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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WILDEARTH GUARDIANS, Petitioner, v. ZINKE, *et al.*, Federal Respondents, [1] and STATE OF WYOMING, ANTELOPE COAL LLC, Intervenor-Respondents,	Case No. 2:16-CV-166-ABJ **FEDERAL RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONER'S OPENING MERITS BRIEFS**

[1] Ryan Zinke was confirmed by the United States Senate as Secretary of the Interior and took his oath of office on March 1, 2017. By operation of Fed. R. Civ. P. 25(d), he is "automatically substituted" for former Secretary S.M.R. Jewell as a party defendant. *See Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1241 n.2 (10th Cir. 2005).

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INTRODUCTION

To conduct surface coal mining operations on federal coal lands in Wyoming, an operator must traverse a three-stage state and federal administrative process. In the first stage, the United States Bureau of Land Management ("BLM") leases federal coal lands under the Mineral Leasing Act of 1920 ("MLA"). In the second stage, the State of Wyoming issues surface mining permits under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), in a program of cooperative federalism. In the final stage, the Secretary, in accord with the MLA and based on the required recommendation of the Office of Surface Mining Reclamation and Enforcement ("OSMRE"), exercises one of three options with respect to state-approved mining plans: approval, disapproval, or approval subject to condition. This final step ensures compliance with the MLA requirement that the Secretary approve all mining plans, *see* 30 U.S.C. § 207(c), regardless of whether surface mining operations are state-permitted, as here, or federally-permitted, as occurs on Indian lands and in states that do not have SMCRA authority.

The Deputy Assistant Secretary lawfully exercised this MLA authority in November 2013 when he approved the mining plan modification at issue here. That modification, in conjunction with a Wyoming-issued SMCRA permit, authorizes Antelope Coal LLC to extend its mining operations at the Antelope Mine into two adjacent tracts of leased federal coal. In support of its recommendation that the Secretary approve the mining plan modification, OSMRE formally adopted a Final Environmental Impact Statement ("FEIS") prepared by BLM. The FEIS, in which OSMRE was a "cooperating agency," *see* 40 C.F.R.

§ 1501.6, was undertaken in support of BLM's 2011 issuance of coal leases for the two tracts at issue.

Petitioner in this National Environmental Policy Act ("NEPA") case claims legal injury from Interior's alleged failure to provide notice of the adoption and asserts Interior erred in approving the modification without taking into account what Petitioner calls "significant new information," *see* ECF No. 85 (Petitioner's Opening Brief) ("Br.") at 26 – information Petitioner says demands a supplemental NEPA process. Petitioner is incorrect in both respects. First, although no regulation specifically requires posting of an adoption notice, OSMRE nonetheless posted a "Statement of NEPA Adoption and Compliance" on its website shortly after it was signed.

Petitioner's additional claims that Interior ignored "significant new information" and failed to consider the severity of greenhouse gas ("GHG") emissions and coal combustion impacts may be rejected either as barred under the doctrine of res judicata, *see MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005), or waived due to Petitioner's failure to alert the agency to its concerns. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004). The claims also fail on the merits because, as explained herein, the FEIS adequately examined GHG emissions and combustion impacts, as the D.C. Circuit recently held, *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013), and for the simple reason that what Petitioner calls "significant new information" does not meet the definition of that phrase in the governing NEPA regulation, 40 C.F.R. § 1502.9(c)(1)(ii), as construed by Tenth Circuit and D.C. Circuit authority.

For all these reasons, Federal Respondents respectfully ask that the Court deny the petition and enter judgment in their favor as a matter of law.

STATUTORY AND REGULATORY BACKGROUND

1. Leasing under the Mineral Leasing Act of 1920

The MLA, 30 U.S.C. §§ 181-287, authorizes the Secretary to lease federal coal deposits. *Id*. § 181. That statute provides that the Secretary shall, on request of a qualified applicant or on his own initiative, "offer [coal] lands for leasing," and "award leases thereon by competitive bidding." *Id*. § 201(a)(1). Regulations implementing the MLA set forth procedures that govern leasing of federal coal. *See* 43 C.F.R. pt. 3420. These procedures include a requirement that BLM prepare an environmental assessment ("EA") or an EIS for the proposed leasing, and "publish notice in the *Federal Register* of the availability of the [EA] or draft [EIS] and of a public hearing required by 43 C.F.R. § 3425.4(a)(1)." 43 C.F.R. § 3425.3(a). The MLA and its implementing regulations also require approval of a mining plan by the Secretary before surface-disturbing activity occurs, 30 U.S.C. § 207(c), 30 C.F.R. § 746.11, based on the recommendation of OSMRE. 30 C.F.R. § 746.13.

2. State Permitting under the Surface Mining Control and Reclamation Act.

SMCRA, 30 U.S.C. §§ 1201-1328, is a comprehensive statute "designed to 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'" *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 268 (1981). The Act establishes a program of cooperative federalism,

allowing states, if they choose, to administer their own regulatory programs within limits established by federal standards and subject to oversight by Interior. *See* H.R. Rep. No. 95-218, at 57 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 595; *Hodel*, 452 U.S. at 289.

Under section 503 of SMCRA, a state may assume primary jurisdiction (or "primacy") over regulation of surface mining by submitting a program proposal to the Secretary and obtaining approval thereof. 30 U.S.C. § 1253. Once a state program is approved, state law then governs regulation of surface coal mining operations in the state. *See Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288-89 (4th Cir. 2001); *see also In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 518 (D.C. Cir. 1981) (en banc). This authority is subject to OSMRE oversight and enforcement, to ensure the effectiveness of the state programs. *See* 30 U.S.C. § 1271.

3. The Wyoming Regulatory Program

Wyoming attained primacy in 1980. *See* 30 C.F.R. § 950.10; *see also* 30 C.F.R. § 950.20 (codification of Wyoming's state-federal cooperative agreement, effective March 18, 1981). As a primacy state, Wyoming state law governs the issuance of surface mining permits in the state. Wyoming exercises its SMCRA authority through its agency, the Wyoming Department of Environmental Quality, Land Quality Division ("Wyoming DEQ"). In its role, Wyoming DEQ considers industry applications for surface mining permits, publishes notices of its proceedings requesting public input, and issues permits under a regulatory program approved by OSMRE. 30 C.F.R. §§ 950.10, 950.15.

To conduct surface coal mining operations, operators must obtain a surface mining permit from Wyoming DEQ. 30 U.S.C. §§ 1253, 1273. However, this delegation of authority, did not and could not delegate the Secretary's duty "to approve mining plans on Federal lands." 30 U.S.C. § 1273(c); *see also* 30 C.F.R. § 745.13(i).

Because authority to approve mining plans rests solely with Interior, a surface mining applicant must submit a Permit Application Package ("PAP") to both OSMRE and Wyoming DEQ. 30 C.F.R. § 950.20, Art. V, ¶ 6. Pursuant to the cooperative agreement, Wyoming DEQ, as the permitting authority, "assume[d] primary responsibility for the analysis, review, and approval or disapproval of the permit application component of the PAP . . . ." 30 C.F.R. 950.20, Art. V. ¶ 7.a. This agreement provides that Interior "concurrently carry out its responsibilities which cannot be delegated . . . ," which includes mining plan approval under the MLA. 30 C.F.R. § 950.20, Art. V, ¶ 7.b.

In addition to state surface mining permits, Wyoming DEQ is also responsible for issuing environmental permits under other statutes that the mines must obtain, including permits related to air and water quality. For example, Wyoming DEQ has delegated authority to issue air quality permits under the Clean Air Act.

4. Mining plan recommendation and approval under the MLA.

The MLA also requires Secretarial approval of a mining plan before significant disturbance to the environment can occur. 30 U.S.C. § 207(c). SMCRA makes clear that this requirement may not be delegated to the states. 30 U.S.C. § 1273(c). Therefore, operators must obtain the Secretary's approval of mining plans of operation before

commencing operations on a federal leasehold. *See* 30 C.F.R. § 746.11(a) ("No person shall conduct surface coal mining and reclamation operations on lands containing leased Federal coal until the Secretary has approved the mining plan."). The Secretary's approval of a mining plan is based on a recommendation from OSMRE. *Id*. § 746.13 (charging OSMRE with preparing and submitting to the Secretary a decision document "recommending approval, disapproval or conditional approval of the mining plan").

5. The National Environmental Policy Act of 1969

NEPA serves the dual purpose of informing decision makers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to the public so that it "may also play a role in both the decisionmaking process and the implementation of that decision." *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA's intent is to focus the attention of agencies and the public on a proposed action so its consequences may be studied before implementation. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

To assist in meeting these goals, NEPA requires preparation of an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), 40 C.F.R. § 1502.3, unless the agency concludes that project impacts will be insignificant and, on that basis, issues a Finding of No Significant Impact ("FONSI"). *See* 40 C.F.R. §§ 1501.3, 1501.4(c), (e), 1508.9. An environmental impact statement must examine, among other things, "alternatives to the

proposed action," and the project's direct, indirect and cumulative impacts. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1502.16, 1508.7.

"Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency." 40 C.F.R. § 1501.6. A "cooperating agency" is defined as "any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in . . . major Federal action significantly affecting the quality of the human environment." *Id.* § 1508.5; *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1242 (10th Cir. 2011). A cooperating agency may adopt "without recirculating" the EIS of a lead agency "when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied." 40 C.F.R. § 1506.3 (c); accord *WildEarth Guardians v. U.S. Forest Serv.*, 120 F. Supp. 3d 1237, 1263 (D. Wyo. 2015).

FACTUAL AND PROCEDURAL BACKGROUND

The Antelope Mine is a surface coal mine located in Campbell and Converse Counties, Wyoming, and is operated by Antelope Coal LLC. OSM016534, OSM000004.[2] It has been in operation since 1985, and acquired its first federally-approved mining plan in 1986. OSM016534. Since then, three mining plan modifications have been approved, including the one at issue in this case. This most recent modification allows operations on

[2] There are two records in this case, one for the BLM leasing decision, and one for decisionmaking by OSMRE and the Office of the Assistant Secretary. Citations to the BLM record begin with "AR" followed by a space and a sequential bates number. Citations to the OSMRE and Assistant Secretarial record begin with "OSM," followed by a sequential bates number, with no additional spaces.

two new leases, designated by BLM as leases WYW163340 and WYW177903. *See* OSM016535. Together the leases comprise 4,746 acres. *Id.*

1. Lease Acquisition

On April 6, 2005, pursuant to the MLA and federal regulations at 43 C.F.R. Subpart 3425 (referred to as the "lease by application" process). Antelope Coal LLC filed an application with BLM's Wyoming State Office (High Plains District) seeking to lease 4,109 acres of coal lands, consisting of two non-contiguous tracts (the "expansion tracts"). AR 05168 (Mar. 25, 2010 Record of Decision). The expansion tracts are located just west of the existing Antelope Mine. *Id.*; AR 05193 (map depicting tracts in cross-hatching). The tracts contain approximately 430 million tons of in-place federal coal. AR 05168.

On October 17, 2006, BLM published notice in the *Federal Register* of its intent to prepare an environmental impact statement and announced a public "scoping" meeting in Douglas, Wyoming, AR 266, which was held on November 1, 2006. *Id.*, AR 00316. In February of the following year, BLM sought public comment on a draft environmental impact statement for the expansion tracts, through another Federal Register notice. *See* Environmental Impacts Statements; Notice of Availability, 73 Fed. Reg. 7555-01, 7555 (Feb. 8, 2008). During the sixty-day comment period, three individuals testified and fourteen groups and individuals submitted written comments, including Petitioner WildEarth Guardians. *See, e.g.*, OSM017246 (Petitioner's April 2008 comments on the Draft EIS). Over the next ten months**,** BLM and OSMRE (as a cooperating agency) completed preparation of the FEIS. AR 4214-4950. On January 23, 2009, in compliance

with 40 C.F.R. § 1506.9, EPA published notice of availability of the FEIS. *See* Notice of Availability of the West Antelope II Coal Lease by Application Final Environmental Impact Statement, Wyoming, 74 Fed. Reg. 4228-01 (Jan. 23, 2009).

On March 25, 2010, BLM's Wyoming State Director approved a record of decision ("ROD") for the leasing decision, authorizing BLM to offer the tracts for acquisition at a competitive lease sale. AR 05188. The ROD modified the nominated tract into two tracts by increasing the tract size to approximately 4,700 acres. *See* AR 05173 (selecting Alternative 2), AR 04074.

Several conservation groups including WildEarth Guardians soon challenged the ROD before the Interior Board of Land Appeals. AR 08845, 08848. Although Petitioner voluntarily dismissed its appeal when the Board denied its request for a stay of the agency decision, AR 09394, the Board nonetheless considered the claims advanced by the other conservation groups. *See Powder River Basin Res. Council*, 180 IBLA 119 (2010). On November 2, 2010, the Board affirmed the decision, clearing the way for a lease sale. AR 09830, 09833. At the June 2011 sale, Antelope Coal LLC was the successful bidder.

2. Wyoming Permit Proceedings

Antelope Coal LLC then submitted a permit application package to Wyoming DEQ, seeking to amend its SMCRA permit for the Antelope Mine, to include the expansion tracts. OSM16541. Wyoming DEQ then commenced its review of the application package, in accord with the governing state-federal cooperative agreement, 30 C.F.R. § 950.20, and its own SMCRA regulations. OSM16536; *see also* OSM00001-27. Thereafter, Wyoming DEQ provided public notice of receipt of the permit application

package in the *Douglas Budget*, a local periodical. The publication notified the public of the availability for review of the administratively complete permit application package. OSM16538. The notice was republished on three other occasions for four consecutive weeks, from December 19, 2012 to January 9, 2013. AR OSM00027, OSM16538. Wyoming DEQ received no objections or other responses to its published notices. *Id.* Following careful consideration, Wyoming DEQ approved the permit on April 29, 2013. AR OSM00001–27.

3. OSMRE Proceedings

As the state reviewed the SMCRA permit Amendment, OSMRE's Western Regional Office in Denver, Colorado was concurrently reviewing the proposed mining plan modification and determined that, under the criteria in 30 C.F.R. §746.18(d), a mining plan approval by the Assistant Secretary was necessary, and it began preparing a recommendation. 30 C.F.R. §746.18(c)

As part of this process, OSMRE took steps to ensure compliance with NEPA and its implementing regulations. This included an "independent review" of the FEIS. *See* OSM16542 (Oct. 28, 2013 Statement of NEPA Adoption and Compliance) ("Statement")**.** The Statement reflected that the FEIS adequately considered and disclosed the environmental impacts of approving the mining plan modification. *Id*. OSMRE subsequently took steps to ensure public notice of its adoption decision. About December 26, 2013, it posted the FEIS Executive Summary on its website. *See* Ex. 1, Declaration of Marcelo Calle ("Calle Decl.") ¶ 4. On January 4, 2014, the agency posted its Statement of NEPA Adoption and Compliance on its website. *Id*. On November 1, 2013, OSMRE's

Western Region Director, sent a memorandum to the OSMRE Director, recommending approval of the mining plan modification. OSM16533.

In the meantime, the Director sent a memorandum also recommending approval of the mining plan modification, to the Assistant Secretary's office for final decision. AR OSM016533–38. The Assistant Secretary signed the mining plan modification approval on November 26, 2013. AR OSM017373–74.

STANDARD OF REVIEW

Challenges to agency actions are reviewed under the standard of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), which allows a court, if the equities so counsel, to vacate agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *S. Utah Wilderness All. v. OSMRE*, 620 F.3d 1227, 1233 (10th Cir. 2010); *see also Marsh*, 490 U.S. at 377 (judicial review of agency NEPA compliance is deferential).

An agency's decision is arbitrary and capricious only 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.

W. Watersheds Project v. BLM, 721 F.3d 1264, 1273 (10th Cir. 2013) (citation omitted); *accord Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). This standard is "very deferential" and the court presumes validity of the action. *W. Watersheds Project*, 721 F.3d at 1273 (citation omitted). Consequently, the court "must uphold the agency's action if it has articulated a rational basis for the decision and has

considered relevant factors." *Wolfe v. Barnhart*, 446 F.3d 1096, 1100 (10th Cir. 2006) (internal citations omitted). Moreover, when examining scientific findings made within an area of an agency's technical expertise, the court must generally be at its most deferential. *Marsh*, 490 U.S. at 376-77; *Balt. Gas & Elec. Co.*, 462 U.S. at 103; *W. Watersheds Project*, 721 F.3d at 1273 (deference is "most pronounced" where "the challenged decision involves 'technical or scientific matters within the agency's area of expertise.'") (quoting *Utah Envtl. Congress v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006)).

ARGUMENT

The Petition for Review charges that OSMRE and the Secretary violated NEPA through their respective roles in approving a mining plan modification at the Antelope Coal Mine encompassing two new leases, designated WYW163340 and WYW177903. Petitioner contends this approval violated NEPA in four ways: first, Interior failed to consider the severity of GHG emissions and combustion impacts; second, OSMRE failed to supplement the FEIS in light of supposedly "significant new information" on air quality and climate change; third, OSMRE failed to perform "its own independent assessment" of an FEIS that OSMRE helped prepare and then later adopted; and fourth, OSMRE failed to provide public notice of its decision to adopt the FEIS prepared by BLM for its leasing decision.

As explained below, all four claims should be rejected as meritless. In addition, the first and second claims may be rejected as waived because Petitioner declined to bring them to the agency's attention during the administrative process, despite ample awareness and opportunity to do so. The first claim may also be rejected as barred under the doctrine

of res judicata. Federal Respondents address the legal defenses of waiver and res judicata in arguments 1 and 2, below, and the merits of all four claims in argument 3.

1. Petitioner's Claims Regarding Climate Change, the Severity of GHG and Combustion Emissions, Air Quality, and Supplementation are Waived.

The Supreme Court has made clear that "[p]ersons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give [issues raised] meaningful consideration." *Pub. Citizen*, 541 U.S. at 764-65 (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (courts should not "topple over administrative decisions unless the administrative body not only has erred but has erred against objection made *at the time appropriate* under its practice (emphasis added)). The Tenth Circuit has echoed these requirements, stating in a NEPA case that claims "not properly raised before an agency are waived, unless the problems underlying the claim are obvious." *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 (10th Cir. 2007) (citing *Pub. Citizen*, 541 U.S. at 764-65 (internal quotation marks omitted)).

Petitioner claims it was left in the dark by a "deeply flawed process," Br. at 3, that deprived its members of their "procedural right under NEPA to be provided with notice," *id*. at 16, but Petitioner is no stranger to the federal coal program. It has filed a dozen or more lawsuits in the past decade challenging federal coal management decisions in the Districts of Wyoming, Colorado, Montana, New Mexico, Utah, and the District of Columbia. Petitioner is also no stranger to the administrative processes that occur in

connection with these decisions, having participated in numerous NEPA processes supporting federal coal decisions throughout the mountain west, including here in Wyoming. In fact, Petitioner formally participated in BLM proceedings for the very FEIS challenged in this case, *see* OSM017246 (Petitioner's Apr. 8, 2008 comment letter), and went on to challenge that same FEIS, without success, in the District Court for the District of Columbia. *WildEarth Guardians v. Jewell*, 880 F. Supp. 2d 77 (D.D.C. 2012); *aff'd*, 738 F.3d 298, 303 (D.C. Cir. 2013). As further indication of its awareness of the mining plan review process, Petitioner sued OSMRE in Colorado in March 2013 – nine months *before* Interior acted in this case – challenging seven distinct mining plan approvals for mines in four states (i.e., Colorado, New Mexico, Montana, and Wyoming). *WildEarth Guardians v. OSMRE*, No. 1:13-CV-00518 (D. Colo. filed Feb. 27, 2013).

These actions demonstrate Petitioner's keen awareness of two important circumstances: first, Antelope Coal LLC's effort to mine the federal coal it leased for the two expansion tracts; and second, OSMRE's role in the mining plan approval process. Petitioner, an experienced NEPA litigator, should also have been aware of the NEPA regulation that specifies that a cooperating agency does not need to recirculate an environmental impact statement before adopting it. 40 C.F.R. § 1506.3.

Despite Petitioner's awareness of these facts, its formal participation in BLM's NEPA proceedings, and the well-publicized Wyoming permitting process for the Antelope expansion tracts, *see* discussion *supra* p. 9, Petitioner made no effort to alert OSMRE to its views that the BLM's FEIS was deficient in its analysis of the severity of GHG emissions or combustion impacts, or that it believed a supplemental NEPA analysis was

required as a result of (i) EPA's 2010 promulgation of a new air-quality standard for nitrogen dioxide (NO_2); or (ii) EPA's 2013 strengthening of the air-quality standard for particulate matter ($PM_{2.5}$). Further, it made no effort to advise OSMRE that, in Petitioner's view, legal error would ensue if OSMRE did not consider a new tool for assessing the effects of GHG emissions, the so-called "Social Cost of Carbon." Br. at 39-41. These alleged flaws could hardly be characterized as obvious. To the contrary, by 2012, the District Court for the District of Columbia had already sustained the FEIS, over objections as to the adequacy of the climate change discussion and the impact of changes in air quality standards. This litigation, coming on the heels of such neglect, is the sort of "unjustified obstructionism" the Supreme Court condemned in *Vermont Yankee*, 435 U.S. at 553. Federal Respondents ask the Court to declare the claims waived.

2. Petitioner's Claims Regarding Climate Change, the Severity of GHG and Combustion Emissions, and Air Quality are Barred by the Doctrine of Res Judicata.

Under the doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *MACTEC, Inc.*, 427 F.3d at 831. Res judicata, usually referred to as "claim preclusion" in the Tenth Circuit, requires: "(1) a judgment on the merits in the earlier action; (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 (10th Cir. 1999). If these requirements are met, as they are here, claim

preclusion is appropriate, unless the party seeking to avoid preclusion did not have a "full and fair opportunity" to litigate the claim in the prior suit. *Id.* at n.4.

Petitioner had ample opportunity to litigate its contention that the Antelope FEIS is inadequate. As noted, it brought suit in 2010 in the District of Columbia against the Secretary of the Interior and BLM asserting numerous errors and omissions in the same environmental impact statement challenged in this case. This satisfies the second and third prongs of the test for claim preclusion. The first prong is also met because the district court issued a final judgment rejecting Petitioner's claims. *WildEarth Guardians*, 880 F. Supp. 2d 77, and the D.C. Circuit affirmed. *WildEarth Guardians*, 738 F.3d 298.

Against this backdrop, Petitioner disingenuously declares it is not attempting to "re-litigate the adequacy of the [FEIS's] air quality and climate analyses," Br. 26 n.5, even as it effusively assails the FEIS on grounds previously raised, including the adequacy of Interior's air quality and climate change analyses. *Id.* at 38-42. The Court should reject Petitioner's attempt to avoid preclusion by cloaking its claims in the rubric of a duty to supplement, as set forth in the NEPA regulation at 40 C.F.R. § 1502.9. Reduced to their essence, Petitioner's claims regarding air quality, climate change, and the severity of GHG emissions and combustion emissions directly impugn the adequacy of the FEIS, *see* Br. at 38-42, and are the foundation of Petitioner's prayer for an order vacating the Assistant Secretary's decision. As such, they are barred by the doctrine of res judicata.

3. Petitioner's NEPA Claims Lack Merit.

Even if the Court concludes that waiver and res judicata do not bar the claims just discussed, it should nonetheless enter judgment in favor of all Respondents, and deny the Petition for Review, because Petitioner's claims lack merit.

A. Supplementation of the FEIS is not required.

Petitioner contends Interior had a duty to supplement the FEIS, given what it calls "significant new information" on air quality and climate change. *Id*. at 2, 29-42. It points to two circumstances occurring since 2008, when the FEIS was published. First, as Petitioner describes it, "a new tool – the social cost of carbon – became available for measuring the environmental and social impacts of GHG emissions from mining and coal combustion." *Id*. at 26. Second, EPA revised its National Ambient Air Quality Standards (NAAQS) by promulgating a more stringent standard for nitrogen dioxide and a new standard for fine particulate matter ($PM_{2.5}$). *See* Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6,474 (Feb. 9, 2010) (new one-hour NO_2 standard of 100 parts per billion); National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3,086 (Jan. 15, 2013) (strengthened annual $PM_{2.5}$ standard of 12 micrograms per cubic meter ($\mu g/m^3$)).

Neither circumstance, however, amounts to new information of the sort that demands supplemental study under NEPA. The regulation Petitioner relies on for the claimed duty to supplement states that, where "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its

impacts" comes to light, the agency shall supplement its prior NEPA analysis. 40 C.F.R. § 1502.9(c)(1). However, the Tenth Circuit has interpreted this provision to require a supplemental EIS "only if the new information or changes made to the proposed action 'will affect the quality of the human environment in a significant manner or to a significant extent not already considered.'" *Wyoming*, 661 F.3d at 1257, quoting *Friends of Marolt Park v. Dept. of Transp*., 382 F.3d 1088, 1096 (10th Cir. 2004), *Marsh*, 490 U.S. at 374.

In this case, the revised air quality standards and the availability of a new tool for attempting to monetize GHG impacts do not affect the human environment at all, let alone affect it "in a significant manner" or "to a significant extent . . . ." *Wyoming*, 661 F.3d at 1257. This is because the standards and the tool are neither newly uncovered *impacts* of the proposed mining operation that demand study and disclosure, nor aspects of the project whose effects were never considered. The new standards are just changes in the regulatory framework, which actually enhance environmental protection, and which do not demand supplementation, as the District Court for the District of Columbia held in assessing this same EIS. *WildEarth Guardians*, 880 F. Supp. 2d at 90. And the Social Cost of Carbon tool is simply a new way of attempting to monetize the cost to society of GHG emissions, and likewise does not demand supplementation, as the District of New Mexico has held. *WildEarth Guardians v. Jewell*, no. 16-cv-605 (Feb. 16, 2017) ("*El Segundo*") (Ex. 2). Federal Respondents address these two categories of purported "new information" below.

(i) New Air Quality Standards

As discussed, the FEIS's air quality analysis has already been sustained by the District Court for the District of Columbia, including those aspects of the analysis which address the pollutants of chief concern to Petitioner: nitrogen dioxide and particulate matter. *See WildEarth Guardians,* 880 F. Supp. 2d at 90 (rejecting Petitioner's contention that BLM was "required to supplement its environmental impacts analysis to apply the [one–hour NO_2 standard] adopted by EPA"), *see also id*. at 88 (rejecting Petitioner's contention that the FEIS's examination of PM_{10}, which encompasses the finer particles designated $PM_{2.5}$, was inadequate).

With respect to nitrogen dioxide, the District of Columbia court rejected Petitioner's claim that supplementation was required for the same reason advanced by Federal Respondents here, to wit, that the new standard "does not reflect the sort of 'new circumstances or information' triggering an agency's duty to supplement. *Id*. at 90, quoting 40 C.F.R. § 1502.9(c)(1)(ii). The court quoted the Supreme Court's decision in *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989), recognizing that

> an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.

490 U.S. at 373 (footnote omitted). In concluding that supplementation was not required, the court held that the FEIS's analysis of NO_2 impacts "complies with the 'rule of reason' that guides this Court's review." *WildEarth Guardians,* 880 F. Supp. 2d at 91. The Court should reach the same conclusion on this same record.

With respect to particulate matter, the District of Columbia court noted that the environs of the Antelope Mine are considered, for Clean Air Act purposes, "to be in 'attainment' status for PM_{10} emissions." *Id*. at 89, citing AR 04701. The court added that, based on the monitoring data relied on by the agency, the 24–hour background concentration for PM_{10} in the areas adjacent to the expansion tracts was 78 micrograms per cubic meter ($\mu g/m^3$), which is well below (in fact, just over half) the applicable standard of 150 μg/m. *Id*. at 88-89, citing AR 4346. The court added that "most of the Wyoming PRB" is considered to be in "attainment status" for PM_{10} emissions. *See id.* at 89, citing AR 4701.

Petitioner argues that the FEIS "lacks any discussion of $PM_{2.5}$ levels," Br. at 33 (citing AR 04347-59), which of course is attributable to the fact that the regulatory standard for $PM_{2.5}$ did not exist at the time of the FEIS. But Petitioner offers no evidence in support of its apparent belief that significant releases of $PM_{2.5}$ will occur during mining operations. To the contrary, the record reflects that Wyoming, as the permitting authority and the Clean Air Act regulator, imposed terms in its April 2013 permit, OSM003346, which expressly require compliance with all applicable state and federal laws. OSM003347. This would encompass the National Ambient Air Quality Standards, codified at 40 C.F.R. § 50.1-50.19, which have the force of law. Petitioner's reliance on new air quality standards as a reason to undertake a new, expensive, and time-consuming NEPA analysis, without stating any reason for concern, is unavailing.

Further, the reasonableness of the agency's conclusion that the FEIS is adequate is underscored by OSMRE's regulatory role, which is implicated only *after* BLM makes a

decision to lease and develop federal coal, and after a SMCRA permit is issued by Wyoming. Given these previous decisions, OSMRE's role is not to usurp BLM's leasing decision or the state's decisions on the permit's compliance with applicable mining and air quality regulations. OSMRE has long-standing experience with the well-known effects of surface coal mining operations in this region, and it reasonably relies on Wyoming, as the regulatory authority, to ensure air quality compliance. *See New Mexico ex rel. Richardson v. BLM*, 459 F.Supp.2d 1102, 1114 (D.N.M. 2006), aff'd in part, vacated in part, rev'd in part, 565 F.3d 683 (10th Cir. 2009) (sustaining agency's conclusion that contamination of the aquifer was unlikely based on an assumption that "existing governmental regulations [would be] enforced correctly"). For these reasons, OSMRE's conclusion that the FEIS was adequate and that it need not be supplemented, particularly where no one suggested a need to supplement, is reasonable and should be sustained.

(ii) The Social Cost of Carbon

Petitioner next urges that Federal Respondents should have used the "social cost of carbon" tool for evaluating GHG emissions. Br. at 38-40. The Court should reject this contention, as the District of New Mexico recently did in *El Segundo* (Ex. 2). There, the court sustained a climate change analysis that, like the one at issue here, used the predicted volume of GHG emissions as a proxy for assessing a mining plan's potential climate change effects. The court noted that CEQ's regulations discourage the use of cost-benefit analyses in situations involving important qualitative considerations, 40 C.F.R. § 1502.23, and held that Respondent's choice of methodology for assessing impacts relating to GHG

emissions had a rational basis and is not arbitrary or capricious. *El Segundo* at 24, citing *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004); *Utahns for Better Transp.*, 305 F.3d at 1171.[3]

The approach used in the FEIS in this case also has a rational basis, reflected in the agency's two-step analysis. First, the agency analyzed GHGs using data from the existing Antelope Mine, and a predicted increase in national demand, to project GHG emissions from mining the expansion tracts. *See* AR 4496. Based on this, BLM concluded that, even after expanding its operations, the Antelope Mine as a whole would contribute less than one percent of total Wyoming GHG emissions. AR 4497.

Second, the FEIS considered the potential contribution that expanded operations at the Antelope Mine might make to global climate change and GHG emissions, *see* AR 4597-4607, and acknowledged the potential for global climate change to produce effects that would be felt in the western United States. AR 4600. In addition, the FEIS recognized the cumulative effects of all Powder River Basin coal, recounting that by shipping coal to power plants throughout the United States, "Wyoming [Powder River Basin] surface coal

[3] Federal Respondents note, in addition, that it is not the task of the district court to "decide which party utilized the better methodology in conducting its . . . analysis. Rather, [the court] simply determine[s] whether the appellees' choice of methodology had a rational basis . . . taking relevant considerations into account," *Jones v. Peters*, 2007 WL 2783387 *22 (D. Utah 2007) (quoting *Druid Hills Civic Ass'n v. Federal Highway Admin.*, 772 F.2d 700, 711 (11th Cir.1985)). Further, a court "will defer to an agency's judgment to use a particular model if the agency examines the relevant data and articulates a reasoned basis for its decision." *Natural Res. Def. Council v. Herrington*, 768 F.2d 1355, 1385 (D.C. Cir. 1985).

mines were responsible for about 13.9 percent of the estimated U.S. CO_2 emissions in 2006." AR 4601.

This approach recognizes the fact that GHGs contribute to climate change only after entering and mixing with the upper atmosphere; they have global rather than local effect. *See* "Endangerment and Cause or Contribute Findings for Greenhouse Gases," 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009); upheld in *Coal. for Responsible Reg. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). Given these considerations, the Interior Board of Land Appeals, in an appeal from BLM's leasing decision on the two expansion tracts, properly concluded that BLM cannot be expected to "posit a precise correlation between specific climatological changes or the environmental impacts thereof attributable to projected GHG emissions from the particular project." *Powder River Basin Resource Council*, 180 IBLA 119, 134. While Petitioner may not like this approach and may prefer that federal agencies use another methodology, such as the Social Cost of Carbon, OSMRE's reliance on the total predicted volume of GHG emissions as a proxy for climate change impacts is entirely reasonable and should be sustained.

Finally, to the extent Petitioner's contentions regarding a "duty to supplement" may be construed as an indirect challenge to the adequacy of the FEIS itself, they should be rejected. Two federal courts in the District of Columbia have already concluded that the FEIS's analysis of climate change and GHG emissions is adequate. And this Court recently sustained a qualitatively comparable analysis in Petitioner's challenge to the Wright Area leasing decision. *See WildEarth Guardians*, 120 F. Supp. 3d at 1273.

In that decision, this Court sustained the Wright Area EIS, excerpts of which accompany this memorandum as Exhibit 3. In Chapter 3 ("Affected Environment"), Ex. 3 at 3-323, the discussion of GHG emissions is nearly identical in substance and detail to the discussion of GHG emissions in Chapter 3 of the Antelope FEIS ("Affected Environment"), AR 4495. Likewise, the discussion of cumulative impacts in Chapter 4 of the Wright Area EIS, Ex. 3 at 4-129, is quite comparable in substance and detail to the discussion of cumulative impacts in Chapter 4 of the Antelope FEIS, AR 4596. Like the Wright Area EIS, the FEIS in this case cites numerous sources and models such as those from EPA, the Intergovernmental Panel on Climate Change, and the National Academies of Sciences. *See, e.g.*, AR 4597-4600, *WildEarth Guardians v. U.S. Forest Serv.*, 120 F. Supp. 3d at 1270. As with the Wright Area EIS, the FEIS in this case discussed "factors of significance," such as the fact that the coal was destined for sale on the open market, and it "demonstrate[s] that GHG emissions were evaluated and attempts to quantify as a percentage of state and nationwide emissions were made." *Id.* at 1271-1273; AR 4606. In reviewing the Wright Area EIS, the Court concluded that "the agencies did not ignore the effects of coal combustion, GHGs and climate change in reaching the decisions it made." *Id*. at 1273.

For all these reasons, the Court should reject Petitioner's argument that "significant new information" demands additional analysis of climate change and air quality, and its artfully subsumed attack on the adequacy of the FEIS.

B. OSMRE'S Independent Review of the EIS was Proper.

After BLM issued the leases and Wyoming DEQ issued a permit, OSMRE's Western Regional Office commenced its own review of planned operations, for the purpose of recommending whether the Secretary should approve the mining plan modification. Although OSMRE had been a cooperating agency on the FEIS, it nonetheless conducted an independent review of the FEIS, as reflected in its Statement of NEPA Adoption and Compliance ("Statement"). OSM016542-43. The Statement recounts that, in compliance with the CEQ regulations at 40 C.F.R. §§ 1506.3(a), (c), OSMRE "independently reviewed the [FEIS]" and found that its "comments and suggestions [had] been satisfied," and that "the [FEIS] meets [CEQ] standards and complies with 43 C.F.R. Subpart B and other program requirements." *Id*.

A brief examination of the relevant regulations illustrates the adequacy of OSMRE's independent review. The first CEQ regulation cited in the Statement provides that an agency may adopt a draft or final EIS "provided that [it] meets the standards for an adequate statement under these regulations." 40 C.F.R. § 1506.3(a). The second cited CEQ regulation provides that a cooperating agency "may adopt without recirculating the [EIS] of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied." *Id*. § 1506.3(c). In addition to these CEQ regulations, Interior's NEPA regulations, which complement the CEQ regulations, expressly allow use of previously-prepared NEPA documents, if they adequately address the proposed action.

> An existing environmental analysis prepared pursuant to NEPA and the [CEQ] regulations may be used in its entirety if the Responsible Official determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives. The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.

43 C.F.R. § 46.120.

Petitioner contends OSMRE erred by not "independently assessing whether the EIS complied with NEPA," Br. at 22, and argues that OSMRE failed to meet any of the regulatory criteria, *id*. at 23, adding that the record is "devoid of any evidence" of an "independent review." *Id*. These assertions are contradicted by the record and entirely ignore the Statement itself, including its plain indication that OSMRE had reviewed the FEIS and had made three findings: first, that OSMRE's comments and suggestions in the EIS process had been satisfied, a finding required by 40 C.F.R. § 1506.3(c); second, that the FEIS meets CEQ standards for NEPA compliance, thus satisfying 40 C.F.R. §1506.3(a); and third, that the FEIS complies with Interior's NEPA regulations and other program requirements.

The Statement, which was prepared to meet the agency's obligations under 40 C.F.R. § 1506.3, is an "established administrative procedure," *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993), and as such is entitled to a presumption of administrative regularity. *Id*. Petitioner demands a more rigorous explanation, faulting Interior for not citing "pertinent page numbers" in the FEIS and for not "describing" the

analyses and conclusions of the FEIS, but Petitioner cites no law or regulation requiring these things.

In fact, Petitioner cites no record evidence of any sort to rebut the presumption of administrative regularity, such as evidence of bad faith or improper behavior that would give the Court reason to doubt whether "independent review" occurred. *See Citizens for Alternatives To Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir. 2007) (finding that the presumption of administrative regularity had not been rebutted by the required "strong showing" of improper behavior). Instead Petitioner relies on two factually dissimilar cases in which OSMRE was faulted for not properly explaining its rationale for issuance of two Findings of No Significant Impact (FONSIs). Br. at 24-25 (citing *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't*, 104 F. Supp. 3d 1208, 1226 (Colo. 2015); *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't*, Nos. CV 14-13-BLG-SPW-CSO, CV 14-103-BLG-SPW-CSO, 2015 WL 6442724 at *7 (Mont. 2015)). A different standard governs where an agency finds that a proposed action will not have significant impact and, on that basis, concludes that an EIS is not required,[4] as opposed to the circumstance here, where a cooperating agency adopts an EIS that it helped prepare. In short, Petitioner has not met its burden of demonstrating arbitrary conduct.

More recently, the District of New Mexico *in El Segundo* affirmed this conclusion in a factually similar adoption case. Ex. 2. As with this case, the claims in *El Segundo*

[4] *See* 40 CFR § 1508.13 (defining FONSI); *see also Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 824 (10th Cir. 2008) (discussing the standard for judicial review of a FONSI).

were severed from Petitioner's original District of Colorado action. *See* ECF No. 1. Although the NEPA analysis adopted in *El Segundo* was an Environmental Assessment ("EA"), and not an EIS, OSMRE was nonetheless required to conduct an independent review of the prior NEPA analysis before adopting it. The agency did so, and the New Mexico court sustained the adoption decision, reflected in the following language and almost identical to that challenged here, in particular, that "OSMRE has independently reviewed the EA and finds that [it] complies with 43 C.F.R. § 46, Subpart D, the relevant provisions of the [CEQ] regulations and other program requirements." Ex. 2 at 19.

Petitioner also contends OSMRE violated Interior's NEPA regulation at 43 C.F.R. § 46.120, set out in block form above. It argues the record is "devoid of any evidence" regarding whether there is "new information pertaining to environmental impacts in the five years since BLM completed the EIS." Br. at 23. Evidently Petitioner construes the regulation to require a statement on "new information" even if no new information (of the sort requiring additional NEPA study) has come to light. Federal Respondents submit that the *absence* of a discussion on new information is not improper where no new information has come to light. The plain language of Interior's regulation only requires a discussion where "new information . . . *not previously analyzed* may result in significantly different environmental effects." 43 C.F.R. § 46.120(c). Here, there is no new information that "may result" in significantly different effects. This is because the social cost of carbon tool and the new air quality standards do not alter the effects of the approved activity, as discussed in Argument 3(A), *supra* pp. 17-24. Petitioner's claim that the adoption decision was improper should be rejected.

C. **OSMRE complied with NEPA's Public Involvement Requirements.**

Petitioner claims OSMRE violated NEPA by failing to include the public in its decision-making process and by failing to give notice of the Statement of NEPA Adoption and Compliance ("Statement"). Br. at 18. The first contention lacks merit because Petitioner cites no law or regulation requiring public participation when a cooperating agency adopts an EIS. In fact, the adoption regulations directly contradict Petitioner's claim. *See* 40 C.F.R. § 1506.3(c) (a cooperating agency may adopt an EIS "without recirculating" it when, "after an independent review," the cooperating agency "concludes that its comments and suggestions have been satisfied."); *see also WildEarth Guardians v. United States Forest Serv.*, 120 F. Supp. 3d 1237, 1263 (D. Wyo. 2015) (noting that CEQ's NEPA regulations permit adoption if the EIS meets the standards for an adequate statement under the CEQ NEPA regulations). Where an agency adopts an EIS, an additional public comment period is unnecessary because the original EIS proceedings were open to the public, and here, Petitioner actually availed itself of those opportunities. *See, e.g.*, OSM017246 (Petitioner's April 2008 comment letter).

Petitioner's second claim, that OSMRE failed to give notice of the Statement, also lacks merit because it is factually incorrect and because Petitioner fails to cite any regulation specifically requiring the posting of adoption notices. Nonetheless, the agency did post the Statement on its website shortly after adopting the FEIS, along with the FEIS's Executive Summary. Calle Decl. at ¶ 4.

None of this is meant suggest that Petitioner was precluded from alerting the agency to its concerns and, in fact, Petitioner had ample opportunity to do so. As detailed in the

waiver argument, *supra* p. 13-15, the Wyoming permitting process was completed in April 2013, but the mining plan was not approved for another seven months. After formally participating in BLM's proceedings for the leasing decision (and then challenging those decisions in the District of Columbia), Petitioner sat idly by while Wyoming conducted its well-publicized permitting process, where the details of the mining plan modification were forged, and it sat idly by while OSMRE examined the Wyoming permit and proposed mining plan modification. As a result, even if the Court were to conclude that public participation opportunities were inadequate, it may nonetheless withhold relief. *See* 5 U.S.C. § 706 (directing courts to take "due account . . . of the rule of prejudicial error."). On this record, the remedy Petitioner seeks – vacatur – is unwarranted because Petitioner suffered no prejudice except by its own choice to ignore agency proceedings.

CONCLUSION

For the foregoing reasons, Federal Defendants are entitled to judgment as a matter of law, and respectfully request that the Petition for Review, ECF No. 1 (filed D. Colo. Sept. 15, 2015; transferred D. Wyo. June 20, 2016), be denied and judgment entered in favor of all Respondents.

Respectfully submitted this 5th day of April, 2017.

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