ENCOURAGING RESPONSIBLE DEVELOPMENT TODAY ~ FOR TOMORROW

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POWDER RIVER BASIN
Resource Council

Via first-class and electronic mail

June 26, 2015

Director (210)
Attn: Protest Coordinator
P.O. Box 71383
Washington, DC 20024-1383
protest@blm.gov

RE: Protest of the Proposed Resource Management Plan and Final Environmental Impact Statement for the Buffalo Field Office Planning Area, May 2015

Dear Director Kornze,

On behalf of our members who live, work, and travel within the Buffalo Field Office Planning Area (BFO), the following organizations hereby protest the BFO's Resource Management Plan (RMP) and Final Environmental Impact Statement (EIS) issued May 29, 2015:

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Interest of the Parties

Our organizations have members who live, work, and/or travel throughout the planning area. Our members breathe the air, live on the land, and drink the water of the planning area. Many of our members are split estate landowners overlying federal minerals that are slated for leasing and development under the proposed plan. Our members also recreate and enjoy wildlife watching on BLM lands in the planning area, hold grazing leases for BLM land parcels, and otherwise use BLM lands. Our members will be adversely affected by the decisions made in the RMP, including but not limited to, authorizing fossil fuel leasing and extraction and the

corresponding impacts to air, land, and water quality. Our organizations are therefore eligible to protest the plan under 43 C.F.R. § 1610.5-2(a).

Participation in the Planning Process

For over six years now, our organizations and our members have been actively engaged in the RMP and EIS process. Our organizations submitted comments on the scope of the document in January 2009, supplemental scoping comments in July 2012, and comments on the draft EIS in September 2013. Members of our organizations and allied organizations submitted over 2,000 comments on the draft RMP and EIS. Throughout the process we have corresponded and met with BLM staff in Buffalo, Cheyenne, and Washington, D.C., and have attended public meetings hosted by BLM.

Parts of the Plan Being Protested

Our organizations are protesting the following parts of the RMP/EIS:

Chapter 2- Alternatives (failure to consider a phased development alternative; failure to consider alternatives that would encourage reclamation of oil and gas wells and coal mines; and failure to explain why authorizing coal exports would meet BLM's purpose and need statement)

Chapter 3 - Affected Environment (failure to consider and disclose the current status of idle/orphaned[1] federal oil and gas wells and delayed oil and gas and coal reclamation)

Chapter 4 – Environmental Consequences (failure to adequately consider and disclose cumulative impacts; failure to adequately consider and disclose impacts related to lease stipulation changes, specifically increased drilling activities in areas with limited reclamation potential and severe erosion potential; failure to consider and disclose impacts related to coal exports; and failure to consider impacts related to idle/orphaned oil and gas wells and delayed coal reclamation)

As required by BLM's RMP regulations, a short description detailing the basis of our protest and the needed changes to each of the protested sections of the proposed RMP and corresponding EIS is included below.

[1] While we are aware that BLM has specific definitions of when the agency considers wells to be "idle" or "orphaned" (see Instruction Memorandum No. 2012-181 from September 5, 2012 http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-181.html) our meaning of the words in this protest is the common understanding as applied by the Wyoming Oil and Gas Conservation Commission. We use the term "idle" to refer to both temporarily abandoned and shut-in wells, meaning wells that are not currently producing oil and gas resources. We use the term "orphaned" to apply to wells where the operating company is bankrupt or no longer available to fulfill reclamation obligations.

I. BLM Violated NEPA by Failing to Consider a Range of Reasonable Alternatives

The "heart" of a NEPA document is its consideration of alternatives. A fundamental requirement of NEPA is that federal agencies must consider a range of reasonable alternative actions. *See* 42 U.S.C. § 4332(2)(c)(iii); 40 C.F.R. § 1502.14; *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1988). The range of alternatives should "sharply [define] the issues and [provide] a clear basis for choice among options by the decisionmaker and the public." *Id*.; *see also California v. Block*, 690 F.2d 753, 765-69 (9th Cir. 1982) (reversing EIS for failure to address reasonable range of alternatives). Alternatives analysis is important because "[w]ithout substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded." *New Mexico v. BLM*, 565 F.3d 683,708 (10th Cir. 2009).

In its EIS, BLM violated NEPA by failing to consider a range of reasonable alternatives by (1) improperly rejecting from detailed analysis an alternative proposed by organizations to implement phased development of mineral resources; and (2) by failing to consider reasonable alternatives and mitigation measures to address and reduce the number of un-reclaimed oil and gas wells and coal mines.[2]

A. BLM's Rejection of a Phased Development Alternative Violated NEPA

BLM's duty to consider a range of alternatives is accompanied by a duty to "study ... significant alternatives suggested by other agencies or the public during the comment period." *DuBois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1286 (1st Cir. 1996). Consideration of alternatives proposed by the public is necessary to allow an agency to meet NEPA's mandate to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R § 1502.14(a); *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) (an EIS must consider "every" reasonable alternative). The courts have consistently held that an agency's failure to consider a reasonable alternative is fatal to an agency's NEPA analysis. *See, e.g., Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1519-20 (9th Cir. 1992) ("The existence of a viable, but unexamined alternative renders an environmental impact statement inadequate.").

In rejecting the proposed phased development alternative, BLM contends that regulating the rate at which oil and gas development happens in the planning area would not be feasible "[g]iven the extent of non-federal mineral ownership." EIS at 95. In responding to comments, BLM further states that

> The primary purpose of the RMP is to identify where fluid mineral development is appropriate, not to determine how or at what rate fluid minerals could be developed. In addition to the reasons identified in the Alternatives not Carried Forward for Detailed Analysis section (Section 2.42), phased development was not considered because an RMP is foremost an allocation document.

[2] BLM also violated NEPA by failing to consider an alternative that would authorize a smaller amount of coal leasing. This violation is discussed in the protest filed by the Western Environmental Law Center, et al. on behalf of our organizations.

EIS at 2684.

BLM's responses are not sufficient and the agency violated NEPA by not carrying forward this alternative for detailed analysis in its EIS.

First, as discussed in detail in the EIS, the majority of oil and gas resources in the planning area are federally owned. Out of the total of 7.4 million acres within the planning area, approximately half, or 3.4 million acres contain federally owned oil and gas resources. EIS at 2. BLM has full capability of establishing a phased development plan for the development of its managed resources, which as the organizations explained, would create orderly development of oil and gas, promote reclamation, and minimize cumulative impacts to air, land, water, and wildlife resources. Notably, BLM's obligation to prevent trespass of federal resources does not prevent a phased development alternative. Federal and non-federal units, as well as forced pooling orders, are almost always used for oil and gas resources in the planning area, and BLM is a participant in negotiating unit boundaries and terms and conditions. It is extremely possible to ensure that if wells are located on state or private lands adjacent to federal resources, which when drilled would drain federal resources, BLM can still collect royalties and value for the development of its resources. Moreover, BLM could easily create a series of exceptions and modifications for a phased development plan that would allow APD approval in areas outside of the phasing established in certain situations, for instance if it was shown that a well was needed to prevent trespass and drainage of federal resources.[3]

Second, an RMP is an appropriate place for a phased development alternative. In fact, it is the most appropriate place as it is the only analysis level that considers landscape level development of resources. BLM's argument is negated by its consideration – and adoption – of a phased development alternative in a RMP level document for the Fortification Creek Area. While that RMP amendment may have covered a smaller planning area than the entire BFO planning area, it was still a RMP level document. Moreover, in order to "identify where fluid mineral development is appropriate" necessitates a consideration of how, when, and under what conditions those minerals are developed. Otherwise, there would be no "management" in the management plan. BLM considers lease stipulations and conditions of approval in its RMP document, so it is clearly more than merely "an allocation document." As explained in the Fortification Creek EA and RMP Amendment, phased development is merely another way to condition development of oil and gas resources to mitigate impacts to the natural resources of the area, and is therefore appropriate for consideration in this RMP.

Finally, as discussed in the Fortification Creek Area RMP Amendment, phased development is appropriate to consider even if large portions of the planning area have already been leased. [4] Phased development does not interfere with valid and existing rights. In *Yates Petroleum Corp.,* 176 IBLA 144 (2008) the IBLA cited to several statutory and regulatory

[3] BLM did not respond to any of these issues raised in the organizations' comments. *See* Powder River Basin Resource Council comments at 12.

[4] While BLM does not raise this issue as a reason not to pursue phased development, the organizations felt it was important to discuss.

provisions that provide "authority to condition post-lease approvals" or "impose post-lease, site-specific surface use controls." 176 IBLA at 155. The IBLA made it clear that under these authorities the BLM can regulate both the siting and timing of development regardless of any stipulations that may be, or not be, attached to the lease. *Id.* at 155-56. Additionally, "[t]here is substantial support for the right of the Secretary of the Interior to regulate drilling rights in order to avoid adverse environmental impacts" and BLM must consider "a wide[] range of alternatives, including the limitation or regulation of the manner and pace of development." *Powder River Basin Resource Council*, 120 IBLA 47, 55 (1991). If phasing would threaten the expiration of leases because they would not be able to be developed in the necessary timeframe, BLM can easily address that. BLM can – and routinely does – administratively extend leases, which could be something that is included in a phased development alternative.

While BLM may not wish to pursue a phased development alternative – most likely because the oil and gas operators in the planning area would not want the agency to pursue one – that is not a valid reason for rejecting consideration of an alternative offered during public comment. *See* Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 48 Fed. Reg. 18,026 (March 16, 1981) ("40 Questions") ("In determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out the particular alternative. Reasonable alternatives include those that are practical or feasible from a technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.")

The need for a phased development alternative is stronger than ever in the planning area. As discussed below, thousands of coalbed methane wells remain idle on the landscape. If operators were required to plug, abandon, and reclaim these wells before pursuing new wells in other areas, the problem with idle and orphaned wells would largely be reduced. Additionally, as discussed below, this RMP revision is dramatically changing the lease stipulations for oil and gas, allowing much greater development in areas on steep slopes and areas with limited reclamation potential. Like the Fortification Creek Area, it is necessary for BLM to phase development in these sensitive areas. This will ensure that successful reclamation can occur before widespread development is allowed.

B. BLM's Rejection of Alternatives and Mitigation Measures to Encourage Reclamation of Oil and Gas and Coal Resources Violated NEPA

In comments, the organizations asked BLM to consider alternatives and mitigation measures that would encourage and require timely reclamation of oil and gas wells and coal mines. These ideas included: (1) limiting new coal leasing for a coal mine until the mine released a certain percentage of land at existing mining operations from reclamation bonds (Powder River Basin Resource Council comments at 14); (2) increasing reclamation bonds for idle oil and gas wells (Powder River Basin Resource Council comments at 4); and (3) requiring reclamation of brush density and other vegetation necessary to reclaim sage-grouse habitats (Powder River Basin Resource Council comments at 17).

As discussed above, if these proffered alternatives are reasonable and found to meet the purpose and need of the RMP, BLM had a duty to consider them within the scope of its EIS. BLM violated NEPA by failing to do so.

None of these proposed alternatives were discussed – or even mentioned – in Chapter 2, meaning BLM did not even consider them. Instead, BLM merely briefly responded to the suggested alternatives in its response to comments appendix. This only underscores the extent of BLM's NEPA violation in failing to consider these proposed alternatives.

1. Delaying Coal Leasing to Encourage Reclamation

In regard to the coal leasing alternative, BLM rejected consideration of the proposed alternative by simply replying that "Wyoming's coal mine reclamation is under the authority of the Wyoming DEQ and the Office of Surface Mining Reclamation and Enforcement, and as such, BLM has no jurisdiction to set coal mine reclamation policy." EIS at 2702.

Therefore, the sole justification provided by BLM for ignoring this critical issue is the agency's claim it is not the agency responsible for setting coal mine reclamation policy. While it is true that the Wyoming Department of Environmental Quality (DEQ) has delegated permitting authority over coal mines from the Office of Surface Mining (OSM), BLM is the Federal agency that starts the process of leasing federal coal reserves, and without a lease, mining and subsequent impacts will not occur. BLM has an independent duty under NEPA to analyze all of the environmental impacts of its proposed action—i.e. the direct, indirect and cumulative impacts of authorizing leasing of additional coal reserves and the associated impacts related therewith. Along with this duty to consider the impacts is a duty to consider alternatives and mitigation measures that will reduce those impacts. An alleged lack of "jurisdiction" over one component of coal development (i.e. reclamation) does not substantiate the BLM's failure to consider alternatives in its NEPA document. *See e.g.*, 40 C.F.R. § 1502.14(c)(Federal agencies have a duty to "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency"); *Pennaco v. DOI, 377 F.3d 1147, 1150* (10th Cir. 2004)("NEPA 'prescribes the necessary process' by which federal agencies must 'take a 'hard look' at the environmental consequences' of the proposed courses of action.")

Moreover, the organizations are not asking BLM to "set" coal mine reclamation policy. As discussed below, coal mine reclamation policy is already well established, with national policy developed by OSM establishing that bond release is the measure of reclamation success. Therefore, the alternative the organizations proposed – limiting new leasing prior to existing mining operations achieving a certain level of bond release – would merely require BLM to apply the reclamation policy already set by its sister federal agency in charge of reclamation enforcement. Additionally, OSM was a cooperating agency on the RMP[5] and BLM could have easily worked with them directly to develop an alternative to encourage more timely coal reclamation.

Regardless, the alternative is arguably within the bounds of BLM authority. An alternative that would condition approval of new coal leases on reclamation of existing leases is

[5] *See* http://www.blm.gov/wy/st/en/programs/Planning/rmps/buffalo/cooperators.html

consistent with the mandates of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1787, the statute that governs management of BLM lands. FLPMA includes a multiple use mandate, which "requires management of the public lands and their numerous natural resources so that they can be used for economic, recreational, and scientific purposes without the infliction of permanent damage." *New Mexico*, 565 F.3d at 710 (citations omitted). Authorizing new coal leasing, while taking "into account the long-term needs of future generations for renewable and nonrenewable resources, including . . . recreation, range, . . . [and] wildlife and fish" would be fully consistent with BLM's authority. 43 U.S.C. § 1702(c). In this case, BLM could analyze the amount of land acres that are currently occupied by coal mines and consider the land use trade-offs that result from a lack of bond release at the mines. This is especially true for mines that occupy large pieces of federal surface lands, including the Thunder Basin National Grassland. Comments from the Thunder Basin Grazing Association, individual ranchers in the area, and our organizations all asked BLM to consider alternatives to encourage more timely reclamation of lands occupied by BLM coal leases and therefore enable more land to be returned for livestock grazing and other multiple uses. *See, e.g.* Comments from Thunder Basin Grazing Association, attached as Exhibit 3. Such alternatives would be fully consistent with BLM authority. In fact, according to the comments from the Grazing Association, they were advised by WY Department of Environmental Quality, the Forest Service, and several coal mine operators that the RMP "would be [their] best opportunity for relief." *Id*. In other words, the Grazing Association was informed that the RMP would be an appropriate – if not the only – place to consider mitigation measures and alternatives related to coal reclamation. BLM did not respond to those comments in its RMP, and more importantly, nor did it take the advice of its sister agencies and consider reasonable alternatives to address coal reclamation, bond release, and the loss of acreage available for other land uses. In doing so, BLM violated NEPA.

2. Increasing Oil and Gas Bonds to Encourage Reclamation

In regard to the oil and gas bonding alternative, BLM responded that "Additional bonding and landowner consent are national level issues which are beyond the scope of the Buffalo RMP. In addition they are implementation level practices not at the allocation level which is the focus of the RMP." EIS at 2687. BLM further stated that "The BLM Field Office level is bound by the national bonding regulations and does not have the ability to increase bond requirements. The regulations include a process to assess risk and ensure proper bonding on a case by case basis. Bond amount are periodically reviewed." *Id*.

However, BLM's own RMP states that bond reviews can occur at the field office level. As part of the proposed reclamation policy, the field office can require additional reclamation bonding depending upon specific site characteristics. EIS at 2498. Therefore, even BLM acknowledges that establishing the conditions that warrant additional bond increases is an appropriate RMP level decision.

Moreover, BLM bonding regulations and policies directly contradict BLM's statement. BLM's Instruction Memorandum No. 2013-151 from July 3, 2013 "requires that Bureau of Land Management (BLM) field offices regularly review oil and gas bonds to determine whether the bond amount appropriately reflects the level of potential risk (liability) posed by the operator." Attached as Exhibit 4. In other words, national BLM policy says that field offices have responsibility to review bond amounts. While the state office ultimately raises the bond, the field

office has to review bond amounts and determine whether there are adequate, forwarding on recommendations to the state office.

Here, the organizations proposed that the field office could review and disclose bond amounts as part of its planning document. This would be appropriate because the thousands of idle and orphaned wells present in the planning area, many of which are the result of bankrupt or otherwise financially insolvent companies. The field office could disclose the bond amounts for these wells and then could make a recommendation for its proposed RMP about appropriate bond amounts, which would then be approved by the state office (and ultimately through resolution of this protest the national office). This is particularly important given the level of record title assignments or transfers of operating rights occurring in the planning area because of the significant downturn in CBM development.[6]

This RMP-level review would be fully consistent with BLM's bonding regulations that require bond amounts to be set at a level "…to ensure compliance with the act, including complete and timely plugging of the well(s), reclamation of the lease area(s), and the restoration of any lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations…" 43 C.F.R. § 3104.1(a).[7] This is exactly why the organizations asked for an alternative to consider raising bond amounts – reclamation and plugging of wells is not timely within the planning area and thus restoration of lands is not happening at the level it should. This problem of untimely reclamation of wells and the risk of operators walking away from reclamation liability of wells becomes compounded by the financial condition of many operators in the planning area (see discussion in Section IV(D) *infra*). BLM has an obligation to fulfill the letter and spirit of its regulations and policies related to bonding and fully consider an alternative to increase bonds in order to encourage timely reclamation within the planning area.

3. Requiring Reclamation of Sagebrush Before New Development

In regard to the sagebrush reclamation alternative, the organizations asked BLM to consider an alternative that would require reclamation of sagebrush ecosystems prior to new development. This alternative was suggested for both coal and oil and gas given the difficulty these industries have had in restoring sagebrush in the PRB and the need for increased brush density to support sage-grouse and other brush dependent species. BLM responded that:

> BLM believes that the overall trend of grassland and shrubland communities will stay fairly static from this point forward. In the past, there has been a reduction in the sagebrush community, but now reclamation is underway on much of the CBNG development and future authorized surface-disturbing activities will include plans for reclamation; site-specific reclamation actions should reflect the complexity of the project, environmental concerns, and the reclamation potential of the site.

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[6] IM 2013-151 identifies that the field office should review bond amounts "Prior to approval of a record title assignment or a transfer of operating rights."

[7] This alternative would also be consistent with Energy Policy Act of 2005 requirements to establish a program to "remediate, reclaim, and close…idled wells."

EIS at 2710.

BLM's responses amount to conclusory statements without basis. NEPA requires more. NEPA requires information provided to the public to be accurate and sufficient to permit analysis of the data provided and the methods used to analyze it. *See, e.g.*, 40 C.F.R. § 1500.1(b); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The agencies must "insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." 40 C.F.R. § 1502.24. BLM's conclusion that "reclamation is underway on much of the CBNG development" does not have any basis. How much? Is reclamation adequately restoring sagebrush to the density of sagebrush pre-development? What is happening at the coal mines? As discussed in Section IV(E) *infra*, out of the 173,914 acres disturbed by coal mining in Wyoming (the vast majority of those acres being related to federal coal development in the planning area), only 10,607 acres have been released from final bond obligations, meaning that the companies' have demonstrated final revegetation, including species composition and diversity and brush density, requirements. In short, BLM's response does not meet NEPA's requirements to adequately analyze potential impacts of a project and reasonable alternatives to reduce those impacts. *See Seattle Audubon Soc'y v. Mosely*, 798 F.Supp. 1473, 1482 (W.D. Wash. 1992) (citing *Friends of the Earth v. Hall*, 693 F.Supp. 904, 934, 937 (W.D.Wash. 1988) (holding that "The agency may not rely on conclusory statements unsupported by data, authorities, or explanatory information.").

Further, as discussed below, BLM violated NEPA by relegating its analysis to the response to comments section in the appendix. BLM must include its analysis of this alternative – and others suggested by the organizations – in the text of the EIS.

II. BLM Violated NEPA by Considering an Alternative that Does Not Meet its Purpose and Need

At the outset of any NEPA document, a federal agency is required to analyze the purpose and need for the project. See, e.g. 40 C.F.R. § 1502.10 (describing the recommended format for an environmental impact statement). Here, BLM's purpose and need statement provides that agency management strategy should "Recognize the Nation's needs for domestic sources of minerals…and incorporate requirements of the Energy Policy Act of 2005." EIS at 4. However, in its proposed alternative, BLM proposes to authorize leasing of coal to meet both domestic and export needs. *Id*. at 147 . BLM includes this proposal without any explanation in the EIS of how leasing and developing federal minerals that will be exported will comply with its management goals and policies and the purpose and need of the RMP.

BLM's only response to comments regarding coal exports was to state that "BLM does not regulate where a lessee sells the mineral resources that it has leased, much of which is used domestically. Therefore, it is not appropriate for BLM to address impacts related to coal exports." EIS at 2686. Although it not entirely clear from the statement, it appears that BLM is offering two separate rationales for rejecting consideration of coal exports. The first being that BLM has no control over where coal is sold and the second being that it does not matter because "much" coal is "used domestically." Both responses are without merit.

First, while it may be that BLM does not currently "regulate where a lessee sells the mineral resources that it has leased," in this RMP – for the first time ever in an EIS related to coal leasing – BLM has identified that the very purpose of its preferred alternative for the coal leasing program is to meet domestic and export needs. Therefore, BLM is specifically leasing for export purposes. As such, BLM has an obligation to ensure that this action meets the purpose and need of its RMP. If it doesn't, BLM should consider additional controls or mechanisms to ensure compliance with its purpose and need. Those controls and mechanisms are appropriate to consider in a management plan for the planning area, which includes by far the largest amount of mining of federal coal in the nation.

Second, BLM's claim that "much" coal is "used domestically" is beside the point. BLM has specifically identified in its RMP that coal leasing will be allowed to meet export needs. Therefore, the agency itself acknowledges that export of coal that has been leased from the planning area – now and into the future – is reasonably foreseeable. Moreover, BLM's identification that coal will be exported is backed up by coal company proposals to increase exports over the planning period.

It is well known that coal operators in the planning area have been investing in proposals to create and expand coal export facilities. For instance, Arch Coal is a partner in the proposed Millenium Bulk Terminals proposal in Longview, Washington. The terminal proposal is designed to allow the export of 44 million tons of coal annually. A permit application for this facility is pending before Washington's Department of Ecology. *See* http://www.ecy.wa.gov/geographic/millennium/ Peabody Energy is a partner in the proposed Gateway Pacific project near of Bellingham, Washington. This port is being designed to allow export of 54 million tons of coal annually. A permit application for this facility is also pending before Washington's Department of Ecology. *See* http://www.ecy.wa.gov/geographic/gatewaypacific/.

Under NEPA's implementing regulations, a "proposal" "exists at that stage in the development of an action when an agency…has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effect can be meaningfully evaluated." 40 C.F.R. § 1508.23. Here, federal and state agencies are actively preparing permits and associated decision documents for the proposed ports described above. This makes them reasonably foreseeable within the scope of NEPA.

Additionally, it is well known that a third major coal operator in the planning area - Cloud Peak Energy – has a focus on expanding coal exports. The company is "[r]esponding to domestic utility demand and low pricing by reducing domestic shipments over time" with a "[f]ocus on growth through exports."[8] While Cloud Peak Energy has focused its export plans on the Northern PRB, particularly the Spring Creek Mine in Montana and the proposed Youngs Creek Mine (which would use privately held coal), publicly available documents show that some

[8] http://investor.cloudpeakenergy.com/sites/cldpk.investorhq.businesswire.com/files/doc_library/file/Updated_YE13_Investor_Presentation_FINAL.pdf at 14.

Antelope Mine federal coal is currently exported. Cloud Peak has been mixing some Antelope Mine coal with Spring Creek Mine coal to facilitate lower sodium content in its exported coal.[9]

Based on this information, BLM's selected alternative – authorizing leasing coal to companies with export plans (and the agency itself stating that it is authorizing leasing to meet export needs) - does not meet its stated purpose and need of meeting the nation's energy needs and reducing dependence on foreign sources of energy. Therefore, BLM's selected alternative violates NEPA. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812 (9th Cir. 1990) (quoting *City of Carmel-by-the-Sea v. U.S. Dep't of Trans.*, 123 F.3d 1142, 1155 (9th Cir. 1997)) ("the stated goal of a project necessarily dictates the range of reasonable alternatives").

Finally, BLM's response to comments does not render its EIS analysis complete. Federal courts have held that

> Relegation [of technical discussion] to the comment and response section of the appendix was improper under NEPA. Disclosures and discussions must be in the body of the FEIS itself. Furthermore, within that body of the EIS, the agency must not only recite dissenting opinions, it must "analyze," "respond to" and "discuss" them.

Pacific Coast Federation v. Nat. Marine Fisheries, 482 F.Supp.2d 1248, 1255 (W.D. Wash. 2007) (internal citations omitted). Here, BLM includes no discussion about coal exports within the text of its document in spite of its alternative that is specifically identified to meet export needs. This lack of discussion and analysis renders BLM's EIS legally inadequate. At the very least, BLM's EIS should be remanded to the field office to fully analyze the supply and demand of coal from the projected leasing activity during the planning period as called for by the organizations in their comments.

III. BLM's Alternative Regarding Coal Leasing Needs Clarity

BLM needs to clarify its preferred alternative related to coal leasing because the text included in Chapter 2 is inconsistent with the text included in Chapter 4. In particular, BLM needs to add new text in Chapter 2 that will clarify what happens when the agency receives a coal lease application for coal outside the previously screened area.

In Chapter 2, BLM states that "All coal lands are open to exploration, subject to multiple use constraints, resulting in zero acres closed to coal exploration and 4,775,136 acres open to coal leasing, subject to application of the coal planning screens in 43 CFR 3420.1-4." EIS at 123.

In Chapter 4, BLM states that "It is expected that additional leasing will be requested for surface coal mining in the areas identified acceptable for further coal leasing consideration during the planning period." However, it also states that "If a coal leasing action was proposed outside the established areas with high-potential for coal development, the four coal planning screens will be applied to those lands and prior to leasing an amendment to this RMP will be required." EIS at 824. This clarifying language about the need for an RMP amendment if a

[9] http://www.coalage.com/features/1194-cloud-peak-energy-prepares-for-the-long-run.html#.UzXJ8_lkQpk

company applies for a coal lease outside the previously screened area should be added to the Chapter 2 description of alternatives.

We also note that BLM's reliance on the previously carried out coal leasing screening process is insufficient as that process last occurred in 2001, fourteen years ago. While it would be therefore more appropriate for BLM to propose an alternative that withholds all lands from leasing until new lease screens can be conducted at the time of a lease application, we appreciate BLM's clarification in the final EIS and proposed RMP that even if the coal lease application is for coal in the area previously screened, BLM commits to reapplying the coal planning screens to ensure that the land should still be acceptable for leasing. This is particularly important in the case of surface owner consent, which should be obtained at the time of leasing.

IV. BLM Violated NEPA by Failing to Adequately Consider and Disclose the Environmental Consequences of its Decision

NEPA requires agencies to take a "hard look" at the environmental consequences of their actions before these actions occur by ensuring that the agency has and carefully considers "detailed information concerning significant environmental impacts," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

In its EIS, BLM failed to take a "hard look" at environmental consequences related to (1) cumulative impacts; (2) oil and gas lease stipulation changes proposed in the RMP; (3) coal exports; and (4) reclamation and production status of oil and gas wells and coal mines.

A. Cumulative impacts

A main part of any EIS is analysis of cumulative impacts caused by the proposed action. A cumulative impact is defined in NEPA's implementing regulations as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions .... Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. In this case, BLM is proposing to approve an RMP that would authorize up to 10.2 billion tons of coal leasing and 4,494 oil and gas wells. EIS at 278. With the magnitude of development of the federal mineral estate anticipated during the planning period, it is incumbent upon BLM to properly consider the cumulative impacts of its action.

However, unlike most EISs, this EIS is devoid of a cumulative impacts chapter. Although BLM includes a section called "cumulative impacts" after each type of impact area (e.g. fluid minerals and solid minerals), nowhere does BLM consider the combined – or cumulative – impacts of the various types of development taken together.

In its response to comments, BLM argues that "Because of the wide geographic scope of a cumulative impact assessment and the variety of activities assessed, cumulative impacts are commonly examined at a more qualitative and less detailed level than are direct and indirect impacts." EIS at 2689. To the contrary – a detailed qualitative and quantitative analysis of cumulative impacts across the planning area is the very type of impacts analysis required at the planning level. For instance, how can BLM ensure compliance with ambient air quality standards

or water quality standards if it does not carry out a quantitative analysis of air and water pollution? How could BLM assess landscape level impacts to vegetation and competing land uses without a quantitative analysis of the amount of cumulative acreage that will be affected during the planning period? How can BLM assess cumulative global climate change impacts without a quantitative assessment of greenhouse gas emissions likely to be emitted from the leasing, extraction, and combustion of fossil fuels authorized by the RMP?[10] How can BLM assess new impacts of horizontal oil and gas development without considering the cumulative impacts of such activity? And how can BLM analyze impacts to groundwater resources without a quantitative assessment of drawdown caused by coal mining and oil and gas development?

It is for these reasons and others that federal courts have found that "[a] proper consideration of the cumulative impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Klamath-Siskiyou Wild- lands Ctr.*, 387 F.3d at 993 (internal quotations and citations omitted). In other words, NEPA requires a "quantified assessment" of the "combined environmental impacts" stemming from the proposed action's components taken in conjunction with other projects in the area (regardless of whether they are federal in nature). *Id*. at 994. A cumulative impacts analysis requires an "objective quantification of the impacts" that tells the reader the basis of BLM's conclusion "or why objective data cannot be provided." *Id*. "[V]ague and conclusory statements, without any supporting data, do not constitute a 'hard look' at the environmental consequences of the action as required by NEPA." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006).

To its credit, BLM did add some additional text in response to comments on the cumulative impacts associated with mineral development on water resources. EIS at 2698. But, adding several paragraphs of outdated text does not amount to analysis that is sufficient under NEPA. In the new text, BLM simply states that CBNG dewaters coal zone aquifers and coal mines dewater coal production zones and overburden aquifers above the coal. EIS at 770.

Then, presumably as a way to avoid conducting impacts analysis in this EIS, the agency refers to the EIS for the Hay Creek II Coal Lease Application and the EIS for the 2003 Powder River Basin oil and gas program. *Id*. By tiering to the previous project-level EISs, BLM is turning NEPA on its head. A proper use of tiering under NEPA occurs when an agency has completed a "broad environmental impact statement" for a program or policy, and subsequently prepares a subsequent, narrower NEPA analysis for "an action included within the entire program or policy"—such as a site-specific project implementing a land management plan. 40 C.F.R. §§ 1502.20, 1508.28. Here, BLM is trying to use a smaller project level EIS to replace the broader EIS analysis needed for a RMP decision. NEPA only permits tiering when the project being analyzed is actually part of the agency action addressed by the other NEPA document. In other words, the project of the new EIS must be "included within" the scope of the first EIS on which it relies. 40 C.F.R. §§ 1502.20, 1508.28. Conversely, tiering is inappropriate where the new action falls outside the scope of the EIS on which it relies. *See, e.g., Klamath-Siskiyou*

[10] This topic is thoroughly addressed in the protest filed by Western Environmental Law Center, et al.

Wildlands Ctr. v. U.S. Forest Serv., No. 2:05-CV-0299-MCE-PAN, 2006 WL 1991414, at *9 (E.D. Cal. July 14, 2006) (agency improperly attempted to tier its NEPA analysis to prior analyses for projects in entirely different locations). In this case, neither the Hay Creek II EIS nor the 2003 Powder River Basin EIS can substitute for analysis of this RMP because the alternatives, mitigation measures, and reasonably foreseeable development scenarios are all quite different than those considered in the previous documents.[1112] Therefore, BLM must conduct a new cumulative impacts analysis for water resources in this EIS – and until it does so, its EIS will be legally deficient.

As for "conventional" oil and gas development (a term which BLM uses for both vertical conventional and horizontal unconventional wells), BLM states that "There are few cumulative or overlapping impacts to water resources associated with conventional oil production." EIS at 770. Once again, BLM makes a conclusory statement without any basis. NEPA requires more. Thousands of horizontal hydraulically fractured oil and gas wells are planned for the area. Each well uses tremendous amounts of water and requires disposal of tremendous amounts of produced water. There are certainly cumulative impacts to water resources of this type of development – especially when considering the cumulative impacts of federal wells added to private and state wells within the planning area. Additionally, there are cumulative impacts of these wells with CBM wells as many operators are using CBM produced water for hydraulic fracturing operations.[13]

It is very disappointing to our organizations that BLM did not carry out a proper cumulative impacts analysis for this RMP. As a result, our organizations are left to draw our own conclusions about the many impacts that will be created for air, land, water, and wildlife resources and more globally to the climate. This is not our job – it is BLM's – and one the agency must do to remedy the legal shortcomings of its EIS.

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[11] Notably, the 2003 EIS did not consider horizontal hydraulically fractured oil and gas wells to be reasonably foreseeable and therefore there is no impacts analysis in that previous EIS related to that type of oil and gas development. *See* RFD Scenario at 5, Appendix A of the 2003 RMP/EIS.

[12] These other EISs are also too old and outdated to be used for tiering purposes. The CEQ instructs that "EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compels preparation of an EIS supplement." *See* CEQ, 40 Frequently Asked Questions, *available at* http://www.blm.gov/wo/st/en/prog/planning/nepa/webguide/40_most_asked_questions/questions_30-40.html. CEQ further instructs that "if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" additional NEPA analyses should be prepared "so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal." *Id*.

[13] *See, e.g.* the Environmental Assessment for Mufasa Application for Permit to Drill, which discloses that 90,000 barrels water will be required to complete the well and that the water "will come from existing, CBNG wells, approximately 6 miles from the Mufasa well," transported using "about 700 round trips" of truck traffic. Mufasa EA at 3, attached as Exhibit 5.

B. BLM Failed to Adequately Consider Impacts of Oil and Gas Lease Stipulation Changes

In this RMP, BLM is proposing to dramatically change the lease stipulations that apply to oil and gas development in the planning area. The proposed RMP would phase out No Surface Occupancy (NSO) stipulations for areas with steep slopes and areas with limited reclamation potential and instead would apply Control Surface Occupancy (CSU) stipulations. *See* EIS at 128-29 (Table 2.8). This issue was addressed in detail in our comments as it is of particular concern to members of our organizations that are split estate landowners because BLM is proposing to allow extensive development of the federal mineral estate on private lands that are unlikely to be reclaimed and where erosion and other soil and vegetation impacts is very likely.

Unfortunately, BLM did not respond to our comments. While BLM includes a proposed site specific construction, stabilization, and reclamation plan (Appendix O) in its proposed RMP, it did not add new impacts analysis to the EIS. In other words, in leiu of conducting impacts analysis in this EIS, BLM simply states that "All proposed disturbances will have a site-specific NEPA analysis and are required to have a construction, stabilization, and reclamation plan that specifically addresses erosion based on the existing soil and site conditions." EIS at 703. BLM concludes – without basis – that the reclamation plan requirements will lead to full reclamation of the lands and limited impacts to soils and vegetation, and therefore impacts analysis is unnecessary. BLM concludes – again without analysis – that Site-specific Best Management Practices (BMPs) and successful reclamation will lessen adverse impacts to the soil resources from the predicted actions." EIS at 332. As a result, BLM concludes that its mitigation measures would lead to lessened long-term impacts. EIS at 727.

However, the very definition of areas with limited reclamation potential and poor reclamation suitability means that these areas are unlikely to be reclaimed. The very definition of areas with severe erosion hazard means development in these areas will very likely cause erosion. In addition to erosion, development in areas with steep slopes causes slumping and mass wasting and increases landslide potential. No conditions of approval will remedy these natural conditions. These areas were classified based on BLM's own data and analysis[14] and it is

[14] BLM explains that

> BLM soil program guidance is established under BLM Manual Section 7100, Soil Resource Management, which focuses on BLM's relationship with the National Cooperative Soil Survey and describes program goals and objectives, organization, management roles and responsibilities, and applicable authorities and regulations. BLM Handbook H-7100-1 Soil Inventory, Monitoring, and Management (Final Draft September 21, 2010) provides BLM personnel with information, guidance, and direction related to the inventory, monitoring, assessment, and management of soil resources on public lands. To help implement the many laws, rules, and regulations, the BLM Soil Program relies on various guidance documents developed by BLM and other agencies. Additional BLM soil resource information is available in the soil resources section of the BLM Soil, Water, and Air Program

illogical that BLM is now ignoring its own classifications and concluding – without basis – that development in these areas will not cause unacceptable impacts, in violation not only of NEPA but also BLM's substantive requirements to prevent "undue and unnecessary degradation" of the lands under FLPMA.

As discussed above, NEPA requires an agency to explain the basis for its conclusion. Here, BLM has not done that. Moreover, BLM has a duty to explain the efficacy of its mitigation measures. Mitigation measures must be supported by "substantial evidence" as required by NEPA. *Robertson v. Methow Valley*, 490 U.S. 332, 352 (1989). BLM acknowledges that impacts would only be lessened if the mitigation measures were "successful." EIS at 727. However, the agency does not provide any support for how its mitigation will in fact be successful.

Additionally, BLM's EIS text goes against its ultimate conclusion. In a chart, BLM discloses that there will be 486,957 acres of short-term disturbance and 128,068 acres of long-term disturbance if its proposed Alternative D is implemented, leading to a conclusion that there will be "Moderate Adverse" impacts from long-term erosion. EIS at 277. [15] However, within the text of the EIS, BLM does not disclose any impacts (short or long-term) that will result if development occurs in these sensitive areas, regardless of applied mitigation measures.

The extent of the BLM's failure to consider impacts of development in areas of poor reclamation suitability, steep slopes, and severe erosion hazard cannot be overstated. Approximately 40% of the lands overlying the federal mineral estate in the planning area contain some portion of areas having poor reclamation suitability. EIS at 332. The proposed plan opens the door to development on 885,235 acres with severe erosion hazard, acres which under the current management plan are off-limits to surface-disturbing activities. *Id*. at 277. Allowing widespread leasing and development of the federal mineral estate will undoubtedly cause some level of impact – most likely severe – to soil, vegetation, and other natural resources. It is incumbent upon BLM to consider – and disclose to the public, especially split estate landowners – the extent of those impacts. Until BLM does so, its EIS will be legally deficient.

(http://www.blm.gov/wo/st/en/prog/more/soil2/soil2.html), and the BLM soil web page (http://www.blm.gov/nstc/Soil2007/index.html).

EIS at 329.

[15] BLM further explains that

> Alternative D could potentially disturb 215,496 acres (28%) of BLM surface and 669,739 acres (20%) of federal fluid mineral estate possessing soils with a severe erosion hazard; 170,590 acres (22%) of BLM surface and 412,145 acres (12%) of federal fluid mineral estate with slopes equal to or greater than 25 percent; 455,090 acres (58%) of BLM surface and 1,514,445 acres (45%) of federal fluid mineral estate possessing soils with poor reclamation suitability; and 218,928 acres (28%) of BLM surface and 685,950 acres (20%) of federal fluid mineral estate potentially containing LRP areas consisting of but not limited to badlands, rock outcrops, or slopes susceptible to mass movement.

EIS at 727.

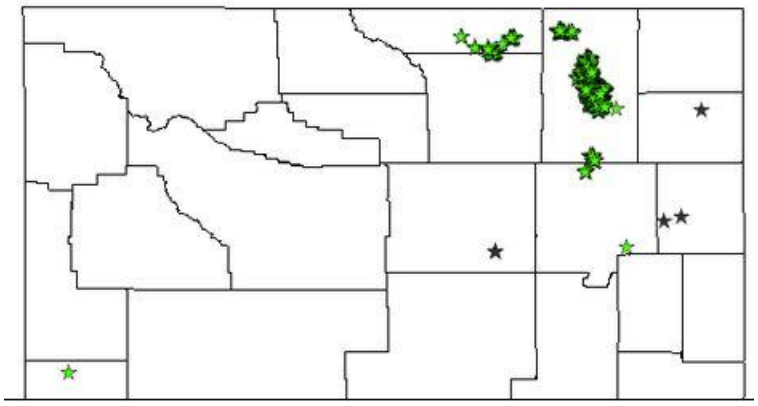
C. BLM Failed to Consider Impacts Related to Coal exports

As discussed in Section II *supra*, BLM ignored impacts related to coal exports, arguing it is "not appropriate" for the agency to consider impacts that stem from increased export of federal coal from the planning area. However, also as discussed in Section II *supra*, coal exports and associated impacts are reasonably foreseeable and should be considered in the EIS. In fact, these are the very impacts that the states of Washington and Oregon have requested BLM to consider in EISs authorizing coal leasing in the Powder River Basin. *See, e.g.* Letter from Washington Department of Ecology to Wyoming BLM, May 11, 2011, attached as Exhibit 6.

BLM's failure to consider any impacts related to coal exports is a blatant violation of NEPA's "hard look" requirements.

D. BLM Failed to Disclose the Current Status of and Related Impacts of Reclamation and Production Status of Oil and Gas Wells

It is no secret that the CBM industry is busting. For the past several years, as the price of natural gas has plummeted, companies have idled thousands of CBM wells. As identified on the Wyoming Oil and Gas Conservation Commission (WOGCC) website, there are thousands of idle and orphaned wells located in the planning area. These wells are a mix of private, state, and federal (with state idle well bonds applying to only private and state wells and no cleanup funds available for federal wells). The map below, which is a screen shot from the WOGCC website, shows the extent of the problem.



BLM itself has identified over 4,000 idle federal CBM wells. Ben Storrow, *BLM leaves thousands of Wyoming CBM wells sitting idle*, Casper Star Tribune, May 28, 2015, *attached* as Exhibit 7. "If a company goes out of business, the BLM will find who sold to the bankrupt firm and ask them to pay for the reclamation. However, that process often takes years, if not decades, and the bureau does have not money set aside for cleanup." *Id*. The number of wells and BLM's lack of action to address them has been the subject of numerous news stories and public conversation in Wyoming over the past few years. *See* Exhibits 8-12.[16] BLM and its sister

[16] In fact, BLM itself has been well aware for years of reclamation delays and failures related to the CBM industry. *See* BLM, Surface Compliance Paper, Nov. 4, 2005, attached as Exhibit 13.

agency at Interior, ONRR, is still trying to enforce against bankrupt and financially insolvent companies, such as High Plains, Patriot, Luca, and Pure Petroleum.

In this EIS, BLM has not even mentioned the words "idle" and "orphaned" let alone attempted to explain the scope of the problem and any impacts that are currently occurring or will foreseeably occur during the planning period.

In order to meet NEPA's "hard look" requirements, BLM should disclose the status of federal wells in the planning area, as called for by the organizations in their comments. After such disclosure, BLM should explain what the agency is doing to address the issue of idle and orphaned wells (both current and those reasonably expected to become idle and orphaned over the planning period). BLM should identify gaps in its process and create new mechanisms to find and enforce against responsible parties in a timely manner. Most importantly, BLM should disclose any impacts that will result from idle and orphan wells, company bankruptcies, and other issues. Specifically, BLM should disclose the reclamation liability that will be passed on to the public as a result of wells without financially solvent operators.

E. BLM Failed to Disclose the Current Status of and Related Impacts of Reclamation of Coal Mines

It is also no secret that coal mines in Wyoming have a reclamation problem. In Wyoming, with 173,914 acres disturbed by mining, only 10,607 acres have been released from Phase III bonds (just over 6%); 24,806 acres released from Phase II (14%); and 63,320 acres released from Phase I (just over 36%). OSM, Annual Evaluation Report for Wyoming, attached as Exhibit 14.

Bond release status is the ultimate determination of reclamation success and therefore bond release status must be considered part and parcel of any discussion of reclamation status. The OSM evaluates the effectiveness of a state program achieving reclamation success based on the number of acres that meet the bond release standards and have been released. OSM Directive REG-8 requires that the annual report includes a comparison and evaluation of the number of acres being mined versus the number of acres reclaimed. In this tabular comparison, bond release acreage is used to determine reclamation status and success. As OSM dictates, "**…**the ultimate determination of reclamation success and release of the operator's liability for further reclamation efforts occurs only through the open and public process of bond release**…**" OSM Directive, Nov. 21, 2008, at 2, attached as Exhibit 15.

Performance bonds for coal mining operations in Wyoming are released in three phases as reclamation proceeds. Phase III bond release is the only stage where a determination is made that "postmining land uses have been restored" pursuant to environmental criteria of Wyo. Land Quality Regulations Ch. 4 § 2. *Id.* at Attachment 5-3 at 1. The bond release process recognizes that reclamation occurs in different steps, but ultimately to remain contemporaneous, reclamation

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This paper, and others like it, also bolsters our claims discussed in Section IV(B) *supra* that impacts related to soil and slopes will be impossible to mitigate, as well as our claims discussed in Section I(C) *supra* that sagebrush is not being reclaimed in a timely manner.

must proceed from one step to the other and eventually reach Phase III final bond release. Bond release status is particularly important in assessing impacts to water resources. OSM dictates that "Achievement of surface water quality and quantity restoration can be measured by acres of Phase III bond release" and "Achievement of groundwater recharge capacity and ground water quantity and quality restoration can be measured by acres of Phase III bond release." OSM Evaluation Report at 8. There is no other objective measure of water quality and quantity restoration (sufficient to allow post-mining land uses) that BLM could substitute for its evaluation.

In the EIS, BLM failed to meet the "hard look" requirements to consider environmental impacts related to bond release status. While BLM includes a table in its EIS that discloses – without any explanation or basis – what the agency projects as cumulative disturbance and cumulative reclamation from coal leasing and mining, the table does not disclose the very important metric of reclamation success: bond release. EIS at 843. In its EIS, BLM failed to disclose the bond release status for each of the planning area coal mines that will likely apply for additional coal leases during the planning period. Additionally, and importantly, BLM does not disclose any environmental impacts related to the lack of bond release and subsequent lack of contemporaneous reclamation.

While it may be true that BLM does not permit coal mining and therefore does not oversee the bond release process, NEPA mandates that BLM must "analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts of 'past, present, and reasonable foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.'" *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1035 (10th Cir. 2001). One of the twin aims of NEPA is that "it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." *Balt. Gas & Elec. Co*. v. NRDC, 462 U.S. 87, 97 (1983)(cite omitted).

If a logical result of leasing the coal is that more land will be disturbed and not reclaimed in a timely manner, as the information discussed in the organizations' comments affirmatively demonstrates, then BLM must analyze those impacts – including any environmental, socio-economic, or public health impacts that result because of untimely reclamation – in its NEPA document authorizing the additional lease of federal coal reserves. *See* 40 C.F.R. § 1502.16 (requiring analysis of direct and indirect effects including "[t]he environmental effects of alternatives including the proposed action.").

As discussed in BLM's EIS, BLM's role in coal mining – and therefore its responsibility – in the Powder River Basin cannot be overstated. Less than 5% of mined lands are private or state coal reserves, and BLM estimates that "Because the fee and state lands are scattered, it is not likely that these lands would be disturbed if the federal coal lands are not leased and permitted." EIS at 843.

V. BLM Violated NEPA by Not Issuing a Supplemental Draft EIS for Public Notice and Comment

In the final EIS, BLM made substantial changes to the draft EIS. This put new information and new environmental analysis in a NEPA document that was not released for public notice and comment, which violated NEPA.

Once a NEPA analysis is completed, an agency must prepare a supplement whenever "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns" or "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §§ 1502.9(c)(1)(i)-(ii). An agency must prepare a supplement to the draft EIS where, after issuance of the draft EIS, "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1); *see Dubois v. U.S. Dep't of Agriculture*, 102 F.2d 1273, 1291-92 (1st Cir. 1996). A supplemental draft EIS must be circulated for public comment and filed in the same manner as an original draft EIS. 40 C.F.R. § 1502.9(c)(4).

In the final EIS, BLM changed or added a large section of analysis and several smaller sections of text under the analysis of Special Status Species regarding The Greater Sage Grouse. See EIS at §4.4.9, table 4.44, and §4.4.9.9. This information contained substantial new information disclosing that mineral exploration and extraction will detrimentally affect the habitat of the greater sage grouse. EIS at 1230. Along with a multitude of other examples, this information is relevant to the environmental concerns of this area.

BLM also changed major portions, and in one case all of the information, regarding the cumulative impact discussion of Water Resources and Biological Riparian/Wetland Resources. See EIS §4.1.4.7 pg. 769 (Water), and §4.4.3.7 pg. 1048-1049. Consisting of information explaining that the most likely impact "to be observed will be aquifer drawdown where CBNG production is dewatering coal zone aquifers and shallower." EIS at 770. This admission, although unsurprising, is crucial to the public review and comment by, and education of, landowners in the area. Because it is a discussion of cumulative impacts, this analysis by definition has an effect on the human environment and is relevant to environmental concerns.

Pursuant to BLM's NEPA Handbook, "New circumstances or information" are "significant" and trigger the need for supplementation if they are relevant to environmental concerns and bearing on the proposed action and its effects. BLM, Handbook H-1790-1, National Environmental Policy Act Handbook at 29. The new information present in the final EIS triggers the need for supplementation because significant additions and changes were made to sections that are relevant to environmental concerns and have a bearing on the alternative selected.

BLM's refusal to meaningfully involve the public in the decision making process in issuing this EIS is in direct contradiction to the latter of NEPA's twin aims – to meaningfully involve the public in its decision-making process. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). BLM has an obligation to fulfill the letter and spirit of

NEPA related to the issuance of this RMP and EIS in order to encourage public involvement and promote education in the process.

VI. BLM Violated NEPA by Considering Information from Third Parties Not Disclosed to the Public

BLM has also violated NEPA's "twin purposes" by considering information from third parties not disclosed to the public.

On July 1, 2013, Powder River Basin Resource Council submitted a Freedom of Information Act (FOIA) request to the BLM. *See* FOIA Request, attached as Exhibit 16. The FOIA request sought communications between oil and gas companies and the BLM regarding the RMP.

On September 11, 2013, the BLM indicated that it had identified 102 pages responsive to Powder River Basin Resource Council's request. *See* Response Letter from BLM. The agency indicated that it would withhold all 102 pages pursuant to FOIA Exemption 4. The agency did not provide any redacted documents. The agency did not provide a list of the withheld documents.

The Resource Council has litigation related to this FOIA request pending in Federal District Court in Washington, DC. Meanwhile, however, BLM has a separate and unique obligation under NEPA that prevents the agency from incorporating by reference or using third-party information "unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment." 40 C.F.R. § 1502.21. NEPA's implementing regulations provide that "Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference." *Id.*

In this EIS, BLM incorporated some of the most important information – information related to its reasonably foreseeable development scenario for oil and gas resources – without disclosing that information to the public. This is in spite of a FOIA request for this specific information, making the BLM very aware that the public was interested in this information. As long as the incorporated information remains unavailable to the public, BLM's EIS will violate NEPA.

Conclusion and Requested Remedies

In order to correct the legal and technical errors of the RMP/EIS, BLM must:

1. Prepare and release for public comment a Supplemental Draft EIS;
2. Consider a wider range of alternatives, including the alternatives and mitigation measures offered by the organizations during public comment;
3. Conduct a new cumulative impacts analysis properly disclosing impacts from multiple mineral development in the BFO Planning Area;
4. Properly consider and disclose other impacts as discussed above; and

5. Release information incorporated in the BLM's analysis that is being withheld from public review and comment.

Sincerely,

Shannon Anderson
On behalf of Powder River Basin Resource Council and Western Organization of Resource Councils

Attached Exhibits

1 - Comments of Powder River Basin Resource Council on the draft RMP and EIS (with attachment list)
2 – Comments of Western Organization of Resource Councils and Natural Resources Defense Council on the draft RMP and EIS
3 – Comments from Thunder Basin Grazing Association
4 – Instruction Memorandum No. 2013-151
5 – Excerpts from the Environmental Assessment for Mufasa Application for Permit to Drill
6 – Letter from Washington Department of Ecology to Wyoming BLM, May 11, 2011
7 – Casper Star Tribune article "BLM leaves thousands of Wyoming CBM wells sitting idle"
8 – WyoFile article "Aftermath of a Drilling Boom: Wyoming stuck with abandoned gas wells"
9 – Casper Star Tribune article "Wyoming lawmakers frustrated by lack of orphan well action"
10 – WyoFile article "Gov Mead wants additional $3M from industry account to plug orphaned wells"
11 – Wall Street Journal article "How 'Orphan' Wells Leave States Holding the Cleanup Bag; Wyoming has to deal with abandoned wells seized from would-be mogul and his Gazmo device"
12 – Wall Street Journal article "What to Know About Orphaned Wells"
13 – Surface Compliance of Coal Bed Natural Gas (CBNG) Development in North Central Wyoming
14 – Office of Surface Mining, Annual Evaluation Report for the Regulatory Program Administered by the Wyoming Department of Environmental Quality, Land Quality Division of Wyoming, Evaluation Year 2014
15 – Office of Surface Mining, Directive 957, Nov. 21, 2008
16 – Powder River Basin Resource Council, FOIA Request, July 1, 2013