UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

WILDEARTH GUARDIANS, Appellant	)	IBLA No. 2013-110
	)	Notice of Appeal, Blue Mountain Energy Coal Lease, COC-74813, Rio Blanco and Moffat Counties, Colorado

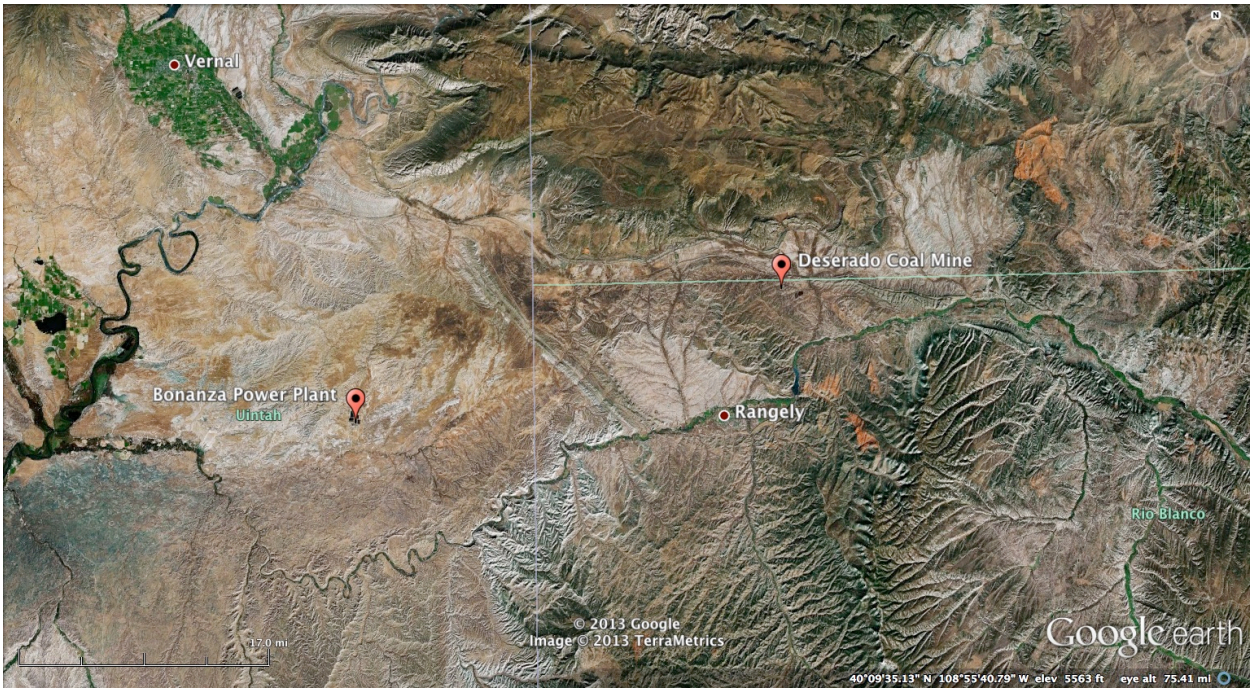
STATEMENT OF REASONS

On March 4, 2013, WildEarth Guardians (hereafter "Guardians") gave Notice of Appeal of the decision by Bureau of Land Management ("BLM") White River Field Office Manager, Kent Walter, to authorize the sale and issuance of coal lease by application COC-74813, described as the "Blue Mountain Energy Coal Lease" in Rio Blanco and Moffat counties in northwestern Colorado. The decision is documented in a Decision Record ("DR") signed by Mr. Walter on February 1, 2013. The DR adopted the Proposed Action as documented in the Environmental Assessment for the Blue Mountain Energy Coal Lease Application, DOI-BLM-CO-110-2012-0023-EA ("Blue Mountain Energy EA" or "EA"), and authorized the sale and issuance of the Blue Mountain Energy Coal Lease (also referred to in this appeal as "the proposed lease"), which includes 3,154.76 acres and 21.3 million tons of deliverable coal. See DR at 1. The BLM assumes Blue Mountain Energy, Inc., a subsidiary of Deseret Generation and Transmission Co-Operative ("DG&T"), will be the successful bidder and that the lease will facilitate expansion of the Deserado Coal Mine in northwestern Colorado. *See* DR at 7; EA at 10. On March 23, 2013, Guardians requested an extension of time to file its Statement of Reasons by May 3, 2013. The BLM did not oppose Guardians' request. On April 2, 2013, the Interior Board of Land Appeals ("IBLA") granted Guardians' request. On April 1, 2013, the BLM published a Notice of Competitive Coal Lease Sale announcing that the sale of the Blue Mountain Energy Coal Lease will be held on May 29, 2013. *See* 78 Fed. Reg. 62, 19520 (April 1, 2013). Pursuant to 43 C.F.R. § 4.412, Guardians now files the following Statement of Reasons in support of their Notice of Appeal.

I. INTRODUCTION

Guardians challenges the Blue Mountain Energy Coal Lease DR, FONSI, and EA relied upon in issuing the DR and FONSI, on the basis that: (1) the BLM failed to demonstrate that the impacts of approving the coal lease will not be significant, and therefore that an environmental impact statement ("EIS") was not required, as mandated by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq*.; (2) the BLM failed to rigorously explore and objectively evaluate a range of reasonable alternatives, as required by NEPA; and (3) the BLM failed to ensure protection of federal air quality standards in accordance with the Federal Land Policy and Management Act ("FLMPA"), 43 U.S.C. § 1701, et seq.

Of primary concern is that the sole purpose of the coal lease is to expand the Deserado Coal Mine and extend the life of the Bonanza Power Station (hereafter referred to as the "Bonanza Power Station" or "BPS"), a 500-megawatt coal-fired electric generating facility located approximately 30 miles west of the Deserado Coal Mine, in Uintah County, Utah. This region of Uintah County, Utah is referred to a the Uinta Basin. A Google Earth map showing the location of the Deserado Coal Mine and the Bonanza Power Station is below.



The Deserado Mine is a "captive mine" since all coal produced is sold and transported via a 37-mile long electric rail to its sole customer, the BPS. See EA at 9. The BLM states it is a "certainty" that all coal produced as part of the Blue Mountain Energy Coal Lease will be consumed by the BPS. *Id*. at 23. Just as mining is a logical consequence of issuing a lease for continued operation of the mine (*see* EA at 28), continued operation of the BPS is a logical consequence of issuing the lease. Indeed, the BLM estimates the proposed lease contains enough coal to keep the plant operating an additional 10 years. *See* EA at 7. Because the lease and the BPS are inextricably linked, the extended operation of the BPS resulting from the lease is a "connected action" under NEPA and therefore must be considered as part of the proposed action.

The full environmental impacts of the BPS have not been analyzed or addressed in decades. An EIS was prepared for the BPS in 1981 in conjunction with a right-of-way issued by the BLM for the construction of the power plant (hereafter referred to as the "1981 Bonanza EIS"). Since that time, substantial new information of material relevance to the impacts of the BPS, including its air quality impacts, has come to light. Among other things, new air quality standards have been adopted by the U.S. Environmental Protection Agency, new species have been listed under the Endangered Species Act and their critical habitats designated, and new cumulative impacts have developed, including impacts related to the development of oil and gas in the region. As a connected action, the BLM was obligated to address the BPS's impacts in order to justify its DR and FONSI for the Blue Mountain Energy Coal Lease. It did not.

BLM's DR and FONSI are further belied by the Agency's failure in its EA to adequately address the direct, indirect, and cumulative impacts of the Blue Mountain Energy Coal Lease to air quality. Available monitoring data shows that Rio Blanco County, where the Deserado Coal Mine is located, is in violation of National Ambient Air Quality Standards ("NAAQS") for ground-level ozone, the key ingredient of smog. While disturbing, this violation appears linked to a regional ozone problem that is being fueled by industrial development. For several years now, ozone monitors in neighboring Uintah

County, Utah to the west, where the BPS is located, have recorded exceptionally high ozone concentrations. Several monitors in Uintah County are already in violation of the NAAQS.

Not only does the BLM's failure to adequately analyze and assess the potentially significant air quality impacts render its DR and FONSI wholly unsupported, it indicates the Agency failed to ensure that air quality standards will be protected in accordance with the Federal Land Policy and Management Act ("FLPMA").

Guardians respectfully requests that the IBLA set aside BLM's decisions to authorize the lease and remand to the BLM to achieve compliance with NEPA and FLPMA.

II. APPELLANT IS A PARTY WHO IS ADVERSELY AFFECTED

To maintain an appeal, an Appellant must (1) be a party to the case; and (2) be adversely affected by the decision being appealed. *See* 43 C.F.R. § 4.410(a). Guardians satisfies both these requirements.

WildEarth Guardians is a registered non-profit corporation whose purpose is the conservation of natural resources. With more than 5,000 members, WildEarth Guardians' mission is to protect and restore the wildlife, wild places, and wild rivers of the American West. WildEarth Guardians is headquartered in Santa Fe, New Mexico, but has offices in Denver, Colorado and Tucson, Arizona. Through its Climate and Energy Program, Guardians works to safeguard the climate, clean air, and communities of the American West by promoting a sensible transition to renewable energy.

To be a party to the case, a person or group must have actively participated in the decisionmaking process regarding the subject matter of the appeal. See 43 C.F.R. § 4.410(b). Here, WildEarth Guardians submitted comments to the BLM regarding the Blue Mountain Energy Coal Lease during the public comment periods provided by the BLM. WildEarth Guardians submitted scoping comments on the Proposed Blue Mountain Coal Lease on January 11, 2012 and also filed comments on the Draft EA on October 5, 2012. Thus, WildEarth Guardians satisfies the "party to a case" qualification.

To demonstrate that it will "be adversely affected by the decision being appealed," a party must demonstrate a legally cognizable "interest" and that the decision appealed has caused or is substantially

likely to cause injury to that interest. *Glenn Grenke v. BLM*, 122 IBLA 123, 128 (1992); 43 C.F.R. § 4.410(d). This requisite "interest" can be established by cultural, recreational, or aesthetic uses as well as enjoyment of the public lands. *Southern Utah Wilderness Alliance*, 127 IBLA 325, 326 (1993); *Animal Protection Institute of America*, 117 IBLA 208, 210 (1990). The IBLA does not require a showing that an injury has actually occurred. Rather, a colorable allegation of injury suffices. *Powder River Basin Resource Council*, 124 IBLA 83, 89 (1992). Moreover, it is not necessary for parties to show that they have actually set foot on the impacted parcel or parcels to establish use or enjoyment for purpose of demonstrating adverse effects. Rather, "one may also establish he or she is adversely affected by setting forth interests in resources or in other land or its resources affected by a decision and showing how the decision has caused or is substantially likely to cause injury to those interests." *Coalition of Concerned National Park Retirees*, et al., 165 IBLA 79, 84 (2005).

Attached as Exhibit 1 is the Declaration of Jeremy Nichols. It shows he is a member and employee of WildEarth Guardians. *See* Exhibit 1 at ¶ 3. His Declaration shows he personally uses and enjoys the area that will be directly and indirectly affected by the Blue Mountain Energy Coal Lease, as well as areas and resources that will be affected by the Bonanza Power Station, for recreational, aesthetic, educational, and conservation purposes, and that he intends to return to the area for enjoyment. *See id*. at ¶ 8-9. Mr. Nichols' Declaration establishes that the BLM's decision to offer for sale and execution the Blue Mountain Energy Coal Lease will adversely affect his recreational, aesthetic, educational, and conservation interests, which are legally cognizable, in these areas through increased air pollution and other environmental impacts. *See id*. at ¶ 32-38. Mr. Nichols' Declaration establishes that the BLM's DR will adversely affect WildEarth Guardians.

III. STATEMENT OF REASONS

For the following reasons, Appellants request that IBLA set aside and remand the BLM's decision to offer for sale and issuance the Blue Mountain Energy Coal Lease.

A. The BLM Failed to Demonstrate the Impacts of Approving the Coal Lease Will Not be Significant as required by NEPA.

The IBLA has set forth the BLM's duties under NEPA in many proceedings. See e.g. *Center for Native Ecosystems*, 170 IBLA 331, 344-345 (2006). Noting that "NEPA is designed to 'insure a fully informed and well-considered decision,'" the IBLA has explained that NEPA requires a consideration of the potential environmental impacts of a proposed action, including a consideration of the unavoidable adverse impacts of a proposed action, alternatives to it, the relationship between short-term uses of the environment and its long-term productivity, and irreversible commitments of resources from implementing a proposed action. *Id*.

Where the BLM prepares an EA and concludes that an EIS is not required, the IBLA has held that such decisions will comply with NEPA:

> ...if the record demonstrates that the agency has considered all relevant matters of environmental concern, taken a 'hard look' at potential environmental impacts, and made a convincing case that any potentially significant impact will be reduced to insignificance by imposing appropriate mitigation measures.

National Wildlife Federation, 170 IBLA 240, 244 (2006). Appellants are cognizant of the IBLA's holding that "[a]n appellant seeking to overcome a FONSI bears the burden of demonstrating, with objective proof, that the BLM has failed to adequately consider an environmental question of significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA." *Id*.

Here, the BLM failed to comply with the requirements of NEPA in its authorization of the Blue Mountain Energy Coal Lease because it failed to appropriately analyze and assess the impacts of the BPS, a connected action under NEPA, and failed to adequately analyze and assess air quality impacts, specifically impacts to the ozone NAAQS. By failing to address these impacts, the BLM has failed to demonstrate the impacts of approving the coal lease will not be significant.

1. The BLM Failed to Adequately Analyze and Assess the Impacts of Extended Operation of the Bonanza Power Plant, a connected action under NEPA.

The IBLA has stated, a "connected action must be considered to be a part of the proposed action

when determining whether a proposed action will have a significant effect on the human environment." *Glacier-Two Medicine Alliance Et. Al*., 88 IBLA 133 (1985), 134. The Tenth Circuit Court of Appeals has further explained,"[o]ne of the primary reasons for requiring an agency to evaluate 'connected actions' in a single NEPA analysis is to prevent agency from minimizing the potential environmental consequences of a proposed action (and thus short-circuiting NEPA review) by segmenting or isolating an individual action that, by itself, may not have a significant environmental impact." *Citizens' Committee to Save our Canyons v. U.S. Forest Service,* 297 F.3d 1012, 1029 (10th Cir. 2002) (citations omitted). Thus, the IBLA must set aside and remand an EA that fails to consider the impact of connected actions. *Sierra Club Et. Al*., 111 IBLA 122, 123 (1989). Here, the BLM failed to adequately consider impacts of a connected action, the extended operation of the Bonanza Power Station, and therefore the Blue Mountain Energy EA must be set aside.

a. Operation of the Bonanza Power Station is a Connected Action.

The operation of the Bonanza Power Station is a "connected action" under NEPA. A "connected action" is defined as one that is "closely related" to other actions and is identified based on three factors in NEPA's implementing regulations. Actions are "connected" if they:

> (i) automatically trigger other actions which may require environmental impact statements.
> (ii) cannot or will not proceed unless other actions are taken previously or simultaneously.
> (iii) are interdependent parts of a larger action and depend on the larger action for their justification."

40 C.F.R. § 1508.25(a)(1). To determine whether actions are connected, the Tenth Circuit applies the "independent utility test," which asks whether "each of the two projects *would* have taken place with or without the other" *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F. 3d 1220, 1229 (10th Cir. 2008) (emphasis added) (quoting *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006); *see also Wetlands Action Network*, 222 F.3d at 1118 ("[W]e have rejected claims that actions were connected when each of the two projects would have taken place with or without the other and thus had independent utility." (internal quotation marks omitted)); *South Carolina v. O'Leary*, 64 F.3d 892, 899 (4th Cir. 1995) (holding that actions are not "connected" when they are "independent and separable").

The proposed lease and the extended operation of the BPS that will result from the proposed lease are connected actions because they "cannot or will not proceed" without one another and have no independent utility.

As the Blue Mountain Energy EA makes clear, the Deserado Mine is a "captive mine," since all coal produced is sold and shipped to its sole customer, the Bonanza Power Plant. EA at 4. The BLM "knows with certainty that all of the coal produced [from the proposed lease] will be used to generate electricity, and further, that the produced coal will be consumed entirely by the… Bonanza Power Station in Utah." EA at 23. In turn, the Deserado Mine is the sole fuel source for the BPS and the two are connected with a designated electric rail line. As Blue Mountain Energy Stated in their lease application, "The Deserado Mine is the primary fuel supplier to the Bonanza Station and its rate of coal production is dictated by the fuel requirements of the station." Blue Mountain Energy, "Federal Coal Mining Lease Application, Red Wash Tract, Rio Blanco County, Colorado" (January 2011) at 6.[1] Not surprisingly, Blue Mountain Energy is a subsidiary of DG&T, the owner and operator of BPS.

The Deserado Mine currently produces coal at a rate of approximately 2 million tons of deliverable coal per year and has approximately eight to nine years of recoverable coal reserves in existing leases. *See* EA at 7. Expecting the rate of production at the mine to remain constant, the BLM anticipates that the addition of the estimated 21.3 million tons of coal in the proposed lease will extend development at the Deserado Mine an additional ten years, (extended from ending in 2021 or 2022 to ending in 2032), thereby extending the life of the BPS. *See id*. This "life extension" of the Bonanza Power Plant is clearly an action that is connected with the Blue Mountain Energy coal lease that must be considered in the same NEPA analysis.

Though there is some tension in some courts' inconsistent usage of the terms "could" and "would" in determining whether an action is "connected" for purposes of NEPA analysis, the regulations

[1] This lease application was provided to Guardians by the BLM in response to a Freedom of Information Act ("FOIA") request filed pursuant to 5 U.S.C. § 552 for records related to the Blue Mountain Energy Coal Lease DR, FONSI, and EA. This FOIA is attached to this appeal as Exhibit 2. This application should therefore be included as part of the administrative record submitted to the IBLA.

make clear that an action is connected if it "[c]annot *or* will not proceed unless other actions are taken simultaneously." 40 C.F.R. § 1508.25(a)(1)(ii) (emphasis added). Therefore, "even if an action could conceivably occur without the previous or simultaneous occurrence of another action, if it would not occur without such action it is a 'connected action' and must be considered with the same NEPA document as the underlying action." *Diné Citizens Against Ruining our Environment v. Klein*, 747 F.Supp 2d 1234, 1254 (D.Colo. 2010) (holding that road relocation and coal mine permit revision approval were connected actions where road *would* not be relocated without approval of the coal mine permit revision; ordering remand of EA over failure to analyze and assess connected actions).

Here, the Deserado Mine and the Bonanza Power Station are firmly linked and therefore an expansion of the former is necessarily an extension of the operation of the latter. Using the Tenth Circuit's "independent utility" test, the question here is straightforward: Would the operation of the Bonanza Power Station be extended without the approval of the Blue Mountain Energy Coal Lease? The answer is similarly straightforward: "no." But for the approval of the Blue Mountain Energy Coal Lease, the life of the Bonanza Power Station would not be extended. In accordance with NEPA, the BLM was therefore obligated to analyze and assess the impacts of this connected action to support its EA and FONSI.

b. The BLM Failed to Adequately Analyze and Assess Significant Impacts Associated with Extended Operation of the Bonanza Power Station.

Although extended operation of the Bonanza Power Station is a connected action, the BLM failed to adequately analyze and assess the plant's environmental impacts. Instead, in the EA, the BLM mentions the environmental impacts of the BPS only as cumulative or indirect impacts of the mine. *See, e.g.* EA at 28. As the U.S. District Court for the District of Colorado has explained, the distinction between a cumulative impact and a connected action is significant because it determines the "content, scope and/or depth of the [NEPA] analysis." *Colorado Wild Inc. v. U.S. Forest Service*, 523 F. Supp.2d 1213, 1226 (D.Colo. 2007) (pointing to a "heated debate" between the Forest Service and its EIS contractor on whether certain actions should be analyzed as connected actions or as cumulative impacts as

evidence of the importance of the distinction). Because a connected action is part of the proposed action, agencies must fully address the direct, indirect, and cumulative impacts of the connected action just as they must for any other part of the proposed action. The Blue Mountain Energy EA utterly fails to satisfy NEPA's mandate to take a "hard look" at the BPS's direct, indirect, and cumulative impacts on the human environment and therefore failed to justify its DR and FONSI for the Blue Mountain Energy Coal Lease. Of particular concern is that the EA does not analyze or assess the impacts of BPS to fish and wildlife, water quality, air quality, and lands in the region.

This failure is particularly egregious in light of the fact that the BLM has already determined the environmental impacts of the BPS are significant. Indeed, in 1981, when the BLM issued a right-of-way authorizing the construction and operation of the power plant, the Agency determined that the plant would have significant impacts on the human environment, as evidenced by the fact that the Agency prepared an EIS in conjunction with the project. *See* Exhibit 3, U.S. Department of Agriculture Rural Electrification Administration and BLM, "Moon Lake Power Plant Project Units 1 and 2 Final Environmental Impact Statement" (April 1981). The BLM does not address this prior significance determination in its EA or FONSI.[2]

Furthermore, substantial new information of material relevance to the impacts of the BPS indicates that this EIS is woefully outdated. Most significantly, the EIS assumed that the life BPS would be only 35 years, thereby ending in 2016. *See* Exhibit 3 at 6, 39, 50, 64, etc. (the EIS states in numerous places that the expected life of the Bonanza Power Station would be 35 years). Yet here, BLM's own disclosures in the EA indicate the life of the BPS would be extended for sixteen additional years, or until 2032. Such a life extension, and the associated environmental impacts of this life extension, was clearly not contemplated in the 1981 EIS and was certainly not analyzed or assessed in the EA at issue here.

[2] It is also notable that the 1981 EIS was not considered at all by BLM in issuing its DR and FONSI for the Blue Mountain Energy Coal Lease. This EIS was not provided to Guardians as a record related to the DR and FONSI, despite a request under FOIA for such records, and is not referenced by the BLM in its EA. This further indicates the BLM did not give adequate consideration to the potentially significant environmental impacts of this connected action.

There are other major indications that the 1981 EIS falls short of covering up the BLM's failure to analyze and assess the potentially significant impacts of the Bonanza Power Station, further demonstrating that the EA fails to adequately address this connected action.

For instance, since 1981, a number of new air quality standards have been adopted by the U.S. Environmental Protection Agency ("EPA"), including: national ambient air quality standards ("NAAQS") limiting 8-hour ozone concentrations to no more than 0.075 parts per million, which were adopted in 2008, (*see* 40 C.F.R. § 50.15); NAAQS limiting 1-hour concentrations of nitrogen dioxide ("NO_2") to no more than 100 parts per billion, which were adopted in 2010 (*see* 40 C.F.R. § 50.11(b)); NAAQS limiting 1-hour concentrations of the sulfur dioxide ("SO_2") to no more than 75 parts per billion, which were adopted in 2010 (*see* 40 C.F.R. § 50.17); NAAQS that limit 24-hour concentrations of particulate matter less than 10 microns in diameter ("PM_{10}") to no more than 150 micrograms per cubic meter, which were adopted in 1987 (*see* 40 C.F.R. § 50.6); NAAQS limiting 24-hour concentrations of particulate matter less than 2.5 microns in diameter ("$PM_{2.5}$") to no more than 35 micrograms per cubic meter, which were adopted in 2006 (*see* 40 C.F.R. § 50.13); NAAQS limiting annual concentrations of $PM_{2.5}$ to no more than 12 micrograms per cubic meter, which were adopted at the end of 2012 (*see* 78 Fed. Reg. 3806 (Jan. 15, 2013); among others.[3] Although the EA generally discloses the type and amount of air emissions released by BPS (*see* EA at 23), there is no actual analysis or assessment as to how these emissions affect air quality in the context of these air quality standards.

Additionally, since 1981, new species have been listed under the Endangered Species Act, 16 U.S.C. § 1531, *et seq*., and their critical habitats designated that may be affected by the Bonanza Power Station. These species include the razorback sucker, which was listed as endangered in 1991. *See* 56 Fed. Reg. 54957 (Oct. 23, 1991). Critical habitat for the razorback sucker was subsequently designated in 1994 and includes portions of the White River in Uintah County, Utah, which is near BPS. *See* 59 Fed. Reg. 13374, 13399 (March 21, 1994). A number of other species are being considered for listing under

[3] The EA discloses a number of these air quality standards, including the date of promulgation. *See* EA at 15-16.

the Endangered Species Act that may be impacted by the Bonanza Power Station, including the greater sage grouse, which became a candidate for listing in 2010. *See* 75 Fed. Reg. 13910 (March 23, 2010). There is no analysis or assessment in the EA of the impacts of the BPS to the razorback sucker or its critical habitat, as well as other species being considered for listing under the Endangered Species Act.

Finally, since 1981, new cumulative impacts have developed, including impacts related to the development of oil and gas in the region. Simply put, conditions have changed in the region since 1981, underscoring that the BLM's decision to issue the Blue Mountain Energy Coal Lease must be set aside due to the Agency's failure appropriately analyze and assess the direct, indirect, and cumulative impacts of the Bonanza Power Station.

i. The BLM Specifically Failed to Adequately Analyze and Assess the Impacts of Extending Operation of the Bonanza Power Station to Air Quality.

The failure of the BLM to adequately analyze and assess the direct, indirect, and cumulative impacts of extending the operation of the Bonanza Power Station is especially evident with regards to air quality impacts.

Here, instead of analyzing BPS's direct, indirect, and cumulative impacts to air quality, the Blue EA addresses the BPS's impacts to air quality as merely indirect and cumulative impacts of the mine. Furthermore, even this analysis is cursory at best as the EA provides only a table of estimated emissions resulting from coal combustion at BPS. *See* EA at 23. The EA makes no effort to assess whether these emissions are significant, particularly in the context of their impacts to the NAAQS identified in the EA on pages 15-16. Instead, the Blue Mountain Energy EA only discusses potential air quality impacts of emissions from the mine itself, and only in the limited context of Rio Blanco County, Colorado. EA at 25-27. There is no analysis or assessment at all of the impacts of BPS emissions on air quality.

To the extent the EA attempts to address the potentially significant impacts of BPS to air quality, it does so only in the context of BPS as a cumulative impact. *See* EA at 28-29. This discussion, however, sheds no light on the actual impacts of BPS to air quality in the region, as it contains no actual analysis or assessment of air quality impacts. Instead, the EA incorporates by reference an analysis prepared in 2007

by the EPA in support of an air pollution permit for a new waste coal-fired combustor unit at the Bonanza Power Plant. *See* EA at 28-29. Reliance on this six year-old "analysis," however, is problematic in several regards and does not serve to demonstrate that the air quality impacts of BPS as a connected action were adequately analyzed and assessed in accordance with NEPA.[4]

To begin with, it is important to point out that the BLM's reliance on the EPA's Statement of Basis is impermissible tiering to a non-NEPA document. *Kern v. U.S. BLM*, 284 F.3d 1062, 1073 (9th Cir.) ("tiering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA.") Though an EA may tier to a NEPA document such as an EIS in order to eliminate repetitive discussions of issues and allow focus on the issues ripe for decision, the relevant question is whether the tiered document adequately addresses the environmental effects of the proposed actions. *See Utah Chapter of the Sierra Club, Et al*., 123 IBLA 302 (1992). Here, the Statement of Basis is not a NEPA document and it does not adequately analyze and assess the environmental effects of extending operations at the Bonanza Power Station.

Although Guardians submits that reliance on the Statement of Basis is misplaced because it was not meant to analyze the full scope of potentially significant air quality impacts associated with BPS (the analysis in fact only analyzed the impacts of a new "waste coal-fired combustor unit" and only to a subset of air quality standards (*see* Exhibit 1 at Exhibit C at 148)), nor was it meant to assess the significance of these impacts in accordance with NEPA, reliance on the Statement of Basis is unfounded simply because it is outdated and no longer accurate. Simply put, although EPA's Statement of Basis may have served to analyze a subset of the air quality impacts of BPS in 2007, it does not serve to analyze the full air quality impacts of BPS today.

The Statement of Basis in fact fails to address the impacts BPS to air quality standards recently promulgated by the EPA, including NAAQS for ozone promulgated in 2008, NAAQS for $PM_{2.5}$ promulgated in 2006 and 2012, NAAQS for SO_2 adopted in 2010, and NAAQS for NO_2 adopted in 2010.

[4] The Statement of Basis is attached to Exhibit 1, Mr. Nichols's Declaration, as Exhibit C.

The Statement of Basis provides no analysis at all of the impacts of BPS to ambient concentrations of $PM_{2.5}$. Further, as Mr. Nichols' Declaration attests, the analysis fails to actually analyze the impacts of BPS to ambient ozone concentrations. *See* Exhibit 1 at ¶ 31. Worse, to the extent the Statement of Basis actually reviews ozone monitoring data, the data reviewed by the EPA was from a monitoring site 150 miles away at Canyonlands National Park and was gathered prior to January 2000. *See id*. This is a significant oversight.

Indeed, ozone monitors within Uintah County and near BPS are now showing that the region is suffering excessively high levels of ozone pollution and is actually violating the current NAAQS. A report prepared by Mr. Nichols and attached to his Declaration illustrates the severity of the problem in the Uintah County. *See* Exhibit 1 at Exhibit A. The report discloses, for example, that so far in 2013, Uintah County has experienced 43 days of ozone exceedances. *See* Exhibit 1 at ¶ 22. On 11 of those days, 8-hour ozone concentrations exceeded 0.115 parts per million. *See id*. The report discloses that three monitoring sites in Uintah County—one in Ouray, one in Redwash, and one in Dinosaur National Monument—are already violating the ozone NAAQS. *See* Exhibit 1 at Exhibit A at 31. The report further discloses that after 2013, additional monitoring sites in the region are likely to fall into violation due to excessively high ozone levels. *See id*.

The failure to at least address the impacts of BPS to ambient ozone concentrations is of great concern in light of the fact that the facility is a large source of both nitrogen oxide ("NO_x") and volatile organic compound ("VOC") emissions. *See* EA at 23. As the BLM discloses, NO_x and VOCs are ozone precursors. Once emitted, they react with sunlight to form ground-level ozone. *See id*. at 17.

In response to comments from Guardians on this issue, BLM suggested that "ozone is not a pollutant of concern" (*see* EA at B-4) with regards to the Blue Mountain Energy Coal Lease. This assertion is belied both by the fact that the Agency did not analyze the impacts of BPS to ambient ozone concentrations and the fact that the Agency failed to address ozone monitoring data from Uintah County indicating that the NAAQS are being violated.

The BLM's failure to adequately analyze and assess the air quality impacts of BPS further underscores the failure of the Agency to appropriately analyze and assess connected actions in the EA and failure to justify a FONSI.[5]

2. The EA Fails to Adequately Analyze and Assess Potentially Significant Ozone Air Quality Impacts

As the Tenth Circuit has stated on numerous occasions, NEPA prescribes the process by which agencies must take a "hard look at the environmental consequences of proposed actions utilizing public comment and the best available scientific information." *Custer County Action Ass'n, et al. v. Garvey*, 256 F.3d 1024 , 1035 (10th Cir. 2001); *see also Lee, et al. v. U.S. Air Force*, 354 F. 3d 1229, 1245 (10th Cir. 2004). Here, the BLM failed to take a hard look at potentially significant ozone air quality impacts required by NEPA, further indicating that its FONSI lacks support and its DR fails to comply with NEPA.

a. The BLM Failed to Address Monitoring Data Showing that Rio Blanco County is in Violation of the Ozone NAAQS

To begin with, it is important to point out that monitoring data gathered so far in 2013 indicates that Rio Blanco County is, in fact, violating the ozone NAAQS.

A violation of the ozone NAAQS is triggered whenever the "3-year average of the annual fourth-highest daily maximum 8-hour average O_3 [ozone] concentration" is higher than 0.075 parts per million. 40 C.F.R. § 50.15(b). Here, monitoring data gathered in Rangely, Colorado in Rio Blanco County so far

[5] The BLM also appears to justify its decision to complete no analysis of the BPS's air quality impacts based on its assertion that the EPA, not the BLM is the regulatory authority that authorizes emissions and controls implementation for the BPS. According to BLM, it therefore has no authority to require controls, monitoring, or reporting for emissions resulting from the BPS. *See* EA at 29. BLM's authority over BPS has nothing to do with its duties under NEPA to analyze and assess the direct, indirect, and cumulative impacts of connected actions, nor does any question of authority preempt the BLM's duties under NEPA. Regardless, the BLM is not powerless to address impacts of operation of the Bonanza Power Station. Here, the BLM could easily use authorities to mitigate environmental impacts under NEPA, as well as its authorities under the Mineral Leasing Act, to condition approval of the Blue Mountain Energy Coal Lease such that DG&T, arguably the owner of the Deserado Coal Mine, would address emissions at BPS. The Mineral Leasing Act in particular states that "[t]he Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do *any and all things necessary* to carry out and accomplish the purposes of [the Act]." 30 U.S.C. § 189 (emphasis added); *see also id*. at § 207 ("The [coal] lease shall include such other terms and conditions as the Secretary shall determine."); 43 C.F.R. § 3475.1 (the Secretary "may add such additional stipulations and conditions as he/she deems appropriate" to coal leases).

in 2013, coupled with data from this monitoring site in 2012 and 2011, confirms that the three year-average of the annual fourth highest daily maximum 8-hour average ozone concentration is currently 0.077 parts per million. This data, which is publicly available on the EPA's own website, is presented in the Declaration of Mr. Nichols. *See* Exhibit 1 at ¶¶ 20-23. This data shows that so far in 2013, the monitoring site in Rangely has experienced eight exceedances of the ozone NAAQS and that the fourth highest value for 2013 is already 0.091 parts per million, well above the standard. Averaged together with fourth highest values from 2011 and 2012, this 0.091 parts per million value was enough to push the region into violation.

This revelation has substantial bearing on the adequacy of BLM's analysis of the ozone impacts of the Blue Mountain Energy Coal Lease. Indeed, the Agency asserts in the EA that ozone is "not a pollutant of concern" based on its assertion that Rio Blanco County is not in violation of the ozone NAAQS. This is clearly not the case. Although certainly Rio Blanco County may not have been in violation prior 2013, the fact that the monitoring site in Rangely, Colorado is now in violation flatly contradicts the BLM's claim that the impacts of the Blue Mountain Energy Coal Lease to ambient ozone concentrations will not be significant. For this reason alone, the IBLA should remand the BLM's decision due to its failure to demonstrate that an EIS is not appropriate in light of potentially significant ozone impacts. However, there are other substantial flaws in the Agency's analysis of ozone impacts that warrant a remand.

b. The EA Fails to Demonstrate that Emissions will not Significantly Impact Ozone Levels

In addition to the BLM's failure to accurately analyze the ozone status of Rio Blanco County, the Agency further failed to demonstrate that ozone impacts will not be significant as follows.

i. The BLM Failed to Analyze and Assess the Ozone Impacts of the Bonanza Power Station

As discussed above, the BLM failed to adequately analyze and assess the impacts of BPS to ambient ozone concentrations. The EA in fact only mentions the Deserado Coal Mine and "Deserado Mine sources" in the context of potentially significant ozone impacts. EA at 26. There is no

acknowledgement that the Bonanza Power Station may pose significant ozone impacts and no attempt to analyze these impacts. This failure is particularly troublesome given that the EA discloses BPS is a very larges source of NO_x and VOC emissions, the very emissions that form ozone. According to the EA, the plant releases 8,522.64 tons of NO_x and 68.35 tons of VOCs annually (*see* EA at 23), whereas the Deserado Coal Mine is reported to release 30.5 tons of NO_x and 8.1 tons of VOCs annually. *See* EA at 22. By overlooking such a large source of ozone forming emissions, the BLM has overlooked potentially significant impacts.

ii. The BLM Fails to Demonstrate that Emissions from the Deserado Coal Mine are not Significant

A key assertion underlying BLM's FONSI with regards to ozone impacts is the Agency's belief that "[t]he Deserado Mine sources (including all of the diesel fired mobile sources) and associated processing equipment are not significant sources of NO_x or VOC emissions...and therefore the mine's operations are not expected to contribute significantly to any regional ozone formation potential." EA at 26. This assertion is flatly unsupported in two key regards.

First, the BLM assumes that that the "ozone formation potential from area emissions should remain small." EA at 26. Although there is no information or analysis cited or presented in the EA to support this assumption (the BLM in fact admits that the only "full scale photochemical grid modeling" can reasonably predict impacts), it is belied by the fact that even a "small" ozone formation potential would appear to pose significant impacts in light of the fact that Rio Blanco County is now violating the ozone NAAQS.

Indeed, a key underpinning of BLM's FONSI is the Agency's belief that, "[t]he cumulative impacts of the Proposed Action are not anticipated to exceed any NAAQS, or to push the region into nonattainment for any NAAQS, and should not result in any net change to baseline air quality given that the mine and Bonanza Power Station are existing sources within the regional emissions profile." EA at 30. However, this underpinning now lacks any validity. The cumulative impacts of the mine (i.e., the impacts of the mine combined with "past, present, and reasonably foreseeable impacts" (*see* 40 C.F.R. §

1508.8)), clearly appear to be anticipated to exceed the ozone NAAQS and push the region into nonattainment (or deeper into nonattainment, as the case may be). Regardless of BLM's assertion that the mine and the Bonanza Power Station are "existing" sources, clearly these existing sources are likely now contributing to a very serious ozone problem, in other words a very serious potentially significant impact that has not been addressed.

Second, BLM's assertion that emissions from the Deserado Coal Mine are not significant are undercut by the Agency's explicit acknowledgement that it did not quantify total VOC emissions from methane venting associated with mining activities. As the BLM states, VOC emissions "would be released as a result of CMM [coal mine methane] venting." EA at 20. Unfortunately, the BLM made no effort to quantify these emissions.[6] Instead, and rather confusingly, the BLM seems to indicate it intends to wait for the Colorado Department of Public Health and Environment ("CDPHE") and/or Blue Mountain Energy to quantify these emissions. *See id*. This is confusing because, under NEPA, the BLM has a duty to analyze and assess potentially significant impacts to ensure a well-informed decision. Simply "punting" to another agency (to boot, a state agency with no obligation to comply with NEPA), or even the mine itself, clearly indicates that BLM did not analyze or assess potentially significant impacts and therefore that it did not issue a well-informed decision or a justified FONSI.

At the least, the failure of the BLM to quantify VOC emissions indicates that the ozone impacts of the Deserado Coal Mine are uncertain at best. Under NEPA regulations, "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks" must be evaluated when assessing the significance of a major federal action. 40 C.F.R. § 1508.27(b)(5). Here, in light of the BLM's failure to even attempt to quantify VOC emissions associated with methane, it appears clear that the impacts of VOC emissions from the Deserado Coal Mine are "highly uncertain or involve unique or unknown risks." Despite this, the Agency made no effort to assess significance in this regard. In fact, in its FONSI, the BLM does not acknowledge any uncertainty, or any unique or unknown

[6] In fact, the BLM made no effort at all to analyze these emissions and whether they are significant, whether from a quantitative or qualitative standpoint.

risks for that matter, associated with VOC emissions related to methane venting. Rather, the Agency asserts "[t]here are no predicted potential effects to the human environment that are considered to be highly uncertain or to involve unique or unknown risks." FONSI at 2. In light the BLM's explicit disclosure that it failed to quantify VOC emissions associated with methane venting, this assertion is erroneous and BLM's claim that emissions from the Deserado Coal Mine are not significant is unfounded.

iii. Ozone Modeling Prepared for the White River Field Office Does not Demonstrate that Ozone Impacts are not Significant

The BLM finally asserts in its response to comments that ozone modeling prepared for a draft resource management plan in the White River Field Office of Colorado demonstrates that emissions "within the field office and adjacent planning areas...would still allow for attainment of the ozone standard within the planning area." EA at B-6. The BLM seems to point to this modeling as further support for its assertion that ozone impacts will not be significant.

To be certain, the BLM did prepare a comprehensive model of ozone impacts in conjunction with its draft resource management plan, and Guardians does not question the validity of that model and the methodologies relied upon in preparing that model. Guardians does, however, question whether the modeling is now accurate in light of ozone monitoring data demonstrate that Rio Blanco County—within the White River Field Office—is now in violation of the ozone NAAQS.

That the modeling is now inaccurate is not surprising. In his Declaration, Mr. Nichols identifies that the modeling only utilized monitoring data from one site in the Uinta Basin region (i.e., the region nearest the Deserado Coal Mine), both as an input and as a reference. *See* Exhibit 1 at ¶ 28. This was the monitoring site at Dinosaur National Monument. The modeling projects that this monitoring site will not violate the ozone ambient air quality standards. *See id.* Yet as the data presented in Mr. Nichols' Declaration demonstrates, the monitoring site at Dinosaur National Monument is currently violating the ambient air quality standards, indicating the modeling is not accurate in terms of analyzing or assessing ozone impacts in the region. *See id.* The modeling further indicates that monitoring data from sites in

Rio Blanco County, Colorado and from other sites in neighboring Uintah County, Utah was not utilized for the modeling or referenced to ensure the accuracy of the modeling. *See id.*

According to Mr. Nichols' Declaration, the modeling itself acknowledges a number of gaps, including the "[p]otential inability to accurately model factors contributing to winter ozone events" and "[l]ack of ozone monitoring data that could be used to evaluate model performance at locations within the...WRFO [White River Field Office." Exhibit 1 at ¶ 29. The report acknowledges that, "the Rangely [ozone] monitor's recent high winter ozone values in 2011 indicate that this basin may be experiencing unique winter ozone formation episodes[.]" *Id*. Thus, the modeling clearly acknowledged limitations and these limitations are now coming to bear.

The BLM's misplaced reliance on this ozone modeling, which clearly has major limitations in terms of its ability to reliably demonstrate whether ozone impacts are or are not significant is yet another sign that the Agency failed to adequately analyze and assess the ozone impacts of the Blue Mountain Coal Lease. The BLM's FONSI is therefore unsupported and contrary to NEPA, and its DR must be set aside.

B. The BLM failed to Consider in Detail a Range of Reasonable Alternatives

The EA, rather than presenting a reasonable range of alternatives as is required under NEPA, poses only a single, daunting choice: either opt for the No Action Alternative, in which the coal lease would not be issued and the recoverable coal resources would be bypassed, or select the Proposed Action that would authorize issuance of the lease with no measures to reduce the most significant impacts from the mining and combustion of the produced coal. This is a false choice needlessly pitting resource development against environmental protection and it does not satisfy NEPA's mandate to consider appropriate alternatives.

The two alternatives considered by the BLM in the EA are insufficient to comply with NEPA. NEPA mandates that an agency "shall to the fullest extent possible: use the NEPA process to identify and asses the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these action upon the quality of the human environment." 40 C.F.R. § 1500.2(E). The requirement to evaluate all reasonable alternatives is not simply procedural; NEPA rules state that the alternatives analysis is "the

heart" of the NEPA analysis, the purpose of which is to "provid[e] a clear basis for choice among options by the decision maker and the public." 40 C.F.R. § 1502.14; 42 U.S.C. §§ 4332(2)(E); 40 C.F.R. §1507.2(D). Cognizant of NEPA's alternatives analysis mandate, Guardians urged the BLM in its comments to analyze a range of reasonable alternatives and described several possible alternatives that the BLM could consider in detail either as alternative mitigation measures or as alternatives to the proposed action.[7] *See e.g.* WildEarth Guardians' Scoping Comments (Jan. 11, 2012) at 10-12. Despite these constructive suggestions, the BLM failed to give any consideration to any of these alternatives in the EA, with the exception of alternatives to address methane venting through capture and use, and flaring. In fact, in the BLM's response to public comments, the BLM provided no response whatsoever to Guardian's comments regarding NEPA alternatives. *See* EA at B-2.

It is unclear why the BLM provided no response at all to Guardians' suggested alternatives, particularly given that the alternatives would address issues related to the air quality impacts of the Blue Mountain Energy Coal Lease. Interior Department NEPA regulations indicate that a responsible official may only consider two alternatives in an EA when it is determined "that there are no unresolved conflicts about the proposed action with respect to alternative uses of available resources[.]" 43 C.F.R. § 46.310(b). Clearly, the air quality impacts of the Blue Mountain Energy Coal Lease present "unresolved conflicts" that warranted greater scrutiny of reasonable alternatives. Despite this, there is no explanation as to why BLM refused to analyze in detail the alternatives suggested by Guardians.

[7] The alternatives Guardians described in its scoping comments included 1) limiting the amount of coal tonnage and/or acreage to be leased, 2) requiring mitigation to address the impacts of methane venting as a stipulation to the proposed lease, 3) requiring mitigation to address impacts to air quality such as establishing stronger emission limits at the BPS, use of low-emitting vehicles for the operation of the mine, and securing commitments from other sources in the region to reduce their emissions as compensation for increased emissions resulting from the proposed action, 4) requiring mitigation to address greenhouse gas emissions associated with the proposed action such as increasing efficiency of the BPS, requiring use of low carbon fuels for operation of heavy machinery, and requiring the use of renewable energy to power the mine and rail system, and 5) requiring offsite mitigation or compensation for greenhouse gas and other emissions.

The failure of the BLM to even respond one way or another to Guardians' indicates a failure to comply with NEPA's mandate that agencies consider a range of reasonable alternatives. The BLM's decision to issue the Blue Mountain Energy Coal Lease must therefore be overturned.

C. The BLM Failed to Protect Air Quality Standards in Accordance with the Federal Land Policy and Management Act.

Under FLPMA the BLM has an affirmative duty to ensure compliance with state and federal air quality standards. *See* 43 U.S.C. § 1712(c)(8). Unfortunately, the BLM has failed to ensure compliance with air quality standards in authorizing the Blue Mountain Energy Coal Lease.

FLPMA specifically states that the BLM shall "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." 43 U.S.C. § 1712(c)(8). Additionally, FLPMA and the BLM's own regulations explicitly provide for protection of air resources. 43 U.S.C. § 1701(a)(8) (the public lands shall be "managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values"). The BLM's regulations mandate the "each land use authorization" shall "require compliance with air and water quality standards established pursuant to applicable Federal or State law." 43 C.F.R. § 2920.7(b)(3). FLPMA's requirement to ensure compliance with air quality standards is mandatory. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987). Thus, the BLM must analyze and assess impacts to air quality to ensure compliance with FLPMA.

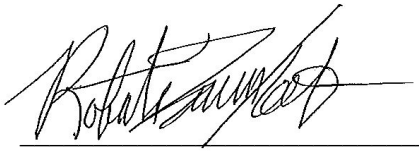
Despite FLPMA's air quality protection mandate, the BLM failed to protect air quality standards in its decision to authorize the proposed lease. This fact is evidenced by the failure of the BLM to analyze and assess the impacts of the Bonanza Power Station to air quality, as well as the Agency's failure to adequately analyze and assess the potentially significant ozone impacts of the Blue Mountain Energy Coal Lease. The fact that BLM's approval of the proposed coal lease comes as several ozone monitors in the region, including the ozone monitor in Rangely, Colorado, are violating the ozone NAAQS. In failing to analyze or assess the impacts of the proposed lease to ambient ozone concentrations, there is absolutely no support for any assertion that the BLM complied

with FLPMA's substantive air quality standard protection requirements. Therefore, the BLM's decision to issued the Blue Mountain Energy Coal Lease must be set aside.

IV. CONCLUSION

For the aforementioned reasons, WildEarth Guardians requests that the IBLA set aside and remand the BLM's decision to offer for sale and issuance the Blue Mountain Energy Coal Lease. The BLM failed to take the requisite "hard look" at the potentially significant impacts of the proposed lease and failed to consider a reasonable range of alternatives, in turn rendering the EA and FONSI legally inadequate. Additionally, the BLM failed to comply with FLPMA's mandate to ensure compliance with air quality standards.

Respectfully submitted this 3rd day of May 2013



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CERTIFICATE OF SERVICE

I certify that on May 3, 2013, I served this Statement of Reasons by certified mail, return receipt requested upon:

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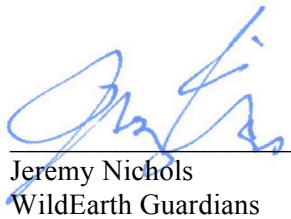

Jeremy Nichols
WildEarth Guardians

TABLE OF EXHIBITS

1. Declaration of Jeremy Nichols

2. WildEarth Guardians' Freedom of Information Act request (March 5, 2013).

3. U.S. Department of Agriculture Rural Electrification Administration and BLM, "Moon Lake Power Plant Project Units 1 and 2 Final Environmental Impact Statement" (April 1981).