Shiloh S. Hernandez
Western Environmental Law Center
103 Reeder's Alley
Helena, Montana 59601
(406) 204-4861
hernandez@westernlaw.org

Laura H. King
Western Environmental Law Center
103 Reeder's Alley
Helena, Montana 59601
(406) 204-4852
king@westernlaw.org

Attorneys for Plaintiffs

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

MONTANA ELDERS FOR A LIVABLE TOMORROW, et al., Plaintiffs, vs. U.S. OFFICE OF SURFACE MINING, et al., Defendants.	Case No. 9:15-cv-106-DWM PLAINTIFFS' COMBINED RESPONSE/REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

EXHIBITS

Exhibit 1 Memorandum from Christina Goldfuss, Council on Envtl. Quality, to Heads of Federal Departments & Agencies (Aug. 1, 2016) [CEQ, NEPA Climate Guidance]

ABBREVIATIONS

CO_2	Carbon Dioxide
EA	Environmental Assessment
EIS	Environmental Impact Statement
FONSI	Finding of No significant Impact
GHG	Greenhouse Gas
NEPA	National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370h
OSMRE	U.S. Office of Surface Mining Reclamation and Enforcement
SMCRA	Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328

Plaintiffs Montana Elders for a Livable Tomorrow et al. (collectively, "Montana Elders" or "Elders"), respectfully file this combined response/reply.

I. INTRODUCTION

At bottom the National Environmental Policy Act (NEPA) requires agencies to tell the environmental truth about the impacts of their actions. It then relies on "democratic processes" to assure that the "most intelligent, optimally beneficial decision will ultimately be made." *Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1099-100 (9th Cir. 2010) (quoting *Calvert Cliffs v. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)).

Here, Federal Defendants suppressed environmental truths about Signal Peak's proposed expansion and coal-export scheme for the Bull Mountains Mine. The agencies ignored:

- congressional policies encouraging domestic coal use and regional opposition to coal exports;
- widespread mortality and sickness from burning coal;
- economic harm of greenhouse gas (GHG) pollution from the mine, exceeding benefits by an order of magnitude; and
- long-term economic bust in Musselshell County, which will inexorably follow the mining boom.

When their environmental assessment (final EA) admitted mitigation of spring-fed wetlands may not be possible, they ignored the problem in their finding of no significant impact (FONSI). This thwarted the democratic process of public oversight.

II. ARGUMENT

A. Defendants' Standing Challenge Lacks Merit.

Addressing only injury-in-fact, the agencies mistakenly contend that Mr. Jensen's declaration provides "no information about the proximity of the areas" visited to the mine expansion. Doc. 48 at 9. In fact, Mr. Jensen regularly visits ranches of long-time friends, which "**will be undermined** by the Bull Mountains Mine." Doc. 41-1, ¶¶ 4-8 (emphasis added). Next, the agencies incorrectly assert that Mr. Jensen "focuses" on impacts to "his friends' ranching operations." Doc. 48 at 9. While Mr. Jensen is rightly concerned that the expansion "will . . . drive my friends' ranching operations out of business," he will also suffer personally:

> My aesthetic, personal, and recreational interests in the Bull Mountains will certainly be lessened by the proposed expansion of the mine. Given the time that I have spent trying to help residents of Roundup and the Bull Mountains protect the area from industrial development, I would likely significantly reduce the time I spend in the Bulls if the proposed expansion moves forward. I could not bear to see the area destroyed.

Id. ¶¶ 10-11. Further, unlike the declarant in *Lujan v. National Wildlife Foundation*, 497 U.S. 880, 886-87 (1990), who alleged use of "lands in the

vicinity" of a "vast tract of territory" of which only a small portion would be mined, Mr. Jensen regularly visits and uses specific lands that sit directly above the mine expansion. Doc. 41-1, ¶¶ 4-8.

The agencies object to injury from coal trains as a predicate for standing because coal trains are not in the "area of the proposed mine expansion." Doc. 48 at 9. However, *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 183 (2000), explained that a plaintiff need not visit the site of an operation, but only have "reasonable concerns" about downstream impacts. The Court found standing for a man who canoed "40 miles downstream" of the facility and was concerned about its pollution. *Id.*; *see Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1150 n.10 (9th Cir. 2000). *Laidlaw* is indistinguishable from Mr. Jensen's concerns about coal trains on the spur line at Broadview 35 miles from the mine. Doc. 41-1, ¶¶ 12, 13; AR:4-4-21420. *Laidlaw* also embraces Dr. Smith's concerns in western Montana, because unlike water pollution which is diluted as it flows downstream, coal trains are not diluted as they move down the tracks. *See* Doc. 41-2, ¶¶ 9-20.

Finally, Signal Peak's suggestion that intermittent visits to an area are insufficient is simply mistaken. *Ecological Rights Found.*, 230 F.3d at 1149-50 & n.10.

B. The Purpose and Need Statement Unlawfully Removed Statutory Objectives Because They Conflicted with Signal Peak's Goals.

The Surface Mining Control and Reclamation Act ("Surface Mining Law"), 30 U.S.C. § 1202(f), and the Energy Policy Act of 2005, 42 U.S.C. § 13571(1), establish congressional policy that coal mining should further national energy security. By removing this policy from the purpose and need statement because it conflicted with Signal Peak's export plans, the agencies improperly narrowed their analysis, making approval a foreordained formality. *Nat'l Parks Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070, 1072 (9th Cir. 2009); *see Anglers of the Au Sable v. USFS*, 565 F. Supp. 2d 812, 834-36 (E.D. Mich. 2008) ("[T]he agency impermissibly narrowed the range of alternatives by only considering those consistent with [proponent's] objectives, rather than [public] Forest Service goals."); *accord Simmons v. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997).

Federal Defendants take the mistaken litigation position[1] that they properly excluded congressional views on national energy security because "national energy security is a requirement under SMCRA [the Surface Mining Law], but not the MLA [Mineral Leasing Act], which governs the mining plan in issue here." Doc.

[1] *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) ("[A] court may uphold agency action only on the grounds that the agency invoked when it took the action.").

48 at 14. In fact, the regulations governing review of mining plan modifications were promulgated under the Surface Mining Law. *See* 48 Fed. Reg. 6912, 6912 (Feb. 16, 1983). Further, Federal Defendants recommended approval of the mine expansion pursuant to both the Mineral Leasing Act and the Surface Mining Law. AR:2-456-11333.

Federal Defendants cite *Westlands Water Dist. v. DOI*, 376 F.3d 853 (9th Cir. 2004), for the proposition that they had discretion to ignore statutory objectives that conflicted with Signal Peak's export goals. But *Westlands* is nothing like this case. There, the court held it was not arbitrary for a purpose and need statement to focus on a subset of statutory objectives. *Id.* at 866-67. There was no concern that the proposal actually conflicted with statutory objectives.

By contrast, here, Federal Defendants removed congressional objectives (national energy security) **because** they **conflicted** with Signal Peak's export scheme. Doc. 42, ¶¶ 63, 65. The final EA stated **no** statutory objectives or public goals, but exclusively the private goals of Signal Peak:

- "allow SPE [Signal Peak] to conduct coal mining . . . and economically recover Federal, state, and private coal . . . ."
- "[A]ction is needed to allow lessee to exercise their right to mine leased Federal coal . . . ."

- "Longwall panel development mining . . . would cease . . . if the Federal mining plan modification is not approved."
- "[U]nderground mining would cease completely within approximately 2.5 years [if the mining plan modification is not approved]."

Doc. 42, ¶ 64. Thus, the case is analogous to the canned analyses in *National Parks*, 606 F.3d at 1070, 1072, and *Anglers of the Au Sable*, 565 F. Supp. 2d at 834-36, not the limited statement of congressional views in *Westlands*, 376 F.3d 866-67.

Signal Peak contends that the final EA appropriately removed reference to national energy security because coal exports are not prohibited. Doc. 52 at 8. Aside from being an improper post hoc rationalization, the argument is a non-sequitur. Regardless of whether coal exports are prohibited, Congress has repeatedly stated that coal mining should further national energy security. 30 U.S.C. § 1202(f); 42 U.S.C. § 13571(1). This was the purpose for which the coal was leased. Doc. 42, ¶ 60. Coal exports increase domestic costs for coal and electricity, harming national energy security. *Id.* ¶ 127.[2] Signal Peak's observation that the Surface Mining Law has other objectives is irrelevant because Federal Defendants did not consider those objectives either. Doc. 42, ¶ 64.

[2] Accordingly, Signal Peak is wrong to suggest coal exports do not affect national energy security.

Defendants also contend it was sufficient for the final EA to state that the "purpose of the Proposed Action is to recommend approval, disapproval, or approval with conditions of the proposed mining plan modification." Doc. 42, ¶ 64; Doc. 48 at 13; Doc. 52 at 6. But this statement does not state **any** statutory objective. It simply recognizes Federal Defendants' **discretion** to approve **or deny** the application under 30 C.F.R. §§ 746.13, .14. The agencies impermissibly narrowed that discretion by identifying Signal Peak's private objectives (i.e., approval), exclusively, as the substantive purposes of the project. *See Nat'l Parks*, 606 F.3d at 1070, 1072; *Anglers of the Au Sable*, 565 F. Supp. 2d at 834-36.

Federal Defendants also contend that adoption of Signal Peak's private goals was permissible because of their "limited role of considering the modification plan submitted by" Signal Peak, and because their "objective was not to reanalyze the decision as to whether the coal should be developed—BLM already did that" when it leased the coal in 2011. Doc. 48 at 12-13.[3] But it is arbitrary for an agency to narrow its purpose and need statement and, accordingly, limit consideration of alternatives on the mistaken assumption that it lacks discretion to disapprove a permit application. *Anglers of the Au Sable*, 565 F. Supp. 2d at 834-36. Here,

[3] Signal Peak's export goals are, again, **contrary** to the purpose of the 2011 lease, which was to "meet the nation's future energy needs" and "reduc[e] . . . the U.S. dependence on foreign sources of energy." AR:4-4-21403.

again, Federal Defendants have **broad discretion** to deny a mine expansion based on a lengthy and open-ended list of factors. 30 C.F.R. §§ 746.13, .14. In fact, Signal Peak's lease was issued "subject to" applicable environmental and mining laws, which includes the agencies' discretion to disapprove a mining plan pursuant to 30 C.F.R. §§ 746.13, .14; AR:1-244-1382. Thus, the agencies' asserted lack of discretion to deny the application is mistaken and arbitrary. *Anglers of the Au Sable*, 565 F. Supp. 2d at 834-36.

Finally, Defendants contend that they included the "public goal" of "the need to economically recover federal coal reserves." Doc. 48 at 13-14; Doc. 52 at 7-8. This argument is specious. In fact, Federal Defendants **removed** considerations of public economic benefits after Montana Elders noted controversies about such purported benefits. Doc. 42, ¶¶ 59, 62, 64; AR:2-453-11240 to -11241. Thus, the final statement identified only the need to "allow **SPE** [Signal Peak] **to** . . . **economically recover** Federal, state, and private coal." *Id.* (emphasis added). Indeed, while the agencies vaunted economic benefits, they ignored economic costs, including the inevitable bust following mining, which will cause "major and negative impacts" to "public sector fiscal conditions in Musselshell County." Doc. 42, ¶ 19; *see also infra* Part D.2.

C. Federal Defendants Failed to Adequately Assess Indirect and Cumulative Effects of Coal Transport.

Federal Defendants and Signal Peak fail in their attempts to excuse the final EA's failure to consider non-GHG impacts from coal trains. First, Defendants' mistakenly contend that the final EA adequately evaluated coal train impacts by cobbling together prior references from a 1992 Environmental Impact Statement (EIS) and the 2011 Lease EA. Those prior references, however, are stale and based on significantly less coal production. The 1992 EIS was premised on annual production of 3.3 million tons of coal, resulting in one loaded train per day. Doc. 42, ¶¶ 22, 26. In 2011, BLM stated that the 1992 EIS was too "stale" and dissimilar to rely on. *Id.* ¶ 27; AR:3-24-12129. The 2011 Lease EA—which only mentions coal trains in two short sentences devoid of analysis—was premised on the then-current annual production level of 5 million tons of coal, resulting in three loaded trains per day. Doc. 42, ¶ 71; AR:4-4-21513, 21569. By 2013, Signal Peak was mining 12.2 million tons annually; the company is permitted to mine up to 15 million tons per year. *Id.* ¶ 72. Because current production is two to five times greater than the production considered in the 1992 EIS and 2011 Lease EA, Federal Defendants cannot rely on those prior evaluations. *Or. Envtl. Council v.*

Kunzman, 714 F.2d 901, 905 (9th Cir. 1983) (agency may not rely on analysis of earlier project that "differed significantly" from current project).[4]

Further, the passing mention of coal trains in the 1992 EIS and the 2011 Lease EA did not address multiple, significant concerns, including: harmful impacts of coal dust to human health and the environment, including endangered species; impacts from vibrations and derailments; impacts to grain shippers and passenger rail; impacts of locomotive diesel exhaust in areas with poor air quality; impacts beyond the spur line; and cumulative impacts. Doc. 42, at ¶¶ 70-97. NEPA does not allow Federal Defendants to ignore potentially significant impacts to public health and safety by pointing to prior analyses that did not actually study the public health and safety impacts that will occur if the mine expansion is upheld. *Pitt River*, 469 F.3d at 784; *Pac. Coast Fed'n*, 929 F. Supp. 2d at 1059; *Sierra Club*, 161 F. Supp. 2d at 1072.

Next, Defendants mistakenly contend that they did not have to assess the impacts of coal trains beyond the spur line, because it is not "certain" or "guarantee[d]" where the coal will be shipped. Doc. 48 at 17-18; Doc. 52 at 11-12.

[4] *See also Pitt River Tribe v. USFS*, 469 F.3d 768, 784 (9th Cir. 2006) (tiering to prior EIS improper if it "does not adequately address the potential impacts" of current proposal); *accord Pac. Coast Fed'n of Fishermen's Ass'ns v. DOI*, 929 F. Supp. 2d 1039, 1059 (E.D. Cal. 2013); *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1072 (D. Ariz. 2001).

But NEPA does not require "certainty," only "reasonable forecasting." *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975). Federal Defendants cannot credibly dispute that they can reasonably forecast where the coal will be shipped. In another part of the same EA, they actually calculated the GHG emissions from coal transportation by measuring the distance from the mine to the two export terminals to which **all** the coal is currently being shipped. Doc. 42, ¶¶ 75-76. Federal Defendants can hardly contend that the destination of coal shipments is too uncertain to analyze non-GHG impacts, yet sufficiently certain to analyze GHG emissions.

Moreover, Signal Peak and its owners have "consistently emphasized Signal Peak's export sales" to investors and the public. AR:3-5-11615 to -11616; Doc. 42, ¶ 79. Signal Peak's owners have, accordingly, purchased shipping capacity in British Columbia, Canada. Doc. 42, ¶ 79. They have boasted that their export plans are "long-term" and that they have customers "trying to lock in coal supply for 10-15 years." AR:4-8-21651. What is "intended"—here shipping coal to export terminals in Canada and the Great Lakes—is plainly "foreseeable." *W. Land Exch.*

Project v. BLM, 315 F. Supp. 2d 1068, 1089 (D. Nev. 2004) (distinguishing *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998)).[5]

Signal Peak's contention that the destination of coal trains is uncertain because "[Signal Peak] does not own or control the coal commodity once it leaves the mine site" is also meritless. *Cf.* Doc. 52 at 12. Signal Peak sells the coal at the mine site **to its owners**, Gunvor and First Energy, which, as noted, have invested in export shipping capacity at specific sites and are currently shipping **all** coal from the mine through just two ports. Doc. 42, ¶¶ 78-79; AR:3-26-12142 to -12143.

Signal Peak's observation that coal has previously been shipped from the mine to domestic power plants is similarly unavailing. *Cf.* Doc. 52 at 12 n.3. First, though the mine has in the past sold coal to plants in Ohio (owned by First Energy, a co-owner of Signal Peak), the coal was still shipped on the same railroad line to the same port on the Great Lakes from which the coal is now being shipped to Europe. Doc. 42, ¶¶ 18, 122; AR:2-432-11177. As such, it is not evidence of uncertain railroad shipping routes. Second, Signal Peak has since entered into a contract to greatly reduce the coal it sells to First Energy, while agreeing to increase the coal it sells to Gunvor (another co-owner) for exports. Doc. 42, ¶ 122.

[5] *Accord N. Plains Res. Council v. STB*, 668 F.3d 1067, 1082 (9th Cir. 2011); *City of Davis*, 521 F.2d at 675; *Friends of the Earth v. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 41 (D.D.C. 2000).

Federal Defendants repeat their unsupported excuse that they did not analyze coal train impacts due to an "absence of methods." Doc. 48 at 17. In making the unsupported assertion, Federal Defendants ignore Montana Elders' citation to available methods and analyses. Doc. 41 at 10 (citing Doc. 42, ¶ 85, and *Mid States Coal. for Progress v. STB*, 345 F.3d 520, 535-40 (8th Cir. 2003)).

Finally, Signal Peak's status quo argument has no merit. *S. Fork Band v. DOI*, 588 F.3d 718, 725-26 (9th Cir. 2009) (mine expansion, leading to prolonged ore transport changes status quo, even if rate of ore transport is unchanged); *accord Dine Citizens Against Ruining Our Env't v. OSM*, 82 F. Supp. 3d 1201, 1214-15 (D. Colo. 2015), *vacated as moot*, 643 F. App'x 799 (10th Cir. 2016).

D. Federal Defendants Failed to Adequately Assess Indirect and Cumulative Effects of Coal Combustion.

1. Federal Defendants Failed Entirely to Assess Non-greenhouse Gas Air Pollution.

Defendants marshal excuses for their failure to assess non-GHG air pollution (such as particulate matter, oxides of sulfur and nitrogen, mercury), but none is persuasive. First, Federal Defendants assert a lack of binding case law requiring an agency approving a mine expansion to consider downstream air emissions. Doc. 48 at 20. However, in *South Fork Band*, the Ninth Circuit held that a federal agency approving a mine expansion had to consider foreseeable downstream air pollution

impacts, resulting from transportation and processing of ore. 588 F.3d at 725; *see also* Doc. 41 at 13 & n.1 (collecting cases).

Next, citing *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), Federal Defendants contend that they did not have to consider non-GHG pollution from coal combustion because "the Secretary[] [of the Interior's] authority in this context is limited." Doc. 48 at 19-21. The argument has no merit. *Public Citizen* held that "where an agency has **no ability** to prevent a certain effect," it "need not consider these effects in its EA." 541 U.S. at 770 (emphasis added). "The holding in *Public Citizen* extends **only** to those situations where an agency has '**no ability'** because of lack of 'statutory authority' **to address the impact**." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213-14 (9th Cir. 2008) (quoting *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006)) (emphasis added). However, if an agency has the ability to prevent effects, such as the impacts of coal combustion, by denying a permit, then the agency must consider those effects. *Diné Citizens*, 82 F. Supp. 3d at 1217 (holding that *Public Citizen* did not excuse the Office of Surface Mining from evaluating coal combustion impacts).

Here, as noted, the Secretary of the Interior has the authority to deny the mine expansion, and, thereby, prevent combustion of the coal. 30 C.F.R. § 746.14. Moreover, the Secretary has open-ended discretion to disapprove the mining plan

on the basis of "[i]nformation prepared in compliance with [NEPA]." *Id.* § 746.13(b); *see* 42 U.S.C. § 4332(1) ("regulations" "shall be interpreted" "in accordance with the policies" of NEPA).[6] Thus, *Public Citizen* does not apply because the agencies "possess[] the power to act on whatever information might be contained in an EIS." *Ctr. for Biological Diversity*, 538 F.3d at 1213.

Finally, Defendants contend that they did not have to consider non-GHG pollution from coal combustion because of uncertainty about where the coal will be burned. Doc. 48 at 21-22; Doc. 52 at 13; Doc. 42, ¶ 108 (agency did not evaluate pollution "due to the uncertainty regarding combustion locations"). This argument fails. First, uncertainty is not an excuse for failing to consider effects in an EA, but rather a basis for analyzing the necessary information in an EIS. *Ocean Advocates v. Army Corps of Eng'rs*, 402 F.3d 846, 870-71 (9th Cir. 2004); *see infra* Part E.2(b). Second, *Mid States* considered analysis under NEPA of foreseeable coal combustion at uncertain locations, holding that "when the **nature** of the effects is reasonably foreseeable but its **extent** is not, we think that the agency may not simply ignore the effect." 345 F.3d at 548-49. The court further noted that the agency had not attempted to follow NEPA's specific procedures for

[6] *Ctr. for Biological Diversity v. USFS*, 349 F.3d 1157, 1166 (9th Cir. 2003) (recognizing statutory rule of construction).

addressing "[i]ncomplete or unavailable information." *Id.* at 550 (citing 40 C.F.R. § 1502.22).

Here, Federal Defendants could have described the **nature** of the widespread health and environmental impacts from coal combustion—e.g., particulate matter pollution, alone, from coal "is expected to cause nearly 13,200 deaths" in the United States—and explained that the Bull Mountains Mine will produce approximately 1% of the coal that causes such impacts. Doc. 42, ¶¶ 47, 103. The agencies could also have mentioned, given Signal Peak's export plans, that air pollution from coal burned in Asia returns to and is deposited in the northwestern United States. *Id.* ¶ 107.[7] To the degree more detailed information was not available, the agency should have followed the procedures from 40 C.F.R. § 1502.22.

Federal Defendants suggestion that *Mid States* was implicitly overruled by *Public Citizen* is wrong. The agency in *Mid States* had the ability, similar to the instant case, to deny the permit for the railroad. 345 F.3d at 533. Thus, *Public*

[7] Further demonstrating the feasibility of such analysis, the Office of Surface Mining has discussed non-GHG coal combustion pollution in other EAs. *E.g.*, OSM, Environmental Assessment Spring Creek Mine, at 4-13, -14, *available at* https://www.wrcc.osmre.gov/initiatives/SpringcreekMineLBA1/documents/finalEA.pdf. The Court may take judicial notice of this information from an official website. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010).

Citizen did not overrule *Mid States*, and its rule does not affect the analysis in *Mid States*.

Federal Defendants also suggest that *Mid States* is distinguishable because it involved an **increase** in coal supply. Doc. 48 at 22. This too fails. There is no question that allowing Signal Peak to mine 176 million tons of coal that would not otherwise be mined will increase the supply of coal. Doc. 42, ¶ 42.

2. Federal Defendants' Defense of Their Analysis of Greenhouse Gas Pollution Lacks Merit.

(a) Mere Quantification Is Not an Appropriate Basis for Assessing Greenhouse Gas Impacts.

Federal Defendants are mistaken that they satisfied NEPA by quantifying the mine expansion's annual GHG emissions (23.16 million metric tons of carbon dioxide (CO_2)) and comparing them national emissions. Doc. 48 at 22-23.[8]

Mere quantification of GHG emissions and comparison to national emissions is insufficient. *Ctr. for Biological Diversity*, 538 F.3d at 1216-17 (holding that quantifying GHG emissions and calculating what "percentage" it represented of "U.S. greenhouse gas emissions" was inadequate). The Council on Environmental Quality (CEQ) also rejects this type of analysis:

[8] Federal Defendants incorrectly state that the final EA compared the mine's emissions to "state" emissions. Doc. 48 at 24. It did not. Had it done so, it would have shown that the mine's annual emissions are greater than any point source in Montana. Doc. 42, ¶ 118 (mine emissions greater than largest point source in nation).

> [A] statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge, and **is not an appropriate basis for deciding whether or to what extent to consider climate change impacts under NEPA**.[9]

Further, the final EA's claim that the state of climate analysis does not allow for assessment of the "incremental impact" of the mine's GHG emissions is patently inaccurate. "[A] tool is and was available: the social cost of carbon protocol." *High Country Conservation Advocates v. USFS*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014); Doc. 42, ¶ 116 ("The [social cost of carbon] is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year."). "A patently inaccurate factual contention can never support an agency's determination that a project will have 'no significant impact' on the environment." *Ocean Advocates*, 402 F.3d at 886; *accord High Country*, 52 F. Supp. 3d at 1191.

(b) Misleading Economic Assessment Is Impermissible.

Federal Defendants next argue that they could permissibly disregard the staggering public costs of the mine's GHG emissions because NEPA regulations do not always require cost-benefit analysis. Doc. 48 at 23-26; *see* 40 C.F.R. § 1502.23. Accordingly, the agencies contend they could prepare a one-sided

[9] CEQ, NEPA Climate Guidance, at 11 (Aug. 1, 2016) (emphasis added) (attached as Exhibit 1).

"economic impact assessment," focused exclusively on short-term economic benefits. Doc. 48 at 25-26. This argument is untenable on this record.

NEPA requires agencies to consider environmental impacts on equal footing with economic considerations: "[A]ll agencies . . . shall . . . identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." 42 U.S.C. § 4332(2)(B). "This language has been interpreted to mandate 'a rather finely tuned and "systematic" balancing analysis in each instance.'" *Columbia Basin Land Prot. Ass'n v. Schlesinger*, 643 F.2d 585, 593 (9th Cir. 1981) (quoting *Calvert Cliffs*, 449 F.2d at 1113). Thus, while cost-benefit analysis is not **always** required, its absence "may be fatal" if no "alternative mode of . . . evaluation" is sufficiently "detailed to aid the decision-makers in deciding whether to proceed." *Id.* at 594.

Accordingly, courts will set aside a NEPA analysis that **misleadingly** inflates economic benefits or omits or minimizes environmental costs.[10] Here, as in

[10] *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."); *accord Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983); *see also Ctr. for Biological Diversity*, 538 F.3d at 1200 (misleading to present economic analysis without assigning any cost to greenhouse gas emissions).

High Country, it was "arbitrary and capricious" for Federal Defendants "to quantify the **benefits** of the [mining plan] modification[] and then explain that a similar analysis of the **costs** was impossible when such an analysis was in fact possible." 52 F. Supp. 3d at 1191. Indeed, "by deciding not to quantify the costs at all, the agencies effectively zeroed out the cost in its quantitative analysis." *Id.* at 1192. This was egregious, here, given that the costs would outweigh the purported benefits by at least an order of magnitude. *See* Doc. 42, ¶¶ 115-17, 119, 134.[11]

Federal Defendants further skewed their analysis by, first, concluding that GHG emissions would not change, or counterintuitively would be greater, in the no action alternative, because the coal supply would just shift to a different mine in the region. Doc. 42, ¶ 121. Yet, the final EA concluded that the mine's economic benefits would be lost entirely in the no action alternative, without considering whether they would also just shift to another mine. *Id.* ¶ 134. Federal Defendants do not even try to reconcile these inconsistent positions. Second, the final EA even skewed its consideration of purely economic impacts: it trumpeted short-term employment and tax benefits, but failed entirely to acknowledge long-term economic impacts of mine closure, which are expected to be "major and negative"

[11] *See Michigan*, 135 S. Ct. at 2707 ("One would never say that it is even rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in . . . benefits.").

in Musselshell County. *Id.* ¶ 19; *Hughes River*, 81 F.3d at 446-48 (agency erroneously considered gross, rather than net economic benefit).

(c) Federal Defendants' Refusal to Use the Only Available and Scientifically Supported Methodology Is Entitled to No Deference.

Federal Defendants further contend that there exists a dispute over choice of methodology, in which they are entitled to deference. Doc. 48 at 24. But no deference is warranted where the agencies did not **choose** a methodology to analyze the impacts of the expansion's 23.16 million metric tons of CO_2, but instead erroneously stated that no methodology existed. Doc. 42, ¶¶ 115-17, 120; *Or. Natural Desert Ass'n*, 625 F.3d at 1121 ("Here, the BLM used **no** method to analyze or plan for management for such values. We cannot defer to a void.").

Moreover, the social cost of carbon was supported by **all** evidence in the record, Doc. 42, ¶¶ 115-17; AR:3-97-18327 (Government Accountability Office report); has been upheld in federal court, *Zero Zone Inc. v. DOE*, 832 F.3d 654, 677-78 (7th Cir. 2016); and has been described by CEQ as "the best available science." CEQ NEPA Climate Guidance, *supra*, at 33 n.86. Federal Defendants could not reject this evidence, without presenting some evidence to support their position. *Ctr. for Biological Diversity*, 349 F.3d at 1168; 40 C.F.R. § 1502.24 ("Agencies shall insure . . . scientific integrity[] of the discussions and analyses . . . .").

Further, as noted, NEPA mandates a procedure for addressing situations involving "incomplete or unavailable information" (as the agencies claimed here). 40 C.F.R. § 1502.22(b); *Mid States*, 345 F.3d at 550. Having failed to employ any methodology to assess the incremental impacts of the mine expansion's GHG emissions and having failed to fulfill requirements for assessing incomplete information, Federal Defendants cannot now argue for deference to their choice of methodology.

(d) Defendants' Remaining Arguments Lack Merit.

Signal Peak proffers the excuses in the agencies' response to public comments. Doc. 52 at 18. Montana Elders' refutation of most of these responses, Doc. 41 at 16-20, remains unrebutted. The one excuse that has not been addressed is the fact that the Federal Government developed the social cost of carbon for rulemakings. Doc. 52 at 18. *High Country* rejected this excuse, noting that "EPA has expressed support for its use in other contexts," as in the NEPA review of the Keystone XL pipeline. 52 F. Supp. 3d at 1190. Further, Federal Defendants have offered no reason why this tool is, per se, not useful in a project-specific analysis.

Finally, Signal Peak cites a series of cases that purportedly support the agencies' refusal to use the social cost of carbon. Doc. 52 at 15-16. Almost all of these cases were distinguished in *High Country* because they did not address the social cost of carbon. 52 F. Supp. 3d at 1192-93. Signal Peak also cites *WildEarth*

Guardians v. USFS, 120 F. Supp. 3d 1237 (D. Wyo. 2015), which postdates *High Country*; however that case also did not involve the social cost of carbon and is, therefore, also inapposite. *WildEarth Guardians*, 120 F. Supp. 3d at 1269-1272. Signal Peak cites *Earth Reports v. FERC*, 828 F.3d 949 (D.C. Cir. 2016), which upheld FERC's decision not to use the social cost of carbon in approving a liquefied natural gas facility on the basis that the protocol involves a range of potential values for CO_2. *Id.* at 956.[12] But this reasoning has already been rejected by the Ninth Circuit. While there may be a range of values for CO_2, "the value of carbon emissions reduction is certainly not zero." *Ctr. for Biological Diversity*, 538 F.3d at 1200.[13] Again, all evidence in the record supported the social cost of carbon. Doc. 42, ¶¶ 115-17. Yet, as noted, the agencies effectively and arbitrarily set this value at zero. *See supra* Part D.2(b).

[12] None of the agency's excuses offered in *Earth Reports* were offered by Federal Defendants here, nor could they save Federal Defendants' arbitrary review on the record in this case.

[13] *Accord Michigan*, 135 S. Ct. at 2707 ("[R]easonable regulation ordinarily requires paying attention to the advantages **and** the disadvantages of agency decisions.").

E. Defendants' Arguments in Defense of the Finding of No Significant Impact Lack Merit.

1. Federal Defendants Cannot Defend Their Complete Failure to Consult Their Own NEPA Guidance.

NEPA regulations mandate that "the Federal agency **shall** . . . [**d**]**etermine** under **its procedures** supplementing these regulations (described in § 1507.3) whether the proposal is one which . . . [n]ormally requires an environmental impact statement [EIS]." 40 C.F.R. § 1501.4(a)(1) (emphasis added). The agencies' FONSI indisputably failed entirely to consider their own procedures for determining whether an EIS would be required, even though Montana Elders specifically raised the issue in comments. *See* AR:4-7-21642 to -21648; AR:2-453-11300. This violated the express terms of 40 C.F.R. § 1501.4(a)(1). Because they failed to address this issue in the administrative process, the agencies are precluded from offering post hoc rationalizations now. *Michigan*, 135 S. Ct. at 2710. In any case, their arguments are unavailing.

First, the agencies mistakenly contend that they did not have to consider their guidance, because it "does not have the effect and force of law." Doc. 48 at 28. But the mandate to consider the NEPA guidance does not come from the guidance itself, but from 40 C.F.R. § 1501.4(a). Moreover, the agencies are wrong that their NEPA guidance was "neither published in the Federal Register nor

subject to notice and comment." *See* 46 Fed. Reg. 7487, 7488, 7489 (Jan. 23, 1981).

Nor is it significant that the manual does not mandate that an EIS should be prepared, but merely sets criteria for when an EIS should "normally" be prepared. *Cf.* Doc. 48 at 28 n.6; Doc. 52 at 26. The guidance establishes a presumption that an EIS will be prepared, "imposing on the [agency] the burden of establishing why that presumption should not apply." *Davis v. Mineta*, 302 F.3d 1104, 1117 (10th Cir. 2002), *abrogated on other grounds*, *Diné CARE v. Jewell*, 839 F.3d 1276 (10th Cir. 2016); *accord Diné CARE v. Klein*, 747 F. Supp. 2d 1234, 1253 (D. Colo. 2010). "If [the agency] arbitrarily and capriciously failed to follow its own regulation, its decision must be reversed." *Davis*, 302 F.3d at 1117. Because Federal Defendants never addressed the guidance below, they cannot meet their burden now.

In briefs, Defendants claim they were not required to prepare an EIS even by the terms of their guidance, because the environmental impacts of the mine expansion were adequately analyzed in the 2011 Lease EA. Doc. 48 at 28 n.6; Doc. 52 at 26; *see* 516 DM 13.4(A)(4)(a). But Federal Defendants admitted that the prior Lease EA did not adequately analyze all environmental impacts. AR:3-52-15039; Doc. 42, ¶ 49. The final EA, itself, explains that it "brought forward for analysis" those "resource areas" that had not been "sufficiently documented in the

Coal Lease EA." AR:4-3-21301, -21302 tbl. 1.4-1. The additional analysis in the final EA was based on "potential changes to the extent or nature of those impacts" analyzed in the Lease EA. AR:4-3-21299. Having premised preparation of the final EA on the **inadequacy** of prior NEPA analyses, Federal Defendants cannot now argue that the prior Lease EA "adequately analyzed" all impacts of the expansion. *Michigan*, 135 S. Ct. at 2710.

The proper remedy for this failure is to "remand to OSM [the Office of Surface Mining] to provide it the opportunity to reassess its position" in light of its NEPA guidance. *Dine CARE*, 747 F. Supp. 2d at 1253.

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

"When an agency issues a FONSI and determines that preparation of an EIS is not necessary, 'it must put forth a convincing statement of reasons' that explains why the project will impact the environment no more than insignificantly." *Helena Hunters & Anglers v. Tidwell*, 829 F. Supp. 2d 1129, 1140 (D. Mont. 2009) (quoting *Ocean Advocates*, 402 F.3d at 864). A FONSI that makes "conclusory assertions" is not enough to "avoid preparing an EIS." *Ocean Advocates*, 402 F.3d at 865. If the agency's EA or administrative record contradicts the conclusions in the FONSI, the "conclusion that the . . . impacts will not be significant is arbitrary and capricious." *Helena Hunters & Anglers*, 841 F. Supp. 2d at 1136; *Native Fish*

Soc'y v. NMFS, 992 F. Supp. 2d 1095, 1109 (D. Or. 2014). Here, Federal Defendant's FONSI reached its conclusion of no significant impact by repeatedly ignoring information in the EA and administrative record.

(a) Federal Defendants Manipulated Context to Evade a Finding of Significance.

Defendants do not dispute that it was arbitrary for the FONSI to consider short-term economic benefits of mine expansion, but ignore long-term impacts of inevitable mine closure. Doc. 42, ¶¶ 19, 134; *see* 40 C.F.R. § 1508.27(a) ("long-term effects are relevant"); *Native Fish Soc'y*, 992 F. Supp. 2d at 1109 (arbitrary for FONSI to ignore problems identified in record).

Federal Defendants contend that the FONSI adequately acknowledged the large-scale impacts of the expansion. This is incorrect. The FONSI characterizes the proposal as a "**site-specific action**." *Compare* Doc. 42, ¶ 132, *with id.* ¶¶ 72-75. The FONSI's passing statement that "effects of the action have been analyzed at the local and regional level" does not rectify this prior incorrect statement. *Cf.* Doc. 48 at 29; *Helena Hunters & Anglers*, 841 F. Supp. 2d at 1136 (contradictions render FONSI arbitrary). The FONSI's failure to acknowledge the intercontinental scale of the proposed mine and coal export operation was misleading and arbitrary.

Federal Defendants are correct that the federal mining plan modification only approves mining of 2,539 acres of federal coal lands. AR:4-3-21299. But the

federal coal is intermixed with state and private coal that "would not be economically mineable" without approval of the federal mine plan. AR:4-3-21300. Together, the federal, state, and private coal comprises the 7,000 acre expansion, which will double the size of the mine to 14,000 acres. *See* Doc. 42, ¶ 42. Federal Defendants' insistence on segmenting out the smaller portion of federal coal, both in their brief and their FONSI, is another example of their failure to consider the full context of the expansion when making their significance determination. *See* 40 C.F.R. § 1508.27(b)(7) ("Significance cannot be avoided by terming an action temporary or breaking it down into small component parts.").

Finally, the agencies discount the gargantuan scale of the mine's coal production and GHG emissions by comparing them to **total** national coal production and GHG emissions. Doc. 48 at 30. But considering these numbers on a "local" or "regional" scale would squarely establish the mine expansion as significant: it will be the largest coal mine by production (11 million tons) and the largest source of GHG emissions (23 million metric tons CO_2) in Montana. *See* Doc. 42, ¶¶ 42-43, 118; *cf.* AR:3-120-19333. Indeed, compared to other individual coal mines and point sources nationally, the expansion is a behemoth. Doc. 42, ¶¶ 42-43, 118. Ultimately, the agencies' use of a nation-wide context to minimize coal production and GHG emissions contradicts the FONSI's statement that the mine expansion is a "site-specific action." As such, the FONSI cannot be

considered a "convincing statement of reasons" for not preparing an EIS. *See Helena Hunters & Anglers*, 841 F. Supp. 2d at 1136, 1140.

(b) Because the Mine Expansion Is "Highly Controversial" and "Highly Uncertain," the Determination to Forego an EIS Was Arbitrary.

(i) Impacts of Coal Train Exports Are Controversial and Uncertain.

Federal Defendants argue that the firestorm of outcry against trains exporting coal through the Northwest was "insufficient to satisfy the controversy requirement under 40 C.F.R. § 1508.27(b)(4)," because it does not relate to the "size, nature, or effect" of the impacts. Doc. 48 at 31-32. This is incorrect. The broad-scale opposition of cities, county health boards, tribes, elected officials, health professionals, businesses, and faith leaders to coal exports are not "mere opposition and differing opinions." Doc. 48 at 31. They are rooted in scientific and academic analyses. Doc. 42, ¶¶ 85-97. Oregon Senator Ron Wyden summarized the controversy:

> Multiple studies and months of media reports have raised concerns of increased coal dust and noise as a result of coal export activity. Additionally, there is potential for air and water degradation in local communities and landscapes in close proximity to the Columbia River. The resulting increased rail and barge traffic could pose a threat to endangered species; disrupt life in small towns bisected by railroad tracks; impact local tourist economy; and put the United States at risk of breaching various treaties with federally recognized Indian tribes in the region.

Id. ¶ 84.

In the face of such substantial questions raised by the public, Federal Defendants could only avoid an EIS by providing a convincing explanation as to why the concerns did not rise to the level of a public controversy. *Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001), *abrogated in part on different grounds*, *Monsanto v. Geertson Seed*, 561 U.S. 139 (2010). Their failure to address these issues in the final EA, *see supra* Part C, and their erroneous and conclusory statement in the FONSI that "there is no scientific controversy over the nature of the impacts," Doc. 48 at 32; AR:4-7-21646, did not carry this burden. *Jones v. Gordon*, 792 F.2d 821, 829 (9th Cir. 1986) (agency failed to "explain[] why these points do not suffice to create a public controversy based on potential environmental consequences."); *see Helena Hunters & Anglers*, 829 F. Supp. at 1137 (state agency opposition to project due to concerns about impacts created "controversy that warrants preparation of an EIS"); *accord Ctr. for Biological Diversity v. BLM*, 937 F. Supp. 2d 1140, 1157-59 (N.D. Cal. 2013).

Signal Peak is incorrect that the court in *Northern Plains Resource Council, Inc. v. BLM*, No. CV 14-60-BLG-SPW, 2016 WL 1270983, at *8 (D. Mont. Mar. 31, 2016), rejected the contention that continued mining is "highly controversial." Doc. 52 at 30. In that case, the effects of coal trains from the mine were neither raised by the Plaintiffs nor considered by the court.

Finally, Montana Elders raised questions about the impacts of coal trains on public health, uncertain risks, cumulative impacts, and impacts to endangered species. Doc. 41 at 25. Defendants failed to dispute these arguments, beyond acknowledging the uncertainty of impacts, Doc. 48 at 32-33; Doc. 52 at 31-32, which confirms that it was arbitrary for the FONSI to assert that "[t]here are no anticipated effects . . . that are considered to be highly uncertain." AR:4-7-21646; *Helena Hunters & Anglers*, 829 F. Supp. 2d at 1136 (contradictory analysis was arbitrary); *see also Ocean Advocates*, 402 F.3d at 866, 868-70 (no convincing statement regarding cumulative effects of increased oil shipments).

(ii) Air Pollution Impacts Are Highly Uncertain and Highly Controversial.

Having attempted to excuse their failure to analyze impacts of non-GHG air pollution from combustion on the basis of uncertainty, Doc. 48 at 20-22; Doc. 42, ¶ 108, Federal Defendants cannot dispute that such impacts are uncertain under 40 C.F.R. § 1508.27(b)(5). *See Nat'l Parks*, 241 F.3d at 733 ("The [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."). Elders provided unrebutted evidence that air pollution from coal combustion has widespread deleterious effects, including causing over 10,000 mortalities and costing the public tens to hundreds of billions of dollars annually, **exceeding** the value of coal. Doc. 41 at

26-27 (citing Doc. 42, ¶¶ 100-07). Defendants responded only by arguing that these effects are uncertain, Doc. 52 at 31, again underscoring the need for an EIS. *Nat'l Parks*, 241 F.3d at 733.

So too with GHGs. After arguing (incorrectly) that "the state of science does not allow any given level of emission to be tied back to a quantifiable effect on climate change," and (without citation to evidence) that using the social cost of carbon would be "misleading," Doc. 48 at 23, 26, Federal Defendants cannot credibly contend that the issue is not, at least, "highly controversial" and "highly uncertain." 40 C.F.R. § 1508.27(b)(4)-(5). Elders presented unrebutted evidence that GHG emissions from the expansion would cause at minimum, a quarter-billion dollars in climate-change-related harm annually, exceeding the project's economic benefits by an order of magnitude. Doc. 42, ¶¶ 115-119, 134. Federal Defendants claimed quantifiable climate impacts were unknowable, contested the social cost of carbon (albeit without presenting any evidence against it), and claimed impacts would be "negligible." *Id.* ¶ 121. "Therein lay the controversy." *Nat'l Parks*, 241 F.3d at 737; *see also Anderson v. Evans*, 371 F.3d 475, 490 (9th Cir. 2004) (significant disagreement about project's impacts shows controversy).

Further, contrary to Signal Peak's contention, Doc. 52 at 31, Federal Defendants' failure to use the social cost of carbon protocol did render the analysis infirm. Where commenters raised a substantial question about uncertain effects of

an action, and where further analysis may answer that question, an EIS containing the further analysis is required. *Nat'l Parks*, 241 F.3d at 732; *accord Ocean Advocates*, 402 F.3d at 871.

Defendants' contention that cumulative GHG emissions may be reduced by unidentified, future technology is "anything but a 'hard look.'" *Compare* Doc. 48 at 32, *and* Doc. 52 at 32, *with High Country*, 52 F. Supp. 2d at 1197. Nor is there merit to the contention that additional coal combustion from the mine expansion will have minimal impacts because it will occur at a constant rate, albeit for a longer time. *S. Fork Band*, 588 F.3d at 725-26.

(c) The FONSI Failed to Address Wetlands, Though They May Be Dewatered and May Not Be Able to Be Mitigated.

The spring-fed wetlands in the mine area are critical to the area's ecology and ranching economy. Doc. 42, ¶ 1. The FONSI failed to make a convincing statement that the expansion would not adversely affect wetlands. Contrary to Federal Defendants' first argument, the FONSI did not address impacts to wetlands **at all**. *Compare* Doc. 48 at 33, *with* Doc. 42, ¶ 133. Nor was it enough that the final EA discussed wetlands: the final EA concluded that spring-fed wetlands may be dewatered and **may not be able to be mitigated**, because sufficient replacement water may not be physically or legally available. Doc. 42, ¶¶ 66-69,

133. As such, it was not a "convincing statement" that the mine expansion would not significantly affect wetlands. *Id.* ¶ 68.

Signal Peak's references to the 2011 Lease EA, Doc. 52 at 32, are irrelevant because the final EA in 2015 reached less optimistic conclusions about the possibility of wetland mitigation. *See* Doc. 42, ¶¶ 66-69. Signal Peak also cites an oblique reference to "[m]itigation measures" for "water resources" in the 2015 FONSI. Doc. 52 at 33. This is not a convincing statement about impacts to wetlands because, again, the final EA contradicts it. Doc. 42, ¶ 68; *Helena Hunters & Anglers*, 829 F. Supp. 2d at 1138.

Signal Peak suggests impacts to **wetlands** will be insignificant because the final EA states that "all water sources necessary to support the **post-mine land uses** would be replaced in accordance with applicable regulations." Doc. 52 at 33 (emphasis added). This confuses "post-mine land uses," which includes "stock water and domestic (household) and lawn irrigation purposes" and the ecological integrity of spring-fed streams and wetlands. AR:3-86-21167. The final EA concludes the former can be replaced, but raises questions about the latter. Doc. 42, ¶ 68; *see also* AR:3-86-21167 (questioning physical and legal availability of water to replace "springs, ponds, and identified stream reaches"). The uncertainty of wetlands mitigation identified in the final EA further undermines Federal

Defendants' decision not to prepare an EIS. *W. Land Exch. Project*, 315 F. Supp. 2d at 1093-94; *Helena Hunters & Anglers*, 829 F. Supp. 2d at 1137-38.

III. CONCLUSION

While Federal Defendants' met their commitment to Signal Peak to "very quickly create an EA that will support the mining plan decision document," Doc. 42, ¶ 51, they failed to meet their obligation to take a "hard look" at the environmental impacts of the mine expansion. Montana Elders respectfully request that the Court grant summary judgment, vacate, and remand to the agencies to conduct a lawful NEPA analysis.

Respectfully submitted this 15th day of March, 2017.

/s/ Shiloh Hernandez
Shiloh S. Hernandez
Western Environmental Law Center
103 Reeder's Alley
Helena, Montana 59601
(406) 204-4861
hernandez@westernlaw.org

Laura H. King
Western Environmental Law Center
103 Reeder's Alley
Helena, Montana 59601
(406) 204-4852
king@westernlaw.org

Attorneys for Plaintiffs