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

WESTERN ORGANIZATION OF RESOURCE COUNCILS, MONTANA ENVIRONMENTAL INFORMATION CENTER, POWDER RIVER BASIN RESOURCE COUNCIL, NORTHERN PLAINS RESOURCE COUNCIL, SIERRA CLUB, and NATURAL RESOURCES DEFENSE COUNCIL, Plaintiffs, v. U.S. BUREAU OF LAND MANAGEMENT, an agency within the U.S. Department of the Interior, RYAN	Case No. CV 16-21-GF-BMM **DEFENDANT-INTERVENOR CLOUD PEAK ENERGY INC.'S REPLY BRIEF IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT**

ZINKE, in his official capacity as Secretary of the U.S. Department of the Interior, MICHAEL NEDD, in his official capacity as Acting Director of the Bureau of Land Management, and KATHARINE MACGREGOR, in her official capacity as Acting Assistant Secretary of Land and Minerals Management of the U.S. Department of the Interior, Defendants, and STATE OF WYOMING, CLOUD PEAK ENERGY INC., PEABODY CABALLO MINING, LLC, and BTU WESTERN RESOURCES, INC., Defendant-Intervenors.	)

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GLOSSARY OF ABBREVIATIONS

BLM	Bureau of Land Management
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
GHG	Greenhouse Gas
GWP	Global Warming Potential for Methane
LNG	Liquefied Natural Gas
NEPA	National Environmental Policy Act
RMP	Resource Management Plan
SOF	Statement of Facts

INTRODUCTION

In challenging the Bureau of Land Management's ("BLM") approval of the Buffalo and Miles City Resource Management Plans ("RMPs"), Plaintiffs continue to disregard the programmatic nature of the RMPs and the corresponding environmental impact statements ("EISs") and instead insist that BLM undertake an environmental analysis that is both impractical and speculative. The extreme breadth of Plaintiffs' claims, and Plaintiffs' continued failure to demonstrate any concrete, particularized injury from BLM's resource planning decisions, highlights why Plaintiffs lack standing to pursue these claims. Even if they could show standing, Plaintiffs have failed to demonstrate that BLM violated the National Environmental Policy Act ("NEPA") in the agency's consideration of alternatives and its analysis of greenhouse gas emissions ("GHG") and other air quality impacts. The Court should deny Plaintiffs' Motion for Summary Judgment and grant summary judgment in favor of Federal Defendants and Defendant-Intervenors.

ARGUMENT

I. Plaintiffs Fail to Establish Standing.

Cloud Peak Energy Inc. ("Cloud Peak") adopts Federal Defendants' response to Plaintiffs' standing arguments (Fed. Reply at 2-6). In the face of Federal Defendants' and Cloud Peak's standing challenges, Plaintiffs have still not

shown that their vaguely alleged and speculative injuries are "concrete, particularized, and actual or imminent." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1140 (9th Cir. 2013).

Plaintiffs' standing justifications fail because the RMPs do not authorize specific coal mining operations *at any location* and do not guarantee that specific coal leasing or mining operations will be approved in the future. ECF 79-1 at ¶ 8; ECF 79-2 at ¶ 8. Under the applicant-driven coal leasing process, BLM will only consider a coal lease sale if a mine operator applies for a new lease. Whether and when an operator decides to apply for a new coal lease will depend on a number of future economic considerations. *See* CPE SOF ¶ 5. If an application is made, there is no certainty that a lease sale will occur or, if it does, what amount of coal will be leased. Finally, if a lease is issued, the operator must undergo rigorous state and federal permitting and environmental review before the federal coal is actually developed. CPE Br. at 3-5.

In light of this multi-pronged process, there is no certainty at the RMP stage as to when, where, or how much coal mining will occur, or what type of environmental mitigation may be required, in the ill-defined RMP areas that Plaintiffs' declarants allegedly visit. *See, e.g.*, ECF 72-3 at ¶ 5 (vaguely describing "overlooking a good part of the land that the BLM's Miles City RMP covers"); ECF 72-4 at ¶ 4 (speculating concern that the RMP "will not appropriately protect

the condition of our water and pastures"); ECF 72-5 at ¶¶ 8-11 (describing picnics near existing "Powder River Basin coal mines" and speculative concern that the mines will expand). The fact that BLM estimated the tons of coal that could potentially be mined from the entirety of the two RMP planning areas is insufficient to give rise to any "concrete, particularized, and actual or imminent" injury to Plaintiffs' entirely localized interests. Pl. Reply at 9. Plaintiffs' failure to establish any injury-in-fact is fatal to their standing.

II. BLM Was Not Required to Consider Alternatives That Would Limit Areas Acceptable for Further Coal Leasing Consideration.

In revising the Buffalo and Miles City RMPs, BLM carried forward its decisions regarding the lands acceptable for further coal leasing consideration from previous RMPs. Fed. SOF ¶¶ 23-24, 66-67. Plaintiffs contend that BLM was required, in light of allegedly new information related to climate change, to consider an alternative that would "limit the amount of coal extracted or [GHG] pollution emitted." Pl. Reply at 9.

Plaintiffs disregard the fact that decisions regarding federal coal development and the subsequent release of GHG emissions occur at the leasing stage, not the RMP stage. As Federal Defendants explain in their Reply (at 6-8), BLM considers whether or not to issue a federal coal lease only once it receives a coal lease application, reapplies the coal screening criteria as needed, and performs the site-specific NEPA analysis. *See also* CPE Br. at 3, 11-12. Because

determinations regarding coal development will be evaluated at the site-specific stage, BLM's approach to defer decision-making regarding levels of resource use at the programmatic stage satisfies NEPA. *W. Watersheds Project v. Kenna*, 610 F. App'x 604, 606-07 (9th Cir. 2015) (upholding BLM decision "not to determine levels of use at this planning stage"); *see also W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1047 (9th Cir. 2013) (holding that "at the programmatic level of NEPA review, it was reasonable for BLM to decline to analyze in detail an alternative that would change [resource] management levels").

In the present case, BLM made a reasoned decision to carry forward the lands acceptable for further coal leasing consideration. Because the purpose and need of the Buffalo and Miles City RMPs was to address new information and changed conditions in the planning area, BLM sought information during public scoping to determine whether it needed to update its "lands acceptable" analysis. Fed. SOF ¶¶ 2-3, 10, 46-47, 56; CPE Br. at 9-11. BLM received no new information. *See* Fed. Br. at 16. As a result, BLM had an adequate basis to carry forward the lands acceptable for further coal leasing consideration. *W. Watersheds Project*, 719 F.3d at 1047. BLM's decision complies with its resource planning obligation to ensure "public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals." 43 U.S.C. § 1701(a)(12).

Despite allegations that BLM was required to consider varying coal alternatives in order to address climate change, Plaintiffs do not provide any specific information that would have altered BLM's alternatives analysis. Instead, Plaintiffs vaguely suggest that BLM should reduce lands acceptable for coal leasing in order to protect those lands and the climate from the effects of coal mining. Pl. Reply at 13-14. However, Plaintiffs do not identify *any* particular geographic areas or specific resources that should be protected from potential future coal leasing at the programmatic level. Fed. Br. at 17-18.

Finally, Plaintiffs have still not shown that they raised their concerns with BLM at the appropriate time. While Plaintiffs provide additional administrative record citations in an attempt to rebut waiver (Pl. Reply at 10), none of these comment letters shows that Plaintiffs preserved their argument that BLM should have reconsidered the lands acceptable for further coal leasing consideration based on climate change. For example, while Northern Plains Resource Council mentioned the need to reassess the lands acceptable for coal leasing in its comments to BLM on the draft Miles City EIS, these concerns involved issues related to surface ownership, water resources, and wildlife populations, not climate change. MC:683-24415. The Plaintiffs' other proffered comment letter was submitted by the National Wildlife Federation—an organization that is not a party to this case. MC:681-24383 to 24384. As a result, Plaintiffs have forfeited this

argument. *See* Fed. Reply at 8-9; *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004).

III. BLM Took a Hard Look at Greenhouse Gas Emissions and Climate Change Impacts.

A. BLM Adequately Considered Cumulative Climate Change Impacts.

BLM took a hard look at cumulative climate change impacts, including impacts associated with future BLM-authorized coal and oil and gas development. In the EISs, BLM provided a qualitative discussion of climate change effects and quantified GHG emissions under each alternative and compared them with GHG emissions from statewide, nationwide, or global emissions inventories. CPE Br. at 13-15; Fed. SOF ¶¶ 31-38, 74-82. Courts have widely accepted BLM's use of this type of climate change analysis as sufficient to satisfy NEPA. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013); *WildEarth Guardians v. BLM*, 8 F.Supp.3d 17, 35-36 (D.D.C. 2014); *Barnes v. U.S. Dep't of Transp*., 655 F.3d 1124, 1139 (9th Cir. 2011).

Plaintiffs disregard BLM's robust climate change analysis and claim that BLM was required to do more, although even Plaintiffs vacillate on whether BLM was required to consider the incremental GHG emissions from coal and oil and gas development that may occur within (a) the planning areas for the Miles City and Buffalo RMPs, (b) the planning areas for eight revised RMPs in the Rocky

Mountain Region, or (c) the 700 million acre federal mineral estate. Pl. Br. at 23-24; Pl. Reply at 24-25. Plaintiffs provide no legal support for their position that BLM was required to consider such a vast geographic scope, especially at the RMP planning stage. Fed. Reply at 13-14 (distinguishing *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1217 (9th Cir. 2008)); *see also* CPE Br. at 15-17.

Plaintiffs fail to acknowledge that BLM subsumed its analysis of future mineral development on BLM lands as part of its consideration of statewide, nationwide, or global GHG emissions inventories. Fed. Br. at 26-27; Fed. Reply at 14. Given the difficult nature of assessing impacts associated with GHG emissions, BLM's decision to utilize reliable statewide, nationwide, or global inventories as the basis for its cumulative climate change analysis was a reasoned approach that is entitled to deference. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976). Finally, Plaintiffs provide no further support for their arguments that BLM should have considered the social cost of carbon or a carbon budget. Those arguments should also be rejected. CPE Br. 17-19.

B. BLM Had No Obligation to Consider Indirect Downstream Combustion Impacts at the RMP Planning Stage.

Plaintiffs' claim that BLM was required to calculate the indirect emissions from coal combustion suffers from the same defect as their alleged basis for standing. The effects of coal combustion at the RMP stage are entirely uncertain and too speculative to assess. *See* Fed. Reply at 11-12; *Presidio Golf Club v. Nat'l*

Park Serv., 155 F.3d 1153, 1163 (9th Cir. 1998). Plaintiffs' overly simplistic claim that downstream combustion impacts are calculable because BLM estimated emissions from coal and oil and gas development in the EISs (Pl. Br. at 19-20) ignores the inherent uncertainties with predicting coal combustion at the RMP planning stage. Fed. Br. at 23-24; Fed. Reply at 11-12; CPE Br. at 21-22.

Tellingly, Plaintiffs do not refute the inherent uncertainties regarding the timing, location, and method of coal combustion. *See* Pl. Reply at 21. Instead, they simply demand that BLM assume all available coal will be combusted and employ an imprecise methodology to quantify potential GHG emissions. *Id.* While BLM may be able to make estimated projections regarding the *development* of federal coal, the agency lacks adequate information at the planning stage regarding subsequent *combustion* of this coal. Indeed, even at the leasing stage, a court has ruled that when "the coal is entering the free marketplace," the "agencies' abilities to foresee the effects of coal combustion" is diminished because "[i]t is not known where the coal may be sold; there is uncertainty as to the location and the method or timing of the combustion." *WildEarth Guardians v. U.S. Forest Serv.*, 120 F.Supp.3d 1237, 1273 (D. Wyo. 2015), *rev'd on other grounds sub nom. WildEarth Guardians v. BLM*, No. 15-8109, 2017 WL 4079137 (10th Cir. Sept. 15, 2017). Given these uncertainties, BLM explained that it lacked sufficient information to consider impacts from coal combustion. Fed. SOF ¶ 81.

The D.C. Circuit has recently upheld an agency's decision to forgo the type of speculative exercise Plaintiffs demand of BLM here. In *Sierra Club v. United States Department of Energy*, 867 F.3d 189, 201-02 (D.C. Cir. 2017), the court rejected Sierra Club's argument that the agency should have used its detailed estimates of GHG emissions from the gas production stage as a reference to estimate the speculative amount of additional GHG emissions from "export-induced gas production" that could occur domestically as a result of a new liquefied natural gas ("LNG") export terminal. *Id.* at 202. The court also rejected Sierra Club's argument that the agency failed to consider the "downstream" GHG emissions in each potential LNG-importing nation in light of LNG competition with renewable fuel sources abroad. *Id.* The court concluded that Sierra Club's arguments fell "under the category of 'flyspecking'" and demanded an analysis that the agency deemed was "too speculative to inform the public interest determination." *Id.* In addition to "foreseeability limitations," the court also concluded that "practical considerations of feasibility might well necessitate restricting the scope of an agency's analysis." *Id.* (internal quotation and citation omitted).

In this case, BLM reasonably concluded that it was too speculative to estimate future GHG emissions from coal combustion at the RMP planning stage. Since coal from the Powder River Basin is shipped all across the United States and

abroad depending on market demand, there is much uncertainty as to how much will be shipped, to where, and what environmental controls may be employed at each location. *See* CPE SOF ¶ 5; Fed. Br. at 23, n.2.

Plaintiffs' suggestion that BLM must analyze indirect combustion impacts without regard to the accuracy of the analysis or the usefulness of the information that would be obtained contradicts NEPA's requirement to ensure sound, objective, environmental analyses under NEPA. 40 C.F.R. § 1500.1(b). BLM's decision to forgo such imprecise and speculative analyses is consistent with the "rule of reason" and must be upheld. *See Sierra Club*, 867 F.3d at 200 (upholding agency's decision to forgo analysis of environmental effects where it would be required to "drill down into increasingly speculative projections about . . . environmental impacts . . . that it lacks any authority to control").

C. BLM's Analysis of Methane Impacts Satisfied NEPA.

Plaintiffs reiterate that BLM underestimated the methane impacts from coal and oil and gas development within the planning areas by using a global warming potential ("GWP") of 21 over a 100-year timeframe, as adopted by the U.S. Environmental Protection Agency ("EPA") in its greenhouse gas reporting regulations at the time the draft EISs were released. Plaintiffs contend that BLM should have employed a higher GWP in its analysis based on a revised EPA GWP

estimate and even higher estimates from other non-EPA sources.[1] Pl. Reply at 29, n.12. Plaintiffs are wrong.

As explained by the Federal Defendants (at 15-16), BLM exercised its technical and scientific judgment by selecting EPA's adopted GWP of 21 for its analyses in the EISs, which allowed methane emissions to be compared to, and analyzed with, other GHG emissions in the planning area. Fed. SOF ¶¶ 36, 75; CPE Br. at 24-25. Moreover, BLM explained in the Miles City EIS that its selected GWP would allow it to draw consistent comparisons with state and national GHG inventories using the same GWP. Fed. SOF ¶ 76. Given BLM's reasoned explanation regarding its selected GWP, Plaintiffs have failed to demonstrate that BLM's decision to use EPA's GWP of 21 was arbitrary or capricious.

Even if Plaintiffs' preferred approach represented the latest scientific methodology, it is not the role of courts to determine "whether an [EIS] is based on the best scientific methodology available." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1088 (9th Cir. 2013); *see also Lands Council v. McNair*, 537 F.3d

[1] Plaintiffs' contention that BLM's GWP estimate was "superseded before BLM initiated scoping for these plan revisions" (Pl. Reply at 30) appears to be based on Intergovernmental Panel on Climate Change reports, not EPA's estimate in its greenhouse gas reporting regulations. *See* MC:2140-68694; Fed. SOF ¶¶ 2, 45. Here, BLM properly used EPA's GWP that was in effect at the time it released the draft EISs.

981, 1003 (9th Cir. 2008) (en banc). Excerpts from BLM's NEPA Handbook suggesting BLM use "best available science" cannot disturb this long-standing NEPA principle. Pl. Reply at 31, n.14. As an initial matter, informal agency guidance is not legally binding. *Edwardsen v. Dep't of the Interior*, 268 F.3d 781, 786 (9th Cir. 2001). Moreover, agencies are afforded substantial deference in selecting a particular methodology "because analysis of scientific data requires a high level of technical expertise." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003). This deference is especially appropriate where the scientific methodologies are rapidly evolving. Fed. Br. at 30; CPE Br. at 25.

Finally, Plaintiffs take issue with BLM's decision to use the 100-year GWP timeframe for its analysis, as opposed to using a 20-year GWP timeframe. Pl. Reply at 29. In doing so, Plaintiffs ignore BLM's reasoned choice to use EPA's adopted GWP, which uses the 100-year GWP timeframe. CPE Br. at 26.

IV. BLM Adequately Considered Cumulative Air Quality Impacts.

Despite ample evidence in the record detailing BLM's consideration of cumulative air quality impacts in the planning area and the surrounding region, Plaintiffs continue to insist that BLM's analyses are deficient. Pl. Reply at 34-35. However, BLM conducted a detailed cumulative air quality analysis, which included emissions from coal and oil and gas development, and concluded that

cumulative pollutant concentrations would remain below the National Ambient Air Quality Standards. Fed. SOF ¶¶ 43, 85.

Plaintiffs do not respond to the authorities cited by Federal Defendants holding that if a proposed activity will not exceed ambient air quality standards, the agency may reasonably conclude that the activity will not have significant impacts on public health. Fed. Br. at 32. Instead, Plaintiffs now emphasize that BLM failed to consider non-health related cumulative air quality impacts. Pl. Reply at 34.

Both the Buffalo and Miles City EISs discussed current air quality conditions in the planning area and surrounding areas, including visibility and deposition. Fed. SOF ¶¶ 39, 83. The EISs disclosed BLM and non-BLM emission levels for various air pollutants as part of its cumulative impact analyses, which contribute to atmospheric deposition and visibility. Fed. Reply 16-17. BLM's cumulative air quality analysis complies with NEPA. CPE Br. at 26-28; Fed. SOF ¶¶ 39-43, 83-85.

Plaintiffs also claim that BLM failed to address existing emissions from coal-fired power plants within or near the planning areas. Pl. Reply at 34-35. Plaintiffs improperly disregard BLM's analysis of existing air quality conditions in the EISs, which included air quality conditions within the planning areas and surrounding areas. Fed. Br. 32-33; Fed SOF ¶¶ 40, 83. These discussions were

informed by both monitoring data and previous modeling efforts in the Powder River Basin. Fed. SOF ¶ 40; CPE SOF ¶ 10. Thus, BLM's analysis accounted for emissions from power plants, as well as other sources, such as industrial activity and natural resource development.

Aside from citing to two power plants Plaintiffs believe BLM should have included in its cumulative impact analysis—one of which is mentioned for the first time in its Reply Brief—Plaintiffs do not explain how BLM's analytical approach violates NEPA, particularly at the RMP stage. Indeed, an agency need not discuss each individual past, present, or reasonably foreseeable future action in its cumulative impact analysis. *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 666-67 (9th Cir. 2009). Instead, an agency "is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate." *League of Wilderness Defenders–Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008).

CONCLUSION

Cloud Peak respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment (ECF No. 72) and grant the Federal Defendants' and Cloud Peak's Cross-Motions for Summary Judgment (ECF Nos. 79 and 87, respectively).

Respectfully submitted this 6th day of October, 2017.

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