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American Petroleum Institute,
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

MONTANA ENVIRONMENTAL INFORMATION CENTER, EARTHWORKS' OIL AND GAS ACCOUNTABILITY PROJECT, and WILDEARTH GUARDIANS,	)	**Case No. CV 11-15-GF-SEH**
Plaintiffs,	)	**DEFENDANT-INTERVENORS' REPLY BRIEF TO PLAINTIFFS' OPPOSITION TO DEFENDANT-INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT**
vs.	)	

UNITED STATES BUREAU OF LAND MANAGEMENT, an agency within the U.S. Department of Interior, KENNETH L. SALAZAR, in his official capacity as Secretary of the Interior, JAMIE CONNELL, in her official capacity as State Director of the Bureau of Land Management's Montana State Office, and THERESA M. HANLEY, in her official capacity as Deputy State Director of the Bureau of Land Management's Montana State Office,	)
Federal Defendants.	)
v.	)
American Petroleum Institute, Montana Petroleum Association, Montana Chamber of Commerce, and Western Energy Alliance,	)
Defendant-Intervenors.	)

Defendant-Intervenors file this Reply Brief to rebut Plaintiffs' response to their Cross-Motion For Summary Judgment.

I. MEIC Lacks Standing

Like Plaintiffs' Complaint and their Brief in Support of the Motion for Summary Judgment, Plaintiffs' Response Brief does not establish standing.

A. Plaintiffs conflate the potential emissions from the leases challenged in this case with potential emissions in the region to buttress their weak argument on the "meaningful contributions" of emissions from the challenged leases.

Central to all of the standing arguments in this Reply Brief are Plaintiffs' distortions on the scope of the agency action at issue. Specifically, woven throughout Plaintiffs' arguments in their response brief is the claim that the court should consider 8,000,000 metric tons -- the potential cumulative emissions from all oil and gas operations within the territory of Bureau of Land Management ("BLM") Planning Areas in Montana, North Dakota, and South Dakota -- as the amount of emissions at issue for purposes of establishing standing. On the page cited by Plaintiffs from the administrative record (AR 1544), it is clear that estimates for North and South Dakota account for more than 5.7 million metric tons of the 8.192 million metric ton total for the three-state region. Neither these emissions nor the emission estimates calculated for the land in BLM's planning areas in Montana should be conflated with emissions associated with potential production from the approximately 100 leases challenged by Plaintiffs in this case. First, Plaintiffs have challenged no BLM leasing decisions outside of Montana in this litigation, so consideration of emissions from other states is irrelevant to the question of whether Plaintiffs have standing. Second, the emissions at issue are those resulting from the leasing decision under review and are estimated to be orders of magnitude less than the cumulative emissions of all oil and gas

development across the three state region. Indeed, BLM estimated that emissions from development of the challenged oil and gas leases issued by the Miles City Field Office, which amounts to the majority of leases challenged by Plaintiffs, would be 0.000015% of global emissions. AR 1199-1200; *see also Amigos Bravos v. BLM*, 2011 WL 3924489, *12 (D.N.M.) (finding 0.0009% contribution to global emissions was not sufficient to prove causation). Thus, Plaintiffs' attempt to import an emissions calculation from their cumulative impact analysis into the standing debate is improper. Further, the potential emissions from the leases challenged by Plaintiffs do not come close to "meaningfully contributing" to climate change. Whether Plaintiffs have standing is driven by what they have challenged in the Complaint and whether it constitutes a redressable injury caused by BLM's actions.

B. Plaintiffs fail to demonstrate imminence as required by the injury-in-fact prong of the test for standing.

In their response, Plaintiffs did not discuss how they meet the "imminence" prong of the injury-in-fact requirement for standing. In *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009), Justice Scalia, in discussing the standing requirements established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), noted, "[t]his vague desire to return [to national forest lands] is insufficient to satisfy the requirement of imminent injury." For cases in which a plaintiff asserts a procedural injury, like this one, the *Summers* majority refused to "replace the

requirement of imminent harm . . . with the requirement of a realistic threat that reoccurrence of the challenged activity would cause harm in the reasonably near future." *Summers*, 555 U.S. at 499-500. As one district court has noted, *Summers* requires a procedural injury to be imminent for a plaintiff to have standing. *Ashley Creek Properties, LLC v. Timchak*, 649 F.Supp.2d 1171, 1178 (D.Idaho 2009). Like the *Earth Island* plaintiffs, Plaintiffs cannot meet their burden by demonstrating imminent injury.

C. Plaintiffs fail to demonstrate that the Federal Defendants' leasing decision caused their alleged injury or that an amendment by the BLM on remand would provide redress to their alleged injury.

In addition to failing to prove the existence of an actual or imminent concrete injury-in-fact, Plaintiffs also fail to meet the necessary threshold for standing through proof that BLM caused their alleged injuries and that relief from this Court will redress their alleged injuries.

In their argument on causation, Plaintiffs assert that the demonstration necessary to establish causation in procedural injury cases is relaxed. Although this is a correct statement of law, a relaxed standard is not equivalent to no standard. The causation requirement remains a constitutional necessity for standing in NEPA cases, and Plaintiffs "must show a 'reasonable probability' that the alleged injury is caused by the challenged action." *Bell v. Bonneville Power Admin*, 340 F.3d 945, 951 (9th Cir. 2003). Plaintiffs have not done so and are

unable to do so. There is no record evidence that emissions from development of the leases under review will meaningfully contribute to global climate change or create site-specific impacts at the lease locations.

Plaintiffs concede that their preferred remedy in this case "may not 'reverse' climate change", yet they insist that they have standing because emissions will be reduced if no oil and gas production occurs on the approximately 100 leases at issue in this litigation. Pls. Resp. Br. at 14. Plaintiffs cannot show, however, that a miniscule reduction in emissions in comparison to global emissions will similarly redress their alleged injury, which is caused by global emissions.

The Ninth Circuit's decision in *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008), is instructive. In that case, the Ninth Circuit held, after noting that the redressability requirement is not "toothless" in cases involving alleged procedural injuries, that plaintiffs could not establish standing on a cause of action in a context similar to this one. The court explained that "if we rule against the groups' claim of procedural injury, they will continue to suffer injury; and, if we rule in their favor, they will still suffer injury because we cannot undo the Treaty." *Id*. Therefore, the court affirmed the district court's dismissal of the claim because "[a court] cannot remedy the harm asserted." *Id*.

Salmon Spawning is important for two reasons. First, it makes clear that Plaintiffs must make an adequate showing with respect to redressability even for procedural injuries. In addition, the case explains that other factors unrelated to conduct of the Federal Defendants makes it impossible to redress their alleged National Environmental Policy Act ("NEPA") violations. As with the standing claim dismissed in *Salmon Spawning*, the relief requested by Plaintiffs would not redress the injuries attributed to climate change in their pleadings. Plaintiffs make no proof-based argument that any additional incremental or marginal impact from lease-based GHG emissions create localized harm. Therefore, the alleged harm will not be redressed by termination of the leases and, as a result, Plaintiffs lack standing.

D. Plaintiffs improperly attempt to meet their burden on standing by invoking facts without a nexus to the causes of action in the Complaint and arguments in their Motion for Summary Judgment.

To have standing, Plaintiffs must establish an actual or imminent concrete injury personal to themselves resulting from BLM's final agency action, which is tied to the causes of action in their Complaint. Although the allegations in the Complaint and in their opening brief target alleged agency failures to evaluate the potential environmental implications of GHG emissions, an issue of generalized, diffuse, and global dimensions, Plaintiffs have now argued that standing is appropriate based upon on-the-ground impacts incurred by their members.

Allegations that were not pleaded as part of the Complaint or not asserted as an argument in the briefing cannot serve as a basis for standing because those unrelated allegations have not been used to substantiate the party's injury, the cause of the injury, or the requested relief to redress the injury.

In their response, Plaintiffs allege on-the-ground impacts as a basis for standing. Pls. Resp. Br. at 2-8. However, neither the Complaint nor the Brief in Support of Plaintiffs' Motion For Summary Judgment focuses on a failure to comply with NEPA with respect to purely local environmental harm. Plaintiffs have been consistent in arguing that potential emissions from the leases will generate generalized climate change impacts which were not properly evaluated by BLM.

In their Complaint, Plaintiffs allege that BLM failed "to carefully address climate and energy concerns before selling and executing … oil and gas leases in Montana. BLM's actions unacceptably fail to safeguard the climate and, further, fail to address the waste of methane to the atmosphere caused by inefficient oil and gas operations." Compl., ¶ 2; *see also* Compl., ¶¶ 3-4, 9, 20-21, 23, 27, 33-62, 65-91, 94, 115-127, 133-135, 139-143. Before BLM conducted the lease sale, Plaintiffs protested the offering based upon the implications for climate change and methane emissions of the leases. *Id*. at ¶¶ 127, 129. Few passages of the Complaint are focused on environmental impacts on-the-ground as the result of the

leases other than those related to GHG emissions. *Id*. at ¶¶ 63-64. Even then, the focus of the assertion is on climate change. According to the pleading, through its failure to comply with NEPA, BLM failed to protect the environment and did not assess the waste of methane caused by inefficient oil and gas operations. *Id.* In Count I, Plaintiffs allege that BLM violated NEPA by failing to consider reasonable alternatives to prevent or abate GHG emissions and waste. *Id*. at ¶¶ 155-156. Count II alleges that BLM failed to do an environmental impact statement ("EIS") in violation of NEPA. *Id*. Finally, Count III asserts that BLM failed to take a hard look at environmental impacts of the leases as required by NEPA, but the claims are targeted at the allegedly unassessed impacts of emissions and climate change as the potential result of the leases in question. *Id*. at ¶¶ 174-76.

Plaintiffs' assertion that BLM illegally failed to consider an alternative that would have placed GHG controls on development activities hinges on the alleged effects of those emissions on climate change. *See* Pls. Resp. Br. at 8-15. Plaintiffs' allegation that BLM should have prepared an EIS is rooted in their allegation that BLM got the science wrong and the effects of methane emissions are greater than were discussed in the NEPA document. *Id*. at 16-22. The on-the-ground effects of the oil and gas footprint of these leases are completely irrelevant

to these claims, and thus, cannot support standing. *See Amigos Bravos*, 2011 WL 3924489 at *14-*15.

The only claim that is tied in any way to effects of the oil and gas surface activities is the assertion that the NEPA review does not adequately account for the cumulative effects of on-the-ground activities in conjunction with global climate change. Pls. Resp. Br. at 22-26. Again, however, at its base, this claim assumes that climate change has and will affect the lease areas in a particularized way that would permit BLM to prepare a site-specific analysis of the effects of oil and gas development in addition to anticipated changes resulting from background climate change effects. This kind of local-scale information does not exist. Thus, the injury for this claim is based on alleged background climate change effects that have not been established here to support standing.

E. BLM's action does not reach the tipping point in terms of the magnitude of emissions to merit standing for Plaintiffs.

The court in *Amigos Bravos* found that potential emissions from BLM leases failed to reach the tipping point required for injury and causation under the standing test. The quantum of emissions in this matter precludes standing for Plaintiffs for the same reason. Moreover, Plaintiffs make no attempt to analyze where the tipping point exists. For example, if BLM had auctioned ten leases in Montana instead of approximately 100, would Plaintiffs have standing to challenge

them on the same theories set forth in the Complaint and their briefing? As with the number of leases at issue in this litigation, the answer is no.

II. BLM Did Not Violate NEPA

A. BLM's consideration of alternatives was reasonable.

Plaintiffs have not met their burden to show BLM's range of alternatives in the leasing Environmental Assessments was unreasonable. *City of Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) ("[B]oth the choice of alternatives as well as the extent to which the Environmental Impact Statement must discuss each alternative" is subject to the "rule of reason." (citations omitted)). The crux of Plaintiffs' argument is that BLM should have considered an alternative imposing stipulations regulating GHG emissions at the leasing stage, rather than determining emissions controls were better considered as conditions of approval ("COAs") at the development stage. This argument fails for at least three reasons: (1) it is based on the false factual and legal presumption that BLM cannot impose the same controls on emissions through COAs as stipulations; (2) given BLM's finding of no significant impact relating to climate change effects from emissions, developing a stand-alone alternative to consider emission control stipulations was not required; and (3) BLM chose to consider the effects of emissions controls as mitigation measures rather than as a stand-alone alternative, which is within its discretion.

First, Plaintiffs have not shown how BLM's decision to consider emissions controls as COAs, rather than lease stipulations, ties BLM's hands. Plaintiffs correctly state that once leases are granted, BLM cannot impose measures "[in]consistent with the lease rights granted," Pls. Resp. Br. at 17-18, but fail to demonstrate how implementing emissions controls at the development stage would be so uneconomical as to violate lease rights. Plaintiffs argued in their opening brief that emissions controls actually pay for themselves through capture of otherwise wasted methane. Pls. Op. Br. at 6. Plaintiffs cannot have it both ways. Here, they fail to show that it is not feasible for BLM to consider emissions controls during subsequent development authorizations, and more importantly, that BLM's decision to consider them at the development stage, but before any wells are drilled, was unreasonable.

Second, the purpose of alternatives analyses is to provide the decisionmaker with a comparison of impacts, "thus sharply defining the issues and providing a clear basis for choice among options." 40 C.F.R. § 1502.14. Where BLM has already determined the impacts to a particular resource will be insignificant, it makes little sense to develop alternatives to mitigate those effects. *See* BLM Op. Br. at 14 (quoting *Sierra Club v. Espy*, 38 F.3d 792, 803 (5th Cir. 1994)). Plaintiffs do not address this argument at all in their response. Further refining the alternatives for this one category of impacts would not have added anything

meaningful to support the choice among alternatives, particularly when these same emissions measures will be considered for implementation at the development stage.

Third, BLM *did* consider emissions controls in its NEPA review of the leasing decisions. Instead of including them in a stand-alone alternative, BLM chose to consider emissions controls and their environmental benefits as potential future mitigation measures. *See, e.g.*, AR 1179-81 (incorporating by reference Supplemental Information Report, AR 1548-66). This approach is consistent with NEPA regulations. *See* 40 C.F.R. § 1502.14(f) (in considering alternatives, agencies shall, "[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives."). Whether BLM considered emissions controls as an alternative or as potential mitigation measures is of no consequence, as the goal of both the alternatives analysis and mitigation processes is to ensure that BLM has sufficient information for an informed leasing decision. *See* 40 C.F.R. §§ 1502.14, 1502.16(h); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). Moreover, though its discussion of mitigation must be reasonably complete, as it was here, NEPA does not require BLM to adopt and enforce emissions controls. *Methow Valley*, 490 U.S. at 352. The Court concluded, "it would be inconsistent with NEPA's reliance on procedural mechanisms . . . to demand the presence of a fully developed plan that will

mitigate environmental harm before an agency can act." *Id*. at 353. BLM had sufficient information to make its leasing decision here, and its choice to evaluate emissions controls as *mitigation measures* rather than an *alternative* should be upheld.

B. Defendant-Intervenors did not concede that BLM failed to evaluate foreseeable methane emissions.

Plaintiffs claim that Defendant-Intervenors concede BLM's failure to consider environmental impacts caused by increased pressure to develop additional natural gas sources caused by inefficiencies in drilling results in "wasted" methane. Pls. Resp. Br. at 21-22. The initial argument was embedded in a single sentence in Plaintiffs' opening brief within a six-page argument that "highly controversial" impacts of the leasing decision required an EIS. *See* Pls. Op. Br. at 21-22 ("Even putting aside their climate impact, these inefficiencies . . . increase the pressure to lease and develop oil and gas from other lands, risking additional impacts to the environment."). Defendant-Intervenors answered Plaintiffs' allegation that controversy required an EIS. Def.-Inv. Op. Br. at 27. Regardless of whether Defendant-Intervenors specifically answered Plaintiffs' vague argument that inefficiencies may "risk" additional impacts, Plaintiffs' bald assertion that increased pressure for gas development from "wasted" methane will "risk[] additional impacts to the environment" is without any record or legal support. Plaintiffs have the burden of proof here, and have failed to meet it. Their theory is

mere supposition, based on an attenuated and unsupported causation chain, and cannot meet Plaintiffs' burden to show that BLM's Finding of No Significant Impact ("FONSI") was arbitrary and capricious.

C. BLM's FONSI is supported by the record.

Plaintiffs' argument that BLM should have prepared an EIS is twofold: (1) that "highly controversial" impacts of GHG emissions warranted a finding of significance; and (2) cumulative impacts of climate change, coupled with on-the-ground impacts of surface development, were not properly evaluated and are significant. Neither of these arguments is supported by the record or law.

Both the Defendant-Intervenors and BLM in their opening briefs point to the extensive and thorough evaluation of GHG emissions and climate change effects in support of the leasing decisions. Def.-Int. Op. Br. at 24-25, 27 (citing hundreds of pages of Montana-specific emissions calculations and assumptions at AR 2142-2495); BLM Op. Br. at 18-21. Plaintiffs do not take issue with the vast majority of these analyses, but instead cherry-pick one study cited in a single comment letter, *see* AR 12968, that BLM did not specifically address. Pls. Resp. Br. at 22. As BLM points out, however, its methods for calculating emissions were consistent with current EPA approaches. BLM Op. Br. at 20 (citing AR 11951). But more importantly, even if BLM had specifically considered the Plaintiffs' cited study and its conclusion that methane is more potent than carbon dioxide as a GHG, it

would not have changed BLM's FONSI in light of the miniscule emissions associated with oil and gas development in relation to the global scale of the issue.

Plaintiffs' only response to BLM's position that it "is difficult to impossible to identify specific impacts of climate change on specific resources within the project area," is that if BLM cannot quantify cumulative impacts of climate change and on-the-ground surface impacts of development, it can at least describe them qualitatively. Pls. Resp. Br. at 26. But BLM does address qualitatively the potential impacts of climate change on the leasing area. *See, e.g.*, AR 1138. To try to address the additive effects of climate change and oil and gas development on a site-specific level is not possible, a fact which Plaintiffs do not dispute. AR 1200. BLM's analysis of cumulative impacts and FONSI were reasonable.

III. Conclusion

This court should dismiss Plaintiffs' Complaint with prejudice based upon the cross-motion of Defendant-Intervenors.

Dated this 7th day of March, 2012.

/s/ William W. Mercer
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Attorney for Defendant-Intervenors
American Petroleum Institute,
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Montana Chamber of Commerce,
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CERTIFICATE OF COMPLIANCE

The undersigned, William W. Mercer, certifies that this Reply Brief complies with the requirements of Rule 7.1(d)(2). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 3,249 words, excluding caption and certificates of compliance and service. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ William W. Mercer
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