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

MONTANA ELDERS FOR A LIVABLE TOMORROW, MONTANA ENVIRONMENTAL INFORMATION CENTER, and the MONTANA CHAPTER OF THE SIERRA CLUB, Plaintiffs, vs. U.S. OFFICE OF SURFACE MINING, an agency within the U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR, a federal agency, ROBERT POSTLE, in his official capacity as Program Support Division Manager of U.S. Office of Surface Mining Western Region; DAVID BERRY, in his official capacity as	Case No. 9:15-cv-106-DWM PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Regional Director of U.S. Office of Surface Mining Western Region; JOSEPH PIZARCHIK, in his official capacity as Director of U.S. Office of Surface Mining; JANICE SCHNEIDER, in her official capacity as Assistant Secretary of Land and Minerals Management of the U.S. Department of the Interior, and SALLY JEWELL, in her official capacity as Secretary of the Department of the Interior

Defendants,

And

SIGNAL PEAK ENERGY, LLC,

Intervenor-Defendant.

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INTRODUCTION

Plaintiffs Montana Elders for a Livable Tomorrow, Montana Environmental Information Center, and the Montana Chapter of the Sierra Club (collectively, "Montana Elders") respectfully submit this brief in support of summary judgment.

Under pressure from Signal Peak Energy to hastily approve its massive coal mine expansion, Federal Defendants issued an environmental assessment (2015 Mining Plan EA or final EA) and finding of no significant impact (FONSI) that were arbitrary and capricious in multiple respects.

In so doing, they green-lighted a coal export project that will **harm** national energy security, while threatening to destroy a fragile ecosystem and impose hundreds of millions of dollars in environmental harms on the public.

STATEMENT OF FACTS

Montana Elders file their Statement of Undisputed Facts concurrently with this brief.

STANDARD OF REVIEW

A party is entitled to summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts reviewing claims under the National Environmental Policy Act (NEPA) pursuant to the Administrative Procedure Act (APA), "shall hold

unlawful and set aside agency action . . . found to be . . . arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). An agency action is 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. v. State Farm, 463 U.S. 29, 43 (1983).

ARGUMENT

A. Montana Elders Have Standing.

To establish standing a plaintiff must show that "(1) he or she has suffered an injury in fact that is concrete and particularized, and actual and imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015).

> Environmental plaintiffs adequately allege 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. Once plaintiffs seeking to enforce a procedural requirement establish a concrete injury, the causation and redressability requirements are relaxed.

Id. (internal quotations and citations omitted). An association has standing to sue when members would have standing in their own right. *WildEarth Guardians*, 795 F.3d at 1154.

Here, Montana Elders have standing based on the standing of their members James Jensen and Paul Smith, DO. *See* Jensen Decl. ¶¶ 2-14; Smith Decl. ¶¶ 9-20.

B. The Purpose and Need Statement Was Arbitrary and Capricious.

A NEPA analysis must state the purpose necessitating the proposed action. 40 C.F.R. §§ 1502.13, 1508.9(b) (environmental assessment must discuss the "need for the proposal"). "An agency must look hard at the factors relevant to definition of purpose . . . ." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013). "[M]ore importantly than the need to take private interests into account, **an agency should always consider the views of Congress, expressed . . . in the agency's statutory authorization to act, as well as in other congressional directives**." *Nat'l Parks Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070 (9th Cir. 2009) (emphasis added) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)). While an agency may include private goals in its statement, it may not do so in a way that ignores public goals or "preordain[s]" "the outcome" of its decision. *Alaska Survival*, 705 F.3d at 1085; *Nat'l Parks*, 606 F.3d at 1071-72.

Here, Federal Defendants included the views of Congress in the draft EA, but removed them from the final EA, after it became clear that the public goals would conflict with the private goals of Signal Peak's export plans. The draft EA stated the mine expansion was needed to "meet the nation's future energy needs"

and provide the public with a "reliable supply of low sulfur coal for power generation." SUF ¶¶ 29, 59-60. This aligned with the Office of Surface Mining's organic statute, the Surface Mining Control and Reclamation Act, one stated purpose of which is to "assure . . . the coal supply essential to the Nation's energy requirements." 30 U.S.C. § 1202(f). It also aligns with the policy of the Energy Policy Act of 2005: to "promote . . . energy security, diversity, and economic competitiveness benefits that result from the increased use of coal." 42 U.S.C. § 13571. This was the stated goal for the 2011 Lease. SUF ¶¶ 29, 60. The draft EA also stated that the mine expansion was needed to generate public revenue. SUF ¶ 59. This aligned with the congressional goal of the Federal Coal Leasing Amendments Act to assure a "fair return to the public" from federal coal. H.R. Rep. No. 94-681 (1975).

In the final EA, however, Federal Defendants jettisoned consideration of domestic energy supply. SUF ¶ 64. They explained: "the sentences discussing the National Energy Policy Act have been deleted due to the percentage [95%] of Bull Mountains No. 1 Mine [sic] that is exported." SUF ¶ 65. Upon deleting this reference, Federal Defendants never again discussed, in either the 2015 Mining Plan EA or any decision document, the conflict between Signal Peak's export plans and congressional energy policy. Coal exports not only deprive the United States of a non-renewable energy source, but also place "upward pressure on coal prices"

and "raise the price of electricity generated by coal." SUF ¶ 127. Thus, the project was **antithetical** to congressional energy policy. The final EA also removed the congressional goal of producing public revenue, SUF ¶¶ 63-64, presumably to avoid addressing the controversy surrounding coal valuation and monetizing the staggering cost of coal combustion to the public, *see* SUF ¶¶ 62, 65, 105, 115-119, 126-129.

Instead, the final purpose and need statement centered on Signal Peak's private goals and timelines:

- The mine expansion "would allow SPE [Signal Peak] to conduct coal mining and reclamation operations within the coal lease and economically recover Federal, state, and private coal reserves through a logical mining unit."
- "Longwall panel development mining (room and pillar) must be completed well in advance of longwall mining and would cease within approximately six months if the Federal mining plan modification is not approved."
- "The Proposed Action is needed to allow the lessee to exercise their right to mine leased Federal coal resources and would extend the life of the mine by 9 years." SUF ¶ 64.

As in *National Parks*, the statement "sets out . . . private objectives as defining characteristics of the proposed project." 606 F.3d at 1072. Further, by removing consideration of congressional goals that conflicted with Signal Peak's export plans and adopting Signal Peak's goals and abbreviated timeline, the final purpose and need statement "preordained" Federal Defendants' approval of the mine expansion and issuance of a FONSI. *Alaska Survival*, 705 F.3d at 1084; *Nat'l Parks*, 606 F.3d at 1070. This may have been consistent with the agencies' pledge to "very quickly create an EA that will support the mining plan decision document," SUF ¶ 51, but it was contrary to their obligation to "consider the views of Congress." *Nat'l Parks*, 606 F.3d at 1070. Thus, the purpose and need statement was arbitrary and capricious.

C. Federal Defendants Failed to Take a Hard Look at Indirect and Cumulative Effects of Coal Transportation and Coal Combustion.

NEPA requires agencies to evaluate "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii). Agencies preparing an EA must consider "the environmental impacts of the proposed action," including direct, indirect, and cumulative effects. 40 C.F.R. §§ 1508.9(b), 1508.25(c). Indirect effects are "caused by the action" and "later in time or farther removed in distance, but . . . still reasonably foreseeable." *Id.* § 1508.8(b). Consideration of secondary or indirect impacts "may often be

more important than consideration of primary impacts." *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975).

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 regardless of what agency . . . or person undertakes such other actions." 40 C.F.R. § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id*. To demonstrate an agency failed to conduct an adequate cumulative impacts analysis, a plaintiff "must show only the potential for cumulative impact." *Te-Moak Tribe v. U.S. Dep't of Interior*, 608 F.3d 592, 605-06 (9th Cir. 2010).

1. Coal Trains and Coal Exports

(a) Indirect Effects

The 2015 Mining Plan EA admitted approving the mine expansion would lead to coal trains and associated impacts: "The impacts of . . . shipping . . . the coal are considered in this EA because it is a logical consequence of approving a mining plan." SUF ¶ 70.

Coal from the mine is railroaded to two destinations: Westshore Terminal in British Columbia, Canada, from which the coal is shipped to Asia, and a terminal in Duluth, Minnesota/Superior Wisconsin, from which it is shipped mainly to

Europe, with a fraction going to Ohio. SUF ¶ 75. The 2015 Mining Plan EA calculated the rail miles that the coal would travel and the resultant greenhouse gas emissions. SUF ¶ 75.

While the 2015 Mining Plan EA calculated the greenhouse gas emissions from coal trains, it failed entirely to assess any other impacts of coal trains, such as the health impacts of diesel emissions, coal dust, noise, and vibrations; the economic impacts of rail congestion; and the environmental effects of coal dust polluting waterways that the trains cross. SUF ¶¶ 80-94. Throughout the Pacific Northwest there has been a firestorm of public outcry and concern about such impacts from trains exporting coal. SUF ¶¶ 80-84, 90. The 2015 Mining Plan EA's complete failure to assess foreseeable effects that Federal Defendants admitted would result from approval of the mine expansion was arbitrary and capricious. *See City of Davis*, 521 F.2d at 677 (failure to consider indirect effects unlawful); *accord California v. U.S. DOT*, 260 F. Supp. 2d 969, 947-78 (N.D. Cal. 2003).

In response to comments, Federal Defendants presented three excuses for failing to assess non-greenhouse gas impacts of coal trains, but none has merit. First, their asserted "uncertainty regarding . . . transportation routes," SUF ¶ 77, is legally untenable and belied by the record. "Reasonable forecasting and speculation is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future

environmental effects as 'crystal ball inquiry.'" *City of Davis*, 521 F.2d at 676 (quoting *Scientists' Instit. for Pub. Info. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)). Thus, uncertainty is no basis for ignoring potentially significant impacts. Indeed, an agency's "lack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 870-71 (9th Cir. 2004) (quoting *Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001)); *accord* 40 C.F.R. § 1508.27(b)(5).

Further, evidence in the record showed exactly where Signal Peak's coal trains are traveling, the routes they are taking now, and the routes they will be able to take in the future. The 2015 Mining Plan EA itself admits Signal Peak is shipping coal to only two rail destinations: Westshore terminal in British Columbia and an terminal on the Great Lakes. SUF ¶¶ 75, 78. Most of the coal is traveling to Canada to be exported to Asia. SUF ¶ 75. The EA calculated the distance that the trains were expected to travel, assuming the coal would travel by train to "Puget Sound." SUF ¶¶ 75, 76. Coal trains from the mine can take two routes west across Montana to Westshore and two routes east to Duluth/Superior. SUF ¶¶ 39-41. At present, most trains from the mine move west on the southern line through Bozeman, Helena, and Missoula, Montana. SUF ¶ 39. It is foreseeable Signal Peak will continue to ship coal to west coast ports, because Signal Peak announced its

intention to do so, purchased export capacity at the Westshore Terminal, and is seeking long-term contracts to "lock in coal supply [to Asia] for 10-15 years." SUF ¶¶ 33-38. Federal Defendants' claimed uncertainty is legally and factually untenable.

Federal Defendants' second excuse—a supposed "absence of methods to reasonably evaluate specific impacts" of coal trains—is also belied by the record. As noted, the record revealed where and by what route the trains are traveling. Further, numerous groups, including academics, businesses, and federal agencies, have evaluated various aspects of the social and environmental impacts of coal trains. SUF ¶ 85. Thus, methods exist to evaluate impacts of coal trains. *See Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (agency must describe the nature of impacts, even if it does not know exactly where they will occur); *see also id.* at 535-41 (evaluating methods for assessing train impacts); 40 C.F.R. § 1502.22(b) (describing procedure to evaluate potential effects in light of incomplete or unavailable information).

Finally, Federal Defendants' are mistaken in asserting that non-greenhouse gas impacts of coal trains were adequately assessed in a 1992 EIS that assessed impacts of train traffic for a mine with maximum production of 3.3 million tons annually. SUF ¶¶ 22, 26. The current mine expects to produce four to five times that amount (12-15 million tons). SUF ¶ 26. Plus, the 1992 EIS only analyzed

impacts over the spur rail from the mine to the railroad mainline at Broadview, Montana; it did not address impacts from coal dust. SUF ¶ 22. Thus, the 1992 EIS did not adequately assess the impacts of the mine expansion. *See Pit River Tribe v. USFS*, 469 F.3d 768, 784 (9th Cir. 2006) (tiering to prior analysis insufficient if prior analysis "did not consider the impacts" at issue).

(b) Cumulative Effects

Montana Elders submitted information regarding six proposed coal export terminals or terminal expansions proposed in the Pacific Northwest. SUF ¶¶ 95-97. Together the terminals could export 140 million tons of coal, causing 27-63 additional coal trains to cross the same rail routes through the Pacific Northwest every day. SUF ¶ 95. Potentially significant cumulative impacts could result from coal train traffic from the proposed export terminals along with the trains transporting up to 15 million tons of coal from the Bull Mountains Mine. SUF ¶¶ 81-97. The 2015 Mining Plan EA entirely failed to assess the potential cumulative impacts. In their response to comments, Federal Defendants failed to provide any explanation for failing to consider cumulative impacts of coal trains. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d, 1208, 1213 (9th Cir. 1998) (failure to respond to comments raising issue indicium that agency failed to take hard look at issue).

The complete failure to consider cumulative impacts of coal trains was arbitrary and capricious. *Helena Hunters & Anglers v. Tidwell*, 841 F. Supp. 2d 1129, 1139 (D. Mont. 2009) (complete failure to discuss potential cumulative impact in environmental assessment inadequate); *Ocean Advocates*, 402 F.3d at 868-70 (agency failed to consider cumulative effects of boat traffic and additional oil tanker traffic from construction new pier at oil refinery); *California*, 260 F. Supp. 2d at 974-75 (agency failed to address cumulative indirect effects of "other currently proposed projects").

2. Coal Combustion

Federal Defendants concede, as they must, that "combusting the coal . . . is a logical consequence of approving a mining plan." SUF ¶ 98. "[I]t is likely that the coal would be used by coal-fired power plants to generate electricity." SUF ¶ 98. Federal Defendants' analysis of combustion-related impacts, however, was incomplete and arbitrary.

(a) Non-greenhouse Gas Emissions

Non-greenhouse gas air pollution from coal combustion—such as particulate matter, oxides of nitrogen, oxides of sulfur, mercury, and a wide range of carcinogenic chemicals—has widespread impacts on human health and causes tens of thousands of premature deaths annually wherever it is burned, be it the United States, Europe, or Asia. SUF ¶¶ 100-104, 106. The economic impact of this

pollution is staggering, costing the public tens to hundreds of billions of dollars annually. SUF ¶ 105.

The proposed mine expansion would cause the combustion of a significant amount of coal: 135-176 million tons of coal, mined at a rate of 12 million tons per year, would constitute about 1% of all coal mined in the United States and would lead to annual greenhouse gas emissions greater than the largest emitting coal plant in the Nation. SUF ¶¶ 42, 47, 118. Despite admitting the foreseeability of coal combustion and the potentially significant impacts, the EA failed entirely to assess any non-greenhouse gas pollution impacts that would result, which was was arbitrary and capricious. *See, e.g., S. Fork Band v. U.S. Dep't of Interior*, 588 F.3d 718, 725 (9th Cir. 2009) (failure to consider air pollution from transportation and processing of ore from mine expansion was arbitrary and capricious).[1]

Federal Defendants,' in response to comments, argued that assessing non-greenhouse gas pollution from coal combustion would be speculative due to

[1] *Accord Diné CARE v. Office of Surface Mining*, 82 F. Supp. 3d 1201, 1214, 1218 (D. Colo. 2015), *vacated as moot*, 643 Fed. App'x 799 (10th Cir. 2016) (memo) (complete failure of EA for mine expansion to consider mercury emissions from coal combustion violated NEPA); *accord WildEarth Guardians v. Office of Surface Mining*, 104 F. Supp. 3d 1208, 1229-31 (D. Colo. 2015), *vacated as moot*, 652 Fed. App'x 717 (10th Cir. 2016) (memo); *see also High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1189-1193 (D. Colo. 2014) (finding failure of EIS for rule that allowed development of coal mines to disclose greenhouse gas emissions from coal combustion violated NEPA).

uncertainty about "combustion locations" and "emissions controls"—this argument is without merit. SUF ¶ 108. As noted, because reasonable forecasting is implicit in NEPA, uncertainty is no basis for failing to assess impacts. *City of Davis*, 521 F.2d at 676. If anything, it supports preparing an EIS. *Ocean Advocates*, 402 F.3d at 870-71; 40 C.F.R. § 1508.27(b)(5). Further, though the ultimate locations of the coal combustion and emission controls that will be in place are unknown, there is no evidence to suggest that combustion will emit zero pollution, *cf.* SUF ¶¶ 100-107; however, by failing entirely to acknowledge or assess impacts of non-greenhouse gas emissions, that is precisely the impression Federal Defendants gave. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008) (arbitrary and capricious for agency to fail to assign value to greenhouse gas pollution, even though evidence showed damage from such pollution was certain to occur). Federal Defendants could have, for example, described the nature of health impacts that occur from coal combustion. *See, e.g.*, *Mid States Coal. for Progress*, 345 F.3d at 549-50 ("[W]hen the **nature** of the effect is reasonably foreseeable but its extent is not, we think that the agency may not simply ignore the effect.").

(b) Greenhouse Gas Emissions

The 2015 Mining Plan EA also failed to adequately assess the indirect and cumulative impacts of greenhouse gas emissions from the mine expansion. The EA

quantified the life-cycle greenhouse gas emissions that would result from mining, shipping, and burning the coal from the mine expansion: 23.16 million metric tons of carbon dioxide, more than largest emitting coal plant in the Nation. SUF ¶ 118. But simply quantifying emissions is not sufficient; the agencies must also **evaluate** the impact. *Ctr. for Biological Diversity*, 538 F.3d at 1216.

Federal Defendants, however, denied any ability to "ti[e]" "any given level of emissions . . . back to a quantifiable effect on climate change." SUF ¶ 120. But, as the U.S. Federal District Court for the District of Colorado observed in an analogous case, "a tool is and was available: the social cost of carbon protocol." *High Country*, 52 F. Supp. 3d at 1190; SUF ¶¶ 115-117. "The protocol"—developed by a dozen federal agencies composing the U.S. Interagency Working Group on the Social Cost of Carbon—"is designed to quantify a project's contribution to costs associated with global climate change." *High Country*, 52 F. Supp. 3d at 1190; SUF ¶¶ 115-116 ("The SCC [social cost of carbon] is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year."). Federal Defendants were aware of this protocol when they prepared the EA. SUF ¶ 116. It was arbitrary and capricious and counter to evidence before the agency for Federal Defendants to refuse to quantify effects of the expansion's greenhouse gas emissions on the basis that "the state of climate science does not allow it"—because the state of climate science

and environmental economics, in fact, allows it. *See High Country*, 52 F. Supp. 3d at 1192; *see also* 40 C.F.R. § 1502.22(b) (elaborating process for agencies to address incomplete or unavailable information).

Further, while NEPA does not require agencies to conduct cost-benefit analysis, 40 C.F.R. § 1502.23, it is "arbitrary and capricious to quantify the **benefits** of [an action] and then explain that a similar analysis of the **costs** [is] impossible when such an analysis [is] in fact possible." *High Country*, 52 F. Supp. 3d at 1191.[2] Here, Federal Defendants justified their FONSI, in part, on the basis of "continuation of gainful employment at the mine, royalty and tax benefits." SUF ¶ 134. They quantified payroll and annual public tax revenues (about $24 million) and stated that such benefits would be eliminated if the mine were not allowed to expand. SUF ¶ 134. However, as in *High Country*, Federal Defendants then declined to quantify the economic costs of greenhouse gas emissions, claiming

[2] *Accord* 42 U.S.C. § 4332(2)(B) (requiring agencies to develop procedures to "insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations"); *Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983) (agency may not present economic analysis in misleading way to give impression that benefits exceed costs, when evidence suggests the contrary); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446-48 (4th Cir. 1996) ("[I]t is essential that the EIS not be based on misleading economic assumptions."); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (if agency "trumpets" economic benefits, it must also disclose costs); *see also Ctr. for Biological Diversity*, 538 F.3d at 1200 (misleading to present economic analysis without assigning any cost to greenhouse gas emissions).

there was no way to do so—when in fact there was. SUF ¶¶ 115-117, 120. This was likely because, as in *High Country*, 52 F. Supp. 3d at 1190, and *Johnston*, 698 F.2d at 1094-95, the costs outweighed the benefits—here, by an order of magnitude. *Compare* SUF ¶ 119, *with* SUF ¶ 134.

Federal Defendants' excuses for not using the social cost of carbon lack merit. First, the record contradicts their assertion that the overall amount of coal burned would not change because "[t]he coal used by the target power plants [in Ohio] could be provided by Powder River Basin mines rather than the Bull Mountains Mine No. 1." SUF ¶¶ 121-122. In fact, almost none of the coal is being shipped to Ohio anymore, but instead 95% is being shipped overseas to Asia and Europe. SUF ¶¶ 74-75. Plus, the record showed coal exports to Asia would not just displace other coal, but would lead to greater overall coal consumption. SUF ¶¶ 123-124. The agencies presented no evidence to the contrary. Absent evidence in the record to support their contention—and there is none here—federal agencies may not ignore foreseeable impacts on the basis that market forces would cause them to occur in any event. The Court in *High Country* rejected precisely this argument, calling it "illogical at best" and noting that "increased availability of inexpensive coal will at the very least make coal a more attractive option to future entrants into the utilities market when compared with other potential fuel sources,

such as nuclear power, solar power, or natural gas." 52 F. Supp. 3d at 1197 (quoting *Mid States Coal. for Progress*, 345 F.3d at 549); *accord* SUF ¶¶ 123-124.

The holding in *High Country* is consistent with long-standing Ninth Circuit precedent. *Ocean Advocates*, 402 F.3d at 869 (rejecting "unsubstantiated" argument that increased boat traffic "result from market forces," rather than proposed dock for refinery); *City of Davis*, 521 F.2d at 674-75 (rejecting unsupported assertion by agency that growth would result from "inevitable industrial development," rather than construction of highway interchange in rural area); *accord, e.g.*, *California*, 260 F.2d at 974-78 (same).

Federal Defendants' second argument—that use of the social cost of carbon to quantify climate impacts from the mine expansion "would be misleading" "without a complete monetary cost-benefit analysis which includes the social benefits of energy production," SUF ¶ 125—is equally unavailing. In fact, it was the agencies' omission of any discussion of the social cost of carbon that was misleading. The agency trumpeted the public economic benefit of the project—$24 million contribution in tax revenues and a monthly payroll of $400,000—and warned that these benefits would be lost if the agencies selected the "no action" alternative. SUF ¶ 134. On the other hand, the agencies refused to monetize the costs of the mine expansion's climate impacts—which under the Federal Government's own protocol would amount to at least a quarter billion dollars

annually—and dismissed them as "negligible." SUF ¶ 121. As in *High Country*, *Center for Biological Diversity*, and *Johnston*, this selective presentation of economic impacts was misleading to the public and decisionmakers. *See supra* note 2 and accompanying text.

Moreover, Federal Defendants skewed their consideration of alternatives and economic impacts by claiming that if they rejected the proposed expansion in favor of the "no action" alternative, all the economic benefits would disappear, SUF ¶ 134, yet all of the greenhouse gas emissions and associated harm would occur anyway (even in the "no action" alternative). SUF ¶¶ 121-122. They cannot have it both ways. They cannot credibly claim that shifting production to other mines in the region would wipe out jobs and taxes, while asserting that overall production and emission levels would remain the same. Doing so inflates the benefits of their action, while minimizing one of the most significant impacts of the action. *See NRDC v. USFS*, 421 F.3d 797, 811 (9th Cir. 2005) ("Inaccurate economic information may defeat the purpose of an EIS by impairing the agency's consideration of the adverse environmental effects and by skewing the public's evaluation of the proposed agency action.").

Finally, Federal Defendants' assertion that consideration of the social costs of carbon would be "misleading" without considering unidentified "social benefits" of the mine expansion (other than public revenue and employment) is

without **any** support. On the contrary, the record shows that the externalities (i.e., social impacts) of energy from coal are tremendous and **exceed** the social benefits of coal production. SUF ¶¶ 104-105. Thus, the agencies' explanation "runs counter to the evidence before the agency." *Motor Vehicle Mfrs.*, 463 U.S. at 43. Any uncertainty or controversy surrounding the accuracy or applicability of the social cost of carbon supports an EIS. *Ocean Advocates*, 402 F.3d at 870-71; 40 C.F.R. § 1508.27(b)(4)-(5).

D. Federal Defendants' Decision Not to Prepare an EIS Was Arbitrary and Capricious.

NEPA requires federal agencies to prepare an environmental impact statement for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "An EIS **must** be prepared if substantial questions are raised as to whether a project **may** cause significant degradation of some human environmental factor." *Ocean Advocates*, 402 F.3d at 864 (internal quotation, ellipsis, and bracket omitted) (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)). "To trigger this requirement a plaintiff need not show that significant effects **will in fact occur**, but raising substantial questions whether a project may have a significant effect is sufficient." *Id.* (internal quotation and bracket omitted) (quoting *Idaho Sporting Cong.*, 137 F.3d at 1150). If an agency opts not to prepare an EIS, and issues a

FONSI, "[t]he FONSI must contain a 'convincing statement of reasons' why the project's impacts are not significant." *Ctr. for Biological Diversity v. BLM*, 937 F. Supp. 2d 1140, 1153 (N.D. Cal. 2013) (quoting *Blue Mountains Biodiversity Project*, 161 F.3d at 1211).

To determine significance, Council for Environmental Quality (CEQ) regulations require agencies to consider the context and intensity of the proposed action. 40 C.F.R. § 1508.27(a)-(b). Context requires consideration of the action in various contexts, including "the affected region," and short- and long-term effects. *Id.* § 1508.27(a). To assess the intensity of the impact, agencies must address a non-exclusive list of factors. *Id.* § 1508.27(b); *Helena Hunters & Anglers*, 829 F. Supp. 2d at 1135. The presence of "one of these factors may be sufficient to require preparation of an EIS." *Ocean Advocates*, 402 F.3d at 865.

"In determining whether to prepare an environmental impact statement the Federal agency shall . . . [d]etermine under its procedures supplementing [CEQ] regulations . . . whether the proposal is one which . . . [n]ormally requires an environmental impact statement." 40 C.F.R. § 1501.4(a)(1).

1. Federal Defendants Failed to Consider Their Own Guidance in Assessing Whether to Prepare an EIS.

Defendant Office of Surface Mining has guidance for determining what actions normally require preparation of an EIS. Department of the Interior,

Departmental Manual, Part 516, Chapter 13 (516 DM 13). Under these guidelines, the agency "normally" should prepare an EIS if a proposed "surface mining operation"[3] meets three criteria:

> (a) The environmental impacts of the proposed mining operation are not adequately analyzed in an earlier environmental document covering the specific leases or mining activity; and
>
> (b) The area to be mined is 1280 acres or more, or the annual full production level is 5 million tons or more; and
>
> (c) Mining and reclamation operations will occur for 15 years or more.

516 DM 13.4(A)(4). The massive expansion of the Bull Mountains Mine exceeds these criteria. SUF ¶¶ 42, 47. Federal Defendants admitted prior analyses had not adequately evaluated the expansion, SUF ¶ 49, the mine will produce 12-15 million tons annually, SUF ¶ 47, and mining and reclamation operations will occur over 19 years. SUF ¶ 42 (9 years mining); Mont. Code Ann. § 82-4-235(2) (requiring 10 years reclamation).

The Office of Surface Mining did not consider these facts at all and, consequently, violated NEPA by failing to "[d]etermine under its procedures supplementing [CEQ] regulations . . . whether the proposal is one which . . . [n]ormally requires an environmental impact statement." 40 C.F.R. § 1501.4(a)(1).

[3] "[S]urface coal mining operations" includes "surface impacts incident to an underground coal mine" and all adjacent land affected by activities incidental to the operation. 30 U.S.C. § 1291(28).

2. Federal Defendants Failed to Present a Convincing Statement of Reasons for Not Preparing an EIS.

(a) Context

Federal Defendants' FONSI mischaracterized the mine expansion as a "site-specific action involving lands that are entirely within the boundaries of the Bull Mountains Mine No. 1 State mine permit." SUF ¶ 132. The agencies ignored the regional and global impacts from the multiple coal trains traveling each day from the mine to ports in Canada and on the Great Lakes and thence to power plants in Asia and Europe. SUF ¶ 75. The record shows the mine is not a "site specific action" isolated in the Bull Mountains, but instead is an international coal mining and shipping operation, with impacts stretching around the globe. The FONSI also ignores that the mine and its resultant pollution is uniquely large on a national scale. The expansion will allow the mine to double in size to 14,000 acres and become the largest underground coal mine by production in the U.S., SUF ¶¶ 42-43, with annual greenhouse gas emissions greater than the largest power plant in the country. SUF ¶ 118; *see Anderson v. Evans*, 371 F.3d 475, 487, 489-92 (9th Cir. 2004) (EIS required due to uncertain effects in local context of action).

The FONSI also fails entirely to acknowledge harmful long-term impacts; specifically, that eventual exhaustion of the coal resource will cause "major and negative impacts over the long term" to "public sector fiscal conditions in

Musselshell County." SUF ¶ 19; *cf.* 40 C.F.R. § 1508.27(a) ("Both short- and long-term effects are relevant."); *Native Fish Soc'y v. NMFS*, 992 F.Supp. 2d 1095, 1109 (D. Or. 2014) (error for FONSI to ignore problems identified in record).

(b) Intensity

Analysis of the intensity factors of 40 C.F.R. § 1508.27(b) further demonstrates that Federal Defendants failed to make a convincing statement that an EIS was not required. Initially, the agencies' complete failure to assess any impacts—other than greenhouse gas emissions—from foreseeable coal train traffic distorted their assessment of multiple factors. *See Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1157 (agency's complete failure to consider oil and gas "fracking" distorted FONSI's assessment of various intensity factors).

(i) Coal Trains

First, the FONSI ignored the firestorm of controversy surrounding coal trains. A proposal is controversial when there are "substantial questions" about the "size, nature, or effect" of an action. *Id.* "If evidence is raised prior to the preparation of the FONSI that 'casts serious doubt upon the reasonableness of an agency's conclusions,' then the burden shifts to the agency to demonstrate why those responses 'do not create a public controversy.'" *Id.* (quoting *Nat'l Parks Conservation Ass'n*, 241 F.3d at 736).

Montana Elders submitted comments demonstrating that hundreds of elected officials, health professionals, businesses, and faith leaders, as well as Northwest Tribes and many municipalities, including the City Council of Missoula, and the boards of health of Gallatin and Lewis and Clark Counties, have raised concerns about myriad impacts from coal trains exporting coal through the Pacific Northwest—which is precisely what Signal Peak intends to do with the coal from the mine expansion. SUF ¶¶ 32-36, 74-97. Thus the burden shifted to Federal Defendants to demonstrate that they did not constitute a public controversy. They did not carry this burden, but declined to discuss coal trains at all in their assessment of controversy. SUF ¶ 132.

The expected coal trains from the mine expansion also raised substantial questions about impacts to public health, 40 C.F.R. § 1508.27(b)(2), uncertain or unknown risks, *id.* § 1508.27(b)(5), potential cumulatively significant impacts, *id.* § 1507.27(b)(7), and potential adverse effects to endangered species, *id.* § 1507.27(b)(9). *See* SUF ¶¶ 74-97. The FONSI, like the 2015 Mining Plan EA, ignored these impacts altogether. SUF ¶ 132; *see also supra* Part C.1. Though the agencies' response to comments claimed impacts from coal trains were **uncertain**, they did not consider this uncertainty in their FONSI, but instead improperly used it as a basis for ignoring the impacts altogether. SUF ¶ 77; *see supra* Part C.1.a.

(ii) Air Pollution

The record and Federal Defendants' response to comments demonstrate that the impacts of the project's life-cycle air pollution emissions are highly uncertain and highly controversial. 40 C.F.R. § 1508.27(b)(4)-(5). First, Montana Elders presented evidence that based on a protocol developed by the federal government, the projected life-cycle greenhouse gas emissions from the project would cause, at a minimum, a quarter billion dollars in climate change related harm annually. SUF ¶¶ 115-119. Federal Defendants on the other hand insisted that the impacts from the emissions would be "negligible." SUF ¶ 121. Further, they refused to use the social cost of carbon to assess the impacts of emissions on the basis that it would be "misleading" without also considering certain unidentified "social benefits of energy production." SUF ¶ 125. At most the agencies' response is inconsistent with the record and arbitrary, *see supra* Part C.2.b, but at least it is an assertion that the net harm caused by the mine expansion's greenhouse gas emissions is highly uncertain and controversial. *E.g.*, *Anderson*, 371 F.3d at 490 (significant disagreement about project's impacts shows controversy).

Second, Federal Defendants attempted to excuse their complete failure to assess impacts from non-greenhouse gas emissions that would result from coal combustion, again, due to **uncertainty** about the locations of combustion and pollution controls. SUF ¶ 108. Montana Elders presented substantial information

about the potentially significant health effects of air pollution from the 135-176 million tons of coal from the mine expansion. SUF ¶ 100-107. Thus, the FONSI's conclusion that there "are no anticipated effects on the human environment that are considered to be highly uncertain or involve unique or unknown risks," SUF ¶ 132, is contradicted by the agencies' own statement. As such, the FONSI was arbitrary and capricious. *See Helena Hunters & Anglers*, 829 F. Supp. 2d at 1136 (inconsistent analysis of impacts arbitrary).

(iii) Wetlands

In assessing significance, an agency must consider "[u]nique characteristics of the geographic area such as . . . wetlands." 40 C.F.R. § 1508.27(b)(3). Here, the FONSI failed entirely to assess whether the mine expansion would impact wetlands. SUF ¶ 133. The 2015 Mining Plan EA, however, determined that the mine expansion may dewater some of the area's sparse, but ecologically critically, spring-fed wetlands (SUF ¶ 10) and, further, that the impacts would not be able to be mitigated due to legal limitations on the availability of replacement water: "options to replace springs with continuously pumping and discharging wells are limited by state law. Depending on the site and degree of impact to spring discharge, some channel segments may not exhibit intermittent or perennial flow after mining." SUF ¶¶ 67-68. Obtaining replacement water to mitigated dewatered springs is further hampered, the EA noted, by the fact that the mine is "located in

the Musselshell River Basin, which is closed to new appropriations." SUF ¶ 67. The inconsistency between the EA's statement that some streams will be dewatered permanently, and the FONSI's complete failure to include impacts to wetlands in its significance assessment demonstrates that the agency "did not properly consider this factor." *Helena Hunters & Anglers*, 841 F. Supp. 2d at 1135-36; *see W. Land Exch. Project v. BLM*, 315 F. Supp. 2d 1068, 1093 (D. Nev. 2004) (issuance of FONSI improper due to uncertainty about obtaining water in fully appropriated watershed).

CONCLUSION

Montana Elders respectfully request that this Court grant its motion for summary judgment, set aside Federal Defendants' actions, and remand the matter for a lawful NEPA review.

Respectfully submitted this 4th day of November 2016.

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CERTIFICATE OF SERVICE

I, the undersigned counsel of record, hereby certify that on this 4th day of November, 2016, I filed a copy of this document electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing.

/s/ Shiloh Hernandez
Shiloh Hernandez

CERTIFICATE OF COMPLIANCE

I, the undersigned counsel of record, hereby certify that this brief is double-spaced, has a typeface of 14 points or more, and contains 6,479 words, excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index. I relied on Microsoft Word to obtain the word count.

/s/ Shiloh Hernandez
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