Comments submitted via ePlanning and email

U.S. Bureau of Land Management
North Central Montana District
Hiline Division of Oil and Gas
Attn: Oil and Gas EA, Tom Barrett
1220 38th Street North
Great Falls, MT 59405
tjbarrett@blm.gov

Re: Comments on the Draft EA for the Montana BLM’s December 11, 2018 Competitive Oil and Gas Lease Sale

Dear Mr. Barrett:

WildEarth Guardians, the Center for Biological Diversity, Montana Environmental Information Center, Park County Environmental Council, Preserve the Beartooth Front, and Upper Missouri Waterkeeper (hereinafter “Conservation Groups”) submit the following comments on the draft environmental assessment (“EA”)¹ for the Bureau of Land Management’s (“BLM’s”) December 11, 2018 competitive oil and gas lease sale in Montana. The BLM is proposing to lease 102 publicly-owned land and mineral parcels totaling 69,270 acres across the state and within the Billings, Butte, Dillon, Glasgow, Havre, and Miles City Field Offices.

WildEarth Guardians is a nonprofit environmental advocacy organization dedicated to protecting the wildlife, wild places, wild rivers, and health of the American West. On behalf of our members in Montana, Guardians has an interest in ensuring the BLM fully protects public lands and resources as it oversees the oil and gas industry’s plans to lease publicly-owned minerals. More specifically, Guardians has an interest in ensuring the BLM meaningfully and genuinely takes into account the air, water, and climate implications of its oil and gas decisions, including objectively and robustly weighing the costs and benefits of authorizing the release of more greenhouse gas emissions known to contribute to global warming.

The Center for Biological Diversity (“Center”) is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center also works to reduce greenhouse gas emissions to protect biological diversity, our environment, and public health. The Center has over one million members and activists, including those living in Montana who have visited these public lands for recreational, scientific, educational, and other pursuits and intend to continue to do so in the future, and are particularly interested in protecting the many native, imperiled, and sensitive species and their habitats that may be affected by the proposed oil and gas leasing.

¹ The draft EA, DOI-BLM-MT-0000-2018-0002-EA, is available on the BLM’s ePlanning website at: https://eplanning.blm.gov/epl-front-office/projects/nepa/108993/153856/188423/December_2018_LeaseSale_EA_V0.2_pub_comment.pdf.
Montana Environmental Information Center ("MEIC") is a nonprofit organization founded in 1973 with approximately 5,000 members and supporters throughout the United States and the State of Montana. MEIC is dedicated to the preservation and enhancement of the natural resources and natural environment of Montana and to the gathering and disseminating of information concerning the protection and preservation of the human environment through education of its members and the general public concerning their rights and obligations under local, state, and federal environmental protection laws and regulations. MEIC is also dedicated to assuring that federal officials comply with and fully uphold the laws of the United States that are designed to protect the environment from pollution. MEIC and its members have intensive, long-standing recreational, aesthetic, scientific, professional, and spiritual interests in the responsible production and use of energy, the reduction of greenhouse gas ("GHG") pollution as a means to ameliorate our climate crisis, and the land, air, water, and communities impacted by fossil fuel development. MEIC members live, work, and recreate in areas affected by this lease sale. MEIC protests this action on its own behalf and on behalf of its members.

Park County Environmental Council is a nonprofit organization based in Livingston, Montana. Park County Environmental Council safeguards and enhances the lands, water and wildlife in Yellowstone’s northern gateway through a powerful community-based advocacy network.

Preserve the Beartooth Front is a blog run by David Katz and his family. Preserve the Beartooth strives to inform the community along the Beartooth Front about the threats from increased fracking.

Upper Missouri Waterkeeper ("Waterkeeper") is a non-profit water advocacy organization with approximately 1,000 members and supporters throughout the United States and the State of Montana. Waterkeeper is dedicated to protecting and improving fishable, swimmable, drinkable water and ecological health in the 25,000 square miles of Southwest and West-Central Montana’s Upper Missouri River Basin for present and future generations. Upper Missouri Waterkeeper and its members have as their mission the goal of protecting water quality and ensuring compliance with laws and regulations of Montana and the United States. To accomplish this goal, Waterkeeper utilizes a combination of strong science, community action, and legal expertise to defend the Missouri River, its tributaries, and communities against threats to clean water and healthy rivers.

The Conservation Groups have consistently participated in BLM decisionmaking for prior oil and gas leasing in Montana and within the areas proposed for lease in December. Therefore, we incorporate by reference our prior comments, protests, and exhibits, including: the EA comments and protest for the December 12, 2017 lease sale (submitted Aug. 10, 2017 and Oct. 16, 2017 respectively); the EA comments and protest for the March 13, 2018 lease sale (submitted Oct. 30, 2017 and Jan. 11, 2018 respectively); the scoping and DNA comments for the June 12, 2018 lease sale (submitted Nov. 28, 2017 and Feb. 6, 2018 respectively); and the scoping comments for the Dec. 11, 2018 lease sale (submitted July 20, 2018). These incorporated comments and exhibits offer detailed technical information, expert reports, and legal analysis that the agency is required to consider in its decisionmaking process for the proposed action. See
As detailed below, the Conservation Groups encourage the BLM to complete a thorough, transparent environmental review for the parcels before moving forward with the lease sale. Specifically, the Conservation Groups request that the BLM refrain from offering all the parcels up for lease for the December 2018 sale unless and until it completes its requirements under the National Environmental Policy Act of 1976 (“NEPA”), 42 U.S.C. §§ 4321–4370h; NEPA regulations promulgated thereunder by the White House Council on Environmental Quality (“CEQ”), 40 C.F.R. § 1500, et seq.; and the Federal Land Policy and Management Act of 1976 (“FLPMA”).

I. The BLM Must Ensure that the December Lease Sale Complies with NEPA and FLPMA.

NEPA is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). The law requires federal agencies to fully consider the environmental implications of their actions, taking into account “high quality” information, “accurate scientific analysis,” “expert agency comments,” and “public scrutiny,” prior to making decisions. Id. § 1500.1(b). This consideration is meant to “foster excellent action,” resulting in decisions that are well informed and that “protect, restore, and enhance the environment.” Id. § 1500.1(c).

NEPA regulations explain that:

Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

Id. §1500.1(c),

To fulfill the goals of NEPA, federal agencies are required to analyze the “effects,” or impacts, of their actions to the human environment prior to undertaking their actions. Id. § 1502.16(d); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (holding that NEPA imposes “action forcing procedures . . . requir[ing] that agencies take a hard look at environmental consequences”) (emphasis added). To this end, the agency must analyze the “direct,” “indirect,” and “cumulative” effects of its actions, and assess their significance. Id. §§ 1502.16(a), (b), and (d). Direct effects include all impacts that are “caused by the action and occur at the same time and place.” Id. § 1508.8(a). Indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” Id.
§ 1508.8(b). Cumulative effects include the impacts of all past, present, and reasonably foreseeable actions, regardless of what entity or entities undertake the actions. Id. § 1508.7.

Generally, an agency may prepare an Environmental Assessment (“EA”) to analyze the effects of its actions and assess the significance of impacts. See id. § 1508.9; see also 43 C.F.R. § 46.300. Where impacts are not significant, an agency may issue a Finding of No Significant Impact (“FONSI”) and implement its action. See 40 C.F.R. § 1508.13; see also 43 C.F.R. § 46.325(2). But, where effects are significant, an agency must prepare an Environmental Impact Statement. See 40 C.F.R. § 1502.3.

Federal agencies determine whether direct, indirect, or cumulative impacts are significant by accounting for both the “context” and “intensity” of those impacts. 40 C.F.R. § 1508.27. Context “means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality” and “varies with the setting of the proposed action.” 40 C.F.R. § 1508.27(a). Intensity “refers to the severity of the impact” and is evaluated according to several additional elements, including: the unique characteristics of the geographic area such as ecologically critical areas, the degree to which the effects are likely to be highly controversial, the degree to which the possible effects are highly uncertain or involve unique or unknown risk, and whether the action has cumulatively significant impacts. Id. § 1508.27(b).

Within an EA or EIS, the scope of the analysis must include “[c]umulative actions” and “[s]imilar actions.” Id. §§ 1508.25(a)(2) and (3). Cumulative actions include action that, “when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” Id. § 1508.25(a)(2). Similar actions include actions that, “when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together.” Id. § 1508.25(a)(3). Key indicators of similarities between actions include “common timing or geography.” Id.

In addition to NEPA, the BLM must comply with the Federal Land Policy and Management Act (“FLPMA”). FLPMA requires that “[t]he Secretary [of the Interior] shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands.” 43 U.S.C. § 1712(a).

The BLM fulfills this mandate by developing Resource Management Plans (“RMPs”) for each BLM field office. In general, RMPs must be up-to-date. The BLM’s Land Use Planning Handbook states that, “[RMP] revisions are necessary if monitoring and evaluation findings, new data, new or revised policy, or changes in circumstances indicate that decisions for an entire plan or a major portion of the plan no longer serve as a useful guide for resource management.” BLM Land Use Planning Handbook, H-1610-1, Section VII.C at 46 (emphasis added); see also 43 C.F.R. § 1610.5-6. Furthermore, the Handbook provides that amendments are needed whenever the BLM must “[c]onsider a proposal or action that does not conform to the plan,” “implement new or revised policy that changes land use plan decisions,” “respond to new, intensified, or changed uses on public land,” or “consider significant new information from...
resource assessments, monitoring, or scientific studies that change land use plan decisions.” BLM Land Use Planning Handbook, H-1610-1, Section VII.B at 45; see also 43 C.F.R. § 1610.5-5.

When the BLM issues a new RMP or amends a RMP, the agency must also comply with the requirements of NEPA. See 43 C.F.R. §§ 1601.0–6. Thus, the BLM is required to issue an EIS with each RMP. Id. Although the BLM may tier its project-level analyses to a broader NEPA document, such as the EIS accompanying the RMP, 43 C.F.R. § 46.140, “[n]othing in the tiering regulations suggests that the existence of a programmatic EIS for a forest plan obviates the need for any future project-specific EIS, without regard to the nature of magnitude of a project.” League of Wilderness Defs.–Blue Mountains Biodiversity Proj. v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998). Furthermore, “[a] NEPA document that tiers to another broader NEPA document . . . must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions.” Id. Put another way, “[t]o the extent that any relevant analysis in the broader NEPA document is not sufficiently comprehensive or adequate to support further decisions, the tiered NEPA document must explain this and provide any necessary analysis.” Id. § 46.140(b).

A. The BLM Cannot Lease Parcels in the Miles City Field Office Until the BLM Supplements the Miles City RMP/EIS.

First and foremost, the BLM cannot lease parcels within the Miles City Field Office until the BLM complies with the decision in Western Organization of Resource Councils v. U.S. Bureau of Land Management, CV 16-21-GF-BMM, 2018 WL 1475470, (D. Mont. Mar. 26, 2018) (hereinafter “WORC”) (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 1).

On March 26, 2018, Judge Brian Morris of U.S. District Court in Montana issued an “Opinion and Order” in a case challenging the validity of the Miles City and Buffalo RMPs and EISs. In the decision, the court ruled for plaintiff environmental groups on three out of the six claims under NEPA. In particular, the court held that: 1) “NEPA requires the BLM to conduct new coal screening and consider climate change impacts to make a reasoned decisions on the amount of recoverable coal made available in the RMPs”; 2) “BLM must supplement the Miles City FEIS and Buffalo FEIS with an analysis of the environmental consequences of downstream combustion of coal, oil, and gas open to development under each RMP”; and 3) “BLM violated NEPA where it failed to justify its use of GWPs [global warming potentials] based on a 100-year time horizon rather than the 20-year time horizon of the RMPs.” WORC, 2018 WL 1475470, at *17–18.

As a result of these flaws, the court indicated that the BLM must “conduct a new coal screening to consider climate change impacts,” and “must supplement the Miles City FEIS . . . with an analysis of the environmental consequences of downstream combustion of coal, oil, and gas open to development under each RMP.” Id. at *17–18. Put simply, “the deficiencies identified in the . . . Miles City RMP must be remedied through the preparation of a supplemental EIS[.]” Id. at *18. The court also held that the BLM must comply with its findings “at the lease-level and permit-level for any pending or future coal, oil, or gas developments in the
Miles City RMP until BLM produces [] supplemental environmental analyses . . . that comply with NEPA and the APA.” *Id.* at *19. In an order responding to remedy briefing, the court recently reaffirmed that its decision “applies when issuing any new or pending lease of coal, oil, or gas resources in the Buffalo or Miles City planning areas until Federal Defendants produce remedial analyses that comply with its obligations under NEPA.” Exhibit 1.1, Order, *WORC*, CV 16-21-GF-BMM (D. Mont. July 31, 2018).

For the December 2018 lease sale the BLM is planning to lease approximately 48 parcels within the Miles Field Office. *See* EA, App’x A, Parcel List, Miles City FO. Although the Conservation Groups appreciate the fact that the BLM includes additional information regarding the global warming potential for GHGs and lease-specific calculations for downstream greenhouse gas emissions, EA at 24 and 31 respectively, the BLM still fails to fully comply with Judge Morris’ order.

On the former issue, the BLM still fails to explain why the 100-year time horizon for GWP is appropriate on a scientific basis. *See* EA at 24. Instead, in the EA the BLM reiterates that it based its 100-year factor on an EPA report—the same report which Judge Morris found to based “on a political agreement between nations rather than on science.” *WORC* at *15. Additionally, although BLM states that it includes the 20-year time horizon for “illustrative purposes,” it does not seem as if the BLM included this in Table 5 (direct emissions) or Table 6 (downstream emissions). Furthermore, BLM fails to explain why it is relying on a 20-year time horizon or otherwise point to any scientific basis for its decision.

For the latter issue, the BLM does not calculate total downstream GHG emissions for the lease sale for the life of the parcels. Thus, it is hard for the reader to assess the full impacts of the proposed action. Second, the BLM belittles the significance of the downstream GHG analysis by stating that “this estimated quantity represents approximately 0.0004% of total U.S. GHG emissions[.]” EA at 31. The CEQ has recommended against issuing statements such as these. *See* CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews at 14 (2016) (hereinafter CEQ Guidance) (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 6). Instead, federal agencies are advised to “use appropriate tools and methodologies for quantifying emissions and comparing GHG quantities across alternative scenarios.” Exhibit 6 at 11. This latter provision is particularly important here where the BLM only considers two alternatives, no leasing or full leasing. As Judge Morris’ order states, “NEPA requires BLM to “foster informed decision making.” *WORC* at *13. Simply providing the calculations here with little context for comparison fails to meet this mandate.

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4 Although the Trump Administration has since revoked the CEQ’s August 2016 Climate Guidance, the BLM is still bound by the CEQ’s NEPA regulations and existing case law applying the Guidance. *See, e.g.*, *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, No. 16-CV-376-MCA-JHR, 2018 WL 2994406, at *11, n.5 (D.N.M. June 14, 2018).
Finally, NEPA regulations established by the CEQ specifically prohibit an agency from taking any action that could undermine its decisionmaking process while work on an EIS “is in progress and the action is not covered by an existing program statement.” See 40 C.F.R. § 1506.1(c). Indeed, the intent of NEPA is to study the impact of an action on the environment before the action is taken. See Conner v. Burford, 848 F.2d 1441, 1452 (9th Cir. 1988) (explaining that NEPA requires that agencies prepare an EIS before there is “any irreversible and irreplaceable commitment of resources”). “The purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they ‘retain[] a maximum range of options.’” Id. at 1446. Foreclosing these options by leasing 48 parcels before the SEIS is complete undermines the purpose and effectiveness of the NEPA process.

Furthermore, where an “[i]nterim action prejudices the ultimate decision on the program,” NEPA forbids the action. 40 C.F.R. §§ 1506.1(c)(1)-(3). An action prejudices the outcome “when it tends to determine subsequent development or limit alternatives.” Id. Again, proceeding to lease 48 parcels within the Miles City Field Office—or any other major Federal action impacting resources in the planning area—is impermissible due to the inherent prejudice that this action will cause to the pending SEIS. As the BLM knows, once a parcel is leased, “the lessee has the right to use as much of the leased land as necessary to explore (or drill) for, extract, remove, and dispose of oil and gas deposits located under the leased lands with exceptions for restrictions that may be imposed consistent with the standard lease terms and stipulations and notices attached to the lease.” 43 C.F.R. 3101.1-2. Put simply, when the oil and gas lease rights are conveyed following the sale, lessees have a right to drill, and the impact on the environment from the exercise of those rights cannot be undone. This is exactly the situation NEPA seeks to protect against—allowing new activity that determines development in the future. Indeed, once this lease sale is held, the BLM cannot stop subsequent development should the agency find out through its supplemental environmental analysis that it needs to eliminate or mitigate impacts. Thus, we request that the BLM postpone leasing the Miles City Field Office parcels in the December lease sale, unless and until the SEIS required by the WORC decision is complete.

B. The BLM Fails to Fully Analyze the Potentially Significant Impacts that May Result from Leasing the Dillon Field Office Parcels.

An EIS is required when a major federal action “significantly affects the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.4. A federal action “affects” the environment when it “will or may have an effect” on the environment. 40 C.F.R. § 1508.3 (emphasis added).

The BLM is proposing to offer for lease 15 parcels within the Dillon Field Office. But, based on the age of the Dillon Resource Management Plan and FEIS (approved in 2006), it is

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5 The Dillon RMP is available on the BLM’s website at https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=77497. The Final EIS for the RMP is available here: https://ia801208.us.archive.org/34/items/proposeddillonre01unit/proposeddillonre01unit.pdf.
unlikely that the RMP provides a full environmental analysis or adequate level of protections regarding unconventional oil and gas development and the use of hydraulic fracturing. Indeed, a search of the document demonstrates that this is the case. Furthermore, the parcels are located just southeast of the Block Mountain Area of Critical Concern (“ACEC”).

For the former, although BLM includes additional information regarding the impacts stemming from hydraulic fracturing, see EA at 49 to 56, the BLM fails to assess how the use of hydraulic fracturing coupled with horizontal drilling will impact an area that has seen little to no oil and gas development. According to the Dillon RMP-DEIS, as of 2004, there were no producing oil and gas wells in the Dillon FO. Dillon RMP-DEIS at 214. Thus, any oil and gas development could be a significant change for the field office and BLM must analyze the site-specific impacts to this area before it commits the land to oil and gas.

The BLM also fails to assess the impacts of fracking on the Block Mountain ACEC, located approximately 5 miles west of some of the Beaverhead County parcels. According to the Dillon RMP-DEIS, this ACEC was designated to protect important geologic features. Dillon RMP-DEIS at 64. These features “draw professors, students and research scientists from all over the United States and the world[,]” Id. at 171. As the BLM is aware, the disposal of wastewater from fracking has the potential to cause induced seismicity. See Won-Young Kim, Induced Seismicity Associated with Fluid Injection Into a Deep Well in Youngstown, Ohio, 118 J. of Geophysical Research: Solid Earth 1 (2013), http://im.j-fstatic.com/content/images/7c4554d5-0a81-11e3-9ec-c0144feabdc0.pdf. The BLM must study whether opening up this geologically important area to fracking could cause significant impacts beyond those analyzed in the Dillon RMP-EIS or the lease sale EA.

Finally the BLM must assess the potentially significant impacts from oil and gas development on the Arctic Grayling in Big Hole watershed. The upper Missouri River basin population of Arctic grayling has lost nearly all its historic habitat and its population numbers have plummeted. Arctic grayling once occupied rivers throughout the upper Missouri River basin in Montana and, to a small extent, Wyoming—including the Missouri mainstem, Smith, Sun, Jefferson, Madison, Gallatin, Big Hole, Beaverhead, and Red Rock rivers and their tributaries—and in Michigan. Today, native populations of the grayling survives in just 181 miles of the Big Hole River, a few small lakes in the area, and a reintroduced, still-small population in the Ruby River.

Surviving Arctic grayling face a barrage of threats, including low flows and barriers in river channels, rising water temperatures, increased pressure from nonnative fish, and a very low population. These threats are even more significant because of the current and predicted impacts of a changing climate, which are expected to even further reduce water flows and raise water temperatures.

Because of these threats, Fish and Wildlife Service (“FWS”) determined less than five years ago that federal ESA protection was necessary to ensure that Arctic grayling did not go extinct in the lower-48 states. See Revised 12-Month Finding To List the Upper Missouri River Distinct Population Segment of Arctic Grayling as Endangered or Threatened, 75 Fed. Reg.
FWS based this determination on, among other things, persistent low population numbers; the lack of success in reintroducing Arctic grayling to river environments; a lack of suitable habitat, including cold water; and population viability analyses that placed a significant risk of extinction within a 30-year window on most sub-populations in the upper Missouri River basin.

Both deforestation and shale gas infrastructure construction and operation will, in turn, lead to greatly increased levels of erosion, sedimentation, and stormwater runoff affecting surface water quality. Excess sedimentation is associated with a number of detrimental effects on water quality, stream morphology, and aquatic life, and has been identified by the EPA as one of the primary threats to US surface waters.7 Parcels proposed for oil & gas leases entail the reasonably foreseeable transformation of landscapes to allow for such natural resource development.

The transformation of landscapes for industrial oil or gas development impacts nearby waterways both large and small. No matter what construction techniques are used, there is vegetation loss associated with clearing and especially with any activities near streams or stream crossings. Reductions in foliage and degradation of riparian zones and wetlands increases stream temperature and reduces suitability for fish incubation, rearing, foraging and escape habitat. The loss of vegetation also makes streams more susceptible to erosion events, as the natural barrier along the stream bank has been removed. These and similar impacts associated with natural gas or oil development can pose significant impacts to any nearby surface waters, and in turn affect the cool, clean flows those waterways provide. This is particularly true where, as here, nearby streams are headwaters of the Big Hole River, and possess Total Maximum Daily Loads (“TMDLs”)8 for pollutants commonly associated with sediment transport, stormwater, and construction discharges.

The fact that oil and gas leases now offered for sale in the Dillon FO jurisdiction are admitted by BLM to be “low” or “very low” in nature means that there is an increased potential for new advances in hydraulic fracturing to be used because of these technologies capabilities in making otherwise unprofitable resource plays technically and economically profitable, as opposed to traditional resource extraction techniques. It follows that BLM must assess the known and reasonably foreseeable impacts of horizontal drilling and fracturing techniques on particular landscapes offered for sale, including headwaters of the Big Hole. This is particularly true when gas development sites are known to produce pollution discharges akin to traditional construction sites in terms of stormwater runoff and sediment discharge levels.9 A 2005 EPA

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6 Available online at: https://www.gpo.gov/fdsys/pkg/FR-2010-09-08/pdf/2010-22038.pdf#page=2.
study concluded that “gas well sites have the potential to negatively impact the aquatic environment due to site activities that result in increased sedimentation rates.”

Among the reasonably foreseeable impacts from potential oil or gas development on headwaters of the Big Hole is increased sedimentation, increased turbidity, nutrient loading, and higher temperatures in the waterways. These types of impacts could exacerbate ongoing conditions inimical to viability of the Big Hole fluvial arctic grayling population, and likewise create impacts to 303d listed and TMDL waterways’ abilities to attain designated uses. BLM must take a hard look at these reasonably foreseeable direct, indirect, and cumulative impacts.

Figure 1: Parcel MTM 105431-GV, adjacent to headwater creeks draining to the Big Hole River, outside the community of Glen, Montana.

quality impacts from sediment runoff from construction activities); 64 Fed. Reg. 68,722, 68,728-30 (Dec. 8, 1999) (Phase II stormwater regulation reiterating concerns about sediment-laded stormwater discharges and extending permitting requirements to small construction sites).

C. The BLM Must Defer All Parcels Within the Billings Field Office.

Although we appreciate the fact that the BLM proposes to defer some of the parcels within the Billings Field Office, it is puzzling as to why the BLM fails to defer all of the parcels within this field office. For example, for parcel MTM 108952-GU in Sweet Grass County (Billings Field Office) the BLM states that it is deferring “all lands pending further review of the adequacy of the Billings Resource Management Plan to provide the appropriate level of protection for this area.” EA, App’x A at 1. But, if the Billings RMP does not provide adequate protection for this parcel, why would it provide adequate protection for the remaining 11 parcels in Musselshell and Carbon Counties? The BLM deferred many of the parcels proposed for March sale because of “issues raised concerning the viewshed, the local economy, and the effects of oil and gas drilling and production on the environment including air quality, drinking water, and overall water quality.” See BLM, March 13, 2018 Competitive Oil And Gas Lease Sale List Of Deferred Parcels (2018), https://eplanning.blm.gov/epl-front-office/projects/nepa/87544/136956/167312/Billings_FO_Exhibit_A_List_of_Deferred_Parcels_March_2018_Lease_Sale.pdf. There is no doubt that many of these impacts would extend to the non-deferred parcels as well, especially if industry is proposing to develop deep shale reserves with horizontal drilling and multi-stage fracking. In particular, Carbon County parcels no. MTM 108952-H8, MTM 108952-HC, MTM 108952-HW, and MTM 108952-KB are very near the Clark’s Fork of the Yellowstone River and the community of Belfry. The BLM received public comments on concerns about fracking and water contamination concerns near these parcels in the March sale. See, e.g., BLM, Earthjustice Protest 1-12-2018, https://eplanning.blm.gov/epl-front-office/projects/nepa/87544/136853/167209/Earthjustice_Protest_1-12-2018.pdf. These concerns remain valid. Thus, the BLM must ensure that the Billings RMP provides the adequate level of protection for these parcels as well.

D. The BLM Fails to Fully Assess the Impacts from Hydraulic Fracturing and Horizontal Drilling.

As noted above, although the Conservation Groups appreciate that the BLM includes information in the draft EA about some of the impacts from fracking, the BLM fails to fully analyze all the impacts from fracking, including the unique impacts presented by the parcels within the Tongue River Valley of southeastern Montana.11


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11 Hydraulic fracturing, or fracking, as used here, refers to a combination of horizontal drilling and multi-stage hydraulic fracturing.
Multiple courts have held that if the BLM plans to allow a new oil and gas extraction technique, the agency must analyze the impacts of this technique in either a programmatic or project-specific NEPA document. See Pennaco Energy, Inc. v. U.S. Dep’t of the Interior, 377 F.3d 1147, 1151, 1153 (10th Cir. 2004) (holding that when a new fossil fuel extraction technology becomes commercially viable, and creates “changed circumstances” such that production of energy with the new technology is “significantly different” than production using previously considered technology, an agency permitting activities utilizing the new technology must take new environmental impacts into account as part of the NEPA process); see also Ctr. for Biological Diversity v. Bureau of Land Mgmt., 937 F. Supp. 2d 1140, 1157 (N.D. Cal. 2013) (invalidating a BLM lease sale because “the scale of fracking in shale-area drilling today involves risks and concerns that were not addressed by the PRMP/FEIS’ general analysis of oil and drilling development in the area”); see also ForestWatch v. U.S. Bureau of Land Mgmt., 2016 WL 5172009, Case No. CV-15-4378-MWF (JEMx) (C.D. Cal. Sept. 6, 2016) (holding that the BLM “acted unreasonably in failing to discuss, let alone take a ‘hard look’ at, the environmental impact of fracking in the FEIS”).

With the use of fracking comes a myriad of potentially significant environmental impacts. Fracking has not only opened up vast areas of minerals that were previously uneconomical to extract—thereby expanding the total land area impacted by development—the process of fracking also causes more intense impacts to our public health, air, water, land, and wildlife. See Concerned Health Prof’ls of NY & Physicians for Soc. Responsibility, Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction) (5th ed. 2018) (“As fracking operations in the United States have increased in frequency, size, and intensity, and as the transport of extracted materials has expanded, a significant body of evidence has emerged to demonstrate that these activities are dangerous to people and their communities in ways that are difficult—and may prove impossible—to mitigate. Risks include adverse impacts on water, air, agriculture, public health and safety, property values, climate stability, and economic vitality, as well as earthquakes.”) (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 2); Env’t America, Fracking by the Numbers: Key Impacts of Dirty Drilling at the State and National Level 13 (2013) (estimating that wastewater from fracking in Montana in 2012 amounted to 360 million gallons) (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 3); see also BLM Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 161,128 (Mar. 26, 2015), https://www.gpo.gov/fdsys/pkg/FR-2015-03-26/pdf/2015-06658.pdf (noting that a final rule regulating fracking on federal lands will “provide significant benefits to all Americans by avoiding potential damages to water quality, the environment, and public health”).

Here, the draft EA includes some information on the impacts from fracking on water quality and quantity. But, the BLM does not include quantitative information about the amount of water that will be used to develop the specific lease parcels,12 the amount of wastewater generated by fracking, the acreage of land that will be disturbed for wastewater and drilling mud impoundments, the increase in truck traffic associated with fracking, the impacts on roads, the

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12 The quantification of water used for fracking was specifically required by the court in San Juan Citizens Alliance v. U.S. Bureau of Land Management. No. 16-CV-376-MCA-JHR, 2018 WL 2994406, at *19 (D.N.M. June 14, 2018).
socioeconomic impacts on small towns from the influx of oil and gas workers, the air pollutants released from deeper wells, the increase in greenhouse gas emissions such as methane, the impacts to human health, or the impacts to wildlife to name a few.

The need to include a full analysis at the lease sale stage is underscored by the fact that the BLM frequently fails to fully analyze the impacts of fracking at the APD stage. For example the BLM recently approved five Application Permits to Drill (“APDs”) in Big Horn County, all of which have used or will use hydraulic fracturing and horizontal drilling to reach a shale formation at 8,000+ feet. See WildEarth Guardians, Request for State Director Review, Alta Vista Oil Corporation Doc Holiday2-H and Bullock 1-H Application Permit to Drill, DOI-BLM-MT-C020-2018-0010-DNA at 4 (Feb. 28, 2018) (previously attached to the Conservation Groups’ scoping comments as Exhibit 4). The underlying EA for the first well completely failed to analyze the impacts of fracking and all of the subsequent APDs relied upon this initial EA. Id. Thus, unless BLM analyzes these impacts at the lease sale stage, such analysis is unlikely to occur.

Finally, the underlying RMPs-EIS frequently also fail to fully address this issue. For example, similar to the EA, the Miles City RMP/FEIS’s analysis of the impacts from fracking and horizontal drilling focuses almost entirely on the impacts to water quality and quantity. See, e.g., Miles City RMP/FEIS at 4-49, available at: https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=79235. As a result, the BLM cannot rely on the analyses in the underlying RMPs-EISs to meet its obligations under NEPA to take a “hard look” at the impacts of fracking. See Pennaco Energy, Inc., 377 F.3d at 1151, 1153; Ctr. for Biological Diversity, 937 F. Supp. 2d at 1157.

E. The BLM Cannot Defer Its Site-Specific Analysis to the Application Permit to Drill Stage.

On a similar note, BLM must also complete a site-specific NEPA analysis for all other impacts before it proceeds with the proposed lease sale. Yet, in a number of places throughout the EA, the BLM defers a full analysis to the APD stage. See, e.g., EA at 55 (“The use of any specific water source on a federally administered well requires review and analysis of the proposal through the NEPA process, which will be completed at the APD stage.”).

“NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment.” U.S. Bureau of Land Mgmt. v. Kern, 284 F.3d 1062, 1072 (9th Cir. 2002); see also 40 C.F.R. § 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”). This is especially the case if postponing analysis results in a piecemeal look at the impacts. See 40 C.F.R. § 1508.27 (“Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.”). Finally, as noted above, NEPA provides that the BLM must assess three types of actions: (1) connected actions, (2) cumulative actions, and (3) similar actions. 40 C.F.R. § 1508.25. Connected actions “are closely related and therefore should be discussed in the same impact statement.” Actions are connected if they, among other things: [a]re interdependent parts of a larger action and depend on the larger action for their justification.” Id.
Because drilling cannot occur without the BLM first leasing the minerals, leasing and drilling are interdependent, connected actions. Thus, the BLM must estimate the impacts of drilling these wells at the lease sale stage. Furthermore, NEPA requires that agencies prepare an EIS before there is “any irreversible and irretrievable commitment of resources.” Conner v. Burford, 848 F.2d 1441, 1452 (9th Cir. 1988). The Ninth Circuit has held that issuing leases without a no surface occupancy (“NSO”) stipulation conveys a right to develop and is thus considered an irretrievable commitment of resources. Id. (“[U]nless surface-disturbing activities may be absolutely precluded, the government must complete an EIS before it makes an irretrievable commitment of resources by selling non-NSO leases.”). None of the parcels at issue have a NSO stipulation for the entire parcel. This means that the leases are irretrievable commitments of resources, and once BLM reaches the APD stage, the agency cannot include additional lease stipulations to stop drilling and other cumulative impacts. Thus, further analysis at the APD stage would be in many cases, too little, too late, and the agency must complete a full NEPA analysis now.

The BLM has previously argued that because it is tiering to the broader RMP/FEISs for the relevant field offices and “it is unknown whether or not a particular parcel will be sold and a lease issued and what potential impacts to those resources may occur,” reliance on an analysis at the APD stage is reasonable. BLM, Billings FO, Draft EA, March 2018 Lease Sale, App’x G at 5 (2018), https://eplanning.blm.gov/epl-front-office/projects/nepa/87544/127692/155388/AppendixG.BillingsResponseToComments.pdf; see also Dec. 2018 EA at 6–7. But, the Ninth Circuit has directly rejected the first argument regarding the RMP analysis in its decision in Blue Mountains Biodiversity Project v. Blackwood, stating: “Nothing in the tiering regulations suggests that the existence of a programmatic EIS for a forest plan obviates the need for any future project-specific EIS, without regard to the nature of magnitude of a project.” 161 F.3d 1208, 1215 (9th Cir. 1998).

The Ninth Circuit has resoundingly rejected the second argument regarding reasonable foreseeability as well, stating:

Appellants also complain that the uncertain and speculative nature of oil exploration makes preparation of an EIS untenable until lessees present precise, site-specific proposals for development. The government’s inability to fully ascertain the precise extent of the effects of mineral leasing in a national forest is not, however, a justification for failing to estimate what those effects might be before irreparably committing to the activity. Cf. EDF v. Andrus, 596 F.2d at 851 (uncertainty about environmental impact of use of water diverted pursuant to option contract “does not obviate the importance of the decision to divert and the necessity to evaluate the environmental consequences of that decision”). Appellants’ suggestion that we approve now and ask questions later is precisely the type of environmentally blind decision-making NEPA was designed to avoid.

Conner v. Burford, 848 F.2d 1441, 1450–51 (9th Cir. 1988) (emphasis added).

BLM’s failure to perform site-specific analysis at the lease stage limits the agency’s authority to imposing mitigation measures consistent with the terms of the lease. In other words,
once the leases are issued, BLM will not be able to impose conditions inconsistent with the lease terms and it cannot deny the developer the right to drill altogether. See EA at 15 (“Once sold, the lease purchaser would have the right to use as much of the leased lands as is reasonably necessary to explore and drill for all of the oil and gas within the lease boundaries, subject to the stipulations attached to the lease (43 CFR 3101.1-4).”). Consequently, if BLM discovers significant impacts at the APD stage, it may no longer be able to prevent them. Thus, because BLM is irretrievably committing resources at the lease sale stage, it must consider the impacts of its decision to lease parcels before it can confer public resources to a private developer in a lease.

Finally, the need to complete a full NEPA analysis at the lease sale stage is further supported by the fact that the BLM consistently approves APDs without additional NEPA analysis. For example, on September 27, 2017, the Billings FO approved an APD for an oil well and pipeline through a categorical exclusion. BLM, Billings FO, Vanguard EBET2-390 APD, DOI-BLM-MT-A010-2G17-0058-CX, https://eplanning.blm.gov/epl-front-office/projects/nepa/90806/122881/149937/DOI-BLM-MT-A010-2017-0058-CX_without_signature_page.pdf (previously attached to Conservation Groups’ scoping comments as Exhibit 5). Other BLM field offices frequently use categorical exclusions as well, and use of these is very likely to increase under the current administration.13

As these categorical exclusions indicate, unless the BLM actually commits, through the imposition of stipulations, to conduct additional, substantive NEPA analysis at the drilling stage, it more often than not does not happen. This means any commitment to address the impacts of the development of the proposed leases through subsequent NEPA is, at best, hollow, and at worst, a deliberate attempt to avoid accountability to addressing potentially significant environmental impacts under NEPA.

F. The BLM Must Prepare an EIS.

Because the proposed lease sale poses significant impacts, the BLM must prepare an EIS for the lease sale.

A federal agency must prepare an EIS when a major federal action “significantly affects the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.4. A federal action “affects” the environment when it “will or may have an effect” on the environment. 40 C.F.R. § 1508.3 (emphasis added); see also Airport Neighbors All. v. U.S., 90 F.3d 426, 429 (10th Cir. 1996). The significance of a proposed action is gauged based on both context and intensity. 40 C.F.R. § 1508.27. Context “means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” Id. § 1508.27(a). Intensity “refers to the severity of impact,” and is determined by weighing ten factors, including “[1] [t]he degree to which the proposed action affects public health or safety,” “[2] [u]nique characteristics of the geographic

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area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas,” “[3] [t]he degree to which the effects on the quality of the human environment are likely to be highly controversial,” “[4] [t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks[,]” and “[5] [w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” *Id.* § 1508.27(b)(2)–(5), (7). For this latter factor, “[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” *Id.*

The first intensity factor under NEPA is “the degree to which the proposed action affects public health and safety.” *Id.* § 1508.27(b)(2). There is no doubt the proposed action, which would allow for the use of fracking, impacts public health and safety. As discussed above, the use fracking presents risks to human health and water due to air pollution and risks of contamination. Thus, the BLM must fully analyze and disclose the impacts of fracking in a future EIS.

A similar argument applies to the second and third intensity factors, which require, respectively, a look at the degree to which impacts are highly controversial and the degree to which impacts are highly uncertain or involve unique and unknown risks. Indeed, the situation here is directly similar to the situation in *Center for Biological Diversity v. U.S. Bureau of Land Management*, where the court held that the BLM’s “unreasonable lack of consideration of how fracking could impact development of the disputed parcels . . . unreasonably distort[ed] BLM's assessment of at least three of the ‘intensity’ factors in its FONSI,” including the aforementioned factors. 937 F. Supp. 2d at 1157. Specifically, the court reasoned that fracking was highly controversial based on the possibility of significant environmental degradation, public outcry, and potential threats to health and safety. *Id.* at 1157–58. There is no doubt that similar reasoning applies here. Fracking presents a significant risk of contamination. For example, the Pavillion well contamination occurred within a related geological formation connected to the formation which stretches into Carbon County, Montana. *Compare*, EPA Draft Report, *Investigation of Ground Water Contamination Near Pavillion, Wyoming* 1 (Dec. 2011), https://www.epa.gov/sites/production/files/documents/EPA_ReportOnPavillion_Dec-8-2011.pdf, with USGS, *Subsurface Stratigraphic Cross Sections Showing Correlation of Cretaceous and Lower Tertiary Rocks in the Bighorn Basin, Wyoming and Montana* 2, 3 (2010), https://pubs.usgs.gov/dds/dds-069/dds-069-v/REPORTS/69_V_CH_6.pdf (both previously attached to Conservation Groups’ July 20, 2018 Scoping Comments as Exhibits 5.1 and 5.2). Based on the public outcry from the March 2018 lease sale parcels in this area, there will likely be significant opposition to December lease sale because it includes similar parcels.14

Additionally, based on the proximity of the December 2018 lease sale parcels to the Blackfeet Indian Reservation, Glacier National Park, the Northern Cheyenne Indian Reservation, the Crow Indian Reservation, Rosebud Battlefield State Park, and the Tongue River Reservoir, there is no doubt that the fourth intensity factor—the unique characteristics of the geographic

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14 The BLM received approximately 8 separate protests of parcels in the Billings and Butte Field Offices.
area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas—is also implicated.

For example, the map below demonstrates the proximity of the lease parcels to the Crow Reservation, Rosebud Battlefield State Park, and the Tongue River Reservoir. As shown on the map, the June 2018 lease parcels (in red) are adjacent to the December 2018 lease parcels (in orange). Although the BLM postponed the June sale and deferred offering the parcels, the parcels are likely to be re-offered at a future lease sale.\(^\text{15}\)

\textit{The Crow Reservation appears on the left side of the map. GIS data obtained from the BLM.}

Furthermore, as shown by the map below, the December lease parcels (in orange) are only a few miles away from the Blackfeet Indian Reservation and Glacier National Park. Oil and gas leasing in this area has been quite controversial in the past due to cultural concerns and will likely be in the future as well.\(^\text{16}\)


Finally, because the December 2018 lease parcels are directly adjacent to both the December 2017 and June 2018 lease parcels, the fifth intensity factor, cumulative impacts, is also implicated by the lease sale, further underscoring the need for an EIS. According to NEPA regulations, “[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7). This latter sentence is particularly important here. The December lease sale is not occurring in a vacuum. There is clearly significant interest in the area that is continuing with the December 2018 parcels. Thus, the BLM must study the cumulative impacts of these similar actions occurring within the same area.
G. The BLM Must Analyze a Range of Reasonable Alternatives.

The BLM must also analyze and assess a range of reasonable alternatives. “The EA, while typically a more concise analysis than an EIS, must still evaluate the need for the proposal, alternatives as required by NEPA section 102(2)(E), and the environmental impacts of the proposed action and alternatives.” See High Country Conservation Advocates v. U.S. Forest Serv., 52 F.Supp. 3d 1174 (D. Colo. 2014); see also 42 U.S.C. § 4332(E) (requiring agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources”).

Here, the BLM only analyzes two extreme alternatives: full leasing or no leasing. EA at 14. NEPA requires agencies to “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14 (emphasis added). As noted above, the court in the WORC decision recently held that “BLM’s failure to consider any alternative that would decrease the amount of extractable coal available for leasing rendered inadequate the Buffalo EIS and Miles City EIS in violation of NEPA.” WORC, CV 16-21-GF-BMM, 2018 WL 1456624, at *9 (D. Mont. March 23, 2018). The BLM must consider an alternative that significantly reduces the proposed acreage for leasing.

Additionally, for the Dillon FO parcels, the BLM must give detailed consideration to alternatives that address the likelihood that industry is only seeking the proposed leases in order to stockpile reserves and not actually produce oil and gas. Indeed, BLM essentially admits that there is no to very low development potential for these parcels by predicting that only one well will result from the 15 parcels. See EA at 18; see also EA at 27 (“Several parcels included in this lease sale are in areas with low to very low potential for development and where little to no actual oil and gas development has occurred in the last decade or more.”).

As a result, we request the BLM give detailed consideration to the following alternative actions:

- An alternative that imposes a minimum bonus bid higher than $2.00 per acre. Under 43 C.F.R. § 3120.1-2(c), BLM is prohibited from accepting a competitive oil and gas leasing bid that is less than $2.00 per acre. However, there is nothing that prohibits the BLM from establishing a minimum bid that is higher than $2.00 per acre. Here, we request the agency give detailed consideration to an alternative that requires a minimum bonus bid higher than $2.00 per acre as a condition of selling the lease parcels. This will ensure that only serious industry interest in the proposed oil and gas leasing parcels and help to prevent companies from stockpiling federal oil and gas leases as a means to increase their assets and enhance their own financial bottomline.

- An alternative that defers offering the proposed lease parcels for sale until at least 50% of all leased federal oil and gas acres in Montana are put into production. This could happen as a result of leases expiring before being put into production, by industry relinquishing leases that have not produced for many years, or by leases
being put into production by companies. This alternative would help to incentivize industry to start producing and generating revenue or to give up their ownership of federal oil and gas leases. This alternative would be a reasonable measure for the BLM to impose as a means for protecting the public interest and maximizing revenue for the American public where leases have already been issued.

In sum, the BLM must ensure that the American public is fairly compensated for the costs of the lease sale and development by including alternatives with fiscal safeguards.

H. The BLM Must Fully Analyze the Direct and Indirect Greenhouse Gas Emissions that Will Result from the Proposed Action.

As noted above, the BLM must also ensure that it conducts a full analysis of the direct and indirect impacts from the proposed sale, including quantifying and assessing the significance of direct and downstream greenhouse gas emissions. See CEQ Guidance; see also San Juan Citizens All. v. U.S. Bureau of Land Mgmt., 2018 WL 2994406, at *11.

Specifically, although the Conservation Groups appreciate that the BLM calculates the direct and downstream greenhouse gas emissions from the lease parcels, a few flaws remain. First, for both direct and indirect (downstream) GHG emissions, the BLM does not calculate total GHG emissions for the lease sale for the life of the parcels. Thus, it is hard for the reader to assess the full impacts of the proposed action. Second, the BLM fails to assess the significance of the direct emissions or otherwise put these emissions in context as required by NEPA. 40 C.F.R. § 1508.27. Finally, the BLM belittles the significance of the downstream GHG analysis by stating that “this estimated quantity represents approximately 0.0004% of total U.S. GHG emissions[.]” EA at 31. The CEQ has recommended against issuing statements such as these. Instead, federal agencies are advised to “use appropriate tools and methodologies for quantifying emissions and comparing GHG quantities across alternative scenarios.” CEQ Guidance at 11. This latter provision is particularly important here where the BLM only considers two alternatives, no leasing or full leasing. As Judge Morris’ order states, “NEPA requires BLM to foster informed decision making.” WORC at *13 (internal quotations omitted) (emphasis in original). Simply providing the calculations here with little context for comparison fails to meet this mandate.


The BLM must also complete an cumulative impacts analysis of the lease sale, including an assessment of the cumulative greenhouse gas emissions that will result from. Specifically, the BLM must analyze greenhouse gas emissions from similar, collectively significant oil and gas lease sales within Montana, as well as throughout the Rocky Mountain West. Despite this, the BLM concludes that “[t]he act of leasing parcels would not cause direct or cumulative effects to resources because no surface disturbance would occur.” EA at 33.

CEQ NEPA regulations define “cumulative impacts” 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 regardless of what agency (Federal or non-Federal) or person undertakes such other 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.

This is exactly what the federal oil and gas leasing program presents—individual actions with collectively significant impacts. For example, the BLM has sold, is selling, and will be selling millions of acres of oil and gas leases in the West, including:


All told, the BLM has leased or is proposing to lease approximately 1,248 parcels or 1,128,277.986 acres of publicly-owned land in the states listed above in 2017 and 2018.\footnote{This number includes the proposed leases for the Montana BLM’s December 2018 lease sale.}

The need to consider “similar” and “cumulative” actions is underscored by the fact that the BLM acknowledges in the EA that the proper geographic area for analyzing and assessing the impacts of greenhouse gas emissions is on a statewide and national scale. See, e.g., EA at 31–32. Although this assessment is apparently prepared to try to mislead the public into believing that emissions from the proposed leasing are not significant, it actually emphasizes the need for the BLM to not simply account for emissions from the proposed leasing, but likely for all greenhouse gas emissions associated with BLM-approved oil and gas leasing nationwide. Indeed, the BLM cannot claim that emissions are insignificant in the context of state or national emissions, but then fail to disclose the direct, indirect, and cumulative greenhouse gases that would result from all other “similar” and “cumulative” actions within a statewide or national scope. Thus, the BLM must assess the cumulative impacts from all of the surrounding lease parcels occurring within the same time period and geographic area.

This argument is further supported by a look at the BLM lease sales in the area. As demonstrated by the map below, the Montana December sale is not occurring in a vacuum. Instead, the lease parcels are very near parcels from the Montana March sale as well as parcels in the Wyoming March and September sales. Based on this geographic proximity and well as similar timing, the BLM must analyze these sales together in a single, programmatic document.

\textit{The December 2018 lease sale parcels from Montana and Wyoming are shown in orange.}
J. The BLM Fails to Analyze the Costs of Reasonably Foreseeable Carbon Emissions Using Well-Accepted, Credible, GAO-Endorsed, Interagency Methods for Assessing Carbon Costs.

Additionally, the BLM must ensure that it includes a discussion on the social cost of carbon protocol, a valid, well-accepted, credible, and interagency-endorsed method of calculating the costs of greenhouse gas emissions and understanding the potential significance of such emissions. Not only does BLM’s failure to use this best available science violate NEPA’s hard look mandate, but because the agency includes an extensive analysis of the economic benefits from leasing, see EA at 40–42, the BLM’s analysis is also misleading and in violation of the decision in High Country Conservation Advocates v. U.S. Forest Service. 52 F.Supp. 3d 1174, 1193 (D. Colo. 2014).

The social cost of carbon protocol for assessing climate impacts is a method for “estimat[ing] the economic damages associated with a small increase in carbon dioxide (CO2) emissions, conventionally one metric ton, in a given year [and] represents the value of damages avoided for a small emission reduction (i.e. the benefit of a CO2 reduction).” U.S. Environmental Protection Agency (“EPA”), “Fact Sheet: Social Cost of Carbon” at 1 (Nov. 2013) (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 10). The protocol was developed by a working group consisting of several federal agencies.


Depending on the discount rate and the year during which the carbon emissions are produced, the Interagency Working Group estimates the cost of carbon emissions, and therefore the benefits of reducing carbon emissions, to range from $10 to $212 per metric ton of carbon dioxide. See Chart Below. In one of its more recent updates to the Social Cost of Carbon Technical Support Document, the White House’s central estimate was reported to be $36 per metric ton. Id. at 4.


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<th>Year</th>
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Most recent social cost of carbon estimates presented by Interagency Working Group on Social Cost of Carbon. The 95th percentile value is meant to represent “higher-than-expected” impacts from climate change. See Exhibit 15.

Although often utilized in the context of agency rulemakings, the protocol has been recommended for use and has been used in project-level decisions. For instance, the EPA recommended that an EIS prepared by the U.S. Department of State for the proposed Keystone XL oil pipeline include “an estimate of the ‘social cost of carbon’ associated with potential increases of GHG emissions.” EPA, Comments on Supplemental Draft EIS for the Keystone XL Oil Pipeline (June 6, 2011) (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 17).
More importantly, BLM’s Billings Field Office, has also utilized the social cost of carbon protocol in the context of oil and gas approvals. For example, the Billings Field Office estimated “the annual SCC [social cost of carbon] associated with potential development on lease sale parcels.” BLM, “Environmental Assessment for October 21, 2014 Oil and Gas Lease Sale,” DOI-BLM-MT-0010-2014-0011-EA (May 19, 2014) at 76, https://blm_prod.opengov.ibmcloud.com/sites/blm.gov/files/MT-DAKS%20Billings%20Oct%202014%20EA%20Protest.pdf (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 18). In conducting its analysis, the BLM used a “3 percent average discount rate and year 2020 values,” presuming social costs of carbon to be $46 per metric ton. Id. Based on its estimate of greenhouse gas emissions, the agency estimated total carbon costs to be “$38,499 (in 2011 dollars).” Id. In Idaho, the BLM also utilized the social cost of carbon protocol to analyze and assess the costs of oil and gas leasing. Using a 3% average discount rate and year 2020 values, the agency estimated the cost of carbon to be $51 per ton of annual CO$_2$e increase. See BLM, “Little Willow Creek Protective Oil and Gas Leasing,” EA No. DOI-BLM-ID-B010-2014-0036-EA 81 (February 10, 2015), https://eplanning.blm.gov/epl-front-office/projects/nepa/39064/55133/59825/DOI-BLM-ID-B010-2014-0036-EA_UPDATED_02272015.pdf (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 19). Based on this estimate, the agency estimated that the total carbon cost of developing 25 wells on five lease parcels to be $3,689,442 annually. Id. at 83.

To be certain, the social cost of carbon protocol presents a conservative estimate of economic damages associated with the environmental impacts of climate change. As the EPA has noted, the protocol “does not currently include all important [climate change] damages.” Ex. 11 at 1. As explained:

The models used to develop [social cost of carbon] estimates do not currently include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature because of a lack of precise information on the nature of damages and because the science incorporated into these models naturally lags behind the most recent research.

Id. In fact, more recent studies have reported significantly higher carbon costs. For instance, a report published in 2015 found that current estimates for the social cost of carbon should be increased six times for a mid-range value of $220 per ton. See Moore, C.F. and B.D. Delvane, “Temperature impacts on economic growth warrant stringent mitigation policy,” Nature Climate Change 2 (January 12, 2015) (previous attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 20). And a report from 2017, estimated carbon costs to be $50 per metric ton, a value that experts have found to be the “best estimate of the social cost of greenhouse gases.” See Revesz, R. et al. “Best cost estimate of greenhouse gases,” 357 Science 655, 655 (Aug. 18, 2017) (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 21). In spite of uncertainty and likely underestimation of carbon costs, nevertheless, “the SCC is a useful measure to assess the benefits of CO2 reductions,” and thus a useful measure to assess the costs of CO2 increases. Exhibit 9.
Most recently, the EPA has reaffirmed the benefits of carbon reductions in a newly proposed rule, the Affordable Clean Energy Rule ("ACE"). According to a fact sheet released by the EPA, “the ACE rule will reduce carbon dioxide (CO2) emissions in 2025 by between 13 and 30 million short tons, resulting in $1.6 billion in monetized domestic climate benefits.” EPA, Fact Sheet: Proposed ACE Rule – CO2 Emissions Trends 1 (2018), https://www.epa.gov/sites/production/files/2018-08/documents/ace_trends.pdf. Although this level of emissions reductions in small in the scheme of climate change, equating\textsuperscript{18} to the annual emissions from the Colstrip Generating Station in Montana (14.4 million metric tons of CO\textsubscript{2} or 15.9 million short tons), it demonstrates that even small reductions of carbon emissions can have large monetary benefits.

That the economic impacts of climate change, as reflected by an assessment of social cost of carbon, should be a significant consideration in agency decision making, is emphasized by a 2014 White House report, which warned that delaying carbon reductions would yield significant economic costs. See Executive Office of the President of the United States, “The Cost of Delaying Action to Stem Climate Change,” (July 2014) (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 22). As the report states:

[D]elaying action to limit the effects of climate change is costly. Because CO\textsubscript{2} accumulates in the atmosphere, delaying action increases CO\textsubscript{2} concentrations. Thus, if a policy delay leads to higher ultimate CO\textsubscript{2} concentrations, that delay produces persistent economic damages that arise from higher temperatures and higher CO\textsubscript{2} concentrations. Alternatively, if a delayed policy still aims to hit a given climate target, such as limiting CO\textsubscript{2} concentration to given level, then that delay means that the policy, when implemented, must be more stringent and thus more costly in subsequent years. In either case, delay is costly.

\textit{Id.} at 1.

The requirement to analyze the social cost of carbon is supported by the general requirements of NEPA and is specifically supported in federal case law. Courts have ordered agencies to assess the social cost of carbon pollution, even before a federal protocol for such analysis was adopted. In 2008, the U.S. Court of Appeals for the Ninth Circuit ordered the National Highway Traffic Safety Administration to include a monetized benefit for carbon emissions reductions in an Environmental Assessment prepared under NEPA. \textit{Center for Biological Diversity v. Nat’l Highway Traffic Safety Admin.}, 538 F.3d 1172, 1203 (9th Cir. 2008). The Highway Traffic Safety Administration had proposed a rule setting corporate average fuel economy standards for light trucks. A number of states and public interest groups challenged the rule for, among other things, failing to monetize the benefits that would accrue from a decision that led to lower carbon dioxide emissions. The Administration had monetized the employment and sales impacts of the proposed action. \textit{Id.} at 1199. The agency argued, however, that valuing the costs of carbon emissions was too uncertain. \textit{Id.} at 1200. The court found this argument to be arbitrary and capricious. \textit{Id}. The court noted that while estimates of the

value of carbon emissions reductions occupied a wide range of values, the correct value was certainly not zero. *Id.* It further noted that other benefits, while also uncertain, were monetized by the agency. *Id.* at 1202.

In 2014, a federal court did likewise for a federally-approved coal lease. That court began its analysis by recognizing that a monetary cost-benefit analysis is not universally required by NEPA. *See High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F.Supp. 3d 1174, 1193 (D. Colo. 2014) (citing 40 C.F.R. § 1502.23). However, when an agency prepares a cost-benefit analysis, “it cannot be misleading.” *Id.* at 1182 (citations omitted). In that case, the NEPA analysis included a quantification of benefits of the project, but, the quantification of the social cost of carbon, although included in earlier analyses, was omitted in the final NEPA analysis. *Id.* at 1196. The agencies then relied on the stated benefits of the project to justify project approval. This, the court explained, was arbitrary and capricious. *Id.* Such approval was based on a NEPA analysis with misleading economic assumptions, an approach long disallowed by courts throughout the country. *Id.* Furthermore, the court reasoned that even if the agency had decided that the social cost of carbon was irrelevant, the agency must still provide “justifiable reasons for not using (or assigning minimal weight to) the social cost of carbon protocol . . . .” *Id.* at 1193 (emphasis added). In August 2017, a federal district court in Montana cited to the *High Country* decision and reaffirmed its reasoning, rejecting a NEPA analysis for a coal mine expansion that touted the economic benefits of the expansion without assessing the carbon costs that would result from the development. *See Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, No. CV 15-106-M-DWM (D. Mont. Aug. 14, 2017).

A 2015 op-ed in the New York Times from Michael Greenstone, the former chief economist for the President’s Council of Economic Advisers, confirms that it is appropriate and acceptable to calculate the social cost of carbon when reviewing whether to approve fossil fuel extraction. *See Greenstone, M., “There’s a Formula for Deciding When to Extract Fossil Fuels,”* New York Times (Dec. 1, 2015), available at https://www.nytimes.com/2015/12/02/upshot/theres-a-formula-for-deciding-when-to-extract-fossil-fuels.html (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 23). In 2017, the Proceedings of the National Academy of Sciences of the United States of America (“PNAS”), acknowledged in a peer-reviewed article from February of this year that the social cost of carbon analysis is “[t]he most important single economic concept in the economics of climate change,” and that “federal regulations with estimated benefits of over $1 trillion have used the SCC.” William D. Nordhaus, Revisiting the Social Cost of Carbon, *PNAS*, Feb. 14, 2017, http://www.pnas.org/content/114/7/1518.full.pdf (previously attached to the Conservation Groups’ July 20, 2018 Scoping Comments as Exhibit 24).

In sum, the social cost of carbon provides a useful, valid, and meaningful tool for assessing the climate consequences of the proposed leasing, and the BLM must discuss it in its forthcoming NEPA analysis.

II. The BLM Should Use Its Discretion Not to Lease the Proposed Parcels.

The BLM has broad discretion to remove the lease parcels from nomination. The agency’s chosen path of opening this vast swath of Montana up to oil and gas development
would threaten our climate, clean air, clean water, wildlife, and communities. Quite simply, developing these areas for oil and gas represents an unnecessary and avoidable risk that puts Montana’s other important resources as risk.

The BLM has broad discretion—and often the responsibility, though too often ignored—not to lease public lands for minerals development to safeguard other multiple use, environmental, and human health resources and values. See, e.g., Udall v. Tallman, 380 U.S. 1 (1965); Rocky Mountain Oil & Gas Ass’n v. U.S. Forest Serv. 157 F. Supp. 2d 1142 (D. Mont. 2000). BLM’s authority to open these parcels to oil and gas development is derived from the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq. Nowhere does the Mineral Leasing Act (“MLA”) mandate that any particular lands be offered for lease. Rather, the Act states generally that “[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.” 30 U.S.C. § 226(a) (emphasis added). The Ninth Circuit has held that the “permissive word ‘may’ in § 226(a) allows the Secretary to lease such lands, but does not require him to do so….[T]he Secretary has discretion to refuse to issue any lease at all on a given tract.” Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1975).

The Supreme Court reached the same conclusion in Udall v. Tallman, 380 U.S. 1, 4 (1965), in which the Court declared that the Mineral Leasing Act “left the Secretary discretion to refuse to issue any lease at all on a given tract.” See also Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988) (providing that refusal to issue leases constitutes a “legitimate exercise of the discretion granted to the Interior Secretary”); McDonald v. Clark, 771 F.2d 460, 463 (10th Cir. 1985) (“While the statute gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory.”); McTiernan v. Franklin, 508 F. 2d 885, 887 (10th Cir. 1975) (concluding that under § 226(a), the government “may refuse to issue any lease at all on a given tract”); Pease v. Udall, 332 F.2d 62, 63 (9th Cir. 1964) (finding that the MLA “has consistently been construed as leaving to the Secretary, within his discretion, a determination as to what lands are to be leased thereunder”); Pacific Legal Foundation v. Watt, 529 F. Supp. 982, 991 n.14 (D. Mont. 1982) (finding that under § 226(a) “the Secretary has discretion either to issue or refuse to issue oil and gas leases”).

Indeed, BLM’s discretion over oil and gas leasing is so great that courts have held that the agency may decide not to allow leasing even after the lands have been offered for lease and a qualified applicant selected. In McDonald, the Tenth Circuit Court of Appeals provided: “The fact that land has been offered for lease does not bind the Secretary to actually lease the land, nor is the Secretary bound to lease the land when a qualified applicant has been selected.” 771 F.2d at 463. The Court continued, saying “the Secretary may withdraw land from leasing at any time before the actual issuance of the lease, even if the offer was filed long before the determination not to lease was made.” Id. (citing Arnold v. Morton, 529 F.2d 1101, 1106 (9th Cir. 1976); Schraier v. Hickel, 419 F.2d 663, 665–67 (D.C. Cir. 1969)).

Moreover, nothing in the Federal Onshore Oil and Gas Leasing Reform Act (“FOOGLRA”) requires BLM to open lands at the behest of the oil and gas industry. The MLA, as amended by FOOGLRA in 1987, 30 U.S.C. § 181 et seq., simply requires BLM to consider oil and gas leasing on land consistent with the RMP. As identified above, just because land is identified for leasing does not mean that it must be leased. If review of a potential lease proposed
for sale reveals problems, or that other resources and values should be protected, the agency can decide not to lease, period, and in fact, may be duty-bound, pursuant to laws such as FLPMA, not to lease to ensure that other resources and values are protected. For example, in Marathon Oil Co., 139 IBLA 347 (1997), BLM removed parcels from a competitive lease sale for environmental reasons, even after they had been offered for sale pursuant to industry nomination. In that case, the IBLA held that “BLM enjoys considerable discretion to depart from its RMP in any specific case, and it may well be able to justify excluding these parcels from leasing for environmental purposes.” Id. at 356.

The MLA and FOOGGRA do not in any way restrict the factors that BLM may consider when exercising its considerable discretion under § 226(a). Therefore, even if the BLM bases its decision entirely on the public’s overwhelming opposition to oil and gas development in this area, it has the authority to do so. Indeed, it would be irresponsible for BLM to propose these lease parcels for sale without first performing the necessary due diligence and environmental review to determine, on a site-specific basis, whether these lands should be conserved as is.

Based on this expansive authority and discretion, we request that the BLM to reconsider its proposal to parcels in December 2018 and remove these parcels from consideration.

III. Conclusion

In sum, because of the deficiencies discussed above, the Conservation Groups respectfully request that the BLM withdraw all of the parcels proposed for the December 2018 sale unless and until the BLM addresses these issues.

Sincerely,

[Signature]

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Exhibit 1
I. INTRODUCTION

The Court issued an Opinion and Order in this matter on March 26, 2018. (Doc. 111.) The Court ordered the parties to meet and confer in good faith to reach an agreement as to remedies. Id. at 52. In the absence of such agreement, the Court ordered the parties to submit, within sixty days, supplemental briefing on the issue. Id. The parties submitted remedies briefs on May 25, 2018. (Docs. 113; 114; 115.)

II. DISCUSSION

A. Timeline for Expedited EIS Revisions

Federal Defendants have provided two proposed expedited schedules for the preparation of a supplemental EIS for the Buffalo RMP and a supplemental EIS for
the Miles City RMP. The first timeline provides a twelve-month schedule for a corrective NEPA analysis. (Doc. 114 at 22.) The second timeline provides a sixteen-month schedule that adds four months for new coal screening. *Id.*; (Doc. 114-1 at 9.) Federal Defendants have filed additionally a motion to reconsider the section of the Court’s March 26, 2018, Order that requires Federal Defendants to perform new coal screening. (Doc. 112.)

The Court deems it inappropriate to take up the motion to reconsider at this juncture, as reconsideration should not serve as a substitute for appeal. *County of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, 1209 (N.D. Cal. 2017) (internal references omitted); *cf. Equal Empl. Opportunity Commn. v. Wah Chang Albany Corp.*, 499 F.2d 187, 190 (9th Cir. 1974) (discussing reconsideration of a final judgment under Fed. R. Civ. P. 60(b)). With the entry of judgment pursuant to this Order resolving remedies, Federal Defendants remain free to appeal the Court’s final decision. *See* F. R. App. P. 4.

The Court notes, however, that the BLM stated that the coal screening criteria could be reapplied as necessary in both the Miles City PRMP and FEIS and the Buffalo PRMP and FEIS. MC:7-3315; BUF:6-2231. BLM responded to public comment advocating for updated coal screening in the Miles City PRMP and FEIS by deferring to the ready reapplication of the coal screening factors. MC:7-3855-3857. The Court sees no reason that Federal Defendants cannot reapply the coal
screening factors at this juncture. The Court adopts Federal Defendants’ 16-month expedited timeline for the remedial NEPA analyses, to be completed no later than November 29, 2019. (Doc. 114-1 at 9.)

B. Injunctive Relief

Plaintiffs assert that the Court should enjoin issuance of new leases, and any surface-disturbing activity on existing leases. Injunctive relief represents “a drastic and extraordinary remedy” that a court should not grant “as a matter of course.” Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010). A party seeking a permanent injunction must demonstrate: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; (4) that the public interest would not be disserved by a permanent injunction.” Id. at 156-57 (internal references omitted).

The Court has already ordered Federal Defendants to comply with the Court’s March 26, 2018, Order. This Order applies when issuing any new or pending lease of coal, oil, or gas resources in the Buffalo or Miles City planning areas until Federal Defendants produce remedial analyses that comply with its obligations under NEPA. (Doc. 111 at 51.) With such relief already imposed, Plaintiffs have failed to demonstrate an irreparable injury, or that the balance

C. **Vacatur**


The ROD addresses twelve RMP revisions and amendments spanning millions of acres of federally owned lands across the western United States. Were the Court to set aside the ROD, such action would invalidate all underlying RMPs. As the Court noted in its Order, invalidation of the RMPs would cause BLM’s management plan to revert to the 1985 Buffalo RMP and the 1996 Miles City RMP. (Doc. 111 at 49.) The parties have not refuted directly this premise. In light of this circumstance, the Court deems it inequitably disproportionate to the scope of the instant action, which challenged only the Buffalo RMP and the Miles City
RMP, to issue a vacatur of the ROD. The ROD remains in place subject to the restrictions of the Court’s March 26, 2018, Order.

III. ORDER

Accordingly, IT IS ORDERED:

1. Federal Defendants shall complete, within sixteen months of today’s date and no later than November 29, 2019, new coal screening and remedial NEPA analyses in compliance with the Court’s March 26, 2018, Order (Doc. 111).

2. Any new or pending leases of coal, oil, or gas resources in the planning areas subject to the Buffalo RMP and the Miles City RMP must undergo comprehensive environmental analyses in compliance with the Court’s March 26, 2018, Order (Doc. 111) and all existing procedural requirements under NEPA and the APA.

3. The Clerk of Court is directed to enter judgment in favor of Plaintiffs and against Defendants on Claim 1, Claim 3, and Claim 5, in accordance with the Court’s March 26, 2018, Order. (Doc. 111.)

4. The Clerk of Court is directed to enter judgment in favor of Defendants/Intervenors and against Plaintiffs on Claim 2, Claim 4, and Claim 6, in accordance with the Court’s March 26, 2018, Order. (Doc. 111.)
5. Federal Defendants’ Motion to Reconsider (Doc. 112) is **DENIED AS MOOT**.

6. Federal Defendants’ and Defendant-Intervenors’ Motions for Leave to File Response to Plaintiffs’ Remedies Brief (Docs. 117; 119) are **DENIED AS MOOT**.

DATED this 31st day of July, 2018.

[Signature]

Brian Morris  
United States District Court Judge