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**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF UTAH, CENTRAL DIVISION**

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| **Sierra Club**, a non-profit corporation; and **Indigenous Environmental Network**, a non-profit corporation,<br><br>Plaintiffs,<br><br>vs.<br><br>**U.S. Department of Interior**, an agency of the United States; **U.S. Bureau of Indian Affairs**; an agency of the United States; **Dirk Kempthorne**, acting in official capacity as Secretary of Department of Interior; **David L. Allison**, acting in official capacity as Superintendent of the Uintah & Ouray Agency of the Bureau of Indian Affairs; and, **Theodore Quasula,** acting in official capacity as Director of Western Area Office of the Bureau of Indian Affairs,<br><br>Defendants. | **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**<br><br>Case No. 2:09-cv-27<br><br>District Judge Tena Campbell |

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## INTRODUCTION

1. In an area plagued by unhealthy levels of air pollution and scarce water resources, Defendants United States Department of Interior, United States Bureau of Indian Affairs,

Dirk Kempthorne, David L. Allison, and Theodore Quasula ("Defendants") approved a poorly understood large-scale project, the Antelope Creek Tar Sands Project ("Tar Sands Project"), that proposes to extract oil from tar sands in Utah's Uintah Basin. The project anticipates the construction of 288 new wells, spaced at an unprecedented density of one well per 2.5 acres and employing "new experimental thermal recovery methods" including in situ combustion or steam-flood techniques to pull oil out of shallow sands. The Tar Sands Project promises to have a significant impact on local and regional air quality by releasing both "criteria" and hazardous air pollutants. Water use for the project threatens to deplete surface water and adversely impact the stream environment and wildlife.

2. In their haste to approve the Tar Sands Project, Defendants ignored federal law, regulations, and guidance in failing to grant the public an opportunity to participate in the agency's decision. Defendants also ignored environmental law requiring them to undertake the analysis necessary to understand the Tar Sands Project, its experimental techniques and its impacts on the environment, including on public health and water resources. As a result, Defendants did not, as required by law, make a well-informed decision when they approved the Tar Sands Project and have not taken the requisite hard look at the consequences of their actions. Defendants' failure to understand and analyze the project, along with their failure to notify the public of their actions, also means that Defendants have not shared information with the public and have not included the public in their decision-making process as required by law.

3. Plaintiffs Sierra Club and Indigenous Environmental Network bring this action to prevent the serious harm to human health and the environment threatened by Defendants'

approval of the large-scale experimental Tar Sands Project without first understanding and analyzing the project's environmental impacts and without informing the public of the development's consequences. Because Defendants' decision to approve the project violates federal law – the National Environmental Policy Act, 42 U.S.C. §§4321 et seq. ("NEPA") and the Administrative Procedure Act, 5 U.S.C §§500 et seq. ("APA") – it must be set aside, and Defendants must be enjoined from allowing any action that relies on that approval and the inadequate environmental analysis that accompanied it.

## JURISDICTION AND VENUE

4. This Court has jurisdiction over this action by virtue of the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and 28 U.S.C. § 1331 (federal question jurisdiction).

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the events or omissions giving rise to the claims occurred within this judicial district; Defendants have offices in this district; public lands and resources in question are located in this district; environmental harm resulting from the Defendants' actions will impact this district; and a number of Plaintiffs' members reside in this district.

## PARTIES

### I. Plaintiffs

6. Plaintiff **Sierra Club** is a national, non-profit, environmental and conservation organization incorporated under the laws of the State of California. Sierra Club is dedicated to the protection of public health and the environment and has as its mission to

preserve and enjoy the land and quality of life in the United States. Sierra Club has more than 500,000 members nationwide, including almost 4,000 active members who live in Utah. For many years, Sierra Club has advocated land use planning that improves air quality, protects public health and preserves natural resource values throughout Utah. Federal land use managers and other federal agencies dedicated to protecting public health and the environment in Utah frequently solicit Sierra Club's input and participation in a variety of land use planning and decision-making processes and Sierra Club actively participates in all levels of these federal decision-making processes. Indeed, Sierra Club and its members have long been involved in land use planning and environmental regulatory processes on state, regional and local government levels. The activities of Sierra Club and its members in land use, water quality, air quality and wildlife issues have taken the form of community organizing, publishing newsletters and other educational materials, establishing a web site, submitting comments, attending and speaking at public meetings, speaking to students and civic and other organizations, and holding seminars and symposia – all in support of land use planning and environmental regulatory processes and decision-making that promote social justice, sustainable economic development, ecosystem health and environmental integrity.

7. Sierra Club brings this action on behalf of itself and its adversely affected members.

8. Plaintiff **Indigenous Environmental Network** (IEN) is a non-profit corporation registered in Minnesota and based in Bemidji, Minnesota. IEN is a network of Indigenous Peoples empowering Indigenous Nations and communities towards sustainable livelihoods, demanding environmental justice and maintaining the Sacred Fire

of their traditions. Over the past 19 years, IEN has worked with tribal Nations and communities to combat environmental injustice in indigenous territories. IEN has worked with communities to combat unsustainable fossil fuel development in and around their homelands including coal mining, coal-fired power plants, oil and gas development, liquefied natural gas terminals, large scale geothermal developments, and oil/tar sands. Also, we currently have an oil sands specific campaign – the Canadian Indigenous Tar Sands Campaign – in Canada.

9. IEN brings this action on behalf of itself and its adversely affected members.

10. Defendants' failure to comply with NEPA and its implementing regulations in approving the Tar Sands Project injures Sierra Club, IEN and their members by denying them the information that NEPA requires regarding the environmental effects of the project, as well as any environmentally superior alternatives to the proposed development, and by denying them the procedural safeguards embodied in NEPA. Those safeguards are designed to ensure that government agencies carefully consider public comment, the environmental consequences of a proposed action, and any environmentally superior alternatives to that action.

11. Sierra Club, its staff and its members' recreational, scientific, spiritual, aesthetic, and other interests have been, are being, and, will continue to be harmed and irreparably injured by Defendants' actions unless this Court grants the relief requested by Plaintiffs. Sierra Club members will suffer health and property impacts from increased air pollution and the interests of the Sierra Club and its members in preserving and protecting their health and the health of their children. Many Sierra Club members live, work or recreate in the region and will be harmed by, among other things, increases in hazardous air

pollutants, particulates, nitrogen oxides, volatile organic compounds, carbon monoxide and other noxious gases caused directly and indirectly by the proposed Tar Sands Project.

12. Air pollution and impacts to wildlife, wildlife habitat, surface water and ground water caused by the Tar Sands Project will eliminate or reduce the value of many aesthetic and recreational opportunities enjoyed by Sierra Club members.

13. Given their advocacy on behalf of protecting and improving air and water quality and protecting wildlife, wildlife habitat and water resources in the impacted area, Sierra Club, IEN and their members have a compelling interest in ensuring that the Defendants comply with the requirements of the laws at issue with regard to the Tar Sands Project. Unless the relief sought herein is granted, the human health, financial, aesthetic, recreational, environmental and other substantial interests of Plaintiffs and their members will continue to be adversely affected and irreparably injured by the Defendants' unlawful and arbitrary actions and the environmental impacts of these decisions.

**II. Defendants**

14. Defendant **United States Department of the Interior** ("DOI") is an agency of the United States. DOI is responsible for oversight of several agencies managing and administering public lands, including those managed and administered by the United States Bureau of Indian Affairs, and for ensuring that their management of these lands complies with all applicable federal laws and regulations.

15. Defendant **United States Bureau of Indian Affairs** ("BIA") is responsible for the administration and management of 66 million acres of land held in trust by the United States for American Indian, Indian tribes, and Alaska Natives, including the lands of the

Uintah and Ouray Reservation located in northeastern Utah approximately 150 miles east of Salt Lake City.

16. Defendant **Dirk Kempthorne** is sued in his official capacity as Secretary of the Department of the Interior. Mr. Kempthorne is responsible for ensuring that lands administered by the Department of Interior, including those administered by the BIA, are managed and administered in accordance with all applicable laws and regulations.

17. Defendant **David L. Allison** is sued in his official capacity as acting Superintendent of the Uintah and Ouray Agency, Bureau of Indian Affairs. Mr. Allison is responsible for ensuring that lands of the Uintah and Ouray Reservation administered by the BIA are managed in accordance with all applicable laws and regulations. Mr. Allison's predecessor, Chester Mills, then Agency Superintendent of the Uintah and Ouray Agency, is the official who approved the Tar Sands Project on behalf of the BIA and DOI.

18. Defendant **Theodore Quasula** is sued in his official capacity as acting Director of the Western Area Office, Bureau of Indian Affairs, Phoenix, Arizona. Mr. Quasula is responsible for ensuring that lands under the jurisdiction of the BIA's Western Area Office, including the Uintah and Ouray Reservation are managed in accordance with all applicable laws and regulations.

## LEGAL BACKGROUND

### I. The Administrative Procedure Act

19. Because NEPA does not include a citizens suit provision, this case is brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq.

20. The APA allows persons and organizations to appeal final agency actions to the federal courts. 5 U.S.C. §§ 702, 704. The APA declares that a court shall hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

**II. National Environmental Policy Act**

21. Congress enacted NEPA to, among other things, "encourage productive and enjoyable harmony between man and his environment" and to promote government efforts "that will prevent or eliminate damage to the environment." 42 U.S.C. § 4321.

22. To fulfill this goal, NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The agency should describe "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(C)(ii). Overall, an EIS must "provide [a] full and fair discussion of significant impacts" associated with a federal decision and "inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.

23. NEPA requires federal agencies, such as BIA and DOI, to include within an EIS "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis is the "heart" of a NEPA document, and the statute's implementing regulations emphasize an agency's duty to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.16.

24. Only if a proposed action will not significantly impact the environment may an agency rely on a less extensive environmental assessment ("EA") and a finding of no

significant impact ("FONSI"). 40 C.F.R. §§ 1501.4(e), 1508. An EA must include a convincing statement of reasons to explain why a project's impacts are insignificant. Id. § 1508.13.

25. During both the EIS and EA/FONSI processes, agency "procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken . . . . [because] public scrutiny [is] essential to implementing NEPA." 40 C.F.R. § 1500.1 (b). Additionally, "Federal agencies shall to the fullest extent possible . . . encourage and facilitate public involvement in decisions which affect the quality of the human environment[.]" Id. § 1500.2(d). Agencies must "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." Id. § 1506.6(a).

## STATEMENT OF FACTS

### I. 2003 Environmental Assessment for the Antelope Creek Field Expansion

26. The Ute Tribe and the Ute Distribution Corporation, as joint managers of the Ute Mineral Estate, in 1982 entered into an Indian Minerals Development Act agreement with Petroglyph Energy Company ("Petroglyph"), Boise, Idaho, to further develop oil and gas resources by expanding and in-filling the Antelope Creek Field on the Uintah and Ouray Reservation.

27. Primarily, the Utah Tribe owns, and the BIA administers in trust, the surface and mineral estates in the Antelope Creek Field.

28. Petroglyph has been developing the Antelope Creek area since at least 1994, when BIA authorized the company to drill 193 new oil and gas wells there. As of 2003, Petroglyph had drilled 128 of these authorized wells.

29. Petroglyph sought approval to drill and develop an additional 478 conventional oil, gas, and injection wells in the Antelope Creek Field area. The wells would generally be spaced at one well location per 40 acres or per 80 acres, depending on the subsurface geologic formation.

30. Petroglyph also sought approval to develop a 720-acre thermal recovery pilot project – the Antelope Creek Tar Sands Project – to extract oil from shallow tar sands.

31. Tar sands (or oil sands) are defined as any consolidated or unconsolidated rock, exclusive of coal or oil shale, that contains a hydrocarbon material known as bitumen with a viscosity greater than 10,000 centipoise at reservoir temperatures. Tar sands are generally comprised of crude bitumen, sand, water, and clay. In practice, the bitumen does not flow and cannot be pumped without being heated, diluted, or upgraded.

32. For the Tar Sands Project, Petroglyph proposes to use new experimental thermal recovery techniques that could include in situ combustion and/or steam-flood or other heat transfer methods or techniques. These methods are untested in Utah and have never been commercially applied.

33. Due to the density of the oil, the Tar Sands Project would entail the construction and operation of 288 wells, spaced one well location every 2.5-acres thereby causing surface disturbance on nearly all of the 720 acres in the pilot project area.

34. In the 2003 Environmental Assessment for the Antelope Creek Field Expansion ("2003 EA"), the BIA purported to undertake environmental analysis of the Antelope

Creek Oil and Gas Field Expansion Project, including the Petroglyph plan to develop 478 conventional oil, gas, and injection wells and the Tar Sands Project to develop 288 experimental tar sands wells in the Antelope Creek Field area.

35. On January 16, 2003, Chester Mills, the then Agency Superintendent for the Uintah and Ouray Agency, signed a Finding of No Significant Impact (FONSI) and approved the Antelope Creek Oil and Gas Field Expansion Project.

36. This action was a final and major federal action.

37. On information and belief, while BIA prepared a Scoping Notice for the Antelope Creek Oil and Gas Field Expansion Project, it failed to ensure that this Notice was actually published. Moreover, Defendants failed to notify the public of either the 2003 EA, its related FONSI or their decision to approve the Tar Sands Project. As a result, the public never received notice of the 2003 EA, the FONSI or the decision based on these documents and was unable to participate in Defendants' decision-making process.

**II. Supplemental EA**

38. Almost immediately, Petroglyph sought approval to drill and develop an additional 445 conventional oil, gas, and injection wells in the Antelope Creek Field area, on top of the 478 BIA previously approved.

39. Petroglyph also sought approval to develop a total of 8,008 shallow steamflood wells throughout 20,740 aces or 32 square miles of the greater Antelope Creek Oil Field. These 8,008 wells would extract oil from tar sands.

40. In a December 2003 Supplemental Environmental Assessment, prepared to consider Modifications to the Antelope Creek Oil and Gas Field Expansion/Infill and Thermal Recovery Projects ("Supplemental EA"), BIA purported to consider the

environmental impacts of the development of 445 additional conventional oil and injection wells and 8,008 tar sands wells at the Antelope Creek Field.

41. The Supplemental EA allowed 20-acre spacing of the oil and injection wells and 2.5-acre spacing for the tar sands recovery wells. The Tar Sands Project authorized in the January 2003 EA would be expanded to cover the entire 20,740 Antelope Creek Field, resulting in the development of the 8,008 wells.

42. On March 16, 2004, the Superintendent of the Uintah and Ouray Agency, BIA, issued a Finding of No Significant Impact for the Supplemental EA.

43. In August 2004, Petroglyph notified the Superintendent of the Uintah and Ouray Agency that, due to environmental concerns raised by a variety of federal agencies, the company would not pursue the proposal to expand the Tar Sands Project to 8,008 wells.

44. On August 20, 2004, the Superintendent of the Uintah and Ouray Agency cancelled the Supplemental EA and 2004 Finding of No Significant Impact. BIA also stated that it would prepare a revised Supplemental EA for the Antelope Creek Oil and Gas Field Expansion/Infill Project, which would address the expansion/in-fill without the 8,008 tar sands wells.

**III. Underground Injection Permits**

45. Petroglyph also sought an Underground Injection Control ("UIC") Program Permit from the U.S. Environmental Protection Agency ("EPA") for the 288 well Tar Sands Project.

46. On May 17, 2004, EPA prepared a draft UIC permit in response to that proposal.

47. Among others, Western Resource Advocates ("WRA") filed comments on the draft permit, contesting, among other issues, the adequacy of EPA's compliance with the National Historic Preservation Act, the Endangered Species Act and NEPA.

48. On June 23, 2005, EPA issued UIC Area permit UT20960-00000 authorizing Petroglyph to injection steam underground in up to 288 Class II oil recovery injection wells to allow extraction of oil from tar sands.

49. On July 13, 2005, WRA filed a Petition for Review of the Petroglyph UIC permit with the EPA's Environmental Appeals Board (Board), raising essentially the same claims as it did in its comments.

50. On February 23, 2006, EPA withdrew the existing UIC permit and the Board granted EPA and WRA's joint motion to dismiss the WRA petition.

51. Subsequently, EPA issued another draft UIC permit for the 288-well Tar Sands Project on which WRA commented.

52. To date, EPA has not finalized that second draft UIC permit.

**IV. Tar Sands, Health Impacts, and Climate Change**

53. The Antelope Creek Field lies within the Uintah Basin, which has seen an unprecedented boom in oil and gas development.

54. In the last several years, concentrations of fine particulate air pollutant ($PM_{2.5}$) have risen to unhealthy levels in the region, putting people, communities and the environment at risk. There is increasing evidence that oil and gas drilling and production in the Uintah Basin are contributing to elevated $PM_{2.5}$ concentrations in the region.

55. In addition, concentrations of ground level ozone air pollution have risen to unhealthy levels in the region, putting people, communities and the environment at risk.

There is increasing evidence that oil and gas drilling and production in the Uintah Basin are contributing to elevated ozone concentrations in the region.

56. Part of the Antelope Creek Field comprises a layer of tar sands, which is immobile. To extract oil from these tar sands, Petroglyph plans to employ new experimental thermal recovery methods.

57. Petroglyph's Tar Sands Project proposed to use thermal recovery techniques that include in situ combustion and/or steam-flood or other heat transfer methods or techniques.

58. Petroglyph may attempt to use in situ combustion, where compressed air generated by a skid-mounted air compressor would be pumped into an injection well to a depth of about 600 feet. The injected air would cause the oil to ignite, releasing heat and causing the oil to become mobile and flow to a production well.

59. If in situ combustion does not work, the company plans to use a steam-flood technique, injecting steam rather than air into the wells.

60. According to EPA, air emission generated from steam injection includes air pollution from: 1) dehydrators used to prepare fuel gas; 2) boilers to generate the steam; 3) engines for power generation; 4) tanks for gathering produced oil; 5) process and tank heaters; and, 6) construction and road dust.

61. Moreover, because oil recovered this way is heated, stored and shipped, these processes are likely to result in emissions of volatile organic compounds (VOCs) and hazardous air pollutants, emissions that are not characteristic of conventional oil and gas extraction processes.

62. Moreover, like conventional oil and gas development, the thermal recovery techniques Petroglyph proposes to use in the Tar Sands Project would also result in emissions of other air pollutants, including sulfur dioxide, nitrous oxides, particulate matter (PM), carbon monoxide, and volatile organic compounds from vehicle traffic and engine exhausts both during construction and production, as well as volatile organic compound emissions from storage tanks.

63. Thus, significant temporary, localized impacts and long-term regional impacts to air quality and public health will result from this project. Temporary, localized impacts ($PM_{2.5}$, sulfur dioxide, carbon monoxide, and nitrous oxide) will result from grading, excavation, and extracting the tar sands.

64. At a minimum, impacts from hazardous air pollutants such as benzene, toluene, ethylbenzene, xylene, and formaldehyde could present health risks to workers, communities, public health and the environment. Long-term regional impacts from carbon monoxide and nitrous oxide, particulate matter, sulfur dioxide, VOC emissions and other air pollutants, including hazardous pollutants, would result from tar sands processing, upgrading, and transport.

65. The Tar Sands Project will also result in significant cumulative impacts to air quality, both locally and regionally and may adversely impact Class I areas.

66. The 2003 EA failed to adequately quantify, address or analyze individual or cumulative air quality impacts from the Tar Sands Project. The 2003 EA failed to even attempt to characterize or address emissions from the specific processes Petroglyph proposes to employ in the 288 wells designed to extract oil from tar sands.

67. Air emissions from the Tar Sands Project will also contribute to global warming. Recent industrialization and burning of carbon sources have resulted in dramatically increased carbon dioxide concentrations and are likely to contribute to overall climatic changes.

68. For example, current upgrading technology for Canadian tar sands produces 37 kilograms of carbon dioxide per barrel of oil.

69. Producing synthetic crude oil from tar sands requires more energy input than does producing conventional crude oil. The total life-cycle emissions for synthetic crude oil are about 20 percent higher than low-sulfur, light crude oils.

70. The 2003 EA failed to adequately quantify, address or analyze individual or cumulative impacts to global warming. The 2003 EA failed to even attempt to characterize or address greenhouse gas emissions from the specific processes Petroglyph proposes to employ in the 288 wells designed to extract oil from tar sands.

71. Since 2003, activities effecting air quality, water quality and quantity and wildlife and wildlife habitat have intensified and the baseline condition of these resource and environmental values has worsened significantly. As a result, the 2003 EA is out-of-date and must, at a minimum, be supplemented to account for these increases in development activities and decreases in baseline conditions.

**V. Tar Sands and Water Impacts**

72. The Antelope Creek Tar Sands Project area encompasses approximately 57 miles of seasonally-flowing (ephemeral) creeks. The confluence of Antelope and Sowers Creeks is located in the north-central portion of the EA area; these creeks flow together to

the Duchesne River, about 6 miles north. The Tar Sands Project area also drains into tributaries to the Green River, which is approximately 20 miles from the project area.

73. Antelope Creek and the Duchesne River are currently characterized by elevated levels of total phosphorous. Antelope Creek as well as the lower Duchesne River, from Randlett to its confluence with the Green River, is on the list of impaired waters under Section 303(d) of the Clean Water Act because of adverse impacts from total dissolved solids. Moreover, the Utah Division of Water Quality admits that it lacks sufficient data to assess whether the Duchesne River is meeting its beneficial uses.

74. The Tar Sands Project will result in significant water depletion, river flow depletion, and impacts to wildlife habitat, including critical habitat for endangered fish in the Duchesne River and Green River.

75. Although the 2003 EA discounts water use for the project, EPA estimates that the 288-well Tar Sands Project alone would consume 338.7 acre feet of water per year. This water consumption would be added to the already significant water consumption used by existing and approved development of the Antelope Creek Field, as well as consumption resulting from ongoing and reasonably foreseeable oil and gas and other development activities.

76. Water quality will also be impacted by the Tar Sands Project. Increased turbidity, salinity and sedimentation will result from increased runoff and erosion from disturbed areas and accidental spills. Wind and water erosion rates will increase and natural drainages could be altered.

77. Groundwater will be depleted and shallow aquifers may be contaminated during drilling from fracturing fluids and from cross-aquifer mixing. Depletion of ground water

could reduce water flow discharged to surface water bodies, alter streamflow patterns and reduce flow in domestic wells.

78. These water quality impacts will be added to significant water quality impacts resulting from existing and approved development of the Antelope Creek Field, as well as impacts that result from ongoing and reasonably foreseeable oil and gas and other development activities.

79. The 2003 EA failed to adequately quantify, address or analyze individual or cumulative water quantity and quality impacts from the Tar Sands Project. The 2003 EA failed to even attempt to characterize or address emissions from the specific processes Petroglyph proposes to employ in the 288 wells designed to extract oil from tar sands.

80. The 2003 EA did not adequately quantify direct, indirect and cumulative losses to wildlife habitat, as well as fragmentation of habitats, that would result from the Tar Sands Project.

## FIRST CAUSE OF ACTION
**(Violation of NEPA – Failure to Provide Public Notice and Participation)**

81. Each of the proceeding paragraphs is incorporated by reference herein.

82. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken . . . . [because] public scrutiny [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b).

83. "Federal agencies shall to the fullest extent possible . . . encourage and facilitate public involvement in decisions which affect the quality of the human environment[.]" 40 C.F.R. § 1500.2(d). Agencies must "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a). The

regulations further propose no fewer than nine alternate means of providing notice to the public where a proposed action will implicate local concerns. 40 C.F.R. § 1506.6(b)(3).

84. Upon information and belief, Defendants violated NEPA and its implementing regulations by failing to provide the public with notice of, and invite public participation in, the preparation of the 2003 EA, its related FONSI, or the final decision approving the Tar Sands Project.

85. Defendants actions violate NEPA and are arbitrary, capricious, an abuse of discretion, and not in accordance with law under the APA. 5 U.S.C. § 706.

## SECOND CAUSE OF ACTION
**(Violations of NEPA – Tar Sands Project)**

86. Each of the proceeding paragraphs is incorporated by reference herein.

87. NEPA requires all federal agencies to undertake a thorough and public analysis of the environmental consequences of proposed federal actions, including a detailed EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

88. NEPA prescribes the process by which agencies must take a hard look at the environmental impacts of a proposed action. 42 U.S.C. §§ 4321-70.

89. If the agency determines a proposed action **may** "significantly affect" the environment, it must prepare an EIS. 42 U.S.C. § 4332(2)(C).

90. Only if a proposed action will not significantly impact the environment may an agency rely on a less detailed EA and a FONSI. 40 C.F.R. §§ 1501.4(e), 1508. A FONSI must include a convincing statement of reasons to explain why a project's impacts are insignificant. Id. § 1508.13.

91. To comply with NEPA, the agency must consider the site-specific impacts of the action as well as the cumulative impact of the proposed action when combined with other past, present, and reasonably foreseeable future actions. Id. §§ 1500-08.

92. When an agency is faced with "incomplete or unavailable information" about the impacts of an activity on the environment and the information is "essential to a reasoned choice among alternatives," the agency must include the information in the NEPA document, provided the costs of obtaining it are not exorbitant. Id. § 1502.22.

93. When an agency allows an applicant to prepare an EA, the agency must make its own evaluation of the environmental issues and must ultimately take responsibility for the scope and content of the EA. Id. § 1506.5.

94. Defendants failed to take a hard look at the impact of the Tar Sands Project on air quality, water quantity and quality, and wildlife and wildlife habitat, as well as the cumulative impacts to these resource values resulting from the proposed action.

95. Defendants violated NEPA and its implementing regulations through issuance of the FONSI and approval of the 2003 EA because they: (1) failed to prepare an EIS addressing the significant environmental impacts of the Tar Sands Project and alternatives to that proposed action; (2) failed to consider adequately the site-specific environmental impacts of the tar sands project; (3) ignored scientific and factual information relevant to the impacts of the tar sands project, (4) failed to consider the cumulative environmental impacts of past, present, and future tar sands and conventional oil and gas development as well as other activities, (5) failed to evaluate independently the environmental impacts of the tar sands project as well as alternatives to that proposed action; (6) failed to consider a reasonable range of alternatives to the proposed project;

and, (7) failed to prepare an updated EA given new circumstances and information relevant to environmental concerns related to the proposed project.

96. Moreover, contrary to NEPA, Defendants failed to base the 2003 EA on up-to-date information and analysis, particularly regarding baseline conditions. As a result, the 2003 EA is currently even more out-of-date.

97. Defendants actions violate NEPA and are arbitrary, capricious, an abuse of discretion, and not in accordance with law under the APA. 5 U.S.C. § 706.

## REQUESTED RELIEF

WHEREFORE, Sierra Club and IEN respectfully request that the Court:

A. Order and declare that Defendants violated NEPA and relevant rules and regulations when they failed to invite public participation in and notify the public of its environmental analysis and decision-making relative to the Tar Sands Project;

B. Order and declare that Defendants violated NEPA and relevant rules and regulations in undertaking analysis of, issuing a FONSI for, and approving the Tar Sands Project;

C. Issue an order and injunction setting aside the 2003 EA, the related FONSI and Defendants' approval of the Tar Sands Project;

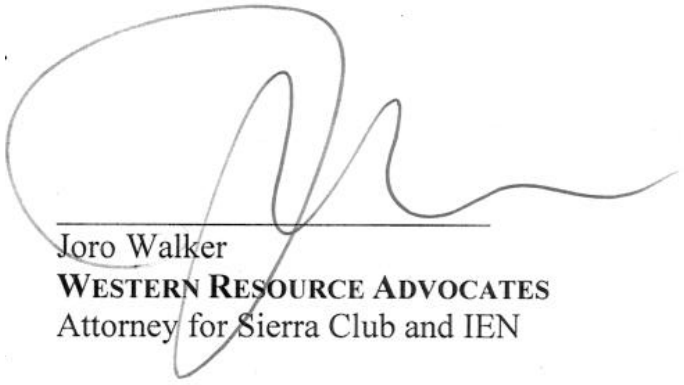
D. Enjoin Defendants from relying upon the 2003 EA, the related FONSI and approval of the Tar Sands Project and enjoin any development or activites associated with the Tar Sands Project until such time as Defendants have complied with NEPA and all relevant rules and regulations;

E. Grant such restraining orders and/or preliminary and permanent injunctive relief as Sierra Club and IEN may request;

F. Award Sierra Club and IEN their reasonable fees, expenses, costs, and disbursements, including, if appropriate, attorneys' fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

G. Grant Sierra Club and IEN such further and additional relief as this Court may deem just and proper.

Respectfully submitted January 15, 2009.



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