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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MONTANA ELDERS FOR A LIVABLE TOMORROW, MONTANA ENVIRONMENTAL INFORMATION CENTER, and the MONTANA CHAPTER OF THE SIERRA CLUB,	)	Case No. 9:15-cv-00106-DWM
Plaintiffs,	)	**SIGNAL PEAK ENERGY, LLC'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
vs.	)	
U.S. OFFICE OF SURFACE MINING, an agency within the U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR,	)	

a federal agency, ROBERT POSTLE, in his official capacity as Program Support Division Manager of U.S. Office of Surface Mining Western Region; DAVID BERRY, in his official capacity as Regional Director of U.S. Office of Surface Mining Western Region; JOSEPH PIZARCHIK, in his official capacity as Director of U.S. Office of Surface Mining; JANICE SCHNEIDER, in her official capacity as Assistant Secretary of Land and Minerals Management of the U.S.,

Defendants,

and

SIGNAL PEAK ENERGY, LLC,

Intervenor.

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Intervenor Signal Peak Energy, LLC ("Signal Peak"),[1] pursuant to L.R. 56.1 and the Court's Order dated December 16, 2016 (Doc. 46), hereby files this Reply in Support of its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

INTRODUCTION

Agency decisions must be upheld unless arbitrary and capricious. (*See* Doc. 52, pp. 3-5). The deference afforded to governmental agencies "is particularly appropriate when a court is reviewing issues of fact, where analysis of the documents requires a high level of technical expertise." *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 578 (9th Cir. 2016) (citations omitted). Such is the case here, as the 2015 EA and FONSI extensively address scientific and engineering matters that implicate substantial agency expertise. As their submissions in this case clearly demonstrate, however, Plaintiffs request that this Court defer not to agency expertise, but instead to a collection of third party materials ranging from a letter issued by an Oregon Senator, to resolutions and periodicals that do not address the Proposed Action before the Court[2] – *i.e.,* the

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[1] Capitalized terms not defined herein shall have the definition provided in Signal Peak's initial Brief (Doc. 52).

[2] *See, e.g.,* Doc. 54, Signal Peak's Statement of Disputed Facts ("SODF"), ¶¶ 83-84.

issuance of a mining plan modification necessary for mining to continue at the Mine. Further, despite encouraging the Court to defer to these general third party materials, Plaintiffs did not file a Statement of Disputed Facts in this case. Accordingly, the facts set forth in each of the Statements of Undisputed Facts filed by the Federal Defendants and Signal Peak are deemed admitted and not in dispute under L.R. 56.1(d).[3]

In sum, the determination of the Office must be upheld under NEPA unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). For the reasons previously set forth, and reiterated herein, the Office's determinations in the 2015 EA and FONSI are none of the above.

ARGUMENT

I. The Purpose and Need Statement Was Not Arbitrary and Capricious

In their Reply, Plaintiffs once again ignore the distinction between the "brief discussions of the need for the proposal" required for an EA and the "purpose and need statement" required for an EIS. (Doc. 52, pp. 6-9). The 2015 EA, however, clearly satisfies either standard. *Id.*

[3] Plaintiffs also do not dispute that they waived Counts V and VII of the Complaint. (*See* Doc. 52, pp. 20-22).

Pursuant to 30 C.F.R. § 746.13, the Office had three possible courses of action under NEPA upon consideration of the application at issue – approval, disapproval, or conditional approval. The Office expressly states this statutory obligation in Section 1.2 of the 2015 EA, and then extensively analyzes potential environmental effects from approval (*i.e.,* the Proposed Action Alternative) and disapproval (*i.e.,* the No Action Alternative). (Doc. 53 ("SOF") ¶ 42; 48). This analysis makes clear that approval was not "a foreordained formality," as alleged by Plaintiffs. (*See* Doc. 55, p. 4). Regarding conditional approval, the Office found that, the "mitigation measures and stipulations presented in the Lease EA remain in effect" and it "did not identify impacts warranting additional mitigation beyond that which would be employed in accordance with the existing mine permit...." (SOF ¶ 49). As a result, the Office determined that conditional approval was not a reasonable alternative. *Id.* This conclusion was entirely reasonable, particularly in light of Plaintiffs' failure to offer "a specific, detailed counterproposal...." *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986).[4]

[4] Among the patently unreasonable alternatives suggested by Plaintiffs was the use of renewable energy sources in place of coal consumption. (AR:4-21623). However, when the purpose of a proposed action "is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved." *City of Angoon*, 803 F.2d at 1021.

Further, despite being in complete accord with the Office's statutory obligations, Plaintiffs also contend that the 2015 EA was impermissibly narrow and exclusively considered Signal Peak's private objectives. (Doc. 55, p. 7). Tellingly, Plaintiffs' latest submission ignores Ninth Circuit authority cited by Signal Peak rejecting challenges to environmental assessments on the basis that they offer only two alternatives. (Doc. 52, pp. 22-23). Plaintiffs similarly ignore Signal Peak's citation to *Alaska Survival v. Surface Transp. Bd.*, wherein the Court held that a purpose and need statement "can include private goals, especially when the agency is determining whether to issue a permit or license." 705 F.3d 1073, 1085 (9th Cir. 2013). In any event, the Office did not "exclusively" consider Signal Peak's private objectives. Rather, like the Lease EA before it, the 2015 EA also considered the substantial public interest in the continued development of the Mine. (Doc. 52, p. 7).

Indeed, most peculiarly, Plaintiffs fault the Office for purportedly "ignoring" the costs associated with "the inevitable bust following mining...." (Doc. 55, p. 8). Section 1.2 of the 2015 EA, however, expressly considers the economic costs associated with the cessation of mining, which the Office concludes will occur ***nine years earlier*** absent approval of the mining plan modification. (AR:4-21300).

This would result in the loss of hundreds of jobs and the removal of millions of dollars from the federal, state, and local economies. (SOF ¶¶ 43-47).

Plaintiffs' Reply is also remarkable for its continued reliance on pre-decisional materials, including a draft version of the 2015 EA. As the Federal Defendants note, a final EA that has been altered from its draft version to more clearly articulate its purpose and need is not inappropriate. (Doc. 48, p. 14). On the contrary, "federal courts are ordinarily empowered to review only an agency's ***final*** action...." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (emphasis in original). With respect to the Lease EA, the Billings Division of this Court held that "BLM's initial reluctance to forego an EIS" was "not evidence" that an EIS was required, noting that "[t]his Court can only review the final decision...." *Northern Plains Resource Council Inc. v. U.S. Bureau of Land Mgmt.,* CV-14-60, 2016 WL 1270983, at *8 (D. Mont. March 31, 2016).

Nevertheless, Plaintiffs contend that the removal of a reference to national energy security from a draft version of the 2015 EA due to the percentage of coal being exported in 2014 somehow renders the final version invalid. (Doc. 55, p. 6). To be clear, there is no conflict between exporting coal and national energy security. Plaintiff Sierra Club knows this. For example, it, with other plaintiffs,

challenged the Export-Import Bank's approval of a $90 million loan guarantee regarding $1 billion in exports of U.S. coal in *Chesapeake Climate Action Network v. Export Import Bank of the United States*, 78 F.Supp.3d 208, 212 (D.D.C. 2015). Energy security does not appear to have been part of that challenge. Moreover, coal exports are not a new development, and have been ongoing for decades. *See, e.g., Coal Exporters Ass'n of U.S., Inc., v. U.S.*, 745 F.2d 76, 78-89 (D.C. Cir. 1984) (discussing coal export industry, and transportation of export coal by rail, at length).[5]

II. The Office Properly Assessed Potential Impacts of Coal Transportation

NEPA expressly allows for tiering in order to avoid requiring agencies to repeatedly craft duplicative analyses. (*See* Doc. 52, pp. 26-27). Duplication, however, is precisely what Plaintiffs now request regarding analysis of rail transport from the Mine. Indeed, in their zeal to overturn the 2015 EA, Plaintiffs mischaracterize prior environmental analyses as having limited discussion regarding rail transportation. By way of example, Plaintiffs state that the 1992 EIS contains only a "passing mention of coal trains." (Doc. 55, p. 10). The 1992 EIS, however, contains extensive analysis regarding potential impacts from the

[5] Additionally, contrary to Plaintiffs' claim otherwise, energy security was just one of many rationales cited by the Bureau of Land Management in support of leasing the Federal Coal. Others included the public's receipt of lease bonus and royalty payments, and the socioeconomic consequences of a mine closure. (AR:4-21403, 21572, 21623).

construction and operation of the 33-mile rail spur between the Mine and the mainline south of Broadview. (AR:3-15075). This includes, *inter alia*, the rail spur's potential impacts to:

- Air quality, including coal dust emissions from coal cars and exhaust emissions (carbon monoxide, nitrogen dioxide, sulfur dioxide, and particulates) (AR:3-15160-15161);
- Agricultural productivity (AR:3-15198);
- Vegetative stability and productivity along the rail corridors (AR:3-15107);
- Land use along the rail spur from construction and train traffic (AR:3-15197);
- Visual aesthetics (AR:3-15199-15200);
- Wildlife (AR:3-15178);
- Topography (AR:3-15167);
- Traffic flow and public safety from coal trains crossing roads (AR:3-15183);
- Noise levels along the rail spur from railroad construction and train-generated noise (AR:3-15186);
- Quality of life for those who live close to the rail spur (AR:3-15192);
- Ranching operations (AR:3-15284); and
- Wetlands along the rail spur right-of-way (AR:3-15175).

Further, contrary to Plaintiffs' contention otherwise, the above-referenced analysis is not stale simply because it was based on fewer than three trains per day utilizing the rail spur. Just as it is "reasonable not to prepare another EIS summarizing the same impacts on additional acreage,"[6] it is likewise reasonable not to prepare another EIS summarizing the same impacts from additional rail traffic. Accordingly, it was well within the Office's discretion not to re-analyze the impacts of rail transport, as "the number of trains per day would not increase" from the current daily average of three (as stated in the 2011 EA)[7] and the duration would be less than the 30-year duration identified in the 1992 EIS. (*See* SOF ¶¶54-55).

Plaintiffs' contention that there should be further analysis of rail impacts beyond the end of the 33-mile rail spur in Broadview is likewise invalid. This would require the Office to evaluate the broad, downstream potential effects of coal transportation, when the routes and destinations are subject to change at the

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[6] *Northern Plains Resource Council v. Lujan*, 874 F.2d 661, 666 (9th Cir. 1989).

[7] Plaintiffs incorrectly assert that, at current production, 6-9 trains per day would load at the Mine. (Doc. 42, ¶¶ 72-73). Although current train capacity is approximately 15,000 tons, the 1992 EIS estimated that each train would have a capacity of 11,500 tons. (AR:3-15282). However, even utilizing this lower figure, the current permitted annual production of 12 million clean tons per year would result in only 2.86 trains per day -- *i.e.,* (12,000,000 annual tons /11,500 tons per train)/(365 days) = 2.86 trains per day. (AR:4-21304).

whim of a volatile energy market. (*See* SOF ¶¶ 56-57). NEPA does not require an agency to "do the impractical." *Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754, 764 (9th Cir. 1996). Moreover, Signal Peak does not own or operate the railroad system. The railroads have been in place and operating for decades, their impacts are known and existing, and their use is not regulated by the Office. Plaintiffs may have separate potential avenues for relief regarding the operation of the railroads in question, but attacking the 2015 EA is not one of them. *See, e.g., Sierra Club v. BNSF Railway Company*, 2016 WL 6217108 (W.D. Wash. Oct. 25, 2016).

III. The Office Properly Assessed Non-Greenhouse Gas Emissions

Potential local effects of non-greenhouse gas emissions were analyzed extensively in the 2015 EA. (Doc. 52, p. 13). Plaintiffs, however, fault the Office for not also including what would necessarily constitute pure speculation as to potential impacts from non-greenhouse gas emissions from the combustion of coal at uncertain locations, with unknown emission controls. (SOF ¶ 58). For the reasons previously stated by both the Federal Defendants and Signal Peak, the Office did not err in excluding such speculation. (*See* Doc. 48, p. 19-22; Doc. 52, p. 13). The authority cited by Plaintiffs, including the holdings in *Mid States Coal. for Progress v. STB*, 345 F.3d 520 (8th Cir. 2003), *South Fork Bank Council of Western Shoshone Nevada v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009)

(per curiam), and *Dine Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation & Enf't,* 82 F.Supp.3d 1201, 1212 (D. Colo. 2015), *vacated in part as moot*, 643 Fed. Appx. 799 (10th Cir. 2016), does not suggest otherwise.

In *Mid States*, when defining the contours of the EIS, the agency stated that air quality impacts were reasonably foreseeable due to increased coal availability and that it would consider the same, but then failed to do so. 345 F.3d at 550. The court found that, "[f]or the most part, [the agency] has completely ignored the effects of increased coal consumption, and it has made no attempt to fulfill the requirements laid out in the CEQ regulations." *Id*. Here, the Office has not "ignored" the effects of coal consumption. On the contrary, the Office identified air quality impacts that were reasonably foreseeable due to increased coal availability (*i.e.* local air emission impacts and local and global greenhouse gas emissions), discussed them in great detail, and explained why further analysis was not possible because of uncertainty and speculation. (SOF ¶¶ 58, 61-62). While the Office was able to quantify and describe the impact of greenhouse gas emissions (because the CO2 produced during coal combustion is relatively consistent, regardless of the source), it explained why it could not do the same for non-greenhouse gas emissions. (SOF ¶ 58; AR:4-21854).

Plaintiffs' reliance on *South Fork* and *Dine* is similarly misplaced. In each of those cases there was no uncertainty as to the location or method of processing ore (*South Fork*) or combusting coal (*Dine*). *See South Fork*, 588 F.3d at 725-26; *Dine*, 82 F.Supp.3d at 1213. Indeed, the court in *Dine* recognized that the interconnected relationship between the mine and power plant at issue there was unlike a scenario where, as is the case here, a coal mine supplies "multiple buyers, each of whom uses that coal in different constraints." 82 F.Supp.3d at 1213.

IV. The Office Properly Assessed Greenhouse Gas Emissions from Coal Combustion

In their Reply, Plaintiffs again focus on the Office's reasoned decision not to utilize the Social Cost of Carbon Protocol ("SCC Protocol"). For the reasons previously stated, this argument lacks any merit (*see* Doc. 52§ II.C), and Plaintiffs attachment of CEQ guidance from ***2016*** does nothing to change that fact.

Specifically, Plaintiffs rely extensively on CEQ guidance which was published ***over a year and half after*** the 2015 EA was issued, and could have no bearing on the reasonableness of the Office's prior determination. (*See* Doc. 55-1, p. 1). Further, even if it was applicable, the guidance is not mandatory and does not require the use of the SCC Protocol. *See id.*

In addition to relying on inapplicable CEQ guidance, Plaintiffs' also continue to cite *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F.

Supp. 3d 1174 (D. Colo. 2014). As discussed previously, the *High Country* court faulted the agency for ignoring the SCC Protocol entirely in its analysis, and providing nothing more than arbitrary post-hoc rationalizations in support of its omission. (*See* Doc. 52, pp. 17-18). Here, the Office expressly considered and explained its decision not to use the SCC Protocol, even distinguishing *High Country* in the process. (*See* AR:3-21640-21641).

Furthermore, despite their efforts, Plaintiffs cannot credibly distinguish the case law cited by Signal Peak, including the holding in *Wild Earth Guardians v. United States Forest Serv.*, 120 F.Supp.3d 1237 (D. Wyo. 2015). As here, the agency discussed concerns related to greenhouse gas emissions, considered their potential effects on climate change, recognized both the costs and benefits of mining coal pursuant to the proposed action, and quantified the estimated greenhouse gas emissions from coal to be extracted from the mine. *Id.* at 1272-73. Furthermore the court deferred to the agency's conclusion that specific impacts from greenhouse gas emissions could not be "reliably calculated with precision," as the coal was destined for sale to unknown end users. *Id.* at 1272.

Plaintiffs may disagree with the Office's decision not to convert its quantification of emissions into a dollar figure using the SCC Protocol, but that does not render the decision arbitrary and capricious.

V. The Office Properly Concluded that the Proposed Action Will Not Have a Significant Impact

The question of whether a proposed action will result in a "significant" environmental effect "implicates substantial agency expertise" and the "agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 376-78 (1989). Plaintiffs' submissions provide no compelling reason to disregard the Office's substantial expertise and reject the FONSI.

Instead, Plaintiffs focus on the Office's Manual, contending that the FONSI failed to consider the same. (Doc. 55, p. 24). This assertion is simply incorrect, as the FONSI explicitly states that the 2015 EA "follows the OSMRE's 516 DM 13, which is the departmental manual guiding the OSMRE's implementation of the NEPA process." (SODF ¶ 131). In full accord with the Manual's terms, rather than preparing a new EIS, the Office tiered to the 2015 EA and prior EIS documents. (*See* Doc. 52, pp. 25-27).[8]

[8] A new EIS also was not required merely because the 2015 EA supplements analysis contained in the documents to which it is tiered. *See, e.g., Native Village of Point Hope v. Minerals Mgmt. Serv.*, 564 F.Supp.2d 1077, 1080-81 (D. Alaska 2008).

Plaintiffs also declare that the Office failed to consider the "full context of expansion" in the FONSI, including by purportedly limiting its analysis to the 2,539 acres of federal coal lands. (Doc. 55, pp. 27-28). Like the 2015 EA, however, the FONSI expressly considers the "mining of adjacent private and State coal." (AR:4-21644). The Office also considered the annual combustion of the coal in both the local and national context in concluding that the impact therefrom would not be significant. On a national level, the Office found that annual coal production at the Mine would constitute less than one percent of total U.S. production and result in "a small percentage" of emissions therein. (AR:4-21365). On a regional level, coal produced from the Mine is more efficient, and should result in lower emissions, than that of neighboring mines. *Id.*

Additionally, as previously stated, the Office was not required to speculate, be it in the FONSI or EA, as to potential impacts that are not reasonably foreseeable. (*See* Doc. 52, § II).[9] And, the Office's refusal to do so does not render the purported impacts "highly controversial and uncertain" under NEPA. (*See* SOF ¶¶ 56-58, 63-65; Doc. 52, § V.B).

[9] *See also Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 839 (8th Cir. 1995) ("Sierra Club cannot simply doubt the FONSI determination without pointing to more than speculative impacts.").

Finally, it bears emphasis that a FONSI is only required to "include the environmental assessment or a summary of it...," and where an EA is included in the FONSI, "the finding need not repeat any of the discussion in the assessment but may incorporate it by reference." 40 C.F.R. § 1508.13. Here, the FONSI attaches the 2015 EA, and states that it "provides sufficient evidence and analysis for this FONSI." (AR:4-21643). Accordingly, Plaintiffs' complaint that the FONSI does not sufficiently address potential impacts to wetlands (Doc. 55, p. 33) is easily dismissed, as wetlands are discussed at length in the attached 2015 EA. And, as previously discussed, the mitigation measures applicable to any impacts to wetlands will, in a worst case scenario, ensure that "all water sources necessary to support the post-mine land uses would be replaced...." (SOF ¶ 75).

Dated: March 22, 2017

Respectfully submitted,

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