Exhibit 1

MEIC v. Haaland, No. CV 19-130-BLG-SPW-TJC
(D. Mont. Feb. 11, 2022)

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,

and

WESTMORELAND ROSEBUD MINING, LLC and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400,

Intervenor Defendants.

CV 19-130-BLG-SPW-TJC

FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Plaintiffs Montana Environmental Information Center ("MEIC"), Indian People's Action, 350 Montana, Sierra Club, and WildEarth Guardians ("Plaintiffs") bring this action challenging Federal Defendants' approval of a Mine Plan Modification for the Rosebud Mine located near Colstrip, Montana. (Doc. 55.) Westmoreland Rosebud Mining, LLC, formerly known as Western Energy Company ("Westmoreland") owns and operates the Rosebud Mine, and was granted leave to intervene in this action as a Defendant. (Doc. 9.) The

International Union of Operating Engineers, Local 400 was also granted leave to intervene as a Defendant. (Doc. 80.)

Judge Watters has referred the case to the undersigned under 28 U.S.C. § 636(b)(1)(B). (Doc. 43.) Presently before the Court are Plaintiffs' Motion for Summary Judgment (Doc. 136), Federal Defendants' Cross Motion for Summary Judgment (Doc. 148), and Intervenor Defendants' Cross Motion for Summary Judgment (Doc. 150). The motions are fully briefed and ripe for the Court's review.

Having considered the parties' submissions, the Court recommends that Plaintiffs' Motion for Summary Judgment be **GRANTED in part**; Intervenor Defendants' Motion for Summary Judgment be **GRANTED in part**; and Federal Defendants' Motion for Summary Judgment be **DENIED**.

I. BACKGROUND

This case concerns the Rosebud Mine ("the Mine"), which is a 25,949-acre surface coal mine located near Colstrip, Montana. The Mine began strip-mining operations in 1968 and has grown incrementally since its inception through various expansions, termed Areas A, B, C, D, and E. In November 2011, Westmoreland submitted an application to the Montana Department of Environmental Quality ("MDEQ") to permit the addition of Area F to the Mine. Westmoreland also requested a Mine Plan Modification from the Office of Surface Mining

Reclamation and Enforcement ("OSM") to exercise its existing lease rights in Area F. The Area F expansion sought to add approximately 6,500 acres to the Rosebud Mine. The expansion is expected to yield approximately 70.8 million tons of recoverable coal and extend the operational life of the Mine by 8 years.

Coal from the Mine is sent almost exclusively to the neighboring Colstrip Power Plant ("the Plant") by a conveyor system.[1] The coal is burned to boil water in a turbine to produce electricity. As a water source, the Plant withdraws water from the Yellowstone River and transports it 30 miles by pipeline for use at the Plant to combust the coal. The Plant consumes between 22,000 and 50,000 acre-feet of water annually from the Yellowstone River.

In November 2018, the MDEQ and OSM jointly issued the final Environmental Impact Statement ("EIS") on the mine expansion. The EIS considered three alternative actions: (1) a no-action alternative, (2) the proposed action, and (3) the proposed action with additional mitigation measures.

In April 2019, the MDEQ issued a Record of Decision approving Alternative 2, with conditions. One of the conditions prohibited mining of approximately 74 acres in Section 12 within Area F.

[1] The Rosebud Mine delivers between 7.7 and 9.95 million tons of coal annually to the Colstrip Power Plant, and approximately 300,000 tons of "waste coal" to the nearby Rosebud Power Plant. (A.R. 116-030393-95.)

In June 2019, OSM issued a Record of Decision approving the Area F expansion, with the excluded 74 acres in Section 12.

On November 18, 2019, Plaintiffs filed this action. (Doc. 1.) Plaintiffs allege the Federal Defendants violated NEPA by failing to adequately consider the mine expansion's cumulative effects on surface water, the adverse impacts of greenhouse gas emissions, the effects of water withdrawals from the Yellowstone River, and a reasonable range of alternatives. (Doc. 98.) Plaintiffs also contend the Federal Defendants violated the Endangered Species Act "ESA" by failing to properly consider and consult on the effects of water withdrawals from the Yellowstone River on pallid sturgeon. (*Id.*) Plaintiffs request the Court vacate and set aside the entire Mine Plan Modification Decision. (*Id.*)

II. LEGAL STANDARDS

The National Environmental Policy Act ("NEPA") is a procedural statute enacted to protect the environment by requiring government agencies to meet certain procedural safeguards before taking action affecting the environment. *Cal. Ex. rel. Lockyer v. US. Dept. of Agric.,* 575 F.3d 999, 1012 (9th Cir. 2009). In other words, NEPA "force[s] agencies to publicly consider the environmental impacts of their actions before going forward." *Idaho Sporting Cong., Inc. v. Rittenhouse,* 305 F.3d 957, 963 (9th Cir. 2002). NEPA requires an agency proposing a major federal action significantly impacting the environment to

prepare an environmental impact statement ("EIS") to analyze potential impacts and alternatives. 42 U.S.C. § 4332(C).

Because NEPA does not contain a separate provision for judicial review, courts review an agency's compliance with NEPA under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. 5 U.S.C. § 706(2)(A). Judicial review of administrative agency decisions under the APA is based on the administrative record compiled by the agency – not on independent fact-finding by the district court. *Camp v. Pitts,* 411 U.S. 138, 142 (1973).

In reviewing an agency action under the APA, the Court must determine whether the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.,* 463 U.S. 29, 43 (1983).

Review under this standard is narrow, and the reviewing court may not substitute its judgment for that of the agency. *Id.* Review is highly deferential to the agency's expertise, and presumes the agency action to be valid. *Arkansas v.*

Oklahoma, 503 U.S. 91, 112 (1992). The agency, however, must articulate a rational connection between the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made." *Id.*; *see also Midwater Trawlers Co-op v. Dep't of Commerce,* 282 F.3d 710, 716 (9th Cir. 2002). Thus, the reviewing court must look at whether the decision considered all of the relevant factors or whether the decision was a clear error of judgment. *Id.*

A court's review under NEPA is limited to whether the agency "took a 'hard look' at the environmental impacts of a proposed action." *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010). A "hard look" under NEPA requires consideration of all foreseeable direct and indirect effects, and the likely cumulative impact of the agency action. *Idaho Sporting Congress*, 305 F.3d at 973; 40 C.F.R. § 1502.16, 1508.7, 1508.8. A hard look should involve a discussion of adverse impacts that does not improperly minimize negative side effects. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1241 (9th Cir. 2005). "General statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Conservation Cong. v. Finely*, 774 F.3d 611, 621 (9th Cir. 2014). Once the court is "satisfied that a proposing agency has taken a hard look at a decision's environmental consequences, [its]

review is at an end." *Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1519 (9th Cir. 1992).

III. DISCUSSION

A. Standing

Plaintiffs assert they have standing based on the standing of their members, Derf Johnson (an MEIC member and employee and Sierra Club member), Steve Gilbert (an MEIC and Sierra Club member), Michaelynn Hawk (an Indian People's Action member and executive director), Jeremy Nichols (a WildEarth Guardians member and employee), and John Woodland (a 350 Montana member). Intervenor Defendants contest Plaintiffs' standing, arguing they cannot prove injury connected to Area F.[2]

An organization has standing to sue when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Individual members would have standing to sue in their own right if they have (1) "suffered

[2] Federal Defendants do not challenge Plaintiffs' standing to bring this action, but do argue they lack standing for their ESA claim. Because the Court finds it unnecessary to reach the Plaintiff's ESA claim, the Court does not separately address Federal Defendants' standing objection.

an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 180-81 (2000) (*citing Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992)). "Once plaintiffs seeking to enforce a procedural requirement establish a concrete injury, 'the causation and redressability requirements are relaxed.'" *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015) (*citing W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011)).

The Court finds Plaintiffs MEIC, Sierra Club and WildEarth Guardians have demonstrated sufficient injury to establish standing based on the declarations of Mr. Johnson, Mr. Gilbert and Mr. Nichols.[3] An environmental plaintiff

[3] Plaintiffs did not contest Intervenor Defendants' arguments that Ms. Hawk and Mr. Woodland lack standing. The Court finds Ms. Hawk lacks standing because she does not claim a particularized injury in relation to Area F. Ms. Hawk avers that she has lived in Lame Deer and Colstrip, and continues to visit regularly. (Doc. 137-3 at ¶ 5-7.) But she does not state she has viewed or visited the area near Area F. The Court also finds Mr. Woodland lacks standing because he fails to state a concrete plan to return to the affected area. Mr. Woodland states that he visited Colstrip on one occasion, and plans to travel back to the area "within the next few years." (Doc. 137-5 at ¶¶ 7, 10.) Mr. Woodland's assertions of a desire to return to the area someday, without "any specification of *when* the someday will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Defenders of Wildlife*, 504 U.S. at 564 (emphasis in original). Therefore,

"adequately allege[s] injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183. The Court finds Mr. Johnson, Mr. Gilbert, and Mr. Nichols have made that showing here.

Mr. Johnson attests that he has taken numerous trips to the southeastern Montana prairie and forests, and more specifically has regularly visited the Colstrip region and has viewed the proposed Area F expansion area from public roads. (Doc. 137-1 at ¶¶ 6-10.) He further avers that where the Mine is visible, the beauty of the area is "desecrated," and greatly harms his appreciation and enjoyment of the area. (*Id.* at ¶ 10.)

Mr. Gilbert attests that he has a long history of visiting the Colstrip area, and has engaged in activities such as hunting, viewing the countryside while driving through the area, and conducting field work. (Doc. 137-2 at ¶¶ 9-12.) Specifically, Mr. Gilbert states that he has traveled the public roads near Area F and viewed the expansion of strip-mining operations, and has hunted birds five to ten miles downstream from the Mine. (*Id.* at ¶¶ 12, 17.) He states that his aesthetic experience is compromised by the industrial development of the Mine and Power Plant. (*Id.* at ¶ 16.)

Plaintiffs have not demonstrated standing for Plaintiffs Indian People's Action or 350 Montana, and it will be recommended that those Plaintiffs be dismissed.

Mr. Nichols attests that he has regularly visited the area where the Mine and Area F are located as part of trips to southeast Montana to view wildlife and recreate outdoors. (Doc. 137-4 at ¶¶ 9-10.) Most recently, he hiked on public lands in an area just northwest of the mining operations, and hiked and viewed wildlife on lands south and east of Colstrip. (*Id.*). He states that the sights and sounds of the mining activities diminish his recreation enjoyment of the area. (*Id.* at ¶¶ 12-14.)

Intervenor Defendants contend Plaintiffs cannot establish standing because their alleged injuries are self-inflicted. Courts have recognized that a person "who goes looking for pollution cannot claim an aesthetic injury in fact from seeing it." *Ctr. for Bio. Diversity v. U.S. Env't Prot. Agency*, 937 F.3d 533, 540 (5th Cir. 2019). But a declarant's environmental activism does not automatically preclude them from fulfilling the requirements for standing. *Ohio Valley Env't Coal., Inc. v. Maple Coal Co.*, 808 F.Supp.2d 868, 879 (S.D. W. Va. 2011). Where a declarant has preexisting connections to an area, their advocacy to protect the area does not defeat standing. *Id.* at 881. To the contrary, 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." *Id.*

In their declarations, Mr. Johnson, Mr. Gilbert, and Mr. Nichols have attested to recreational activities and aesthetic interests in the area around Area F in addition to their involvement with the Plaintiff environmental organizations. (Docs. 137-1 at ¶¶ 6, 10-11; 137-2 at ¶¶ 9, 11-12; 137-4 at ¶¶ 9-10.) Thus, the Court finds this case is distinguishable from *Ctr. for Bio. Diversity*, 937 F.3d 533, where the Fifth Circuit found one of the plaintiffs' members lacked standing because he had been specifically searching for oil spills in the Gulf of Mexico, and *Ohio Valley*, 808 F.Supp.2d 868, where the district court found two of the plaintiffs' members lacked standing because they had no connection to the affected area before the lawsuit.

Intervenor Defendants also argue Mr. Gilbert's declaration fails to state a sufficiently concrete allegation of future use. Although vague assertions of a desire to return to an area "do not support a finding of [] 'actual or imminent' injury," *Defenders of Wildlife*, 504 U.S. at 564, "[r]epeated recreational use itself, accompanied by a credible allegation of desired future use, can be sufficient, even if relatively infrequent, to demonstrate that environmental degradation of the area is injurious to that person." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000). Here, Mr. Gilbert explains that he is an avid outdoorsman and has made at least annual visits to the area surrounding the Mine over the past four decades. (Doc. 137-2 at ¶¶ 9, 11.) He further states he plans to

continue to visit and recreate in and around East Fork Armells Creek, West Fork Armells Creek, Colstrip, and the Rosebud Mine. (*Id.* at ¶ 17.) The Court finds Mr. Gilbert has stated a sufficiently concrete and credible allegation of future use.

Intervenor Defendants further argue Plaintiffs cannot establish an injury which will be redressed by a favorable decision, because they lack an adequate nexus to Area F. An environmental plaintiff cannot establish standing by merely offering "averments which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portion of which mining activity has occurred or probably will occur by virtue of the governmental action." *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 889 (1990). Nevertheless, proximity to the site on which the challenged activity is occurring can be sufficient. *Laidlaw*, 528 U.S. at 181-84; *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001). In *Laidlaw*, for example, the Supreme Court found the plaintiff had standing where its members lived 20 miles and recreated up to 40 miles away from the facility at issue. *Laidlaw*, 528 U.S. at 181-83. *See also Sierra Club v. Franklin Cty. Power of Ill.*, 546 F.3d 918, 925 (7th Cir. 2008); *Ecological Rights Found.*, 230 F.3d at1148 (noting the injury in fact requirement in environmental cases is not "reducible to inflexible, judicially mandated time or distance guidelines").

Intervenor Defendants assert Mr. Gilbert has not shown that he recreated on or near Area F, but rather only that he rode in a vehicle and viewed parts of Area F from the road. But where "an area can be observed and enjoyed from adjacent land, plaintiffs need not physically enter the affected area to establish an injury in fact." *Cantrell*, 241 F.3d at 681. *See also Sierra Club v. Jewell*, 764 F.3d 1, 6 (D.C. Cir. 2014) (finding the plaintiffs "possess interests in observing the landscape from surrounding areas, for instance, or in enjoying the Battlefield while on public roads").

Intervenor Defendants also challenge Mr. Nichols standing because he lives over 500 miles away from the Mine. The fact Mr. Nichols lives in Colorado, however, does not automatically defeat his standing. "An environmental plaintiff need not live nearby to establish a concrete injury[.]" *Cantrell*, 241 F.3d at 680; *Ecological Rts. Found.*, 230 F.3d at 1149 ("[A] person who uses an area for recreational purposes does not have to show that he or she lives particularly nearby to establish an injury-in-fact due to possible or feared environmental degradation."). Here, Mr. Johnson, Mr. Gilbert and Mr. Nichols aver to visiting and recreating in the area near the Mine and viewing Area F. The Court finds their declarations demonstrate an adequate nexus to the affected area to show injury in fact.

Accordingly, the Court finds MEIC, Sierra Club, and WildEarth Guardians have standing because Mr. Johnson, Mr. Gilbert and Mr. Nichols' declarations adequately demonstrate their personal stake in this controversy.

B. Cumulative Impacts to Surface Water

Plaintiffs first argue OSM failed to take a hard look at cumulative impacts to surface waters. Plaintiffs contend OSM provided only a perfunctory and qualitative statement about generalized impacts to surface water, rather than conducting a detailed and quantified analysis. Federal Defendants counter that OSM has discretion in how to organize and present information in the EIS, and that the required hard look at cumulative effects can be found in the direct and indirect effects analysis. Intervenor Defendants argue the cumulative effects analysis is adequate because the necessary quantitative analysis can be found in MDEQ's Cumulative Hydrological Impact Assessment ("CHIA") and water quality modeling.

A "hard look" under NEPA requires consideration of both foreseeable direct and indirect effects, as well as cumulative impacts. *Idaho Sporting Congress*, 305 F.3d at 973. A cumulative impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of

time." 40 C.F.R. § 1508.7. A direct effect is "caused by the action and occur[s] at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b).

Ninth Circuit case law is clear – to properly consider cumulative impacts, "some quantified or detailed information is required." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998). The cumulative impact analysis "must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994 (9th Cir. 2004). "Without such information, neither the courts nor the public, in reviewing the [agency's] decisions, can be assured that the [agency] provided the hard look that it is required to provide." *Cuddy Mountain*, 137 F.3d at 1379. Thus, conclusory presentations or "general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Id.* at 993, 995. *See also Bark v. United States Forest Serv.*, 958 F.3d 865 (9th Cir. 2020) (finding cumulative impacts analysis insufficient where there was no attempt to quantify cumulative impacts, but only "conclusory statements, based on 'vague and uncertain analysis'").

Here, although the EIS discusses cumulative impacts, it fails to provide the detailed, quantified analysis required to satisfy NEPA. The EIS listed multiple actions that would cumulatively affect surface water. (A.R. 116-31106-08.) But "simply listing all relevant actions is not sufficient" for cumulative impacts analysis. *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1104-05 (9th Cir. 2016). Rather than provide a meaningful analysis of the identified actions, the EIS set forth the following three-sentence conclusion:

> The Proposed Action would contribute long-term cumulative impacts on surface water hydrology that would range from minor to major. This would occur due to changes in stream and spring flows, loss of springs, loss of ponds or reduction in water supple to ponds, and changes in the hydrologic balance. The Proposed Action would contribute short-term and long-term adverse cumulative impacts on surface water quality due to backfilling with spoil, surface disturbances, and changes in the hydrologic balance that would range from minor to major.

(A.R. 116-31108.)

This general, qualitative statement falls short. Stating, without elaboration, that cumulative impacts to surface water "would range from minor to major" is akin to the "general statements about possible effects and some risk" that the Ninth Circuit has consistently held to be insufficient to constitute a hard look. *Klamath-Siskiyou*, 387 F.3d at 995; *Cuddy Mountain*, 137 F.3d at 1380. Further, the EIS did not offer any justification for why more detailed information could not be provided. *Cuddy Mountain*, 137 F.3d at 1380. Indeed, as Plaintiffs point out,

OSM's own staff recognized the deficiency in the cumulative impacts analysis and pointed out that OSM had access to data necessary to conduct a thorough analysis. (A.R. 1138-142973; 1138-142981.)

Federal Defendants correctly note that OSM has discretion in how to organize and present information in the EIS. *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1002 (9th Cir. 2013). But the manner in which OSM organized and presented the information in the EIS is not the problem. Rather, the problem is the lack of substance. *Id.* ("Whether [the agency] complied with NEPA [] turns on the *substance* of the FEIS rather than its form[.]") (emphasis in original). Further, contrary to Federal Defendants' argument, the discussion of direct and indirect impacts on surface water contained elsewhere in the EIS is not a substitute for a meaningful cumulative impacts analysis. *Idaho Sporting Congress*, 305 F.3d at 973 (NEPA requires analysis of both cumulative impacts and direct and indirect effects); 40 C.F.R. §§ 1508.7; 1508.8(a).

Intervenor Defendants' argument that the CHIA can save the EIS's cumulative effects analysis is similarly unavailing. The CHIA was prepared by the MDEQ as part of its permitting process to comply with the Montana Strip and Underground Mine Reclamation Act. It determined whether the proposed mining operations "are designed to prevent material damage to the hydrologic balance outside the permit area." (A.R. 116-030440.) As stated in the EIS, "material

damage is not assessed in this EIS, which has been prepared to comply with MEPA and NEPA." *Id.* Thus, the CHIA involved a review to comply with Montana permitting law, not to satisfy NEPA's cumulative impacts analysis. It is not a NEPA document. *South Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) ("A non-NEPA document – let alone one prepared and adopted by a state government – cannot satisfy a federal agency's obligations under NEPA"). The EIS also did not incorporate or tier to the CHIA, which is dated after the issuance of the EIS. Nor could it have properly done so; "[a] NEPA document cannot tier to a non-NEPA document." *Klamath-Siskiyou*, 387 F.3d at 998, citing *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir. 2002 (holding that "tiering to a document that has not itself been subject to NEPA review is not permitted").

Accordingly, the Court finds OSM failed to take a "hard look" at cumulative impacts to surface waters.

C. Greenhouse Gas Analysis

Next, Plaintiffs assert OSM's analysis of greenhouse gas emissions violated NEPA. Plaintiffs do not dispute that OSM sufficiently disclosed greenhouse gas emission, nor do they challenge OSM's use of the proxy methodology as a means

to disclose greenhouse gas impacts.[4] Rather, Plaintiffs argue OSM presented a skewed socioeconomic analysis as it relates to greenhouse gas emissions. Plaintiffs argue OSM touted the socioeconomic benefits of the mine expansion, but failed to account for its associated socioeconomic costs. Plaintiffs argue it was arbitrary and capricious for OSM to ignore scientific tools, such as the Social Cost of Carbon Protocol ("SCC"), to monetize the harm from greenhouse gas emissions. Defendants counter that because cost-benefit analyses are not required by NEPA, OSM was not required to monetize greenhouse gas impacts, and OSM's choice of methodology is entitled to deference.

Defendants are correct that NEPA does not require a cost-benefit analysis. *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining (MEIC)*, 274 F.Supp.3d 1074, 1096 (D. Mont. 2017); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F.Supp.3d 1174, 1191 (D. Colo. 2014). But "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." *WildEarth Guardians*

[4] It is generally reasonable for an agency to use the proxy methodology as a means to disclose greenhouse gas impacts. *See e.g. W. Org. of Res. Councils v. BLM (WORC)*, 2018 WL 1475470, *14 (D. Mont. Mar. 26, 2018) (holding BLM's use of the proxy method was reasonable); *WildEarth Guardians v. Jewell*, 2017 WL 3442922, *12 (D. N.M. Feb. 16, 2017) (holding OSM satisfied its obligation to consider greenhouse gas effects by using the predicted volume of greenhouse gas emissions as a proxy for assessing potential climate change impacts).

v. Bernhardt, 2021 WL 363955, *9 (D. Mont. Feb. 3, 2021). Thus, if an agency elects to quantify the benefits of a proposed action, it must also quantify the costs, or offer non-arbitrary reasons for its decision not to do so. *Id.*; *High Country*, 52 F.Supp.3d at 1191-92.

The SCC Protocol is a tool agencies can use to quantify costs associated with greenhouse gas emissions. *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F.Supp.3d 1074, 1095 (D. Mont. 2017). The SCC Protocol "attempts to value in dollars the long-term harm done by each ton of carbon emitted." *Sierra Club v. Fed. Energy Reg. Comm'n*, 867 F.3d 1357, 1375 (D.C. Cir. 2017). Courts do not mandate the use of the SCC Protocol. *Utah Physicians for Healthy Envir. v. U.S. Bureau of Land Mgmt.*, 528 F.Supp.3d 1222, 1231 (D. Utah 2021); *WildEarth Guardians v. Zinke*, 2019 WL 2404860, *12 n. 7 (D. Mont. Feb. 11, 2019), report and recommendation adopted by *WildEarth Guardians*, 2021 WL 363955 at *8-10. Nevertheless, when an agency quantifies the economic benefits of a proposed action, courts do consider whether the agency provided reasoned explanations for declining to use the SCC Protocol. *High Country*, 52 F.Supp.3d at 1191-92 ("The agencies, of course, might have been able to offer non-arbitrary reasons why the [SCC] protocol should not have been included in the FEIS. They did not."); *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41, 78-79 (D. D.C. 2019); *Utah Physicians*, 528 F.Supp.3d at 1231.

The Court agrees with Plaintiffs that OSM's analysis of greenhouse gas emissions was arbitrary and its record justifications for not using the SCC Protocol lack merit.[5] Defendants assert NEPA does not require a cost-benefit analysis, and OSM did not undertake one here.[6] Defendants contend OSM's discussion of socioeconomic conditions in the EIS was not a partial cost-benefit analysis, because there is a difference between discussing economic impacts and discussing economic benefits. But "[t]his is distinction without difference where, as here, the economic benefits of the action were quantified while the costs were not." *MEIC*, 274 F.Supp.3d at 1096, n.9. Further, the EIS expressly identified the increased economic activity as a "benefit" in its statement of "Purpose, Need, and Benefits." (A.R. 116-030400.)

[5] The Court will only discuss the reasons OSM provided in the EIS for not using the SCC Protocol because Defendants' "post-hac rationalizations . . . are irrelevant to the question of whether the agencies complied with NEPA at the time they made their respective decisions." *High Country*, 52 F.Supp.3d at 1192.

[6] It appears OSM has abandoned the three other justifications it set forth in the EIS for not using the SCC Protocol, as Federal Defendants do not counter Plaintiffs' arguments in this respect. To the extent they remain at issue, however, the Court finds they lack merit. First, it is irrelevant the SCC Protocol was "originally developed" for rulemakings. *High Country*, 52 F.Supp.3d at 1190, 1192. Next, the prior Administration's decision to withdraw the SCC Protocol is not a valid basis to reject its scientific methodology. *WildEarth Guardians*, 2021 WL 363955 at *9. Finally, OSM's argument that in order for the SCC Protocol to provide any meaningful insight, the broader benefits of coal production would have to be considered, has previously been rejected by this Court. *WildEarth Guardians*, 2019 WL 2404860 at *12.

In its analysis here, OSM clearly quantified the socioeconomic benefits of the proposed mine expansion. The EIS identified several "benefits" of the mine expansion, including "continued employment," "ongoing tax base . . . to federal, state, and local governments," "ongoing royalty payments," and "continued support to local businesses." (A.R. 116-030400.) Then, OSM went on to catalogue and quantify, in detail, various aspects of the economic benefits of the mine expansion.[7] (A.R. 116-031018-26.) Accordingly, the Court finds OSM 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.

Intervenor Defendants urge the Court to find OSM adequately justified its decision not to use the SCC Protocol because of the variability in the Protocol's calculations. But the fact the SCC 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. *See High Country*, 52 F.Supp.3d at 1192 (noting that although there is a wide range of estimates about the social cost of greenhouse gas

[7] This case is distinguishable from *WildEarth Guardians*, 368 F.Supp.3d at 78-79, where the BLM's discussion of socioeconomic benefits was "abbreviated and involved little quantification." For example, the EA at issue in that case noted "the State of Wyoming receives a percentage of the Federal oil and gas lease sale receipts" but did not calculate "the dollar value of that percentage." *Id.* at 78. Whereas, here, the EIS contained several detailed tables setting forth specific dollar amounts associated with projected revenues from the mine expansion. (A.R. 116-031022-26.)

emissions, it was arbitrary for the agencies to decide not to quantify the costs at all because the "agencies effectively zeroed out the cost"); *Ctr. for Bio. Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008) (rejecting uncertainty argument as arbitrary and capricious because "while the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero"). *But see 350 Mont. v. Bernhardt*, 443 F.Supp.3d 1185, 1196 (D. Mont. 2020), *appeal docketed*, No. 20-35411 (9th Cir. May 13, 2020).

Nevertheless, even 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. *See Utah Physicians*, 528 F.Supp.3d at 1231-32 (finding that even though the BLM cited adequate reasons for not using the SCC Protocol, the BLM's "treatment of GHGs and their costs is still problematic" because the EIS failed to "paint a clear picture for decisionmakers and the public of the impacts of the GHGs that will result from the project.").

Accordingly, the Court finds OSM failed to take a "hard look" at the costs of greenhouse gas emissions.

/ / /

/ / /

D. Water Withdrawals from the Yellowstone River - NEPA

Plaintiffs argue OSM violated NEPA by refusing to consider the impacts of water withdrawals from the Yellowstone River that are required for coal combustion. Defendants counter that water withdraws from the Yellowstone River were properly excluded from the indirect effects analysis because the Colstrip Power Plant's use of river water is beyond the scope of Area F impacts.

Under NEPA, agencies must consider indirect effects of the proposed action, which are effects that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). "Indirect effects may include . . . related effects on air and water and other natural systems, including ecosystems." *Id.* NEPA does not require agencies to examine everything for which a proposed action could conceivably be a but-for cause. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). But NEPA does require agencies to consider indirect effects that are reasonably foreseeable. *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998); *Public Citizen*, 541 U.S. at 767 ("NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause," which is analogous "to the 'familiar doctrine of proximate cause from tort law.'").

Impacts from coal combustion and coal transportation, for example, are reasonably foreseeable indirect effects of coal mining that must be considered. *See*

e.g., WildEarth Guardians, 2021 WL 363955 at *5-10; *MEIC*, 274 F.Supp.3d at 1091-99. Plaintiffs contend that the withdrawals from the Yellowstone River are likewise reasonably foreseeable effects that OSM should have considered. Defendants counter that case law only requires analysis of downstream emissions of coal combustion, not other impacts related to power plant operations. But the test for determining whether an impact must be considered is reasonable foreseeability. Thus, while courts have found combustion emissions are a reasonably foreseeable indirect effect of mining, combustion is not the only foreseeable effect. *See e.g.*, *WildEarth Guardians*, 2021 WL 363955 at *5-6 (finding effects of coal trains were reasonably foreseeable); *MEIC*, 274 F.Supp.3d at 1091-93 (same); *350 Mont.*, 443 F.Supp.3d at 1195 (finding risk of train derailments was reasonably foreseeable).

In this case, the operations of the Mine and the Power Plant are intricately connected. The Mine is the sole source of coal for the Power Plant. Substantially all the coal from the Mine is transported by a conveyor system directly to the Plant. Therefore, if coal is mined from Area F, it will be combusted at the Colstrip Power Plant.[8] (A.R. 116-030393-95; 93-18501; 202-37564.) The Power Plant burns the coal to boil water to produce electricity, and that water – between 22,000 and

[8] A small amount of "waste coal" is trucked to the Rosebud Power Plant (A.R. 116-030393), but otherwise the coal from the Mine is consumed at the Colstrip Power Plant. (A.R. 116-030934).

50,000 acre-feet – is withdrawn annually from the Yellowstone River. (A.R. 112-140394; Docs. 73-5 at ¶ 18; 102 at ¶ 102.) Thus, the mining and combustion of Area F coal will necessarily require withdrawals from the Yellowstone River. The Court finds this is not only a reasonably foreseeable result of mining Area F coal, the withdrawals will occur with certainty.

Indeed, OSM staff recognized the water withdrawals were reasonably foreseeable. (A.R. 1019-013750; 1025-013867-68; 1026-013884.) During the preparation of the EIS, agency personnel raised the issue of whether impacts to the Yellowstone River should be discussed. (A.R. 1025-013867-68; 1026-013883-84.) OSM acknowledged that it could only omit impacts to the Yellowstone River "as long as a good rationale can be provided." (A.R. 1025-013868; *See also* A.R. 1026-13884 ("If we make justification that analysis area doesn't extend to Yellowstone, then we don't have to talk about it.") But ultimately, OSM offered no reasoned analysis whatsoever in support of its decision to exclude the Yellowstone River withdrawals from its indirect effects analysis. Instead, OSM merely stated the Yellowstone River had been excluded, without any rationale. (*See* A.R. 117-031539 ("The Yellowstone River is not included in the direct, indirect, or cumulative effects analysis area . . . and water quantity impacts to the Yellowstone River as a result of power plant cooling operations were not analyzed in the EIS.")). This was insufficient.

An agency may not unilaterally decide to exclude foreseeable effects of a proposed action without providing any justification. *See Ksanka Kupaqa Xa'lcin v. U.S. Fish & Wildlife Serv.*, 534 F.Supp.3d 1261, 1272-73 (D. Mont. 2021) (holding agency was "required to consider the effects" of the entire proposed action "or provide a reasonable explanation why it did not [do] so"); *Ctr. for Biological Diversity v. Bernhardt*, 982 F. 3d 723, 740 (9th Cir. 2020) (finding that because greenhouse gas emissions were foreseeable, "the EIS 'should have either given a quantitative estimate of the downstream greenhouse gas emissions' that will result from consuming oil abroad, or 'explained more specifically why it could not have done so.'"). Federal Defendants argue OSM's decision not to address the withdrawals from the Yellowstone River is owed deference. But the Court "cannot defer to a void." *Ore. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010).

Intervenor Defendants raise additional arguments for why they believe OSM was not required to consider the water withdrawals from the Yellowstone River. The Court, however, is prohibited from relying upon post-hoc rationalizations of counsel to uphold the agency's decision. *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008). "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

Moreover, the premises of the arguments are either incorrect or cannot be supported based on the record. Intervenor Defendants assert, for example, that OSM lacks authority over the Power Plant's water withdrawals, citing *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004). In *Public Citizen*, the Supreme Court held an agency does not have an obligation to consider environmental effects if it has no authority to act on that information. *Public Citizen*, 541 U.S. at 770. In that case, because the Federal Motor Carrier Safety Administration had no authority to categorically exclude Mexican motor carriers from operating in the United States, it was not required to consider the environmental effects of their cross-border operations. Those environmental impacts had "no effect on [the agency's] decision making – [the agency] simply lack[ed] the power to act on whatever information might be contained in the EIS." *Id*. at 768.

That is not the case here. OSM has authority to recommend approval, disapproval or conditional approval of mining plans based on "[i]nformation prepared in compliance with [NEPA]." 30 C.F.R. §§ 746.13(b). *See also* 736.14; 30 U.S.C. § 207(c). It thus has the authority to consider the direct and indirect environmental effects of mining the coal in Area F in its NEPA analysis, and can act on that information in recommending approval or disapproval of the proposed action. OSM's decision will determine the availability of coal to be combusted at the Colstrip Power Plant and, in turn, the water withdrawals from the Yellowstone

River necessary for that process. Therefore, because OSM has the authority to act on information it compiles under its NEPA analysis, *Public Citizen* does not excuse it from considering the reasonably foreseeable indirect effects of the mining plans it approves. See e.g., *Ctr. for Biological Diversity*, 538 F.3d at 1213-14 (if an agency has statutory authority to act, the rule from *Public Citizen* does not apply); *WildEarth Guardians*, 2021 WL 363955 at *6 (holding OSM was not constrained from considering effects of coal transportation); *Dine Citizens Against Ruining Our Envir. v. U.S. Office of Surface Mining Reclamation and Enf't*, 82 F.Supp.3d 1201, 1217 (D. Colo. 2015) (rejecting argument that OSM was excused from considering combustion-related impacts of a proposed mine expansion on the basis that OSM could not impose conditions on the operations of the nearby power plant).

Next, Intervenor Defendants assert mining Area F will not change or increase the rate of water withdrawals at the Power Plant. But activities that extend the duration of harmful indirect effects must be considered, even if they do not change the rate of the activity. *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 725 (9th Cir. 2009) (finding that where proposed mine expansion would create ten additional years of transportation of toxic ore to an off-site facility, the agency was required to consider the air quality impacts of the transportation, even though no increase in the rate of ore

shipments was proposed); *Dine Citizens*, 82 F.Supp.3d at 1214-15 (finding that even though proposed mine expansion would not change the rate of coal combustion at the nearby power plant, OSM was not excused from considering effects of the combustion because the mine expansion would result in an additional 12.7 million tons of coal being combusted). Thus, even if the *rate* of water withdrawals at the Power Plant would not change, the Area F expansion will result in the combustion (using Yellowstone River water) of an additional 70.8 million tons of coal for an additional eight years. As such, the "status quo" argument advanced by Intervenor Defendants would not excuse OSM from considering the water withdrawals.

Intervenor Defendants also claim that the water withdrawals will continue with or without Area F coal because the Power Plant will operate with coal from other sources. But the record is unclear on this point. Currently, the Power Plant is restricted to burning coal from the permit areas of the Rosebud Mine. (A.R. 116-030461.) Without the Area F expansion, existing permit areas will be depleted in 3 to 5 years. (Doc. 73-2 at ¶ 7.) Thus, it is conceivable that without the Area F expansion, Power Plant operations would cease, including the withdrawals from the Yellowstone River.

For the Power Plant to use coal from another source, it would have to achieve modification of its Major Facility Siting Act certificates, air quality

permits, and other applicable permits. (A.R. 116-030461.) Although the EIS "assumes that the power plants would be able to achieve any modifications necessary" (*Id.*), there is no indication how likely or plausible that scenario may be. Evidence in the record is not clear on this point. For example, NorthWestern Corporation, a joint owner of the Power Plant, stated "[i]t would be cost prohibitive for the Colstrip Co-Owners to buy and ship coal from a mine other than the Colstrip Complex." (A.R. 1204-145337.) A Mine employee also opined in an email that if the Mine were to shut down, he was "unsure of what the plant would do for coal." (A.R. 93-018501.) Further, Intervenor Defendants have made inconsistent statements themselves about whether barring Area F mining could lead to closure of the Power Plant. *Compare* Doc. 150-1 at 43 ("[A]n order from this Court barring access to Area F has a high likelihood of closing the Mine . . . potentially leading to closure of the Colstrip Power Plant") *with* Doc. 161 at 27 ("[E]ven if Plaintiffs were able to convince this Court to shut down the Mine, the power plant . . . can obtain coal from other sources."). Thus, the Court does not find Intervenor Defendants' post-hoc arguments persuasive based on the record before the Court.

In sum, it appears water withdrawals from the Yellowstone River are a reasonably foreseeable indirect effect of mining Area F coal. OSM, therefore, was

required to address the water withdrawals in the EIS or explain why it did not do so. Its failure to do either was arbitrary and capricious.

E. Water Withdrawals from the Yellowstone River - ESA

Plaintiffs further contend OSM violated the ESA by failing to consider impacts of water withdrawals from the Yellowstone River on the endangered pallid sturgeon. Because the Court has found OSM's failure to consider water withdrawals violated NEPA and warrants setting aside the EIS on that issue, the Court need not reach the merits of Plaintiffs' additional pallid sturgeon challenge.

F. Consideration of Alternatives

Finally, Plaintiffs argue OSM failed to consider a reasonable range of alternatives. Plaintiffs raise two arguments: first, that OSM violated NEPA by only considering virtually identical action alternatives; and second, that OSM failed to consider an undefined "mid-range" alternative that would have provided for less coal development. Defendants counter that OSM evaluated a reasonable range of alternatives, and that a mid-range option would not have satisfied the purpose and need of the project.

NEPA requires agencies to consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). "The scope of the alternatives analysis depends on the underlying 'purpose and need' specified by the agency for the proposed action." *League of Wilderness Def.-Blue Mountains Biodiversity Project v. U.S. Forest*

Serv., 689 F.3d 1060, 1069 (9th Cir. 2012). The EIS "need only evaluate alternatives that are 'reasonably related to the purposes of the project.'" *Id.* citing *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004). "The 'rule of reason' guides both the choice of alternatives as well as the extent to which the Environmental Impact Statement must discuss each alternative." *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Under the rule of reason, the EIS "need not consider an infinite range of alternatives, only reasonable or feasible ones." *Id.* "Alternatives that do not advance the purpose of the [project] will not be considered reasonable or appropriate." *Native Ecos. Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1247 (9th Cir. 2005). "But if an alternative is eliminated from detailed study, the agency must 'briefly discuss [its] reasons' for doing do." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1046-47 (9th Cir. 2013); *N. Alaska Envt'l Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006).

The EIS examined three alternatives in detail – a no action alternative (Alternative 1), and two action alternatives (Alternative 2 and Alternative 3). (A.R. 116-030454-542.) The EIS acknowledged that the two action alternatives were similar. (A.R. 116-030528.) The EIS stated that the level of mining would be the same under Alternative 2 and 3. (*Id.*) Likewise, the amount of surface disturbance would be similar, although under Alternative 3 the location of the

disturbance may be different. (*Id.*) Alternative 3, however, added several additional environmental mitigation measures. (A.R. 116-030527-31.)

The Court does not find OSM's range of alternatives deficient simply because Alternatives 2 and 3 are similar. Under NEPA, "there is no minimum number of alternatives that must be discussed." *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994); *Native Ecos. Council*, 428 F.3d at 1245-46 ("To the extent that [plaintiff] is complaining that having only two final alternatives – no action and a preferred alternative – violates the regulatory scheme, a plain reading of the regulations dooms that argument . . . the regulation does not impose a numerical floor on alternatives to be considered."). Moreover, similarities between alternatives alone, does not violate NEPA. *Laguna*, 42 F.3d at 524 (upholding EIS that that discussed in detail two similar action alternatives and a no-action alternative).

Here, the additional mitigation measures proposed in Alternative 3 sufficiently distinguished it from Alternative 2. Alternative 3 included additional environmental protective measures, such as a water management plan, additional wetlands mitigation requirements, modified reclamation and revegetation efforts, a geological survey, and paleontology mitigations. (A.R. 116-030528-531.) Further, the EIS presented the alternatives in comparative form, illustrating their differences and providing a clear basis for weighing the relative effects of each. (A.R. 116-

030535-542.) Thus, although Alternatives 2 and 3 share certain impacts, they are not identical. Accordingly, OSM did not violate NEPA based on the similar nature of Alternatives 2 and 3.

Likewise, the Court finds OSM's decision to eliminate a mid-range alternative from detailed analysis did not violate NEPA. The EIS considered seven other potential alternatives including, limiting mining to private coal only, and mining within a smaller disturbance area, for a shorter duration and/or within a different timeframe. (A.R. 116-030531-34.) OSM ultimately eliminated each from further study as not feasible or for failing to meet the purpose and need of the project. (*Id.*)

"The range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project." *Laguna Greenbelt*, 42 F.3d at 524. The stated purpose of the proposed action here was to "allow continued operations at the Rosebud Mine by permitting and developing a new surface-mine permit area." (A.R. 116-030434.) The 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 reserves located in the project area." (A.R. 116-030434.) OSM briefly discussed its reasons for finding the potential mid-range alternatives were not reasonable or feasible. (A.R. 116-030531-34.) For example, OSM

concluded the mid-range alternatives would not be operationally feasible, would have substantially similar effects to the action alternatives, and would run afoul of the BLM regulations and Montana state laws that require full recovery of coal. (A.R. 116-030532-533.) "This is all NEPA requires." *Laguna*, 42 F.3d at 524. *See also Native Ecos. Council*, 428 F.3d at 1246 ("So long as 'all reasonable alternatives' have been considered and an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement is satisfied.").

Accordingly, the Court finds OSM's alternatives analysis satisfied NEPA.

G. Remedy

Having found Federal Defendants in violation of NEPA, the Court must determine the appropriate remedy. Plaintiffs argue the presumptive remedy of vacatur is appropriate. Defendants counter that the equities support a remand without vacatur.

"Although not without exception, vacatur of an unlawful agency action normally accompanies a remand." *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018). But the Court "is not required to set aside every unlawful agency action." *Nat'l Wildlife Fed. v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995). The Court may remand without vacatur "when equity demands." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). To determine whether an invalid agency decision should be vacated or left

in place, courts consider "how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'" *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012).

Here, the Court finds the equities weigh in favor of remanding without immediate vacatur. On the one hand, Plaintiffs point to serious and significant environmental concerns associated with mining and combusting Area F coal. But vacatur would not have an immediate effect on harms such as greenhouse gas emissions or water withdrawals because those harms will continue at least until other areas of the Mine are depleted. On the other hand, immediate vacatur would have detrimental consequences for the Mine, its employees and the Colstrip community. Further, through additional analyses and decision-making on remand, OSM may be able to cure the deficiencies in the EIS.

Accordingly, based on the circumstances of this case, the Court recommends that vacatur be deferred for a period of 365 days from the date of a final order on the pending motions for summary judgment. During this time period, Federal Defendants should be directed to correct the NEPA violations outlined above.

III. CONCLUSION

Based on the foregoing, **IT IS RECOMMENDED** that:

1. Plaintiffs' Motion for Summary Judgment (Doc. 136) be **GRANTED in part** as set forth above;

2. Intervenor Defendants' Cross Motion for Summary Judgment (Doc. 150) be **GRANTED in part** as to the dismissal of Plaintiffs Indian People's Action and 350 Montana, and **DENIED** in all other respects; and

3. Federal Defendants' Cross Motion for Summary Judgment (Doc. 148) be **DENIED**.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of the Findings and Recommendations of United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after service hereof, or objection is waived.

IT IS ORDERED.

DATED this 11th day of February, 2022.

TIMOTHY J. CAVAN
United States Magistrate Judge

Exhibit 2

Second Declaration of Russell Batie (Dec. 6, 2021)

John C. Martin
Samuel R. Yemington
Holland & Hart LLP
645 S. Cache Street, Suite 100
P.O. Box 68
Jackson, Wyoming 83001-0068

Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, Montana 59103-0639

Attorneys for Westmoreland Rosebud Mining LLC

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents.	Cause No. DV 19-34 **SECOND DECLARATION OF RUSSELL BATIE**

I, Russell Batie, declare under penalty of perjury as follows:

1. I am the Environmental and Engineering Manager at the Rosebud Mine ("Mine"), which is owned and operated by Westmoreland Rosebud Mining, LLC ("Westmoreland"), formerly Western Energy Company. I have been employed at the Mine in various capacities for 16 years, and I have served in my current role for five years.

2. I am familiar with this Court's October 27, 2021 Order in this matter and with Petitioners' Combined Response brief and accompanying exhibits filed November 22, 2021.

3. I have personal knowledge of Westmoreland's operations at the Mine, including its operations in the area covered by the AM4 Permit (the "AM4 Area"). I also have personal knowledge of the anticipated impacts to the Mine if operations in the AM4 Area were to cease.

4. I have reviewed the Declaration of David Alan Schlissel submitted with Petitioners' Combined Response brief.

5. I understand that Mr. Schlissel asserts that if vacatur of the AM4 permit is delayed until April 2022, it is unlikely that the cessation of mining operations in the AM4 Area will threaten the energy supply or cost of energy in Montana or the Pacific Northwest. I understand that Mr. Schlissel bases this belief in part on his interpretation of my previous declaration and that of the previous manager of the Rosebud Mine, Jack Standa.

6. I disagree with Mr. Schlissel's prediction because his oversimplified calculations do not reflect the complex realities of coal mining at the Rosebud Mine. Rosebud Mine production is a function of a complicated interplay of state and federal government approvals, geology, infrastructure, and labor.

7. First, the Mine must have legal authority to mine coal. At present, the Mine has five permitted areas, four of which are currently in production. It uses coal from all of these

areas to blend together to produce coal that meets the quality requirements in its contract with the Colstrip Power Station. Thus, contrary to Mr. Schlissel's assumption, the Mine's total volume of coal reserves is insufficient to determine whether the Mine will be able to meet contractual commitments. The Mine must have coal available in sufficient quantities to blend to meet the contractual requirements.

8. AM4 produces approximately 180,000 tons of coal each month as an annual average to fulfill the Mine's contractual obligations with the Colstrip Power Station. However, in the first quarter of 2022 we expect to mine approximately 200,000 tons of coal each month from AM4. As stated in my previous declaration, this represents approximately 30% of the Mine's production each month.

9. Currently, the Mine's permitted reserves are as follows (with the caveat that these numbers change daily with mine production):

9.1. The Mine has one permitted pass remaining within Area A. To mine this pass, equipment will need to be moved, which may take 2–4 months, as noted in my prior declaration. We estimate this pass includes approximately 800 thousand tons of coal. At the Colstrip Power Station's current rate of consumption, this represents 1–2 months of production. Because this coal is of higher quality and will be blended with lower quality coal, I estimate mining the coal from the final pass of Area A would take 3–4 months and thus would not be able to replace AM4's production long-term.

9.2. The Mine has approximately 9 million tons of permitted coal in Area B, exclusive of the AM4 Area. Approximately 7 million tons of this coal is on the far west end of Area B, in what is called Area B Extension. The Mine is actively

mining this coal, so it cannot serve to replace lost production from AM4. Area B Extension coal also requires blending with higher quality coal to achieve contractual quality requirements. The remainder of non-AM4 coal lies in Area B East and is currently a non-active area requiring preparation before production can be restarted. Since the pit has been inactive for some time, I estimate it would take at least 6–8 months to prepare that area for mining to attempt to replace some of the AM4 production. Once preparation is completed (and assuming no safety or other issues are identified) there are approximately 2 million tons of mineable coal available in Area B East.

9.3. The Mine has approximately 2.5 million tons of permitted coal remaining in Area C. The Mine is actively mining Area C as part of its current production, so Area C cannot serve as a replacement for AM4. When that coal is mined, Area C will be fully mined out, with only reclamation work remaining. The coal remaining in Area C represents less than half a year's worth at the current rate of production.

9.4. The Mine's permitted reserves in Area F are being challenged by the Petitioners in federal court and before the Board of Environmental Review. In each case, Petitioners are seeking vacatur of the permit. If Petitioners obtain their requested relief in either action, the permitted reserves in Area F will not be available to replace AM4 coal. Further, the Mine is currently mining one pit in Area F, which is considered "direct ship" quality. The pit is very short and does not have the capacity to satisfy the Colstrip Power Station's demand. This coal does meet contract specifications and does not require blending, but it not of high

enough quality that it can be blended with lower quality coal, particularly coal with higher sodium levels. As we progress in this part of Area F, we expect the sodium to increase, so that we will have to blend with lower sodium coal. This part of Area F has 9 million tons of coal remaining. To access higher quality coal in another part of Area F would require an investment of approximately $6–7 million, and I expect that it would take approximately 8–10 months of preparatory work to build necessary infrastructure before coal production could begin.

10. In sum, of the Mine's permitted reserves, the only available long-term replacement for the approximately 180,000–200,000 tons of coal mined from AM4 each month are in the portion of Area B that has significant engineering challenges and could be available (if at all) no earlier than 6–8 months, and in undeveloped parts of Area F that would also require substantial preparatory work and would not produce coal for electrical generation for at least 8–10 months. I previously offered the 2–4 month timeframe in reference to Area A, specifically to address the expected winter demand spike by identifying the earliest that any short-term replacement could be available if the Court vacated the permit in the near-term because Petitioners had not, at that time, proposed deferred vacatur until April. That estimate was not intended to imply that it would require only 2–4 months for the Mine to be in a position to *fully* replace the coal from AM4 over the long-term.

11. Second, the Mine's production is dependent on geology. As noted above, the Mine blends coal from multiple sources to achieve contractual specifications. AM4 is important to the Mine's production because it is high quality coal that can be blended with other coal. Vacating the AM4 permit would do more than reduce the permitted reserves available, it would significantly reduce the volume of higher quality coal that the Mine has available for blending.

12. Third, the Mine's production requires substantial engineering. AM4 is a well-developed portion of the mine, with well-established pits. If the Mine is forced to replace the AM4 coal with coal from other permitted areas earlier than planned, it will necessarily be required to mine in pits with more difficult engineering strategies and to develop currently undeveloped parts of the Mine. Because of the engineering and construction requirements, Areas B and F cannot be available in the near term. Once they become available, they cannot serve as a single-source long-term replacement for AM4 because of coal quality and operational constraints.

13. Fourth, the Mine is limited by its manpower availability. Coal mining requires skilled labor, and there is a limited pool of individuals with the appropriate skills. The Mine has been actively attempting to hire for the past several months. The Covid-19 pandemic has also negatively impacted attendance.

14. I understand the Mr. Schlissel has suggested that the Mine and the Colstrip Power Station "increase their inventories" of coal prior to the vacatur of the AM4 permit. If such action were feasible, the only source within the Mine capable of producing the proposed stockpiling would be the AM4 Area. However, it is not feasible for two reasons. First, the Mine does not have the necessary labor force to increase production beyond the Colstrip Power Station's current demands, nor do I expect the Mine would be able to hire staff on short notice for such a surge in production. Second, neither the Mine nor the Colstrip Power Station has sufficient area permitted to accommodate a stockpile as suggested by Mr. Schlissel.

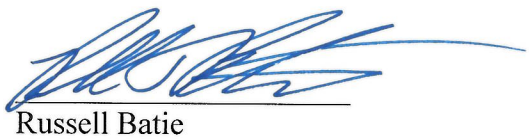
15. I understand that Petitioners assert that deferring vacatur until April would provide sufficient time to wind down operations in AM4 in an orderly fashion. The lead time

must be sufficient so that all placed explosives are detonated, all exposed coal is removed, and at least interim action is taken to stabilize the pit prior to reclamation.

16. Further, Petitioners do not address the concern raised by Martin Van Oort regarding permitting for reclamation. Westmoreland has won awards for the quality of its reclamation, which is designed to be integrated with the mining process to the extent possible. All of the reclamation plans for the AM4 Area are in the AM4 Permit, and the Department has taken the position in Mr. Van Oort's declaration that reclamation cannot proceed if the AM4 Permit is vacated. Westmoreland would work promptly and cooperatively with the Department to obtain a new permit approval for reclamation of the AM4 Area, but it would necessarily take time, during which the exposed pit would delay reclamation activity.

17. Finally, I do not believe replacing the AM4 coal from a source other than the Rosebud Mine is a viable solution given the current infrastructure. Coal from the Mine is carried on a conveyor belt to the Colstrip Power Station. Because there is no current way to offload trains at the Mine or the Colstrip Power Station, the replacement coal must be shipped by truck. If a semi-truck carries approximately 40 tons, even assuming coal could be purchased from another source and trucked to Colstrip, moving 180,000 tons of coal per month would require 4,500 vehicle trips per month, or 150 trucks per day.

Executed this 6th day of December, 2021.



Russell Batie

Exhibit 3

Declaration of David Schlissel (Nov. 18, 2021)

Exhibit J

Shiloh S. Hernandez
Earthjustice
Northern Rockies Office
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743
(406) 426.9649
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
107 W. Lawrence St., #N-6
Helena, MT 59624
(406) 443-2520
djohnson@meic.org

Walton D. Morris, Jr. *pro hac vice*
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, Virginia 22901
(434) 293 6616
wmorris@fastmail.net

Roger Sullivan
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com

Attorneys for Petitioners

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, et al., Respondents.	Case No. DV 19-34 **DECLARATION OF DAVID ALAN SCHLISSEL**

Exhibit 2

I, David Alan Schlissel, in accordance with the requirements of Montana Code Annotated § 1-6-105, hereby declare:

1. I am over 18 years of age. I reside in Seattle, Washington.

2. I submit this declaration based on my person knowledge, education, and experience.

3. I graduated from the Massachusetts Institute of Technology in 1968 with a Bachelor of Science Degree in Engineering. In 1969, I received a Master of Science Degree in Engineering from Stanford University. In 1973, I received a Law Degree from Stanford Law School. In addition, I studied nuclear engineering at the Massachusetts Institute of Technology during the years 1983-1986.

4. Since 1983 I have been retained by governmental bodies, publicly owned utilities, and private organizations in 38 states to prepare expert testimony and analyses on engineering, economic, and financial issues related to electric utilities. My clients have included state utility commissions, attorneys general, consumer advocates, publicly owned utilities, the U.S. Department of Justice, and local, national and international environmental and consumer organizations.

5. I have become familiar with operations of the Colstrip Power Plant (Colstrip) during the past decade through my testimony in two proceedings before the Montana Public Service Commission (Dockets Nos. 2013.5.33 and D2014.5.46 and Docket No. 2018.2.12). I also have prepared several reports on the operations

Exhibit 2

and economics of the Colstrip units. I have become familiar with the operations of the Western electricity grid and markets through these and other work projects.

6. Rustie Batie of Westmoreland Rosebud Mining LLC (WRM) and Shannon Brown of Talen Energy Supply LLC suggest that stopping mining in the AM4 Area of the Rosebud Mine threatens the coal supply to the adjacent Colstrip Power Plant, which receives coal exclusively from the Rosebud Mine. They then state that this, in turn, potentially threatens the public's access to power in the winter months.

7. In my professional opinion, if this Court defers the cessation of mining operations in the AM4 Area until the spring (April 2022), then it is extremely unlikely that temporary cessation of mining operations in the AM4 Area will threaten the energy supply or cost of energy in Montana or the Pacific Northwest. This is because state and regional energy demand is lower and energy supply is greater in the spring. As such, Colstrip Unit 3 and Unit 4 have each been shut down for two-and-one-half month outages in the spring and fall "shoulder seasons" in 2020 and 2021.

8. The mine and power plant have reserve coal stockpiles to operate both units of the plant for approximately two months. Mr. Batie notes that WRM "has sufficient inventory to make up for" cessation of operations in the AM4 Area "for approximately one month." Batie Decl. ¶ 6. Mr. Brown states that the power plant

Exhibit 2

stores enough coal on site to operate Units 3 and 4 for "25-30 days." Brown Decl. ¶ 12. Thus, there is enough stockpiled coal at the mine and power plant to operate both units for approximately two months or one unit for approximately four months if coal supply from the Rosebud Mine is "completely halted."

9. It is also virtually certain that coal supply from the Rosebud Mine will not be "completely halted" regardless of what happens with the AM4 Area. WRM's former General Manager, Jack Standa, testified in September 2020 that the mine has 95 million tons of permitted reserves in four active mine areas, Areas A, B, C, and F. Declaration of Jack Standa, *MEIC v. Bernhardt*, No. 19-CV-130 SPE TJC, ¶¶ 3-4 (D. Mont. Sept. 18, 2020). Martin Van Oort from DEQ explains that only 7.5 to 9.2 million tons of these reserves are in the AM4 Area. Van Oort Decl. ¶ 16. Consequently, WRM has substantial reserves in other permit areas where it can obtain coal if mining in the AM4 Area stops temporarily.

10. WRM explains that it would likely take "two to four months" for the company to move its operations from the AM4 Area to another mine area. Batie Decl. ¶ 6. If any stoppage of mining in AM4 is deferred until April 2022, it is highly likely that coal stockpiles at the mine and power plant will be sufficient to keep both or at least one power plant operating during the entire time, which would prevent any harm to state or regional power supplies.

Exhibit 2

11. In spring in Montana and the Pacific Northwest the electricity load (demand for power) is lower and therefore there is less need for power from Colstrip. This can be seen in Chart 1, below, which shows the total monthly energy output of the five non-Talen owners of Colstrip—NorthWestern Energy Corporation, Puget Sound Energy, Portland General Electric, Avista Corporation, and PacifiCorp.—during each month of 2020. It is clear from this Chart, that the combined energy output of these owners (shown in red) are lower during the main spring months of April, May and June. Public information about Talen's monthly outputs are not available.

Chart 1: Combined monthly energy outputs of the Five Non-Talen owners of Colstrip during 2020.

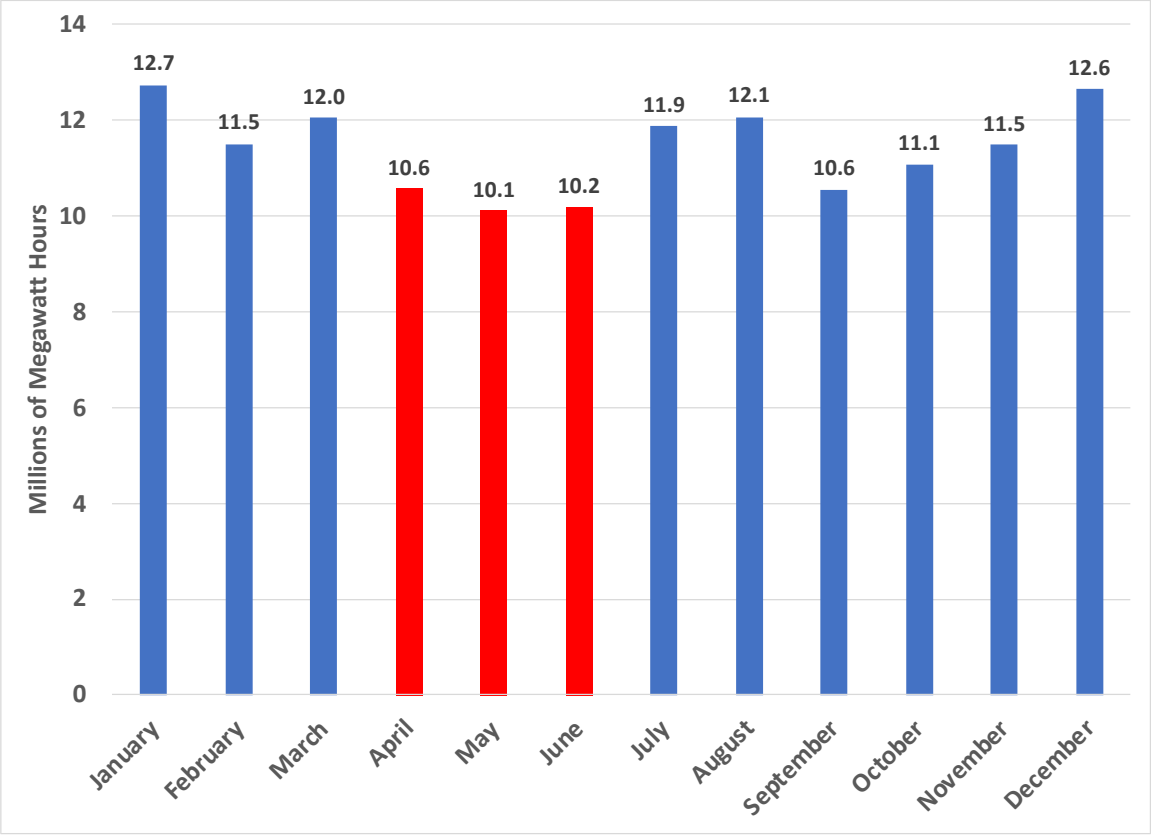
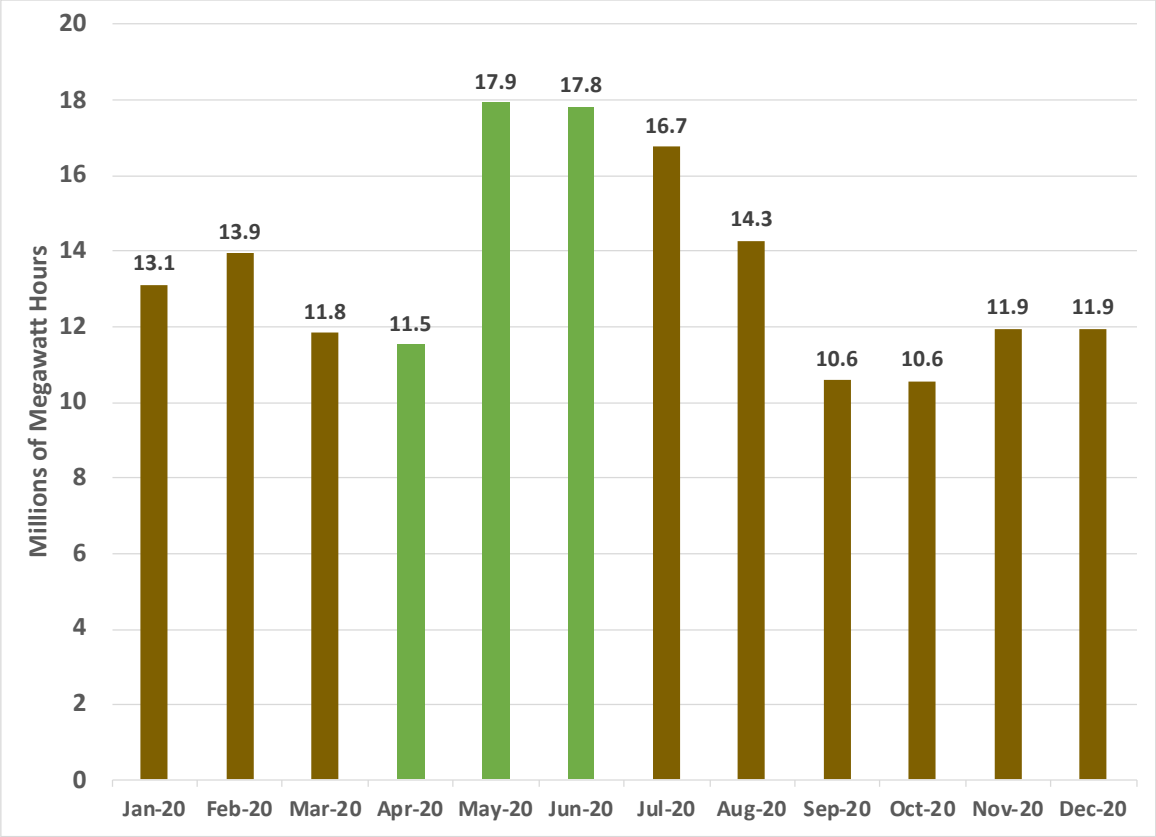


Exhibit 2

12. Also, in spring the power generation from hydroelectric facilities (dams) in the western U.S., including dams in Oregon, Washington, and Montana, increases. This can be seen in Chart 2, below where the green bars shown the hydro generation in the months of April, May and June.

Chart 2: Monthly generation from conventional hydro facilities in the West in 2020



13. The availability of generation from solar photovoltaic (PV) facilities in the West also increases in the spring months because of the growing number of daylight hours.

Exhibit 2

14. The majority of the owners of Colstrip—Puget Sound Energy, Portland General Electric Company, PacifiCorp, and Northwestern Energy—have access to low cost solar PV generation, mainly from California, because they are members of the Western Energy Imbalance Market (EIM) (two owners, Talen and Avista, are not currently members of the EIM, but Avista is scheduled to become a participant in 2022). The EIM, which includes portions of Arizona, California, Idaho, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming, Montana, and portions of Canada. The EIM optimizes energy resources in the west by coordinating generation and delivery of energy. One major effect of this is that it allows participants to access low cost solar PV energy that would otherwise have to be curtailed.

15. In the spring temperatures are more mild and the risk of extreme weather is significantly lower than in winter months.

16. In order to reduce the risk that one or both of the Colstrip units would be unavailable during a heat wave similar to that experienced in the summer of 2021, Westmoreland and Talen should increase their inventories of coal before any shutdown of mining in the AM4 Area. This would protect against the negative effects hypothesized by WRM and Talen.

Exhibit 2

17. As it is, for Montana ratepayers, Colstrip is the most expensive resource in the portfolio of the Montana utility owner of Colstrip, Northwestern Energy.

18. The power plant owners from Oregon and Washington—Portland General Electric, PacifiCorp, Puget Sound Energy, and Avista—are planning to exit operations at Colstrip by 2025 or sooner.

19. Accordingly, assuming the worst case and highly speculative scenario, where coal supply from all four areas of the mine (including Areas A, C, and F, in addition to the AM4 Area in Area B) is completely halted and WRM takes the maximum amount of time (four months) to move its equipment from the AM4 Area to other permitted coal, the power plant would still have sufficient coal stockpiles to keep at least one unit operating for all four months. In that worst case scenario, it is still extremely unlikely that energy supplies or energy costs in the Montana or the Pacific Northwest would be negatively affected.

I declare under penalty of perjury and under the laws of the state of Montana that the foregoing is true and correct.

Dated: November 18, 2021.

David Schlissel

David Alan Schlissel

Exhibit 2

Exhibit 4

Declaration of Anne Hedges (Nov. 19, 2021)

Exhibit 1

Shiloh S. Hernandez
Earthjustice
Northern Rockies Office
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743
(406) 426.9649
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
107 W. Lawrence St., #N-6
Helena, MT 59624
(406) 443-2520
djohnson@meic.org

Walton D. Morris, Jr. *pro hac vice*
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, Virginia 22901
(434) 293 6616
wmorris@fastmail.net

Roger Sullivan
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com

Attorneys for Petitioners

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, et al., Respondents.	Case No. DV 19-34 **DECLARATION OF ANNE HEDGES**

Exhibit 1

I, Anne Hedges, in accordance with the requirements of Montana Code Annotated § 1-6-105, hereby declare:

1. I am over 18 years of age. I reside in Helena, Montana.

2. I submit this declaration based on my personal knowledge, education, and experience.

3. I am the co-director of the Montana Environmental Information Center and the director of policy and legislative affairs. I have worked for MEIC since 1993.

4. I am a member of both MEIC and the Sierra Club.

5. I have been extensively involved with Colstrip coal-fired power plant and Westmoreland's Rosebud Mine permitting, compliance, and remediation issues since 2010. I have taken a tour of the mine with DEQ and Westmoreland's predecessor Western Energy, visited the mine area on many occasions, repeatedly visited the town of Colstrip and surrounding areas, and enjoyed the view of many of the area creeks, including but not limited to, East Fork Armells Creek, West Fork Armells Creek, and Armells Creek. I have communicated with MEIC members and concerned individuals in and around the Colstrip Plant and mine who are concerned about their health and water resources due to impacts from the plant and mine. The harm caused to me by the ongoing pollution and harm to East Fork

Exhibit 1

Armells Creek cannot be repaired with monetary compensation and is therefore irreparable.

6. EFAC is impaired and the impairment is getting worse, in 2020 DEQ determined the stream was impaired for alteration in stream-side or littoral vegetative covers, aluminum, iron, specific conductivity (salinity), total dissolved solids (salinity), nitrate/nitrite, total nitrogen, total phosphorus, and habitat alterations. Coal mining is identified as an unconfirmed source of the salinity pollution.

7. OSM and DEQ recently found in their joint FEIS for the Area F expansion that the cumulative effects on surface water from mining include "changes in stream and spring flows, loss of springs, loss of ponds or reduction in water supply to ponds, and changes in the hydrologic balance" and that some of such impacts would be "long-term adverse" and "major." Area F FEIS at 685. The FEIS defined "major" impacts as "measurable effects on surface water hydrology and/or water quality that are distinguishable from the fluctuations in natural processes, and would permanently preclude existing land uses and/or beneficial uses of surface waters." FEIS at 509.

8. The FEIS also found that the incidence of lung cancer and asthma is elevated in Rosebud County, which "may be linked … to environmental pollution from coal plant emissions." FEIS at 184.

Exhibit 1

9. The Rosebud Mine repeatedly discharges pollution in violation of effluent limitations, including 67 days of violations since 2017, according to EPA's online database, Enforcement and Compliance History Online (ECHO), *available at* https://echo.epa.gov/detailed-facility-report?fid=110040987536 (select "CWA Effluent Limit Exceedances Report" hyperlink).

10. Westmoreland talks about the supposed importance of energy from the Colstrip Power Plant to Montanans. However, 70 percent of Colstrip's power is exported out of state. For in-state users, Colstrip is consistently one of the most expensive sources of electricity to Montana ratepayers. It is expensive because the only Montana utility that is a partial owner of the plant, NorthWestern Energy forced ratepayers to purchase this share of the power plant at greatly inflated rates in 2009. NorthWestern had purchased the plant approximately one year earlier for $187 million and the next year the Montana Public Service Commission allowed NorthWestern to charge customers $407 million for a 30% share of Unit 4 (222 megawatts). That cost does not include annual operation and maintenance costs or the escalating cost of fuel.

11. In short, EFAC has suffered terribly from the impacts of strip-mining. DEQ and WRM now have the opportunity to clean up this mess. If they seize this opportunity, the harm that I suffer from witnessing the impacts of strip mining on this stream will be, at least, in part remedied.

Exhibit 1

I declare under penalty of perjury and under the laws of the state of Montana that the foregoing is true and correct.

Dated: November 19, 2021, at Helena, Lewis and Clark County, Montana.

Anne Hedges

Exhibit 1

Exhibit 5

Nw. Corp. v. Dep't of Pub. Serv. Regul., No. DV 16-1236
(Mont. 13th Jud. Dist. Ct. July 29, 2018)

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

NORTHWESTERN CORPORATION, d/b/a NORTHWESTERN ENERGY, Plaintiff, v. THE MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION, MONTANA PUBLIC SERVICE COMMISSION, Defendant, and MONTANA ENVIRONMENTAL INFORMATION CENTER, SIERRA CLUB, and MONTANA CONSUMER COUNSEL, Intervenors.	Cause No.: DV16-1236 Judge Rod Souza ORDER AND MEMORANDUM ON PLAINTIFF'S PETITION FOR JUDICIAL REVIEW **AFFIRMING** THE PUBLIC SERVICE COMMISSION'S DECISION

This matter comes before the Court on the Petition for Judicial Review of NorthWestern Corporation d/b/a NorthWestern Energy (hereafter "NorthWestern.") [Dkt. 1.] NorthWestern's petition challenges the Defendant Montana Public Service Commission (hereafter "the Commission") disallowing charging consumers $8.243 million for replacement power costs from the 2013 outage of Colstrip Unit 4 (hereafter "CU #4") [Dkt. 1.] The petition also contests the Commission denying modeling costs. [Dkt. 1.] The Commission's answer opposes

NorthWestern's contentions. [Dkt. 11.] The Court granted the Unopposed Motions to Intervene of the Montana Environmental Information Center ("MEIC"), Sierra Club, and Montana Consumer Council ("MCC.") [Dkts. 16-17.] These groups also oppose NorthWestern's contentions. [Dkts. 28, 29.] The Court held oral argument on the petition on June 1, 2017. [Dkt. 36.] During the oral argument, NorthWestern announced it withdrew its challenge to the Commission denying modeling costs.

MEMORANDUM

FACTUAL BACKGROUND

NorthWestern is one of five public utilities that own CU #4, a net 740-megawatt "coal-fired generation station…in Colstrip, Montana" that started operating on December 15, 1985. [Dkt. 25 at 3.] Westinghouse Electric Corporation now Siemens Energy (hereafter "Siemens") built CU #4's generator and turbine. [Dkt. 25 at 3.] Talen Montana LLC (hereafter "Talen") operates CU #4. [Dkt. 25 at 3.] In May 2013, Talen hired Siemens to perform a planned rotor out-inspection. [Dkt. 25 at 4.] Siemens had "to remove the approximately 50-ton rotor from the generator," reassemble the generator by reinserting the rotor via a skid pan, and install air gap baffles. [Dkt. 25 at 4.] During the inspection, Siemens utilized an Electromagnetic Core Imperfection Detector test ("El CiD test"). [Dkt. 25 at 4.] This test examines "generator cores for potentially damaging shorts between laminations." [Dkt. 30 at 4.] Siemens performed El CiD tests while the rotor was removed. [Dkt. 30 at 4.] El CiD tests were not performed after rotor reinsertion/skid pan removal and air gap baffles installation. [Dkt. 30 at 4.] An El Cid test takes around four hours, and the El Cid test in question was not prohibitively expensive. [Ex. 144 at 191:4-6, 228:4-8.]

After Siemens completed generator reassembly, CU #4 "returned to service on June 27, 2013." [Dkt. 25 at 4.] On July 1, 2013, an unplanned outage of CU #4 began and lasted almost seven months. [Dkt. 25 at 4.] In the outage's aftermath, Talen hired Robert Ward ("Ward") and Ronald Halpern ("Halpern") to conduct a Root Cause Analysis ("RCA") for the outage. [Dkt. 30 at 4.] The RCA concluded "the outage [resulted from] a combination of inadequate interlaminar Alkophos insulation of the generator's core and damage to those laminations from the…rotor, skid pan, or air gap baffles [reinstallation] during reassembly." [*Id.*] NorthWestern's Petition for Judicial Review followed the Commission issuing a written order after hearing on October 5 and 6, 2015 disallowing NorthWestern from charging customers for the costs of replacement power during the CU #4 outage.

APPLICABLE LAW

"A district court reviews an administrative decision in a contested case to determine whether the agency's findings of fact are clearly erroneous and whether its interpretation of the law is correct." *Northwestern Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2016 MT 239, ¶ 25, 385 Mont. 33, 380 P.3d 787. "A finding of fact is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made." *Northwestern Corp.*, 2016 MT 239 at ¶ 26. "Substantial evidence is evidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla." *Northwestern Corp.*, 2016 MT 239 at ¶ 27. "In reviewing findings of fact, the question is not whether there is evidence to support different findings, but whether competent substantial evidence supports the findings actually made." *Id.* at ¶ 26. "[T]he court should give

deference to an agency's evaluation of evidence insofar as the agency utilized its experience, technical competence, and specialized knowledge in making that evaluation." *Id.* at ¶ 27.

OUTLINE

For ease of reading, the Court will address NorthWestern's challenges of the Commission's legal interpretations first. These challenges are:

- The Commission departed from precedent without explanation infringing *Waste Mgmt.* and *Jicarilla.*
- The Commission improperly applied the prudence standard adopted in *NorthWestern.*
- The Commission improperly placed on NorthWestern the burden of persuasion for prudence.
- The Commission improperly applied *AEP Texas.*
- The Commission incorrectly measured risk.
- The Commission improperly required corroborating evidence for testimony of NorthWestern's witnesses.

The Court will then address NorthWestern's challenges to the Commission's findings of fact

- The Commission's findings on risk were erroneous.
- The Commission's findings on outage insurance were erroneous.
- The Commission's findings on NorthWestern not pursuing litigation with Talen or Siemens were erroneous.
- Under Montana Supreme Court and federal circuit precedent, the Commission's findings were erroneous.

///

///

ANALYSIS

I. The Commission did not infringe *Waste Mgmt.* or the D.C. Circuit's jurisprudence.

NorthWestern asserts the Commission infringed *Waste Mgmt.* by not explaining why the Commission allowed replacement power costs for a 2009 CU # 4 outage, but not this outage. [Dkt. 25 at 16-17.] An agency must "either follow its own precedent or provide a reasoned analysis explaining its departure." *Waste Mgmt. Partners v. Montana Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (Mont. 1997). NorthWestern Energy previously petitioned the Commission to allow replacement power cost for a 2009 CU #4 outage. *In re NorthWestern Energy's Application for Electric Supply Deferred Cost Account Balance and Projected Electric Supply Cost*, Docket ## D2008.5.45, D2009.5.62. Following a stipulation, the Commission concluded NorthWestern prudently incurred these costs and allowed NorthWestern to charge its customers for these costs. Docket ## D2008.5.45, D2009.5.62, Final Order #6921c at 35, 2010 Mont. PUC LEXIS 33 at *58.

The Ninety-Second Conclusion of Law in Final Order # 6921c, regarding the 2009 outage, states "[t]he Commission considers the stipulation's resolution of the [CU #4] lost revenue issue reasonable. The Commission cautions, however, that its approval of the stipulation's resolution of this issue is **not precedential** as to how the Commission may decide this issue in the future if it arises." 2010 Mont. PUC LEXIS 33 at *58 (emphasis added). Therefore, Final Order # 6291c is not precedential regarding allowing NorthWestern to charge customers for replacement power for a CU #4 outage. Accordingly, the order's absence from the Commission's findings and conclusions in this case did not infringe *Waste Mgmt.* Furthermore, the decision in Final Order #6921c accepted the parties' stipulation and was not the result of findings of facts and conclusions of law after presentation of contested evidence.

Federal circuit courts have expounded on the limits of requiring an agency to grapple with its precedents. "An agency is by no means required to distinguish every precedent cited to it by an aggrieved party." *Jicarilla Apache Nation v. United States DOI*, 613 F.3d 1112, 1120 (D.C. Cir. 2010). As explained *supra*, Final Order #6 291c is not precedential. The D.C. Circuit "permit[s] agency action to stand without elaborate explanation where distinctions between the case under review and the asserted precedent are so plain that no inconsistency appears." *Bush-Quayle '92 Primary Comm., Inc. v. FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997). The "not precedential" approval of the CU #4 outage stipulation in Final Order #6921c constitutes a "plain" distinction revealing no inconsistency with the Commission's decision regarding cost-recovery for the 2013 CU #4 outage. Moreover, this case is unlike *Jicarilla* where the agency engaged in disparate treatment of methods without explanation. *See* 613 F.3d at 1119, 1120. Here both in Final Order # 6921c and this case, the prudence standard was applied.

II. Other Commission applications of law are similarly correct.

NorthWestern challenges the Commission's application of the prudence standard in assessing whether the replacement power costs were properly incurred. NorthWestern's arguments are framed in the context of a reasonable utility. In its reply, NorthWestern acknowledges the prudence standard governs and that a reasonable utility standard is a factor in prudence analysis. [Dkt. 35 at 11.] The Montana Supreme Court has rejected the reasonable utility standard and expressly gave great deference to the Commission in evaluating prudence. *Northwestern*, 2016 MT 239 at ¶ 36. "The Montana Legislature gave the Commission express latitude to determine if the given costs were prudent—careful, sensible, practical, discreet, wise, or farsighted or, more apt in the regulatory environment, avoiding unnecessary risks—through its own fact finding and administrative authority." *Northwestern Corp.*, 2016 MT 239

at ¶ 33. The Court reasoned "[i]f 'prudent' was restricted to what a reasonable utility would do in similar circumstances, the Commission would be deprived of its own discretion to evaluate and determine whether the utility's actions were prudent." 2016 MT 239 at ¶ 36.

In *Northwestern*, immediately after recognizing a reasonable utility was an "appropriate factor to consider," the Court concluded the record supported the Commission's decision. 2016 MT 239 at ¶ 38. As shown more fully *infra*, the Commission explained why the actions of a reasonable utility were insufficient to conclude NorthWestern prudently incurred replacement power costs from the CU #4 outage and substantial evidence and Montana law supports that explanation. Moreover, NorthWestern's arguments so heavily rely on what a reasonable utility would do that accepting these arguments in this case would adopt the "reasonable utility" standard rejected in *Northwestern*.

NorthWestern criticizes the Commission applying its own expertise in determining NorthWestern's imprudence. [Dkt. 25 at 25-27.] However, in rejecting the reasonable utility standard to determine prudence, the Montana Supreme Court observed "[t]ying the outcome to evidence of what other utilities did or would do would remove or reduce the discretion of the Commission to rely on its own expertise." *Northwestern Corp.*, 2016 MT 239 at ¶ 36. Therefore, by using the prudence standard, the Commission correctly applied the law.

NorthWestern argues the Commission decision was legally incorrect because it did not presume costs that a utility incurs are prudent. [Dkt. 25 at 29.] NorthWestern cites Justice Brandeis's concurring opinion in *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Pub. Serv. Com.*, 262 U.S. 276, 289, n. 1 (1922). [Dkt. 25 at 29 & f.n. 177.] First, a concurring opinion of two Justices is not binding. Second, Justice Brandeis does not cite to authority supporting the presumption and uses the permissive "may", not the mandatory 'must' or 'shall.'

See id. Third, the concurrence analyzed "whether a prescribed rate is confiscatory," 262 U.S. at 289. NorthWestern has not argued the Commission's denial of replacement power costs for CU #4's outage confiscates NorthWestern's property. [*See* Dkt. 1.]

NorthWestern also cites *West Ohio Gas Co. v. Pub. Utilities Com.*, 294 U.S. 63, 72 (1935). [Dkt. 25 at 29, f.n. 177.] However, in *West Ohio*, the Supreme Court differentiated the role of a commission and a court. *Id.* at 74. "A court passing upon a challenge to the validity of statutory rates does not determine the rates to be adopted as a substitute." *Id.* Instead, the Court examines whether the rates are so inadequate as to constitute confiscation. *Id.* Again, NorthWestern's Petition does not argue denial of authorization to charge customers for the cost of replacement power from the CU #4 outage confiscates NorthWestern's property.

NorthWestern utilizes the presumption to argue the Commission misapplied the law at COL No. 94 by concluding NorthWestern had the burden of persuasion regarding prudence. [Dkt. 25 at 30 & f.n. 182.] However, Admin R. Mont. 38.5.8220(2) and 38.5.8213(1)(i) recognize the utility's burden of proof regarding prudence. "[T]he burden of proof is a party's duty to prove a disputed assertion or charge and includes both the *burden of persuasion* and the *burden of production*.") *State v. Chaussee*, 2011 MT 203, ¶ 12, f.n. 2, 361 Mont. 433, 259 P.3d 783 (internal emphasis included, internal brackets, quotation marks, and parentheses omitted). Therefore, the Ninety-Fourth Conclusion of Law correctly states Montana law.

Additionally, the Minnesota Supreme Court held "enactment of Minn. Stat. § 216B.16, subd. 4 (1986) effectively removed" the presumption in *Southwestern Bell* and *West Ohio*, if it ever existed in Minnesota. *In re Petition of N. States Power Co.*, 416 N.W.2d 719, 726 (Minn. 1987). Minn. Stat. § 216B.16, subd. 4 states "[t]he burden of proof to show that the rate change is just and reasonable shall be upon the public utility seeking the change." Therefore, the

Minnesota Supreme Court has concluded a statute giving the utility the burden of proof eliminates a presumption. As shown *supra*, two Administrative Rules of Montana give the utility the burden of proof regarding prudence. Thus, *N. States Power* is further authority that it was correct for the Commission not to apply the presumption.

Among the decisions NorthWestern cites in reply is *Pub. Serv. Comm'n v. Ely Light & Power* Co., 393 P.2d 305, 324 (Nev. 1964). [Dkt. 35 at 19 & f.n. 93-98.] "In the absence of an abuse of discretion on the part of the utility and in the absence of showing lack of good faith, inefficiency or improvidence...the commission should not substitute its judgment for that of management." 393 P.2d at 311. However, the Montana Supreme Court has long recognized the Commission is unique. *Cascade County Consumers Ass'n v. Public Serv. Comm'n*, 144 Mont. 169, 191-92, 394 P.2d 856 (Mont. 1964). *Ely Light* does not recognize the statement in *Northwestern supra* that that the Commission has expertise. Furthermore, in *Potomac*, the prudence presumption was questioned when in conflict with statutory authority. *Potomac Elec. Power Co. v. Public Serv. Comm'n.*, 661 A.2d 131, 140-41 (D.C. Ct. App. 1995). Like *Potomac*, Montana's Administrative Rules put the burden on Northwestern.

A. *AEP Texas*, a decision the Commission cites, accurately applied precedent, and the decision does not require a link between the vendor's imprudence and the utility's actions before vendor imprudence is imputed to the utility.

NorthWestern challenges FoF No. 67 that says "NorthWestern outsourced these responsibilities to Talen and Siemens, and then failed to provide witness testimony from these entities to support its claim that the maintenance procedure that led to the outage was performed prudently." [Dkt. 25 at 31.] FoF No. 67 subsequently cites *AEP Tex. Cent. Co. v. PUC*, 286 S.W.3d 450, 467-70 (Tex. App. 2008) for support. NorthWestern's brief implies that *AEP Tex.* is legally erroneous because it applied a 1988 decision of the Texas Public Utilities

Commission ("PUC"), instead of the 1991 Texas PUC decision, *Application of Texas Utilities Electric Company for Authority to Change Rates*, Docket No. 9300, 1991 Tex. PUC LEXIS 279, 1991 WL 790285. [Dkt. 25 at 31 & f.n. 191-192.]

However, *AEP Tex.* cited the 1991 decision as authority to state "[u]nder Commission precedent, costs incurred due to the imprudence of a third-party vendor are not reasonable and necessary...The imprudence of a third-party vendor may be imputed to the utility, even if the utility has not acted imprudently." 286 S.W.3d 468-69 & f.n. 20-21 (citing 1991 WL 790285, at *473, Conclusion of Law No. 34 (Sept. 27, 1991)). Moreover, Conclusion of Law No. 34 states "[r]egardless of a utility's prudent conduct, a vendor's imprudence is imputed to the utility because ratepayers should not bear the responsibility of the vendor's imprudence." 1991 Tex. PUC LEXIS 279 at part 11, *136-*137.

In challenging the Commission's use of *AEP Tex.*, NorthWestern asserts the 1991 PUC decision "held...there needed to be a connection between the vendor's conduct and the utility's conduct...to impute [the vendor's] impruden[ce] to the utility." [Dkt. 25 at 31.] The Court cannot agree. Pages 112 and 113 of part 3 of 1991 Tex. PUC LEXIS 279 states "[t]here is no evidence, however, establishing any link between Transamerica DeLaval's imprudent conduct and TU Electric's conduct." Furthermore, Conclusion of Law No. 34 in *AEP Tex.* does not state a connection is needed before a vendor's imprudence can be imputed to the utility. The Texas PUC is not the only public service commission to liberally impute a vendor's imprudence to the utility. The Pennsylvania Public Utility Commission has opined "[r]espondent's ratepayers should not be made to bear the burden of the costs of replacing the malfunctioning steam valves, for it was the respondent, not its ratepayers, which selected the contractor to provide the valves and respondent and stockholders should bear the risk of performance failure." *Outage at*

the Salem Nuclear Generating Station, 1985 Pa. PUC LEXIS 29 at *15, *95 (Pa. P.U.C.) (quoting *Pennsylvania Public Utility Commission v. Metropolitan Edison Company*, 28 PUR 4th 555, 562-63 (Pa. P.U.C. 1979)).

B. The Order cites *AEP Tex.* as authority for NorthWestern having the burden to show prudent oversight of its independent contractors, not as authority to impute Talen's or Siemens' imprudence to NorthWestern.

NorthWestern tries to distinguish *AEP Texas* by observing the lack of evidence that Talen was imprudent, generally discussing the RCA which stated Talen was not imprudent, and noting the Commission cited the RCA earlier in its order. [Dkt. 25 at 32.] FoF No. 34 recounts "MEIC['s] observ[ation] that...the [RCA] did not find Talen negligent or imprudent [regarding] the core damage that occurred during the generator overhaul." Nevertheless, FoF No. 34 says the analysis was silent regarding Siemens' negligence or imprudence. Northwestern proceeds to argue the Commission's reasoning means "Talen's prudent conduct should be imputed to NorthWestern." [Dkt. 25 at 32.] However, this line of argument misstates the Commission's purpose in citing *AEP Tex.* NorthWestern's brief does not address the statement from FoF No. 67 that reads "NorthWestern may be able to delegate the operation of its property to a contractor, but it cannot outsource its statutory and regulatory obligations as a public utility to prove the prudence of costs resulting from [its] property's failure." Thus, the Commission found NorthWestern did not satisfy its burden of proof about prudence, not that Talen's or Siemens' imprudence was imputed to NorthWestern.

C. While NorthWestern cites the Michigan PSC, Michigan PSC precedent shows the PSC's legal analysis whether NorthWestern's oversight of Talen and Siemens was prudent was correct.

In challenging the Commission citing *AEP Texas*, NorthWestern cites *In re Consumers Power Co.*, 84 P.U.R.4th 389, 399 (Mich. P.S.C. 1987) for the idea a vendor's mistake does not

mean a utility was imprudent. [Dkt. 25 at 31, f.n. 192.] However, the Michigan P.S.C. places the burden of proof on the utility to show prudence in the context of independent contractor performance. *In re Consumers Power Co.*, 1986, 1988 Mich. PSC LEXIS 378 at *34 (Mich. Pub. Serv. Com. 1988) (The utility "did not show that the company properly performed its duty to select and monitor the performance of independent contractors.") Moreover, in the 1987 *Consumers Power* decision, the Michigan P.S.C. evaluated whether the utility was reasonable and prudent in selecting and monitoring independent contractor performance. 1987 Mich. PSC LEXIS 627 at *25. Therefore, it was not error for the Commission to evaluate the prudence of NorthWestern's oversight of its independent contractors Talen and Siemens in determining whether NorthWestern was prudent or to place the burden of proof on NorthWestern.

D. Substantial evidence supports the Commission's factual analysis of prudence in the context of oversight of Talen and Siemens.

While NorthWestern criticizes the Commission's reliance on *AEP Texas*, NorthWestern does not challenge the Findings of Fact regarding NorthWestern's imprudent oversight of Talen and Siemens. FoF No. 67 states "Barnes admitted [playing] a minimal role in overseeing the CU [#]4 outage work. For example, he did not read the daily outage reports that the plant operator sent to him., which relayed the El Cid test results." The Order cites 273:22-274:3 of the hearing transcript to support these sentences. Barnes is NorthWestern's Superintendent of Joint Owned Operations. [Ex. 144 at 199:17-23.] Barnes testified he did not read their results, and the question referenced "the daily outage reports that relayed information about the particular El CiD tests that were going on." [Ex. 144 at 273:22-25.]

Another unchallenged sentence from FoF No. 67 states "[w]hen asked whether he made any suggestions to the plant operator about doing supplementary due diligence during the outage [Barnes] said he did not, explaining, 'I [would] be disagreeing with the very entity who

is charged with...responsibility of doing that prudently.'" The Order cites lines 12-14 of page 274 of the hearing transcript to support these sentences. Barnes testified he "did [not] call them back and say I disagree or anything with what [Talen is] doing. I mean, I [would be] disagreeing with the very entity who is charged with the responsibility of doing that prudently." [Ex. 144 at 274:12-14.] Therefore, substantial evidence supports FoF No. 67 recitations of Barnes' testimony and the Commission's extrapolation from that testimony to find NorthWestern's oversight of Siemens and Talen imprudent.

The Court cannot reweigh evidence after concluding substantial, credible evidence supports a finding of fact. *America's Best Contrs., Inc. v. Singh*, 2014 MT 70, ¶ 31, 374 Mont. 254, 321 P.3d 95. Nevertheless, NorthWestern cites the testimony of the RCA, Halpern, Ward, and Mont. Code Ann. § 26-1-301 to demonstrate prudence. [Dkt. 25 at 32.] Halpern is the President and sole employee of Generator Consulting Services who appeared on NorthWestern's behalf and conducted the RCA. [Ex. 144 at 141:12-24, 145:16-25.] Mont. Code Ann. § 26-1-301 states "[t]he direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason." Nevertheless, "[t]he Commission, of course, is always free to weigh any...information [the utility provides] against any information to the contrary presented by other agencies or its own staff." *In re Montana Power Co.*, 180 Mont. 385, 400, 590 P.2d 1140, 1149 (Mont. 1979).

The Commission explained why the RCA was insufficient to show NorthWestern reasonably and prudently oversaw CU #4 plant operations and maintenance. [FOF No. 68.] FoF No. 68 also states an employee of another co-owner of CU #4 appeared to criticize the RCA as inconclusive. NorthWestern does not challenge this sentence, and Barnes' testimony states "Steve Quennoz from PGE deems it inconclusive and says he needs a conclusive root cause by

January 2014 for reporting purposes." [Ex. 144 at 278:3-17.] Thus, substantial evidence supports FoF No. 68. Finally, under NorthWestern's reasoning, the Commission had to accept all of the RCA or none of it. The Montana Supreme Court has rejected this idea. *See State v. Shields*, 2005 MT 249, ¶ 30, 328 Mont. 509, 122 P.3d 421.

NorthWestern contends the Commission erred by "faulting NorthWestern for not presenting a witness from Talen or Siemens." [Dkt. 25 at 32.] Halpern stated his knowledge that the core of CU #4 was tested and its insulation acceptable during prior outages was "based on verbal conversations...with Eric Petritz" of Talen. [Ex. 144 at 173:1-13, 174:13-20.] Halpern described Petritz as "probably in charge of the outage, or above the person in charge of the outage" and "the most knowledgeable person." [Ex. 144 at 174:22-25, 175:3-6.] Petritz was not a witness at the hearing, and Halpern recounted to the Commission what Petritz told him. [*Id.* at 175:7-10.] Therefore, the Commission did not err in discounting this testimony for lack of a Siemens or Talen witness. "The law makes no distinction in weighing evidence between expert testimony and evidence of other character. It is for the trier of the facts to determine the weight to be given to any evidence." *Weakley v. Cook*, 126 Mont. 332, 336, 249 P.2d 926, 928 (Mont. 1952).

III. Applying Montana Supreme Court, federal, or state and federal regulatory precedent, it was correct for the Commission to measure risk using the probability and cost standard.

NorthWestern argues the Commission's analysis of risk is conjecture. [Dkt. 25 at 21.] "Although the statistical probability of damaging the core during reassembly of the rotor may be very low, this does not imply that the risk is in fact low, because risk, in this instance, is an amalgam of probability and cost." [FOF No. 52.] Montana law measures risk by weighing the cost of the resulting harm and its probability in a variety of contexts. For example, regarding an

employer reasonably accommodating an employee, "[i]ndependent assessment of the risk of substantial harm is evaluation by the employer of the probability and severity of potential injury in the circumstances." *Reeves v. Dairy Queen*, 1998 MT 13, ¶ 42, 287 Mont. 196, 953 P.2d 703 (quoting Admin. R. Mont. 24.9.606(8)). Two of the three elements of assumption of risk in a strict liability case are "realizing the existence of the defect or danger" and "perceiv[ing] and appreciat[ing] the risk involved, *i.e.*, the probability of harm." *Brown v. North Am. Mfg. Co.*, 176 Mont. 98, 111, 576 P.2d 711, 719 (Mont. 1978).

"As the common law of torts long ago recognized, the rational calculation of risk requires multiplying the magnitude of a threatened loss by the probability of its occurrence." *Arrendondo v. Neven*, 763 F.3d 1122, 1131 (9th Cir. 2014). California state and federal courts have applied these principles to a utility company's duty of care. *See, e.g., Tesoro Ref. & Mktg. Co. Llc v. Pac. Gas & Elec. Co.*, 2016 U.S. Dist. LEXIS 5030, *54-*57 (N.D. Cal.). The Nuclear Regulatory Commission defines risk "as the probability of the occurrence of a given event multiplied by the consequences of that event." *In Re Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), 71 N.R.C. 449, 475, f.n. 147 (Nuclear Reg. Com. 2010).

Other state PSCs have used probability and magnitude of harm to measure risk. For example, the Ohio Public Utilities Commission stated "Duke ignores the fact that risk is composed of two elements: the probability of occurrence and the magnitude of the consequences of such an occurrence." *In re Application of Duke Energy Ohio, Inc.*, 2017 Ohio PUC LEXIS 438 at *27. The Maine Public Utilities Commission said "[f]or example, a utility could make a benefit/cost demonstration by comparing the risk (i.e. probability of failure times cost of failure) of not addressing the criteria violation compared to the cost (and reduced risk of system failure) of addressing the need identified by testing beyond the safe harbor."

Investigation into Maine Electric Utilities Transmission Planning Standards and Criteria, 2013 Me. PUC LEXIS 67 at *49.

IV. Substantial evidence supports the PSC's characterization of the source of the risk.

NorthWestern argues Halpern's testimony does not support the Commission's analysis of risk. [Dkt. 25 at 21.] FOF No. 52 says "NorthWestern acknowledged the risk associated with rotor-out maintenance, noting that this risk is one reason for an observed increase in the time period between major generator maintenance events in the industry." The Commission cited Hr'g Tr. 154:16-25, Halpern's testimony, as authority for the statement. One of the reasons for extending "the interval between major maintenance events" "was the risk associated with rotor out inspection and maintenance." [Ex. 144 at 154:8-11, 154:16-20.] Halpern also saw that he said upon removal and reinstallation of the rotor "there [is] a risk that it can bump the core and it can damage the interlaminar insulation." [*Id.* at 154:21-25.] Therefore, Halpern's testimony acknowledged rotor-out maintenance involved significant risk, and substantial evidence supports FoF No. 52.

The first sentence FoF No. 53 states "[t]he source of the risk is well-known: reassembling the generator requires inserting a 50[-] ton generator rotor into the cylinder within the core with only an inch or two clearance." [FOF No. 53.] Authority for that statement is 178:19-20 of the Hearing Transcript. Halpern testified "you [are] putting in a 50-ton rotor into a small whole (sic) with about an inch or two gap. If the crane fails, or something happens, it drops and you can damage the core," and the question referenced installation. [Ex. 144 at 178:12-16, 19-22.] Thus, substantial evidence supports the Commission's characterization of generator reassembly as inserting a sizeable rotor with a margin of error of only 1-2 inches. FoF 53 then says "[a] slight shift in the position of the rotor can damage the core without

maintenance personnel even knowing." [FOF No. 53.] Authority for this statement is 178:17-25 of the hearing transcript. These lines are also Halpern's testimony. Halpern preceded his statement about a small hole and a two-inch gap with "sometimes you do [not] know" that damage happened. [Ex.144 at 178:17-19.] Thus, substantial evidence supports the Commission's finding that core damage can occur without maintenance's knowledge. Moreover, a gap of 1-2 inches is sufficiently small to constitute substantial evidence that core damage can occur with only a slight shift in the rotor's position. The precise nature of the task obviously demonstrates risk. Risk is further increased where a slight shift in the 50-ton object's position can cause core damage that maintenance personnel would not know of.

NorthWestern's brief objects to hindsight determining prudence. [Dkt. 25 at 21-22.] The alleged hindsight was the Commission using the millions of dollars of damage from not performing another El-CiD test in its risk analysis. *Id.* The Commission's risk analysis also cites the effect CU #4's outage on Northwestern customers, incremental replacement power costs of $8.243 million. [FoF No. 53.] The Court disagrees that the Commission used hindsight to measure risk. CU #4's outage is far from the first instance that an outage led to enormous replacement power costs. One example is the 2009 outage of CU #4 resulting in the stipulation discussed *supra*. In *Northwestern*, the Montana Supreme Court stated "the outage caused NorthWestern to incur an additional $1,419,427 in charges to Powerex and Avista for regulation service." 2016 MT 239 at ¶ 9. Outside of Montana, the Maryland Public Service said that, at least since 1981, Baltimore Gas and Electric was on notice about consequences of "high costs associated with replacement energy when a nuclear power plant is out of service." *In Re Balt. Gas & Electric Co. App.*, 1989 Md. PSC LEXIS 85 at *25.

The Commission used the presence of consequential damage provisions to corroborate its finding of significant risk in rotor-out maintenance. [FoF No. 52.] FoF No. 52 cites FoF No. 42 for support. FoF No. 42 says "[a]ccording to NorthWestern, the risk to vendors and contractors of consequential damages is potentially unlimited and if vendors and contractors were required to absorb that risk[,] the price of their services would contain a substantial contingency to mitigate their exposure. Therefore, waivers of consequential damages generally reduce costs for the plant owners." NorthWestern does not challenge FoF Nos. 52 or 42. "[P]otentially unlimited" risk and a cost reduction from "mitigat[ing] exposure" support the Commission's analysis of risk.

Courts have also examined consequential damages in the utility context. *See Ebasco Services, Inc. v. Pennsylvania Power & Light Co.*, 460 F. Supp. 163 (E.D. Pa. 1978) (recognizing suppliers will not take on liability for consequential damages, including replacement power costs, caused by outages as the financial risk of these outages is too great). Thirty years ago, the District of New Hampshire described contractual provisions eliminating consequential damages as "not unusual in the power industry." *Public Service Co. v. Westinghouse Electric Corp.*, 685 F. Supp. 1281, 1289 (D.N.H. 1988). Therefore, the Commission's consequential damages analysis is further substantial evidence for its analysis of risk.

The Commission also determined standard industry practice of not performing another El CiD test after rotor insertion into the core was unpersuasive because NorthWestern's representations were conclusory and lacked evidentiary support in industry technical manuals. [FOF No. 54.] NorthWestern argues this finding is legally incorrect and cites Mont. Code Ann. § 26-1-302, which states "[a] witness is presumed to speak the truth." [Dkt. 25 at 26 & f.n.

162.] However, witnesses Ward and Barnes testified another El-CiD test could have been performed, would have taken four hours, and was not cost prohibitive. [Ex. 144 at 191:4-6; 228:4-8.] Finally, NorthWestern quotes Ward's answer that he did not "think so" when asked if a pre-air gap baffles re-installation El CiD test could have averted the outage. [Dkt. 25 at 21, f.n. 135.] This is risk justification that the Montana Supreme Court rejected in Northwestern. *See* 2016 MT 239 at ¶ 38. The time to analyze the efficacy of another El CiD test was before the outage.

V. In assessing risk, the Commission did not misapprehend the effect of evidence.

NorthWestern contends the Commission's risk analysis misapprehended the effect of evidence because the Commission mistook a possible risk for a risk sufficiently substantial to require mitigation. [Dkt. 25 at 22.] However, as shown in § IV *supra*, the record supports the Commission's characterization of risk. Therefore, the Commission has not misapprehended the effect of evidence.

NorthWestern states "damage to generator cores from rotor reinsertion is low." [Dkt. 25 at 22-23.] Once again though, risk is a dynamic equation balancing the cost of mitigation against the consequences of failure. The Commission recognized this because FOF No. 52 states "[a]lthough the statistical probability of damaging the core during reassembly of the rotor may be very low, this does not imply that the risk is in fact low, because risk, in this instance, is an amalgam of probability and cost." Furthermore, FoF No. 53 states "[v]ery, very low probability…is no consolation to NorthWestern ratepayers when they experience $8.243 million in…replacement power costs [and] regular fixed plant costs of approximately $21 million" when CU #4 was down. Thus, NorthWestern is really arguing the low probability of harm dwarfs the high cost of harm and reveals the risk is low. The Court cannot reweigh

evidence upon "determin[ing] substantial credible evidence exists to support the findings of the trier of fact." *Benjamin v. Anderson*, 2005 MT 123, ¶ 37, 327 Mont. 173, 112 P.3d 1039. Furthermore, the Commission did not just weigh cost of harm against probability. The Commission also evaluated the efficacy of another El-CiD test with FoF No. 54 stating the test should have been performed "[s]ince such a test is neither prohibitively expensive, nor time consuming and could detect potentially catastrophic core damage that might otherwise go unnoticed." Ward testified an El CiD test takes around four hours. [Ex. 144 at 191:4-6.] Barnes answered "[y]es" when asked "presumably, this second El CiD test has [not] been found to be prohibitively expensive." [Ex. 144 at 228:4-8.] Furthermore, Halpern testified "And I don't know even now what would have been done differently, except an additional El CiD test." [Ex. 144 at 182:20-21.] Additionally, Talen is now doing these tests; demonstrating they can be done in a cost-effective manner.

Therefore, substantial evidence supports FoF No. 54. The Second Circuit's third criterion in evaluating risk is "the burden of adequate precautions." *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) Accordingly it was legally correct for FoF No. 54 to assess the efficacy of another El CiD test.

VI. *Northwestern* instructs the Commission correctly found NorthWestern imprudent for evaluating outage insurance only after the CU #4 outage occurred.

FoF No. 62 found NorthWestern imprudent for not evaluating outage insurance's availability and cost until after the outage took place. NorthWestern condemns this finding as "illogical." [Dkt. 25 at 28.] The Court disagrees. Binding precedent instructs this finding is correct. Prudence is not shown when a utility embarks upon "[r]isk justification, not risk management." *NorthWestern*, 2016 MT 239 at ¶ 38. NorthWestern appraising outage insurance's availability and cost after the outage took place is risk justification. NorthWestern

argues CU #4's operating history did not sufficiently apprise it of possible future generator core outages. [Dkt. 25 at 24.] This authorizes the risk justification *Northwestern* rejects because it means only after an outage occurs, when it is too late to buy outage insurance, is it prudent to evaluate outage insurance. NorthWestern also cites the other CU #4 owners lacking outage insurance. [Dkt. 25 at 24.] This does not vitiate NorthWestern's risk justification, and as recounted *supra*, the reasonable utility does not determine prudence. NorthWestern cites the cost and cost-ineffectiveness of outage insurance. [Dkt. 25 at 24.] However, after acknowledging insurance costs have risen, the New Hampshire Public Service Commission stated "[n]otwithstanding the cost issue, we believe it prudent for the Company to investigate whether coverage is available." *In re White Rock Water Co., Inc.* 2002 N.H. PUC LEXIS 118 at *9-*10.

NorthWestern argues the Commission misapprehended the effect of Mr. Lyon's testimony regarding the prudence of a utility like NorthWestern investigating outage insurance. [Dkt. 25 at 23.] In FoF No. 62, the Commission clearly understood Mr. Lyon's testimony. "Independent owned projects have outage insurance because there is no one else to fall back upon to make up revenues in the event of an outage." [FoF No. 62.] Lyons answered "[i]n part" when asked "[s]o investor-owned utilities do [not] have that same incentive [to obtain insurance] in part, because they [have] access to ratepayers in a way that independent power producers don't." [Ex. 144 at 104:16-105:21.]

Also, while recognizing Mr. Lyon's distinction between private and regulated utilities and the likelihood of insurance purchases, the Commission simply found NorthWestern did not investigate outage insurance. "NorthWestern did not even bother to look at the availability and cost of outage insurance." [FoF No. 62.] Further, the Commission found that NorthWestern's

actions constituted risk justification disapproved of in *Northwestern* and the A.R.M.s. [FoF. No. 63.]

Finally, Northwestern criticizes the Commission for dismissing Barnes' testimony about other utilities not buying insurance for lack of corroborating affidavits. [Dkt. 25 at 28.] However, the Commission noting the absence of these affidavits "or other documentation" is in FoF No. 39, in the section of the order summarizing the parties' positions. The Commission's decision on the insurance issue did not give little weight to this testimony for lack of affidavits or other documentation. [See FoF. 62.] Instead it gave little weight to this testimony because NorthWestern's insurance analysis was after the fact, i.e. risk justification. [FoF No. 62.]

VII. Substantial evidence supports the Commission's finding that NorthWestern was imprudent in not considering pursuing litigation against Talen or Siemens for the cost of replacement power.

FoF No. 72 says "[b]ecause NorthWestern failed to show that it timely evaluated alternatives to recovering replacement costs from customers it has not meet its burden of proof" to show prudence. The alternative specifically contested was NorthWestern suing Siemens or Talen. [Dkt. 25 at 32-33.] NorthWestern first argues FoF No. 72 erred in citing Admin. R. Mont. 38.5.8201(3) because the rule does not require NorthWestern to consider all possible means of recovering replacement costs before charging rate-payers for these costs. [Dkt. 25 at 33.] However, the Commission did not cite Admin. R. Mont. 38.5.8201(3) for this purpose. It cited the rule to support the combination of FoF Nos. 70 and 71 that state NorthWestern repeatedly stated in pre-hearing discovery that it had not determined whether to pursue legal action only to assert during the hearing "it had no viable cause of action." Admin. R. Mont. 38.5.8201(3) states "[a] utility should thoroughly document its ...management decision-making so that it can fully demonstrate to the commission and stakeholders the prudence of supply-

related costs and/or justify requests for approval of electricity supply resources." NorthWestern's position change between discovery and hearing did not comply with the A.R.M.

NorthWestern does not challenge the Commission's findings of its change in position by stating at the hearing litigation would be fruitless. [*See* Dkt. 25.] Nonetheless, Barnes testified his answer dated November 7, 2014 to a data request stated "[n]o determination has been made...whether NorthWestern can pursue any actions to recover all or part of the costs incurred by the outage." [Ex. 144 at 209:9-210:8.] Barnes also testified NorthWestern provided an updated response indicating its original response had not changed. [Ex. 144 at 210:9-211:3.] Therefore, substantial evidence supports FoF Nos. 70 and 71.

NorthWestern subsequently cites Patrick Corcoran's pre-filed rebuttal testimony that reads "[t]he fact that NorthWestern might have a cause of action against another party to recover the [replacement] power costs [due to the CU#4 outage] does not magically transform those costs into something other than purchased power costs recoverable in an electricity supply cost tracker." [Dkt. 25 at 33 & f.n. 198 (quoting Ex. 144 at PRC-6.] The Minnesota Public Utilities Commission denied permission to a utility company to recover costs from ratepayers reasoning in pertinent part to this case, "[t]here is no sworn testimony in the record detailing, explaining, and documenting Company efforts to secure third-party recovery," and the Company "has provided no account of the sources explored, the fact-finding and analyses conducted, [or] the conclusions reached." *In Re Application by CenterPoint Energy*, 2010 Minn. PUC LEXIS 262, *80, 82-*85 (Minn. PUC 2010). Corcoran's rebuttal testimony similarly provides no insight into NorthWestern's investigation into suing Talen or Siemens, efforts to obtain replacement power costs from these entities, or why NorthWestern concluded

claims against those entities were not viable. [*See* Ex. 118 at PRC-1-11.] James Goetz, a NorthWestern retained attorney expert witness did not "know whether NorthWestern conducted even a cursory analysis [of recovering against Siemens" before retaining him. [Ex. 144 at 288:8-12, 291:7-11. *See, also*, Ex. 144 at 307:13-16.]

Additionally, "a utility should pursue available legal means to obtain redress from an erring contractor." *In Re Reg. of Electric Fuel Component of Rate Schedules of Toledo Edison Co.*, 1987 Ohio PUC LEXIS 69 at *45 (reviewing case law). "Once a manufacturing defect is discovered, [the California Public Utilities Commission] would expect the regulated utility to pursue its available civil remedies aggressively in order to protect its ratepayers from unnecessary costs, or to be prepared to justify the reasonableness of its decision to refrain from pursuing those remedies." *In re San Onofre Nuclear Generating Unit No. 1*, 1985 Cal. PUC LEXIS 149 at *9. Finally, NorthWestern's challenge to the Commission's analysis of suing Talen or Siemens occurs in the context of presuming prudence. [Dkt. 25 at 34.] As explained *supra*, there is no presumption of prudence in Montana law.

VIII. *Fox* instructs the Court defer to the Commission, and Montana Supreme Court precedent instructs the Court's review is limited and must not usurp the finder of fact.

NorthWestern cites *inter alia Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) to support its argument the Commission's decision is not entitled to deference. [Dkt. 25 at 34, f.n. 200] *Fox* states a largely incomprehensible decision is unworthy of deference. 684 F.3d at 75 The Commission's decision is comprehensible, that is the Court could read it and understand the Commission's decision. Therefore, *Fox* instructs the Commission's decision is worthy of deference. Furthermore, "the reviewing court may not substitute its judgment for that of the

agency as to the weight of the evidence on questions of fact." *McDonald v. Dep't of Envtl. Quality*, 2009 MT 209, ¶ 38, 351 Mont. 243, 214 P.3d 749.

IX. The Commission did not ignore uncontradicted evidence.

As recounted *supra*, substantial evidence supports the Commission's findings, the Commission did not misapprehend the effect of evidence and did not commit an error of law. The Court's review of the entire case leaves the Court no conviction that the Commission made a mistake.

Therefore, **IT IS HEREBY ORDERED** that the Commission's decision to disallow NorthWestern from charging its customers for the costs of replacement power due to the CU #4 outage is **AFFIRMED**.

DATED this 29th day of July, 2018.

DISTRICT JUDGE

cc: Sarah Norcott, Esq.

Special Attorneys General Justin Kraske, Esq., Jeremiah Langston, Esq.

Jason T. Brown, Esq.

Jenny K. Harbine, Esq.

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail/hand upon the parties or their attorneys of record at their last known addresses this 30th day of July, 2018

BY Joanna Mary
Judicial Assistant to Hon. Rod Souza