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-TSC

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION (ECF NO. 64)*

* Plaintiffs' motion for leave to file this overlength brief is pending at ECF No. 88.

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INTRODUCTION

Defendants now concede that the Bureau of Land Management (BLM) has authority to regulate Fee/Fee/Fed surface operations and to impose air quality mitigation measures, leaving little doubt that Plaintiffs will prevail on these claims. Their defenses to Plaintiffs' arguments under the National Environmental Policy Act (NEPA) fare no better. Because Plaintiffs are almost certain to prevail on the merits, an injunction is warranted to avoid further irreparable harm from BLM allowing new wells and their ground-disturbing activity, drilling, and construction without proper NEPA study or environmental and health safeguards.

Defendants and Intervenors argue that injunctive relief nevertheless should be denied because an injunction would impose heavy financial costs. Those objections are vastly overstated. Plaintiffs here do not seek to enjoin any completed wells, and an injunction would not prohibit eventual well drilling but merely ensure it adheres to federal law. If the Court remains concerned about enjoining development of Applications for Permit to Drill (APDs) approved before Plaintiffs could present their motion, it can more narrowly tailor the injunction to prohibit new APD approvals while expediting resolution of the merits.

The bottom line is that important resource protections are being omitted from Converse County Project authorizations based on BLM's plainly erroneous abdications of statutory authority. There is no doubt that absent injunctive relief, substantial portions of the Project will be developed before the Court can rule on the merits, allowing a host of unnecessary and irreparable harms to lands, waters, air, wildlife, and the public, as attested in Plaintiffs' declarations and as documented in the Converse County Project Final Environmental Impact Statement (FEIS) itself. Equally important, the Project is being built without appropriate NEPA analysis, risking unforeseen consequences and compromising BLM's ability to neutrally review

the project or alter course later. To preserve the status quo and opportunity for meaningful relief, the Court should thus grant Plaintiffs' Motion for Preliminary Injunction.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. Plaintiffs Are Likely to Prevail on Their Fee/Fee/Fed Claims.

1. BLM's Fee/Fee/Fed APD Decisions Are Arbitrary and Capricious.

Defendants' briefing confirms that Plaintiffs have an overwhelming likelihood of success on the merits of their first Fee/Fee/Fed claim, which argues that BLM's Fee/Fee/Fee APD decisions are arbitrary and capricious because they rested on BLM's erroneous disclaimer of legal authority over surface operations for such wells. Far from defending their legal interpretation in PIM 2018-014 and the Converse County Project FEIS, Defendants now concede BLM has such power. *See* ECF No. 87 at 2–3[1] (acknowledging that the "broad delegation of authority" under FLPMA and MLA to regulate federal mineral development allows BLM to "regulate activities on non-federal surfaces" and "could under some circumstances include . . . surface-disturbance activities"); ECF No. 83 at 27–30 (agreeing that MLA "provides broad discretion to the Secretary in regulating surface-disturbing activities," such that "BLM has at least some authority to regulate non-federal surface reclamation" and "might conclude that regulation of certain activities on non-federal surface is necessary to ensure safe [and] responsible . . . production of federal oil and gas"). By thus conceding Plaintiffs' key legal argument, Defendants should admit their error here.

[1] Page numbers for filings refer to the CM/ECF page numbers, not the internal page numbers. Citations to Plaintiffs' exhibits refer to the Bates stamp number ("PIR-XXXX").

But Defendants instead try to rewrite history. They now argue that BLM has properly acknowledged its authority and simply "elected" not to exercise it "at this time" on "policy" grounds. ECF No. 83 at 27–31; ECF No. 87 at 2–3. However, the record flatly refutes this narrative. The actual rationale BLM gave in PIM 2018-014 was its lack of "jurisdiction" or "authority" to impose surface use mitigation on Fee/Fee/Fed wells. *See* ECF No. 64-17 at PIR-4665 (PIM 2018-014, stating that "BLM's jurisdiction extends to surface facilities on entirely non-Federal lands solely to the extent of assuring production accountability for royalties") (emphasis added); *id.* at PIR-4670 ("Neither [FLPMA] nor the MLA provide the BLM with authority to require mitigation of surface disturbances on non-Federal lands") (emphasis added); *id.* at PIR-4669 ("BLM does not have authority to require a bond to protect non-Federal surface owner interests") (emphasis added); *see also* ECF 80-13 at 6 (prior IM 2009-078, stating "BLM lacks authority under the [FLPMA] and the [MLA] to require mitigation of surface impacts on non-Federal land") (emphasis added).

The Converse County FEIS and APDs rest on this same legal conclusion—again, with no mention of discretion. *See* ECF No. 64-9 at PIR-0152–53 (FEIS) ("BLM's authority under a Fee-Fee-Fed scenario is limited to assuring production accountability from Federal mineral leases" and excludes "mitigation actions or reclamation") (emphasis added); ECF No. 64-14 at PIR-3317, -3335, -3361, -3376, -3390 (sample APDs) (BLM "cannot impose Conditions of Approval (COAs) related to the surface") (emphasis added). Intervenors also understand BLM's "official policy" to be that it "do[es] not have the statutory authority to regulate surface operations for fee-fee-fed wells and related infrastructure." ECF No. 20-1 at 8.

The Court must therefore reject BLM's *post hoc* rationalization. It is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that

the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. 743, 758 (2015) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("*Chenery I*")). Where that rationale is a legal error, as here, the agency action must be set aside under the APA—even if the agency could reach the same result as a matter of discretion. *See Chenery I*, 318 U.S. at 94; *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998) ("An agency action, however permissible as an exercise of discretion, cannot be sustained where it is based not on the agency's own judgment but on an erroneous view of the law.") (cleaned up).[2]

2. Intervenors' Statutory Interpretations Are Meritless.

Intervenors continue to dispute BLM's jurisdiction over Fee/Fee/Fed wells, but barely address the relevant statutes. Wyoming contends the general delegations in 43 U.S.C. §§ 2, 1457, and 1457c only extend to title disputes, ECF No. 77 at 21, but the Supreme Court reads these statutes far more broadly, as granting "plenary authority." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336–37 (1963); *see also Silver State Land, LLC v. Schneider*, 843 F.3d 982, 986 (D.C. Cir. 2016). Wyoming also suggests that regulations promulgated under these laws have only pertained to "strictly . . . administrative functions," ECF No. 77 at 22, which is also wrong. A host of regulations cite these laws as authority, including those governing oil and gas and other mineral operations. *See, e.g.*, 43 C.F.R. § 3160.0-3 (oil and gas operations); 43 C.F.R. § 3150.0–3 (oil and gas exploration); 43 C.F.R. § 3100.0-3(d) (stating that § 1457 provides "implied authority" for leasing certain lands for oil and gas development).

[2] Defendants and Intervenors also appear to misconstrue the issue as whether BLM has a *duty* to regulate Fee/Fee/Fed wells. ECF No. 83 at 25, 28; ECF No. 80 at 27–28. However, this APA claim turns on whether BLM has the *authority*. Whether BLM was required to exercise that authority is presented only by the "unnecessary and undue degradation" claim below. References to *Auer* and *Chevron* deference are also misplaced for the reasons Plaintiffs previously explained. *See* ECF No. 84 at 19–24.

Wyoming also overlooks the many cases interpreting these general statutory delegations to provide authority for the imposition of conditions on mineral or land use authorizations to protect the public interest. *See, e.g.*, *Hannifin v. Morton*, 444 F.2d 200, 202 (10th Cir. 1971) (affirming Secretary's power to impose condition on mineral permit under his "general powers" over public lands despite absence of express statutory authorization); *Ryan Outdoor Advert., Inc. v. United States*, 559 F.2d 554, 556 (9th Cir. 1977) (holding that "general . . . grant of authority" under 43 U.S.C. § 1201, since moved to § 1457c, authorized Interior to restrict location of advertisements on federal lands); *Humboldt Cnty. v. United States*, 684 F.2d 1276, 1283 (9th Cir. 1982) (holding that BLM had "ample authority" under general delegations including § 1201 to require road closure to "assure proper resource utilization, conservation, and protection").

Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), does not support Wyoming either. ECF No. 77 at 22–23. In that case, the D.C. Circuit invalidated rights-of-way and special land use permits the Secretary issued for the Alaska pipeline because they exceeded an express width limitation contained in the MLA, 30 U.S.C. § 185(d). *See Wilderness Soc'y*, 479 F.2d at 847. The court explained, in a footnote, that these generic statutes could not override that "express proviso" in the MLA. *Id.* at 867 n.54. This is entirely consistent with Plaintiffs' position and the Supreme Court's instruction that these statutes provide plenary authority "in the absence of some specific provision to the contrary." *Corp. of the Catholic Bishop of Nesqually v. Gibbon*, 158 U.S. 155, 167 (1895). Here, of course, no such express limitation exists.

Private Intervenors do not address these general delegations or case law interpreting them, except to baselessly assert the rule they announce is "a test of [Plaintiffs'] own making" and "made-up." ECF 80 at 27. The rule is the Supreme Court's, not Plaintiffs'. *See Cameron v.*

United States, 252 U.S. 450, 461 (1920); *see also Cosmos Expl. Co. v. Gray Eagle Oil Co.*, 190 U.S. 301, 309 (1903); *Corp. of the Catholic Bishop*, 158 U.S. at 167.

As for the MLA, Intervenors' argument about the "lease area" restriction contained in a *different* part of 30 U.S.C. § 226(g) contravenes the "meaningful-variation" and "absent provision" canons of statutory construction, as Plaintiffs already explained. ECF No. 84 at 17–18; *see also Allina Health Servs. v. Price*, 863 F.3d 937, 944 (D.C. Cir. 2017) ("[A] material variation in terms suggests a variation in meaning."); *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) (absent provisions should not be supplied by courts, especially where "Congress has shown that it knows how to adopt the omitted language or provision").

Equally meritless is Intervenors' claim that the key FLPMA provision, 43 U.S.C. § 1732(b), is inapplicable because it covers only "public lands." ECF No. 77 at 23, ECF No. 80 at 26. They again ignore that FLPMA defines "public lands" to include "any . . . interest in land," 43 U.S.C. § 1702(e), and that federal minerals and mineral leases are "interest[s] in land," *see* 70 Fed. Reg. 41,532, 41,532–33 (July 19, 2015). Thus, FLPMA authorizes BLM to "regulate . . . [the] development of" federal minerals, 43 U.S.C. § 1732(b). Intervenors cannot explain why this expansive and unqualified delegation does not apply to surface operations on Fee/Fee/Fed wells, even though they "develop[]" federal minerals. Wyoming's further suggestion that FLPMA only governs "land use planning" and does not authorize other agency actions, ECF No. 77 at 24, is also obviously wrong. FLMPA governs virtually every BLM activity, including land-use permitting, 43 U.S.C. § 1732; land sales or acquisitions, *id.* §§ 1713, 1715; right-of-way grants, *id.* § 1761; and grazing management, *id.* § 1752; among others.

Utah Native Plant Society v. U.S. Forest Service, 923 F.3d 860 (10th Cir. 2019), is also inapposite, as it involved a demand that the Forest Service prohibit the State of Utah *itself* from

releasing goats onto state land to avoid harming neighboring Forest Service lands, under the Forest Service's statutory authority to regulate the "use" and "occupancy" of its lands. *Id.* at 866–67 (discussing 16 U.S.C. § 551). The court rejected the argument, on the basis that releasing goats on state lands that might wander onto federal land is not a "use" of federal property. *Id.* at 869–71. By contrast here, Fee/Fee/Fed wells unquestionably "develop[]" federal minerals, bringing them within the reach of FLPMA's authorization in 43 U.S.C. § 1732(b).[3]

Finally, no "practical impossibilities" prohibit BLM from regulating Fee/Fee/Fed wells. ECF No. 80 at 25. The scenarios that Private Intervenors raise occur equally as to split-estate wells, but that has not stopped BLM from regulating them. *See, e.g.*, ECF No. 64-13 at PIR-2522 (split-estate well producing federal, state, and private minerals). Laws and policies already exist to navigate such scenarios. *See, e.g.*, 30 U.S.C. § 184a. Regardless, these are all considerations BLM may consider in deciding how to exercise its power.

3. The Clear Statement Canon Does Not Apply.

Intervenors' assertions about preemption and invocation of the federalism "clear statement" canon are misplaced. *See* ECF No. 80 at 26–30; ECF No. 77 at 33–35. The clear statement rule requires "Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991). That canon does not bear on the Court's interpretation of the relevant statutes here, for many reasons.

[3] *Utah Native Plant Society* is further inapposite in that it involved *direct regulation of state conduct* and in a field (wildlife management) that is the traditional province of states, triggering the "clear statement" canon and unique federalism concerns absent here. 923 F.3d at 867–69. For the reasons explained below, that canon has no relevance here.

First, the essential premise of Intervenors' argument is that Plaintiffs' interpretation would allow BLM to regulate private or state land. ECF No. 80 at 30. That is fiction. It would simply authorize BLM to prohibit federal oil and gas from being extracted through operations that do not meet BLM standards. Recall that a Fee/Fee/Fed well can only be developed with the surface owner's consent, through a contractual agreement. If that owner disagreed with BLM's terms, it could simply prohibit the Fee/Fee/Fed well from being drilled from its land. In other words, the non-federal landowner *must voluntarily accept* the terms BLM sets—and thus loses no authority. Therefore, Plaintiffs' interpretation would not "significantly alter the balance between federal and state power" to dictate state or private land use. For that same reason, this case is nothing like *Utah Native Plant Society*, where the Forest Service was asked to regulate state conduct on state land—a direct intrusion on state power. 923 F.3d at 863–64.[4]

Second, insofar as the supposed intrusion is into the state's power over oil and gas activity, Intervenors' argument also fails. Merely allowing BLM to regulate Fee/Fee/Fed wells will not preempt any state powers in this area, as Plaintiffs previously explained. *See* ECF No. 84 at 24–26. Federal rules will simply complement state law and give way only in the event of actual conflict, as is already true for every other federal well. *Id.* The exceedingly unlikely possibility of conflict preemption does not justify disregarding BLM's power entirely. *Id.* at 26. Nor would it even "significantly alter" the existing balance of federal and state powers, as Congress has already removed federal oil and gas management from the State's exclusive

[4] For similar reasons, Wyoming's arguments against "exclusive federal jurisdiction," ECF No. 77 at 28–29, and federal regulation of state trust lands, *id.* at 33–35, are misplaced. Plaintiffs' interpretation would not produce either result. Wyoming's conclusion about the reservations of state authority contained in 30 U.S.C. §§ 187, 189 is also wrong. ECF No. 77 at 28. These provisions are "not a recognition of concurrent state jurisdiction" or a limit on BLM's power to preempt state oil and gas law. *See Ventura Cnty. v. Gulf Oil Corp.*, 601 F.2d 1080, 1085–86 (9th Cir. 1979), *aff'd* 445 U.S. 947 (1980).

control. Confirming this, BLM exercises this very same power over all other federal mineral operations, including on private and state lands in the split-estate context. The federal government has also pervasively regulated federal mineral development for over 100 years, under laws such as the MLA and General Mining Law of 1872. The presumption is simply inapplicable to scenarios like this, in which the federal government has traditionally had a "significant" presence. *United States v. Locke*, 529 U.S. 89, 108 (2000).

Third, the canon applies only to areas of "traditional state responsibility." *See, e.g.*, *Gregory*, 501 U.S. at 453, 457 (state judge qualifications); *Jones v. United States*, 529 U.S. 848, 849 (2001) (criminal conduct); *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 466, 471–72 (D.C. Cir. 2005) (practice of law); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) (state corporate law). Management of federal property is not reasonably characterized as the traditional province of states. The Property Clause places that responsibility squarely in the hands of Congress, making the imposition of such a "clear statement" burden on Congress particularly out of place in the context of exercises of Property Clause, as opposed to Commerce Clause, power.

Fourth, this canon is one of constitutional avoidance, designed to avoid "potential constitutional problem[s]" that would arise if Congress had delegated the disputed power. *Gregory*, 501 U.S. at 464; *see also Am. Lung Ass'n v. EPA*, 985 F.3d 914, 968 (D.C. Cir. 2021) *rev'd on other grounds sub nom. West Virginia v. EPA*, 142 S.Ct. 2587 (2022) (rule is "a matter of constitutional avoidance"). There is no constitutional problem lurking here, as Congress indisputably could have delegated this authority under its vast Property Clause powers. *See* ECF No. 64-1 at 30–33; ECF No. 69-1 at 10; ECF No. 83 at 25. Thus, the essential justification for application of this special rule of interpretation is wholly absent here.

4. The Fee/Fee/Fed APD Decisions Separately Violated BLM's FLPMA Duty to Avoid Unnecessary or Undue Degradation.

Plaintiffs' opening brief explained that BLM's failure to impose any mandatory surface use restrictions on Fee/Fee/Fed wells also violated its substantive FLPMA duty to take "any action necessary to prevent unnecessary or undue degradation" of public lands, 43 U.S.C. § 1732(b). These wells will result in "unnecessary" degradation—that is, "something more than the usual effects anticipated from appropriately mitigated [oil and gas] development." *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011) (cleaned up).

Defendants and Intervenors argue there will be no unnecessary or undue degradation because state regulation is adequate to protect federal lands. ECF No. 77 at 26–27; ECF No. 80 at 27. That fails, first, because it is an improper *post hoc* rationalization—BLM did not reach that conclusion anywhere in the record, and an agency's decision must be judged based upon its own reasoning articulated in the record. *Chenery I*, 318 U.S. at 87; *cf. Theodore Roosevelt*, 661 F.3d at 76 (assessing reasonableness of BLM's determination that mitigation measures would avoid unnecessary and undue degradation). Second, the record refutes the claim. Although the same state regime applies to Project wells drilled on federal lands, as well as split-estate wells on private and state lands, BLM found it necessary to impose its own protections on such wells to avoid environmental harms. Third, the record contins no evidence that state regulations would be applied more stringently to Fee/Fee/Fed wells to make up for the absent federal ones. Finally, the FEIS explicitly accounted for the state regulatory regime yet still found that Fee/Fee/Fed wells would result in greater impacts than ordinary wells. *See* ECF No. 64-1 at 37–38 (collecting record citations).

Intervenors' cases also do not support them. *See* ECF No. 77 at 25, 27. *Gardner v. BLM*, 638 F.3d 1217 (9th Cir. 2011), involved an APA "unreasonable delay" claim, which "can

proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." *Id.* at 1221. *Gardner* merely held that 43 U.S.C. § 1732(b) did not impose a "discrete" requirement to close an area to off-road vehicle use because unnecessary and undue degradation can be met through various means, such as mitigation, and plaintiffs did not allege that BLM omitted standard mitigation from that off-road vehicle use. *Id.* at 1222–23. In *Theodore Roosevelt*, the court found that plaintiffs failed to establish that BLM's mitigation measures were insufficient to avoid unnecessary or undue degradation, where BLM had not omitted standard measures and plaintiffs failed to identify other feasible measures. 661 F.3d at 77–78. In stark contrast with *Theodore Roosevelt* and *Gardner*, here, BLM omitted *all* of its routine surface mitigation requirements from Fee/Fee/Fed wells, and also conceded this would result in greater-than-normal impacts. *See* ECF No. 64-1 at 38. Thus, the Converse County Project would result in "something more than the usual effects anticipated from appropriately mitigated development." *Theodore Roosevelt*, 661 F.3d at 76 (cleaned up).

B. Plaintiffs Are Likely to Prevail on Their Air Mitigation Claim.

This claim presents a straightforward question: whether BLM wrongly concluded that it lacked authority to require mitigation measures to reduce adverse impacts to air quality. *See* ECF No. 64-1 at 38–42. The answer is unequivocally yes, particularly since Defendants' response now admits the agency has such authority. *See* ECF No. 83 at 32–34.

1. BLM's Disclaimer of Authority Was Legal Error.

BLM declined to impose various measures recommended by the Environmental Protection Agency (EPA) and National Park Service (NPS), among others, to reduce Converse County Project air pollution on the basis that it "does not have authority to require application of [the measures]." ECF No. 64-9 at PIR-0678, -0684–87. This was the only explanation the FEIS

gave for rejecting this mitigation, including measures such as cleaner engines, road paving, flaring reductions, fewer truck trips, and increased dust abatement. *See id.* These measures would have reduced Project emissions by up to 90%. *Id.* at PIR-0678.

Defendants and Intervenors misconstrue this claim as arguing that BLM has a *duty* to *enforce* or *regulate* air quality standards. ECF No. 83 at 31–32; ECF No. 77 at 39–40; ECF No. 80 at 33–34. That is wrong. Plaintiffs argue only that BLM has *authority* to impose mitigation measures on its project authorizations to reduce their air quality impacts. If it has such authority, BLM's rejection of the measures proposed here based on a purported lack of authority rendered its decisions arbitrary and capricious.

For this reason, *WildEarth Guardians v. BLM*, 8 F. Supp. 3d 17 (D.D.C. 2014), and *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77 (D.D.C. 2012), are inapposite. These cases involved a distinct claim: that BLM violated its *duty* under a FLPMA regulation, 43 C.F.R. § 2920.7(b)(3), to impose "terms and conditions" on its "land use authorizations" to "require compliance with air . . . quality standards." In each case, the court found that BLM sufficiently complied by imposing a lease clause requiring compliance with air quality standards, as opposed to terms prescribing specific mitigation measures. *See WildEarth Guardians v. BLM*, 8 F. Supp. 3d at 37–38; *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d at 94.

Again, Plaintiffs here do not argue BLM was legally obligated to impose the rejected mitigation, so these cases are irrelevant. Plaintiffs argue instead that BLM misconstrued its legal authority when rejecting these measures, and that legal error requires reversal. *Sea-Land Serv.*, 137 F.3d at 646; *Chenery I*, 318 U.S. at 94.[5]

[5] Similarly, Plaintiffs are not arguing that BLM improperly relied on the State of Wyoming to regulate air quality. *See* ECF No. 80 at 33–34. Nor do Private Intervenors' authorities support

Neither are Plaintiffs asking BLM to set or enforce compliance with air quality standards, as Wyoming and Defendants seem to believe. *See* ECF No. 77 at 39; ECF No. 83 at 31–32. The measures would simply have required the Operator Group to employ specified practices or technology. ECF No. 64-9 at PIR-0678, -0684–86. They would not have required BLM to set, measure, or enforce pollutant limits. It also does not matter that the EPA, State, and BLM have overlapping authority to operate in this arena. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (although "two [agency] obligations may overlap . . . there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistenc[ies]"); *see also* 42 U.S.C. § 7610(a) (the Clean Air Act "shall not be construed as superseding or limiting the authorities . . . [of] any other Federal officer, department, or agency."). The Casper RMP, which governs the Converse County Project, confirms that BLM is to "[i]mplement management actions within the scope of the BLM's land-management responsibilities to improve air quality as practicable." ECF 83-2 at 23.

As to the issue actually in dispute—whether BLM has the authority to impose conditions on its land use authorizations to reduce their air quality impacts—the opposing parties offer basically no argument. In fact, Defendants now admit that BLM has this authority, which should be conclusive. ECF No. 83 at 32–34 ("BLM has broad authority to impose mitigation measures . . . that would mitigate impacts to air resources.").[6]

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their assertion that BLM "must defer" to other agencies "to protect air quality," *id.* at 33, or that BLM is prohibited from imposing emission-reduction measures of its own.

[6] However, Defendants appear to draw a confusing distinction between "mitigation measures on impacts to air resources from activities on federal lands" and "air *quality* mitigation measures on non-federal lands." ECF No. 83 at 34; *see also id.* at 31. It is unclear what the first distinction means, and the reference to "non-federal lands" is irrelevant because the FEIS made a blanket disclaimer of authority regardless of well location. ECF No. 64-9 at PIR-0678, -0686–87.

2. BLM's Disclaimer of Authority Was an Unexplained Reversal.

BLM's disclaimer of authority over air quality measures also conflicts with longstanding agency practice. As Plaintiffs' opening brief explained, BLM routinely requires the same or similar air quality mitigation measures as those rejected here. Private Intervenors' attempts to distinguish Plaintiffs' examples fail. ECF No. 80 at 35.[7]

First, for the Normally Pressured Lance (NPL) project, Intervenors are correct that the ROD says "some measures" will be voluntary; however, some would also be mandated during permitting, and BLM did not disclaim authority to mandate the listed air quality measures. *See* ECF No. 64-18 at PIR-4728. Second, for the Jonah Infill Drilling Project, Appendix A of the ROD lists a host of BLM-imposed air quality measures—such as Tier II diesel engines—separately from the Operator-Committed measures in Appendix B. *Compare* ECF No. 64-17 at PIR-4785, -4787–88 *with id.* at PIR-4794–96. Third, BLM's statutory authority is the same nationwide, so examples from other states are not distinguishable based on their location. *See* ECF No. 80 at 35 n. 25. Finally, the examples in Plaintiffs' opening brief were just a sampling of the countless projects for which BLM has required measures similar to those rejected here.[8]

[7] Wyoming is incorrect that these BLM records cannot be considered. ECF No. 77 at 42. They fall within two of the extra-record evidence exceptions, as they show BLM failed to (1) examine all relevant factors, and (2) adequately explain its grounds for decision. *See IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997). The Jonah Infill and NPL decisions are also part of the administrative record as BLM considered them. ECF No. 64-9 at PIR-1014.

[8] *See, e.g.*, BLM, *Harper 01-18 #2 Natural Gas Well* at Attachment A (Sept. 2018), https://eplanning.blm.gov/public_projects/nepa/101054/156326/191394/DR_Harper_01-18-2_September_2018.pdf (requiring Tier II drilling engines, dust abatement, flareless well completion); BLM, *Tabor #1 Natural Gas Well Re-entry [2018]* at Attachment A (Sept. 2018), https://eplanning.blm.gov/public_projects/nepa/113545/157064/192184/Decision_Record_Tabor_1_Reentry_September_2018.pdf (requiring Tier II drilling engines, dust abatement, flareless well completion); BLM, *Laramie Energy LLC BCU 14 Project* at COAs-1 (Mar. 2023), BLM, *Laramie Energy LLC BCU 14 Project* at COAs-1 (Mar. 2023),

BLM's course reversal here is not like *Friends of Animals v. Pendley*, 523 F. Supp. 3d 39 (D.D.C. 2021), on which Wyoming attempts to rely. ECF No. 77 at 42. In that case, BLM's updated instruction memorandum contained only recommendations and did not alter the agency's prior wild horse and burro removal policy and practice. *Friends of Animals*, 523 F. Supp. 3d at 57. In contrast here, BLM made an unexplained, 180-degree turn regarding its authority to impose measures it previously required. This is classic arbitrary and capricious decision-making. *See Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (agency's failure "to acknowledge and adequately explain its change in policy" was arbitrary and capricious).

Finally, Wyoming misrepresents BLM Manual 7300. ECF No. 77 at 41. The Manual does not say that it is *BLM's* practice to "'*recommend*' appropriate emission control" and mitigation measures. *Id.* (emphasis added). Rather, it is the practice of a distinct BLM division—its Air Resource Management *Program*—to "evaluate and recommend" such measures to be incorporated into BLM decisions "to ensure compliance with appropriate . . . air quality standards." BLM Manual 7300 at .02C. This language does not limit BLM to making recommendations. In any event, BLM's practice has been to require, not merely recommend, such measures. *See* ECF No. 64-18 at PIR-4728–30, -4795–96, -4825, -4879.

C. Plaintiffs Are Likely to Prevail on Their NEPA Claims.

1. BLM Failed to Properly Account for Impacts from Fee/Fee/Fed Wells.

BLM violated NEPA by assuming that BLM-imposed protections would mitigate harm across the entire Project, including Fee/Fee/Fed wells. ECF No. 64-1 at 42–44. BLM and

https://eplanning.blm.gov/public_projects/2022767/200549600/20076113/ 250082295/DOI-BLM-CO-G020-2023-0016-EA.wt.pdf (requiring dust abatement measures).

Wyoming both misunderstand this argument. The problem is not that BLM was "unaware" of its disclaimer of authority, or that Fee/Fee/Fed wells were excluded from the analysis entirely. ECF No. 83 at 34. Neither does it matter that private and state measures would also apply to Fee/Fee/Fed wells, *id.*; ECF No. 77 at 44, as the FEIS separately accounted for, ECF No. 64-9 at PIR-0158–60, -0651, -0723, -0724, -0869, -0871, -0872, -0892, -0986, -1030. The problem is that BLM's analysis erroneously assumed that *its own* mitigation requirements would *further* reduce these impacts.

Private Intervenors' responses fare no better. ECF No. 80 at 35–37. They first claim BLM was simply disclosing "available mitigation" options and that its impact analysis "did not assume [they] would be applied to Fee/Fee/Fed lands." *Id.* at 36–37. Nonsense. For example, BLM's analysis of impacts to soil resources "was based on the assumption" that "standard BMPs, required design features, and other RMP and LRMP resource protection measures" (all types of federal mitigation) "would be implemented." ECF No. 64-9 at PIR-0827. Similarly, BLM's air modeling assumed that certain dust controls—which BLM requires only for traditional wells, *compare* ECF No. 64-13 at PIR-2532 *with id.* at PIR-2541–42—would be implemented universally to reduce PM emissions from roads by 50 percent.[9]

Intervenors observe that BLM evaluated mitigation measures for viewsheds and traffic in standalone FEIS sections, ECF No. 80 at 36, but that is irrelevant. Wherever analyzed, BLM was required to consider the "effects" of these measures on the Project's impacts. 43 C.F.R. § 46.130. BLM's blanket claim that these measures "would reduce" and even "ensure" certain impacts would not occur was no more truthful here. ECF No. 64-9 at PIR-0839, -0864. And to be clear,

[9] Page A-24 is found in Attachment A *to* FEIS Appendix A ("Air Quality Technical Support Document"), which is publicly available: https://eplanning.blm.gov/eplanning-ui/project/66551/570 (listed as "Converse County FEIS Appendix A AQTSD attachments").

these measures were not presented as "potential" mitigation but as elements of the Selected Alternative. *See* ECF No. 64-8 at PIR-0017–18 (listing among "Mitigation Measures Carried Forward" in ROD).

Neither do Plaintiffs seek to "generate NEPA obligations out of thin air." ECF No. 77 at 45. The Supreme Court has explained that NEPA requires a "hard look" at an action's impacts, including "a reasonably complete discussion" of mitigation measures with "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). "Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Id.* Regulations make this explicit. 43 C.F.R. § 46.130. By claiming the Project's significant effects would be reduced by mitigation measures it had no intention of requiring, BLM failed to "fairly evaluate[]" and disclose the effects of its decision, *Methow Valley*, 490 U.S. at 352, and to engage in reasoned decisionmaking, *see City of Kansas City v. Dep't of Hous. & Urb. Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) ("Agency action based on a[n] [erroneous] factual premise . . . does not constitute reasoned . . . decisionmaking.").

2. BLM Failed to Conduct a Proper Cumulative Effects Analysis for Greenhouse Gas Emissions.

BLM also violated NEPA by failing to quantify the cumulative greenhouse gas emissions of the Project "when added to other past, present, and foreseeable future [projects]."[10] *See* 40 C.F.R. §§ 1508.7, 1508.8 (1978); 40 C.F.R. § 1508.1(g) (2022). Defendants and Intervenors

[10] Plaintiffs withdraw the argument on pages 44–48 of their opening brief that the FEIS underestimated existing and future oil and gas development, in light of Wyoming's clarification about the WOGCC data attached to Plaintiffs' comments. *See* ECF No. 83 at 37–38; ECF No. 77 at 48; ECF No. 77-1 at ¶¶ 28–29. Plaintiffs focus their arguments on the second portion of their NEPA cumulative effects claim.

claim BLM met its NEPA duty by simply comparing Project emissions to local, state, and national emission inventories. ECF No. 83 at 37–38; ECF No. 77 at 50; ECF No. 80 at 33–34. They are wrong for the simple reason that those inventories did not account for foreseeable *future* development.

Other courts have rejected this very approach of relying solely on incomplete emissions inventories. *See WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237, 249–51 (D.D.C. 2020) (*Guardians II*); *WildEarth Guardians v. BLM*, 457 F. Supp. 3d 880, 894 (D. Mont. 2020). Defendants and Private Intervenors make no effort to distinguish this case law. Wyoming claims *Guardians II* is distinguishable on the basis that Plaintiffs here identify no projects omitted from the inventories, *see* ECF No. 77 at 51, but Plaintiffs' opening brief clearly articulated that BLM failed to quantify the emissions of the other cumulative projects listed in Table 5.2-1 of the FEIS. *See* ECF No. 64-1 at 49; ECF No. 64-9 at PIR-1002–03.

The inventories BLM used here had other gaping holes. For local emissions, BLM relied on two sources: the 2015 Wyoming Greater Sage-Grouse RMP and 2014 Wyoming Oil and Gas Conservation Commission (WOGCC) data. ECF No. 64-9 at PIR-1020. BLM acknowledged that the 2015 Sage-Grouse RMP reflected only a limited "subset" of oil and gas development, in that it excluded all state and private wells, as well as federal wells outside designated sage-grouse habitat. *Id.* at PIR-0260, -1020. And while Intervenors are correct that the 2014 WOGCC data included "all active wells" in the Casper Field Office as of 2014, ECF No. 77 at 50; ECF No. 80 at 41, it excluded more than five years of existing wells along with every single future project outlined in Table 5.2-1. *Compare* ECF No. 64-9 at PIR-1020 *with id.* at PIR-1002. For statewide emissions, BLM used three inventories: 2017 EPA GHG reporting, which includes only certain reporting facilities; 2014 USGS data, which includes only federal lands; and 2018 WOGCC data.

Id. at PIR-0261, -1021. None captured future wells. *Id.* And for national emissions, BLM relied on 2017 EPA data that similarly failed to capture future oil and gas development. *Id.* at PIR-0262, -1021. BLM did not quantify emissions from the future oil and gas wells from projects identified in Table 5.2-1, despite having the tools to do so. *See, e.g.*, *id.* at PIR-0693, -1020 (projecting emissions based on production estimates). The FEIS's failure to properly quantify cumulative greenhouse gas emissions—especially future emissions—robbed the public of its right to be meaningfully informed of the Project's cumulative contribution to climate change, in violation of NEPA.

3. BLM Improperly Used CXs, DNAs to Avoid Site-Specific NEPA.

BLM also violated NEPA by failing to conduct site-specific NEPA analysis before approving APDs, as NEPA requires and its own FEIS committed. Defendants and Intervenors do not show otherwise.

As to BLM's use of CX3, Defendants do not claim it can be used for activities other than drilling. ECF No. 83 at 39. Rather, they suggest that for Fee/Fee/Fed wells, drilling is the only activity requiring NEPA analysis because of BLM's limited authority. *Id.* They are wrong. First, this problem was not limited to Fee/Fee/Fed wells. *See* ECF No. 64-12 at PIR-2399–2402 (compare "NEPA type" and "Fee/Fee/Fed (yes/no)" columns for APD-50, -52, -56, -57, -63, -67, -68, -74, -76, -80, -82, -83, -98, -99). Second, BLM's authority is not limited to regulating drilling, as explained above. Third, PIM 2018-014 itself confirms that the NEPA analysis for Fee/Fee/Fed projects must encompass both drilling *and* "surface disturbances and facilities needed for the production of Federal minerals pursuant to the [Fee/Fee/Fed] APD" because they are "attributable to the Federal Action." ECF No. 64-17 at PIR-4670.

Private Intervenors alone argue that CX3 may be used to approve activities other than drilling. ECF No. 80 at 44. They too are wrong. First, BLM's NEPA Handbook describes CX3 as applying to "the new well" and a "proposed well" and does not state that CX3 applies to road, powerline, pipeline, or even pad construction. ECF No. 64-16 at PIR-4632. Second, the statutory text and structure prohibit their interpretation. The plain text of CX3 refers only to "drilling an oil or gas well," 42 U.S.C. § 15942(b)(3), which should be dispositive. BLM interprets this same phrase in CX2 to mean just what it says: drilling. ECF No. 80 at 44. Further undermining their interpretation is that Congress created a different Categorical Exclusion to govern "surface disturbances," which would include pads, roads, pipelines, and powerlines (CX1), and another just for "pipelines" (CX4). 42 U.S.C. § 15942(b)(1), (4). Had Congress meant for CX3 to include this same activity, it would have said so.

As for DNAs, Defendants claim "BLM *did* perform this site-specific analysis for all APDs." ECF No. 83 at 40. They do not explain where this can be found. DNAs are not site-specific NEPA analyses, but determinations that other adequate NEPA analysis already exists. Their point about Fee/Fee/Fed wells fails, again, because this problem was not limited to such wells, BLM does not lack authority, and PIM 2018-014 requires NEPA analysis of both drilling and surface disturbances even for Fee/Fee/Fed wells. ECF No. 64-17 at PIR-4670. In any event, the Converse County FEIS also excludes site-specific effects of drilling (e.g., noise, light, dust, water, traffic, wildlife). *See* ECF No. 64-1 at 51–52.

Private Intervenors claim that the requisite site-specific analysis is found in the other EAs to which BLM "tiered." But tiering requires agencies to "summarize" the prior analysis, not just cite the document as BLM did here. 40 C.F.R. § 1501.11(b). Moreover, the prior EAs concerned *different projects*, and thus did not disclose the "localized" and "incremental impacts of [the]

specific" APDs at issue. *See Mayo v. Reynolds*, 875 F.3d 11, 23 (D.C. Cir. 2017); *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1237 (D.C. Cir. 2018). They are thus unlike any of the scenarios in which BLM's NEPA Handbook allows DNAs. *See* ECF No. 64-16 at PIR-4511. As courts and BLM itself acknowledge, location matters in assessing the impacts of oil and gas activity. *E.g.*, ECF No. 64-9 at PIR-1058–59 (wildlife impacts depend upon the "status and condition" of the specific habitat and wildlife populations affected); *id.* at PIR-0847 ("extent of [vegetation] impacts would depend on" location and project-specific factors); *id.* at PIR-0674 (human health harms depend on proximity to residences, schools); *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009) ("[W]e cannot accept that because the *category* of impacts anticipated from oil and gas development were well-known . . . any change in the location or extent of impacts was immaterial" under NEPA); *see also S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) ("analysis of *similar* effects for a separate project" will not suffice under NEPA).

Most damning is that the prior EAs are largely not even site specific. Consider two of the most frequently cited: the Highland Loop Road EA (November 2012)[11] and Spearhead Ranch EA (November 2012).[12] Both were *programmatic*, just like the Converse County FEIS. They do not address discrete APDs or development sites but rather hypothetical scenarios across broad regions—603 and 375 square miles, respectively. *See* Highland Loop Road EA at 9, 16, 28 ("surface locations . . . have not been selected"); Spearhead Ranch EA at 9, 16, 28. Most of the prior EAs were also a decade old, yet BLM did not account for new information, such as rising oil and gas activity, ECF No. 64-9 at PIR-0187, -0385; increased groundwater demands, ECF

[11] https://eplanning.blm.gov/eplanning-ui/project/119139/570
[12] https://eplanning.blm.gov/eplanning-ui/project/119135/570

No. 64-10 at PIR-1673–74; sage-grouse declines and conservation plans, ECF No. 64-9 at PIR-0620; ECF No. 64-11 at PIR-1704, -0620; and loss of the raptor timing stipulation exemption.

Courts have rejected use of DNAs under similar circumstances. *Compare, e.g.*, *Bd. of Cnty. Comm'rs of Cnty. of San Miguel v. U.S. BLM*, 584 F. Supp. 3d 949, 973 (D. Colo. 2022) (holding use of DNA improper because oil and gas impacts vary based on location-specific factors, such as proximity of other wells); *Triumvirate, LLC v. Bernhardt*, 367 F. Supp. 3d 1011, 1027 (D. Alaska 2019) (holding use of DNA improper despite similarities in project type and location because new approval would add cumulatively to prior ones) *with Ctr. for Biological Diversity v. U.S. BLM*, No. 3:17-cv-553, 2019 WL 236727, at *13 (D. Nev. Jan. 15, 2019) (DNA proper to issue oil and gas leases "either adjacent to or very near" leases issued just months prior with identical protections and similar "resource[s] conditions").

Finally, Wyoming is wrong that this issue must await the full administrative record. Plaintiffs submitted the NEPA document for every APD decision, ECF Nos. 64-12 to 64-15, not just a "selective sample," as Wyoming claims, ECF No. 77 at 52; *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (confirming that a preliminary injunction may be granted on the basis of "evidence that is less complete than in a trial on the merits"). Thus, this is not a case where the Court "cannot tell on what basis the [agency] took the agency action the plaintiff seeks to enjoin." *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 580 (D.C. Cir. 2001).

II. PLAINTIFFS ARE LIKELY TO SUFFER IRREPARABLE HARM.

While the discussion above confirms that Plaintiffs are likely to prevail on the merits, they also have established the requisite "likelihood of irreparable injury" to warrant injunctive relief. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8–9 (D.C. Cir. 2016); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (requiring "likely," not certain, irreparable

harm). Hundreds of new wells may be drilled, and their associated pipelines, powerlines, roads and other developments constructed, before this case is resolved on the merits. There is no doubt this industrial activity will cause irreparable harm to public lands, water, air, and wildlife, and to Plaintiffs' members, as described in Plaintiffs' declarations. Over 44 members live in the Project area and others work, travel, and recreate there, testifying to personal experiences with the harmful realities of oil and gas development. While Defendants and Intervenors try to downplay these irreparable harms, they are documented in the Converse County Project FEIS itself and echoed by EPA. That these harms are combined with the procedural harm of inadequate NEPA study only further confirms the propriety of injunctive relief. *See Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003); *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 512–13 (D.C. Cir. 1974) ("The purpose of equitable intervention in [NEPA]" cases is to preserve the "possibility that the statement will lead the agency to change its plans in ways of benefit to the environment.").

A. Irreparable Harm from Air Pollution

Plaintiffs' opening brief explained that continued construction and development of the Project will result in irreparable harm by exposing Plaintiffs' members—including those that live, work, travel, and recreate in the Project area—to unhealthy air pollutants. *See* ECF No. 64-1 at 55–56; *see also* Anderson Decl. ¶ 20 (ECF No. 64-3); Katherman Decl. ¶ 13 (ECF No. 64-4); Turner Decl. ¶¶ 9–10 (ECF No. 64-5); Molvar Decl. ¶¶ 22–23 (ECF No. 64-6); O'Toole Decl. ¶ 11 (ECF No. 64-7). This harm is especially concerning for members with underlying conditions making them particularly vulnerable to emissions in any amount. Molvar Decl. ¶ 22 (ECF No. 64-6). The pollutants emitted by the Project—including $PM_{2.5}$, PM_{10}, VOCs, and

ozone-forming NO_x—have well-documented adverse health impacts for the people that breathe them.[13]

This is not "alarmist rhetoric." *See* ECF No. 80 at 32. EPA itself expressed repeated concerns about "public exposure to unhealthy levels of air pollution" from this Project. ECF No. 64-11 at PIR-1677. This is quintessential irreparable harm. *See, e.g.*, *Beame v. Friends of the Earth*, 434 U.S. 1310, 1314 (1977) (J. Marshall, in chambers) (recognizing "irreparable injury that air pollution may cause during [a two month] period"); *Sierra Club v. U.S. Dep't of Agric.*, 841 F. Supp. 2d 349, 358 (D.D.C. 2012) (irreparable harm satisfied where coal plant expansion would "emit substantial quantities of air pollutants that endanger human health and the environment"); *Dine Citizens Against Ruining Our Env't v. Jewell*, No. 15-cv-0209, 2015 WL 4997207, at *48 (D.N.M. Aug. 14, 2015), *aff'd*, 839 F.3d 1276 (10th Cir. 2016) (air pollution from well drilling and fracking constituted irreparable harm).

The near-term exposure to such pollutants from project construction and operations is irreparable. Moreover, each additional well, tank, pump, and other facility constructed during the pendency of this litigation without appropriate pollution controls will lock in future emissions that, absent retrofitting, would worsen regional air quality indefinitely.

Intervenors make essentially two arguments in response, neither of which has merit. First, they claim that state permitting and operator-committed measures could avoid the predicted NAAQS violations. ECF No. 77 at 54; ECF No. 80 at 33. They overlook that BLM's air quality modeling already accounted for these emission-reducing measures and projected NAAQS

[13] *See, e.g.*, ECF No. 64-19 at PIR-4902 (EPA documentation of adverse health effects from exposure to particulate matter); ECF No. 64-20 at PIR-4904 (EPA documentation that oil and gas industry "is the largest industrial source of emissions of [VOCs]" which are "linked to a wide range of health effects" and "premature death"); ECF No. 64-11 at PIR-1769–72.

exceedances despite their implementation. *See* ECF No. 64-9 at PIR-0651–52 ("Project emission inventory . . . accounted for all applicable emissions controls" including those required by WDEQ permitting of oil and gas sources); *compare* ECF No. 64-8 at PIR-0008 (listing operator committed measures) *with* ECF No. 64-9 at PIR-0651–52 (listing same measures as model assumptions). Likewise, EPA expressed significant concern over exceedances and urged BLM to adopt more protective mitigation measures *despite* being well aware of the state's regulatory framework. *See* ECF No. 64-11 at PIR 1677, 1679–80. EPA also expressed concern over the accuracy of BLM's model, advising that it was inconsistent with EPA's guidance and under-predicted potential impacts. *Id.* at PIR-1679–80. Intervenors also fail to mention that the identical state regulatory regime has allowed significant air quality problems from Wyoming oil and gas development.[14]

Second, Wyoming claims that the Project has not *yet* resulted in documented NAAQS exceedances, ECF No. 77 at 54, but this misses the point. Emissions are cumulative and BLM found they would increase over time as development ramps up, peaking in year ten. ECF No. 64-9 at PIR-0662. Moreover, NAAQS are not required to "definitively identify pollutant levels below which risks to public health are negligible." *Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 369–70 (D.C. Cir. 2002). This is particularly true of particulate matter ($PM_{2.5}$ and PM_{10}), for which there is no safe level of exposure. In the 2013 NAAQS, EPA itself stated that there is "no

[14] *See, e.g.*, American Lung Association, *State of the Air: 2023 Report* at 156 (2023) https://www.lung.org/getmedia/338b0c3c-6bf8-480f-9e6e-b93868c6c476/SOTA-2023.pdf (noting numerous Wyoming counties with PM and ozone issues and giving Converse County a grade of "D" for ozone and "incomplete" for PM); Nicole Pollack *Wyoming Air Quality Affected by Oil and Gas Study*, Casper Star Tribune (May 16, 2023), https://trib.com/business/energy/wyoming-air-quality-affected-by-oil-and-gas-study-finds/article_1734c7ac-f376-11ed-abe7-1b6a85f98de5.html (noting recent peer-reviewed article found "[a]ir pollution from oil and gas production is harming Wyomingites' health").

population threshold, below which it can be concluded with confidence that $PM_{2.5}$ -related effects do not occur." National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086, 3098, 3118–19, 3148 (Jan. 15, 2013); *see also United States v. Ameren Missouri*, 421 F. Supp. 3d 729, 817 (E.D. Mo. 2019), *aff'd in part*, 9 F.4th 989 (8th Cir. 2021) ("The overwhelming weight of evidence supports that $PM_{2.5}$ is a no-threshold pollutant, meaning it can pose risks to human life and health at any concentration level."); *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 593 F. Supp. 2d 812, 821 (W.D.N.C. 2009) ("PM2.5 exposure has significant negative impacts on human health, even when the exposure occurs at levels at or below the NAAQS."), *rev'd on other grounds*, 615 F.3d 291 (4th Cir. 2010). EPA has also proposed strengthening the NAAQS standard for annual $PM_{2.5}$ from 12 $\mu g/m^3$ to between 9 and 10 $\mu g/m^3$, given the latest science on its harmful effects.[15]

Wyoming's claim about NAAQS exceedances is also factually misleading. ECF No. 77 at 54. In fact, recent monitoring data shows that exceedances have already occurred in Converse County. For instance, ozone levels spiked above the 8-hour ozone standard on three separate occasions in 2021 and four times in 2020. The 24-hour PM_{10} standard was already exceeded on at least one day in 2021.[16] Moreover, while particulate matter emissions are "localized" to the extent that they are most severe near their source, ECF No. 80 at 32, one key source is vehicle

[15] *See* EPA, *EPA Proposes to Strengthen Air Quality Standards to Protect the Public from Harmful Effects of Soot* (Jan. 6, 2023), https://www.epa.gov/newsreleases/epa-proposes-strengthen-air-quality-standards-protect-public-harmful-effects-soot.

[16] EPA, *Monitor Values Report*, Outdoor Air Quality Data, https://www.epa.gov/outdoor-air-quality-data/monitor-values-report (last visited May 26, 2023) (select pollutant, years "2020" and "2021," and "Converse County," then "generate report"). Even if these exceedances are in part attributable to naturally occurring—but not uncommon—factors like wildfires and winter inversions, ECF No. 77-2 at ¶ 26 (ECF No. 77-2), the addition of the Project's pollution during these events will exacerbate their human health impacts.

traffic on unpaved roads, which will occur throughout the Project area. ECF No. 64-10 at PIR-1235–36, -1293; *see also id.* at PIR-1210 (map showing $PM_{2.5}$ emissions throughout Project area); ECF No. 64-9 at PIR-0183 (map of existing roads). Ambient air monitors are also unlikely to pick up all exceedances in the Project area. For NO_2 and ozone, there is only one monitoring station located near the Project's southern boundary. *Id.* at PIR-0239. For PM_{10}, there are several "in the vicinity of" the Project area, but most "are industrial in nature and are not intended for regional background purposes." *Id.* at PIR-0243. For $PM_{2.5}$, the closest stations are both outside the Project area, in Campbell and Natrona Counties. *Id.* at PIR-0239, -0245. Thus, results from these sparse monitoring sites cannot establish that levels in the heart of the Project area are not being exceeded.

Wyoming's cases are also inapposite. *See* ECF No. 77 at 54–55. In *City of Tempe v. FAA*, 239 F. Supp. 2d 55, 63–64 (D.D.C. 2003), plaintiffs did not establish that emissions would be "anything more than minimal" because the development project would not result in emissions triggering a conformity determination under the Clean Air Act, which was the basis of plaintiffs' challenge. Similarly, in *Citizens Ass'n of Georgetown v. Washington*, 370 F. Supp. 1101, 1107 (D.D.C. 1974), plaintiffs sought an injunction because there had been no air quality impact analysis to ensure construction of the challenged project would not result in harmful pollution. However, the court found they had not demonstrated irreparable harm because EPA's regulations were inapplicable to the type of project, thus evincing the agency's determination that it would not result in harmful pollution. *Id.* at 1110.[17] In contrast here, BLM's own model predicted substantial air pollution exceeding health-based air quality standards.

[17] Likewise, in *Sierra Club v. Atlanta Regional Commission*, 171 F. Supp. 2d 1349 (N.D. Ga. 2001), plaintiffs did not show how the challenged transportation plan was likely to exacerbate

B. Irreparable Harm to Wildlife Interests

An injunction is also necessary to avoid irreparable harm to Plaintiffs' concrete interests in bird and wildlife viewing, photography, and study. *See* Anderson Decl. ¶¶ 10–13, 17; Molvar Decl. ¶¶ 12, 16–18, 20–21, 24–25; O'Toole Decl. ¶¶ 5–6, 9–14; Katherman Decl. ¶¶ 15, 17–20; Turner Decl. ¶ 18. As Plaintiffs' opening brief explained, the Project area provides habitats critical to iconic western wildlife, like sage-grouse, pronghorn, and raptors—all highly sensitive to development. ECF No. 64-1 at 20–22. The FEIS confirms that oil and gas development is likely to displace, reduce, or eradicate these species in the Project area, despite state and federal mitigation. *See* ECF No. 64-9 at PIR-0969 (possible sage-grouse extirpation); *id.* at PIR-0923 (raptor displacement and declines); *id.* at PIR-0901–03, -0908 (pronghorn displacement and declines); *id.* at PIR-0582 (existing pronghorn declines attributed to oil and gas activity).

BLM thus acknowledges that Project development will reduce opportunities for wildlife watching. *Id.* at PIR-0758. Such impacts are almost inevitable before a merits ruling, given the direct harms that well development causes, *id.* at PIR-0906, and near certainty of development occurring in these habitats, *see id.* at PIR-0758 ("habitat for pronghorn . . . is widespread" in project area); *id.* at PIR-0908 (noting "higher probability that [pronghorn] would occur in close proximity to disturbance"); *id.* at PIR-0926 (one-third of BLM-managed wells projected to fall near a raptor nest); *id.* at PIR-0625 (sage-grouse habitat map); *id.* at PIR-0580 (pronghorn habitat map); PIR-0597 (raptor nest map). Importantly, impacts to wildlife at any location would impair viewing opportunities across that population's seasonal or migratory range—from public roads, state and federal public lands, or Plaintiffs members' own property.

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existing ozone levels and construction was unlikely to even begin before the case could be decided on the merits. *Id.* at 1361.

Neither Defendants nor Intervenors address—much less refute—these irreparable wildlife impacts, which alone amply support an injunction. S*ee Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 323–26 (D.C. Cir. 1987) (finding irreparable harm from destruction of wildlife habitat); *Fund for Animals v. Norton*, 281 F. Supp. 2d at 220–22 (finding irreparable harm from reduced wildlife viewing opportunities for MBTA-protected species); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995–96 (8th Cir. 2011) (finding irreparable harm from wildlife impacts).

C. Irreparable Harm to Environmental Values

An injunction is also necessary to prevent irreparable harm to the landscape and Plaintiffs' concrete interests in its scenic, natural, and aesthetic values. Members regularly use the Project area for hiking, spiritual renewal, scenic drives, wildflower spotting, and solitude. *See* Anderson Decl. ¶¶ 8–16; Molvar Decl. ¶¶ 12, 18–22, 24; O'Toole Decl. ¶¶ 6, 9–14; Katherman Decl. ¶¶ 8, 12–19; Turner Decl. ¶ 18. They will be irreparably harmed by the aesthetic changes; dust, fumes, flares, and noise; and lost or degraded recreational opportunities. *See* Anderson Decl. *Id*. ¶¶ 17–22; Molvar Decl. ¶¶ 19–26; O'Toole Decl. ¶¶ 8, 11–14; Katherman Decl. ¶¶ 8–20; Turner Decl. ¶ 18.

The image below, taken by declarant Erik Molvar on an aerial overflight inside the Converse County Project boundary, Molvar Decl. ¶ 15 (photo), illustrates these harms. Pictured are the scars and obvious industrial intrusion from just one well pad. Yet the Converse County Project would encompass 1,500 such well pads. ECF No. 64-9 at PIR-0091.

The supposedly "strict" site reclamation BLM requires on federal surface, ECF No. 83 at 42, will not avoid these harms. Final reclamation will only be performed after the productive life of each well (estimated at 30 years), ECF No. 64-9 at PIR-0196–97, -0172, and BLM admits that interim reclamation "would be minimal," *id.* at PIR-0916. Moreover, "it would take 20 to 50 years" for vegetation to recover after reclamation begins, and "some areas may never return to their pre-disturbance condition function." *Id.* at PIR-0860.

The Supreme Court recognizes that this type of "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 545 (1987). Thus, a plaintiff's members suffer irreparable harm where an activity impairs their "interests in conserving natural resources for their aesthetic, recreational, and environmental use and enjoyment." *Nat'l Wildlife Fed'n*, 835 F.2d at 325; *see also All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (enjoining project due to irreparable harm to ability to

"view, experience, and utilize" an area in its undisturbed state); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) (enjoining project due to irreparable harm from aesthetic and environmental injuries to public lands visitors); *Citizen's Alert Regarding the Env't v. U.S. DOJ*, No. 95-cv-1702, 1995 WL 748246, at *10 (D.D.C. Dec. 8, 1995) (finding irreparable harm from project that would leave "behind a blighted landscape"); *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422, 423–24 (D.D.C. 1970) (enjoining oil pipeline due to irreparable damage).

D. Irreparable Harm to Community Residents

The Project will also result in irreparable harm to Plaintiffs' members by impairing daily quality of life. Katherman Decl. ¶¶ 8–11, 22, 24; Turner Decl. ¶¶ 10–12; Anderson Decl. ¶ 21; Molvar Decl. ¶¶ 21–22. BLM again concedes these impacts, including "volumes of heavy truck traffic" that cause pervasive dust and "safety concerns" for residents, ECF No. 64-9 at PIR-0812; round-the-clock flaring and lighting that noticeably deteriorate night skies and stargazing, *id.* at PIR-0864; "intrusive" noise levels, *id.* at PIR-0739; strains on public services and infrastructure, *id.* at PIR-0794–802, -0812; "substantial increases in traffic offenses and accidents, crime, and social problems," *id.* at PIR-0811; and harms to "lifestyle, quality of life and property values" for local residents, *id.* at PIR-0450. This, too, satisfies the irreparable harm standard. *See, e.g.*, *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Serv.*, 657 F. Supp. 2d 1233, 1240 (D. Colo. 2009) (finding irreparable harm from increased traffic and drill rigs that will create noise and bright lights).

These are not just minimal or temporary "nuisances," ECF No. 77 at 56, as Converse County's own history with fossil fuel development confirms. *See* ECF No. 64-9 at PIR-0811 (noting increases in crime and social problems from 2013/2014 development boom); *see also id.*

at PIR-0448 (noting challenges an oil boom-and-bust "can pose for local governments, school districts, businesses, housing markets, and the quality of life for their residents"); Katherman Decl. ¶ 22 (discussing Wyoming's "long, sad history of" social problems associated with oil and gas booms); Molvar Decl., Ex. 1 at 14–15 (ranch owners in Converse County forced to relocate due to nosebleeds, headaches, fumes resulting from oil and gas activity). These problems impact Plaintiffs' members' daily lives, creating dangerous living conditions and threatening their livelihoods. *See, e.g.*, Turner Decl. ¶ 10 (describing "how bad the dust gets from the 24-hour-a-day truck traffic" and negative impacts to ranching business). And even if some of these harms are transient, ECF No. 80 at 22; ECF No. 83 at 42–43, they are still irreparable "in the sense that [they are] not compensable by money damages." *San Luis Valley Ecosystem Council*, 657 F. Supp. 2d at 1241 (plaintiffs' aesthetic and noise interests, although temporary, were irreparable).[18]

Finally, these harms will not be adequately mitigated by the Operator Group, County, or State. ECF No. 77 at 55–56. No mitigation could eliminate many of the anticipated harms to the community—like the sheer volume of trucks expected to use the roads, decreases in property values adjacent to oil and gas infrastructure, rapid influx of temporary workers, and overall strains on social services. *See also* Katherman Decl. ¶ 11 ("Our county has had serious trouble keeping up with road maintenance"); Turner Decl. ¶ 10 ("The companies are supposed to do dust control, but in my experience, that is not occurring.").

Thus, the cases cited by Wyoming are distinguishable. ECF No. 77 at 55–56. In *Macht v. Skinner*, 715 F. Supp. 1131 (D.D.C. 1989), the court considered the state's mitigation of noise

[18] This case is unlike *W. Ala. Quality of Life Coal. v. U.S. Fed. Highway Admin.*, 302 F. Supp. 2d 672, 684 (S.D. Tex. 2004). ECF No. 80 at 22. In that case, the project's entire life expectancy was only 33 months and plaintiff "presented no evidence of increased air or noise pollution."

and disturbance impacts in the balance of equities, but also found irreparable injury was "not clear cut" because the new rail line would be constructed over an old rail line and thus "not alter the characteristic use of the land involved." *Id.* at 1137; *see also Seeger v. U.S. Dep't of Def.*, 306 F. Supp. 3d 265, 291 (D.D.C. 2018) (record did not show cancer was certain, actual, or imminent given mitigation). Here, on the other hand, there will be significant adverse impacts to community residents *notwithstanding* potential mitigation. *See* ECF No. 64-9 at PIR-0813–15.

E. The FEIS Is Compelling Evidence of Irreparable Harm.

Private Intervenors ask the Court to disregard Defendants' own projections of serious harm in the FEIS with a classic straw man fallacy: that "[i]f every NEPA analysis that discloses a project's impacts evidences irreparable harm, then preliminary injunctions would issue after every ROD." ECF No. 80 at 21. There is of course no such blanket rule, nor do Plaintiffs advocate for one. For an injunction to issue in a NEPA case, a plaintiff must satisfy the four-factor injunction test. But in evaluating irreparable harm, a defendant's own assessment of the degree of probable harm is highly relevant. Indeed, it is difficult to imagine a *more* compelling source. Here, Plaintiffs' member declarations, other exhibits, and comments from EPA and NPS further establish that irreparable injury is likely.

That developers have not yet ramped up drilling to the average rate projected in the FEIS does not undercut the need for an injunction or irreparable harms of development. *See* ECF No. 80 at 21. Intervenors do not dispute that hundreds of new wells and their supporting roads, powerlines, pipelines, tanks, pits, and other facilities are likely to be developed before the Court rules on the merits. Such development will result in irreparable harms, even if the precise extent is not yet fully known. *See San Luis Valley Ecosystem*, 657 F. Supp. 2d at 1240 (drilling just two oil and gas wells would cause irreparable harm); *Brady Campaign*, 612 F. Supp. 2d at 25

(finding likelihood of irreparable harm given "almost universal view" that action "will have *some* environmental impacts, even if the extent of those impacts [was] not fully known").

Finally, Defendants misrepresent the FEIS by claiming the "vast majority" of impacts are "temporary" or would be avoided by mitigation. ECF No. 83 at 42. That is simply false. Many EIS sections document "residual impacts," which are "[u]navoidable adverse impact[s] to a resource that remain after implementation of mitigation has been applied." ECF No. 64-9 at PIR-1193. Residual **visual impacts** include "noticeable" changes to scenic viewsheds that that would persist for the 40-year Project lifespan. *Id.* at PIR-0865–66. Residual **recreation** impacts include a decline in "quality and opportunities for camping, hiking, [and] fishing," *id.* at PIR-0759, which would remain until "final reclamation is completed" in 40 years, *id.* at PIR-0761. As for **air pollution**, BLM admits that air quality would only "revert to its original state" once "wells are plugged and abandoned" and "wind erodible surfaces are reclaimed" after the 40-year project life. *Id.* at PIR-0695. Residual **vegetation** impacts include "compromis[ing]" the "health of vegetation communities and special status plant species" due to surface disturbance and invasive weed establishment. *Id.* at PIR-0856. "[I]t would take 20 to 50 years" for vegetation to recover after the Project is completed and "some areas may never return to their pre-disturbance condition." *Id.* at PIR-0860. Residual **wildlife** impacts include habitat loss, behavioral interference, direct mortality, and population declines. *Id.* at PIR-0911, -0934, -0941. Most of these impacts would again persist until decommissioning (i.e., 40-years) and some would be irreversible. *Id.* at PIR-0916, -0941 (noting irreversible loss of migratory birds).

F. Private Surface Use Agreements Will Not Avoid Irreparable Harm.

Private surface use agreements will not avoid the irreparable harms from Fee/Fee/Fed wells. As the examples from Intervenors show, ECF Nos. 80-8 at 12–40; 80-9 at 5–24; 80-11 at

21–50, these agreements are narrowly focused on protecting the landowner as opposed to the greater public interest. None include the host of detailed protections as to wildlife, air quality, light pollution, viewshed impacts, water consumption, truck traffic, and other offsite impacts that BLM attaches to non-Fee/Fee/Fed wells. *Compare id. with* ECF No. 64-13 at PIR-2457–62 (listing BLM requirements).[19] Neither are they subject to BLM's landscape-scale perspective. An individual landowner simply does not have that level of focus, nor should they.

Surface use agreements are also private contracts. BLM does not have the ability to enforce their terms and conditions, and they are not filed as part of the APD process. Moreover, these agreements are *also* routine for split estate development, yet BLM does not forego its own detailed environmental standards for such wells. Instead, BLM serves as an important partner to split-estate landowners, negotiating and enforcing mitigation requirements for the protection of both the individual landowner and broader public interests.[20] Thus, private landowners simply do fulfill BLM's important role or obviate the need for injunctive relief.

G. Any Delay Does Not Undercut Plaintiffs' Irreparable Harm.

Defendants and Private Intervenors argue that Plaintiffs have delayed unreasonably in seeking preliminary injunctive relief, pointing out that the Converse County ROD was signed in December 2020 and BLM begun issuing APDs under it in 2021 and continuing in 2022 and 2023. *See* ECF No. 83 at 41–42; ECF No. 80 at 12, 15–17. They cite several cases where delays

[19] Intervenors claim the agreements "typically contain provisions" to protect "wildlife," ECF No. 80 at 18, but the sole example they could unearth is a mere temporary prohibition on development in livestock pastures, unlikely habitat for wildlife. *See* ECF No. 80-8 at 22.

[20] *See, e.g.*, BLM, The Gold Book: Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development 11–12 (2007), https://www.blm.gov/sites/blm.gov/ files/Gold Book 2007 Revised.pdf; BLM, Split Estate: Rights, Responsibilities, and Opportunities 2 (2007), https://www.blm.gov/sites/blm.gov/files/documents/files/SplitEstate07.pdf.

were held to count against plaintiffs seeking injunctive relief, but as the D.C. Circuit has instructed, "a delay in filing is not a proper basis for denial of a preliminary injunction." *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011). As *Gordon* observed:

> Although federal courts have at times bolstered their denials of preliminary injunctions by referring to the late hour of a filing, those cases in no way stand for the proposition that a late filing, on its own, is a permissible basis for denying a preliminary injunction . . . . Rather, they demonstrate only that untimely filings may support a conclusion that the plaintiff cannot satisfy the irreparable harm prong.

Id. at 725–25 (citing *McDermott ex rel. NLRB v. Ampersand Pub., LLC*, 593 F.3d 950, 965 (9th Cir. 2010) ("The factor of delay is only significant if the harm has occurred and the parties cannot be returned to the status quo . . . .")). Consistent with this observation, Defendants' and Intervenors' cases all denied injunctive relief for multiple reasons, not solely delay.[21]

Moreover, unlike those cases seeking relief over some single action, this is a large and complex case challenging hundreds of agency decisions. The Converse County Project FEIS and ROD alone are complex, technical documents and their administrative records voluminous, as

[21] *See Newdow v. Bush*, 355 F. Supp. 2d 265, 282–92 (D.D.C. 2005) (plaintiff unlikely to succeed on First Amendment claims challenging inclusion of prayers at President Bush's second inaugural, and noting plaintiff waited until just one month before the inauguration to seek relief); *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213–16 (9th Cir. 1984) (plaintiff unlikely to succeed in challenging city zoning ordinance and noting that plaintiff waited months after receiving city relocation notice before seeking an injunction just days before relocation deadline); *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 42–44 (D.D.C. 2000) (denying injunctive relief because plaintiff only alleged economic harms from a 180-day delay in getting FDA approval of its drug, and plaintiff miscalculated when that would occur); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987–88 (D.C. Cir. 1975) (denying injunction where hunting would not have adverse impacts on the geese populations, and plaintiff waited until just days before hunting season started to seek injunction); *Dallas Safari Club v. Bernhardt*, 453 F. Supp. 3d 391, 399–401, 403 (D.D.C. 2020) (denying mandatory injunction to require immediate processing of plaintiffs' applications to import hunted African elephant trophies, when agency had warned processing times would be lengthy and plaintiffs hunted the elephants in 2017 but waited until 2019 to seek relief); *W. Watersheds Project v. Bernhardt*, 468 F. Supp. 3d 29, 47–50 (D.D.C. 2020) (denying injunction against biological opinion allowing lethal take of female Yellowstone grizzly bears, where plaintiffs could not show that any change in killing of females bears would occur before the merits could be resolved).

confirmed by BLM's assertion that it required eight months to compile the Administrative Record for those alone. *See* ECF Nos. 57 & 59. And BLM's procedures for notifying the public about APD approvals largely exclude the public, as Plaintiffs have already documented, ECF No. 81 at 31–32 and ECF No. 81-1 ¶¶ 8–14, complicating Plaintiffs' ability to track and identify the APD and NEPA documents challenged in this case and their legal errors.

As small nonprofit conservation groups, Plaintiffs have extremely limited financial, staff, and legal resources, and cannot simply hire private lawyers to take on a case of this magnitude, as Private Intervenors are able to do. It necessarily took time for Plaintiffs to obtain *pro bono* counsel to review the FEIS and ROD after they were approved, understand BLM's APD approvals, and analyze and develop this litigation involving what Defendants acknowledge are "complex and nuanced" legal issues. ECF No. 72 at 1–2. Plaintiffs' filing of the Complaint in September 2022 is thus not inordinate delay under the circumstances.

Moreover, part of the delay in filing this case was due to Plaintiffs' efforts to comment on APDs after the ROD was approved, detailing BLM's legal violations in approving APDs under the defective FEIS and ROD—in hopes of forestalling BLM from future unlawful APD approvals. *See* ECF Nos. 81-2 to 81-4. As Plaintiffs have already explained to the Court, BLM has an established policy, PIM 2022-001, which directs BLM staff to take particular care when processing APDs for which the underlying environmental analysis is under further review related to litigation. *See* ECF No. 74-1 ¶ 5. Plaintiffs hoped BLM would take this same reasonable approach here, obviating the need for a Motion for Preliminary Injunction. *Id.* Yet it took

Defendants several weeks even to respond to Plaintiffs' multiple inquiries last year about whether BLM would proceed with approving Project APDs. *Id.* ¶¶ 5–8.[22]

Confirming that Plaintiffs have not unreasonably delayed in seeking injunctive relief is the undisputable fact that BLM is continuing to approve Converse County APDs under the defective FEIS and ROD, and under equally-defective legal positions that disclaim authority to impose important safeguards on such APDs. Again, Plaintiffs do not seek injunctive relief over Project wells that are already drilled. They only seek forward-looking relief to preserve the status quo until the Court can resolve the merits, thus preventing a host of irreparable harms. The Court thus should not buy into Defendants' and Intervenors' delay arguments.

III. THE BALANCE OF EQUITIES FAVORS AN INJUNCTION.

Defendants and Intervenors also argue that balancing of harms requires denying an injunction, alleging it would cause enormous losses of jobs, taxes, and royalties. ECF No. 83 at 43–44; ECF No. 77 at 57–59; ECF No. 80 at 46–51. These objections are vastly overstated.

Again, Plaintiffs do not seek to enjoin any wells that are already drilled or operating, so there would be no impact on current revenues, royalties, or jobs they provide. An injunction pausing future development would also not cause the financial or other harms Private Intervenors assert. The Converse County Project approved some 5,000 new wells that would be developed over a decade or longer, and an injunction would only temporarily pause further Project development without permanent loss of hoped-for profits or jobs. *See also* ECF No. 64-9 at PIR-0784–85 (showing sharp drop off in employment after well construction). The Operator Group also consists of multi-billion-dollar energy corporations that can easily absorb any true costs of

[22] Plaintiffs also have repeatedly underscored their desire to adjudicate the injunction motion and the merits of their claims as quickly as possible, while Defendants and Intervenors have repeatedly sought to stay or delay the case. *See* ECF Nos. 57, 59 & 74.

delay, *see* ECF No. 64-7 at 6, which are simply the nature of doing business in a highly-regulated industry.[23]

Moreover, an injunction will also merely postpone the potential tax and royalty incomes for local, state, and federal governments. These revenue streams will largely continue from other federal wells, existing Project wells, as well as state and private mineral development. Although Wyoming also claims a temporary decline in such revenues could impact social services, ECF No. 77 at 58–59, it ignores the major strains the Project itself will place on housing, the job market, hospitals, schools, roads, water and sewer infrastructure, law enforcement, and emergency management and response, ECF No. 64-9 at PIR-0794–802, -0811–12.

Defendants and Intervenors cite cases in which preliminary injunctions were denied on the basis of countervailing interests, but they are readily distinguishable. *See S. Utah Wilderness All. v. Bernhardt*, 512 F. Supp. 3d 13, 22 (D.D.C. 2021) (finding balance of hardships disfavored injunction where Plaintiffs showed no likelihood of success and ground disturbing work before merits ruling was "uncertain" and "limited [in] scope"); *Nat. Res. Def. Council v. Kempthorne*, 525 F. Supp. 2d 115, 125 –27 (D.D.C. 2007) (finding balance of hardships disfavored injunction where Plaintiffs showed no likelihood of success or irreparable harm, because "the development at issue is largely complete" and would occur in "extensively developed" area); *Amoco Prod. Co.*, 480 U.S. at 545 (balance of harms favored oil company where "injury to subsistence resources from exploration was not at all probable"); *Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 895–96 (10th Cir. 2013) (affirming denial of injunction denial where plaintiffs had no likelihood of success and "minimal" environmental impact failed to tip balance in their favor);

[23] Private Intervenors also misleadingly claim any delay would risk termination of their leases, ECF No. 80 at 50, ignoring that they would be entitled to a lease suspension, which would freeze the running of the lease term. *See* 43 C.F.R. § 3103.4-4.

Land Council v. McNair, 537 F.3d 981, 1004–05 (9th Cir. 2008) (confirming public interest in environmental preservation "outweighs economic concerns in cases where plaintiffs [are] likely to succeed on the merits" but denying injunction where Plaintiffs lacked even a "fair chance of success on the merits").

At bottom, Intervenors' overbroad claims of harm do not undermine the need for a preliminary injunction. In light of Plaintiffs' high likelihood of success on the merits, the Court must also consider that an injunction will avoid the greater disruption of altering or shutting down completed wells after a merits determination. If the Court nonetheless remains concerned about enjoining development of APDs that were already approved before Plaintiffs could present their injunction motion, it can more narrowly tailor the injunction to prohibit approval of new APDs while expediting resolution of Plaintiffs' claims on the merits. The harm calculus for pausing yet-to-be approved APDs tilts even further in Plaintiffs' favor. *See Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002); *Sierra Club*, 645 F.3d at 997 (both assigning less weight to harms incurred from "jump[ing] the gun" on permitting approvals).

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

The public interest in this case also strongly favors a preliminary injunction—particularly due to "[Plaintiffs'] extremely high likelihood of success on the merits" which "is a strong indicator that a preliminary injunction would serve the public interest." *League of Women Voters*, 838 F.3d at 12. As with balancing, Defendants and Intervenors focus on the supposed benefits of "developing domestic minerals from public lands." ECF No. 80 at 53. However, any such interest is contingent on compliance with federal laws like NEPA and FLPMA and the Congressional policies they reflect. *See, e.g.*, 43 U.S.C. §§ 1701(a)(8), 1702(c) (declaring in FLPMA a purpose and duty of environmental protection); 42 U.S.C. § 4331 (declaring in NEPA

a national policy of environmental protection). Courts also recognize the particular public interest in halting agency action where a plaintiff establishes a likelihood of success on a NEPA claim, to ensure a project is given careful consideration before impacts occur. *See Brady Campaign*, 612 F. Supp. 2d at 26; *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998); *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2002); *All. for the Wild Rockies*, 632 F.3d at 1139; *Davis*, 302 F.3d at 1116. The public interest strongly supports an injunction to avoid ongoing violations of these legal duties.

In touting the economic benefits of energy production, Intervenors also ignore the costs. The environmental and public health harms associated with the Converse County Project will not be borne only by Plaintiffs' members, but by the broader community. The impacts will stretch beyond Wyoming's boundaries, as reflected in NPS's concerns with air pollution impacts to National Parks in multiple states. ECF No. 64-8 at PIR-1550. Comments on behalf of the Standing Rock Sioux, Rosebud Sioux, Oglala Sioux, and Flandreau Santee Sioux Tribes also identified harms to tribal treaty and water rights. *See id.* at PIR-0084–88, -1589–93. Important wildlife like sage-grouse and migratory birds will also be adversely impacted by the Project due to habitat, breeding, nesting, and behavioral disturbances. *See Missouri v. Holland*, 252 U.S. 416, 435 (1920) (observing that conserving migratory birds is "a national interest of very nearly the first magnitude"); *Nat'l Wildlife Fed'n v. Andrus*, 440 F. Supp. 1245, 1256 (D.D.C. 1977) (noting public interest in "preservation of the natural environment"). These further public interests will be better served by an injunction preserving the status quo.

Finally, as already explained above, Intervenors' claims that an injunction would cause serious economic hardships contrary to the public interest are also vastly overstated, since an injunction would be limited in time, not apply to any wells already in development, and delay

rather than eliminate mineral royalties and taxes. By carefully tailoring the injunction and moving quickly to adjudicate the merits, the Court can ensure that the litany of harms Intervenors claim are minimized, while protecting the strong public interest in preventing irreparable damage to environmental resources.

V. THE COURT SHOULD IMPOSE ONLY A NOMINAL BOND.

Finally, the Court should impose a nominal preliminary injunction bond under Federal Rule of Civil Procedure 65(c), in light of the public interest nature of this litigation and Plaintiffs' status as nonprofit conservation groups. *See* ECF No. 64 at 3 (requesting bond of $100). Courts recognize that nominal injunction bonds are proper in public interest cases such as this. *See, e.g.*, *Davis*, 302 F.3d at 1126 ("Ordinarily . . . a minimal bond amount should be considered" in NEPA suits); *Citizen's Alert Regarding Env't*, 1995 WL 748246, at *12 n.10 ($100 bond); *Sierra Club v. Block*, 614 F. Supp. 488, 494 (D.D.C. 1985) ($20 bond); *Nat. Res. Def. Council v. Morton*, 337 F. Supp. 167, 168–69 (D.D.C. 1971), *aff'd on other grounds*, 458 F.2d 827 (D.C.Cir.1972) ($100 bond).

Notably, Federal Defendants and Wyoming do not dispute that a nominal bond is proper here. But Private Intervenors ask the Court to impose a $5 million bond, citing cases where bonds were required for injunctions against private intervenors. *See* ECF No. 80 at 54 (citing *Front Range Equine Rescue v. Vilsack*, 844 F.3d 1230, 1231–32 (10th Cir. 2017) ($495,000 bond); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 297 F.R.D. 633, 634–35 (N.D. Ala. 2014) ($300,000 bond); and *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 397 (9th Cir. 1989) ($100,000 bond)).

The $5 million bond sought by Private Intervenors here dwarfs those and should be rejected, for two reasons. First, the Court need not enjoin Intervenors to afford Plaintiffs' relief,

and Rule 65(c) only permits a bond to cover "costs and damages sustained by a party found to have been wrongfully *enjoined* or restrained." Fed. R. Civ. P. 65(c) (emphasis added). A preliminary injunction as to Defendants, who do not seek a higher bond, would suffice as they control APD development.

Second, "[i]t is well settled that Rule 65(c) gives the Court wide discretion in the matter of requiring security" including to avoid the "effect of denying the plaintiffs their right to judicial review of administrative action." *Nat. Res. Def. Council*, 337 F. Supp. at 168–69; *see also Brown v. Artery Org., Inc.*, 691 F. Supp. 1459, 1462 (D.D.C. 1987) (requiring "plaintiffs in this case to post anything more than a nominal bond would effectively deny them the relief to which they may be entitled"); *Armstrong v. Bush*, 807 F. Supp. 816, 823 (D.D.C. 1992) (requiring $100 bond "because the public interest favors granting" injunction). Indeed, the Ninth Circuit reversed a similar bond as Private Intervenors seek here as an abuse of discussion. *See Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975) (reversing $4,500,000 bond).

Imposing such a high bond here is beyond Plaintiffs' financial capability—as Private Intervenors no doubt are aware. Plaintiffs' publicly-available Form 990 federal tax reports show that Plaintiffs together have assets of well less than $2 million.[24] They could not possibly pay an injunction bond of even a fraction of what Private Intervenors are demanding. Accordingly, the Court should exercise its discretion to impose a nominal bond of $100.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Preliminary Injunction, in whole or in part, and at a minimum prohibit BLM from approving new APDs in the Converse County Project.

[24] Plaintiffs' Form 990s are available online at www.guidestar.org.

Respectfully submitted this 26th day of May 2023.

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