Nos. 12-1322 & 12-1339

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CONSERVATION COLORADO EDUCATION FUND, et al.,
Plaintiffs-Appellees/Cross-Appellants,

v.

KENNETH SALAZAR, in his official capacity as Secretary of the Department of Interior, et al.,
Defendants-Cross-Appellees,

BILL BARRETT CORPORATION,
Intervenor-Appellant/Cross-Appellee, and

OXY USA INC., et al.,
Intervenors-Cross-Appellees.

On Appeal from the United States District Court for the District of Colorado
Civil Action No. 1:08-cv-01460-MSK-KLM
The Honorable Marcia S. Krieger, District Judge

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April 19, 2013

ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Conservation Colorado Education Fund (formerly Colorado Environmental Coalition), Colorado Mountain Club, Colorado Trout Unlimited, Rocky Mountain Wild, Rock The Earth, Natural Resources Defense Council, National Wildlife Federation, Sierra Club, The Wilderness Society, and Wilderness Workshop have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF RELATED CASES

This case is not related to any prior or pending appeal before this Court.

GLOSSARY

APA	Administrative Procedure Act
BBC	Bill Barrett Corporation
BLM	Bureau of Land Management
CEC	Plaintiff-Appellee/Cross-Appellant Colorado Environmental Coalition (now Conservation Colorado Education Fund). Sometimes used to refer collectively to all Plaintiffs-Appellees/Cross-Appellants.
COGCC	Colorado Oil and Gas Conservation Commission
Conservation Groups	Plaintiffs-Appellees/Cross-Appellants Conservation Colorado Education Fund et al.
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FLPMA	Federal Land Policy & Management Act
GIS	Geographic Information System
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act
NOSRs 1 and 3	Naval Oil Shale Reserves 1 and 3
NOx	Nitrogen Oxides
NSO	No Surface Occupancy
Plan	2006 Resource Management Plan Amendment and Final Environmental Impact Statement for the Roan Plateau Planning Area
Planning Area	Roan Plateau Planning Area
ppb	parts per billion
RFD	Reasonably Foreseeable Development
RMP	Resource Management Plan
RTE	Plaintiff-Appellee/Cross-Appellant Rock the Earth
SA	Conservation Groups' Supplemental Appendix
Transfer Act	Public Law No. 105-85, 111 Stat. 1629, 2060 (1997)
VOC	Volatile Organic Compound

JURISDICTION

The District of Colorado had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question) because it raises claims under federal law. On June 22, 2012, the district court issued an opinion and order setting aside Defendant-Cross-Appellee Bureau of Land Management's (BLM) 2006 Resource Management Plan Amendment and Final Environmental Impact Statement for the Roan Plateau (the Plan) and remanding to BLM for further proceedings. Appx. of Intervenor-Appellant/Cross-Appellee Bill Barrett Corporation (BBC) 306-43 (Appx.).

BLM did not appeal. BBC noticed an appeal on August 21, 2012. Plaintiffs-Appellees/Cross-Appellants Conservation Colorado Education Fund et al. (collectively, the Conservation Groups) timely filed a cross-appeal on August 31, 2012. The Conservation Groups challenge this Court's jurisdiction over this appeal. See Dkt. # 01018923102.

ISSUES FOR REVIEW

1. Did BLM violate the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., by failing to consider two reasonable alternatives allowing substantial oil and gas development while protecting the ecologically rich top of the Roan Plateau from drilling?

2. Did BLM violate NEPA by failing to consider future oil and gas development in Colorado outside the Roan Plateau in its analysis of cumulative air pollution impacts?

3. Did BLM violate NEPA by failing to consider the ozone pollution that would result from drilling under its Plan?

4. Did BLM violate NEPA by ignoring the impacts of 85% of the wells it determined were reasonably foreseeable atop the Plateau?

STATEMENT OF THE CASE

The Conservation Groups concur with BBC's statement of the case, except its statement that they alleged a violation of Public Law No. 105-85, 111 Stat. 1629, 2060 (1997) (the Transfer Act). While BBC raises the Transfer Act as a defense, the Conservation Groups have not alleged that the Act was violated. They instead alleged violations of NEPA and the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq. Conservation Groups' Supp. Appx. (SA) 58-63.

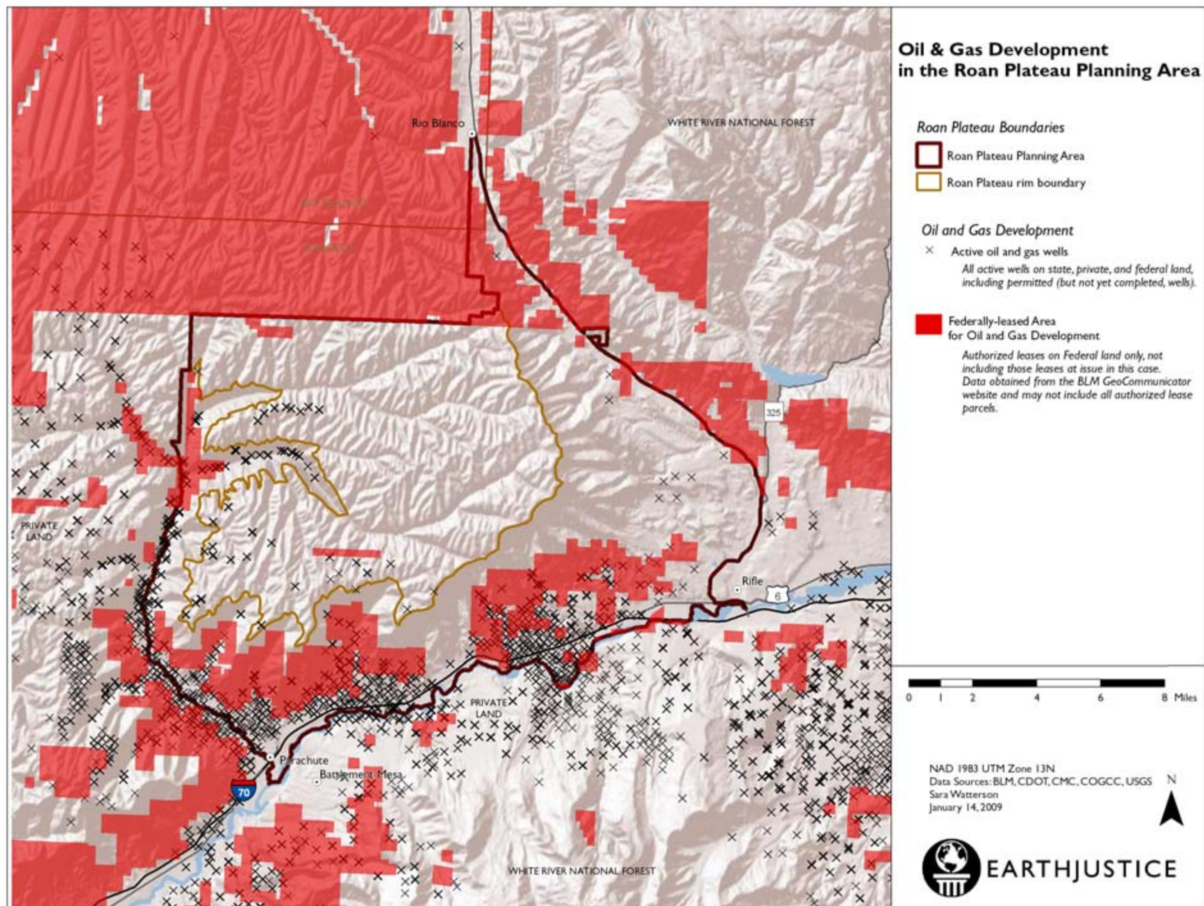
STATEMENT OF FACTS

I. THE ROAN PLATEAU PLANNING AREA

The Roan Plateau is an island of unspoiled federal land in a sea of natural gas development. Located just northwest of Rifle, Colorado, the Roan Plateau Planning Area (Planning Area) encompasses 73,602 acres of federal land – most of

which had not been leased for mineral development prior to the decisions challenged in this case. Appx. 3084, 3314. Approximately 47% of those federal lands are on top the Plateau, with the rest below its rim. See Appx. 3825. The upper and lower plateaus are separated by a 3,000-foot high band of cliffs, known as the Roan cliffs. See Appx. 3084.

Booming natural gas fields surround much of the Plateau. By 1998, BLM had leased 95% of the federally-owned minerals in the surrounding area for oil and gas development. Appx. 3313. In Garfield County, where the Planning Area is located, more than 5,000 natural gas wells were operating when BLM approved the Plan at issue in this case. Appx. 3343. This development boom has resulted in a maze of well pads, roads, and infrastructure on the public and private lands surrounding the base of the Plateau. See Appx. 12 (map, reproduced below).



In contrast, the federal lands atop the Plateau have been spared from leasing and development. See id. Consequently, the Roan Plateau has become an isolated jewel of Colorado's landscape. For example, BLM concluded in 2000 that 19,322 acres on the Plateau were so pristine and remarkable that they would qualify for Congressional wilderness designation pursuant to the Wilderness Act of 1964. Appx. 3324.

The Roan Plateau is also a biological treasure chest. According to the Colorado Natural Heritage Program, the top of the Roan supports a degree of biodiversity rivaled by only three other areas in Colorado – each of which is

already protected as part of the National Park System. SA 509. BLM observed in 2000 that while the Roan "is the only area of the four that does not enjoy protective status such as that afforded to National Parks or Monuments, it is clearly of comparable biological significance." Id.

An estimated 59 threatened or sensitive animal species are known to or may live in and around the Planning Area, including sage grouse, bald eagles, and the peregrine falcon. Appx. 3265-67. The Roan also has some of the "rarest plants in North America." Appx. 3256-58, 3321.

The top of the Plateau is home to "nationally and regionally significant" populations of Colorado River cutthroat trout, a species BLM and Colorado have designated as warranting special concern. Appx. 3269-70, 3329. As BLM noted:

> [t]he Roan Plateau contains one of only a few remaining watersheds where genetically pure, reproducing populations of Colorado River cutthroat trout are found in all streams capable of sustaining a fishery. Maintaining or expanding these populations would play an important role in the overall recovery of this subspecies.

Appx. 3270. BLM acknowledges that pollution and sedimentation from natural gas development will result in permanent and irreversible losses of cutthroat trout and other wildlife habitat on the Roan. Appx. 3470.

The Roan also provides a stronghold for big game species. Mule deer and elk use the area for migration and winter habitat, fawning and calving, and seclusion. Appx. 3240-44. In part because of these elk and deer, the Roan Plateau

supports a significant economy in hunting, fishing, and backcountry recreation. BLM reported that tourism supported 18% of all jobs in Garfield County in 2003, and hunters contribute an estimated $29 million annually to the local economy. Appx. 3441. "In central Garfield County, big game hunting in particular is viewed as critical to the economy. . . . [H]unting gives a seasonal boost to many local businesses that could not otherwise survive." Id.

II. THE TRANSFER ACT

Prior to 1997, most of what is now the Planning Area was managed by the Department of Energy as Naval Oil Shale Reserves (NOSRs) 1 and 3. Appx. 3099. Generally (but not entirely), NOSR 1 encompassed the area atop the Roan Plateau, while NOSR 3 included the lower elevation areas at the Plateau's base. See SA 191 (map).

In 1997, Congress passed the Transfer Act, which transferred management authority over the Roan Plateau to BLM. The Transfer Act provides that the lands will be managed in accordance with FLPMA and other laws normally applicable to public lands. 10 U.S.C. § 7439(c). The Act also states that:

> the Secretary of the Interior shall enter into leases with one or more private entities for the purpose of exploration for, and development and production of, petroleum (other than in the form of oil shale) located on or in public domain lands in Oil Shale Reserves Numbered 1 and 3.

Id. § 7439(b)(1). The Transfer Act also mandates that "[a]ny such lease shall be made in accordance with the requirements of the Mineral Leasing Act," the statute that governs BLM oil and gas leasing. Id. Until 2002, BLM did not view the Transfer Act as constraining its ability to preserve large parts of the Roan Plateau. See infra at 39-41. However, BLM's interpretation of the Act's leasing provision shifted dramatically during the Roan planning process and the course of this litigation. See id.

III. THE ROAN PLATEAU PLANNING PROCESS

BLM began its planning process for the Roan in 2000. 65 Fed. Reg. 69,323 (Nov. 16, 2000). During the first two years, BLM considered the range of alternatives and issues it would address in its environmental impact statement (EIS) for the Plan. BLM also sought comments on potential management alternatives. The overwhelming majority of the public favored an alternative protecting the top of the Plateau from development – either by not leasing it or by requiring industry to extract the gas without causing any surface disturbance.

BLM met this public sentiment with preliminary Alternative F, the "Naturalness and Primitive Recreation Alternative." See Appx. 1021. Alternative F would have made thousands of acres of less sensitive lands at the base of the Plateau available for leasing, but would not have allowed the leasing or development of the top of the Plateau. Appx. 3139, 1021-22. Nearly 12,000

citizens sent in letters supporting Alternative F, as did every town council in Garfield County and Congressman John Salazar. See SA 44, 78. It also garnered support from several newspapers including the Denver Post. See id.

Despite this outpouring of support, BLM refused even to consider Alternative F in its EIS for the Roan. In 2002, industry representatives complained to BLM that the alternatives being considered were too environmentally protective. See infra at 40-41. In response, the agency adopted a new interpretation of the Transfer Act in late 2002 that required leasing most or all of the Planning Area. See id. This new interpretation disqualified Alternative F from consideration because it did not lease the top of the Plateau. See id.; Appx. 3139, 3569.

After BLM refused to consider Alternative F in the Draft EIS, local citizens offered a compromise approach, sometimes dubbed the "Community Alternative." This Alternative would have allowed leasing both around the base and on top of the Plateau, but required that leases atop the Plateau be developed without disturbing the surface. Under this approach, companies would access the gas reserves by drilling "directionally" from adjacent lands. Appx. 2811-60, 4391-93, 4411; SA 708.

Like Alternative F, the Community Alternative garnered broad public support. Summit and Pitkin counties and the cities of Carbondale, Silt, New Castle, and Aspen each endorsed the Alternative. See SA 46, 79. Approximately

98% of the 75,000 public comments received on the Draft EIS supported the Community Alternative or otherwise favored keeping oil and gas drilling off the top of the Roan Plateau. See SA 46, 79-80.

Despite this overwhelming public support, BLM's Final EIS refused to consider the Community Alternative. Instead, in apparent keeping with BLM's view that the Transfer Act compelled aggressive development, every action alternative in BLM's Final EIS provided for leasing most or all of the top of the Roan Plateau. Infra at 15-16.

IV. BLM'S ROAN PLATEAU MANAGEMENT DECISIONS

In June 2007 and March 2008, BLM issued two records of decision adopting its management plan for the Roan. SA 1290, 1297; Appx. 3955, 3966-67. BLM's Plan provides for leasing the entire Planning Area, including the top of the Plateau. Appx. 4001-02. In addition to leasing every single acre, the Plan leaves most of the top of the Plateau available for well pads, roads, waste pits, and industrial equipment. See Appx. 3345. In accordance with its Plan, the agency issued leases later in 2008 for all the available minerals in the Planning Area. See Appx. 5221; SA 191.

BBC touts the Roan Plan as "one of the most environmentally protective resource management plans in history." BBC Br. at 12. However, BLM's own

staff internally condemned the Plan's protective stipulations as "disingenuous." The agency's National Science and Technology Center commented that:

> The descriptions of surface impacts . . . go beyond confusing and enter the realm of being disingenuous. Activities such as . . . phased development, and [no ground disturbance/no surface occupancy stipulations] are continually relied upon to reduce or preclude negative impacts atop the plateau, yet careful reading reveals these practices to be much less protective/restrictive than the impression given . . . . [W]e give the impression to the general public that the Roan will be protected, when in reality it is likely to undergo substantial degradation . . . .

SA 1139 (emphasis added).

Review of the Roan Plan bears out this criticism. For example, BBC highlights what the Plan calls "no ground disturbance/no surface occupancy" (NSO) stipulations. BBC Br. at 12. But contrary to their name (and the usual meaning of the term), these "NSO" stipulations do allow development of the surface of the leases. Under BLM's Plan, numerous loopholes allow lessees to build roads, well pads, and pipelines in the so-called "NSO" areas. See, e.g., Appx. 4120-23. As one BLM staffer noted, the agency's use of the term "NSO" implies that wells will not be developed in covered areas, "AND THAT IS JUST NOT TRUE." SA 690 (emphasis original).

Similarly misleading is BBC's assertion that the Plan limits surface disturbance "to 350 acres, or less than one percent of the acreage of the Upper Plateau, at any one time." BBC Br. at 13. This 350-acre limit applies only to the

drilling of wells, which takes approximately thirty days each. See Appx. 4132-33 (2.4.1-2.4.2). The limit does not apply to the wells, roads, and pipelines left in place during the ensuing 20-30 years when the well produces oil and gas. See id. Because it ignores this production-related infrastructure, the 350-acre limit will allow companies to continually drill more and more new wells that steadily degrade the Roan Plateau. While the producing wells are invisible for purposes of Plan's 350-acre cap, this long-term oil and gas production will be all too obvious to wildlife, hunters, and others as it spreads across the top of the Plateau.

V. PROCEDURAL HISTORY

The Conservation Groups filed this case on July 11, 2008 challenging the Roan Plan and BLM's decision to issue leases. SA 25-66. On June 22, 2012, the district court ruled in Plaintiffs' favor on the merits of three NEPA claims and rejected several others. Appx. 306-43. The court set aside the Plan and remanded it to BLM for further analysis and a new decision. Appx. 343. The district court did not set aside the leases, but ruled that "the question of whether and how the leases should be unwound can be addressed" when BLM makes a new decision. Appx. 342-43.

BLM did not appeal the district court's ruling. Instead, the agency has moved to comply with the order by conducting a new NEPA analysis. That NEPA process is currently underway. 78 Fed. Reg. 5834 (Jan. 28, 2013). BBC, however,

has sought to prevent the completion of the agency's new analysis and decision by filing an appeal. In response to BBC's appeal, the Conservation Groups filed a cross-appeal to raise certain issues on which the district court ruled in BLM's favor.

Pursuant to an order from the Court, the parties submitted memoranda on September 27, 2012 addressing this Court's jurisdiction. BLM and the Conservation Groups challenge appellate jurisdiction.

SUMMARY OF ARGUMENT

BLM's Plan violates NEPA in three respects. First, BLM violated NEPA by considering only alternatives providing for aggressive oil and gas development. In so doing, the agency failed to consider two reasonable middle-ground alternatives, Alternative F and the Community Alternative. Because both alternatives are legally available under the Transfer Act, their elimination violated NEPA's requirement that BLM consider a full range of reasonable alternatives.

Second, BLM's air pollution analysis violated NEPA in two respects: (a) its analysis of cumulative impacts ignored the significant future oil and gas development expected in Colorado outside the Roan Plateau; and (b) the agency failed to analyze the ozone pollution that would result from its Plan.

Third, BLM violated NEPA by considering in its EIS the impacts of drilling only 210 wells atop the Plateau. The agency's own analysis acknowledged that it

was omitting from the EIS about 85% of the reasonably foreseeable drilling. NEPA required BLM to analyze all of an action's reasonably foreseeable impacts before adopting its Plan and issuing leases for oil and gas development. BLM failed to do so here.

ARGUMENT

I. STANDARD OF REVIEW

The Administrative Procedure Act (APA) governs judicial review of an agency's compliance with NEPA. New Mexico ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 704 (10th Cir. 2009). Under the APA, a court must set aside agency action or findings that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious if the agency:

> (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment.

New Mexico, 565 F.3d at 704 (internal quotations and citation omitted).

An agency's action "must be upheld, if at all, on the basis articulated by the agency itself," and "courts may not accept [litigation] counsel's post hoc rationalizations for agency action." Motor Vehicle Mfrs. Ass'n v. State Farm Mut.

Auto. Ins. Co., 463 U.S. 29, 50 (1983); accord Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994).

This Court reviews the district court's ruling de novo. New Mexico, 565 F.3d at 704.

II. BLM VIOLATED NEPA BY FAILING TO CONSIDER REASONABLE MANAGEMENT ALTERNATIVES THAT WOULD PROTECT THE TOP OF THE PLATEAU FROM DRILLING.

NEPA requires agencies to consider "alternatives to the proposed action" in an EIS. 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis is the "heart" of a NEPA document, and the statute's implementing regulations direct BLM to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). As this Court has recognized, "[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, 565 F.3d at 708.

During the planning process, BLM refused to consider two management alternatives – the Community Alternative and Alternative F – that were supported by the public and local governments. Supra at 8-10. Instead of considering either of these reasonable middle-ground options in its EIS, BLM included only aggressive development strategies. Every one of the action alternatives in the EIS provided for leasing most or all of the Roan for oil and gas development:

Final EIS Action Alternatives	Alt. II	Alt. III	Alt. IV	Alt. V	Proposed Plan
Percentage of top of Plateau to be leased	70%	100%	100%	100%	100%
Percentage of base of Plateau to be leased	72%	100%	100%	100%	100%

See Appx. 3345.[1] By refusing to consider middle-ground options that would protect the most sensitive part of the Plateau while allowing development in other areas, BLM failed to comply with NEPA. SA 58-59.

A. NEPA Required BLM To Analyze The Community Alternative.

The Community Alternative would have taken a middle-ground approach by allowing BLM to lease the entire Planning Area, but mandating that leases on top of the Plateau contain NSO stipulations that would leave the surface undisturbed. See Appx. 2811-60. Those stipulations would have required companies to recover the gas by drilling directionally from other surface locations, such as at the perimeter of the federal leases or from the base of the Plateau. See id.

[1] The EIS also included Alternative I, the no-action alternative, because doing so was mandated by NEPA regulations. 40 C.F.R. § 1502.14(d). BLM, however, never considered the no-action alternative to be an approach it could legally adopt. Infra at 24 n.4.

The Community Alternative was a reasonable option. A "reasonable" alternative that must be analyzed in detail is one that: (1) satisfies the project's purpose; (2) "falls within the agency's statutory mandate"; and (3) is "significantly distinguishable from the alternatives already considered." New Mexico, 565 F.3d at 709. The Community Alternative met this test, and the district court correctly ruled that BLM violated NEPA by failing to consider it. Appx. 324-26. BLM has not challenged that ruling.

BBC, however, seeks reversal based on two rationales given by BLM during the planning process for not analyzing the Community Alternative. First, the agency asserted the Community Alternative was inconsistent with the Transfer Act. Appx. 3548. Second, BLM claimed "many of the basic components of the 'Community Alternative' were incorporated in various combinations in the five alternatives analyzed in the . . . EIS." Appx. 3542. In addition, BBC raises several post hoc theories. All of BBC's arguments are meritless.

1. The Community Alternative Is Consistent With The Transfer Act.

In the Roan EIS, BLM claimed it could not consider the Community Alternative because its protections conflicted with the Transfer Act's direction that the agency "shall enter into leases" in the Planning Area. See supra at 7.[2] By

[2] BLM's Transfer Act argument implicated two of the requirements for a reasonable alternative. See supra at 17. First, it allegedly took the Community

eliminating this alternative based on an incorrect legal interpretation, the EIS violated NEPA. See, e.g., New Mexico, 565 F.3d at 710 (invalidating plan where BLM failed to analyze protective alternative based on incorrect legal interpretation that it was inconsistent with FLPMA's multiple use mandate); Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1121-22 (9th Cir. 2008) (vacating plan).

When the Transfer Act argument was challenged in the district court, BLM abandoned it. See Appx. 189-97; SA 465:15-478:13. BBC, however, continues to press the theory, arguing the Transfer Act prohibits the Community Alternative's imposition of NSO stipulations on the top of the Plateau. BBC Br. at 29-32. BBC waived this argument by failing to raise it below. See Appx. 98-112 (discussing Transfer Act without mentioning Community Alternative); SA 492:15-495:25; Singleton v. Wulff, 428 U.S. 106, 120 (1976); Richison v. Ernest Grp., Inc. 634 F.3d 1123, 1127-30 (10th Cir. 2011) (appeals court generally will not consider basis for reversal that was waived or forfeited below). BBC cannot seek reversal on the basis of an argument the company failed to raise below, and which the agency itself did not make. See Richison, 634 F.3d at 1127-30.

Alternative outside the agency's "statutory mandate." Second, it meant an alternative did not satisfy the Plan's purposes, one of which was to "[c]omply with the provisions of [the Transfer Act]." Appx. 3098. BLM has never disputed that the Community Alternative would satisfy the other purposes it articulated for the Plan. See id.

In any event, BBC's interpretation of the Transfer Act is meritless.

a. Plain Language Of The Transfer Act

The district court correctly ruled that the Community Alternative was consistent with the Transfer Act because it "would have made the top of the Plateau available for leasing (albeit mostly unavailable for surface occupancy)." Appx. 324-25. BBC, however, contends the Act requires not only leasing the top of the Plateau – which the Community Alternative allowed – but also that the leases allow development on the surface of those lands. BBC Br. at 29-32. The company's argument is entirely unsupported by the language of the statute.

While the Act says BLM "shall enter into leases," it says nothing about specific lease terms. See 10 U.S.C. § 7439. To the contrary, the Transfer Act directs that BLM manage the Roan in accordance with the same statutes that apply to all oil and gas leasing: the Mineral Leasing Act and FLPMA. Id. § 7439(b)(1), (c). Both laws allow BLM to impose NSO provisions.

First, the Mineral Leasing Act allows BLM to issue leases barring surface occupancy. See, e.g., Sierra Club v. Peterson, 717 F.2d 1409, 1411 (D.C. Cir. 1983); Memorandum from Office of Solicitor to Director, BLM (Aug. 13, 1984) (available at 1984 WL 51943, at *4). Likewise, FLPMA gives BLM ample discretion to impose lease conditions that limit surface use in order to protect other uses. FLPMA requires that BLM manage its lands according to the principle of

"multiple use and sustained yield." 43 U.S.C. §§ 1712(c)(1), 1732(a). That "multiple use" principle authorizes BLM to close certain areas to oil and gas development. New Mexico, 565 F.3d at 709-10. FLPMA also anticipates that BLM, "where appropriate, will preserve and protect certain public lands in their natural condition." 43 U.S.C. § 1701(a)(8). Thus, the Transfer Act's express direction to manage the Roan in accordance with FLPMA and the Mineral Leasing Act maintained BLM's normal authority to impose NSO stipulations on leases atop the Plateau.

b. Legislative History

The plain language of the Transfer Act is dispositive because it unambiguously allows BLM to impose NSO or other stipulations on Roan leases. See US Magnesium, LLC v. U.S. E.P.A., 690 F.3d 1157, 1164 (10th Cir. 2012) ("If the statute is clear, we apply its plain meaning and the inquiry ends"). In any case, the legislative history of the Act only confirms BLM's management discretion. While BBC claims Congress had the "express intent" to authorize surface development atop the Plateau, the company fails to cite a shred of supporting legislative history. See BBC Br. at 31 (citing Appx. 3139 and 3542, neither of which address the issue). In reality, the history of the statute shows that Congress intended BLM to retain its normal discretion to balance energy development with environmental protection on the Plateau.

The Transfer Act implemented a 1997 Department of Energy report recommending that NOSRs 1 and 3 be transferred to the Interior Department. SA 1338-39, 1344-45. In making that proposal, the Energy Department rejected a consultant's recommendation to maximize revenues by selling the NOSRs to a private party. See id. The Department concluded that the "immediate fiscal benefit" from selling the NOSRs was outweighed by the benefit of protecting "the substantial recreational, scenic, and biological values" there. SA 1338-39. Consistent with this goal, the Energy Department report did not propose that energy development be given privileged status, or that any special leasing terms should be imposed on the NOSRs. Instead, the report recommended that NOSR 1 be managed under FLPMA and the Mineral Leasing Act "for multi-purpose usage." Id.

Congress had the same view. The Transfer Act's sponsor, Congressman Hefley of Colorado, explained that "the Interior Department, through the [BLM], may lease lands in NOSRs 1 and 3 to one or more private entities for exploration and development of petroleum and natural gas, other than in the form of oil shale." 1997 WL 241187, at *2 (May 7, 1997) (emphasis added). Congressman Hefley went on to state that the transferred lands would be managed in accordance with FLPMA, so that "55,000 surface acres . . . consisting largely of aspen forests and

mountain meadows" are not lost, and to "ensure [that] grazing and wildlife values are maintained." Id. at *2-3.

Similarly, Congressman David Skaggs of Colorado explained that the bill provided for multiple-use management "under the same laws that govern leasing of other lands BLM manages." SA 197. Congressman Skaggs anticipated BLM would provide for the "continued protection" of the Roan's "high environmental values." Id. He also emphasized that under the Transfer Act, BLM must "consider whether some of these lands should be set aside as wilderness or given other special protected designation." Id. (emphasis added).

This legislative history makes clear Congress left BLM with its normal authority to impose NSO stipulations, and to balance multiple uses of the Roan. BBC's argument that Congress dedicated the Roan to aggressive surface development must be rejected.

2. The District Court Correctly Ruled That The Community Alternative Was Significantly Distinguishable From Other Alternatives.

A reasonable alternative must be "significantly distinguishable from the alternatives already considered." New Mexico, 565 F.3d at 709. That test was met here because none of the alternatives analyzed in BLM's EIS contained the key feature of the Community Alternative: protecting the entire top of the Plateau while allowing gas development on less sensitive areas around the base. Every

action alternative analyzed by BLM leased the top of the Plateau and made much of it available for surface disturbance. Appx. 3348. For example, the agency observed that its Plan required some NSO stipulations above the rim, but they were only "relatively narrow features" around rivers and streams. Appx. 3121.

At oral argument, counsel for BLM conceded the agency had not analyzed an approach comparable to the Community Alternative:

> Q (from the court): "[W]here would I find in the record the information that . . . BLM thought was the closest to the Community Alternative?"
>
> A: "Well, there is no specific reference to every aspect of the Community Alternative that was analyzed."

SA 472:18-22; see also SA 473:11-16 (BLM could not identify "aspects of the Community Alternative that . . . were duplicated" in analysis of other alternatives).

BLM's admission notwithstanding, BBC claims the Community Alternative was not significantly distinguishable from the no-action alternative mandated by the NEPA regulations. BBC Br. at 20-21 (citing Appx. 4393, which references no-action alternative from draft EIS (Alternative 1)).[3] The no-action alternative would not have allowed leasing or drilling anywhere in the Planning Area – whether on

[3] BBC also asserts the Community Alternative "was similar to" preliminary Alternative F (which would not have allowed any leasing atop the Plateau). BBC Br. at 20. Any similarity is irrelevant because the agency also refused to analyze Alternative F in its EIS. Infra at 34-43.

top of the Plateau or at its base.[4] As the district court correctly recognized, "none of the other alternatives proposed a combination of nearly full exploitation of the resources under the Plateau while simultaneously preserving nearly all of the lands atop the Plateau for environmental protection." Appx. 325.

The option of taking no action at all is not a substitute for considering a reasonable, middle-ground approach like the Community Alternative. NEPA requires consideration of all reasonable alternatives so that agencies take into account approaches that alter the "cost-benefit balance" and make "the most intelligent, optimally beneficial decision." Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

The no-action alternative here had a far different "cost-benefit balance" than the Community Alternative. For example, the Community Alternative would have allowed leasing and generation of mineral revenue from the entire Planning Area. By contrast, the no-action alternative would have left even the less-sensitive parts of the Planning Area closed to new leasing and generated no new mineral revenue at all. See Appx. 3313. Nor would the no-action alternative have served the other BLM management goals provided by the Community Alternative, such as travel

[4] Moreover, while the regulations required including the no-action alternative in the EIS, BLM never seriously considered adopting it because the agency viewed taking no action as precluded by the Transfer Act. See, e.g., Appx. 3130; SA 676.

management, comprehensive land use planning, and designations of wilderness study areas or areas of critical environmental concern. See SA 1118-19.

BBC's suggestion that the extreme no-action alternative encompassed the Community Alternative also runs counter to controlling case law. As this Court pointed out in New Mexico when rejecting a similar argument, if BLM could exclude reasonable alternatives merely by claiming they are subsumed within more extreme approaches, the "agency could exclude any alternative it wished by considering (and rejecting) an extreme." New Mexico, 565 F.3d at 711 n.32; see also Wilderness Soc'y v. Wisely, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007) (the "absolutism" of BLM's no-action alternative could not substitute for a more protective middle ground alternative that allows some development while protecting an area from surface disturbance).

New Mexico is particularly relevant because in that case, like here, BLM's action alternatives all provided for aggressive development throughout the planning area. Also like here, BLM failed to analyze an alternative that would protect an ecologically critical core area (the Chihuahuan Desert grasslands of Otero Mesa) while allowing development elsewhere in the agency's larger planning area. 565 F.3d at 709-11. Because "the option of closing the Mesa [wa]s a reasonable management possibility," this Court ruled that NEPA required BLM

to consider "an alternative closing the Mesa to development," while leaving the remaining 75% of the planning area open to drilling. Id. at 711.

BLM's EIS for the Roan suffers from the same flaw. The Community Alternative was a "reasonable management possibility" that opened much of the Planning Area to oil and gas development, while protecting the highly-sensitive core area atop the Plateau. Under this Court's New Mexico decision, the district court's holding should be affirmed. See also Natural Res. Def. Council v. U.S. Forest Service, 421 F.3d 797, 814 (9th Cir. 2005) (agency failed to consider any alternative protecting most of forest's roadless areas); Wisely, 524 F. Supp. 2d at 1311-12 (BLM violated NEPA by failing to consider an alternative imposing NSO stipulations on wilderness-quality lands while allowing drilling from outside the area's boundary).

3. The District Court Did Not Misinterpret The Community Alternative.

BBC also claims the district court "misinterpreted" the Community Alternative. BBC Br. at 22. According to BBC, the Community Alternative involved "deferred leasing," while an alternative calling for NSO stipulations for leases atop the Plateau was "never put before" the agency. Id. at 22-24. BBC is mistaken. The district court correctly understood that the Conservation Groups

had asked BLM to consider an alternative barring surface disturbance on such leases.[5]

During its planning process, BLM received tens of thousands of public comments asking that the top of the Roan Plateau be protected from drilling. See supra at 8-10. Many comments asked BLM to consider an approach that would allow leasing atop the Plateau, but require that no surface occupancy be permitted. See, e.g., Appx. 4393, 4411, 2811-60. This was sometimes referred to as the "Community Alternative."

For example, Appellee/Cross-Appellant Rock the Earth (RTE) submitted a detailed set of comments proposing that the entire top of the Plateau be leased immediately with NSO stipulations. Appx. 2811-60, 2817. The district court specifically held that RTE's comments described the Community Alternative "in sufficient detail so as to permit meaningful analysis of that alternative by the BLM." Appx. 324.

In addition, several other conservation group parties to this case (which BBC refers to collectively as "CEC") submitted extensive comments advocating for NSO stipulations atop the Plateau. The CEC groups requested that BLM "require

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[5] BBC understood the same thing. In the district court the company never argued that the Community Alternative involved only deferred leasing. Instead, BBC – like all the parties – recognized that the point of the Community Alternative was to require directional drilling to access the top the Plateau. See SA 435:9-14, 465:19-22, 492:15-495:25.

that any oil and gas leases on the top of the plateau be subject to unalterable restrictions requiring no surface disturbance and no surface occupancy on any lands on the top of the Plateau." Appx. 4411; see also Appx. 4393 (requesting that "for leases issued for the top of the plateau" no "surface disturbance" be permitted). The CEC parties recognized they were describing the same fundamental proposal as RTE and incorporated the RTE submission by reference. See Appx. 4411. Many other commenters likewise supported NSO stipulations. See Appx. 3547-48 (Colorado Wildlife Federation), 3494-95 (BLM reporting that more than 65,000 comments supported a requirement that leasing only occur on the top of the Plateau when "oil and gas can be developed such that it will not disturb the surface" (emphasis added)).

BBC's focus on references by CEC to "deferral of leasing" is a red herring because they concern only the timing of the Community Alternative's central NSO requirement. All the Community Alternative supporters argued that leasing on the top should be subject to NSO stipulations; they simply made different assumptions about when those NSO leases would be issued. CEC assumed that many of the NSO leases would be issued in the future while RTE concluded they could be issued immediately. See Appx. 2817, 4393, 4411. Both CEC and RTE, however, advocated the same basic approach: a requirement that any leases impose broad NSO stipulations across the top of the Plateau. See id.

BLM plainly understood that protecting the top from surface disturbance was the key feature of what the public requested. For example, in its response to CEC's comments, BLM summarized those comments as stating: "There should be no drilling on top of the plateau. BLM should adopt the components of the 'Community Alternative.'" Appx. 3566; see also Appx. 3548 (summarizing Colorado Wildlife Federation comments as requesting that "[a]n alternative that fully protects the [area atop the Plateau] with an NSO/NGD designation [] be considered"), 3494 (BLM summary of 65,000 public comments), 3563 (RTE). As BLM's responses demonstrate, the agency recognized that the public sought an alternative with NSO restrictions for the top of the Plateau. The district court did not err by recognizing that the agency had been presented with this alternative.

4. BLM Did Not Determine The Community Alternative Was Infeasible.

BBC next attacks the district court for failing to defer to what the company describes as a "technical determination" that the Community Alternative was infeasible because of limits on directional drilling. BBC Br. at 25-29, 35-36. This argument fails because it is premised on a mischaracterization of the terms of the Community Alternative. Moreover, BBC fundamentally mischaracterizes BLM's reasoning in rejecting the Community Alternative. BLM did so based on its pro-development legal interpretation of the Transfer Act, not because the alternative was technically infeasible.

As an initial matter, the district court correctly rejected the feasibility theory as a post hoc excuse. See Appx. 325-26; Olenhouse, 42 F.3d at 1575. In the EIS, BLM consistently relied on the two arguments discussed above to eliminate the Community Alternative: (1) that it violated the Transfer Act, and (2) that the Community Alternative was duplicative of other alternatives. See, e.g., Appx. 3542-43, 3548. Nowhere in the EIS does BLM assert the Community Alternative would be infeasible to implement. See, e.g., id.

None of the documents cited by BBC contain the feasibility determination it claims BLM made. See BBC Br. at 27-29, 35. Indeed, BLM says nothing about feasibility when it would most be expected to do so. For example, when RTE submitted detailed comments in 2005 showing how the Community Alternative could be implemented, BLM did not respond substantively. See Appx. 3563 (response to RTE comments states that BLM Plan "represents a high degree of environmental protection while recovering a reasonable amount of the oil and gas").

BLM's subsequent denial of RTE's administrative appeal also did not assert the Community Alternative was technically infeasible. See Appx. 5020-24. Nor did BLM's denial question that the Community Alternative could recover a

significant amount of gas from the top of the Plateau. See Appx. 5023.[6] Instead, the agency asserted that it had considered "an adequate range of alternatives" and that other alternatives incorporated protections for the top of the Plateau. See Appx. 5023; see also Appx. 5221-23 (denying other parties' administrative appeal without mentioning feasibility of Community Alternative).[7] The district court properly rejected BBC's post hoc claim, Appx. 325-26, and BLM has not challenged that ruling.

In any event, BBC's argument fails on the merits because it attacks a straw man version of the Community Alternative. The company claims that it is "infeasible" to access the gas under the top of the Plateau from surface locations around the base. BBC Br. at 19-29. But the proposal addressed by the district court does not restrict companies to drilling only at the base of the Plateau. The Community Alternative also permits surface locations at the perimeter of the federal leasehold atop the Plateau, and on adjacent private lands. Appx. 2852, 2858 (RTE comments); Appx. 324-25. That approach allows federal lands atop

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[6] The appeal denial also came years after BLM eliminated the Community Alternative, and did not satisfy NEPA's requirement to explain that decision in the EIS. See 40 C.F.R. § 1502.14(a).

[7] Even in their district court briefs, BLM and BBC never asserted that the Community Alternative was technically infeasible. See Appx. 99-112, 189-97. BBC first grasped for the feasibility theory as a last-ditch defense during oral argument when the district court appeared to recognize that the Community Alternative was a reasonable alternative NEPA required BLM to consider. See SA 493:20-495:20.

the Plateau to be accessed with substantially shorter directional drilling reaches than if only the base were used. See Appx. 2852, 3113 (maps). BBC does not dispute that such a strategy would allow recovery of a significant amount of gas from atop the Plateau. See Appx. 2858.

More broadly, BBC errs by mischaracterizing BLM's decision as a technical, rather than a legal, issue. BLM viewed the Community Alternative as legally inconsistent with the Transfer Act because the agency assumed it could not recover all of the gas under the Plateau. BLM stated that leaving much of the gas "unavailable for development" because of limits on directional drilling would be "inconsistent with the intent of the Transfer Act." Appx. 3535. That conclusion presents a legal question about the Transfer Act – not a technical judgment call. Because BLM misinterpreted the Transfer Act to require aggressive development, BBC's feasibility argument fails as a legal matter. Supra at 17-22.

Thus, BBC misses the mark when it focuses on BLM's view that 2,500 feet was the maximum reasonable directional drilling reach. BBC Br. at 26-29. Even assuming companies can only drill 2,500 feet directionally, an alternative barring surface disturbance on leases atop the Plateau presents an entirely reasonable (and feasible) management option. For example, if only 25% of the gas on top could be reached by directional drilling, such a strategy would still yield nearly two-thirds

of the federally-owned gas in the Planning Area as a whole.[8] See Appx. 3824 (BLM figures estimating that top and base contained 47% and 53% of the gas in Planning Area, respectively). That approach, moreover, would be entirely consistent with FLPMA's multiple-use mandate to "use [] some land for less than all of the resources . . . and not necessarily [] the . . . greatest economic return." 43 U.S.C. §§ 1702(c), 1712(c)(1).

This Court should reject BBC's post hoc attempt to mischaracterize BLM's meritless Transfer Act interpretation as a technical question. The district court's ruling should be affirmed.

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[8] In reality, the Community Alternative likely would recover far more than 25% of the gas under the top of the Plateau. While BLM never estimated how much gas it believed the Community Alternative could yield, RTE submitted a fifty-page analysis concluding that substantially all of the gas could be recovered. Appx. 2817-18. RTE pointed out that while BLM based its 2,500-foot assumption entirely on the self-interested claims of local companies, see, e.g., SA 687 (Colorado reported 2,500-foot figure based on what "Industry reports"), energy industry databases and other empirical data told a much different story. Appx. 2819-30, 2853-57. Those sources showed that ordinary drilling equipment could reach the gas reservoirs targeted on the Roan from up to three miles away – six times what BLM assumed – and that directional drilling reaches had increased dramatically during the previous decade as companies gained more experience. Id.

Subsequent experience confirms that the agency's 2,500-foot assumption was meritless. By the time BLM issued the Roan Plateau leases in 2008, companies had already permitted wells adjacent to the Plateau that reached as far as 4,750 feet – nearly twice the distance BLM assumed. See Mot. for Judicial Notice at 4. By 2012, wells were being drilled horizontally for two miles in Garfield County. Id. at 4-5.

B. BLM Also Violated NEPA By Failing To Analyze Alternative F In Its EIS (Cross-Appeal).

BLM also violated NEPA by failing to consider a second reasonable management approach known as Alternative F. Appx. 3139; SA 58-59.[9] Alternative F had many of the benefits of the Community Alternative, but would have provided even more protection by foregoing leasing altogether atop the Plateau. At the same time, Alternative F (like the Community Alternative) would have allowed thousands of acres of leasing and development around the base of the Plateau. See Appx. 3139, 1021-22. Figures in the EIS suggest that a plan to lease lands only around the base could allow recovery of up to 53% of the federal gas in the Planning Area. See Appx. 3824 (minerals atop Plateau represented 47% of federally-owned gas resources).

When developing its Plan, BLM offered the same two rationales for eliminating Alternative F as it did for the Community Alternative: (1) it conflicted with the Transfer Act; and (2) the elements of Alternative F had been included in other alternatives. E.g., Appx. 3139. Unlike the Community Alternative, the district court upheld BLM's decision not to consider Alternative F. Appx. 319-24. That ruling should be reversed.

[9] Both Alternative F and the Community Alternative presented reasonable middle-ground alternatives for the Roan. The Conservation Groups do not argue that BLM was required to analyze both alternatives, only that its failure to consider either of them violated NEPA.

1. BLM's Interpretation Of The Transfer Act Was Contrary To The Act's Plain Language And Legislative History.

BLM's Transfer Act rationale differed somewhat between Alternative F and the Community Alternative. For the Community Alternative, the question was whether the Act precluded imposing NSO conditions on leases for the top of the Plateau. See supra at 17-22. The issue for Alternative F, in contrast, was how many leases (if any) must be issued for the top of the Plateau. Like the Community Alternative, however, BLM abandoned the Transfer Act as a defense in the district court for rejecting Alternative F. See supra at 18.

The Transfer Act argument was just as meritless with regard to Alternative F as it was for the Community Alternative. BLM's reading contradicts the plain language of the statute and finds no support in the legislative history of the Act. Moreover, BLM's pro-development interpretation deserves no deference because it was never consistently applied and has now been abandoned by the agency.

a. Plain Language Of The Statute

BLM took the position that by not offering leases atop the Plateau, Alternative F conflicted with the Transfer Act's direction that BLM "shall enter into leases" on NOSRs 1 and 3. 10 U.S.C. § 7439(b)(1); Appx. 3139. The plain language of the statute undercuts BLM's interpretation. The Act states that the agency: "shall enter into leases [for petroleum exploration and development] on or in public domain lands in [NOSRs] 1 and 3." 10 U.S.C. § 7439(b)(1). Nothing

requires any minimum number of leases on the Roan Plateau, or mandates that all of NOSRs 1 and 3 be leased. BLM was required, at most, to offer some land in NOSRs 1 and 3 for leasing.

BLM could have satisfied that direction without leasing any lands atop the Plateau. While most of NOSR 1 lies atop the Plateau, a significant portion is below the rim of the Roan cliffs. Compare Appx. 3112 (NOSRs), with Appx. 3725 (showing location of rim); see also SA 191 (map showing both rim and NOSRs). Before BLM began preparing its Roan EIS, the agency had already leased some of the NOSR 1 lands below the rim in 1999, along with parts of NOSR 3. Appx. 3313-14. Those leases satisfied the Transfer Act. To the extent any further leasing was necessary, BLM's Plan could have leased additional NOSR 1 lands below the rim while leaving the top of the Plateau alone, in accordance with Alternative F.

Despite this plain language, BLM asserted that an alternative allowing no leasing above the rim would conflict with the Act because NOSR 1 lay mostly above the rim of the Plateau. See, e.g., Appx. 3100, 3130, 3139, 3503, 3545, 3569, 3592, 3595, 3602. In effect, the agency misinterpreted the statute by reading it as if it stated: BLM "shall enter into leases [for petroleum exploration and development] on or in ***all or most of the*** public domain lands in [NOSRs] 1 and 3." Compare 10 U.S.C. § 7439(b)(1); see also Appx. 3602 ("BLM believes that the Transfer Act requires that all of the NOSR areas be made available for oil and gas

leasing . . . ." (emphasis added)); Appx. 3130 (BLM states the Act requires opening "a significant portion of NOSR 1" for leasing). The plain language of the Act imposes no such requirement. See SA 195 (Congressional Research Service analysis concluding that the Transfer Act does not require BLM to lease "all" of the transferred lands). The statute sets no minimum threshold for the acreage to be leased.

Similarly, the district court erred by ruling that Alternative F was unavailable because the Act requires leasing a "significant portion of" NOSR 1. Appx. 320. This interpretation fails for the same reasons: (1) nothing in the Act requires any minimum amount of leasing; and (2) significant areas of NOSR 1 were available for leasing below the rim (and had already been leased).

Other provisions of the Transfer Act confirm that BLM misinterpreted the statute. As discussed above, the Act directs that BLM manage the Roan in accordance with the Mineral Leasing Act and FLPMA. Supra at 19-20. The Mineral Leasing Act gives BLM discretion to choose not to lease any particular area. See 30 U.S.C. § 226(a); United States ex rel. McLellan v. Wilbur, 283 U.S. 414, 419 (1931); McDonald v. Clark, 771 F.2d 460, 463 (10th Cir. 1985).[10]

[10] The Transfer Act's subheadings also reflect the preservation of BLM's discretion over the scope of leasing: the section conveying the Roan from the Department of Energy to the Department of Interior is headed "Transfer required." 10 U.S.C. § 7439(a). By contrast, the leasing provision is titled "Authority to lease," rather than "Leasing required." Id. § 7439(b).

FLPMA likewise gives BLM ample discretion to withhold lands from leasing. See 43 U.S.C. § 1701(a)(8); supra at 19-20.

As long as BLM leased some lands from NOSRs 1 and 3, the plain language of the Transfer Act gave the agency full authority to protect lands above the rim. Because BLM could satisfy the leasing mandate with leases entirely below the Plateau's rim, the agency had no legal justification for excluding Alternative F.

b. Legislative History

The Transfer Act's legislative history confirms that Congress did not require leasing all or most of NOSRs 1 and 3. Nor did the Act make energy development the primary use of the Plateau. While anticipating that some leasing would occur in the NOSRs, Congress made clear it maintained BLM's ordinary authority to strike a balance between multiple uses there. See supra at 20-22.

c. BLM's Shifting Interpretation Is Not Entitled to Deference.

Informal agency interpretations of a statute, such as BLM's Transfer Act theory, are not accorded the same degree of deference that formal rules enjoy under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Rather, courts afford an informal agency interpretation "respect proportional to its 'power to persuade.'" United States v. Mead Corp., 533 U.S. 218, 235 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). That "power to persuade" depends on "the thoroughness evident in [the agency's]

consideration, the validity of its reasoning," and whether the interpretation reflects a consistent agency position. Id. at 228 (quoting Skidmore, 323 U.S. at 140). An inconsistently applied statutory interpretation deserves much less weight than one applied consistently. Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993); S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 759-60 (10th Cir. 2005).

None of these factors support BLM's interpretation of the Transfer Act. First, the interpretation was adopted informally with no significant analysis by the agency. See SA 188-89 (BLM admitting that it never prepared a written opinion or research memorandum addressing the meaning of the Act).[11]

Second, BLM has not interpreted the Transfer Act in a consistent manner. Until late 2002, BLM viewed the Transfer Act as preserving its authority to implement the full range of management options available under FLPMA and the Mineral Leasing Act. See, e.g., SA 648, 654, 850 (1997, 1999 and 2002 analyses stating that lands could be closed to oil and gas leasing on the Roan). In 2002, for example, BLM prepared an analysis explaining that under pre-Transfer Act Energy Department management, "development of the hydrocarbon resources of the NOSRs" was to "have priority over all other programs." SA 850. But, the report

[11] By contrast, the Congressional Research Service did such a written analysis of the Act. It rejected BLM's interpretation that the Act required leasing all of the NOSRs. See supra at 37.

continued, "[n]ow that NOSR 1 and 3 are public lands under the administration of the BLM, [it] must manage[] them in accordance with the FLPMA" and other public lands laws. Id. During this period, BLM never suggested that any minimum amount of leasing was required for NOSRs 1 or 3.

BLM's approach changed in November 2002 after an oil and gas industry group contacted BLM's national director to object to the range of alternatives being considered, which then included Alternative F. The industry group Public Lands Advocacy (successor to the Rocky Mountain Oil & Gas Association) asserted that "the sole purpose of transferring these lands" to the Interior Department was to lease them for mineral development. SA 670. At the same time, a BLM representative in Washington, DC made the same argument and complained that under the preliminary range of alternatives "it would difficult to select Alt: E: Oil and gas leasing development." SA 667.

A few days later, BLM made a results-driven decision to eliminate Alternative F from consideration. Appx. 3139. In an internal email, BLM provided several reasons for rejecting Alternative F:

1. Interior Department lawyers advised that an alternative with "no leasing on top of the Plateau may not be within our authority to implement."

2. "[W]e are certain [alternatives with no leasing on top of the Plateau] would not be supported by the Department."

3. "Taken together, these changes have the added advantage of allowing us to demonstrate a much more positive response to the Letter from the Public Lands Advocacy . . . ."

SA 676 (emphasis added).

BLM's internal explanation suggests it interpreted the Transfer Act with the goal, at least in part, of eliminating alternatives that did not fit the agency's preferred outcome for the Roan. An agency cannot eliminate otherwise-reasonable alternatives because they differ from the agency's preferred result. See 40 C.F.R. § 1502.2(g) (an EIS "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"); Davis v. Mineta, 302 F.3d 1104, 1112 (10th Cir. 2002).

BLM staff objected to this new development-oriented interpretation of the Transfer Act. One agency analyst rejected industry's interpretation and wrote that the Transfer Act "has no bearing on the need and stipulations required to protect resources." SA 670; accord SA 669, 680. These objections – like those of the broader public – went unheeded by the agency.

Finally, any basis for deferring to BLM's post-2002 interpretation is now gone because the agency no longer defends that reading of the statute. See supra at 18. Given the history and inconsistent views taken by BLM, its former interpretation deserves no deference from this court.

2. Alternative F Did Not Duplicate Other Alternatives.

Alternative F also was "significantly distinguishable" from the alternatives considered in the EIS. New Mexico, 565 F.3d at 709. As with the Community Alternative, the other alternatives did not incorporate or otherwise consider the key element of Alternative F: protecting the top of the Plateau while allowing drilling around the base. Indeed, the most environmentally-protective action alternative in the EIS called for leasing 70% of both the top and bottom of the Plateau – and the others allowed leasing on every last acre. See Appx. 3345; supra at 16 (chart comparing alternatives).[12]

BLM's claim that "the no-lease component [of Alternative F] was retained as part of the No Action alternative" also fails. Appx. 3139. Like the Community Alternative, Alternative F presented a middle-ground option with a far different "cost-benefit balance" than the no-action alternative. Supra at 24-25; see also SA 1118-19. As BLM staff acknowledged, "[w]e can say that No Action covers the no leasing on top option, but it also provides no [other land management

[12] The district court concluded that Alternative F was not significantly different from other preliminary alternatives. This holding erroneously compared Alternative F with other preliminary alternatives (such as preliminary Alternative B) – not the alternatives eventually included in the final EIS. See Appx. 323. Neither Alternative F nor Alternative B was analyzed in the final EIS. See Appx. 3139.

provisions included in Alternative F], and so will not be viewed as representing what the adjacent communities wanted at all." SA 680.

Under this Court's New Mexico decision, Alternative F's approach of protecting a core area while making most of the Planning Area available for leasing was a "reasonable management possibility" that was not covered by any other alternatives in the EIS, and should have been considered. Supra at 17, 25-26.

III. BLM'S AIR POLLUTION ANALYSIS VIOLATED NEPA.

The district court also ruled correctly that BLM's analysis of air pollution fell short in two respects: (1) it failed to account for the cumulative impact of air pollution from the Plan when combined with emissions from significant future oil and gas development in nearby areas of Colorado; and (2) it failed to analyze ozone. Both holdings should be affirmed.

A. BLM Violated NEPA By Failing To Address The Air Pollution Caused By The Roan Plan In Combination With Oil And Gas Development In The Surrounding Area.

NEPA recognizes that significant environmental impacts "can result from individually minor but collectively significant actions taking place over a period of time." Utah Envtl. Congress v. Richmond, 483 F.3d 1127, 1140 (10th Cir. 2007). Therefore, an EIS must put a proposal into context by evaluating its "incremental impact . . . when added to other past, present, and reasonably foreseeable future

[federal and non-federal] actions." These are known as "cumulative impacts." 40 C.F.R. §§ 1508.7, 1508.25(c).

BLM explains the cumulative impacts requirement with the "straw on a camel's back" metaphor: "a single gas well [] may be of little significance. A hundred wells in the same area, however, may profoundly impact a given resource." SA 203. The cumulative impacts analysis "must consider the 'straws being added' by other BLM jurisdictions, and other land managing entities." Id. Similarly, BLM's land use planning manual explains that environmental analyses can "extend beyond the planning area boundary" and notes that "it is necessary for planning purposes to understand the cumulative effects of activities on lands outside BLM's jurisdiction." SA 997; see also SA 878, 888-89 (BLM-Forest Service NEPA manual for oil and gas development directing that cumulative impacts analysis should extend to activities outside planning area); N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1078-79 (9th Cir. 2011) (agency not permitted to pretend its project "operat[ed] in a vacuum" by ignoring reasonably foreseeable cumulative impacts of nearby development).

The district court correctly held that BLM violated this requirement by ignoring emissions from future oil and gas development outside the Planning Area. Appx. 334-38; SA 60. The agency prepared an air pollution analysis that addressed two categories of emissions sources in Colorado:

(a) Existing sources of air pollution (Appx. 2890-91); and

(b) Future oil and gas development inside the Planning Area. Appx. 2891, 2895-96; compare Appx. 2899 (number of wells in air analysis), with Appx. 3351 (EIS prediction of number of wells inside Planning Area).[13]

BLM's analysis ignored an important category: emissions from future Colorado oil and gas development outside the Planning Area. In effect, BLM assumed that the Roan Plateau is the only place where new oil and gas development will occur in Colorado during the coming decades. See Appx. 3113 (map of Planning Area).

BLM's approach was arbitrary and capricious because new oil and gas development will not stop outside BLM's Planning Area boundary. The record shows that thousands of producing oil and gas wells surround much of the Planning Area, and that the number will continue to grow. Oil and gas development in the surrounding area generates air pollution, just as it does on the Roan, and the emissions combine to degrade air quality. See SA 887-93. BLM's approach led it to substantially underestimate the air pollution impacts to which its Plan would contribute.

While BBC argues that future development was only "speculative," BBC Br. at 36-43, the record demonstrates that significant future drilling was readily

[13] BLM also modeled emissions sources in Utah because the agency prepared its Roan air analysis as a joint effort with its Vernal, Utah field office. As a result, the future sources category includes wells in the Vernal Planning Area of eastern Utah. Appx. 1084-86. BLM, however, omitted all future sources in Colorado and Wyoming, many of which were closer to the Roan Plateau.

foreseeable outside the Planning Area. BBC portrays the district court's holding as supported by only a single document – a paper from Garfield County predicting that 10,000 to 20,000 wells would be drilled there over the next twenty years. BBC Br. at 36. The company neglects to mention that BLM endorsed the County's estimate as reasonable by publishing it in the Final EIS. Appx. 3343. In doing so, the agency gave no indication that it disagreed with the conclusion that 10,000 or more new wells were reasonably foreseeable. See id. Garfield County, moreover, based its estimate on industry sources, which included BBC itself and two other intervenors in this case. Appx. 3017 (sources included BBC, Williams Production (now called WPX), and Antero Resources (predecessor to Ursa Resources)).

Moreover, the Garfield County estimate was far from the only evidence in the record showing that significant future drilling was reasonably foreseeable. BLM observed in the EIS that production in the gas fields surrounding the Roan had increased by 20% per year for the past eight years, Appx. 3847, 3343, and it gave no sign of halting. Similarly, the Colorado Oil and Gas Conservation Commission (COGCC) and Intervenor WPX anticipated 5,000-10,000 new wells

in Garfield County over the next ten years. See, e.g., Appx. 1292 (COGCC describing figure as a "pretty safe" estimate).[14]

What's more, BLM is responsible for much of that future development. At the same time the agency developed its Roan Plan, it was approving other federal oil and gas projects in western Colorado that involved thousands of wells. These wells were not just foreseeable – the agency itself was analyzing and approving them. They include, for example:

- The Figure Four Gas Development Project in Rio Blanco and Garfield Counties, where a 2004 environmental assessment forecast 327 new wells;

- BLM approval of three separate projects totaling 260 new wells in 2005 within a few miles of the Planning Area;

- Drilling in BLM's Little Snake Resource Area, laying next to the Roan Plateau on the north, where BLM's 2005 analysis of reasonably foreseeable development projected 3,031 new wells;

- The 2004 BLM approval of 582 new wells in the Desolation Flats area of Carbon and Sweetwater Counties, Wyoming (both counties bordering Colorado); and

- An additional 2,130 new wells authorized by BLM in 2000 as part of the Continental Divide/Wamsutter II Natural Gas Project in Sweetwater and Carbon Counties, Wyoming.

SA 346-47, 1265.

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[14] If the Court takes judicial notice of the draft BLM EISs offered by BBC, it also should note that they predict thousands of new wells in western Colorado. See Dkt. # 01019019558 (BBC Mot. for Judicial Notice, Ex. A) at SUPP-00288 (7,274-11,973 federal wells in Colorado River Valley Field Office), SUPP-00273 (up to 3,938 wells in Grand Junction Field Office); Dkt. # 01019039184 at 4-7 (Resp. to Mot. for Judicial Notice, Ex. A) (thousands in White River Office).

In addition to conflicting with the record, BBC's theory that future development outside the Planning Area was "speculative" disregards the applicable legal standard. Future activities must be analyzed as cumulative impacts when they are "reasonably foreseeable" – not just when they are absolutely certain to occur. See Wilderness Workshop v. Bureau of Land Mgmt., 531 F.3d 1220, 1228 n.8 (10th Cir. 2008).[15] As the district court recognized, "reasonable forecasting is implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'" Appx. 329 (quoting Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1286 (1st Cir. 1996)); see also N. Plains Res. Council, 668 F.3d at 1078-79.

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[15] BBC's reliance on Wilderness Workshop is misplaced. Wilderness Workshop described the standard for cumulative impacts, but the holding cited by BBC did not address whether future oil and gas development represented a cumulative impact for which analysis was required. To the contrary, this Court expressly stated that the holding did not address cumulative impacts. Id. at 1228 n.8. Instead, it considered whether two activities were "connected actions" under NEPA, a much different question to which the "reasonably foreseeable" standard does not apply. Id. at 1229-30.

Nor is this a case like Theodore Roosevelt Conservation Partnership v. Salazar, where the plaintiff argued that an EIS should have evaluated two projects that were only in the earliest stage of planning when the project being challenged was approved. 616 F.3d 497, 513 (D.C. Cir. 2010) (BLM not required to analyze drilling in two projects for which only a preliminary "notice of intent" to prepare NEPA document had been issued). The oil and gas development described above had either been approved or was far along in the analysis process when BLM completed its EIS for the Roan.

BBC's argument that available drilling predictions were inexact misses the point. Even if the precise number of future wells in Garfield County was uncertain at the time of the EIS, BLM had no support for its assumption that the number would be zero. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (agency action arbitrary and capricious where it "runs counter to the evidence before the agency"). NEPA requires BLM to provide its best estimate of future development. Assuming that none will take place was arbitrary and capricious.

Next, BBC argues that even if future drilling outside the Planning Area was reasonably foreseeable, analyzing the impacts of that development was impractical. BBC Br. at 44.[16] According to BBC, the district court should have deferred to BLM's assertion that "such development could not be effectively modeled" on private lands. BBC Br. at 44 (quoting Appx. 3343); see also Appx. 336-38 (rejecting BLM's argument).

BLM's excuse ignores the fact that much of the reasonably foreseeable future development was expected on federal, rather than private, lands. See supra at 47. When BLM developed its Plan, it had ample information about future federal development because the agency was approving those projects itself. In the

[16] BBC also argues that BLM evaluated air pollution from some future drilling outside the Planning Area. BBC Br. at 45-46. The company, however, refers only to activity in the Vernal planning area of Utah. Id. (citing Appx. 2899). As discussed above, BLM's error lay in ignoring all future development in Colorado and Wyoming – not in Utah. See supra at 44-45.

course of reviewing new oil and gas proposals, BLM analyzes and sets the terms for that future development. When developing the Roan Plan, BLM could readily have considered the air pollution from other projects that the agency had already analyzed.

But even for drilling on private lands, BBC's argument fails. See Olenhouse, 42 F.3d at 1575, 1580-81 (agency technical conclusions reversed where not supported in the record). The record shows that BLM was capable of estimating emissions from future private drilling in a manner that would be useful to decision makers and the public. BLM, in fact, did analyze private development – but only to the extent it will occur within the Planning Area boundaries. See Appx. 3351, 2899 (analysis of future wells in Planning Area covers both private and federal land). In assessing future private development inside the Planning Area, BLM used a methodology that was equally applicable to private development outside that boundary. Far from being an impossible task, modeling emissions from private wells was a job the agency was already doing as part of its Roan EIS.

Inside the Planning Area, BLM estimated the pollution generated by typical equipment at each well. Appx. 2896-904, 336-37. The agency then utilized those per-well estimates and the number of anticipated wells to generate a prediction of aggregate emissions. See Appx. 2896-904. BLM applied this approach to predict

emissions from both federal and private wells inside the Planning Area. Appx. 3351, 2899.

As the district recognized, BLM offered no explanation why it could not use the same methodology to predict emissions from future wells outside the Planning Area. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (agency must offer rational connection between facts and its decision); Sorenson Comms., Inc. v. Fed. Comms. Comm'n, 567 F.3d 1215, 1221-22 (10th Cir. 2009) (failure to explain disparate treatment of similar activities was arbitrary and capricious). BLM had already generated its estimate of emissions from each well, and the EIS predicted that 10,000 to 20,000 wells would be drilled in Garfield County over the life of the Plan. The agency needed only to perform some basic calculations to estimate the cumulative emissions. It could then have evaluated the impacts of that pollution on ambient air quality, public health, and visibility, and disclosed the information to the public in the EIS. BLM's argument that it was impractical to do so was arbitrary and capricious. The district court's ruling should be affirmed.

B. BLM Violated NEPA By Failing To Analyze Ozone Pollution.

BLM also failed to analyze ozone (commonly known as smog), which is a major air pollution problem caused by oil and gas development. The district court's holding that this failure violated NEPA should be affirmed. Appx. 338-42; SA 60.

1. Oil And Gas Development Causes Ozone Pollution.

Under the Clean Air Act, the federal government sets national ambient air quality standards (national standards or NAAQS) for six air pollutants that can "endanger public health and welfare." 42 U.S.C. §§ 7408-09. One of those pollutants is ozone. Ozone is formed when volatile organic compounds (VOCs) and nitrogen oxides (NOx) react in the atmosphere. Ozone causes a variety of adverse health impacts, including respiratory problems such as lung inflammation and asthma, and can even lead to premature death. SA 1223-25; see also 73 Fed. Reg. 16,436, 16,436 (Mar. 27, 2008) (Environmental Protection Agency (EPA) advisory committee discussing "an array of [ozone]-related adverse health effects"). Elevated ozone levels also harm agriculture, costing hundreds of millions of dollars annually in reduced crop yields. SA 1225-26.

Natural gas development causes significant ozone pollution in Colorado. Oil and gas operations produce ozone-generating VOCs and NOx emissions from a variety of equipment and activities. See Appx. 3527 (EPA comments); SA 211-16. Colorado's Air Pollution Control Division has estimated that oil and gas development produces more VOCs than all other sources in the state combined. SA 212-13.

In Colorado, Utah, and Wyoming, growth in natural gas development has coincided with large increases in ozone levels. EPA designated metropolitan

Denver as a "nonattainment" area that violates the national standard for ozone, due in part to oil and gas development in northeastern Colorado. 40 C.F.R. § 81.306. In Utah and southwestern Wyoming, intensive oil and gas development has also degraded air quality to the point of violating the national ozone standard, which is set at 75 parts per billion (ppb). See 40 C.F.R. § 81.351; 77 Fed Reg. 30,088, 30,089, 30,157 (May 21, 2012). In Garfield County, Colorado, where the Roan Plateau is located, a 2007 Forest Service study recorded ozone levels that approached or exceeded 75 ppb. See SA 178-79. And Garfield County reported ozone levels from summer 2008 that reached 74 ppb. See SA 218-19.

2. BLM Violated NEPA By Ignoring Ozone.

NEPA requires an agency to consider every "significant aspect of the environmental impact of a proposed action." Baltimore Gas & Lamp Elec. Co. v. Natural Res. Defense Council, Inc., 462 U.S. 87, 97 (1983); see also Davis, 302 F.3d at 1123. As part of taking that "hard look" at environmental consequences, BLM also must explain how its actions will or will not comply with environmental laws and policies. 40 C.F.R. § 1502.2(d).

BLM violated these requirements. The agency concluded in the EIS that drilling allowed by the Plan will not cause or contribute to exceedances of any national air standards. Appx. 3373. BLM also classified the Plan's air quality impacts as "none" or "negligible." Appx. 3377. BLM had no basis for these

reassuring conclusions because the agency never analyzed the ozone pollution that will result from the Plan.

In the EIS, BLM analyzed the Plan's impacts on four of the six "criteria pollutants" for which national standards have been established. It failed, however, to assess the ozone that will be generated from oil and gas development on the Roan Plateau. See Appx. 2925. Consequently, BLM had no way of knowing whether Plan-related emissions would cause a violation of the national standard for ozone. Drawing such conclusions without evidentiary support is, by definition, arbitrary and capricious. Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (decision must be supported by evidence before the agency). Without any analysis of the ozone standard, the EIS violates NEPA. See 40 C.F.R. § 1502.2(d).[17]

Federal and state air regulators recognized that ozone represents a significant aspect of the air pollution from BLM's Plan and repeatedly asked BLM to prepare an ozone analysis. For example, EPA submitted comments in 2003, and again in 2005, asking BLM to address ozone. Appx. 1089, 3527. The State of Colorado in 2002 also asked BLM to cover ozone in its analysis. Appx. 1063. The Utah

[17] The cases BBC cites, BBC Br. at 57, do not support its position that analyzing ozone was unnecessary. In the district court cases, the agency did address ozone in its NEPA analysis, but without an extensive model. See id. In TOMAC v. Norton, the court upheld the agency's conclusion that a new casino would not have significant air quality impacts for any pollutant. See 433 F.3d 852, 862-64 (D.C. Cir. 2006). These cases do not hold that an EIS can disregard ozone impacts completely, which is what BLM did here.

Department of Environmental Quality made similar requests because the air quality model prepared for the Roan covered parts of Utah. SA 1347, 222-23; see supra at 45 n.13. In its 2005 comments, EPA stressed that an ozone analysis is necessary because "the additional development proposed in the DEIS" may "significantly" increase emissions of the VOCs and NOx that produce ozone. Appx. 3527 (emphasis added).

BLM's failure to address ozone in the Roan EIS departed from the agency's own past practice. In a 1999 NEPA analysis for the Glenwood Springs Field Office (of which the Roan is a part), BLM analyzed the air quality impacts – including ozone – of up to 300 new federal wells over twenty years. Appx. 508-12, 572-74.[18] The 1999 EIS predicted that with only these 300 new wells, ozone pollution in the area could increase substantially and reach 93% of the national standard. See Appx. 512. Yet a few years later, BLM ignored ozone altogether while approving five times that amount of drilling in its Roan Plan. The agency offered no explanation for (or even acknowledgement of) its reversal, which was arbitrary and capricious. See infra at 59-60.

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[18] That analysis did not cover the Roan Plan, or address the 1,570 new wells anticipated under that Plan. See Appx. 3348.

3. BBC Wrongly Asserts That BLM Analyzed Ozone Pollution.

BBC's arguments for reversal are meritless. BBC first claims that, contrary to the district court's ruling, BLM did analyze the likely pollution from its Roan Plan and determined it "would be inadequate to result in ozone formation." BBC Br. at 49. No such analysis exists. At oral argument, counsel for BLM conceded that the agency made no attempt "to predict whether the decision to expand drilling in the Planning Area would increase ozone levels." Appx. 341 (discussing admission); SA 491:14-24.

The documents cited by BBC are not to the contrary. The documents show that early in the process, BLM circulated a draft plan for its computer modeling effort on air quality (known as the "protocol"). See Appx. 1091. The protocol stated that the computer model would not address ozone because BLM assumed VOC emissions would be "relatively insignificant." Appx. 1109 (cited at BBC Br. at 53, 58). The protocol made this assumption before the air quality analysis was conducted, and cited no analysis or data to support it. See id. Nor did the protocol mention the results of BLM's previous ozone assessment in 1999, which found substantial ozone increases from a much smaller number of wells. See id.; supra at 55.

In their comments on the draft protocol, EPA and state air agencies asked BLM to address likely ozone impacts in the NEPA analysis. They urged that if no

computer modeling was done, BLM at least use some alternative method for estimating ozone pollution. Appx. 1063 (Colorado comments); Appx. 1089 (EPA). For example, BLM has used a set of screening tables known as the "Scheffe method" in other NEPA analyses.[19] See infra at 59-60.

BLM's consultants responded that "[t]he air quality impact report will discuss ozone impacts, but no ozone modeling will be conducted." Appx. 1131 (response to EPA), 1119 (response to Colorado). BLM never followed through on this promise: the EIS says nothing about ozone. See Appx. 3366-77 (EIS discussion of air pollution impacts with no reference to ozone); see also Appx. 1381, 2925 (air quality report supporting the EIS simply repeats the previous protocol statement that computer modeling would not cover ozone).[20]

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[19] BBC misses the point when it emphasizes that EPA and Colorado acquiesced in BLM's decision not to address ozone using a computer model. See BBC Br. at 53-54. Those air quality regulators asked BLM to address ozone in some manner, even if not through a computer model. Appx. 1089, 1063, 3527.

[20] BBC also offers numerous citations showing that the air quality report supporting the EIS contained calculations for NOx emissions, and some limited information about VOCs (primarily addressing certain hazardous air pollutants, which represent a small subset of VOCs). BBC Br. at 54-55. Nothing in the report, however, purported to address how VOCs and NOx would react with each other to form ozone. See Appx. 2875-998. As BBC has acknowledged, ozone production depends on several factors. Appx. 140. It also is a function of the emissions of both NOx and VOCs, and does not bear a simple linear relationship to either precursor. See SA 1228.

This raw and incomplete data told the public nothing about whether ozone would form and impact air quality. It is not the public's job to take raw data and attempt to carry out an air pollution analysis – that is what BLM is required to do in its EIS. See Te-Moak Tribe of W. Shoshone v. U.S. Dep't of Interior, 608 F.3d

When ozone was ignored in the draft EIS, EPA and other agencies renewed their requests that BLM address that pollutant. See supra at 54-55. In dismissing those requests, BLM made no mention of having conducted the earlier ozone analysis claimed by BBC. For example, in response to EPA's comments, BLM claimed only that computer modeling was "impractical," and refused to use an alternative screening method that would identify ozone levels of concern. Appx. 3527; see infra at 59-60. The agency's position that ozone modeling was "impractical," and its refusal to use the screening method, are impossible to reconcile with BBC's current argument that BLM had already analyzed ozone pollution.

In addition, BBC references conclusory statements BLM made several years after the fact when denying certain administrative appeals. See BBC Br. at 51 (citing Appx. 5066, 5082, 5129). Those after-the-fact statements fail to provide or cite any supporting ozone analysis. They refer to the assumptions made in the draft protocol, but do not identify any actual assessment by BLM determining that drilling under its Roan Plan would not generate ozone. Appx. 5066, 5082, 5129; see also Appx. 340-41.

Moreover, as noted above, the protocol only addressed why BLM did not prepare a computer model for ozone. It did not explain why BLM could not use

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592, 605 (9th Cir. 2010) (obligation to identify and describe impacts falls on agency, not on public).

non-modeling approaches such as the Scheffe tables. See infra at 59-60. BLM's administrative protest denials do not support BBC's argument or the agency's decision.

4. It Was Not Impractical For BLM To Prepare An Ozone Analysis.

BBC also errs in arguing that the district court should have deferred to BLM's position that preparing an ozone analysis was impractical. BBC Br. at 56-58. In responding to EPA's comments, BLM claimed there was no practical way to do a computer model of ozone – but it also declined to use the Scheffe tables, an alternative approach suggested by EPA. Appx. 3527; supra at 57. This refusal was arbitrary and capricious because BLM has used that same alternative method to address ozone in many other NEPA documents. When an agency reverses course, it must provide a reasoned explanation for the change. Otherwise, the decision is arbitrary and capricious. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 42; Qwest Corp. v. F.C.C., 689 F.3d 1214, 1225, 1228 (10th Cir. 2012).

The Scheffe tables provide a matrix comparing the amount and ratio of VOC and NOx emissions to project increments of ozone pollution. See SA 152-53. In its 1999 NEPA analysis, BLM used the Scheffe method to estimate the ozone that would result from drilling up to 300 wells. See supra at 55. The agency calculated that, even with this relatively low level of drilling, ozone levels could increase substantially and reach about 93% of the national standard. Id.

When BLM developed its Roan Plan, however, the agency claimed the Scheffe approach was "too conservative" to be of value. Appx. 3527. BLM offered no explanation for why Scheffe was useful when planning for 300 wells in 1999, but not when analyzing the air pollution from five times that number a few years later. See Appx. 3348; supra at 55. Moreover, BLM has used the Scheffe method for other oil and gas planning efforts, and defended it as an appropriate method of estimating ozone impacts. See Theodore Roosevelt Conservation P'ship, 616 F.3d at 510-12; Wyo. Outdoor Council, 176 IBLA 15, 33-34 (2008). Even today, BLM continues to endorse the Scheffe method for oil and gas projects in the area surrounding the Roan Plateau. See SA 274-75. BLM's position that the Scheffe method was "too conservative" for the Roan Plan was arbitrary and capricious. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 42; Qwest Corp., 689 F.3d at 1225, 1228.

If anything, a conservative initial estimate of ozone was more important here than when it was done in 1999 because the larger number of wells authorized by the Roan Plan made a violation of the ozone standard much more likely. If the screening tables predicted that the Roan Plan could cause a violation, it would warn the agency that further steps to address ozone pollution were needed in its Plan. BLM's unwillingness to get that information suggests the agency was concerned it would stand in the way of aggressive drilling on the Roan. BLM's

position that getting no information on ozone pollution was preferable to a conservative estimate was fundamentally inconsistent with the purpose of NEPA.

C. NEPA Does Not Permit BLM To Defer The Analysis Of Air Pollution Until After Adopting Its Plan And Issuing Leases.

Finally, BBC attempts to defend BLM's failure to analyze cumulative air pollution and ozone by arguing that both issues can be addressed at some later time. BBC Br. at 47-49, 58-61. This argument fails. NEPA does not allow BLM to defer its environmental analysis until after the critical decisions have been made for the Roan.

NEPA aims to prevent unnecessary environmental harms by requiring "that environmental concerns be integrated into the very process of agency decision-making." Davis, 302 F.3d at 1114 n.5 (internal quotation omitted); see also 42 U.S.C. § 4321 (Congressional declaration of purpose). To that end, NEPA's implementing regulations require an agency to prepare its analysis "early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5.

BLM manages oil and gas development using a three-phase process. First, the agency develops "an area-wide resource management plan." New Mexico, 565 F.3d at 689 n.1; accord Pennaco Energy v. Dep't of Interior, 377 F.3d 1147, 1151 (10th Cir. 2004). In the second phase, BLM issues leases under that plan.

Pennaco, 377 F.3d at 1151. This case involves both the first and second phases because the Conservation Groups challenged both the Roan Plan and the leases issued pursuant to that Plan. Supra at 12. Finally, lessees obtain drilling permits to develop their leases. Pennaco, 377 F.3d at 1151-52. BLM must comply with NEPA at every step in the process. See, e.g., 43 C.F.R. § 1601.0-6 (requiring EIS for plan-level actions); New Mexico, 565 F.3d at 716-19 (issuance of leases).

BBC's "study it later" argument is inconsistent with this legal framework. First, NEPA requires agencies to prepare an EIS before making an irreversible and "irretrievable commitment of resources" to an action. New Mexico, 565 F.3d at 718 & n.44. For oil and gas development, that irreversible and irretrievable commitment occurs when BLM issues leases allowing ground disturbance. Id. at 718. By issuing leases, BLM gives leaseholders a right to use the land and sets the ground rules for future development. Crucially, if the lease does not bar surface disturbance, BLM loses the authority to preclude all oil and gas development on the surface at some later stage by, for example, imposing NSO stipulations. Id.

In this case, BLM not only adopted a Plan for drilling, but it proceeded to lease the entire Roan Plateau. By issuing those leases, the agency irreversibly committed the Roan to its aggressive development plan. Supra at 10. BLM was required to study air pollution before leasing the Roan so that the analysis could inform its decision on whether to issue those leases. BBC's argument that the

missing analysis can be done at the drilling permit stage, BBC Br. at 47-49, or provided in NEPA documents four years later, BBC Br. at 58-61, ignores NEPA's requirement that BLM analyze the Plan's fundamental environmental impacts before making those irreversible commitments. See Pennaco, 377 F.3d at 1160 (BLM may not rely on "post-leasing analysis" that "did not consider pre-leasing options, such as not issuing leases at all").

The draft EISs cited by BBC, BBC Br. at 58-61, illustrate why BLM needed to consider air pollution before leasing the Roan. Those EISs will do nothing to inform BLM's decision several years earlier about whether to lease the Roan Plateau. 40 C.F.R. § 1502.5 (analysis must be done early enough to make a "contribution to the decisionmaking process"). If the new analyses eventually show that the amount of drilling on and around the Roan will violate the national standard for ozone or cause other severe air pollution, that information will come too late to scale back oil and gas development on the Roan. See Pennaco, 377 F.3d at 1160. The draft documents themselves recognize that any new environmental controls they impose would apply to new oil and gas leases – and that existing leases, including those on the Roan, "would be managed under the stipulations in

effect when the leases were issued." Resp. to BBC Mot. for Judicial Notice, Ex. A at 43; see also id. at 48, 53 (same).[21]

BBC's argument that the missing air analysis can be done during the drilling permit stage fails for the same reason: at that point the analysis will be too late to inform BLM's earlier leasing decisions.

BBC's reliance on individual drilling permit approvals fails for an additional reason: such site-specific decisions do not provide the broad landscape-level view required in the Resource Management Plan (RMP). An RMP is an "area-wide management scheme" for BLM lands, and the NEPA analysis that supports the RMP must address its impacts on the same "area-wide" basis. New Mexico, 565 F.3d at 689 n.1, 716 n.40; see also 43 U.S.C. § 1712 (describing role of RMPs).

Air pollution is exactly the type of area-wide impact that RMPs exist to address. The degradation of air quality – such as violation of the ozone standard – is not caused by a single drilling permit or a handful of permits. Instead, it results from the combined emissions of thousands of wells authorized by the Plan. See supra at 43-51. For BLM and the public to understand the air pollution impacts of the Roan Plan, the agency must address the impacts from the Plan as a whole – not

[21] BBC also errs in claiming that those draft EISs establish that ozone pollution is not a problem BLM needed to consider in its Roan Plan. See BBC Br. at 59-61. The analysis in the draft EISs suffers from serious flaws, which have been brought to BLM's attention by various commenters. Resp. to BBC Mot. for Judicial Notice at 4-7. The conclusions as to air quality may change substantially if those errors are corrected in the final documents. Id.

on a permit-by-permit basis. See Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1072 (9th Cir. 2002) (agency may not avoid environmental analysis in RMP EIS by promising later site-specific analysis because otherwise, "no environmental consequences would ever need to be addressed in an EIS at the RMP level" if similar consequences might arise on a smaller scale from later actions).

BLM, in fact, does not attempt to address the air pollution from its Plan at the permit stage. In practice, when issuing site-specific approvals, BLM does not look beyond those approvals or analyze how a particular drilling permit adds to other air pollution authorized under the Plan. Instead, the agency's site-specific approvals rely on its earlier Plan-level NEPA analysis for that broader view. See, e.g., SA 354-419 (project approvals relying on the Roan EIS for analysis of cumulative air pollution impacts).[22]

IV. BLM VIOLATED NEPA BY FAILING TO EVALUATE MOST OF THE REASONABLY FORESEEABLE DRILLING ATOP THE PLATEAU (Cross-Appeal).

BLM's Plan should be set aside for another reason: the agency violated NEPA by failing to analyze the large majority of wells it predicted would be drilled atop the Plateau. BLM designed the Plan to comply with its mistaken belief

[22] These approvals violated NEPA because they involved projects outside the Planning Area. As BLM has acknowledged, its Roan EIS never analyzed air pollution from future drilling outside the Planning Area. See supra at 44-45; CEC v. Crockett, 1:11-cv-1534-JLK (D. Colo.) (lawsuit challenging approvals of projects outside Planning Area).

that the Transfer Act required full development of the Roan, and the agency issued leases that irreversibly committed the Plateau to the drilling of thousands of natural gas wells. See supra at 10. BLM, however, analyzed the impacts of only 210 wells atop the Plateau – a small fraction of the drilling it anticipated there. Appx. 3348, 3837, 3853. BLM's approach violated NEPA's requirement that it address all of the "reasonably foreseeable" impacts of its decisions. See SA 59-62. The district court's ruling in BLM's favor on this issue should be reversed. Appx. 328-31.

NEPA requires BLM to take a "hard look" at the impacts of all "reasonably foreseeable future actions" resulting from its Plan and leasing decisions. Pennaco, 377 F.3d at 1150-51, 1160. To provide the foundation for its NEPA analysis, BLM developed a report estimating the full extent of "reasonably foreseeable development" (RFD) atop the Roan Plateau. See SA 658; Appx. 3823-55. The RFD report provides a "baseline" for the agency's NEPA analysis by predicting how many oil and gas wells are reasonably foreseeable in the absence of any management constraints imposed by BLM. SA 658; Appx. 3836. In the usual EIS, BLM adjusts the wells predicted by the RFD to account for constraints imposed under different management alternatives considered by the agency. SA 658.

BLM's RFD report for the Roan predicted that thousands of wells and associated infrastructure will spread across the top of the Plateau over several decades. See Appx. 3837, 3853 line 8; accord Appx. 3119-21. None of the alternatives in the EIS impose management constraints that would prevent that from occurring. Nevertheless, BLM took a small subset of the wells anticipated in the RFD report – those it assumed would be drilled in the first twenty years – and used only those initial wells for the analysis in its EIS. Appx. 3348, 3350. BLM acknowledged that it was analyzing the impacts of only "about 15% of the number of wells . . . that will eventually be drilled on the upper plateau." Appx. 3837, 3853 lines 8-10; see also SA 685-86 (COGCC estimate that the EIS only analyzed recovery of 8.4% of the natural gas under the top of the Plateau, but that "[i]ndustry has proposed a plan wherein most of the reserves could be developed").

BLM's truncated analysis allowed the agency to paint a rosy, but inaccurate, picture of the impacts of its Plan on the top of the Plateau: the EIS addresses only 210 wells there, rather than the thousands of wells that were reasonably foreseeable. BLM's own National Science and Technology Center pointed out this disparity, noting that while the EIS evaluates only the first twenty years, "the bulk

of the development will occur beyond the 20 year threshold" and "significant impacts are anticipated beyond" that point. SA 1139.[23]

Nothing in BLM's EIS or RFD report suggests that the omitted wells were unforeseeable or unlikely to be drilled. The alternatives considered in the EIS included various management requirements – but none of the alternatives terminated leases or halted development after twenty years. BLM simply imposed an artificial cut-off in the EIS that excludes the large majority of reasonably foreseeable drilling atop the Plateau.[24]

Omitting 85% of the reasonably foreseeable wells from the EIS violated NEPA. NEPA does not contain any cut-off date. The temporal scope of the analysis must be determined on a case-by-case basis, and a reasonably foreseeable impact must be analyzed whether it will occur the next day or thirty years from now. See, e.g., N. Plains Res. Council, 668 F.3d at 1077-79 (invalidating NEPA

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[23] Moreover, BLM seriously underestimated the foreseeable impacts of development even during its twenty-year window. Industry comments described BLM's analysis as "grossly unrealistic," and predicted that companies would drill approximately 3,000 wells on the upper Plateau during those twenty years. Appx. 3560.

Subsequent events have borne out industry's predictions and further undermined BLM's truncated analysis. During the litigation, BBC reported to the Securities and Exchange Commission and the State of Colorado that it planned to drill over 3,000 wells atop the Plateau within the next twenty years. See SA 239-41, 265-67.

[24] Moreover, the lessees paid a record sum – more than $113 million – for the leases in the Planning Area. Appx. 87-88. BLM could not assume the companies expected to leave 85% of their investment undeveloped.

analysis for new railroad line with artificial five-year cut-off that ignored impacts of "likely future development"); Potomac Alliance v. U.S. Nuclear Regulatory Comm'n, 682 F.2d 1030, 1035-37 (D.C. Cir. 1982) (per curiam; Bazelon, J., concurring) (NEPA analysis for storage of spent nuclear fuel could not be limited to thirty years where it was reasonably foreseeable that off-site storage might not be available at the end of that period).

BLM defended its failure to analyze and disclose the full impacts of its decisions by claiming that development after twenty years is too uncertain to predict. See, e.g., Appx. 3343, 3539. The district court accepted this argument "[b]y the barest of margins" based on a single internal email from a BLM staffer. Appx. 331; SA 1121 (April 28, 2003 email from BLM employee Duane Spencer).

The district court erred in relying on the staffer's passing email reference. The email did not offer any reason that drilling on the Roan would stop after twenty years. Instead, it objected to the scope of BLM's RFD report based on a generalized view that the agency had a poor record of predicting development impacts beyond that twenty-year period. SA 1121.

That opinion contradicts what BLM actually concluded in the record. The agency's formal position in its RFD assessment – developed by agency experts –

found that far more than 210 wells were reasonably foreseeable.[25] BLM's decision must be evaluated based on that conclusion rather than on the informal dissenting opinion of an individual employee. See Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 199 (4th Cir. 2005) (looking to the agency's analysis itself, not "the alleged subjective intent of agency personnel divined through selective quotations from email trails"); Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163, 1174 (9th Cir. 2004) (similar). BLM cannot disregard its own findings by pointing to a single dissenting email from within the agency. See WildEarth Guardians v. Nat'l Park Serv., 703 F.3d 1178, 1186-87 (10th Cir. 2013) (decision evaluated based on whether it is supported by the record, not on whether there was dissent within the agency).

The record also refutes BLM's assertion that it was impractical to evaluate the full impacts of reasonably foreseeable development atop the Plateau. Indeed, the agency did prepare a model showing what full development of the upper Plateau would look like. To ensure its Plan would allow companies to recover

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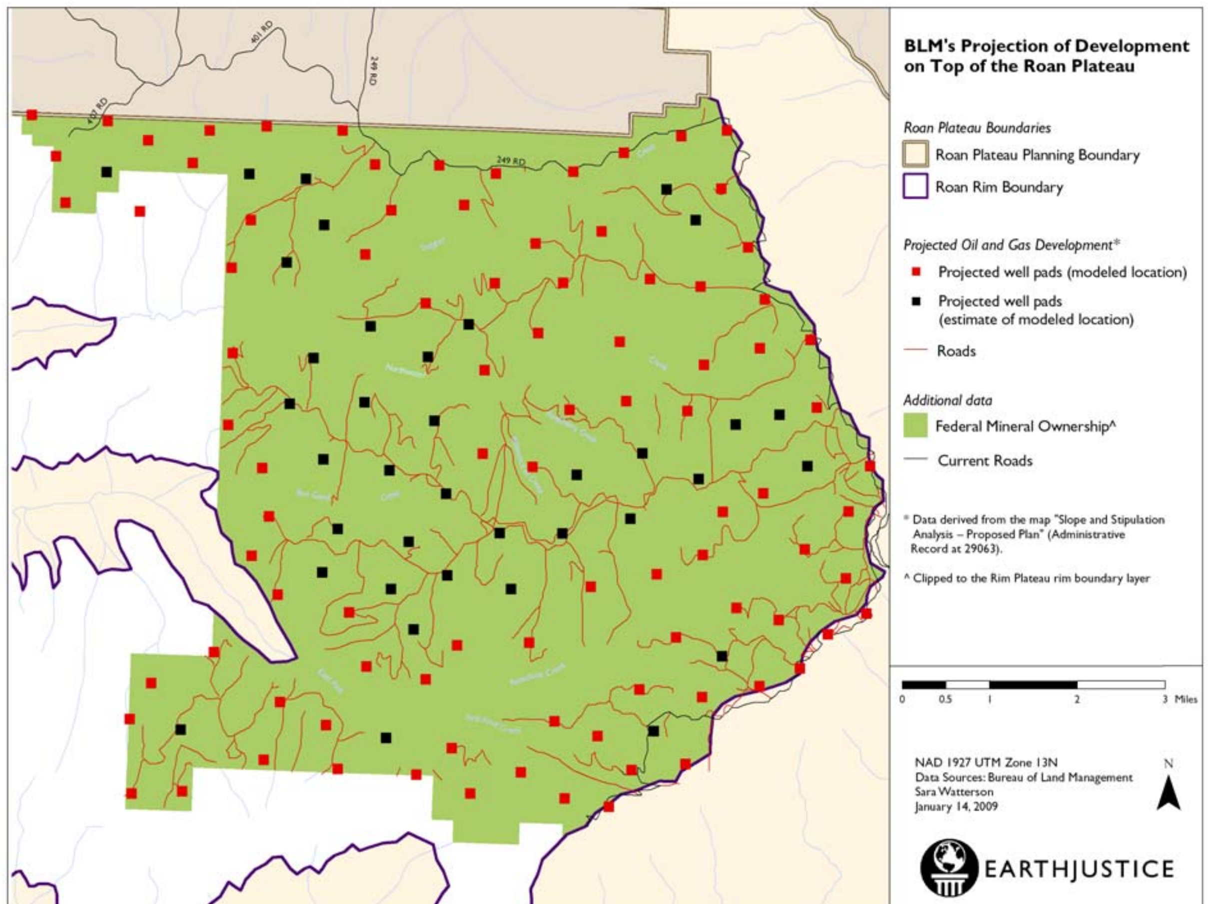
[25] Mr. Spencer's email also conflicted with the conclusions of other BLM Colorado staff who recognized that the 210-well analysis did not comply with NEPA. In fact, the agency decided in July 2002 to analyze full development atop the Plateau in accordance with its RFD analysis. SA 682; see also SA 1118 (explaining that NEPA requires "disclos[ure of] the full impacts of our actions that may occur over time, not just those that occur in the next 15-20 years"). That decision was later reversed based on direction from a BLM staffer from Washington. See SA 511-12, 526-29; compare SA 518, 522-23 (Aug. 2002 draft), with SA 534-35, 543-45 (Oct. 2002 draft).

substantially all the natural gas from the top of the Roan, BLM prepared a geographic information system (GIS) map of potential well locations after full development. See Appx. 3121. BLM's map apparently showed that approximately 130 separate multi-well pads could eventually be built atop the Plateau. Based on BLM's assumption of 16 wells per pad, Appx. 3348, that model anticipated almost 2,100 wells – ten times what was analyzed in the EIS:



See Appx. 43 (reconstruction of GIS model).[26]

[26] See SA 224-29, 236-37, 1116; Appx. 291-94.

Having mapped the locations of wells under its Plan (and confirming the Plan allowed recovery of all the oil and gas), the agency could have used this same model to predict the impacts of those wells on non-mineral resources such as wildlife, water quality, and rare plants. Instead, BLM violated NEPA by turning a blind eye to those impacts. BLM cannot claim it is impractical to forecast the environmental impacts of drilling atop the Plateau where the agency has actually modeled that drilling for its own purposes. See New Mexico, 565 F.3d at 707-08 (rejecting argument that BLM could not analyze the extent to which drilling would fragment wildlife habitat where the record revealed the agency actually had conducted an internal assessment of those impacts); see also, e.g., N. Plains Res. Council, 668 F.3d at 1077-78 (rejecting artificial five-year cutoff because record showed projections of "significant growth" in coal bed methane development beyond that time). The district court's ruling on this issue should be reversed.

CONCLUSION

If this Court concludes it has jurisdiction, the district court's order setting aside the Roan Plan and EIS should be affirmed for the reasons stated above.

STATEMENT REGARDING ORAL ARGUMENT

The Conservation Groups believe that because of the importance of the issues presented, oral argument would assist the Court in resolving this appeal.

Respectfully submitted April 19, 2013,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

(1) this brief complies with the type-volume limitation of Fed. R. of App. P. 28.1(e)(2) and 32(a)(7)(B) because it contains 16,484 words, excluding the parts of the brief exempted by Fed. R. of App. P. 32(a)(7)(B)(iii) and 10th Cir. R. 32(b); and

(2) this brief complies with the typeface and type style requirements of Fed. R. of App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, size 14 point font.

s/ Alison C. Flint

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I hereby certify that:

(1) all required privacy redactions have been made pursuant to 10th Cir. R. 25.5;

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s/ Alison C. Flint

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2013 I electronically filed the foregoing **APPELLEES AND CROSS-APPELLANTS' OPENING AND RESPONSE BRIEF** using the court's CM/ECF system which will send notification of such filing to the following:

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