted for Impacts from Fee/Fee/Fed Wells.

Plaintiffs erroneously argue that BLM did not “meaningfully account for Fee/Fee/Fed wells” because “the FEIS assumed that BLM-imposed protections would mitigate adverse effects for the entire Project.” *See* Pls.’ Mem. at 28–29. The FEIS did not assume BLM can or will

²⁵Plaintiffs also point to projects approved by BLM’s Moab, Utah, and Miles City, Montana, Field Offices. *See* Pls.’ Mem. at 28; PIR-4813; PIR-4872. These one-well projects outside of Wyoming do not constitute decisions by other “state” offices. Further, given that the Secretary signed the ROD, these Field Office decisions cannot evidence a reversal in position.

require mitigation measures for Fee/Fee/Fed wells. Instead, BLM expressly acknowledged that its “authority to require mitigation of impacts is limited by the land and mineral estate ownership pattern in the [Converse County Project Area].” PIR-0649; *see also* PIR-1075.

None of the examples Plaintiffs cite supports their assertion that BLM assumed mitigation measures would apply to Fee/Fee/Fed wells. Plaintiffs misunderstand NEPA’s requirements and the State’s regulatory landscape.

First, Plaintiffs fail to recognize that, in the FEIS, BLM disclosed available mitigation measures as required by NEPA, but did not assume they would be implemented, either on federal or nonfederal lands. Specifically, Plaintiffs assert that the FEIS’s analysis assumed that BLM would impose mitigation measures to reduce the Project’s impacts on viewshed, traffic,²⁶ and particulate matter.²⁷ Pls.’ Mem. at 29 (citing FEIS at 4.13-7 and 4.15-4). Plaintiffs are correct that the FEIS identifies potential mitigation measures, but Plaintiffs overlook that the FEIS identifies them independently from the impact analysis. *See* PIR-0839, PIR-0864.

BLM included these potential mitigation measures in the FEIS to comply with the Council on Environmental Quality’s requirement that EISs consider potential mitigation

²⁶Plaintiffs cite a statement on page 4.12-1 of the FEIS (PIR-0827) that the analysis of impacts to soil resources assumes resource protection measures would be implemented. *See* Pls.’ Mem. at 29. Plaintiffs incorrectly read into this statement an assumption that *BLM-imposed* resource protection measures would be implemented. In fact, “[s]oil resources are managed through a broad set of regulations, guidelines, and formal planning processes” that are “administered through federal, state, or local units of government.” PIR-0459.

²⁷Plaintiffs also assert that “BLM’s air quality model assumed particulate matter emissions would be substantially reduced due to road watering and other dust control measures.” Pls.’ Mem. at 29. In support of this assertion, Plaintiffs cite “App. A at A-24.” But Appendix A does not include page “A-24.” Moreover, the air quality model does not assume application of dust control measures. *See* PIR-1263.

measures not otherwise included in an agency’s proposed action or its alternative.²⁸ 40 C.F.R. § 1502.14(f) (2019); *accord* 43 C.F.R. § 46.130(b) (allowing potential mitigation measures to be identified separately from alternatives). BLM’s analysis of impacts in the FEIS did not assume that these mitigation measures would be applied to Fee/Fee/Fed lands.

Second, Plaintiffs fail to recognize that the State will impose certain mitigation measures where BLM cannot. Specifically, Plaintiffs assert that BLM assumed that “there would be zero areas of surface disturbance within 0.6 miles of leks in priority sage-grouse habitat . . . ignoring the fact that it would not prohibit Fee/Fee/Fed wells from being developed within that 0.6-mile lek buffer.”²⁹ Pls.’ Mem. at 29 (citing PIR-0963). Plaintiffs ignore that the State imposes the same limits on fee lands. Wyoming Executive Order 2019-3 prohibits surface disturbance on fee lands within 0.6 miles of greater sage-grouse leks in “core population areas,” which coincide with BLM “priority habitat management areas.” *See* Ex. 13, Wyo. Exec. Order No. 2019-3, app. E at 7 (Aug. 21, 2019); PIR-0612–0613 (recognizing application of executive order); PIR-0620 (discussing relationship between Wyoming’s core population areas and BLM’s priority habitat); PIR-0969 (observing that regulations set forth under the executive order “are required regardless of land ownership”). Therefore, in the FEIS, BLM correctly determined that there would be zero areas of surface disturbance within 0.6 miles of leks in priority habitat.

2. BLM Properly Analyzed Cumulative Impacts.

(a) BLM Thoroughly Considered the Cumulative Impacts of Oil and Gas Development.

Plaintiffs fault BLM for relying on WOGCC well and drilling data from 2015 for its

²⁸Although the CEQ adopted revised NEPA regulations in July 2020, they only apply to NEPA processes begun after September 14, 2020. *See* 85 Fed. Reg. 43,304, 43,372–73 (July 16, 2020) (codified at 40 C.F.R. § 1506.13).

²⁹Leks are areas where male greater sage-grouse strut during mating season.

cumulative impacts analysis, asserting that (i) more than 3,800 wells were developed between 2016 and 2019, as compared to the 110 wells per year that BLM predicted; and (ii) BLM used an “arbitrary cut-off date” that resulted in the agency underestimating the future number of wells in the area. Pls.’ Mem. at 30–34. Plaintiffs are mistaken on both the facts and the law.

Plaintiffs’ Well Data is Wrong. Plaintiffs inexplicably assert that more than 3,800 wells were drilled in the Project area between 2016 and 2019 when, in fact, fewer than 450 wells were drilled during that timeframe. *See* Wyo. Br. at 33–36; Byram Decl. ¶ 30 (“To put Plaintiffs’ incorrect data in perspective, only 2,346 wells reported first production *in the entire State of Wyoming* between January 1, 2016 and December 31, 2019.” (emphasis added)).

BLM Reasonably Relied on 2015 Baseline Data. The NEPA process for the Project formally began on May 16, 2014. PIR-0031; PIR-0097. Thus, it was reasonable for BLM to select WOGCC and NEPA data from 2015 as the baseline data it used to estimate future oil and gas development. In addition, it was reasonable for BLM to reject protesters’ requests—made *six years* after the NEPA process began and *after* the comment periods on the Draft EIS and Supplemental Draft EIS had already closed—to forestall decision on the Project and restart its analysis to consider 2020 drilling data. *See* PIR-0031–0033 (comment periods occurred in 2018 and 2019); PIR-1810 (Plaintiffs’ Aug. 31, 2020 protest letter requesting that BLM consider “data current as of August, 25, 2020”); *see also, e.g., Custer Cty. Action Ass’n v. Garvey*, 256 F.3d 1024, 1039 (10th Cir. 2001) (holding that, because EIS was published in 1997, “Petitioners can hardly criticize that document for failing to utilize 1999 ... data”); *Concerned Citizens & Retired Miners Coal. v. U.S. Forest Serv.*, 279 F. Supp. 3d 898, 919 (D. Ariz. 2017) (“[r]eassessments must end at some point”).

BLM Reasonably Estimated Existing and Future Development. To determine existing

development in the Project area, BLM looked to WOGCC data disclosing that, as of January 2015, “1,520 existing wells . . . have been drilled and are in operation.” PIR-0182. BLM selected data from 2015 or earlier as a “fixed point in time to represent information that is continuously changing.” PIR-0187.

To determine future and cumulative drilling numbers, BLM relied on NEPA and WOGCC data that existed as of 2015 and made certain assumptions about future development. First, BLM relied on previously approved NEPA documents to determine that 1,064 new wells could be drilled on federal minerals under these approvals. PIR-0186–0187; *see also* PIR-0188 (tbl. 2.3-3). Second, BLM estimated that an additional 599 wells could be drilled to access nonfederal minerals based on the percentage of nonfederal lands within the Project area, bringing the total of future development under the No Action alternative up to 1,663 wells. PIR-0187. Based on WOGCC drilling data from 2008–2014, BLM determined that these identified future wells may be drilled at a rate of 110 wells per year. *Id.* As Wyoming explained, BLM’s assumption of 110 wells per year is consistent with the 426 wells actually drilled in the Project area. Wyo. Br. at 34. Third, BLM added the existing and “new development” totals to the well count totals (between 2,333 and 2,458 wells) of “other past, present, and reasonably foreseeable oil and gas activity in the larger general [cumulative impact study area³⁰].” PIR-0190–0192; PIR-1001; PIR-1002–1003 (tbl. 5.2-1). These several-thousand wells are “those for which NEPA decision documents are anticipated or in process but have not yet been completed.” PIR-1001. Added to BLM’s estimate of 1,663 future wells under the No Action alternative, this brings BLM’s cumulative number of future wells—used in its cumulative impacts analysis—to between

³⁰The cumulative impact study area is depicted by the green-and-grey hash-mark border on the map at PIR-1005.

3,996 to 4,121 wells. *See* PIR-1001–1003; *see also* PIR-1615. Thus, BLM reasonably assessed existing and future development in and around the Project area.

BLM’s Discretionary Decision is Owed Deference. “[T]he Court does not have the authority to set aside [an agency] decision that has ‘examined the relevant data and articulated a satisfactory explanation for its action[.]’” *Sakievich v. United States*, 369 F. Supp. 3d 278, 295 (D.D.C. 2019) (cleaned up) (quoting *State Farm*, 463 U.S. at 43). Here, BLM more than “cogently explain[ed] why it has exercised its discretion” to establish baseline data as of 2015. *See State Farm*, 463 U.S. at 48; PIR-0080–0081; PIR-1577 (explaining a need “to avoid a potentially continuous cycle of document updating”); *see also* PIR-1615 (rejecting proffered data as inaccurate); PIR-0187 (explaining that 2015 data “provides a consistent basis for evaluation of the Project alternatives”). Thus, this case is easily distinguished from *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237, 249 (D.D.C. 2020), which Plaintiffs cite for their assertion that “an agency cannot construct an arbitrary cut-off date to circumvent” the requirement to analyze reasonably foreseeable impacts. Pls.’ Mem. at 33–34. Unlike in *WildEarth Guardians*, BLM in its cumulative impacts analysis identified existing and future wells using a variety of data (applying its broad understanding of reasonable foreseeability) and considered projects that were proposed for NEPA review but not yet approved by BLM. *See, e.g.*, PIR-0186–0187; PIR-0190–0192; PIR-1001; PIR-1002–1003 (tbl. 5.2-1); PIR-1615.³¹ Also unlike in *WildEarth Guardians*, BLM repeatedly explained its decision regarding the scope of review, and why it

³¹For these reasons, BLM’s consideration of future proposed projects reflects the holdings set out in the other cited cases Plaintiffs cite in which an agency is required to consider “all projects that already exist or ‘will exist by the time’ the agency’s proposal is ‘in operation’” and projects for which an agency “has sufficient information ‘to analyze [their] impacts.’” Pls.’ Mem. at 33 (citations omitted). Plaintiffs have not otherwise identified any specific projects that BLM failed to consider. *See id.* at 30–34.

rejected Plaintiffs’ conflicting well numbers. *See* PIR-0187; PIR-1548; PIR-1577; PIR-1615.

Accordingly, BLM reasonably estimated and accounted for future production in the Project area.

(b) BLM Correctly Quantified Greenhouse Gas Emissions.

Plaintiffs wrongly assert that “BLM failed to quantify the greenhouse gas emissions attributable to the other existing or future wells in the Converse County Project area.” Pls’ Mem. at 36. BLM *did* quantify greenhouse gas (“GHG”) emissions for other past, present, and future wells. PIR-1019–1021. In fact, Plaintiffs reject BLM’s quantifications in the FEIS on the basis that “they predated the Project by many years, failing to account for projects that had come online in recent years,” i.e., projects that came online after BLM began its NEPA analysis in 2015. Pls’ Mem. at 35. But again, Plaintiffs are incorrect. BLM’s GHG quantifications relied on 2014 data *and also on* GHG quantification data specific to the region from 2017 and 2019. PIR-1019–1021. Specifically, BLM quantified and disclosed GHG emissions from: (i) all existing wells in the Casper Field Office area as of 2014; (ii) all existing oil and gas systems on federal land in Wyoming in 2014; (iii) all future emissions from 1,300 non-Project wells in all Wyoming BLM Field Office areas; (iv) all oil and gas systems on all lands in Wyoming as of 2018 (which includes the “future” wells BLM predicted would come online after 2015); and (v) all oil and gas development in the country as of 2017 (also accounting for post-2015 wells). PIR-1020–1021.

Therefore, for its consideration of state-wide emissions and national emissions, BLM relied on data concerning oil and gas direct and indirect emissions that was available to it in 2019. *Id.* (citing multiple agencies’ 2019 data). At each of these levels of quantification, BLM compared estimated direct and indirect GHG emissions for Alternatives A and B to the quantified values to provide the necessary context, listing the Project’s emissions as a percentage of local, state, and national emission levels. *Id.*

Contrary to Plaintiffs’ averment, BLM’s analysis of cumulative GHG impacts is unlike

that in the environmental assessment (“EA”) remanded in *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). In that case, plaintiffs argued that BLM failed to quantify the GHG emissions “from other BLM-managed projects in the region and across the country.” *Id.* at 76. According to the court, BLM had refused entirely to quantify the probable GHG emissions from other BLM leased parcels. *Id.* at 77. Instead, the EA merely declared that the “probable GHG emission levels [of the project], when compared to the total GHG emission estimates from the total number of federal oil and gas wells in the state, represent an incremental contribution to the total regional and global GHG emission levels.” *Id.* at 67–77.

Here, BLM did exactly what that court ordered on remand. Thus, Plaintiffs are unlikely to succeed on their claim GHG impacts claim.

3. BLM Properly Utilized CXs and DNAs.

Plaintiffs criticize BLM for using categorical exclusions (“CXs”) and Determinations of NEPA Adequacy (“DNAs”) to approve certain APDs, mischaracterizing their use as playing a “shell game.” *See* Pls.’ Mem. at 37. CXs and DNAs, however, are commonly used, well-accepted legal tools that allow agencies to efficiently comply with NEPA. BLM properly employed them here.

(a) CXs and DNAs Are Established NEPA Compliance Tools.

Both CXs and DNAs are established compliance tools that enable BLM to efficiently satisfy its NEPA obligations. A CX is “a category of actions that . . . normally do not have a significant effect on the human environment.” 40 C.F.R. § 1508.1(d) (2022). For these categories of actions, agencies need not prepare an environmental assessment or EIS. PIR-4506.

“Application of a CX is not an exemption from NEPA; rather, it is a form of NEPA compliance, albeit one that requires less than where an [EIS] or an [EA] is necessary.” *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1096 (9th Cir. 2013) (citing 40 C.F.R. § 1508.4 (2013));

PIR-4506.

A DNA is exactly what its name describes—a determination by BLM that existing NEPA analyses adequately assess the impacts of a proposed action. *See* PIR-4492. Federal courts have endorsed the use of DNAs. *See Pennaco Energy, Inc. v. U.S. Dep’t of the Interior*, 377 F.3d 1147, 1162(10th Cir. 2004) (“agencies may use non-NEPA procedures to determine whether new NEPA documentation is required”); *see also Friends of Animals v. Haugrud*, 236 F. Supp. 3d 131, 132–33 (D.D.C. 2017). CXs and DNAs thus are important tools that BLM may utilize to approve APDs.

(b) BLM Correctly Applied an EAct CX When Approving APDs in the Project Area.

BLM appropriately applied the third CX (“CX3”) set forth in section 390 of the Energy Policy Act of 2005, 42 U.S.C. § 15492 (“EAct”), when approving APDs in the Project area because it specifically applies to APDs approved for:

Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 years prior to the date of spudding the well.

42 U.S.C. § 15942(b)(3); *e.g.*, PIR-2480. Plaintiffs argue that BLM can use CX3 when an APD only involves well “drilling” and cannot use CX3 when an APD involves “construction of well pads, roads, pipelines, powerlines, and other supporting facilities.” Pls.’ Mem. at 37. Plaintiffs’ narrow construction of CX3 fails, for three reasons.

First, Plaintiffs’ construction of CX3 clashes with BLM’s long-standing interpretation of CX3, set forth in its 2008 NEPA Handbook. There, BLM contemplated activities other than drilling, including, surface-disturbing activities, in connection with CX3:

Full field development EISs do not need to be prepared where the development envisioned was analyzed in the land use plan EIS. *As long as the development foreseen does not exceed the . . . surface disturbance analyzed in the prior NEPA*

document, no additional NEPA documentation is required because of changes in the density of development.

PIR-4632 (BLM NEPA Handbook H-1790-1, App. 2, 143) (emphasis added). Plaintiffs' interpretation is directly at odds with BLM's interpretation.

Second, Plaintiffs' interpretation is inconsistent with section 390 of EPCA itself. The second section 390 CX ("CX2") specifically limits new drilling to "*a location or well pad site at which drilling had occurred within five years prior to the date of spudding the well.*" 42 U.S.C. § 15942(b)(2) (emphasis added). BLM has construed CX2 as not contemplating new surface disturbance. *See* PIR-4632 (defining a "location or well pad" as "previously disturbed or constructed well pad used in support of drilling a well"). Had Congress intended to limit CX3 to circumstances without new surface disturbance, it would have limited its use to areas of existing surface disturbance as it did with CX2. *SEC v. Bolla*, 550 F. Supp. 2d 54, 59 (D.D.C. 2008) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")).

Third, Plaintiffs' reliance on a Government Accountability Office report to contest BLM's application of CX3 is unpersuasive. *See* Pls.' Mem. at 37. Plaintiffs cite Table 4 of the report, which describes a survey of various BLM field offices' use of CXs and identifies allegedly improper uses of "CX3 to approve an activity other than drilling an oil or gas well." PIR-4933. This report, however, did not criticize the use of CX3 to approve both the drilling of an oil and gas well and construction the associated well pad. *See id.* (identifying use of CX3 to authorize water wells, grant of right-of-way, and installation of electrical lines). Moreover, Plaintiffs' argument is misplaced with respect to Fee/Fee/Fed wells, whereby BLM only authorizes drilling of the well itself and does not approve or authorize the construction of well

pads. *See, e.g.*, APD-4 (PIR-2483). Therefore, Plaintiffs have not established error in BLM’s use of CX3.

(c) BLM Correctly Used DNAs When Approving APDs in the Project Area.

Plaintiffs argue that BLM improperly used DNAs because no existing NEPA document analyzed the site-specific impacts of the approved APDs. Pls.’ Mem. at 37. Plaintiffs’ argument fails. Initially, Plaintiffs incorrectly suggest that BLM’s DNAs only rely on the analysis in the FEIS. *See* Pls.’ Mem. at 37–38. In fact, the DNAs also tier to and incorporate project-specific EAs. *E.g.*, PIR-2409; PIR-2465; PIR-2494. Plaintiffs do not explain why these project-specific EAs, together with the FEIS, do not adequately analyze the potential impacts of development. For example, Plaintiffs do not identify any impacts that these analyses fail to address.

Additionally, Plaintiffs err in their contention that BLM may use DNAs only for the same action analyzed in an existing NEPA document. *See* Pls.’ Mem. at 38. At least one court has upheld the use of a DNA for an action that is “substantially similar” to an agency action analyzed in an EA. *See Ctr. for Biological Diversity v. BLM*, No. 3:17-CV-553-LRH-WGC, 2019 U.S. Dist. LEXIS 7525, at *44 (D. Nev. Jan. 15, 2019). In that case, the court observed that the two authorized actions were located close to one another with similar “geographic and resource conditions.” *Id.*; *see also Friends of Animals*, 236 F. Supp. 3d at 133 (observing that BLM may utilize DNAs when a proposed action is “similar” to a previous action). Plaintiffs’ citation to *South Fork Band Council of Western Shoshone v. U.S. Department of the Interior*, 588 F.3d 718, 726 (9th Cir. 2009), does not foreclose an EA’s use for a similar project if the EA “discussed the specific environmental impacts at issue”—and the prior NEPA documents BLM relied on here did just that. And, Plaintiffs cite no “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” that prevents BLM

from relying on existing NEPA documents. *See* 40 C.F.R. § 1502.9(c)(1)(ii) (2019); *see also* Pls.’ Mem. at 38–39. Accordingly, Plaintiffs fail to establish error in BLM’s use of DNAs.

III. THE BALANCE OF EQUITIES WEIGHS AGAINST PLAINTIFFS.

Under the third preliminary injunction factor, the Court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24 (internal quotations and citations omitted). The Supreme Court has cautioned against “exercis[ing] equitable powers loosely or casually” simply because “a claim of ‘environmental damage’ is asserted.” *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 409 U.S. 1207, 1217 (1972). Critically, the third factor requires the moving party to affirmatively demonstrate “that an injunction would not substantially harm other interested parties.” *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). Plaintiffs have not done that. In fact, the “other interested parties” here—not only the Defendants and Defendant-Intervenors, but the many third parties dependent on and benefitting from the Project and its implementation, including the private land and mineral owners who depend on the Project for their living—will be unequivocally and substantially harmed in three main ways if an injunction issues.

A. An Injunction Will Result in Severe Disruptive Consequences.

The injunction Plaintiffs seek would halt much of the oil and gas development in Converse County—derailing many of Private Intervenors’ drilling and production operations that are already well in motion and slamming the door on the companies’ long-planned, logistically complex, and economically vulnerable future operations slated for imminent commencement. AEC’s, Devon’s, and Continental’s drilling programs under the approved, pending, and forthcoming APDs subject to this lawsuit entail a multi-year process that requires overlapping resources devoted to numerous wells at any given time, as opposed to discretely drilling one well

after another. *See* DeDominic Decl. ¶¶ 77–79; Byram Decl. ¶¶ 13, 19–20; Baker Decl. ¶¶ 12, 19–20. This type of interconnected drilling program requires the companies to mobilize large and diverse teams that include drill rig operators, engineers, seismologists, scientists, construction companies, trucking companies, water, and other service providers. DeDominic Decl. ¶¶ 79–84; Devon. Decl. ¶¶ 14, 19; Baker Decl. ¶¶ 13, 19. Specifically, AEC estimates that it employs 327 vendors, contractors, and subcontractors to drill and complete a single well and produce oil and gas from that well. DeDominic Decl. ¶ 80. Not only would granting Plaintiffs’ requested injunction leave a large and interconnected drilling operation only partially completed, but it would also leave these vendors, contractors, and subcontractors without meaningful jobs. DeDominic Decl. ¶ 84; *see* Baker Decl. ¶ 15.a. (discussing harm to Continental’s vendors and third parties from potential injunction from June 1, 2023 to May 31, 2024); Byram Decl. ¶ 17. Devon will lose more than \$25.7 million in net present value—i.e., the time value of money—from just a one-year delay in its planned drilling schedule from Plaintiffs’ requested injunction.³² Byram Decl. ¶ 16. Using the same metric, Continental will lose \$24 million. Baker Decl. ¶ 16. This lost time value of money cannot be recouped by the companies against either the Plaintiffs or the government.

B. Private Intervenor Will Suffer Substantial Economic Harm.

Courts have repeatedly weighed, and will favor, concrete losses to business and other third-party interests in weighing the balance of harms. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (balance of harms favored oil company where “injury to subsistence resources from exploration was not at all probable” but “on the other side of the balance of

³² The “timeframe” from June 1, 2023 to June 1, 2024 approximates the earliest time the Court could rule on Plaintiffs’ requested injunction to when the Court could rule on the merits. Byram Decl. ¶ 11; Baker Decl. ¶ 10.

harms was the fact that the oil company petitioners had committed approximately \$70 million to exploration to be conducted during the summer of 1985 which they would have lost without chance of recovery had exploration been enjoined”); *Sierra Club, Inc. v. Bostick*, 539 F. App’x 885, 895–96 (10th Cir. 2013) (affirming district court’s finding that financial harm to pipeline company outweighed alleged environmental harm); *Land Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (considering harm to local economy and timber companies’ business interests in balancing harms).

Here, a preliminary injunction would negate the Private Intervenor’s returns on their substantial investments in the NEPA process that produced the ROD. The Project’s seven-year environmental review cost the five Project proponents nearly \$6.5 million. PIR-0001, PIR-0004; Obermueller Decl. ¶ 13.³³ Particularly, Devon incurred over \$1 million in direct expenses during that process.³⁴ In addition to these expenditures, the Project proponents invested hundreds of hours of employee and contractor time to develop and support the Project. *See* 1st Byram Decl. ¶¶ 8, 13; DeDominic Decl. ¶¶ 65–73. The Private Intervenor’s cannot timely recover their investments in the ROD if it is preliminarily enjoined.

The requested injunction also would delay the return on the Private Intervenor’s investments in approved but undrilled APDs and likely would cause the Private Intervenor’s to lose these investments entirely.³⁵ These investments include the approximately \$11,000 processing fee, and additional preparation costs that can reach approximately \$30,000, associated

³³*See also* Decl. of Emily Cozyris in Supp. of Mot. to Intervene ¶ 8, ECF No. 20-8.

³⁴Decl. of Rebecca A. Byram in Supp. of Mot. to Intervene ¶ 13, ECF No. 20-3 (“1st Byram Decl.”).

³⁵Because APDs have a maximum four-year term, *see* 72 Fed. Reg. 10,308, 10,335 (Mar. 7, 2007), a preliminary injunction may cause some permitted APDs to expire even if the Court ultimately upholds the ROD following merits briefing.

with each of the hundreds of APDs at issue. Ex. 14, Decl. of Kelly Meyers (“Meyers Decl.”) ¶ 7; Byram Decl. ¶ 13 (estimating \$660,000 stranded from costs to submit and prepare APDs); Baker Decl. ¶ 12 (estimating \$333,840 stranded from costs just to submit APDs). In addition, the Private Intervenor may be unable to fully recover related, necessary investments that allow them to develop their permitted operations subject to the APDs, such as investments to lease mineral acreage in the Project area, secure related SUAs, drill existing wells, and build related infrastructure to facilitate production from planned wells. *See* DeDominic Decl. ¶¶ 64–73; Byram Decl. ¶¶ 14–15.

Finally, an injunction will inflict unique harms throughout Converse County. One oil and gas operator only has ongoing development activities in Converse County. Ex. 15, Walker Decl. ¶ 3. An injunction “would effectively terminate the entirety of” the company’s drilling activities and force the company to lay off “a significant portion of its drilling and completions workforce.” *Id.* ¶ 7. And, an injunction will impact service companies as well. One PAW member is a consulting company with a significant portion of its monthly revenues coming from development activities in the Powder River Basin, which includes Converse County. Meyers Decl. ¶ 5. An injunction would cause this company’s workload to decline, along with associated revenues. *Id.* ¶ 8. And an injunction would directly impact surface and minerals owners by depriving them of surface and royalty payments from the enjoined production—the lost royalties total nearly \$80 million from just royalty owners in Devon’s and Continental’s wells from June 2023 to June 2024. Byram Decl. ¶ 15.g.; Baker Decl. ¶ 15.c.; Moore Decl. ¶¶ 5–7. Accordingly, the Private Intervenor will suffer substantial, and possibly irreparable, economic harms.

C. An Injunction Would Interfere with Contracts.

Delayed development may cause the Private Intervenor to forfeit their rights under existing oil and gas leases or incur penalties under existing contracts. To facilitate the

development of their leases and related APDs within the Project area, the Private Intervenor have executed contracts with third-party service companies and suppliers. *See* Byram Decl. ¶¶ 14–15; Baker Decl. ¶ 14; DeDominic Dec. ¶¶ 79–84. Some of these contracts require an upfront and non-refundable payment by the Private Intervenor and many cannot readily be cancelled without financial penalty. *See* Byram Decl. ¶¶ 14, 15.a–d; Baker Decl. ¶ 14. The requested preliminary injunction would cause the Private Intervenor to lose their investments in these third-party contracts and incur additional financial burdens. For example, if Plaintiffs obtain their injunction, Devon will (1) incur more than \$6 million in contractually required fees if its rigs are not drilling from June 2023 to June 2024, Byram Decl. ¶ 15.a; (2) lose more than \$1.6 million for a buildout from its midstream company that would have been satisfied by expected production during the injunction, *id.* ¶ 15.b; (3) have stranded pre-purchased casing for the wellbores of \$16 million and more than \$5 million for related production facilities, *id.* ¶ 15.c; and (4) lose \$210,000 in payments under surface use agreements for the planned well pads, *id.* ¶ 15.d.

Oil and gas leases require lessees to timely initiate drilling. *See* Byram Decl. ¶ 20; Baker Decl. ¶ 20. Without timely drilling, an operator's leases can be subject to termination or automatically terminate. For example, Plaintiffs' requested injunction subjects leasehold within federal exploratory units to potentially contract due to the inability to continuously drill. Byram Decl. ¶¶ 21–23; Baker Decl. ¶¶ 21–23. If a federal unit contracts, leasehold may be subject to termination or expiration or stranded due to unleased federal minerals. Byram Decl. ¶¶ 22–23; Baker Decl. ¶¶ 22–23. The value of potentially terminated or stranded leasehold is nearly \$95 million to Continental and nearly \$79 million to Devon. Byram Decl. ¶ 24; Baker Decl. ¶ 24. Accordingly, a preliminary injunction puts the Project at risk and makes oil and gas operations

far more costly and difficult, posing immediate and concrete harms to the Private Intervenor's business and property interests.

Moreover, a preliminary injunction would necessarily impair the property and contractual lease rights of the Private Intervenor's. The federal leases that the companies purchased from the BLM under the ROD—leases that give the companies the right to then file APDs for specific wells that BLM authorizes by permit—are both property rights and contracts between the federal government and the operators. *W. Watersheds Project v. Haaland*, 22 F.4th 828, 842 (9th Cir. 2022). Private Intervenor's have significantly protectable interests in their leases and approved APDs, and those interests would be impaired if the Court were to rule in Plaintiffs' favor at this early stage of the case—even before the certified record is lodged with the Court.

Plaintiffs' speculative injuries do not outweigh these concrete harms to Private Intervenor's and third parties.

IV. AN INJUNCTION IS NOT IN THE PUBLIC INTEREST.

“[E]xercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). When an injunction would adversely affect the public interest, even temporarily, “the court may[,] in the public interest[,] withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.” *Goings v. Court Servs. & Offender Supervision Agency*, 786 F. Supp. 2d 48, 60–61 (D.D.C. 2011) (quoting *Yakus v. United States*, 321 U.S. 414, 440–41 (1944)). Plaintiffs must establish that the Court, by entering the requested relief, would improve the balance of the equities and better serve the public interest than if it chose not to enter the injunction. *Winter*, 555 U.S. at 24. Here, two fundamental public interests strongly weigh against issuing a preliminary injunction of the ROD or undrilled APDs: the

Project’s economic benefits, and the Project’s furtherance of the President’s and Congress’ public policy objectives.

A. An Injunction Will Stymie Economic Benefits from the Project.

“The Project is critically important for Wyoming and the country.” Ex. 16, Letter from Senator John Barrasso et al. to Secretary Debra Haaland 2 (Apr. 6, 2023) (“Wyoming Delegation Letter”). The Project benefits the public interest by funding federal, state, and local treasuries and creating jobs. Over its lifetime, BLM expects the Project to generate approximately \$18 billion in public sector revenue—\$8.3 billion in royalty payments to the United States treasury, \$5.1 billion in severance tax revenue to the State, and \$4.5 billion in *ad valorem* tax revenues to Converse County and Converse County school districts. *See* PIR-0112 (tbl. ES-2); PIR-804. The Project is predicted to create over 8,500 jobs in the region and cause “local labor unemployment decline, perhaps below 2.0 percent.” PIR-0783–0784. Thus, the Project will generate “substantial” revenues for public use. *See* PIR-0810; *see also* Wyo. Br. 44–45.

Significant loss of employment opportunities and loss of public revenue are substantial public interests that weigh against issuing the injunction. *See Mo. Edison Co. v. Fed. Power Comm’n*, 479 F.2d 1185, 1189 (D.C. Cir. 1973) (considering the public interest effects on the local economy and job loss if an end-user of natural gas was forced out of business due to high energy costs); *Diné Citizens Against Ruining Our Env’t v. Jewell*, No. CIV 15-0209 JB/SCY, 2015 U.S. Dist. LEXIS 109986, at *161 (D.N.M. Aug. 14, 2015) (“The oil-and-gas industry is an enormous job creator and economic engine in New Mexico and shutting down portions of it based on speculation about unproven environmental harms is against the public interest.”), *aff’d*, 839 F.3d 1276 (10th Cir. 2016); *see also Campo Band of Mission Indians v. United States*, No. 99-3375 (TFH), 2000 U.S. Dist. LEXIS 7269, at *30 (D.D.C. May 24, 2000); *Atmosphere Hosp. Mgmt. Servs., LLC v. Royal Realities, LLC*, No. 14-10299, 2014 U.S. Dist. LEXIS 190999,

at *8 (E.D. Mich. Mar. 25, 2014) (finding that the public interest is served by preserving jobs and tax revenue). In sum, if this Court halts future Project development, Converse County, the State, and the United States treasury will suffer.

B. The Project Furthers the Public Policy Goals of Congress and the President.

Courts often look to Congress to determine where the public interest lies. *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 551 (1937) (court sitting in equity “cannot ignore the judgment of Congress, deliberately expressed in legislation”); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (“Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.”). In promulgating FLPMA, Congress expressly directed BLM to facilitate developing domestic minerals from public lands. 43 U.S.C. § 1701(a)(12). Taking steps to develop public oil and gas—as BLM has done here—satisfies the public interest prong.

Granting the injunction Plaintiffs seek also would undermine longstanding bipartisan goals to facilitate domestic energy production in the face of increasingly hostile foreign providers whose environmental, social, and cultural agendas and legal frameworks clash with this country’s. In fact, President Biden has encouraged domestic oil companies to “produc[e] more oil”—especially on sites already leased—and discouraged the oil and gas industry from “sitting on . . . unused but approved” APDs like those that Plaintiffs seek to enjoin.³⁶ Senators Barrasso and Lummis, and Congresswoman Hageman, also recognize that the Project will “strengthen our domestic energy security—which now, more than ever, enhances our national

³⁶*E.g.*, Remarks by President Biden on Actions to Lower Gas Prices at the Pump for American Families (Mar. 31, 2022), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/31/remarks-by-president-biden-on-actions-to-lower-gas-prices-at-the-pump-for-american-families/>.

security.” Wyoming Delegation Letter at 2. The public interest in implementing the Project and developing the undrilled APDs favors denying Plaintiffs’ PI Motion.

V. PLAINTIFFS’ REQUESTED PRELIMINARY INJUNCTION COMPELS A SIGNIFICANT BOND.

Plaintiffs urge the Court to set a \$100 bond that accompanies the Plaintiffs’ requested preliminary injunction. PI Mot. at 3+. Although a nominal bond in environmental litigation against only the government may be appropriate, “it would be a mistake to treat a revenue loss to the Government the same as pecuniary damage to a private party.” *Nat’l Res. Def. Council v. Morton*, 337 F. Supp. 167, 168–69 (D.D.C. 1971). Because Plaintiffs request to enjoin the Private Intervenor’s use of their approved APDs, a nominal bond is not appropriate. Rather, in similar scenarios, courts have required significant bonds. *See, e.g., Front Range Equine Rescue v. Vilsack*, 844 F.3d 1230, 1231–32 (10th Cir. 2017) (noting the district court set bonds totaling \$495,000 in NEPA case that enjoined private intervenors); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng’rs*, 297 F.R.D. 633, 634–35 (N.D. Ala. 2014) (acknowledging \$300,000 bond in environmental case challenging private intervenors’ permits); *Sylvester v. U.S. Army Corps of Eng’rs*, 884 F.2d 394, 397 (9th Cir. 1989) (recognizing \$100,000 bond in NEPA and Clean Water Act case against government and developer and only requiring reconsideration because of the narrowed scope of the injunction). An injunction will cause the Private Intervenor’s harm totaling hundreds of millions of dollars. *See supra* § III. The Private Intervenor does not request a bond for the entire amount, but more than a nominal bond is required. If an injunction issues, the bond should be set at \$5 million.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs’ Application for Preliminary Injunction.

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Respectfully submitted,

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