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

MONTANA ENVIRONMENTAL INFORMATION CENTER, et al.,	)	No. 1:19-cv-00130-SPW-TJC
Plaintiffs,	)	
v.	)	**FEDERAL DEFENDANTS' BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
DEBRA HAALAND, in her official capacity as Secretary of the United States Department of the Interior, et al.,	)	
Federal Defendants,	)	
and	)	
WESTMORELAND ROSEBUD MINING, LLC,	)	
Defendant-Intervenor.	)	

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INTRODUCTION

At issue is a federally-approved mining plan for Area F of the Rosebud Mine near Colstrip, Montana. Plaintiffs' arguments are premised on a cramped reading of the Office of Surface Mining Reclamation and Enforcement's ("OSMRE") analysis that omits important context, misconstrues OSMRE's reasoning, and cannot be squared with the administrative record. That record shows that OSMRE conducted a thorough review of the best available information, weighed all the relevant factors, and then reached a reasonable conclusion based on its own expert judgment and the entire record. Nothing more is required, and thus Plaintiffs' efforts to second-guess OSMRE's judgment should be rejected.

Specifically, Plaintiffs seek to stop the expansion of the already-existing Rosebud Mine, and the already-producing Area F, by suggesting OSMRE violated the National Environmental Policy Act ("NEPA") by ignoring its own experts and failing to use Plaintiffs' preferred methodologies in its analysis. To the contrary, OSMRE's thorough analysis satisfied NEPA's requirements. Plaintiffs' Endangered Species Act ("ESA") claims fare no better. At the threshold, Plaintiffs have waived their claims against the United States Fish and Wildlife Service ("FWS"), and they lack standing to pursue such claims against OSMRE. Further, Plaintiffs present no compelling grounds for overturning OSMRE's no-effect determination and, likewise, no convincing reason for OSMRE to reinitiate

consultation. For all these reasons, and as addressed *infra*, this Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Cross-Motion for Summary Judgment.

FACTUAL BACKGROUND

On November 2, 2011, Western Energy Company ("WEC") submitted a mine permit application package to the Montana Department of Environmental Quality ("MDEQ") for its Rosebud Mine near Colstrip, Montana. AR-116-030441; AR-143-037555. That permit application sought authorization to expand the existing Rosebud Mine into a new area ("Area F"). AR-116-030424; AR-143-037555. Prior to submitting this permit application package, WEC had already obtained a Federal coal lease (M82186) from the Bureau of Land Management ("BLM"), which gave it rights to mine the federally-owned coal within Area F. AR-116-030432. Before WEC could exercise those rights, however, WEC was required by the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. §§ 1201 *et seq*., to obtain a permit to engage in surface coal mining and reclamation operations and an operations and reclamation plan (i.e., a mining plan) required by the Mineral Leasing Act of 1920, 30 U.S.C. § 207(c).

As provided for in SMCRA and the implementing Federal regulations, MDEQ is authorized to issue surface mining permits, including surface mining

permits for Federal coal. *See, e.g.*, 30 C.F.R. §§ 926.10 (recognizing MDEQ as the State regulatory authority under SMCRA) and 926.30 (the State-Federal Cooperative Agreement allowing MDEQ to exercise its jurisdiction on Federal lands); *see also Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 767-68 (D.C. Cir. 1988). Although the authority to approve SMCRA permits can be delegated to a state, SMCRA prohibits the delegation of Mineral Leasing Act mining plan approval to a state. 30 U.S.C. § 1273(c) ("Nothing in this subsection shall be construed as authorizing the Secretary to delegate to the States his duty to approve mining plans on Federal lands . . . ."). Thus, when Federal coal has been leased, before mining can take place, OSMRE is required to make a recommendation to the Assistant Secretary of Land and Mineral Management ("ASLM") whether to approve, disapprove, or conditionally approve the mining plan. 30 C.F.R. § 746.13. This recommendation does not second-guess a state's application of SMCRA contained within the permit, but rather ensures compliance with Federal laws, other than SMCRA. 30 C.F.R. § 746.13(c); Office of Surface Mining Reclamation and Enforcement, 48 Fed. Reg. 6912, 6915 (Feb. 16, 1983) ("OSM[RE] will receive copies of permit application packages, which include permit applications, not to review the applications for compliance with SMCRA, but to facilitate OSM[RE]'s role in compliance with applicable laws not otherwise

covered in the SMCRA review. The State will have the sole responsibility for reviewing permit applications for SMCRA's compliance.").

Both MDEQ and OSMRE must analyze the permit application package as part of their respective authorizations, and both agencies must follow their respective laws governing environmental decisionmaking, e.g., the Montana Environmental Policy Act ("MEPA"), MONT. CODE ANN. § 75-1-1 *et seq*., and NEPA. After receiving WEC's permit application package OSMRE and MDEQ decided to prepare a joint Environmental Impact Statement ("EIS") under MEPA and NEPA to analyze the environmental impacts of the proposed Area F expansion. AR-116-030392. The two agencies sought input from the public during a formal scoping period (OSMRE's scoping period ran August 27-November 8, 2013) and a 60-day public comment period following the issuance of the Draft EIS ("DEIS"). AR-116-030401-02. The DEIS analyzed a no-action alternative, a proposed action alternative, and an additional alternative, the "proposed action plus environmental protection measures." AR-116-030402-08. The Final EIS ("FEIS") was released in November 2018. AR-116-030392. MDEQ completed its review of the permit application and issued its findings on April 18, 2019. AR-143-037563.

On June 18, 2019, OSMRE selected the proposed action alternative as modified by MDEQ's decision to exclude 74 acres of federal coal. AR-143-

037563, AR-143-037582. Based on the FEIS, OSMRE made its recommendation to the ASLM to approve the proposed Federal mining plan for the project area (less the 74 acres). AR-143-037582. The ASLM approved the mining plan on July 15, 2019. AR-143-037778-037779.

LEGAL BACKGROUND

I. NEPA

NEPA serves the dual purpose of informing agency decision-makers of the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public so that they "may also play a role in both the decisionmaking process and the implementation of that decision." *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To meet these dual purposes, NEPA requires that an agency prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.3.

A court reviewing the sufficiency of an agency's NEPA analysis may set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). But, while "[o]ther statutes may impose substantive environmental obligations on federal agencies . . . NEPA merely prohibits uninformed—rather than unwise—agency action." *Robertson*, 490 U.S. at 351. A reviewing court is not to "substitute its judgment

for that of the agency." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). Rather, "[o]nce satisfied that a proposing agency has taken a 'hard look' at a decision's environmental consequences, the review is at an end." *Id.* (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

II. ESA

Under ESA Section 7(a)(2), each federal agency must ensure that any "action" it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat for such species. 16 U.S.C. § 1536(a)(2). If the agency proposing the action ("action agency") determines its action "may affect" a listed terrestrial or freshwater species or critical habitat, the agency must consult with FWS. 50 C.F.R. § 402.14(a)-(b). If, however, the action agency finds its action will have no effect on the species or critical habitat, no consultation is required. *Id*. § 402.14(a).

An agency is sometimes required to reinitiate consultation after consultation has been completed on a proposed or ongoing action "where discretionary Federal involvement or control over the action has been retained or is authorized by law" and one of four conditions is met, including "[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." *Id*. § 402.16.

STANDARD OF REVIEW

Plaintiffs' NEPA and ESA claims are subject to the judicial review standards of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Under the APA, final agency action is reviewed under 5 U.S.C. § 706(2), and such review is highly deferential. *Lands Council v. McNair*, 537 F.3d 981, 992-94 (9th Cir. 2008) (en banc), *overruled in part on other grounds*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Agency decisions may be overturned only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (citations omitted). An agency action will be upheld if the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105-06 (1983). The court may not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. OSMRE's Analysis Complied with the Requirements of NEPA

A. OSMRE Took a Hard Look at Cumulative Impacts to Surface Water

Plaintiffs selectively quote from dated emails by agency staff and take FEIS quotations out of context to support their allegation that Federal Defendants did not take a hard look at the cumulative impacts of the project to surface water. But the record shows that OSMRE did take the requisite hard look. At the time OSMRE prepared the FEIS, a "cumulative impact" was defined in the Council on Environmental Quality's NEPA regulations as "the impact on the environment which results from the incremental impacts of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Mont. Wilderness Ass'n. v. Connell*, 725 F.3d 988, 1001 (9th Cir. 2013) (quoting 40 C.F.R. § 1508.7 (1978)).[1] An agency need not include its analysis of cumulative impacts in a section entitled "cumulative impacts" but instead "has discretion in deciding how to organize and present information in an EIS." *Id.* at 1002.

The FEIS describes the baseline environmental conditions for surface water quality in the direct and indirect effects analysis areas, including a description of

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[1] The Council on Environmental Quality ("CEQ") promulgated regulations implementing NEPA in 1978, 43 Fed. Reg. 55,978-01 (Nov. 29, 1978), and a minor substantive amendment to those regulations in 1986, see 51 Fed. Reg. 15,618-01 (Apr. 25, 1986). More recently, CEQ published a new rule, effective September 14, 2020, substantially revising the 1978 regulations. The claims in this case arise under the 1978 regulations, as amended in 1986. All citations to CEQ's regulations in this brief refer to those regulations as codified at 40 C.F.R. Parts 1500-08 (2019).

the impacts from coal combustion from the Colstrip Power Plant on a number of specific creeks and streams within and beyond the project area. AR-116-030637-69. This analysis includes water quality data collected from creeks and streams within the analysis areas. *Id.* The FEIS includes a thorough qualitative discussion of the direct and indirect impacts of the Area F expansion on surface water quality impacts. AR-116-030942-47. The cumulative impacts analysis area for water quality is the same as that for indirect effects analysis. AR-116-031106. The FEIS evaluated qualitatively the cumulative impacts of past,[2] present, and reasonably foreseeable future actions including agricultural water use, management of BLM lands, coal combustion at the Colstrip and Rosebud Power Plants, and the discharges to surface water from existing areas of the Rosebud Mine, the power plants, the city of Colstrip Water Treatment Plant, the Colstrip golf course, wildfires, etc. AR-116-031106. OSMRE also concluded that future coal mining and prospecting would likely have similar impacts as existing mining at Rosebud

[2] As to the "historical data" cited by Plaintiffs, Pls.' Mem. 18, ECF No. 137, OSMRE was aware of this data and explained why that data was inadequate to quantify certain impacts. AR-116-030942 ("[T]here were inadequate pre-mine data to make such a comparison. In addition, changes in laboratory detection limits [pre-mining], as well as natural water quality variability, made it difficult to analyze changes in . . . water quality due to mining.")

Mine, but reasonably concluded that they were too speculative to quantify at the time of the FEIS. AR-116-031108.

Plaintiffs contend that the FEIS's overall conclusion regarding the impacts to surface water are "nearly identical" to those rejected in other cases, Pls.' Mem. 17, but the referenced cases are distinguishable. In *Neighbors of Cuddy Mountain*, the Court took issue with the agency's predictions of "'possible' effects and 'some risk.'" 137 F.3d at 1380. Here, by contrast, OSMRE appropriately recognized that the Proposed Action *would* contribute long-term adverse cumulative impacts, not only that such impacts were possible. AR-116-031108. As compared to *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, the FEIS here provided a detailed qualitative discussion of cumulative impacts, rather than a short summary table. 387 F.3d 989, 994 (9th Cir. 2004). And, also unlike *Klamath*, the FEIS here included sources for the information included in its cumulative effects discussion, and explained why quantification of certain impacts was not always possible. AR-116-031106-08.

Plaintiffs also mistakenly rely on comments made on the first internal draft of the EIS (AR-1138-142969)—over a year and a half before the DEIS was issued—to suggest the FEIS is inadequate. Pls.' Mem. 18. These preliminary, high-level comments reflect opinions of an individual agency hydrologist, and do not rise to the level of "detailed and well-supported conclusions of [the agency's]

own scientists," present in other cases. Pls.' Mem. 18 (citing *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957. 973 (9th Cir. 2002) (referring to a Monitoring Report issued by the Forest Service every five years); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 479 (9th Cir. 2011) (referring to input from a BLM interdisciplinary team of agency experts assembled to review and provide formal comments on the proposed regulations).

Despite the preliminary statements made by agency staff well before the FEIS and ROD were issued, the record shows that OSMRE's analysis of cumulative impacts to surface water from the mining of Area F satisfied the requirements of NEPA.

B. OSMRE's Greenhouse Gas Analysis Satisfies the Requirements of NEPA

As an initial matter, it is important to note that Plaintiffs do not seriously challenge the adequacy of OSMRE's disclosure of GHG emissions or their corresponding climate impacts. Presumably, this is because the challenged FEIS disclosed GHG impacts using the "proxy" methodology, whereby anticipated GHG emissions from mining Area F were calculated and then analyzed as a percentage of regional, national and global emission levels, AR-116-030909-11, thus providing useful context for understanding the relative magnitude of the proposed action's corresponding emissions and its ultimate climate impact. This, coupled with OSMRE's discussion of climate change impacts elsewhere in the FEIS, *see*

AR-116-030896-907 (discussing GHG emission trends and climate impacts, including to surface and air temperature, surface water, and precipitation), satisfied NEPA's twin goals of ensuring informed agency decision-making and effective public involvement in the decision process.

This Court and others have recognized that agencies may satisfy their obligation under NEPA in this manner – i.e., agencies may, among other things, use the predicted volume of GHG emissions as a proxy for assessing a project's potential climate change impacts. *See WildEarth Guardians v. Zinke*, No. 17-cv-00080-SPW-TJC, 2019 WL 2404860 (D. Mont. Feb. 11, 2019) (approving use of proxy method); *W. Org. of Res. Councils v. BLM*, No. 16-21-GF-BMM, 2018 WL 1475470, at *14 (D. Mont. Mar. 26, 2018) (same); *WildEarth Guardians v. Jewell*, 2017 WL 3442922, at *12 (D. N.M. Feb. 16, 2017) (same). Indeed, this methodology was specifically recommended in the Council on Environmental Quality's Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews ("GHG Guidance"). *See* 81 Fed. Reg. 51,866-67 (Aug. 5, 2016).[3] Insofar as Plaintiffs complain in passing that OSMRE failed to

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[3] CEQ withdrew the GHG Guidance on April 5, 2017, pursuant to Executive Order 13,783, titled "Promoting Energy Independence and Economic Growth." But that order was itself revoked on January 20, 2021, when President Joseph R. Biden issued Executive Order 13,990, titled "Protecting Public Health and the

take additional steps to discuss the effects of the disclosed GHG emissions, *see* Pls.' Mem. 21, they identify no authority requiring more than what OSMRE did here.

Plaintiffs instead take issue with the fact that OSMRE did not monetize the environmental effects of GHG emissions in its discussion of socioeconomic impacts, despite having catalogued and discussed the propose action's economic benefits. *See* Pls.' Mem. 21. But that argument also fails, because as Plaintiffs concede (Pls.' Mem. 23), nothing in NEPA or its implementing regulations requires agencies to weigh the economic costs and benefits of a proposed action. *See*, *e.g.*, *WildEarth Guardians v. Bernhardt*, No. CV 17-80-SPW, 2021 WL 363955 at *9 (D. Mont. Feb. 3, 2021) ("NEPA does not require federal agencies to engage in a cost-benefit analysis"). To the contrary, 40 C.F.R. § 1502.23 specifically provides that agencies need not weigh the merits and drawbacks of

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Environment and Restoring Science to Tackle the Climate Crisis." Section 7 of EO 13,990 directs CEQ to "review, revise, and update" the GHG Guidance "as appropriate and consistent with applicable law." Following that, on February 19, 2021, CEQ published a Federal Register Notice indicating, among other things, that federal agencies "should consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, including, as appropriate and relevant, the 2016 GHG Guidance." Nat'l Env'tl Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 86 Fed. Reg. 10,252 (Feb. 19, 2021).

alternatives using a monetary cost-benefit analysis, and in fact should avoid doing so when there are important qualitative considerations.

Nonetheless, Plaintiffs contend that OSMRE presented an unbalanced assessment by discussing only the "economic gains from the project" in the "socioeconomic [impacts]" subchapter of the EIS, *see* Pls.' Mem. 21-23, and they ask this Court to correct that perceived imbalance by directing OSMRE to monetize GHG emissions. *See*, *e.g.*, Pls.' Mem. 24 (contending that "using the SCC would balance OSM[RE]'s analysis"). The Court should decline Plaintiffs' invitation for at least two reasons.

First, and contrary to Plaintiffs' apparent belief, declining to monetize certain adverse effects in a NEPA document is not the same as undervaluing them, or assigning them a value of zero. OSMRE reasonably opted to discuss wages, taxes, royalties, and induced economic activity in monetary terms, *see* Pls.' Mem. 21 (citing relevant portions of the record), and it reasonably opted to discuss climate impacts—along with countless other environmental impacts—in qualitative terms rather than monetizing them. The NEPA regulations preserve ample decision space for federal agencies to use the metrics and methodologies best suited to the issues at hand, and the Court should defer to OSMRE's choices here. *See Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 922 (9th Cir. 2018) (deferring to the agency's choice of methodology in its

analysis) (*citing Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007)); *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1110 (9th Cir. 2016) ("[I]n the face of competing reasonable methodologies, we do not substitute our judgment for that of the agency.").

Second, and more fundamentally, the perceived imbalance driving Plaintiffs' argument is a function of their overly narrow focus on the socioeconomics subchapter of the FEIS. It is not unusual for the socioeconomic impacts subchapter in an EIS to discuss the economic benefits of a proposed project, and it is not unusual for countervailing adverse impacts to be more environmental in nature, and thus to appear in other sections of the EIS. But while this may cause discrete portions of an EIS to appear unbalanced when read in isolation, an EIS must be read as a whole. Here, the whole FEIS reflects a balanced and thorough analysis, including of the climate impacts of interest to Plaintiffs. *See e.g.*, AR-116-030896-907 and AR-116-030581-91 (discussing GHG emission trends and climate impacts). OSMRE appropriately discussed GHG-related impacts in the parts of the FEIS it deemed most appropriate, and Plaintiffs have identified no authority providing that GHG-related effects must analyzed under the rubric of socioeconomic impacts.

In sum, Defendants agree that an agency may not place its "thumb on the scale by inflating the benefits of the action while artificially minimizing its

impacts." *See* Pls.' Mem. 23 (quoting *MEIC v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1098 (D. Mont. 2017)). But there is no thumb on the scale here. This Court should defer to OSMRE's choice of methodology, as well as its judgments on how best to structure its presentation of impacts in an EIS.

C. OSMRE Considered an Appropriate Range of Alternatives

OSMRE evaluated a reasonable range of alternatives pursuant to NEPA. "The scope of an alternatives analysis depends on the underlying 'purpose and need' specified by the agency for the proposed action . . . The agency need only evaluate alternatives that are reasonably related to the purposes of the project." *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012) (citations omitted). The purpose of the project here was to "allow continued operations at the Rosebud Mine by permitting and developing a new surface-mine permit area." AR-116-030434. OSMRE's need for the action was "to provide Western Energy the opportunity to exercise its valid existing rights (VER) granted by BLM under federal coal lease M82186 to access and mine undeveloped federal coal resources located in the project area." *Id*.

To that end, the FEIS analyzed three alternatives: Alternative 1 (a no-action alternative), Alternative 2 (the proposed action alternative) and Alternative 3 (the proposed action plus additional environmental protection measures). AR-116-

030454, AR-116-030464-63, AR-116-030527-28. Alternatives 2 and 3 satisfied the project's purpose and need because they allowed continued operations of the Rosebud Mine in a new mining area and provided the opportunity to WEC to exercise its existing rights under a federal coal lease. Plaintiffs contend that Alternatives 2 and 3 were "virtually identical," (Pls.' Mem. 32-33) but Alternative 3 was "designed by OSMRE and [M]DEQ to minimize environmental effects." AR-143-037568. It included additional protection measures, such as modifications to reclamation practices and other mitigation elements. *Id*. As the NEPA process continued over several years, WEC submitted revisions to its permit application and incorporated many of the protection measures from Alternative 3 into its permit application (which was ultimately considered as Alternative 2). AR-143-037568. Now, Plaintiffs seek to fault Intervenor-Defendants for including additional protection measures in WEC's permit application because it made the two action alternatives similar. But this line of argument undermines the "action-forcing" purpose of NEPA, *Robertson*, 490 U.S. at 352, as well as Plaintiffs' own conservation goals. The range of alternatives analyzed in the FEIS was appropriate, as they were the only alternatives OSMRE and MDEQ identified that satisfied the purpose and need of the project.

Plaintiffs further argue that Federal Defendants were required to consider "mid-range" or "middle ground" coal alternative. Pls.' Mem. 34. But an

unidentified "mid-range" option would not satisfy the purpose and need of the project because it would not be a feasible option. The FEIS did consider but eliminated from further analysis options for less coal development and provided its reasons for doing so, including that mining within a smaller permit area or for a period shorter than 21 years "would not be permitted under ARM 17.24.322." AR-116-030533.

Under the Montana coal conservation rule, mining permit applications must include a "coal conservation plan" showing a mine proponent will extract "all of the minable and marketable coal" in a proposed mine plan area. Mont. Admin. R. 17.24.322. Plaintiffs claim this state rule does not apply to OSMRE. Pls.' Mem. 36. But, the rule does apply to WEC. To mine in Area F, WEC needs approval of its mining permit from the state as well as its federal mining plan from the federal government. AR-116-030401. MDEQ could not approve WEC's mining permit application unless it complied with the Montana coal conservation rule. A mid-range option was not a feasible alternative as explained in the FEIS. AR-116-030533. Plaintiffs argue that because "OSM *ultimately approved* an action . . . that reduced the area and duration of mining in Area F," OSMRE could have considered an alternative with even further reductions in mining. Pls.' Mem. 35. But, OSMRE could only approve the alternative as modified by MDEQ; the Action Alternative analyzed in the FEIS was no longer feasible once MDEQ removed 74

acres from that option. OSMRE is not required to consider alternatives that are not feasible. *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1180 (9th Cir. 1990) (an agency need not "consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area." (citation omitted)). This includes alternatives that would not receive necessary regulatory approval in order to proceed.

Finally, Plaintiffs cherry pick record cites in an attempt to show that a reduced mining alternative would not have produced impacts "substantially similar" to those already analyzed in the FEIS. Pls.' Mem. 35-36. Plaintiffs mistakenly assume that "reducing mining by one-half" would also reduce surface effects and air pollutant effects by half. *Id*. They cite to air pollutant information from the Colstrip and Rosebud Power Plants, which combust coal from multiple other areas of the Rosebud Mine (AR-116-030392), and for that reason alone their math is suspect. After considering the available data, OSMRE concluded that while air quality would not likely fall below regulatory standards for human health, there could be "short-term, minor to moderate, and adverse" indirect effects on sensitive subpopulations, "comparable to effects under the No Action alternative, as the power plants would operate at the same level of output . . ." AR-116-030922-23. Plaintiffs' math does not upend the deference owed to OSMRE's expertise. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) ("Because

analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'" (quoting *Kleppe*, 427 U.S. at 412)).

D. Water Withdrawals from the Yellowstone River Were Properly Excluded from the Indirect Effects Analysis

The FEIS disclosed detailed indirect effects from the Project to surface water, ground water, and water rights, including anticipated loss of tributaries, springs and stock ponds, and reduced stream flow. AR-116-030932-36; AR-116-031106. Plaintiffs nonetheless argue that OSMRE should also have included in its indirect effects analysis the water withdrawals by the Colstrip Power Plant from the Yellowstone River. Pls.' Mem. 24-27. The agency determined that the Yellowstone River was outside of the direct, indirect, and cumulative effects analysis areas for mining in Area F, and therefore did not include it in its analysis. AR-116-030627-30; AR-117-031539. That determination is owed deference.

Again, Plaintiffs rely on comments from individual analysts at the agency (and contractor) from early phases of deliverations. *See*, *e.g.,* Pls.' Mem. 26 (citing 2016 meeting minutes (AR-1019-013750) and January 2017 meeting minutes (AR-1026-013884, AR-1025-013867)). Drafting an EIS is an iterative process and Plaintiffs attempt to impute a high level of authority and certainty to comments by individual agency scientists (or contractors) made in the very early stages of this process. Water withdrawals by the Colstrip Power Plant were not included in the

FEIS's indirect effects analysis, but that does not mean agency commenters were ignored. Instead, the FEIS includes an indirect effects analysis of water quantity and quality within its analysis area, as required by NEPA.

Further, the cases relied on by Plaintiffs do not support the proposition that water withdrawals related to power plant operations must be considered an indirect effect of mine approval. Those cases instead stand for the proposition that OSMRE must analyze the downstream emissions of coal combustion, *see* Pls.' Mem. 24-25 (citing *WildEarth Guardians*, 2021 WL 363955, at *5-10); *see also* Pls. Mem. 25n.14 (collecting cases), which OSMRE has already done. *See* AR-116-030912.

II. Plaintiffs Have Waived Any ESA Claims Against FWS

As an initial matter, Plaintiffs present no arguments regarding FWS. This is significant because courts "will not ordinarily consider matters … not specifically and distinctly argued" in an opening brief. *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (citation omitted). Because their ESA arguments pertain only to OSMRE – and not at all to FWS – Plaintiffs have waived any claims against FWS. *See Husyev v. Mukasey*, 528 F.3d 1172, 1183 (9th Cir. 2008).

III. OSMRE Complied With the ESA

A. Plaintiffs Lack Standing For Their ESA Claims Against OSMRE

Additionally, and also at the threshold, Plaintiffs lack standing to pursue their ESA claims because they have not met their burden to provide claim-specific facts demonstrating their standing. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). To establish standing, a plaintiff must show (1) it has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) such injury is "fairly traceable" to the challenged action; and (3) it is "'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citation omitted). Furthermore, at the summary judgment stage, a plaintiff cannot rely on "mere allegations" and instead must set forth evidence and specific facts for each element. *Id*. at 561.

Here, despite the prolixity of Plaintiffs' standing declarations, the totality of their allegations regarding the pallid sturgeon is limited to a *single sentence* in Mr. Gilbert's declaration, conclusorily stating that "continued operation of the Colstrip Power Plant will necessarily require a continued drawdown of water in the Yellowstone River, removing critical stream flows for fish and wildlife, and potentially impacting the critically endangered Pallid Sturgeon." ECF No. 137-2 ¶ 15. This scant assertion does not support Plaintiffs' standing for several reasons.

First, although "'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is

not too speculative." *Lujan*, 504 U.S. at 564 n.2 (citation omitted). Here, Mr. Gilbert alleges, at most, a risk that withdrawals may "*potentially* impact[]" pallid sturgeon at some indeterminate time. ECF No. 137-2 ¶ 15 (emphasis added). Such allegations, as this Court recognized in prior proceedings, describe "merely *possible* effects" of withdrawals. *MEIC v. Bernhardt*, No. 1:19-cv-00130-SPW-TJC, 2021 WL 243140, at *5 (D. Mont. Jan. 25, 2021) (emphasis added). But conclusory "[a]llegations of *possible* future injury are not sufficient" to show imminent injury. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013) (citations omitted). An injury is imminent only if it is "certainly impending, or there is a substantial risk that the harm will occur." *U.S. Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2565 (2019) (citation omitted). Neither showing is made here, and Plaintiffs thus demonstrate no actual or imminent harm to the species.

Second, Plaintiffs fail to explain how the possible effects of withdrawals on pallid sturgeon affects their (or their members') alleged interests. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 181 (2000) (requiring "injury to the plaintiff"). There is no dispute that a showing of particularized harm to the "desire to use or observe an animal species, even for purely esthetic purposes," is sufficient for standing purposes, *Lujan*, 504 U.S. at 562-63 (citation omitted), and Plaintiffs' members allege such interests. *See* ECF No. 137-4 ¶¶ 11, 14 (stating Mr. Nichols has "observed wildlife, including deer, raptors and other birds, and

badgers" near the mine; alleging mining-related "sounds interfere with [his] efforts to locate and view wildlife while outdoors"); ECF No. 137-2 ¶ 16 (stating Mr. Gilbert's desire to "hunt" and "fish"; alleging "pollution from the Rosebud Mine and the Colstrip Power Plant" has made it "difficult … to have positive recreational or aesthetic experiences in the outdoors near Colstrip").

None of Plaintiffs' standing declarants, however, explains how the alleged impacts to *pallid sturgeon* hamper their observational and recreational interests. No declarant, for example, alleges any interest in observing pallid sturgeon – or any connection to the species at all. Indeed, the only reference to the species is untethered to any alleged injury to Plaintiffs' interests. ECF No. 137-2 ¶ 15. Because these declarants identify no linkage between their interests and alleged impacts to the species, Plaintiffs fail to make any "showing of perceptible harm." *Lujan*, 504 U.S. at 565-66.

Third, and finally, any injury from the effects of withdrawals on pallid sturgeon would not be fairly traceable to – or redressable by – OSMRE's actions. As Mr. Gilbert acknowledges, these alleged impacts are caused by "operation of the Colstrip Power Plant," ECF No. 137-2 ¶ 15—not the challenged mining activities—and thus Plaintiffs have not met their burden on causation, since "it does not suffice if the injury complained of is 'th[e] result [of] the *independent* action of some third party not before the court.'" *Bennett v. Spear*, 520 U.S. 154,

169 (1997) (citations omitted). For similar reasons, Plaintiffs have not shown that their requested relief—vacatur of the mining plan approval, Pls.' Mem. 37-39—is "likely, as opposed to merely speculative," to redress any injury caused by the Colstrip Power Plant's operations. *Lujan*, 504 U.S. at 561 (citation omitted).[4] Where redressability hinges on "unfettered choices made by independent actors not before the courts," as here, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id*. at 562. Plaintiffs fail to carry that burden here.

B. OSMRE's No-Effect Determination Was Reasonable

Under the then-applicable ESA regulations,[5] OSMRE was required to consider "indirect effects," but only insofar as such effects were "*reasonably certain* to occur." 50 C.F.R. § 402.02 (emphasis added).[6] OSMRE thus analyzed

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[4] Underscoring this point, the separately-approved mining operations at Rosebud Mine would continue for "3 to 5 years" *even if* the Court "ultimately side[d] with Plaintiffs on the merits of their lawsuit." *MEIC*, 2021 WL 243140, at *4.

[5] These regulations were amended after OSMRE's decision to include the term "consequences" to "capture those effects (consequences) previously listed in the regulatory definition of effects of the action." 84 Fed. Reg. 44,976, 44,977 (Aug. 27, 2019).

[6] This "reasonably certain to occur" standard demands a higher degree of certainty than the "broader 'reasonably foreseeable' standard" under NEPA, which itself

several potential impacts of the proposed mining on pallid sturgeon. *See* AR-117-031542 (addressing "potential water quantity and water quality" impacts); AR-116-031013-14 (analyzing possible effects from "mercury deposition" and "coal-combustion emissions"). OSMRE also reviewed information regarding the species' distribution, habitat needs, and life history. *See* AR-117-031542 (stating the "nearest pallid sturgeon populations" are "60 miles from the Colstrip Power Plant");[7] AR-116-031010 (finding "no suitable habitat in the direct effects analysis area"). Weighing these factors, OSMRE concluded the proposed action would have "no effect" on the species, AR-116-31010, and its judgment is entitled to deference. Plaintiffs nevertheless object to one narrow aspect of OSMRE's analysis, arguing that OSMRE failed to adequately consider the potential effects of water withdrawals on pallid sturgeon. Pls.' Mem. 27-29. Plaintiffs' arguments are unpersuasive for two reasons.

First, as Plaintiffs acknowledge, the "continued drawdown of water in the Yellowstone River" is part of the "operation of the Colstrip Power Plant"—not the

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"requires a substantial degree of certainty." *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd*., 602 F.3d 687, 702 (5th Cir. 2010) (citations omitted).

[7] Plaintiffs note that pallid sturgeon were observed near Cartersville Dam in 2018 and 2019. *See* Pls.' Mem. 29 n.16. But the fact that two fish were observed in that area, *see* ECF No. 102 ¶ 107, is not contrary to the finding that sturgeon densities are much higher "60 miles" downriver. AR-116-031542.

Rosebud Mine. ECF No. 137-2 ¶ 15. Approval of the mining plan, therefore, is not the legally relevant cause of any harms related to withdrawals by the power plant because those operations are outside of OSMRE's authority or control. Rather, such alleged harms are caused, if at all, by the Colstrip Power Plant's operations, which are separately regulated by MDEQ, AR-116-030432, and "independent from the operations of the mine." AR-116-031082. OSMRE's approval of the mining plan thus is "too far down the causal chain to be the legal cause of the harm." *Ctr. for Biological Diversity v. U.S. Dep't of Housing & Urban Development*, 541 F. Supp. 2d 1091, 1100 (D. Ariz. 2008), *aff'd*, 359 F. App'x 781 (9th Cir. 2009); *cf.* 50 C.F.R. § 402.17(a)(3) (identifying "legal requirements necessary for the activity to go forward" as factor in evaluating whether effects are "reasonably certain to occur"). Put otherwise, because OSMRE has no authority or control over any aspect of the power plant's separately-permitted operations, including its water withdrawals, the causal chain between OSMRE and any alleged harms to pallid sturgeon from such withdrawals is simply too attenuated. *See Ctr. for Food Safety v. Vilsack*, 844 F.Supp.2d 1006, 1020 (N.D. Cal. 2012), *aff'd* 718 F.3d 829 (9th Cir. 2013) (finding agency was "not the legally relevant cause" of harm from herbicide because it had "no authority to regulate where and how [the herbicide] is used"); *Quechan Indian Tribe v. U.S. Dep't of Interior*, No. CV 07-0677, 2007 WL 1890267, at *10 (D.

Ariz. June 29, 2007) (finding agency "had no duty to consider" effects of refinery since it had "no ability to prevent" them).[8]

Second, Plaintiffs focus on whether water withdrawals might be reasonably certain to occur, Pls.' Mem. 28-29, but they fail to show that these withdrawals are reasonably certain to result in any *harm* to pallid sturgeon. Tellingly, Plaintiffs do not identify a *single sturgeon mortality* related to the withdrawals, even though the Colstrip Power Plant has continuously withdrawn water since 1975. AR-116-030394; *cf. Winter v. Natural Res. Def. Council*, 555 U.S. 7, 33 (2008) (reversing injunction of military training ongoing "for 40 years with no documented episode of harm to a marine mammal"). Indeed, despite continual withdrawals, "the status of the species has improved" since it was listed in 1990. AR-1121-141300.

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[8] Plaintiffs cite only one unreported case—*Ksanka Kupaqa Xa'lcin v. FWS*, No. 19-cv-00020-DWM, 2021 WL 1415255 (D. Mont. Apr. 14, 2021), Pls.' Mem. 28—and place a heavier reliance on *Ksanka* than it can bear. In *Ksanka*, the court held the defendant agencies erred in analyzing only one phase of a two-phased mining project rather than "effects of the entire mining operation." 2021 WL 1415255, at *8. Significantly, however, the *same* agencies had authority to regulate the second phase. *Id*. at *1. Further, the court emphasized *Ksanka* was distinguishable from other projects because "two decades of [earlier] agency analysis" "considered full mine operations part and parcel of the same project." *Id*. at *8. No such circumstances are presented here, where OSMRE has no authority to regulate water withdrawals, and there is no inconsistency between OSMRE's present and prior approaches for analyzing potential withdrawal-related impacts.

Instead, Plaintiffs point to three documents for the notion that the "best available science indicates that … water withdrawals may affect pallid sturgeon," Pls.' Mem. 27, but none of these documents supports their characterization of the "best available science." For example, Plaintiffs cite to their own notice of intent to sue, AR-1202-145081, which, in turn, refers to a report prepared by their own consultant in November 2019. AR-1202-145090-116 ("Griswold Memo"). Not only is this document post-decisional, but it was prepared for purposes of this litigation. *See W. Watersheds Project v. Salazar*, 766 F. Supp. 2d 1095, 1120 (D. Mont. 2011) (discounting study prepared "for the purpose of advancing [p]laintiffs' interests"). More importantly, this Court previously examined the Griswold Memo and concluded its statements regarding water withdrawals described "merely *possible* effects of that action," *MEIC*, 2021 WL 243140, at *5 (emphasis added) – *i.e.*, effects far short of being "reasonably certain to occur."

Similarly, Plaintiffs cite to their own comments to OSMRE, AR-117-031542, as another example of the "best available science." Pls.' Mem. 27. As with the Griswold Memo, however, OSMRE was not required to credit this self-serving information as the "best available science." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) (stating agency may "disagree[]" with or "discredit[]" information without violating the "best available science standard" (citations omitted)). Moreover, the relevant portion of these

comments purports to characterize a third cited document—FWS's revised recovery plan for pallid sturgeon. AR-1121-141295-420. There is no dispute that the recovery plan qualifies as "best available science," but Plaintiffs' comments mischaracterize FWS's findings in several respects. For example, Plaintiffs assert "the lower Yellowstone River provides probably the best sturgeon spawning habitat in the state," AR-117-031542, but FWS clarified that the actual – rather than potential – importance of the lower Yellowstone River as spawning habitat was uncertain, AR-1121-141320 (stating "[w]hile it is suspected that spawning occurs in the lower Yellowstone River in most years … recruitment remains undetected").[9] Likewise, while Plaintiffs quote the recovery plan for their assertion that "climate change may threaten sturgeon due to 'reduced late-season flows,'" AR-117-031542, they omit context cautioning that climate change impacts were "difficult to evaluate," AR-1121-141337, and such reduced flows would primarily impact forage species, rather than pallid sturgeon specifically. *Id.* (stating "[i]ncreased water demand coupled with reduced late-season flows could significantly affect in-channel habitats which in turn may affect other species that are food items for Pallid Sturgeon"). Most importantly, FWS emphasized that

[9] "Recruitment" in the pallid sturgeon-context refers to the survival of individuals to age-1. *Cf.* AR-1121-141301.

other threats – not water withdrawals – present far greater threats to the species. *Id*. (noting "effects from dams" "may be the single greatest factor affecting the species in the upper Missouri River basin"). Taken together, these documents thus reflect Plaintiffs' own views or misreading of other documents – not the "best available science."

C. The Griswold Memo Did Not Trigger Reinitiation Of Consultation

Alternatively, Plaintiffs fault OSMRE for not reinitiating consultation based on the Griswold Memo, arguing that it presented "new information" regarding the "adverse impacts of water withdrawals … on pallid sturgeon." Pls.' Mem. 30. But this claim largely repackages the arguments raised in support of Plaintiffs' first ESA claim, and it fails for similar reasons.

To start, "[t]he first problem with [Plaintiffs'] argument is obvious – that is, [OSMRE] was never required to initiate consultation in the first place, so there was *nothing to reinitiate*." *Conservation Cong. v. U.S. Forest Serv*., No. 2:16-cv-00864-MCE-AC, 2018 WL 2427640, at *12 (E.D. Cal. May 30, 2018) (emphasis added). If an "agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered." *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994). Such is the case here. There was no need for OSMRE to consult in the first instance, and thus no need to re-initiate a consultation that was never initiated. *See Conservation*

Cong., 2018 WL 2427640, at *12; *Protect Our Water v. Flowers*, 377 F. Supp. 2d 844, 877 (E.D. Cal. 2004) (holding agency "need not reinitiate consultation" on no-effect determination).

Second, for the same reasons that this Court previously concluded that the Griswold Memo did "not describe likely effects of continued water withdrawals but merely possible effects of that action," *MEIC*, 2021 WL 243140, at *5, the Griswold Memo triggered no reinitiation obligation. While reinitiation may be necessary "[i]f new information reveals effects of the action … not previously considered," 50 C.F.R. § 402.16(a)(2), the then-applicable regulations defined "effects of the action" to include only "reasonably certain" effects. 50 C.F.R. § 402.02. Because the Griswold Memo, by comparison, describes effects that are "merely possible," *MEIC*, 2021 WL 243140, at *5, no reinitiation was required.

Finally, the Griswold Memo revealed no effects "not previously considered." 50 C.F.R. § 402.16(a)(2). Indeed, nearly all the citations in the Griswold Memo predate the FEIS, so the extent to which this information was "new" is unclear. *See Conservation Cong. v. Finley*, 774 F.3d 611, 619 & n.3 (9th Cir. 2014) (discounting "new information" based on older studies). Moreover, Plaintiffs fail to show that the information in the Griswold Memo was "new" to OSMRE. For example, the Griswold Memo alleges effects related to "lower flows" based on a flow rate of 66 cfs, AR-1202-145093-94, but OSMRE was

already aware that the Colstrip Power Plant used "[u]p to 69 cfs of raw water." AR-116-31106. Likewise, the Griswold Memo claims – without citation – that "four adults migrated to the base of the Carterville dam" in 2018, AR-1202-145092, but it fails to explain why the temporary occurrence of four sturgeon at this location is significant, let alone inconsistent with OSMRE's population-level finding. AR-116-031013. In any event, OSMRE found that the primary threat to sturgeon was "habitat loss from damming of the Missouri River," AR-116-030751, so this "new information" regarding withdrawal-related effects was "simply not material" to its no-effect determination. *Conservation Cong.*, 2018 WL 2427640, at *12.

IV. The Appropriate Remedy Is Remand Without Vacatur

If the Court concludes that Defendants have failed to fully comply with the ESA or NEPA, Federal Defendants request an opportunity to provide additional briefing as to the appropriate remedy. In short, the Court should remand the matter to the agencies to fix any errors, not vacate the decision. *See Smith v. U.S. Forest Serv.*, 33 F.3d 1072, 1079 (9th Cir. 1994). "Although the district court has power to do so, it is not required to set aside every unlawful agency action. The court's decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (citations omitted). When equity demands, the regulation or action "can be

left in place while the agency follows the necessary procedures." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (citation omitted). Here, mining has been ongoing for over a year and stopping mining in Area F could cause economic impacts to the community. *See, e.g.*, Mot. by City of Colstrip for Leave to File an Amicus Brief, 3 (ECF No. 139). Further, any remedy would need to be narrowly tailored to address the specific violation identified. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Service*, 422 F.3d 782, 799-80 (9th Cir. 2005).

CONCLUSION

Based on the foregoing, the Court should deny Plaintiffs' Motion for Summary Judgment, and grant Federal Defendants' Cross-Motion for Summary Judgment.

Respectfully submitted this 15th day of June, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rules 7.1(d)(2)(B) and (E), and the word limits established by the Court's June 1, 2021 Order (ECF 145), the attached brief is proportionately spaced, has a typeface of 14 points, and contains 7,723 words, excluding the caption, tables, signature, and certificate of compliance.

DATED this 15th day of June, 2021.

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