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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

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| WESTERN ORGANIZATION OF RESOURCE COUNCILS, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>U.S. BUREAU OF LAND MANAGEMENT, an agency within the U.S. Department of the Interior, *et al.*,<br><br>Federal Defendants,<br><br>and<br><br>CLOUD PEAK ENERGY, INC., *et. al.*,<br><br>Intervenor Defendants. | Case No. 4:16-cv-00021-BMM<br><br>**FEDERAL DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT** |

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## INTRODUCTION

Federal Defendants' opening brief explained that Plaintiffs failed to satisfy their burden of establishing standing. Fed. Defs.' Br. Supp. (ECF. No. 79) 6-14. Plaintiffs' response brief does not alter this conclusion.

Moreover, in arguing that the environmental impact statements (EISs) violated the National Environmental Policy Act (NEPA) by not considering certain alternatives or taking a hard look at greenhouse gas (GHG) emissions or potential air-quality impacts, Plaintiffs consistently ignore the programmatic nature of the resource management plans (RMPs) and the extensive analyses contained in the EISs. When considered in the proper light, it is clear that the EISs considered a reasonable range of alternatives and took a hard look at GHG emissions and air-quality impacts.

Finally, Plaintiffs failed to respond to Federal Defendants' arguments that Plaintiffs are improperly attempting to rely on extra-record evidence. For the reasons stated in Federal Defendants' opening brief, the extra-record materials and any arguments relying on them should be stricken from the record. Fed. Defs.' Br. Supp. 33-34.

## ARGUMENT

### I. Plaintiffs have not established standing.

In their opening brief, Federal Defendants' explained that the legal status of the lands as "open" to energy leasing is unchanged. Fed. Defs.' Br. Supp. 7-8. Lands that were open to leasing under the prior RMPs remain open under the new RMPs and thus no change has occurred as a result of RMP adoption. *Id*.

Plaintiffs argue this wrongly suggests that "no plan can be subject to judicial challenge," Pls.' Reply 3 (ECF No. 94), and in support they cite *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992). However, that case involved a challenge to a decision of the Forest Service not to make certain wilderness designations under the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136, not a land classification under the Federal Land Policy and Management Act. More importantly, the case does not address Federal Defendants' argument that Plaintiffs' alleged procedural injury—assuming it is founded, as it must be, on a concrete interest that is subject to a sufficiently "imminent" threat, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)—would not be redressed by a favorable decision. Plaintiffs' argument ignores the redressability requirement entirely and further ignores the fact that an order vacating the new RMPs would have the effect of restoring the prior RMPs, under which the lands were also open to leasing, to full force and effect. *Organized Village of Kake v. U.S. Dep't of*

*Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (invalidating an agency rule "reinstate[s] the rule previously in force") (quotation and citation omitted).

Should the Court disagree, Plaintiffs' demonstration of a case or controversy is still deficient because they do not "affirmatively" and "clearly" show, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), what is required of an environmental plaintiff: prior use of the potentially affected areas and concrete plans to return. *See, e.g.*, *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 183 (2000) ("environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity"); *Defenders*, 504 U.S. at 564 (noting that "'some day' intentions—without any description of concrete plans," are inadequate).

Plaintiffs attempt to bolster the inadequate showing in their opening brief by arguing that their members, upon whom the organizations rely for their standing, have established "'regular' and 'continuing' use of the planning areas that is sufficient to provide standing, as well as specific plans to return to the affected areas.'" Pls.' Reply 5. They contend that their declarations are more specific than the declarations rejected in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), and *Defenders*, which Plaintiffs trivialize as "exceptional cases." While it is true that those standing decisions were each based on a unique set of facts, this is

almost always the case. The important point is that the Supreme Court's standing jurisprudence sets a minimum not met here: prior use of affected areas and "specific and concrete" plans to return.

Plaintiffs claim otherwise, but their reply brief does not help. For example, with respect to the Buffalo RMP, supported by a single standing declaration, *see* ECF No. 72-5 (Anderson Decl.), Plaintiffs merely repeat the same vague assertions from paragraphs 8 and 10 that Federal Defendants argued were inadequate. Fed. Defs.' Br. Supp. 7-8. In fact, the only temporally-specific averments regarding use of affected lands actually post-date the complaint. This is inadequate because standing must exist on the date the complaint is filed. *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003).

All other averments regarding use of potentially affected lands are vague as to timing. Moreover, Ms. Anderson never states *when* she first visited the affected lands. And in regard to the necessary intent to return, she states only that she "plans to return in the months and years to come." Anderson Decl. ¶ 10. Vague as it is, the allegation comes closer to the "some-day" intentions in *Defenders*, 504 U.S. at 564, than the "specific and concrete plan" identified as essential in *Summers*, 555 U.S. at 495. In short, Plaintiffs' reply lends no support to their claim of standing to challenge the Buffalo RMP.

With respect to claims of standing to challenge the Miles City RMP, Plaintiffs' reply merely restates the earlier contention that Mr. Sikorski, a rancher, can see BLM-managed lands from his home. He states that, from certain elevated areas of his ranch, he can see "the pine covered hills outside of Miles City," which is eighty miles away. Sikorski Decl. ¶ 5.

In paragraphs 6 and 7, he refers specifically to two areas which are open to leasing, without indicating the distance to either, claiming, as to the first, that it "may be visible to him" from buttes on his property; and, as to the second area, that his property "overlooks" it. *Id*. However, no evidence establishes the declarant's actual proximity to the affected areas, thus the Court is essentially asked to presume injury based solely on testimony that the land is within the declarant's potentially distant purview, from an elevated point. These facts distinguish this case from *Ecological Rights Foundation v. Pacific Lumber Company*, 230 F.3d 1141 (9th Cir. 2000), a citizen suit under the Clean Water Act charging violations by an existing lumber mill. Plaintiffs' members in that case had recreated for years on the river just downstream of the mill. Likewise, the declarants in *Laidlaw*, the decision principally relied on by the Ninth Circuit in *Ecological Rights Foundation*, lived on the river just below the pollution source. It was these circumstances that led to the Ninth Circuit's observation that the two

cases involve "allegations of injury quite specific." *Ecological Rights Found.*, 230 F.3d at 1149. Such specificity is lacking here.

## II. The EISs considered a reasonable range of alternatives.

### A. The EISs were not required to consider alternatives identifying fewer areas as acceptable for further consideration for coal leasing.

As is typical when considering programmatic management actions such as RMP revisions, the EISs considered a spectrum of alternative high-level management approaches, ranging from approaches focused on conserving resources to those that focused on developing resources. *See* Fed. Defs.' SOF ¶¶ 13-16, 59-63 (ECF No. 80). For the coal resource, which is one of many resources managed by the RMPs, no substantial new information was provided during the RMP-revision process that affected BLM's previous coal-screening determinations. BLM therefore reasonably decided to carry forward those determinations. As a result, the EISs did not consider alternatives increasing or decreasing the land previously identified as potentially available for coal leasing. *See* Fed. Defs.' SOF ¶¶ 3-4, 8, 21-23, 47, 54, 58, 66.

Plaintiffs argue that this approach was arbitrary and capricious because the EISs did not consider an alternative "that would limit the amount of coal extracted or greenhouse gas pollution emitted." Pls.' Reply 9. But this argument misunderstands the effect of retaining the previous coal-screening determinations.

The identification of lands potentially available for coal leasing has no immediate effect. It does not result in more or less coal being developed.[1] Instead, coal development can occur only after an operator applies for a lease, BLM issues the lease, and a mine plan is approved. Leasing decisions and mine-plan reviews require substantial additional administrative review, including additional analysis under NEPA. Fed. Defs.' Br. Supp. 3-4, 17-18. And that additional analysis requires consideration of a reasonable range of alternatives, including a no-action alternative that would consider not issuing leases or approving mine plans. *See* 40 C.F.R. § 1502.14(d) (requiring "alternative of no action" in EIS); *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1245 (9th Cir. 2005) (noting "alternatives provision of NEPA" applies to EISs and EAs).

In other words, BLM must eventually consider the alternative of reduced coal development that Plaintiffs seek. And consideration of this alternative will reasonably occur later in the development process at the time implementing decisions are made and more concrete information is available to the agency. But

[1] The only alternative that would have the immediate effect of limiting coal development would be an alternative identifying no lands as available for coal leasing. But any such alternative would be inconsistent with BLM's objective of making coal "available to support domestic and export needs." Fed. Defs.' SOF ¶ 18; *see also id.* ¶ 65 (noting objective for Miles City to "[p]rovide opportunities for mineral use in an environmentally responsible manner."). As a result, such an alternative need not be considered. *See N. Alaska Ent'l Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (agency need not consider alternative that is "inconsistent with the basic policy objectives for the management of the area.").

consideration of an alternative of reduced coal leasing was not necessary to permit an informed decision "at this planning stage." *See W. Watersheds Proj. v. Kenna*, 610 F. App'x 604, 606-07 (9th Cir. 2015); *see also Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 498 (9th Cir. 2014) (noting agency's "flexibility in deciding the level of analysis to be performed at a particular stage.").

Moreover, as highlighted by Intervenor-Defendants Peabody Caballo Mining, LLC and BTU Western Resources, Inc., the alternatives considered in the EISs contemplated a range of restrictions on coal exploration that would have the practical effect of varying the amount of coal development. *See* ECF No. 85 at 10-12; *see also* MC_0003315-20 (noting variation in exploration by alternative in Miles City EIS); BUF_0002237-53 (same for Buffalo EIS). Such variation further supports the reasonableness of the range of alternatives considered by the EISs. *Cf. Kempthorne*, 457 F.3d at 978 (finding alternative reflects "middle ground" despite "open[ing] 96% of the available land to petroleum development" because it "places numerous limitations on the leases").

Finally, Plaintiffs identify no comments during the administrative process indicating that the previous coal screening was outdated due to climate change. Rather, Plaintiffs commented that the process of coal development should be

slowed and that BLM should not open up more land for coal development.[2] Fed. Defs.' Br. Supp. 17. But the RMPs do not govern the pace of coal development and do not open more land for coal development. Instead, Plaintiffs' comments go to the implementation stage of issuing coal leases and approving mining plans, not to the application of the coal-screening criteria. Plaintiffs therefore waived this argument by not making it during the administrative process. *See Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010).

### B. The EISs were not required to consider an alternative requiring specific measures to reduce methane emissions from oil and gas development.

Plaintiffs continue to ignore the programmatic nature of the RMPs by arguing that the EISs should have considered alternatives imposing specific methane mitigation technologies on all oil and gas leases issued in the Buffalo and Miles City planning areas. As Federal Defendants previously noted, consideration of such alternatives was not necessary because the management actions common to all alternatives included the goal of reducing the effects of GHG emissions through the implementation of specific mitigation measures at the project-level planning stage. Fed. Defs.' Br. Supp. 19-20.

[2] Plaintiffs' response brief includes additional citations to comments in the Miles City record, but only one of the cited comments is from a Plaintiff and none of the comments indicate that the previous coal screening was outdated due to climate change. *See* MC_0024415-16 (comments from Northern Plains Resource Council); MC_0024383-84 (comments from non-party).

This approach is consistent with the purpose of the RMPs "to guide future land-management actions and subsequent site-specific implementation" while retaining "flexibility to adapt to new and emerging issues and opportunities to provide for adjustments to decisions over time based on new information and monitoring." Fed. Defs.' SOF ¶ 10; *see also id.* ¶ 56 (noting purpose for Miles City RMP). By contrast, Plaintiffs' proposed approach would mandate specific measures across the entire planning area over the 20-year planning period of the RMPs regardless of project-specific considerations, technological advances, or other new information. Such ossification is inconsistent with the RMPs' adaptive approach to management, and consideration of Plaintiffs' proposed alternative was not necessary to permit a reasoned choice. *See Kempthorne*, 457 F.3d at 978 (agency need not consider alternative that is "inconsistent with the basic policy objectives for the management of the area.").

## III. The EISs took a hard look at GHG emissions.

### A. The EISs were not required to quantify the potential effect of the downstream combustion of coal, oil, and gas resources potentially developed under the RMPs.

Plaintiffs insist that the EISs should have estimated the potential effect of downstream combustion of coal, oil, and gas resources potentially developed under the RMPs. Requiring such an analysis at the programmatic stage of the development process would be unprecedented. Plaintiffs have cited no cases

requiring such an analysis, and Federal Defendants are aware of none. Instead, the cases cited by Plaintiffs address specific projects or sites. *See Sierra Club v. FERC*, 867 F.3d 1357, 1371-72 (D.C. Cir. 2017) (considering EIS for pipeline project); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 532, 550 (8th Cir. 2003) (addressing approval of construction and upgrade of rail line to transport coal); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1184, 1196-97 (D. Colo. 2014) (addressing exemption for road construction related to coal mining in protected area).

There is good reason for not requiring such an analysis. Uncertainty that other courts have noted regarding downstream combustion of coal at the leasing stage is compounded at the RMP stage. *See WildEarth Guardians v. U.S. Forest Serv.*, 120 F. Supp. 3d 1237, 1273 (D. Wyo. 2015) (noting uncertainty as to "where the coal may be sold" and "the location and the method or timing of the combustion.") *rev'd on other grounds sub nom. WildEarth Guardians. v. U.S. Bureau of Land Management*, --- F.3d ---, No. 15-8109, 2017 WL 4079137 (10th Cir. Sept. 15, 2017); *see also WildEarth Guardians v. Jewell*, 738 F.3d 298, 310 (D.C. Cir. 2013) (noting coal leases are "projects in their infancy [that] have uncertain futures." (quotation and citation omitted)). At the RMP stage, it is uncertain what types of minerals will be developed (*i.e.*, coal, oil, or gas), how much will be developed, when they will be developed, how they will be developed,

how they will be used, and what emissions will result from that use. In light of these uncertainties, it is reasonable to defer such analysis until the leasing stage when there is more clarity as to at least some of these issues. *Cf. WildEarth Guardians v. Bureau of Land Mgmt.*, 8 F. Supp. 3d 17, 35 (D.D.C. 2014) (EIS assessing combustion emissions at coal-leasing stage).

BLM's decision to not quantify the uncertain combustion effects of minerals potentially developed under the RMPs was reasonable and cannot be characterized as arbitrary or capricious. Plaintiffs nevertheless argue that *Kern v. U.S. Bureau of Land Management.*, 284 F.3d 1062 (9th Cir. 2002), requires a different conclusion. That case, however, is inapposite because the portion of it relied on by Plaintiffs addresses whether an EIS for an RMP needs to consider a particular environmental impact at all. *Id.* at 1072-73. In other words, the issue was not what level of analysis was required, but rather whether any analysis was required. Here, by contrast, Federal Defendants do not argue that the EISs did not need to consider the potential environmental impact of GHG emissions. Rather, the issue is what level of analysis NEPA requires at the RMP stage. And the detailed qualitative and quantitative analysis of GHG emissions set forth in both EISs provided the requisite hard look. *See* Fed. Defs.' SOF ¶¶ 31-38, 74-82.

### B. The EISs adequately addressed the cumulative impacts of GHG emissions.

Plaintiffs' argument that the EISs were "confined . . . to individual planning areas" misrepresents the analyses in the EISs. Pls.' Reply 24. Far from being confined to the individual planning areas, the EISs examined statewide, nationwide, or global GHG emissions. *See* Fed. Defs.' Br. Supp. 26-27. The EISs then compared those emissions with the estimated emissions generated on the planning areas. *Id*. Such comparisons provided useful context for understanding the magnitude of each alternative's potential emissions, which in turn served as a proxy for assessing the potential climate impacts of each alternative. It is precisely this type of analysis that other courts have found to satisfy NEPA. *See Jewell*, 738 F.3d at 308-10 (accepting agency position that "estimated level of GHG emissions can serve as a reasonable proxy for assessing potential climate change impacts, and provide decision makers and the public with useful information for a reasoned choice among alternatives.").

Plaintiffs, however, apparently believe NEPA requires an agency to quantify the incremental GHG emissions for all of the agency's past, present, or reasonably foreseeable activities as part of a cumulative effects analysis. *See* Pls.' Reply 24-25 (suggesting BLM must assess cumulative emissions from "BLM's management of 700 million acres of federal mineral estate."). Such an approach would be impractical, and Plaintiffs cite no legal support for it. Instead, Plaintiffs' position

highlights the practical limitations of assessing the cumulative impacts of GHG emissions and climate change noted in Federal Defendants' opening brief. Fed. Defs.' Br. Supp. 25-26. Moreover, the EISs' examination of broader state, national, or global GHG emissions necessarily subsumed all GHG emissions from those areas, including those emissions from other BLM activities.

The EISs' cumulative-impacts analyses satisfied NEPA, and Plaintiffs' reliance on *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1217 (9th Cir. 2008), is misplaced. The agency in that case argued that it had "no obligation to assess the cumulative impact of its rule on climate change." *Id.* at 1216. The court rejected that argument, stating that the "impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Id.* at 1217. Here, the EISs did consider the cumulative impacts of GHG emissions. Plaintiffs simply believe that NEPA requires a different analysis. It does not.

In the end, the touchstone for a court's inquiry is whether the agency's analysis satisfied NEPA's dual purposes of informing agency decision-makers of the environmental effects of the proposed federal action and ensuring relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Again, the extensive qualitative and

quantitative analyses of GHG emissions and climate change contained in both EISs satisfied these purposes. *See* Fed. Defs.' SOF ¶¶ 31-38, 74-82.

### C. The EISs' conversion of methane emissions to carbon dioxide equivalents was not arbitrary or capricious.

Plaintiffs argue that the EISs "failed to disclose the true impact of methane emissions." Pls. Reply 29. This argument fails to acknowledge that the EISs estimated the methane emissions in both planning areas. Fed. Defs.' SOF ¶¶ 34-36, 75-76. This, together with the EISs' qualitative discussion of GHG emissions and climate change, satisfies NEPA by disclosing the potential environmental effects of the proposed action.

But the EISs then went one step further and standardized the methane emissions as carbon dioxide equivalents ($CO_2e$) by multiplying the methane emissions by a global warming potential (GWP) factor. The EISs used GWP factors from the U.S. Environmental Protection Agency (EPA) that were in effect at the time the draft EISs were prepared. *See* Fed. Defs.' SOF ¶¶ 5, 51 (draft EISs disclosed in 2013). Those factors utilized a 100-year time horizon, and their use permitted comparisons to other GHG emissions inventories that used the same factors. *See id.* ¶¶ 75-76. This rationale for using the GWP factors from EPA was not arbitrary or capricious.

Moreover, the Miles City EIS further noted that EPA had proposed to change the GWP factors and that other organizations used different factors based

on different time horizons. *Id.* ¶ 76. By providing the estimated methane emissions and identifying other GWP factors, the EIS enabled the public to use those other GWPs to calculate different $CO_2e$. *Id.* ¶ 76. This approach satisfied NEPA by promoting informed decision making and fostering public participation.

## IV. The EISs took a hard look at the effects to air quality.

Plaintiffs' response brief no longer argues that the EISs were required to examine health "impacts that occur at or below the NAAQS." Pls. Br. Supp. 33 (ECF No. 72-1). As Federal Defendants previously noted, reliance on NAAQS satisfies NEPA. Fed. Defs.' Br. Supp. 32. Instead, Plaintiffs continue to ignore the extensive and detailed air quality analyses contained in both EISs to argue that the EISs somehow did not adequately assess impacts to visibility or did not consider emissions from outside of the planning areas.[3] The record belies these arguments.

Both air quality analyses specifically examined pollutants "that could contribute to Air Quality Related Values (AQRV), including visibility, atmospheric deposition, and acid rain." Fed. Defs.' SOF ¶ 39; *see also id.* ¶ 83 (Miles City). The Buffalo EIS (1) looked at such pollutants in the planning area

[3] Plaintiffs confusingly refer to "vegetation" as an "air quality concern[]" and complain that the EISs omitted unspecified effects to vegetation. Pls.' Reply 34. But Plaintiffs fail to acknowledge both EISs' extensive analyses of the existing vegetation in the planning areas and the potential environmental effects to vegetation under all of the alternatives. *See* BUF_0001843-58, BUF_0002355-458, MC_0002744-50, MC_0003130-292. These analyses satisfy NEPA's hard-look mandate, and Plaintiffs do not argue otherwise.

*and nearby areas* outside of the planning area; (2) examined the potential impact on air quality of BLM-authorized activities in the Buffalo planning area; (3) assessed whether those impacts would exceed NAAQS, Wyoming Ambient Air Quality Standards, or "screening levels of concern *for visibility and atmospheric deposition*;" and (4) compared emissions from "BLM actions and activities, non-BLM activities (for oil, natural gas, and [coalbed natural gas] development), and the cumulative totals for the planning area" to "Wyoming statewide emissions for all anthropogenic sources." Fed. Defs.' SOF ¶¶ 40-42.

The Miles City EIS (1) examined pollutants and AQRVs "within the study area, which *extends beyond the planning area*;" (2) conducted an "air resources impact analysis" that assessed emissions inventories from BLM and non-BLM sources within the planning area and included "quantitative analysis for near-field air resource impacts from oil and gas activity, and qualitative descriptions of potential far-field impacts to air pollutant concentrations and [AQRV], *including visibility and deposition*;" and (3) determined that projected combined emissions from BLM and non-BLM sources in the planning area "would not be expected to exceed the NAAQS or [Montana Ambient Air Quality Standards] for any pollutant." Fed. Defs.' SOF ¶¶ 83-85.

These extensive air quality analyses permitted informed decision-making and promoted public participation. This satisfied NEPA.

## CONCLUSION

For the foregoing reasons, Federal Defendants request that the Court deny Plaintiffs' motion for summary judgment, grant Federal Defendants' cross-motion for summary judgment, enter judgment in favor of Federal Defendants, and strike Plaintiffs' extra-record exhibits from the record.

Respectfully submitted on this 29th day of September, 2017.

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