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

MONTANA ENVIRONMENTAL INFORMATION CENTER, *et al.*,

Plaintiffs,

vs.

DEB HAALAND, *et al.*,

Defendants.

Case No. 1:19-cv-00130-SPW-TJC

PLAINTIFFS' COMBINED RESPONSE TO OBJECTIONS OF FEDERAL DEFENDANTS AND INTERVENOR-DEFENDANTS

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INTRODUCTION

Federal Defendants do not object to the merits analysis in the Findings and Recommendations (Findings) of Magistrate Judge Cavan. (Doc. 180 at 1.) Instead, they request an additional 7 months (19 months total) to complete the remand process and a corresponding extension of the proposed deferral of vacatur. (*Id.*)

Plaintiff Conservation Groups do not oppose the remand extension. However, Conservation Groups submit that deferred vacatur is inappropriate for the requested remand because Westmoreland has represented that it has sufficient alternative permitted coal reserves to operate without interruption for the 19 months needed to complete the remand. As such, vacatur should not be deferred.

Westmoreland alone objects to the Findings' analyses of standing, cumulative impacts to surface water, greenhouse gas emissions, and water withdrawals from the Yellowstone River. Westmoreland's objections, however, are unsupported by the law and refuted by the record.

ARGUMENT

I. WESTMORELAND WRONGLY OBJECTS TO THE FINDINGS' DETAILED ANALYSIS AND CONCLUSION THAT PLAINTIFFS HAVE STANDING.

The Findings carefully detail the facts and law of standing in an eight-page discussion and correctly conclude that three Conservation Groups have standing.

(Doc. 177 at 7-14.)[1] Westmoreland's effort to flyspeck this careful analysis omits or misrepresents critical facts and, therefore, fails.

A. The Findings correctly conclude that Westmoreland's 6,700-acre strip-mine will harm the interests of Conservation Groups' members in appreciating the native landscape.

Westmoreland erroneously states that Messrs. Gilbert, Johnson, and Nichols lack particularized interests in the area the company intends to strip-mine. (Doc. 183 at 6.) In fact, each has a specific interest in preserving this landscape. (*See* Doc. 177 at 8-10.) Contrary to Westmoreland's unsupported assertion (Doc. 183 at 6), Mr. Gilbert has never "disclaimed[] under oath" his interest in recreating on lands near Area F. He has been visiting the West Fork Armells Creek basin (where Area F is located) for decades. (Doc. 48-5 at 37:12-22 (at 2014 deposition, describing driving "down parts of West Fork Armells Creek" and "looking for places to hunt"), 39:1-16 (describing driving along West Fork Armells Creek to view the creek and explaining, "That's why I was there …. I like the country"); Doc. 137-2, ¶ 9 (describing visits beginning in late 1970s).) For Mr. Gilbert, viewing the untrammeled prairies and breaks in the West Fork Armells Creek

[1] With sadness, undersigned counsel learned on February 14, 2022, that Michaelynn Hawk, representative and director of Plaintiff Indian People's Action (*see* Doc. 137-3), passed away following a battle with cancer.

basin from country roads is "like a Sunday drive," "a breath of fresh air." (Doc. 48-9 at 106:9-21 (2019 deposition).)

Westmoreland's quibble about Mr. Gilbert's not *hunting* in Area F (Doc. 183 at 6) is irrelevant: there is no dispute that he has long enjoyed being in, viewing, and appreciating this countryside, which, as the Findings rightly explain, is more than sufficient for standing. (Doc. 177 at 9, 13; *see also, e.g.*, Doc. 48-9 at 105:11 to 106:21 (describing enjoyment of driving through and viewing this "spectacular country").) While Westmoreland grouses that Mr. Gilbert canceled a trip to Colstrip in 2018 (Doc. 183 at 6), the company omits that Mr. Gilbert subsequently visited Colstrip later in 2018, 2019, and 2020. (Doc. 137-2, ¶ 12.)

Westmoreland's complaints about Messrs. Johnson and Nichols (Doc. 183 at 6) are also not well taken. While Mr. Johnson enjoys "southeastern Montana" in general, he also specifically and regularly visits the area around Colstrip, including "the proposed Area F expansion area," as the Findings explain. (Doc. 177 at 9; Doc. 137-1, ¶¶ 7-10.) Westmoreland misleadingly states that Mr. Nichols has only visited the general area of "southeast Montana" since 2011 (Doc. 183 at 6), omitting that he has visited "the area where the Rosebud Mine and Area F are located" "once every two years … since 2011" (Doc. 137-4, ¶ 9), long predating this litigation. The Findings correctly note the specificity of Mr. Nichols's visits to the Colstrip area. (*See* Doc.177 at 10.)

Westmoreland's arguments about the supposed insufficiency of the declarants' intent to return to the area (Doc. 183 at 7) are also refuted by the evidence. Westmoreland avers that "there is no evidence that Mr. Gilbert recreated anywhere in the Mine's vicinity … in the last three years" (Doc. 183 at 7), but, in fact, Mr. Gilbert traveled to the West Fork Armells Creek basin in 2017, 2018, 2019, and 2020 to "visit … the area" and "appreciate its aesthetic values." (Doc. 137-2, ¶¶ 12-13.) Westmoreland admits Mr. Johnson has specific plans to visit the area, but wrongly asserts that they are not for recreation. (Doc. 183 at 7.) Mr. Johnson described his intention to visit friends and acquaintances in the area and "view the countryside," which is an activity that brings him "solace and escape from the daily grind of life." (Doc. 137-1, ¶¶ 6, 11.) And Mr. Nichols, contrary to Westmoreland's assertion, also stated a clear and concrete intention to visit the area of "West and East Armells Creeks" in summer 2021. (Doc. 137-4, ¶ 11.) As such, Westmoreland's arguments fail.

B. The Findings correctly conclude that Conservation Groups' members' long-standing efforts to protect the area from strip-mining bolster their standing.

The Findings correctly state—and Westmoreland does not dispute (Doc. 183 at 7-12)—that "a declarant's personal connection to an area, combined with an interest in environmental issues and involvement in an environmental organization may 'add credence to his assertion that he has suffered injury in fact.'" (Doc. 177

at 10 (cleaned up) (quoting *Ohio Valley Env't Coal. v. Maple Coal Co.*, 808 F. Supp. 2d 868, 879 (S.D. W. Va. 2011)).)

Here, Westmoreland's arguments about "manufactured" standing fail in light of the long-standing interests of Messrs. Gilbert, Johnson, and Nichols in the areas threatened by Westmoreland's Area F strip-mining operation. As noted, Mr. Gilbert's affection for and connection to this land began over 40 years ago. (Doc. 137-2, ¶ 9.) That Mr. Gilbert took a photo in 2018 to document this interest in hopes of protecting the area from Westmoreland's draglines does not undermine, but bolsters, his asserted interest and injury. *See Ohio Valley Env't Coal.*, 808 F. Supp. 2d at 879.[2] As noted above, Westmoreland's arguments about Mr. Gilbert's supposedly "disclaiming" recreating in the West Fork Armells Creek basin and his canceling a visit to the area in 2018 are inaccurate and irrelevant, respectively. *See supra* Part I.A.

Westmoreland contends Messrs. Johnson's and Nichols's visits are only linked to litigation (Doc. 183 at 10-11), but the company glosses over their

[2] Westmoreland is more than a little disingenuous to attack Mr. Gilbert's standing on the basis of this photo. The company has deposed Mr. Gilbert twice and cross-examined him once at hearing in unsuccessful standing challenges (Docs. 48-5, 48-8, 48-9), often demanding documentation of his presence in the Colstrip area. (*E.g.*, Doc. 48-5 at 13:14-15 ("Q. [D]o you remember what creek you were on?"); Doc. 48-9 at 59:7-8 ("Q. Any documentation of that trip, fueling up in Colstrip, for example?"). Having done so, the company can hardly complain now that Mr. Gilbert has in fact documented one of his recent visits to the area.

statements about visiting the area for a decade (long before the filing of this case) for personal enjoyment of the "abundant beauty" of the area, in addition to their advocacy interests in protecting the area from strip-mining. (Doc. 137-1, ¶¶ 6-7; Doc. 137-4, ¶¶ 9-11; *see also* Doc. 177 at 11 (noting Mr. Johnson's interests in the area are both personal and related to advocacy).) Accordingly, the Findings correctly rejected Westmoreland's arguments about "manufactured" standing. (Doc. 177 at 10-11.)

C. Westmoreland's unprecedented ploy to prolong this litigation with discovery and a trial on standing should be rejected because it is unsupported and would constitute a monumental waste of resources.

Westmoreland's last-ditch effort to prolong this litigation via discovery and, eventually, a trial on standing is unsupported by fact or precedent, would constitute a gross waste of resources of the Court and parties, and should be rejected.

This unorthodox and unheard of request should be rejected first because it lacks factual support. It is axiomatic that the arguments of counsel are not evidence and cannot create a factual dispute. *E.g.*, *Television Events & Mktg., Inc. v. AMCON Distrib., Co.*, 484 F. Supp. 2d 1124, 1130 n.4 (D. Haw. 2006). Nor does Westmoreland's immaterial flyspecking of the declarations of Messrs. Gilbert, Johnson, and Nichols create triable issues of fact. *Brit. Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952-53 (9th Cir. 1978) ("And if the factual dispute is immaterial, it cannot be held to bar the granting of summary judgment."). There is no material

dispute that Conservation Groups' members have long-standing connections to the landscape that Westmoreland seeks to strip-mine. (Doc. 177 at 7-14.) The Findings' careful analysis of standing is legally sound and factually correct. Westmoreland is entitled to neither discovery nor trial on standing.

Westmoreland provides no support for its unprecedented effort to turn record review cases under the Administrative Procedure Act into evidentiary trials. The prospect would impose monumental costs on parties and the courts. *See, e.g.*, Rodgers Environmental Law, § 12:3 (2d ed. Nov. 2021 update) ("To this day, a single 'standing' deposition can consume ten hours at a cost of $10,000.00."); Fed. R. Civ. P. 1 (Federal Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"); Fed. R. Civ. P. 26(a)(1)(B)(i) (exempting "action[s] for review on an administrative record" from pretrial evidentiary disclosures). Moreover, as noted, Westmoreland has already deposed Mr. Gilbert twice and cross-examined him at hearing about his connections to the Colstrip area,[3] yet every tribunal that has addressed the issue has found that Mr. Gilbert has standing with respect to the Rosebud Mine and has rejected Westmoreland's fanciful arguments to the contrary. (Doc. 156 at 2-3; Doc. 49 at 19-20.)

[3] (Docs. 48-5, 48-8, 48-9.)

Westmoreland's request for a fifth bite at this apple has no merit and should be rejected.

II. WESTMORELAND'S ARGUMENTS ABOUT CUMULATIVE IMPACTS TO SURFACE WATER ARE UNSUPPORTED BY FACTS OR LAW.

As with standing, the Findings carefully review Federal Defendants' cumulative effects analysis and correctly conclude it was lacking. The Findings explain that NEPA requires the cumulative effects analysis to include "some quantified or detailed information," but a "perfunctory" analysis of cumulative effects does not constitute a hard look. (Doc. 177 at 15 (quoting *Neighbors of Cuddy Mountain v. USFS*, 137 F.3d 1372, 1379 (9th Cir. 1998), and *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 994 (9th Cir. 2004).)[4]

Here, Federal Defendants' perfunctory three-sentence conclusion about cumulative effects to water resources was unlawful, as explained by both Federal

[4] Westmoreland's suggestion that this was the wrong standard has no merit. (Doc. 183 at 14 n.9.) This is the same standard applied in *Center for Community Action & Environmental Justice v. FAA*, 18 F.4th 592, 604-05 (9th Cir. 2021) (citing requirement of "quantified or detailed" information from *Klamath-Siskiyou Wildlands Center*, 387 F.3d at 993).

Defendants' own experts and the Findings. (*Id.* at 16-17.)[5] Federal Defendants no longer dispute this conclusion. (Doc. 180 at 1.)

Westmoreland contests the conclusion, but its arguments are, again, at war with the record and wrong on the law.

A. Westmoreland wrongly asserts that the cumulative effects analysis for surface water was more than three perfunctory sentences.

Westmoreland contends that the Findings make the "demonstrably false" statement that the cumulative effects analysis is "limited to a 'three sentence' conclusion." (Doc. 183 at 12 (citing Doc. 117 [sic] at 16).) But it is Westmoreland that misstates the record.

While Westmoreland asserts that the three-sentence analysis is "preceded by three pages of cumulative impact assessment" (*id.* at 12), review of those pages

[5] Federal Defendants' expert staff objected strenuously to the cumulative effects analysis of surface water in the Environmental Impact Statement (EIS). AR-1138-142973 ("At minimum, the available water monitoring datasets for the other areas of the Rosebud Mine (Areas A, B, C, etc.) need to be analyzed along with the Area F data to determine cumulative impacts. I don't know what our story would be if we avoided this and someone were to challenge us on it given that a historic dataset exists, some analysis is no doubt already done in the CHIA, PHC and other documents, and there isn't a significant cost (drilling wells, etc.) associated w/ obtaining this data. I've never seen an EA or EIS released where we didn't at least look at other sections of a mine to determine cumulative impacts."); AR-1138-142981 ("Please describe [cumulative] impacts in much greater detail. NEPA requires all available data to be utilized for these types of analyses. This is not sufficient."); AR-1002-12633 (stating that cumulative effects analysis "needs to be quantitative and not just qualitative").

reveals that they consist only of a *list* of actions that would contribute to cumulative effects, as the Findings explain. (Doc. 177 at 16 (citing AR-116-31106 to -31108).) Aside from the three perfunctory sentences identified in the Findings, the preceding list does not assess or disclose in any way either the combined impact of these other actions on surface waters or the "incremental impact" of the direct and indirect effects of Area F "when added" to the combined impacts of these other actions. 40 C.F.R. § 1508.7 (defining cumulative effects). As such, it is not an analysis of cumulative effects. Notably, Westmoreland does not dispute that (1) this list of actions that would contribute to cumulative effects is, in fact, a list; and (2) that "simply listing all relevant actions is not sufficient" for cumulative impacts analysis. (*Compare* Doc. 183 at 12-13, *with* Doc. 177 at 16 (quoting *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1104-05 (9th Cir. 2016)).)

Accordingly, Westmoreland's argument fails.

B. Westmoreland's *post hoc* speculation that the cumulative effects analysis could be limited to West Fork Armells Creek contradicts the EIS and is irrelevant.

Westmoreland next pieces together a *post hoc* argument that cumulative impacts will somehow be limited to the West Fork Armells Creek basin and therefore the Federal Defendants' failure to disclose a quantified or detailed analysis was somehow justified. (*See* Doc. 183 at 13-16.) Not only is this argument contrary to the record, but it is also *post hoc* and a non sequitur.

Contrary to Westmoreland's argument to limit the cumulative effects analysis to West Fork Armells Creek, the EIS in fact established a "surface water cumulative impacts analysis area" that "include[d] the Sarpy Creek, Armells Creek [including the East Fork and West Fork], and Rosebud Creek watersheds." AR-116-31106. This was in recognition that cumulative effects would include the impacts of "coal combustion," "discharges to surface water from existing areas of the Rosebud Mine" and other dischargers in East Fork and West Fork Armells Creek, mining in other areas of the Rosebud Mine in East Fork and West Fork Armells Creek, as well as agriculture and land management throughout the cumulative impacts area. AR-116-31106 to -31107. The EIS then recognized that the cumulative impact of these activities on surface water quality and quantity would not be nonexistent—as Westmoreland contends (Doc. 183 at 13-14)—but would "range from minor to *major*." AR-116-31108 (emphasis added). While the EIS's analysis failed for lack of quantified or detailed analysis (as Federal Defendants' own experts repeatedly explained), it nevertheless refutes Westmoreland's contention that cumulative effects would somehow be limited to West Fork Armells Creek.

Moreover, Westmoreland's argument is *post hoc*. "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 50 (1983). Thus, whether Federal

Defendants could have confined their cumulative effects analysis to West Fork Armells Creek, as Westmoreland wrongly contends,[6] is ultimately irrelevant. Federal Defendants determined that the cumulative effects area included East and West Fork Armells Creek, that activities that would cause cumulative effects occurred on both streams, and that some of these cumulative effects on surface water would be "major." AR-116-31106 to -31108. Westmoreland's effort to reconstruct an alternative analysis out of whole cloth is without merit.

Westmoreland's argument is also a non sequitur. The flaw in the EIS was its perfunctory and general analysis of cumulative impacts to surface water, even though Federal Defendants possessed abundant historical data with which to conduct the required quantified or detailed analysis. (Doc. 177 at 16-17.)[7] Westmoreland's unfounded and *post hoc* speculation (that cumulative impacts

[6] As noted, Federal Defendants' expert staff had "never seen an EA or EIS released where we didn't at least look at other sections of a mine to determine cumulative impacts." AR-1138-142973. Accordingly, the EIS rejected Westmoreland's suggestion of limiting the cumulative effects analysis area to West Fork Armells Creek. AR-116-31106 to -31108.

[7] Westmoreland's argument that the EIS addresses the "very impacts" with which Conservation Groups are concerned (Doc. 183 at 14-15) is another diversion. Conservation Groups' concern is that the three-sentence cumulative impacts assessment in the EIS stating that impacts would "range from minor to major" (AR-116-31108) was perfunctory and not quantified or detailed, even though Federal Defendants possessed the historical data to conduct a lawful analysis, as its own expert staff advised. AR-1138-142973.

could somehow be limited to West Fork Armells Creek) fails to supply the missing quantified or detailed analysis and is, therefore, beside the point.

Finally, as demonstrated below, Westmoreland's effort to substitute a narrower state-level analysis for the missing quantified or detailed cumulative effects analysis under NEPA has no merit.

C. Westmoreland improperly attempts to substitute a non-NEPA state-level analysis limited exclusively to the impacts of mining for the required NEPA analysis of all cumulative impacts.

The Findings correctly reject Westmoreland's *post hoc* effort to substitute a state-level analysis (called a "CHIA") prepared under state law[8] for the NEPA analysis. The Findings base this conclusion on the grounds that (1) the CHIA did not apply the standard required by NEPA; (2) the EIS did not incorporate or tier to the CHIA; and (3) the EIS could not have incorporated or tiered to the CHIA because it post-dated the EIS and it is not a NEPA document. (Doc. 177 at 17-18.) Westmoreland attempts to dispute these points, but its arguments have no merit.

First, Westmoreland's intimation (Doc. 183 at 17-18) that the State Coal Mining Law applies the same standard as NEPA is refuted by Westmoreland's own prior statements in a state proceeding, explaining that the State Coal Mining

[8] The analysis is a cumulative hydrologic impact assessment or "CHIA," prepared pursuant to the Montana Strip and Underground Mine Reclamation Act ("MSUMRA" or "State Coal Mining Law"). *See* Mont. Code Ann. § 82-4-227(3). The CHIA addresses only impacts of "*anticipated mining*," no other activities. *Id.*

Law is narrowly limited to the impacts of *mining*, excluding any analysis of other cumulative effects on water resources that must be analyzed under NEPA (including combustion impacts, agriculture impacts, and impacts from discharges from other non-mining activities):

> [N]EPA standards … are broader than MSUMRA [the State Coal Mining Law] standards. MSUMRA requires consideration of *hydrologic* impacts (impacts to water) from mining that may interact with other *mining* impacts. In contrast, NEPA requires consideration of impacts to every aspect of the environment … from all sources (mining and non-mining).

(Doc. 113-1 at 6 n.5 (emphasis in original).) Having thus previously argued that that the standard under the State Coal Mining Law is significantly narrower than the cumulative effects standard under NEPA, Westmoreland cannot now credibly contend that the analysis from the State Coal Mining Law (the CHIA) can substitute for the required analysis under NEPA.

Second and equally fatal, the record demonstrates that, as the Findings state, the "EIS … did not incorporate or tier to the CHIA" (Doc. 177 at 18), and the record refutes Westmoreland's statement that "OSM … incorporated MDEQ's [Montana Department of Environmental Quality] analysis by reference." (Doc. 183 at 17.) Notably, Westmoreland does not cite the EIS, but instead, *sub silencio*, cites a document issued months after the final EIS, Federal Defendants' Record of Decision (ROD). (*Id.* (citing AR-202-37574).) Thus, Westmoreland does not, in fact, dispute the Findings' statement that the *EIS* did not "incorporate" the CHIA.

(Doc. 177 at 18.) This distinction is important because NEPA regulations only provide for "incorporation by reference" into an environmental impact statement, 40 C.F.R. § 1502.21, not a record of decision.[9] Moreover, contrary to Westmoreland's representation (Doc. 183 at 18), the ROD does *not* "incorporate" the CHIA "by reference," but simply notes that MDEQ prepared a CHIA and that the CHIA and related state documents "constitute compliance with SMCRA [the Surface Mining Control and Reclamation Act, which is the Federal Coal Mining Law]." AR-202-37574 to -37575.[10]

Third, Westmoreland's argument about the timing (Doc. 183 at 18-19) of the CHIA has no merit. MDEQ issued the CHIA approximately five months after Federal Defendants issued the final EIS. AR-125-37314 (CHIA issued April 18, 2019); AR-116-30354 (EIS issued November 2018). Consequently, the EIS could not tier to the CHIA or incorporate it by reference, as the Findings explain. (Doc. 177 at 18.) Contrary to Westmoreland's suggestion, *Protect Our Communities*

[9] The EIS is an analysis document that informs the public and decision-makers about impacts, 40 C.F.R. § 1502.1; whereas, the ROD is a decision document, 40 C.F.R. § 1505.2. The analysis document "is where the [agency's] defense of its position must be found." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998).

[10] Westmoreland continues to misrepresent the record when it states that Federal Defendants "agre[ed] to *incorporate*" a different CHIA into the EIS as the cumulative effects analysis. (Doc. 183 at 19 n.13 (emphasis added) (citing AR-1002-12633).) The cited document does not mention any agreement to "incorporate" the CHIA into the EIS. AR-1002-12633

Foundation v. Lacounte, 939 F.3d 1029, 1040 (9th Cir. 2019), does not condone use of post-EIS information to satisfy NEPA. While in dicta that case briefly discussed certain "post-EIS analysis," the court then cautioned: "[W]e do not suggest that post-EIS analysis can serve as a substitute for EIS … analysis." *Id.* An analysis that occurs after issuance of the EIS does not fulfill NEPA's objective of ensuring that decision-makers and the public have relevant information "before [an] action[] [is] undertaken." *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 993; 40 C.F.R. § 1500.1(b). Nor does the fact that the CHIA appears in the administrative record (Doc. 183 at 18 & n.12) change the analysis—it is in the NEPA analysis (here, the EIS), not buried in the administrative record, that an agency's "defense of its position must be found." *Blue Mountains Biodiversity Project*, 161 F.3d at 1214. Accordingly, a "non-NEPA document—let alone one prepared and adopted by a state government" and issued months after an EIS—"cannot satisfy a federal agency's obligations under NEPA." *S. Fork Band Council v. BLM*, 588 F.3d 718, 726 (9th Cir. 2009). Finally, Westmoreland erroneously insists that the missing NEPA analysis can be found in additional state-level documents prepared by Westmoreland and MDEQ under the State Coal Mining Law. (Doc. 183 at 18-19.) But these non-NEPA documents cannot and do not fit the bill, *S. Fork Band*, 588 F.3d at 726, because, again, the scope of the State Coal Mining Law is substantially narrower than the scope of the cumulative impacts

analysis under NEPA. (Doc. 113-1 at 6 n.5.) These analyses of only the effects of mining, Mont. Code Ann. § 82-4-227(3), do not address the great majority of non-mining activities which the EIS states will contribute to cumulative effects on surface water. AR-116-31106 to -31107. Such limited analyses cannot substitute for the required analysis under NEPA. *See, e.g.*, *Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800, 811 (9th Cir. 1999) (agency could not rely on document that "cover[ed] only a portion of the area affected" for required NEPA analysis of cumulative impacts). Thus, while these non-NEPA state-level documents provided Federal Defendants with abundant data (as their staff recognized, AR-1138-142973), they were "only the starting point" for the full analysis of cumulative impacts required by NEPA. *Muckleshoot Indian Tribe*, 177 F.3d at 811.

For these reasons, Westmoreland's objections are not well taken and should be rejected.

III. WESTMORELAND'S ARGUMENTS ABOUT THE FINDINGS' CLIMATE CHANGE ANALYSIS ARE UNAVAILING.

The Findings appropriately conclude that "OSM failed to take a 'hard look' at the costs of greenhouse gas emissions," because the agency "quantified the benefits of the mine expansion without providing a balanced quantification of the costs, or at least a reasonable justification for failure to do so." (Doc. 177 at 22-23.) Westmoreland's objections (Doc. 183 at 19-23) have no merit, as the Findings are

well grounded in precedent and the record, address Westmoreland's concern about the range of values, and break no new legal ground.

A. The Findings are consistent with Ninth Circuit and District of Montana precedent.

Westmoreland erroneously asserts that the Findings "depart[] from this district's precedent," relying on *350 Montana v. Bernhardt*, 443 F. Supp. 3d 1185 (D. Mont. 2020). (Doc. 183 at 19-20). That is incorrect, and Westmoreland neither acknowledges the Findings' reliance on this Court's decision in *WildEarth Guardians v. Bernhardt*, No. 17-CV-80-BLG-SPW, 2021 WL 363955 (D. Mont. Feb. 3, 2021), nor attempts to distinguish the precedent. As the Findings explain, the precedent in this Court stands for the proposition that, although NEPA does not require a cost-benefit analysis, "when an agency chooses to quantify the socioeconomic benefits of a proposed action, it would be arbitrary and capricious for the agency to undervalue the socioeconomic costs of that plan by failing to include a balanced quantification of those costs." (Doc. 177 at 19 (quoting *WildEarth Guardians*, 2021 WL 363955, at *9).)

In attempting to rely on *350 Montana v. Bernhardt*, Westmoreland overreaches, claiming that that case and this matter were "based upon virtually the same administrative record." (Doc. 183 at 20.) That is a bridge too far. The Findings, unlike *350 Montana*, 443 F. Supp. 3d at 1195-96, and the recent Ninth Circuit decision reversing it in part on appeal, *350 Montana v. Haaland*, No. 20-

35411, 2022 WL 999919, at *11-13 (9th Cir. Feb. 4, 2022), squarely address a central feature of Federal Defendants' record here: the quantification of purported economic benefits without similarly quantifying climate costs. Neither *350 Montana* decision discusses the extent to which the agency did or did not quantify purported economic benefits in the record and thus should have balanced that analysis with a similar quantification of climate costs. The Findings, by contrast, carefully explain the many ways in which Federal Defendants catalogued supposed economic "benefits" here, including their choice to use the label "benefits" in the EIS, and distinguish the reasoning of cases where courts upheld an agency's decision not to quantify costs based on the "abbreviated" discussion of benefits that "involved little quantification." (Doc. 177 at 21-22 & 22 n.7 (quoting *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 78-79 (D.D.C. 2019)).)

Although Westmoreland complains that the Findings require Federal Defendants to "present a balanced cost-benefit analysis" and that this obligation is an "extreme position" (Doc. 183 at 22-23), Westmoreland is wrong on both counts. First, the Findings expressly do not require Federal Defendants to create a formal cost-benefit analysis. Instead, the Findings explain that "NEPA does not require a cost-benefit analysis," (Doc. 177 at 19 (citing *MEIC v. OSM*, 274 F. Supp. 3d 1074, 1096 (D. Mont. 2017), and *High Country Conservation Advocates v. USFS*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014))), but that where an agency chooses to

quantify socioeconomic benefits of a proposed action, as Federal Defendants did here, it must "include a balanced quantification" of costs. (Doc. 177 at 19 (quoting *WildEarth Guardians*, 2021 WL 363955, at *9).)

Second, far from being an "extreme position," as Westmoreland characterizes it (Doc. 183 at 23), the Findings' conclusion—that where an agency chooses to provide a detailed quantification of benefits, it must similarly quantify costs (or adequately explain why it cannot do so)—is supported by decades of NEPA precedent. *E.g.*, *WildEarth Guardians*, 2021 WL 363955, at *9; *Utah Physicians for a Healthy Env't v. BLM*, 528 F. Supp. 3d 1222, 1228 (D. Utah 2021); *California v. Bernhardt*, 472 F. Supp. 3d 573, 623 (N.D. Cal. 2020); *MEIC*, 274 F. Supp. 3d at 1097; *High Country Conservation Advocates*, 52 F. Supp. 3d at 1191; *CBD v. NHTSA*, 538 F.3d 1172, 1198 (9th Cir. 2008).[11] Ignoring this well-established body of caselaw, Westmoreland supports its "extreme position" dig at the Findings only with reference to a draft Council on Environmental Quality NEPA guidance document, which was issued in June 2019 (roughly eight months *after* Federal Defendants issued the EIS here) and which has since been rescinded. 86 Fed. Reg. 10,252-01, 10,252 (Feb. 19, 2021).

[11] *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1177 (9th Cir. 1982) ("NEPA represents a firm Congressional mandate that environmental factors be considered on an equal basis with other, more traditional, concerns."); *see also* 42 U.S.C. § 4332(2)(B).

B. The Findings appropriately conclude that the range of values expressed by the social cost of carbon does not preclude its usefulness to decision-makers and the public.

Westmoreland further objects that the social cost of carbon offers too wide a range of values to be useful and that this Court may not "impose on the agency" which tools or procedures are most appropriate for analysis. (Doc. 183 at 21.) Westmoreland again misses the mark.

First, the Findings cite Ninth Circuit and District of Colorado precedent in concluding that "the fact the [social cost of carbon] Protocol is expressed in a range of values is not necessarily a valid reason to decline to quantify the costs of greenhouse gas emissions altogether." (Doc. 177 at 22-23 (citing *High Country Conservation Advocates*, 52 F.Supp.3d at 1192, and *CBD v. NHTSA*, 538 F.3d at 1200 (rejecting the variability argument because "while the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero").)[12]

Second, the Findings do not "impose" the social cost of carbon or any other particular methodology on Federal Defendants. Instead the Findings make clear that a balanced analysis must either similarly quantify costs "or offer non-arbitrary reasons for its decision not to do so." (Doc. 177 at 20.) Federal Defendants' key

[12] *See 350 Montana*, 2022 WL 999919, at *11-13 (rejecting proposition that "an agency may decline to consider evidence relevant to indirect and cumulative impacts simply because it cannot *precisely* identify direct effects").

failure here, the Findings explain, is not their refusal to use the social cost of carbon *per se*, but is their failure to use *any method* to balance their analysis by quantifying the costs of the climate impacts caused by the expansion. "[E]ven assuming OSM could justify its decision not to use a particular tool—i.e., the SCC Protocol—the EIS fails to demonstrate why OSM could not present a balanced quantitative analysis of the economic costs of greenhouse gas emissions." (Doc. 177 at 23 (citing *Utah Physicians*, 528 F.Supp.3d at 1231-32).)

Accordingly, this Court should reject Westmoreland's flawed objections to the Findings' well-reasoned climate change analysis.

IV. WESTMORELAND'S *POST HOC* ARGUMENT—THAT DEFENDANTS LACK AUTHORITY TO CONSIDER FORESEEABLE COMBUSTION IMPACTS—BREAKS AGAINST A WALL OF PRECEDENT.

The Findings correctly conclude that planned combustion of Area F coal at the Colstrip Power Plant will lead to foreseeable, massive water withdrawals from the Yellowstone River, which must be analyzed under NEPA. (Doc. 177 at 26-28.) Westmoreland does not dispute foreseeability, but instead wrongly contends such foreseeable impacts are "beyond the scope" of NEPA because Federal Defendants lack direct "authority or control" over power plant operations. (Doc. 183 at 23-24.) Westmoreland's argument fails because (1) it is an improper *post hoc* rationalization; and (2) this Court has already rejected it, as has every other court that has addressed the issue.

First, as noted, an agency may not defend a decision with *post hoc* rationalizations. *Motor Vehicle Mfrs.*, 463 U.S. at 50. The Findings note that Federal Defendants' EIS excluded analysis of water withdrawals "without any rationale." (Doc. 177 at 26 (citing AR-117-31539).) This renders Westmoreland's argument about Federal Defendants' lack of direct control over water withdrawals an improper *post hoc* argument. Westmoreland attempts to resists this conclusion on the basis of sundry notes from "several internal meetings" (Doc. 183 at 24 n.16), but the argument lacks merit. An agency may not defend its argument on the basis of obscure statements buried in the record. *Blue Mountains Biodiversity Project*, 161 F.3d at 1214. Moreover, one cannot squint close enough to discern Westmoreland's proposed argument about agency authority in the record citations offered by the coal company. (*See* Doc. 183 at 24 n.16 (citing AR-1025-13867 to -13868; AR-1026-13884; AR-1004-13591).) In these meeting notes, agency representatives (1) recognize the foreseeability of water withdrawals, but defer "develop[ing]" any "rationale" about whether to include them in the EIS until a later date, AR-1025-13868; (2) defer "determin[ing] if Yellowstone is or is not included in the analysis area based on indirect effects of combustion," AR-1026-13885; and (3) state that they "don't want to analyze every action … at [the] power plant" and are "taking the approach of saying that they're on the hook for looking at combustion of coal at power plant but not on the hook for looking at anything

else happening at the power plant," AR-1004-13591. Nowhere do the notes discuss or even mention limiting the analysis based on lack of direct agency authority over coal combustion. As such, Westmoreland's argument is *post hoc* and must be rejected. *Motor Vehicle Mfrs.*, 463 U.S. at 50.

Second, in any event, Westmoreland's argument about agency authority fails on the merits. While an agency need not extend its NEPA analysis to effects that the agency "has no ability to prevent," *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004), here, Federal Defendants "ha[ve] broad statutory authority to recommend approval or disapproval of a mining plan based on the information compiled in accordance with the mandates of NEPA." *WildEarth Guardians*, 2021 WL 363955, at *5).[13] Against this wall of authority, Westmoreland offers one out-of-circuit decision that did not involve Federal Defendants' authority under the regulations at issue here and ultimately concluded that the agency there was required to assess indirect impacts of fossil fuel combustion. *WildEarth Guardians*

[13] *Accord 350 Montana*, 2022 WL 999919, at *10-11 (agency required to assess indirect effects of foreseeable overseas combustion of coal shipped from Montana coal mine); *CBD v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020) (agency required to assess foreseeable overseas combustion of offshore oil project in Alaska); *MEIC*, 274 F. Supp. 3d at 1091-99 (coal transportation and combustion); *Diné Citizens Against Ruining Our Env't v. OSM*, 82 F. Supp. 3d 1201, 1217 (D. Colo. 2015), *vacated as moot on appeal*, 643 F. App'x 799 (10th Cir. 2016) (mem.) (mercury deposition from combustion); *see also Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (pipeline approval must assess downstream combustion of gas).

v. Zinke, 368 F. Supp. 3d 41, 64-66 (D.D.C. 2019). The case is inapposite, and Westmoreland's argument fails.

Indeed, Westmoreland concedes that Federal Defendants were required to analyze the indirect effects of coal combustion. (Doc. 183 at 25.) Having made this concession, Westmoreland cannot, with any consistency or credibility, distinguish the equally foreseeable combustion-related impacts of water withdrawals. (*See id.* at 25.) Both the Findings and Federal Defendants' meeting notes recognize that water withdrawals are part of the coal combustion process—after all, the "Power Plant burns the coal to boil water to produce electricity." (Doc. 177 at 25.)[14]

In short, there is no dispute that combustion of Area F coal at the Colstrip Power Plant will lead to foreseeable, massive water withdrawals from the Yellowstone River. The Findings rightly conclude that Federal Defendants' exclusion of these foreseeable results from their analysis without any justification was arbitrary. (Doc. 177 at 25-26.) Westmoreland's arguments to the contrary have no merit.

[14] AR-1026-13883 (noting "process diagram" of plant shows "water … used in many different process" and inquiring "[s]o it could be part of combustion").

V. FEDERAL DEFENDANTS' REQUESTED REMAND PERIOD DEMONSTRATES THAT VACATUR WILL NOT IMPACT EMPLOYEES OR THE COMMUNITY AND SHOULD NOT BE DEFERRED.

The Findings acknowledge the "serious and significant environmental concerns" from mining and burning Area F coal, yet recommend that the appropriate remedy be vacatur deferred for 365 days out of concern for impacts to "the Mine, its employees and the Colstrip community." (Doc. 177 at 37.) Conservation Groups objected to this recommendation. (Doc. 182 at 14-17.)

Federal Defendants in turn object to the 365-day deferral and request that vacatur be deferred by an additional 7 months (for a total of 19 months, through November 3, 2023), which they state is sufficient time for them to correct their errors on remand. (Doc. 180 at 4-7.)

Conservation Groups do not object to granting Federal Defendants the additional time requested to complete the remand process. However, Federal Defendants' representations demonstrate that immediate vacatur will not cause harm to mine employees or the Colstrip community because Westmoreland has represented that it has sufficient alternative permitted coal reserves to operate without interruption for 19 months.

The Ninth Circuit agrees that allowing coal mining to continue during remand would "frustrate NEPA's purpose of requiring agencies to look *before* they leap." *350 Montana*, 2022 WL 999919, at *13; *accord Robertson v. Methow Valley*

Citizens Council, 490 U.S. 332, 349 (1989). Here, Westmoreland itself admitted that vacatur "would have no immediate effect on mine operations" (Doc. 150-1 at 32) and added that as of September 2020 the company had approximately 30 million tons of permitted reserves outside Area F, sufficient to supply the Colstrip Power Plant for 3-5 years (Doc. 73-2, ¶¶ 3, 7). Accordingly, based on Westmoreland's representations, vacatur during a 19-month remand would not adversely affect employees of the mine or power plant (which would continue to operate) or the community. Absent such harm, the "limited circumstances" in which remand without vacatur are appropriate are not present. *350 Montana*, 2022 WL 999919, at *13 (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)).

Consequently, Conservation Groups do not oppose the 19-month remand period, but submit that any deferral of vacatur during this period is unwarranted given Westmoreland's representations that cessation of mining in Area F will not affect employment or production during the remand period.

CONCLUSION

For the foregoing reasons, this Court should reject Westmoreland's objections to the Findings. Conservation Groups do not oppose Federal Defendants' proposal for extending the remand period to November 3, 2023, but Conservation Groups do oppose deferring vacatur for 19 months, which would

frustrate the objectives of NEPA. Instead, because Westmoreland has represented that cessation of mining in Area F would have no impact on mining or power plant operations for the proposed remand period, this Court should vacate the Area F expansion pending completion of the remand process.

Respectfully submitted this 15th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I hereby certify that the brief, excluding caption, certificates, tables, exhibit index, and signature block, contains 6,479 words. I relied on a word-processing system to obtain this word count.

/s/ Shiloh Hernandez
Shiloh Hernandez