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

WESTERN ORGANIZATION OF RESOURCE COUNCILS, *et al.* Plaintiffs, v. U.S. BUREAU OF LAND MANAGEMENT, *et al.*, Federal Defendants, and CLOUD PEAK ENERGY INC., *et al.*, Intervenor-Defendants.	Case No. CV 16-21-GF-BMM **PEABODY CABALLO MINING, LLC AND BTU WESTERN RESOURCES, INC.'S REPLY BRIEF IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs (collectively, "WORC") ratchet up the rhetoric in their reply (ECF 94) rather than respond to arguments from Intervenor-Defendants Peabody Caballo Mining, LLC and BTU Western Resources, Inc. (together, "Peabody"). WORC submitted nothing new to support Article III standing to challenge the resource management plan ("RMP") from the Bureau of Land Management ("BLM") for the Buffalo planning area, and it also failed to demonstrate that the Buffalo RMP is anything but reasonable. Here, we again urge the Court to find that WORC lacks standing and that the Buffalo RMP complies with the National Environmental Policy Act ("NEPA").

I. WORC LACKS STANDING TO CHALLENGE THE BUFFALO RMP.

In its reply, WORC conflates injury, causation, and redressability in an attempt to establish standing. But the fact remains that WORC has not asserted a concrete, particularized injury, much less an injury fairly traceable to BLM's approval of the Buffalo RMP.

A. Nothing in WORC's Reply Remedies the Deficiencies in Its Non-Specific, Preexisting, Purported Injuries.

1. WORC has still failed to demonstrate a concrete, particularized injury to challenge the Buffalo RMP.

WORC's reply is completely silent on its initial reliance on post-complaint oil and gas leasing to support standing to challenge the Buffalo RMP,[1] *see* WORC Reply Br. 4-5 (ECF 94), despite BLM's and Peabody's challenge to such allegations, Fed. Defs.' Reply Br. 4 (ECF 100), Peabody Br. Supp. Mot. Summ. J. ("Peabody Br.") 6 (ECF 85), leaving alleged injuries related to the availability of lands for coal leasing as its sole basis for standing. But the allegations regarding available lands for coal leasing are still too vague to satisfy constitutional requirements. BLM ably refuted WORC's argument that its asserted injury was sufficiently specific to pass constitutional muster, Fed. Defs.' Reply Br. 2-4 (ECF 100), and we adopt that argument and add the following:

First, WORC erroneously maintains that it has standing to challenge the Buffalo RMP based on vague "some day" intentions to visit the planning area. To salvage its standing argument, WORC provided a supplemental declaration of a

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[1] In addition to paragraph 7 of the Anderson Declaration (asserting post-complaint leasing as a basis for standing), paragraph 12 mentions oil and gas development, but only with respect to non-specific "other areas in the Powder River Basin." ECF 72-5 ¶ 12. Because it does not have to do with the Buffalo planning area, paragraph 12 does not support WORC's standing.

member who discussed the Miles City planning area. Supplemental Declaration of Dr. Lori Byron ¶ 3 (ECF 94-1). Notably absent from WORC's supplement is a declaration from anyone with any "concrete plan" to visit the *Buffalo* planning area. WORC cannot bootstrap its way into standing to challenge the Buffalo RMP by relying upon standing allegations supporting its challenge to the Miles City RMP, both because the allegations are not concrete and particularized as to the Buffalo RMP, and because any alleged injuries attributable to the Miles City RMP are not capable of redress through remand of the Buffalo RMP. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court . . . .").

Second, the cases WORC cites are not persuasive—they either provide no specific insight into what standing declarants allege, or reference declarations providing more detail than WORC's declarants present. *E.g.*, *Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d 1151, 1162 (W.D. Wash. 2004) (describing general contents of affidavits in two sentences); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 235 F. Supp. 2d 1109, 1127 (D. Or. 2002) (describing declarant's having applied for hunting tags). Whereas the declarant in *Sierra Club* took a specific action—applying for hunting tags—that demonstrated a personal investment in returning to

the affected area, 235 F. Supp. 2d at 1127, here the only declarant supporting WORC's challenge to the Buffalo RMP "plan[s] to return in the months and years to come," Anderson Decl. ¶¶ 6, 10 (ECF 72-5); Peabody Br. 5-6 (ECF 85). That is not enough. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

2. WORC's attempt to reframe its injury is unavailing.

Perhaps in an attempt to repair the glaring deficiencies in its allegations with regard to the Buffalo RMP, WORC reframes its injury argument, claiming WORC was "injured by the fact that these particular plans forewent an opportunity to *close* additional areas to leasing." WORC Reply Br. 3-4 (emphasis in original) (ECF 94). This reframing fails for two reasons: (1) the Anderson Declaration does not assert "foregoing the opportunity to close areas to leasing" as an injury, and (2) that allegation is not an injury to a protected interest. As explained below, courts have viewed similar allegations through the prisms of redressability or causation; but there must still be an articulated *injury* to Plaintiff's interests. As a result, the case law WORC cites in support of its new theory is off the mark.

First, Central Sierra Environmental Resources Center v. U.S. Forest Service is factually and legally distinct. The challenged action there represented the *first* time the roads at issue were "formally approved" in an agency action, 916 F. Supp. 2d 1078, 1087 (E.D. Cal. 2013), whereas here, areas available for coal leasing had already been approved in previous agency actions. Further, the pertinent standing

issue there was *redressability*, not injury. *Id.* (noting intervenors' argument that reduction in trails available for OHVs rendered plaintiffs' claim not redressable). The court did not find a change in road availability, or lack thereof, as a cognizable injury.

Second, the court in *National Wildlife Federation v. Espy* ruled on standing to challenge an agency's failure to comply with a statutory mandate to establish a conservation easement when disposing of real property. 45 F.3d 1337, 1340-41 (9th Cir. 1995). The court found a cognizable injury in the alleged harm to plaintiff's aesthetic interests in the wetlands on the property—a standing element defendants did not appear to contest. *Id.* Defendants did contest *causation*, which the court concluded was established due to the failure to impose an easement even though the property's character had not changed. *Id.* at 1341 n.3. Here, however, WORC now argues that forgoing the "opportunity to *close* additional areas to leasing" is a cognizable *injury*, WORC Reply Br. 4 (ECF 94), which *Espy* does not support. Furthermore, the legal context there—an agency in violation of a definitive mandate to take a specific action—is materially different to that here, where the agency had no duty to take *any* particular action with respect to coal

leasing.[2] In sum, neither WORC's belated supplemental declaration nor its reframing of its injury save its fundamentally flawed argument that it has standing to challenge the Buffalo RMP.

B. The Buffalo RMP Did Not Cause WORC's Alleged Injury.

Even if WORC had been able to rescue its deficient injury allegations in its reply, it remains unable to connect that injury to BLM's action.

First, WORC is wrong that BLM caused its alleged injury by essentially maintaining the status quo. Indeed, there must be some increased risk of injury compared to the status quo to establish standing. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 915 (D.C. Cir. 2015). Before BLM approved the Buffalo RMP, certain tracts were available for coal leasing. After the Buffalo RMP approval the same tracts are available for coal leasing. Had BLM not prepared a new Buffalo RMP, the same tracts would have been available for coal leasing. WORC's asserted injury involves alleged aesthetic impacts of coal development. Anderson Decl., ECF 72-5 ¶ 11. The Buffalo RMP has no effect on the likelihood, or lack thereof, of those impacts. Thus, BLM's action did not "substantially increase[] the risk of" injury "compared to the existing . . . systems," and did not

[2] Ironically, although the Ninth Circuit in *Espy* ruled plaintiffs had standing the court ultimately decided that the agency did not have to prepare an EIS at all because it was not changing the status quo. 45 F.3d at 1343-44.

cause WORC's injury. *Food & Water Watch,* 808 F.3d at 915; *accord WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, No. 15-8109, 2017 WL 4079137, at *5 (10th Cir. Sept. 15, 2017) (noting that "increased risk" of harm is required to establish causation); *see also N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1284 (10th Cir. 2001) (ruling that district court "implicitly acknowledged that [plaintiffs] have been impacted" by agency action because "[i]f none of the impacts . . . are actually attributable to the [action] . . . appellants suffer no injury from [it], and cannot establish standing to challenge it); Peabody Br. 6-8 (ECF 85).

Second, WORC makes no attempt whatsoever to respond to Peabody's argument that too many "links in the causal chain" separate BLM's action from WORC's alleged future injury to satisfy Article III standing requirements. *See Attias v. Carefirst, Inc.*, No. 16-7108, 2017 WL 3254941, at *4 (D.C. Cir. Aug. 1, 2017); Peabody Br. 7-8 (ECF 85). New coal mining in the Buffalo area is dependent upon numerous decisions, only the most superficial of which is a parcel's availability for leasing—a decision not even made in the Buffalo RMP. At bottom, no alleged injury experienced by WORC, as claimed here, is "fairly traceable" to the Buffalo RMP. *Lujan*, 504 U.S. at 560-61.

C. WORC Lacks Standing to Make Climate Change Claims.

Finally, WORC's purported injuries bear no relationship to the climate change-related challenges WORC asserts against the Buffalo RMP. In its reply, WORC cites no case where a court finds standing to challenge climate change-related deficiencies in a landscape-scale planning-level document. *Mont. Envt'l Info. Ctr. v. BLM*, 615 F. App'x 431, 432 (9th Cir. 2015) (lease sale); *Sierra Club v. FERC*, No. 16-1329, 2017 WL 3597014, at *1 (D.C. Cir. Aug. 22, 2017) (pipeline construction approval); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013) (approval of tracts for lease). These cases are wholly inapposite to the question here: whether WORC established standing to challenge climate-change related aspects of a planning document that did not authorize greenhouse gas emissions. It has not.

II. BLM'S COAL RESOURCE ALTERNATIVES COMPLIED WITH NEPA.

No party disagrees that "BLM is required to consider a range of alternatives for managing public resources." WORC Reply Br. 9 (ECF 94). WORC disagrees with the type of coal resource alternatives BLM evaluated, but that disagreement does not render BLM's choices arbitrary and capricious. Again, we adopt BLM's response, Fed. Defs.' Reply Br. 6-9 (ECF 100), and elaborate upon a few arguments below.

First, WORC's criticism of the coal resource alternatives' differences with respect to exploration, *i.e.*, that the similarity in the end result—the number of coal leases issued—renders the alternatives invalid *ab initio*, lacks merit. WORC's analysis is backwards, looking to the projected impact of an alternative to evaluate its sufficiency as a distinct alternative in itself. WORC Reply Br. 14 n.7 (ECF 94). That BLM's analysis of the effects of the alternatives with respect to exploration reached similar conclusions with regard to leasing does not abrogate the actual differences in the alternatives themselves. *See* Peabody Br. 10-12 (ECF 85). WORC's continued reliance on *ONDA* to argue the contrary is unavailing, WORC Reply Br. 14-15 (ECF 94), because there BLM had only proffered alternatives that *increased* areas available for ORV use. *Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1106 (9th Cir. 2008) ("[E]very alternative opened more land to some kind of ORV use than was permitted before."). Here, each alternative maintained the status quo with respect to acreage available for leasing which, as we explained, is consistent with the purpose and need of the RMP. Peabody Br. 12 (ECF 85).

Additionally, as explained in our opening brief, the RMP in *ONDA* was the final word with respect to land available for ORV use. Here, in contrast, BLM has committed to undertaking a new suitability analysis before offering a tract for lease. Fed. Defs.' SOF ¶ 24 (ECF 80); Fed. Defs.' Reply Br. 6-8 (ECF 100). Hence, the Buffalo RMP is *not* the last word with respect to a tract's availability

for leasing, and the Ninth Circuit's criticisms of the RMP in *ONDA* do not apply here. WORC's tunnel vision on alternatives is limited to acreage, but BLM is not so constrained in its analysis. BLM can—and did—look to a range of options to manage the coal resource, including variations in exploration restrictions. WORC's single-minded focus on leasing acreage ignores BLM's thorough consideration of the coal resource.

Second, BLM need not evaluate *every* alternative that may achieve the purpose and need of the project. To the contrary, BLM need only evaluate a reasonable number of alternatives that are consistent with the project's policy objectives. Peabody Br. 12 (ECF 85). WORC does not grasp that BLM need not consider *all* alternatives that would achieve the stated purpose and need of maintaining leasing and exploration. *Id.* at 10, 12. And BLM has expressly made clear that, indeed, a no-leasing alternative would *not* have achieved a stated objective of the RMP. Fed. Defs.' Reply Br. 7 n.1 (ECF 100).

Third, WORC wholly ignored Peabody's argument on BLM's adherence to CEQ's guidance regarding alternatives, namely, that the starting point is the "current management direction or level of management intensity." Peabody Br. 12-13 (ECF 85). Nothing in NEPA requires BLM to go *backwards* with respect to management direction or intensity. WORC has not demonstrated that BLM's

decision to evaluate coal resource alternatives from the baseline of existing available coal leasing acreage was unreasonable.

III. BLM CONSIDERED GREENHOUSE GAS EMISSIONS AND THEIR CUMULATIVE IMPACTS TO THE EXTENT NEPA REQUIRES.

Peabody agrees with BLM that a downstream analysis of coal combustion "at the programmatic stage of the development process would be unprecedented." Fed. Defs.' Reply Br. 10-12 (ECF 100). For that reason and those discussed below, BLM's greenhouse gas emissions analysis was reasonable.

A. WORC Cannot Distinguish Away *Public Citizen*.

WORC claims Peabody argued that BLM had no duty to evaluate coal combustion impacts because BLM could not prevent the coal from being extracted. WORC Reply Br. 23 (ECF 94). Not so. In fact, Peabody argued that, in preparing the Buffalo RMP, BLM had no duty to evaluate coal combustion because, in an RMP, BLM cannot prescribe, influence, or prevent coal combustion. For this reason, *Public Citizen* is precisely on point. There, the Supreme Court determined that because the Federal Motor Carrier Safety Administration had a statutory duty to "authorize a Mexican motor carrier for cross-border services, where [it] was willing and able to comply with" the agency's safety and financial rules, the agency had no control over, and thus no duty to evaluate, *any* environmental impacts of its rules. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 766-67 (2004).

But this Court need not make such a sweeping ruling. Neither Peabody nor BLM contests that BLM must evaluate certain environmental impacts in issuing an RMP. However, as in *Public Citizen*, in the context of an RMP, BLM's authority is limited. BLM is under a statutory mandate to include in land-use plans "an assessment of the amount of coal deposits in such land, identifying the amount of such coal which is recoverable by deep mining operations and the amount of such coal which is recoverable by surface mining operations." 30 U.S.C. § 201(a)(3)(B). BLM's authority does not extend to deciding *how much* coal should be leased, *who* should mine it, *where* it should go, *how* it should get there, *how* it should be used, or *when*. *See* Fed. Defs.' Reply Br. 11-12 (ECF 100). As with WORC's error with regard to causation in the standing analysis, WORC errs here in arguing that coal combustion is such a reasonably foreseeable consequence of a land-use planning document that it can be assessed with enough specificity to be meaningful. BLM's decision to not quantify uncertain downstream impacts over which it has no influence at this juncture was not arbitrary or capricious.

B. BLM's Greenhouse Gas Cumulative Impacts Analysis Was Not Arbitrary or Capricious.

In its challenge to BLM's cumulative impacts analysis for greenhouse gas emissions, WORC once again errs in its assertion of what NEPA requires, and how courts evaluate NEPA analyses. WORC compounds the error by relying on the faulty premise that because BLM *could have* undertaken a particular analysis, it

necessarily *should have*. The feasibility of any of WORC's preferred analysis or tools does not matter in evaluating whether BLM's chosen scope and manner of analysis was reasonable. *See WildEarth Guardians*, 2017 WL 4079137 at *9 (noting administrative law maxim that courts do not "displace the agencies' choice between two conflicting views" (citation and internal quotation marks omitted)); *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989) ("The action, however, need be only a reasonable, not the best or most reasonable, decision."). No provision of NEPA requires the precise analysis WORC would have BLM undertake. Particularly where, as here, BLM's action comported with relevant CEQ guidance (an argument to which WORC did not respond), Peabody Br. 18-20 (ECF 85), the BLM's decision deserves deference.

WORC's continued reliance on case law we demonstrated was inapplicable is to no avail. *Id.* at 20-21. Project-specific analyses with directly foreseeable and calculable impacts are not analogous to land-use plans covering millions of acres that are merely meant to set forth general principles governing subsequent decisions. *See id.* BLM's decision not to adopt WORC's desired analysis was reasonable.

IV. BLM'S AIR QUALITY ANALYSIS SATISFIED NEPA.

WORC cannot avoid the deficiencies in its challenge to BLM's consideration of visibility and vegetation by arguing that because BLM did not

directly respond to that specific argument it is waived. WORC Reply Br. 34 (ECF 94). Indeed, intervenors are also parties, and WORC ignores Peabody's response to WORC's unsupported argument that BLM disregarded visibility and vegetation. Peabody Br. 21-22 (ECF 85). WORC raised the issue. Peabody responded. WORC did not address Peabody's arguments. If anyone has waived a defense, it is WORC. Peabody adopts BLM's reply with regard to its Buffalo RMP air quality analysis, and maintains that it was reasonable. Fed. Defs.' Reply Br. 16-17 (ECF 100).

CONCLUSION

WORC lacks standing. BLM complied with NEPA. This Court should grant Peabody's Motion for Partial Summary Judgment and uphold the Buffalo RMP.

DATED this 6th day of October, 2017.

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