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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

MONTANA ENVIRONMENTAL INFORMATION CENTER, INDIAN PEOPLE'S ACTION, 350 MONTANA, SIERRA CLUB, WILDEARTH GUARDIANS, Plaintiffs, vs. DEBRA HAALAND, et al., Defendants, and WESTMORELAND ROSEBUD MINING LLC and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, Intervenors.	Case No. 1:19-cv-00130-SPW-TJC **INTERVENORS' BRIEF IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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AR	Administrative Record
BLM	Bureau of Land Management
CHIA	Cumulative Hydrological Impact Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FLPMA	Federal Land Policy and Management Act
GHG	Greenhouse gas(es)
MDEQ	Montana Department of Environmental Quality
NEPA	National Environmental Policy Act
OEP	Office of Energy Policy
OSM	United States Office of Surface Mining, Reclamation and Enforcement
SCC	Social Cost of Carbon
SMCRA	Surface Mining Reclamation and Control Act
Union	International Union of Operating Engineers, Local 400
Westmoreland	Westmoreland Rosebud Coal LLC

INTRODUCTION

After almost a decade of review and thousands of pages of detailed, expert analyses, Plaintiffs seek to overturn the Office of Surface Mining Reclamation and Enforcement's ("OSM") Rosebud Mine Area F approval. Plaintiffs appeal to emotion and selectively reference law and fact. They do not refute the overwhelming evidence in OSM's record that the agency satisfied the National Environmental Policy Act ("NEPA") and Endangered Species Act ("ESA"). The Court should reject Plaintiffs' claims because:

- Plaintiffs lack standing: any injuries are self-inflicted or not tied to Area F.
- OSM took a "hard look" at cumulative water impacts: detailed modeling proved no or limited interaction of impacts with other Mine areas.
- Plaintiffs incorrectly represent that OSM failed to consider a quantified social cost of carbon ("SCC"): OSM reviewed SCC calculations, but because those costs "vary by over 40-fold from a low of $319 million to as high as $12.9 billion," the calculations were "of very limited utility to the decision maker." AR-117-31368; AR-117-31373.[1]
- The EIS analyzed a reasonable range of alternatives. NEPA did not require OSM to consider a smaller Mine, which would violate requirements under

[1] Administrative Record ("AR") documents are referenced as follows: AR-[row number where document is found in AR index]-[bates numbered page].

the Surface Mining, Control, and Reclamation Act ("SMCRA") and Westmoreland's lease.

- Power plant water withdrawals are not effects of Area F mining.

If, however, this Court finds that OSM erred, it must weigh injunctive relief factors and balance consequences. Vacatur is not justified: consequences to the Mine and Colstrip would be severe, while any injury to remote Plaintiffs would be minor and temporary.

BACKGROUND[2]

In June 2019, after more than eight years of review, the Montana Department of Environmental Quality ("MDEQ") and OSM approved the Area F mine expansion at the Rosebud Mine. AR-202-37551-37594. Area F would add eight years to the Mine's operations, but would not increase annual output or emissions from the Mine or the Colstrip Power Plant. AR-116-30424. OSM supported its Record of Decision ("ROD") in a 700-page Environmental Impact Statement ("EIS") with hundreds of pages of appendices, AR-116-30354-31162, AR-117-31163-31663, analyzing Area F's direct, indirect, and cumulative impacts,

[2] Intervenors adopt the background facts set out in their opposition to the preliminary injunction. Doc. 73 at 3-6.

including on water, climate change, and wildlife. Plaintiffs do not meet their burden to prove OSM's analysis was arbitrary and capricious.[3]

ARGUMENT

I. PLAINTIFFS LACK STANDING.

Plaintiffs' burden to prove standing corresponds to the proof required at each stage of litigation. At summary judgment, Plaintiffs must present definitive evidence proving standing. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-63; *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Plaintiffs must prove (1) a "concrete and particularized" injury; (2) a causal connection between Area F and any injuries, and that (3) a favorable decision will redress those injuries. *See* Doc. 33 at 4-6.[4] Here, the individual standing declarants do not live anywhere near the Rosebud Mine and could only suffer an "injury" from sporadic visits that appear intended to create standing for their challenge.

A. Plaintiffs Cannot Prove Injury.

Of Plaintiffs' standing witnesses, only three—Derf Johnson, Steve Gilbert, and Jeremy Nichols—even claim to have been near the Mine. The evidence indicates that each of them travelled over 300 miles to the Mine vicinity for the express purpose of establishing standing. Self-inflicted injury cannot support

[3] Intervenors adopt OSM's discussion of standards of review.

[4] Citations are to internal document pagination.

standing. "Someone who goes looking for pollution cannot claim an aesthetic injury in fact from seeing it." *Ctr. for Biological Diversity v. U.S. Env't Prot. Agency*, 937 F.3d 533, 540 (5th Cir. 2019); *see also* Doc. 60 at 9-10; Doc. 50 at 4-5.

Mr. Johnson, an MEIC lawyer, has admitted that he traveled to the Mine area expressly to "view potential expansion activities," and did so as "part of the duties of [his] employment for MEIC." *See* Doc. 73 at 25-26; Doc. 137-1 at 4. MEIC may not create its own injuries by sending its counsel to experience self-inflicted "shock" and "disgust." *See* Doc 137-1 at 4.

Embodying the "roving environmental ombudsman" foreshadowed in case law, Mr. Nichols also cannot show standing. *See, e.g., Friends of the Earth v. Gaston Copper Recycling*, 204 F.3d 149, 157 (4th Cir. 2000); *see* Doc 60, 5-7. Mr. Nichols has a documented history of "vacationing" near facilities that his organization wishes to challenge in litigation. *See, e.g.*, Doc. 50 at 6-7, and Ex. C. His purported connections to Area F are tenuous at best. His only identified visit coincides with Plaintiffs' April 19, 2018 request to OSM seeking a cessation order for Rosebud. *See, e.g.*, Doc. 46 at 7-9, Doc. 48 at 11-14; Doc. 50 at 6-9; Doc. 60 at 5-7, 9-10.

For his part, Mr. Gilbert admitted in parallel state litigation that his 2018 Mine visit was a cursory "drive through" to establish standing.[5] *See* Doc. 48 at 8-9; Doc. 46 at 5-6; Doc. 46-2 at 9 (pp. 74-75 of transcript); Doc. 50 at 5-6; Doc. 60 at 7-9.[6] Mr. Gilbert's most recent Mine visit further demonstrates that his interest in the area is solely related to litigation. MEIC counsel organized that trip and drove Mr. Gilbert to locations near Area F specifically to establish standing. *See* Doc. 46 at 6, Doc. 50 at 5-6, Doc. 60 at 7-10. Even when he went to the Colstrip area, Mr. Gilbert was never able to establish that he recreated on or near Area F; rather he rode in a vehicle and, like perhaps thousands of others, he viewed parts of Area F from the vantage of a public road.

Mr. Gilbert's vague statements about future visits confirm that he lacks a genuine ongoing interest. He generalizes: "I expect to continue to visit the Colstrip area at least on an annual basis in the coming years." *See* Doc. 137-2 ¶11. These "'some day' intentions—without any description of concrete plans" and unfulfilled

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[5] Here, he first claimed that he "occasionally stopp[ed] and walk[ed] to appreciate the beautiful area" (Doc. 44-1 ¶12), but when Intervenors identified the conflict between Mr. Gilbert's sworn deposition and that declaration, Plaintiffs submitted a new declaration that quietly omitted these claims. *See* Doc. 137-2 ¶12. Mr. Gilbert's most recent declaration also recanted his claim of hunting in the area in 2017, after Intervenors pointed out contradictions with his state litigation testimony. *Compare* Doc. 44-1 ¶11 *with* Doc. 137-2 ¶11.

[6] Plaintiffs emphasized Mr. Gilbert's past interest in the general Colstrip area. Standing, however, requires a current interest that is subject to future injury and redressability. *See, e.g.*, *Lujan*, 504 U.S. at 564.

projections "do not support a finding of 'actual or imminent' injury." *Lujan*, 504 U.S. at 564.

Plaintiffs' two remaining standing witnesses plainly lack a concrete or particularized injury. Ms. Hawk resides in Butte, Montana, approximately 350 miles from the Mine. Occasional visits to Lame Deer, which is at least 23 miles from Colstrip, do not prove standing. *See* Doc. 46 at 9-10. Allegations that Area F will impact the Northern Cheyenne and Crow Reservations are also attenuated, and any personal relationship Ms. Hawk has with those Reservations is unclear. *Id*. at 10. Ms. Hawk cannot rely on others' potential injuries. *Id*. Nor does her worry establish an injury in fact. *Id*. at 11.

Mr. Woodland has no protectable interest or injury. He lives roughly 520 miles away. His declaration focuses on general climate change impacts. He ties no injuries to Area F. *See* Doc 46, 11-12. Mr. Woodland's sole visit to the area was a drive-through nearly five years ago. That one-time drive through a town roughly 15 miles away from Area F shows no "personal stake." Stating intentions to return to the area "within the next few years" does not support standing. *See id.* at 12-13.

B. Plaintiffs Cannot Link Injuries to Area F.

Plaintiffs do not connect any alleged injuries to Area F, and thus a favorable ruling would provide no redress. *See* Doc. 50 at 4. Neither Ms. Hawk nor

Mr. Woodland claims an interest in affected areas. *See id*. Mr. Johnson gets closer, claiming a general aesthetic interest in "southeastern Montana" (*see* Doc. 137-1 at 3-4), but an interest in an area larger than several states is insufficient to demonstrate a specific interest in Area F. The only interest in Area F he has professed was observing mining activity *for his employer to support this litigation*, which cannot establish standing.

No evidence shows that Mr. Gilbert ever recreated in the *West* Fork Armells Creek drainage (where Area F is), let alone on the privately-owned surface lands within Area F. *See* Doc. 46 at 5. Mr. Gilbert's prior accounts of his interests in the area have not extended to Area F. *See* Doc. 48 at 4-11. Even if Mr. Gilbert had a genuine interest in the mine area generally, issues remain as to whether Area F will create any new injury. *See id*.

Mr. Nichols lives over 500 miles from the Mine. Any connection between Mr. Nichols and Area F appears nonexistent. Although Mr. Nichols claims that he first visited the Colstrip area in 2011,[7] that claim is contradicted by his testimony elsewhere. Contemporaneous declarations (October 2011, February 2012) in Montana litigation do not mention any Colstrip visits. Yet those same declarations specify trips to public lands in Colorado, New Mexico, and Wyoming. Moreover,

[7] Colstrip is over 10 miles from Area F. AR-116-30396.

his later declarations clarify that his visits to "southeast Montana" (at least between 2009 and 2018) were to visit friends in Sheridan, Wyoming, and view the Spring Creek and Decker coal mines approximately 70 miles south of Colstrip. *See* Doc. 46 at 7-8.

Finally, Mr. Nichols does not identify the location of his 2018 hikes (three years ago) with any specificity and has not established a sufficient "geographic nexus" with Area F. *See* Doc 46 at 8-9. He references (i) "public lands," (ii) a watershed consisting of 94,720 acres, (iii) an area "just to the northwest of the current Rosebud mining operations," and (iv) "lands south and east of the town Colstrip." *Id*. Using an area "roughly in the vicinity" of challenged activity is not enough. *Lujan*, 504 U.S. at 565. Mr. Nichols reference to "public lands" in the West Armells Creek area is also problematic because "public" lands are extremely limited and isolated, calling into question whether he actually hiked there, and his reasons for seeking out those areas. *See e.g.*, Doc. 46 at 8-9.

Plaintiffs' cannot prove concrete, particularized injuries from Area F and lack standing. At the very least, disputes of fact exist that require an evidentiary hearing on standing.

II. THE EIS COMPLIED WITH NEPA.

Courts make a "pragmatic judgment" whether a NEPA analysis fosters informed decision-making; *i.e.*, whether it includes "a *reasonably thorough*

discussion of the *significant aspects* of the *probable* environmental consequences." *City of Carmel-by-the-Sea v. U.S. Dept. of Transp*., 123 F.3d 1142, 1150-51 (9th Cir. 1997) (citation and quotations omitted, emphasis added); *see San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 621 (9th Cir. 2014); *All. for Wild Rockies v. Bradford*, 864 F. Supp. 2d 1011, 1021 (D. Mont. 2012). Here, OSM took a "hard look" at Area F's water, climate change, and wildlife impacts.

A. OSM Considered Cumulative Surface Water Impacts.

OSM analyzed Area F's cumulative effects on surface waters, determining there would be no interaction with the East Fork Armells Creek drainage, where the rest of the Mine and power plant are located.[8] AR-116-30943-44, 31106-8, AR-117-31546. OSM nevertheless incorporated data from other mine areas into water models to assess Area F impacts. AR-117-31550.

Plaintiffs complain that OSM's explanation is three sentences, Pl. Br. 17, but refer only to the conclusion, ignoring OSM's three-page discussion. OSM's analysis was thorough and detailed, addressing all of Armells Creek (West and East) and adjacent drainages and evaluating collective effects of 10 activities affecting water quality in that vast area. AR-116-31106-8. OSM explains that because Area F is in a separate watershed (West Fork Armells Creek) than the rest

[8] A small part of Area C also falls within the West Fork Armells Creek watershed. AR-117-31550.

of the Mine (East Fork), overlapping effects will be minimal. AR-125-37465 (map); AR-116-30943-44, 31106-8, 31109 (groundwater drawdown does not "overlap" between adjacent mine areas), 31546 (impacts "indiscernible from the natural variability" at East/West Forks' confluence).

OSM's analysis also incorporated MDEQ's detailed Cumulative Hydrological Impact Assessment ("CHIA") and supporting groundwater model, which concluded that water effects would not extend outside the Area F permit area. AR-125-37313-500, 37399, 37465 (no material damage to hydrologic balance outside Area F); *see* AR-1214-145490-756 (Area F Hydrology Report), AR-1216-146086-108 (Area F Groundwater Model), and AR-1217-146109-91 (Area F Probable Hydrologic Consequences Report); AR-1215-145757-6085 (Area B AM4 CHIA); AR-125-37338 (Area F CHIA reviewed "baseline data and qualitative and quantitative analyses . . . to determine the maximum extent for the cumulative hydrological impact area within which a measurable change in water quantity or quality may arise due to mining activities").

Plaintiffs dismiss MDEQ's CHIA and water quality modeling as non-NEPA documents. Pl. Br. 19 n.9. But NEPA encourages incorporation of materials prepared by expert agencies to avoid repetition. 40 C.F.R. §§ 1500.4(j), 1502.21. Accordingly, courts must consider the "whole record" in reviewing agency action. 5 U.S.C. § 706; *see also League of Wilderness Defs. v. U.S. Forest Serv.*, 549 F.3d

1211, 1218 (9th Cir. 2008) ("It is not for [courts] to tell the [agency] what *specific* evidence to include, nor how *specifically* to present it.").

MDEQ's CHIA was not improperly limited in scope. The CHIA addressed all Area F water impacts to determine, among other matters, whether mining would cause material damage *outside* the permit area. *See* § 82-4-227(3)(a), MCA; ARM 17.24.314(5); AR-125-37330. The area examined in the Area F CHIA, i.e., the cumulative impact area, was upheld in separate state proceedings in response to comparable argument. *In the Matter Of: Surface Mining Permit No.* C2011003F, Nos. BER 2019-03 and 2015-05, Order on Partial Motions for Summary Judgment and Motion to Dismiss, at 35-38 (Mont. Bd. of Envt'l Rev. Nov. 24, 2020), attached as Exhibit 1. It ultimately concluded that water impacts would not occur outside the cumulative impact area—there would be no interaction of Area F effects with other Mine areas. AR-125-37399 (CHIA).

Plaintiffs point only to cases where agencies lacked this robust quantitative analysis. *See Klamath-Siskiyou Wildlands Center v. Bureau of Land Management ("BLM")*, 387 F.3d 989, 994-95 (9th Cir. 2004) (merely listed other timber sales and acreages); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998) (analysis limited to a few paragraphs with no detail about how timber sales would reduce old growth habitat); *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 872 (9th Cir. 2020) (merely listing other projects and vaguely asserting

no cumulative effects); *Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1104 (9th Cir. 2016) (acknowledging cumulative effects on air quality, but failing to quantify them). By contrast, here OSM adopted the state's CHIAs for Area F and other approvals. AR-116-31106-108 (citing AR-1215-145757-146085 (Area B AM4 CHIA)); AR-202-37574 (citing AR-125-37313-500 (Area F CHIA)).

Plaintiffs' selective references to individual staff comments on the first internal draft EIS requesting more detailed analysis change nothing. Pl. Br. 18 (citing AR-1138-142973-81, AR-1139-142984-90). Plaintiffs omit the discussions that followed and OSM's eventual resolution, including meetings, AR-1003-13576, at which MDEQ's hydrologist pointed out that Area F and other areas of the Mine are "separate." AR-1002-12633. Yet, to ensure other Mine areas were addressed, OSM agreed to incorporate "the CHIA for the most recent Area B amendment," which covered Mine areas in the *East* Fork Armells Creek. *Id*. After additional meetings, AR-1000-12620-21, AR-1015-13705-07, OSM confirmed it would "utilize the DEQ CHIA" to address cumulative water effects. AR-1016-13722.[9]

[9] Note that the OSM hydrologist who initially raised the issue also suggested "MDEQ's CHIA" as a "helpful tool" for identifying cumulative effects. AR-1138-142981.

OSM hardly ignored its hydrologist's questions, but spent months and many meetings addressing them. Regardless, an agency is not judged on the opinions of a single staff person whose opinion is overtaken by successive EIS drafts. *See Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 868 (9th Cir. 2017) ("[C]onclusions reached by the agency need not reflect the unanimous opinion of its experts." (citation omitted)).

B. OSM Took a Hard Look at Climate, Including the SCC Methodology.

OSM provided thorough, quantitative and qualitative analyses of GHG emissions, fully informing the public and decisionmakers of the impacts of mining, transporting, and combusting Area F coal. AR-116-30577-592, 30896-914; AR-117-31368-378 (addressing comments on GHGs and SCC); AR-117-31471-479; AR-117-31522-538. Plaintiffs offer no basis to overturn OSM's decisions: (i) to forgo a formal cost-benefit analysis, which Plaintiffs admit is entirely optional, Pl. Br. 23, and (ii) that SCC values for Area F would not aid OSM's decision. Both decisions were within OSM's expertise and discretion and are entitled to deference. *See Utah Physicians for a Healthy Env't v. BLM*, 2021 WL 1140247, at *5 (D. Utah Mar. 24, 2021) (whether to use tool like SCC "implicates agency expertise."); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 79 (D.D.C. 2019) (agency's "reasoned determination [rejecting the SCC] is entitled to deference").

1. OSM Adequately Assessed GHG Impacts.

Although OSM quantified GHG emissions and discussed climate change impacts in detail, Plaintiffs argue OSM did not assess their "*actual effects.*" Pl. Br. 21. But Plaintiffs ignore much of OSM's GHG analysis, and identify no "actual effects" that OSM failed to considered. *See id.* Instead, perplexingly, Plaintiffs point to OSM's *socioeconomic impacts* analysis to argue OSM's *GHG* analysis was deficient. *Id.* (citing AR-116-31018-36 *compare with* AR-116-30896-914).

Relying solely on OSM's socioeconomic impacts analysis, Plaintiffs contend OSM declined to use the SCC to monetize GHG impacts. Pl. Br. 21-22. NEPA, however, does not mandate monetization, let alone a particular monetization methodology, to assess impacts. Attempts to translate GHG impacts to dollars, particularly where the resulting dollar estimates vary by orders of magnitude, provide no meaningful additional measure of "actual effects." *See* AR-117-31505-510 (Area F SCC calculations); AR-117-31368 (Area F SCC calculations "vary by over 40-fold from a low of $319 million to as high as $12.9 billion" and are "of very limited utility to the decision maker"); *see also* AR-117-31373 (Plaintiffs explaining that the SCC itself "*translate[s]*" emissions into GHG concentrations, concentrations into temperature, and temperature into economic damages).

OSM's GHG analysis satisfied NEPA by disclosing real-world climate change impacts in easily understood metrics: temperature increases, precipitation

changes, rising sea levels, shrinking polar ice caps. *See* AR-116-30581-589, 896-907. It quantified direct and indirect GHG emissions and compared them to state, regional, and national emissions. AR-116-30910-12. Based on this analysis, OSM concluded that GHG emissions "would contribute incrementally to the climate impacts" already analyzed. AR-116-30911-912.

Courts addressing the duty to analyze "environmental effects which cannot be avoided" fault agencies only when they rely *exclusively* on tallying direct numeric results of a project while ignoring all real-world impacts. *See, e.g.*, *W. Watersheds Project v. BLM*, 443 F. App'x 278, 280 (9th Cir. 2011) (faulting BLM for merely reciting "the number of wind turbines" and the "acres of habitat"); *Klamath-Siskiyou*, 387 F.3d at 995 (only calculating acreage to be logged). Had OSM merely disclosed the tonnage of Area F coal or of GHG emissions, its analysis of "actual effects" might be deficient. But that is not what OSM did, and recent case law confirms that the agency's analysis satisfies NEPA. *See Utah Physicians for a Healthy Env't*, 2021 WL 1140247, at *4 ("Between the FEIS' quantification of the GHGs that will be emitted and its qualitative discussion of the effects of GHGs, it is clear that Plaintiffs' claim that [the agency] only performed a 'bare arithmetic emissions calculation' of GHGs is not correct.").

Other federal courts have consistently upheld OSM's approach. Estimating GHG impacts from development and consumption, and comparing them to

regional, national, and global emissions, satisfies NEPA. *See, e.g., id.*; *WildEarth Guardians v. Bernhardt*, 2021 WL 363955, at *8 (D. Mont. Feb. 3, 2021) ("OSM properly used the proxy methodology to discuss the effects of the additional greenhouse gas emissions approval of the mining plan would entail."); *WildEarth Guardians v. Bernhardt*, 2020 WL 6799068, at **8-10 (D.N.M. Nov. 19, 2020); *WildEarth Guardians,* 368 F. Supp. 3d at 77-78; *Citizens for a Healthy Cmty. v. BLM*, 377 F. Supp. 3d 1223, 1239-40 (D. Colo. 2019); *W. Org. of Res. Councils v. BLM*, 2018 WL 1475470, at **13-14 (D. Mont. Mar. 26, 2018); *Wilderness Workshop v. BLM*, 342 F. Supp. 3d 1145, 1156-58 (D. Colo. 2018); *WildEarth Guardians v. Jewell,* 2017 WL 3442922, at *12 (D.N.M. Feb. 16, 2017); *WildEarth Guardians v.BLM*, 8 F. Supp. 3d 17, 35-37 (D.D.C. 2014); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308-09 (D.C. Cir. 2013).

2. OSM Was Not Required to Monetize GHG Impacts as Part of a Cost-Benefit Analysis.

Plaintiffs acknowledge NEPA does not require a cost-benefit analysis. Pl. Br. 23. Agencies need not monetize environmental impacts. *See* 40 C.F.R. § 1502.23; *Citizens for a Healthy Cmty.*, 377 F. Supp. 3d at 1240 ("it is within [the agency's] discretion to decide when to analyze an effect *quantitively or qualitatively*") (emphasis added). Plaintiffs sidestep these rules, accusing OSM of undertaking and presenting a "one-sided" cost-benefit analysis. Pl. Br. 22. Neither the record nor Plaintiffs' cases support their argument.

First, Plaintiffs ignore that OSM considered the monetization of Area F GHG emissions based on Plaintiffs' SCC methodology. AR-117-31505-10. OSM took a hard look at those very numbers, but given their enormous variability, determined that the calculations were "of very limited utility to the decision maker." AR-117-31368; AR-117-31373; AR-1211-145441-47.

Second, because OSM considered the SCC, Plaintiffs' cases do not apply. *See* Pl. Br. 22. To the extent the cases demand a cost accounting of GHG emissions to balance the economic impact analysis, ***OSM considered the SCC figures here***.

Moreover, each case cited by Plaintiffs assumes the agency ***engaged in a cost-benefit analysis***. Here, OSM did not.[10] AR-116-30914 ("NEPA does not require cost-benefit analysis and the agency did not undertake one here."). OSM's quantification of some socioeconomic impacts was not a quantification of Area F benefits. *See* AR-116-30914 (socioeconomic impacts are distinct from "economic benefits" as defined in economic theory); AR-117-31369 (same in response to comments); AR-1213-145469-71. Contrary to Plaintiffs' assertions, at 22, OSM's

[10] In *WildEarth Guardians*, the agency also provided very different justifications for not considering SCC. *Compare* AR-116-30913-914 *with* 2021 WL 363955, at *8 (OSM citing (1) lack of consensus on SCC fraction tied to coal producer, (2) inability to ascertain whether mine plan approval would affect GHG emissions, and (3) general uncertainties about SCC's accuracy).

rejection of the Office of Energy Policy's ("OEP") comments confirms this distinction. OEP encouraged OSM to "[u]pdate the socioeconomic section to include [the] beneficial impacts of [the] project"—OSM declined to do so "*because* [a] cost-benefit analysis is *not included* in [the] document to that scale." AR-1050-14328 (emphasis added). Thus, while NEPA obligated OSM to address socioeconomic impacts, OSM expressly avoided undertaking the "benefits" part of a cost-benefit analysis suggested by OEP. *See id*. Courts have never found that quantification of socioeconomic impacts requires an agency to put dollar values on other resource impacts, such as soils, water, and vegetation.[11] *See Citizens for a Healthy Cmty.*, 377 F. Supp. 3d at 1240.

Finally, courts have upheld agency decisions not to use the SCC for the same reasons articulated in the EIS. *WildEarth Guardians*, 2020 WL 6799068, at *11 (agencies have "ample decision space" to choose "metrics and methodologies"); *Appalachian Voices v. Fed. Energy Regul. Comm'n*, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) (SCC not required); *W. Org. of Res. Councils v. BLM*, 2018 WL 1475470, at *14 (same); *EarthReports, Inc. v. FERC*,

[11] *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1197-1203 (9th Cir. 2008) is inapposite. There, the Energy Policy and Conservation Act—not NEPA—required the agency to detail costs and perform an actual "cost-benefit analysis" to determine economic feasibility in setting "maximum feasible" fuel economy standards.

828 F.3d 949, 956 (D.C. Cir. 2016) (same); *Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017) (same); *WildEarth Guardians*, 368 F. Supp. 3d at 78-79 (same).

Here, OSM considered the SCC calculations and detailed why they would not aid its decision-making. AR-116-30913-914; AR-117-31368. OSM's analytic tool was within its discretion and is entitled to deference. *See, e.g., WildEarth Guardians*, 368 F. Supp. 3d at 79; *Citizens for a Healthy Cmty.*, 377 F. Supp. 3d at 1240; *WildEarth Guardians*, 2020 WL 6799068, at *10.

C. OSM Considered a Reasonable Range of Alternatives.

1. NEPA Has No Minimum Number of Alternatives.

Plaintiffs complain that OSM considered too few alternatives: the no action and two action alternatives that they claim are "virtually identical." Pl. Br. at 32. Under NEPA, however, "there is no minimum number of alternatives." *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994); *see also Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005) (same); *see also* AR-116-30402. Courts should focus on "the substance of the alternatives" and "not the sheer number[.]" *Native Ecosystems Council*, 428 F.3d at 1246;[12] *see also Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d

[12] Agencies need only evaluate "reasonable" alternatives. 40 C.F.R. § 1502.14(a). Whether an alternative is reasonable is evaluated "in light of the ultimate purposes of the project," and the agency's determination "merit[s] particular deference."

800, 812-14 (9th Cir. 1999) (faulting agency for failing to consider specific alternative, not for the number of alternatives).

Here, OSM correctly focused on the substance of alternatives, and their consistency with the project's purpose and need and the agency's policy objectives. In addition to the three alternatives analyzed in detail, OSM considered seven other alternatives, including mining within a smaller disturbance area, for a shorter duration, and/or within a different timeframe. Because these alternatives did not meet the purpose and need or were infeasible, OSM screened them from the next, more detailed stage of analysis. AR-116-30408; AR-202-37572-573.[13]

Plaintiffs' claim that the two action alternatives are "virtually identical" is irrelevant—there's no bar against considering similar alternatives. Nevertheless, the distinctions between the two action alternatives are apparent. Alternative 3 incorporates protective measures including a water-management plan, additional wetlands mitigation requirements, improved reclamation and revegetation efforts, a geological survey, and paleontology mitigations.[14] AR-116-30408; AR-116-

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Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571, 580-81 (9th Cir. 2016) (citations omitted).

[13] The EIS need only "briefly discuss" reasons for eliminating an alternative from detailed examination. 40 C.F.R. § 1502.14(a).

[14] Plaintiffs accuse Westmoreland of neglecting reclamation. Pl. Br. 5. But Westmoreland is actively reclaiming all mined areas under Montana's rigorous four-phase standards. AR-116-30451-52, 30455-57; AR-1213-145454-56. Almost all disturbed areas at the Mine have achieved at least Phase I reclamation status.

30527-531. Plaintiffs' claim that Alternatives 2 and 3 would produce the "same" or "similar" impacts, Pl. Br. 32 & n.19-20, ignores that the additional mitigation proposed in Alternative 3 would reduce residual impacts overall. *See, e.g.*, AR-116-30535-542. Indeed, the Environmental Protection Agency supported Alternative 3 specifically because it would mitigate water impacts.[15] AR-117-31445.

Finally, Plaintiffs point to individual staff comments in 2016 questioning alternatives development. Pl. Br. 33. Internal comments like these 2016 fragments of agency discussions are part of a robust agency decision-making process and prove nothing amiss with OSM's final 2019 alternatives. A robust internal debate that precedes finalization of the agency position is hardly cause to complain; and not every view espoused by agency employees becomes the agency's final position. *See Nat'l Mining Ass'n*, 877 F.3d at 868.

More than 40% are in Phase II or higher (at least two years of successful revegetation). AR-116-30457 (Table 5); AR-1213-145455.

[15] Plaintiffs downplay Alternative 3's environmental protections and suggest Westmoreland opposed their implementation. Pl. Br. 33. But Plaintiffs fail to mention that Westmoreland actually ***agreed to undertake many of them*** during parallel state permitting. *See* AR-202-37568 (incorporating key components of protections).

2. OSM Need Not Consider a Mid-Range Alternative.

Plaintiffs' demand for a mid-range alternative ignores OSM's statutory obligations.[16] *See Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 871 (9th Cir. 2004) (agency need not analyze alternatives inconsistent with statutory objectives). "[I]t would turn NEPA on its head to interpret the statute to require that [an agency] conduct in-depth analyses of . . . alternatives that are inconsistent with the [agency's] policy objectives." *Id.* (quoting *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1122 (9th Cir. 2002)).

The Mineral Leasing Act and SMCRA govern OSM's approval of mining plans. *See* 30 U.S.C. §§ 201(a)(3)(C), 1273(c); 30 C.F.R. §§ 746.1, 746.13; *see also* AR-116-30532 (OSM discussing statutory objectives guiding alternatives). Under those statutes, mine plans must address the lessor's obligation to achieve maximum economic recovery, and OSM's alternatives must be guided by this statutory directive. 30 U.S.C. § 201(a)(3)(C) ("[N]o mining operating plan shall be

[16] Plaintiffs waived their mid-range alternative argument because their draft EIS comments do not raise it. *See* AR-117-31574-578 (commenting that OSM did not consider "clean energy alternatives"); *see generally* AR-117-31367-443, AR-117-31512-580. Absent exceptional circumstances, "belatedly raised issues may not form a basis for reversal of an agency decision." *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004) (plaintiffs "forfeit[] any objection" not identified in their comments).

approved which is not found to achieve the maximum economic recovery of the coal within the tract."); *see also* 30 C.F.R. § 816.59.

Plaintiffs' cited cases merely confirm that the range of alternatives is limited by statutory directives. In those cases, the agency's statutory directive conferred broad discretion under the Federal Land Policy Management Act's ("FLPMA") and forest planning statutes to designate areas available for leasing. *See* Pl. Br. 34 (citing *W. Org. of Res. Councils,* 2018 WL 1475470, *7-9 (FLPMA planning case); *High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217, 1224 (10th Cir. 2020) (Forest Service had "broad discretion" to consider a greater range of alternatives)). The vastly different statutory objectives in those cases are not relevant guides for OSM when faced with a *site-specific, third-party* proposal under SMCRA for previously leased coal.

In any case, OSM explained why Plaintiffs' mid-range alternative was not reasonable. AR-116-30532-33. First, the "checkerboard pattern" of interspersed federal and state leases in the area make a smaller permit area operationally and economically infeasible, if not impossible. Preventing mining of certain federal tracts would "necessitate leaving large wedges of private coal in place."[17] AR-116-30532-533 (incorporating EIS Section 2.6.2 on operational issues).

[17] OSM's decision to exclude 74 acres from the final permit was based on MDEQ's denial under ***state*** law. AR-202-37563. Without a state permit, that area could not

Second, Plaintiffs simplistic conclusion that reducing Area F by half would reduce all impacts by half, *see* Pl. Br. 35-36, does not reflect operational reality. As OSM explained, because Westmoreland's federal leases are interspersed in a checkerboard pattern with its private leases, "the disturbance necessary to mine the private leases only would be similar to the level of disturbance (and thereby have similar effects) for Alternatives 2 and 3 because *the surface overlying federal coal would still be disturbed for highwall layback and ancillary actions that support mining*." AR-116-30532 (emphasis added). Plaintiffs likewise ignore reality in pronouncing that a mid-range alternative would avoid indirect impacts from coal combustion (e.g., local air pollution, GHG emissions), Pl. Br. 35, because "the Colstrip Power Plant would continue to operate at the same level of output" even under the No Action alternative. AR-117-31564.

Finally, Plaintiffs argue that Montana's regulation, ARM 17.24.322, is not an obstacle to a mid-range alternative. Pl. Br. 36. OSM, however, explained that "*the agencies*"—*i.e.*, OSM *and* the co-lead agency, MDEQ—considered and had to approve the smaller permit area. AR-116-30532 (emphasis added); *see also* AR-116-30356. Montana regulation (ARM 17.24.322) requires a coal conservation plan ensuring the Mine will mine "all of the mineable and marketable

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be mined. Had MDEQ permitted the 74 acres, OSM would have had no basis to exclude that area.

coal," which undoubtedly constrains MDEQ's authority to approve a permit that leaves the coal in the ground, consistent with OSM's obligation to approve a mine plan that achieves maximum economic recovery of the coal. *See* AR-116-30532 (addressing constraints imposed by both ARM 17.24.322 *and* 30 C.F.R. § 816.59).

Because OSM provided a reasoned basis for rejecting further consideration of a mid-range alternative, and because it otherwise considered a reasonable range of alternatives, it complied with NEPA.

D. The Power Plant's Ongoing Water Withdrawals Are Beyond the Scope of Area F Impacts.

Plaintiffs claim that the Colstrip Power Plant's water withdrawals from the Yellowstone River should have been analyzed as indirect impacts. Pl. Br. 24-27. The power plant's water withdrawals, ongoing for decades, are not an indirect effect of Area F.

An agency is not required to "examine everything for which the [project] could conceivably be a but-for cause." *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016). NEPA requires a "reasonably close causal relationship" between agency action and impact, akin to the "doctrine of proximate cause from tort law." *Public Citizen*, 541 U.S. at 767 (citations and quotations omitted). "Where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id*. at 770; *Alaska Wilderness League v. Jewell*, 788

F.3d 1212, 1225-26 (9th Cir. 2015). Further, NEPA review need not address the indirect effects of activities that another agency "has sole authority" to regulate. *Sierra Club,* 827 F.3d at 47.

The Colstrip Power Plant has been withdrawing water from the Yellowstone River since the 1970s.[18] AR-1112-140394. Withdrawals will continue with or without Area F. AR-116-30403, 30424, 30461. Thus, as a factual matter, Area F will not control or change Power Plant operations, including water withdrawals. Further, an entirely separate company operates the power plant,[19] AR-116-30394, and different state and federal regulatory authorities govern those operations.

OSM closely considered the scope of its impact analysis, including holding several meetings with MDEQ. Because Area F would not affect withdrawals, OSM concluded they were not within its analysis. AR-117-31539; AR-1025-13867-68; AR-1026-13884 (Regional Branch Manager explaining "there won't be increases in withdrawals so no impact is expected"). OSM explained that NEPA does not require it to "analyze every action taking place at [the] power plant." AR-

[18] Plaintiffs claim the plant uses 50,000 acre-feet/year from the River citing only their own Complaint. Pl. Br. 25. The plant actually uses only about 22,000 acre-feet/year. Doc. 73-5 ¶18.

[19] Plaintiffs repeatedly refer to the Rosebud Mine and Colstrip Power Plant as a single operation—the "coal complex." They are not. The Mine and Power Plant are owned by unrelated companies, operated under separate permits, and regulated by different government agencies. AR-116-30461.

1004-13591. OSM distinguished water use from combustion emissions, which tie directly to Area F coal, and determined it must engage in air quality modeling to better understand emissions, including mercury deposition.[20] *Id*.

The case law supports OSM. In *Sierra Club v. FERC*, the court held that the agency should consider impacts of actual downstream ***combustion***—which was the "entire purpose" of the proposed action and, thus, foreseeable. 867 F.3d at 1371-72. The courts reached the same conclusion in the other cases Plaintiffs cite. Pl. Br. 25 & n.25. None of Plaintiffs' cases require the agency to address other operational impacts of a power plant, including water use.

III. ESA CONSULTATION WAS NOT NEEDED FOR UNAFFECTED SPECIES.

Because the impact area encompassed no pallid sturgeon habitat, OSM determined that Area F would not affect the species. AR-116-30750-51; AR-861-12493-96, AR-898-36483-85. The U.S. Fish and Wildlife Service concurred. AR-116-31132-33. Further, Plaintiffs' allegations of error, Pl. Br. 27-29, fail because the power plant water withdrawals are not ESA "effects" of OSM's Area F "action."

[20] Ultimately, air quality and deposition modeling demonstrated that mercury and other pollutants would not reach the Yellowstone River, so OSM did not include the Yellowstone in the impact area. AR-116-30627 (methodology, 32km-radius impact area), 30946.

The Service defines "[e]ffects of the action" as "consequences to listed species or critical habitat *caused by* the proposed action, including the consequences of other activities caused by the proposed action." 50 C.F.R. § 402.02 (emphasis added). A consequence is caused by the action "if it would not occur ***but for***" the action. *Id*. Under this "but for" test, applied by the Service for decades, "if the agency fails to take the proposed action and the activity would still occur, there is no 'but for' causation [and] the activity would not be considered an effect of the action." 84 Fed. Reg. 44,976, 44,977 (Aug. 27, 2019).

OSM correctly determined that without Area F, power plant operations and water withdrawals would continue with coal from other Mine areas or sources. AR-116-30461. Thus, water withdrawals are not ESA "effects" of Area F.

The ESA's definition of effects also invalidates Plaintiffs' reinitiation argument. *See* Pl. Br. 29-30. Reinitiation of consultation is required if "new information reveals *effects of the action* that may affect listed species." 50 C.F.R. § 402.16(a)(2) (emphasis added). Because water withdrawals are not Area F effects, reinitiation was not required.[21]

[21] Even if Area F affected power plant water withdrawals, Plaintiffs' expert merely highlights decades-old and ongoing water use that is a minute fraction of Yellowstone River flows. AR-1202-145090. The sturgeon's recent expansion into this area is evidence that the River continues to provide high quality habitat. Doc. 73-6 at 8-9.

IV. IF PLAINTIFFS PREVAIL ON THE MERITS, THE REMEDY MUST BE NARROWLY TAILORED; VACATUR IS NOT WARRANTED.

A. Injunctive Relief May Not Be Granted Absent a Showing Under the *Monsanto* Factors.

Plaintiffs carefully avoid the word "injunction," but seek a decision that would stop Area F mining. Pl. Br. 37-38; *see PGBA, LLC v. United States*, 389 F.3d 1219, 1228 (Fed. Cir. 2004) ("[R]elief in the form of an order setting aside the [decision] . . . is tantamount to a request for injunctive relief."). In the case on which Plaintiffs primarily rely, the D.C. Circuit recently rejected the idea that a party can side-step the *Monsanto* analysis by characterizing injunctive relief as the mere result of vacatur. *See Standing Rock Sioux v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1054 (D.C. Cir. 2021) (citing *Monsanto Co. v. Geertson Seed Farms*, 516 U.S. 139, 156-58 (2010)). The court explained that if "a district court could, in every case, effectively enjoin agency action simply by recharacterizing its injunction as a necessary consequence of vacatur, that would circumvent the Supreme Court's instruction in *Monsanto* that 'a court must determine that an injunction *should* issue under the traditional four-factor test.'" *Id.* (quoting *Monsanto*, 561 U.S. at 158);[22] *see also 350 Montana v. Bernhardt*, 443 F. Supp. 3d

[22] When the district court analyzed the *Monsanto* factors to determine whether injunctive relief *should* issue, the court determined that it *should not* because plaintiffs could not make the requisite showing. *See Standing Rock*, at **6-13.

1185, 1202 (D. Mont. 2020) (vacating NEPA document, but declining to vacate mine plan or enjoin mining).

The traditional four-factor test (irreparable injury,[23] inadequacy of remedies at law, balance of the hardships, and the public interest) applies to injunction requests for NEPA violations. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018). Where an ESA violation has occurred, the court reviews only irreparable injury. *Id*. Thus, before this Court may take action that would bar mining in Area F, it must make a finding that such relief *should* issue based on those factors. Plaintiffs offer no such showing.

1. No Injunction is Justified for Alleged ESA Violations.

The ESA does not "restrict" the Court's "discretion to decide whether a plaintiff has suffered an irreparable injury." *Id.* at 818. Plaintiffs may not merely identify a "possible" irreparable harm to obtain an injunction—they must "demonstrate that irreparable injury 'is *likely* in the absence of injunction.'" *Id.* (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008)) (emphasis in *Winter*). Importantly, the injury demonstrated must be to Plaintiffs themselves, not to the listed species. *Id.* at 822.

[23] Where plaintiffs seek an injunction pending agency remand for procedural defects, the "first prong of the injunction test should be modified to match the analogous prong in the preliminary injunction test: plaintiffs must show that they are 'likely to suffer irreparable harm in the absence of preliminary relief.'" *Nat'l Wildlife Fed'n,* 886 F.3d at 817.

Plaintiffs are not eligible for injunctive relief under the ESA because they have not demonstrated that it is *likely* that they will suffer irreparable harm. As a threshold matter, nowhere in their opening brief or copious attachments do Plaintiffs offer evidence that *they* will be harmed in any way by alleged ESA violations. Even if harm to the pallid sturgeon *alone* could justify injunctive relief, this Court has already reviewed Plaintiffs' evidence of that harm and determined that it was "too attenuated to constitute the likely irreparable harm needed to award preliminary injunction." Doc. 118 at 12. That Plaintiffs now seek permanent relief does not change the analysis because, as they admit, the effects they allege are far from likely to harm the pallid sturgeon. Plaintiffs only assert that combined impacts of various factors (most of which are unrelated to this case) "may affect the pallid sturgeon." Pl. Br. 27. It is well established, however, that the mere possibility of harm is insufficient for injunctive relief.

2. No Injunction is Justified for Alleged NEPA Violations.

The Supreme Court has stated that there is no "thumb on the scales" in favor of injunctive relief in NEPA matters. *Monsanto Co.*, 561 U.S. at 157-58. Again, Plaintiffs cannot show the *likelihood* of irreparable harm *in the absence of* an injunction. *Nat'l Wildlife Fed.*, 886 F.3d at 818.

Plaintiffs' expert's claims of harm to human health are based upon an "exaggeration and misuse" of available information and entirely fail to explain a

"defensible link between future mine/power plant operations and the mortality and monetary costs claimed in his declaration. Beckerman Decl. ¶25, attached as Exhibit 2.

Plaintiffs admit that their requested relief would have no immediate effect on mine operations. Thus, no change in GHG emissions could be expected at least until other Mine areas are depleted—*i.e.*, these alleged harms would continue even if the equitable relief is granted. *See* Pl. Br. 39; *see also* Doc. 73-3 ¶¶9-16. Even then, the Power Plant could continue operations with other sources of coal. Doc. 73-4 ¶9. Moreover, Plaintiffs have not demonstrated that even immediately removing the GHG emissions associated with Area F entirely would meaningfully ameliorate the global climate change concerns they cite. *See id.* ¶¶10, 15.

Plaintiffs rely on OSM's determination that Area F would have "major" impacts on surface water as justification for equitable relief. However, because Plaintiffs cannot access the private surface of Area F to recreate, *see* Doc. 73-1 ¶4, the only possible injury *they* may suffer related to surface waters is *outside* the permit boundary.[24] As part of its state permitting review DEQ determined that

[24] To the extent Plaintiffs claim injury from viewing surface water impacts in Area F, they disregard the strict reclamation standards imposed within the permit area. *See* Doc. 73-1 ¶¶6-12; Batie Decl. ¶5, attached as Exhibit 3. Thus, any aesthetic harm resulting from surface water impacts is *not* irreparable.

Area F would cause *no* material damage outside the permit area. AR-125-37399; *see also* Nicklin Decl., Doc. 73-5 ¶¶9-16, 19.

Finally, Plaintiffs' unsubstantiated claim that Area F will result in the "permanent destruction of tribal artifacts and landmarks," is belied by the Programmatic Agreement, which documents that the potentially affected Tribes do not object and establishes a plan to protect historic artifacts. AR-929-37788-98. Indeed, the Programmatic Agreement shows an adequate legal remedy, rendering injunction inappropriate.

In contrast to Plaintiffs' hyperbolic assertions of injury, the harm to Westmoreland and the Union of an order barring Area F mining would be real and immediate. Barring Area F would deny Westmoreland access to Area F's shallower coal and would immediately increase the Mine's operating costs by approximately $2.5 million per year. Doc. 73-2 ¶6; Batie Decl. ¶4. The Mine is a fixed cost operation, and such an increase would significantly undermine the Mine's viability. Doc. 73-2 ¶7; Batie Decl. ¶4. Moreover, within 3-5 years, without Area F, Westmoreland will deplete permitted coal reserves and be forced to close and layoff its employees. Doc. 73-2 ¶7; Micheletti Decl. ¶3, attached as Exhibit 4; Batie Decl. ¶6. OSM took many years to complete the approval that Plaintiffs seek to vacate. Thus, Plaintiffs' blithe assurance that the Mine has enough reserves to "operate for years" and unsupported assertion that "vacatur will

not impact employment" rings hollow. The obvious reality is that an order from this Court barring access to Area F has a high likelihood of closing the Mine, forcing employee layoffs, and inflicting severe economic distress on the surrounding communities, potentially leading to closure of the Colstrip Power Plant and exacerbating energy reliability issues in Montana. Doc. 73-2 ¶¶7-8; Micheletti Decl. ¶3; Batie Decl. ¶¶4, 8; Doc. 73-4 ¶¶11-14.

Plaintiffs' speculation that "tax subsidies" may result in an increase in public revenue, Pl. Br. 39, is unsupported, short-term thinking. Westmoreland pays millions in coal excise taxes, Doc. 73-2 ¶8, which will disappear if the Mine closes. The public interest goes well beyond tax revenues, however. Plaintiffs do not contest that closure of the Mine will have serious negative impacts on the community.

In sum, injunction is not warranted under the traditional four-factor test, so Plaintiffs' implicit request for an order barring mining in Area F must be denied.

B. Vacatur Is Not Warranted.

The decision to vacate an agency decision is "controlled by principles of equity." *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018). The Court must "weigh the seriousness of the agency's errors against 'the disruptive consequences'" of vacatur. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015).

Plaintiffs argue that *Standing Rock* shows that vacatur is "especially appropriate" in NEPA cases. Pl. Br. 37. *Standing Rock* made no such sweeping statement. In fact, the D.C. Circuit distinguished between the case before it, where the Corps had ***declined to prepare an EIS***, thereby "bypass[ing] a fundamental procedural step," and those where the agency failed to consider certain public comments. 985 F.3d at 1052. Here, OSM prepared an EIS and conducted the appropriate consultation under the ESA, so there is no argument that the agency "bypassed a fundamental procedural step." Instead, Plaintiffs' claims amount to differences of opinion about the agency's methodology and the conclusions it reached upon evaluating the information presented—issues squarely within the agency's discretion. *See supra* at 13-19.

In contrast, the disruptive effects of vacatur would be significant for Westmoreland, the Union, and the surrounding communities, as described above. Even if OSM acts quickly on remand, the uncertainty surrounding Area F re-authorization would have serious effects.

In sum, Plaintiffs' "just transition" is a fig leaf.[25] Whether cast as the result of vacatur or injunction, the order they seek would jeopardize the Mine's continued

[25] Plaintiffs' "just transition" is also based on the false assumption that the Colstrip Power Plant will close by 2030. Available information indicates it will continue well after that date. Micheletti Decl. ¶¶4-7; Doc. 73-4 ¶¶10-12.

operation, along with the livelihood of hundreds of employees, and could devastate the surrounding communities.

CONCLUSION

For the reasons discussed above, OSM's ROD and approval of Area F should be affirmed.

Dated this 15th day of June, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is double-spaced, has a typeface of 14 points or more, and contains 7,935 words exclusive of the caption, table of contents, tables of authorities, and certificates, in compliance with the word limit set out in Doc. 145.

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2021, I filed the foregoing document electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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