

Mark Templeton, Director, *pro hac vice* pending
Robert Weinstock, Fellow and Lecturer at Law, *pro hac vice* pending
Abrams Environmental Law Clinic
6020 South University Avenue
Chicago, Illinois 60637
(773) 702-9611
templeton@uchicago.edu
rweinstock@uchicago.edu

FILED

DEC 01 2017

Clerk, U.S. District Court
District Of Montana
Helena

Shiloh Hernandez, Attorney
Western Environmental Law Center
103 Reeder's Alley
Helena, Montana 59601
(406) 443-3501
hernandez@westernlaw.org

Attorneys for Proposed Amicus Curiae Professor Michael Greenstone

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

CITIZENS FOR CLEAN ENERGY, *et al.*

and

THE NORTHERN CHEYENNE TRIBE

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*

Federal Defendants.

and

STATE OF WYOMING, *et al.*

Intervenor-Defendants.

Case No. 4:17-cv-30-
BMM
(lead consolidated case)

**PROFESSOR
MICHAEL
GREENSTONE'S
MOTION FOR
LEAVE TO FILE AN
AMICUS BRIEF**

STATE OF CALIFORNIA, *et al.*

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*

Federal Defendants,

and

STATE OF WYOMING, *et al.*

Intervenor-Defendants.

Case No. 4:17-cv-42-
BMM
(consolidated case)

Professor Michael Greenstone, one of the country's leading economists on the social costs of carbon and other air pollutants, hereby files his *Motion for Leave to File an Amicus Brief* pursuant to Local Rule 7.5(b) and requests leave to file an amicus brief to assist the Court in determining whether the United States Department of Interior (DOI) acted lawfully when it revoked Secretarial Order 3338 and lifted its coal-leasing moratorium without having completed a programmatic environmental impact statement (PEIS) or supplemental environmental impact statement (SEIS) to evaluate the environmental impacts of the Federal Coal Program.

BACKGROUND

On January 15, 2016, then-Secretary of the Interior Sally Jewell issued Secretarial Order 3338. This order directed the Bureau of Land Management (BLM) to undertake a programmatic environmental impact review of the federal

coal-leasing program, the first such review since 1979. *See* AR 8 (Secretarial Order 3338). BLM was to review several aspects of the program, including the program's effect on climate change, to consider improvements or modernizations that would "foster the orderly development of BLM administered coal on Federal lands in a manner that gives proper consideration to the impact of that development on important stewardship values, while also ensuring a fair return to the American public." *Id.* at 3, 10. The order also instituted a moratorium on coal-leasing decisions until BLM completed its programmatic review. *Id.* at 10–11. The moratorium postponed decisions regarding new coal leases until they could be made with the benefit of information gained from the programmatic review. *See id.* at 10.

On March 29, 2017, Secretary of the Interior Ryan Zinke issued Secretarial Order 3348, revoking Secretarial Order 3338. The new order declared Secretary Zinke's determination that it was not in the public interest to maintain the leasing moratorium and that a programmatic environmental impact review was not needed. *See* AR 1 (Secretarial Order 3348). The order directed BLM to resume processing coal lease applications. Additionally, the order halted "[a]ll activities associated with the preparation of the Federal Coal Program PEIS." *Id.* at 2.

Plaintiffs filed their *Complaint for Declaratory and Injunctive Relief* on March 29, 2017.

Pursuant to L.R. 7.5(b)(2)(A) and 7.1(c)(1), Professor Greenstone has sought consent to file an amicus brief from all parties to the litigation. Each plaintiff has consented. The State of Wyoming and the National Mining Association took no position. After some discussion, BLM and DOI (Federal Defendants) have said they oppose Professor Greenstone's motion for leave to file an amicus brief.

LEGAL STANDARD

District courts have broad discretion to decide whether to grant amicus status. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472, 484 (1995). An amicus brief is typically allowed when (1) the party is "not represented," (2) "the amicus has an interest in some other case that may be affected by the decision in the present case," or (3) "when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Heath v. Am. Express Travel Related Servs. Co. (In re Heath)*, 331 B.R. 424, 430 (9th Cir. B.A.P. 2005) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (J. Posner)); *see also Cmty. Ass'n for Restoration of the Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (using same reasoning to grant amicus status).

While judicial review of an agency action is typically limited to the administrative record on which the agency based its decision, *Fence Creek Cattle*

Co. v. U.S. Forest Serv., 602 F.3d 1125, 1131 (9th Cir. 2010) (citing *Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005)), the Ninth Circuit allows the introduction of extra-record material if it meets one of four exceptions. *See Lands Council*, 395 F.3d at 1030. Relevant to this motion, district courts may admit extra-record evidence when (1) “supplementation is necessary to determine if the agency has considered all factors and explained its decision” or when (2) “supplementation is needed to explain technical terms or complex subjects.” *Fence Creek*, 602 F.3d at 1131 (citing *Lands Council*, 395 F.3d at 1030).¹ These exceptions recognize that “when highly technical matters are involved,” a court may need to look “outside the record to determine what matters the agency should have considered but did not.” *Asarco, Inc. v. U.S. Env’tl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980). Professor Greenstone’s amicus brief, if allowed, would consider and present limited extra-record material that meets this test.

ARGUMENT

Professor Greenstone’s amicus brief will make two basic points that provide context for the questions at the center of this case. First, it will explain the

¹ If any portions of Professor Greenstone’s amicus brief ultimately fail to meet these exceptions, this Court can narrowly strike those portions. *See, e.g., Ctr. for Biological Diversity v. U.S. Env’tl. Prot. Agency*, 90 F. Supp. 3d 1177, 1199–1200 (W.D. Wash. 2015) (striking improper extra-record evidence and related text from amicus briefs but declining to strike extra-record evidence that qualified under relevant factors exception).

significance of Federal Defendants' decision by demonstrating the societal costs of climate change and air pollution caused by new coal leasing. Second, Professor Greenstone's brief will explain advances in climate-change economics since the last programmatic review of federal coal leasing in 1979. By not considering these matters, Federal Defendants failed to consider all relevant factors when they chose not to complete a PEIS or SEIS before lifting the coal-leasing moratorium.

I. Professor Greenstone's Motion for Leave Should Be Granted Because He Has a Unique Perspective that Will Be Helpful to the Court.

Professor Greenstone possesses a unique perspective and offers information that the other parties in this litigation are unable to provide. Professor Greenstone is a leading expert on the incorporation of the social costs of carbon and other air pollution into government decision-making. He is interested in this case because the government has failed to incorporate adequately such costs and thereby failed to make a fully-informed decision. Because the parties lack his expertise on the social costs of carbon and other air pollution, Professor Greenstone's interest is unrepresented.

i. Professor Greenstone's Interest in this Matter Arises from His Role as Co-Creator of the Social Cost of Carbon and Expertise on Applying Environmental Economics to Government Decisions.

Professor Greenstone is the University of Chicago Milton Friedman Professor in Economics at the College and the Harris School of Public Policy, as

well as the Director of the interdisciplinary Energy Policy Institute at the University of Chicago and the Energy & Environment Lab at the University of Chicago Urban Labs. He previously served as the Chief Economist for President Barack Obama's Council of Economic Advisers and is a former member of the Secretary of Energy's Advisory Board. He earned his Ph.D. from Princeton University. He has examined extensively the Clean Air Act; its impacts on air quality, manufacturing activity, housing prices, and human health; and its benefits and costs. He is currently leading large-scale projects, including those through the Climate Impact Lab initiative, to estimate the economic and social costs of climate change and to identify efficient approaches to mitigating these costs. *See generally* Michael Greenstone, <https://www.michaelgreenstone.com> (last visited December 1, 2017); *see also* Curriculum Vitae of Michael Greenstone, attached as Exhibit 1.

When Professor Greenstone served as Chief Economist for the Council of Economic Advisers, he co-led the interagency process to develop a government-wide approach to evaluating the costs and benefits of the release of greenhouse gases into the atmosphere. This process led to what is commonly known as the social cost of carbon, a method of monetizing the impacts of greenhouse gases. The Interagency Working Group on the Social Cost of Carbon (IWG) included subject-matter experts from six federal agencies and six offices from the Executive Office of the President of the United States. In developing its estimates, the IWG

used consensus-based decision-making, relied on existing academic literature and models, and took steps to disclose limitations and incorporate new information.

As a co-creator of the social cost of carbon, Professor Greenstone is interested in educating the public and policymakers on the value of the metric and its ability to inform government decision-making. Professor Greenstone has written and spoken extensively on the importance of considering climate damages and externalities like air pollution when making decisions on federal policies, including coal leasing. *See, e.g.,* Michael Greenstone, *There's a Formula for Deciding When to Extract Fossil Fuels*, The Upshot, N.Y. Times, Dec. 1, 2015, available at https://www.nytimes.com/2015/12/02/upshot/theres-a-formula-for-deciding-when-to-extract-fossil-fuels.html?_r=0&mtref=undefined; Kenneth Gillingham, James Bushnell, Meredith Fowlie, Michael Greenstone, et al., *Reforming the U.S. Coal Leasing Program*, 354 Science 1096 (2016).

Professor Greenstone has filed, and plans to continue filing, comments in administrative proceedings where the government fails to consider adequately the social cost of carbon during its decision-making process. Related to this litigation, Professor Greenstone filed a comment and objection with the U.S. Forest Service regarding its review of the West Elk Coal Mine lease extension, which addressed how the social cost of carbon should be integrated into National Environmental Policy Act (NEPA) review of a particular federal coal-lease decision. Professor

Greenstone also filed a comment with the U.S. Army Corps of Engineers on the Draft Missouri River Recovery Management Plan and Environmental Impact Statement, which also related to the proper application of the social cost of carbon in the NEPA context.

Professor Greenstone seeks to assist this Court in understanding the social costs of carbon and other air pollution, the state of climate-change damage science, and whether Federal Defendants properly considered these costs and advancements in climate-change economics as relevant factors under NEPA.

ii. An Amicus Brief Is Desirable and Relevant.

To assist the Court in understanding the necessity of considering the social costs of carbon and other air pollution in evaluating the effects of the Federal Coal Program, Professor Greenstone's amicus brief will make two points. First, Professor Greenstone's brief will demonstrate the significant societal costs incurred by revoking the federal coal-leasing moratorium. Second, Professor Greenstone's brief will review the dramatic progress made in the fields of climate-change science and integrated assessment modeling since 1979, the last time Federal Defendants conducted a programmatic environmental review of the coal-leasing program.

Professor Greenstone's expertise will be a valuable resource on the technical terms and complex subjects that the Court must understand to determine whether Federal Defendants considered all relevant factors before lifting the moratorium.

iii. The Parties to This Litigation Cannot Adequately Address Professor Greenstone's Interest.

Professor Greenstone is not represented by any party in this case, and he possesses unique and relevant information and perspective that the lawyers for the parties are unable to provide. This singular perspective is sufficient to justify granting Professor Greenstone leave to file an amicus brief. *See Safari Club Int'l v. Harris*, No. 2:14-CV-01856-GEB-AC, 2015 WL 1255491, at *1 (E.D. Cal. Jan. 14, 2015) (granting opposed motion to appear as amicus when proposed brief contained new information and briefing schedule could accommodate amicus brief). Plaintiffs are environmental organizations, and, while they are very knowledgeable about environmental law, they are not climate-change or air-pollution economists. Professor Greenstone's academic life is focused on climate-change and air-pollution damages, and his knowledge of these subjects is unparalleled. As an academic economist, Professor Greenstone is an independent, objective teacher of environmental economics. No other party in this case has or represents this level of technical expertise.

iv. The Timing of Professor Greenstone's Brief Will Not Disrupt the Briefing Schedule Agreed to by the Parties.

Professor Greenstone will comply with all filing deadlines set forth in the parties' forthcoming, jointly-filed, revised briefing schedule pursuant to the Court's September 21, 2017 order. (Doc. 73 at 2.) If the Court grants this motion, Professor Greenstone will file his brief sufficiently in advance of Defendants' briefing deadlines to avoid any potential prejudice.

In sum, Professor Greenstone is not represented by the parties, has interests that may be affected by the outcome of this litigation, and offers a unique perspective on the role of the social cost of carbon and air pollution in the federal coal leasing context. *See Ryan*, 125 F.3d at 1063 (recommending granting amicus status if party meets one of three criteria). His perspective and explanations will be a valuable resource and will assist the Court in determining whether Federal Defendants considered all relevant factors under NEPA when they lifted the moratorium without completing a PEIS or SEIS.

II. Any Extra-Record Information Discussed in Professor Greenstone's Brief Will Qualify under Two Exceptions to the Prohibition Against Extra-Record Evidence.

Information in Professor Greenstone's amicus brief will qualify under the "complex subject" and "relevant factor" exceptions to the principle that judicial review of agency action is limited to the administrative record. *See Fence Creek*, 602 F.3d at 1131. Moreover, this case centers on Federal Defendants' failure to

complete a PEIS or SEIS, which raises legal questions that justify reference to materials outside an inherently circumscribed formal record and for which the Ninth Circuit has instructed courts to employ a broad application of the relevant factors exception. *See Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 665 (9th Cir. 1998) (recognizing that when question is “whether an agency’s activities have triggered NEPA’s procedures,” scope of review is “broader.”).

First, any extra-record information discussed in Professor Greenstone’s proposed amicus brief will meet the “complex subject” exception. *See Rock Creek All. v. U.S. Fish & Wildlife Serv.*, 390 F. Supp. 2d 993, 1000 (D. Mont. 2005) (admitting extra-record document that elaborated on document used by government). The initial administrative record submitted by the government contained several references to climate change, the social costs of carbon, and air pollution. *See, e.g.*, AR 35 (“Draft Statement of Work, Technical Assistance for the Coal Program”) (noting “greenhouse gas emissions, criteria air pollutants and climate change” as issues for analysis in PEIS); AR 322 (“Notice of Intent To Prepare a Programmatic Environmental Impact Statement To Review the Federal Coal Program and To Conduct Public Scoping Meetings”) (noting incorporation of social cost of carbon into royalty rates as potential modification under consideration); AR 1616 at fn. 195 (“Federal Coal Program Programmatic Environmental Impact Statement – Scoping Report”) (noting consideration of

external costs associated with coal may rely on social-cost-of-carbon estimates of the IWG). Professor Greenstone's brief will provide background information on these technical and economically-complex subjects to assist the Court. *Cf. Native Ecosystems Council v. Weldon*, 232 F. Supp. 3d 1142, 1148–49 (D. Mont. 2017) (striking extra-record evidence that went beyond “explaining technical terms or complex subject matter”). This information will include advances in climate-change economics since 1979 and how the Federal Coal Program imposes costs of carbon and other air pollution on society.

Second, Professor Greenstone's brief will help the Court determine whether Federal Defendants considered all relevant factors before making its decision. The primary purpose of the “relevant factors” exception is to allow a court to “develop a background against which it can evaluate the integrity of the agency's analysis.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014). This standard is particularly permissive for NEPA review. *See Nat'l Audubon Soc'y v. U.S. Forest Serv.*, 46 F.3d 1437, 1447 (9th Cir. 1993) (citing *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988)) (“[A]n allegation that an EIS has failed to mention a serious environmental consequence may be sufficient to permit the introduction of new evidence outside of the administrative record.”).

Professor Greenstone's brief will show that Federal Defendants did not consider all of the relevant factors under NEPA when determining not to complete a PEIS or SEIS. *See Nat'l Audubon* at 1147–48 (allowing extra-record evidence under relevant factor exception when agency failed to consider serious environmental consequences and tried to sweep “stubborn problems...under the rug”); *Rock Creek*, 390 F. Supp. 2d at 999-1001 (allowing extra-record evidence under relevant factors exception because evidence demonstrated agency inconsistency and failure to consider cumulative impacts). The relevant factors Federal Defendants failed to consider are the factors stated above: the social cost of carbon and other air pollution, how understanding of these costs has improved significantly since 1979, and how new Federal coal leases contribute to these costs. *See, e.g., Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, ___ F. Supp. 3d ___, 2017 WL 3480262 at *15, *19 (D. Mont. Aug. 14, 2017) (finding agency violated NEPA by “failing to address the indirect and cumulative impacts of greenhouse gas emissions” and failing to take “hard look” at project’s “effects on air pollution.”); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190–93 (D. Colo. 2014) (finding failure to include social cost of carbon in quantitative cost-benefit analysis to be arbitrary and capricious); *see generally Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016) (concluding that BLM violated NEPA by not assessing adequately air

pollution effects of mine); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 725 (9th Cir. 2009) (holding that BLM violated NEPA by not taking “hard look” at effects proposed mine would have on air quality); *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (recognizing benefits of up-to-date evidence in making accurate cumulative impact assessment).

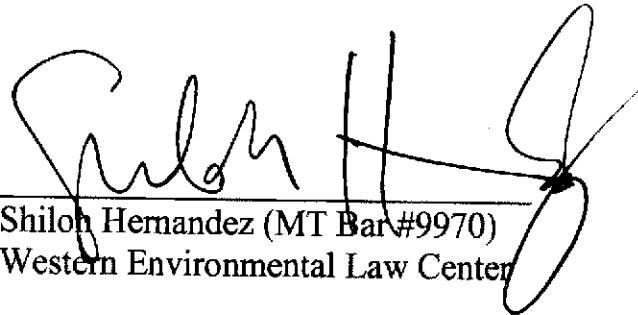
Professor Greenstone’s brief will speak to the cumulative costs of restarting federal coal leasing. This Court has recognized that an agency’s decision that refused to consider cumulative effects on the environment could result in “death by a thousand pinpricks” and justified admitting extra-record evidence. *Rock Creek*, 390 F. Supp. 2d at 1001. While BLM’s “Nedd memorandum” states that lease-specific climate-change analyses are sufficient for considering effects of greenhouse gas emissions from the coal-leasing program, AR 19 (“Recommendation Memorandum for the Assistant Secretary – Land and Minerals Management from Michael D. Nedd, Acting Director – Bureau of Land Management”), this Court rejected a similar proposition in *Rock Creek*. *Rock Creek*, 390 F. Supp. 2d at 1001 (ruling that agency could not consider all relevant information if it did not consider cumulative effects of several projects). This Court should allow Professor Greenstone’s brief to understand the cumulative effects of

the coal-leasing program, a relevant factor Federal Defendants should have considered before deciding not to complete the PEIS or to issue an SEIS.


CONCLUSION

Professor Greenstone respectfully requests that this Court grant his *Motion for Leave to File an Amicus Brief* in this matter. Professor Greenstone's brief will provide this Court with useful information, and his unique perspective and interests are beyond what the parties to the litigation are able to provide. Furthermore, Professor Greenstone's brief will assist the Court by explaining technical background information and by identifying relevant factors that Federal Defendants failed to consider when they decided not to complete the PEIS or issue a SEIS.

DATED this 1st day of December.



Shilon Hernandez (MT Bar #9970)
Western Environmental Law Center



Mark Templeton
Robert Weinstock
Abrams Environmental Law Clinic
Pro Hac Vice pending

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to L.R. 7.1(d)(2), I certify that this motion contains 3,164 words. I relied on my Microsoft Word word-processing tool to obtain the word count.

Respectfully submitted December 1, 2017.

s/ Shiloh Hernandez

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2017, I caused the foregoing to be served via United States Postal Service Mail on counsel for all parties at the following addresses:

Edward B. Zukoski
ROCKY MOUNTAIN OFFICE OF EARTHJUSTICE
633 17th Street
Suite 1600
Denver, CO 80202

Jenny K. Harbine
EARTHJUSTICE LEGAL DEFENSE FUND – BOZEMAN
313 East Main Street
Bozeman, MT 59715

Anchun Jean Su
CENTER FOR BIOLOGICAL DIVERSITY – OAKLAND
1212 Broadway
Suite 800
Oakland, CA 94612

Michael A. Saul
CENTER FOR BIOLOGICAL DIVERSITY – DENVER
1536 Wynkoop Street
Suite 421
Denver, CO 80202

Joshua Osborne-Klein
Wyatt Golding
ZIONTZ CHESTNUT VARNELL BERLEY & SLONIM
2101 Fourth Avenue
Suite 1230
Seattle, WA 98121

Roger M. Sullivan
Dustin A. Leftridge
McGARVEY HEBERLING SULLIVAN & McGARVEY
345 First Ave. East
Kalispell, MT 59901

Andrew G. Frank
Yueh-ru Chu
NEW YORK STATE ATTORNEY GENERAL'S OFFICE
120 Broadway
26th Floor
New York, NY 10271

George Torgun
Liz Rumsey
CALIFORNIA DEPARTMENT OF JUSTICE
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550

William R. Sherman
WASHINGTON STATE ATTORNEY GENERAL'S OFFICE
800 Fifth Avenue, Suite 2000, TB-14
Seattle, WA 98104

William G. Grantham
STATE OF NEW MEXICO OFFICE OF THE ATTORNEY GENERAL
201 Third St. NW
Suite 300
Albuquerque, NM 87102

John S. Most
U.S. DEPARTMENT OF JUSTICE-DC-7611
P.O. Box 7611
Environment & Natural Resources Division
Washington, D.C. 20044-7611

David C. Dalthorp
JACKSON, MURDO & GRANT, P.C.
203 N. Ewing Street
Helena, MT 59601-4298

Erik Edward Petersen
WYOMING ATTORNEY GENERAL
2320 Capitol Avenue
Cheyenne, WY 82002

Mark L. Stermitz
CROWLEY FLECK PLLP – BILLINGS
490 North 31st Street, Suite 500
P.O. Box 2529
Billings, MT 59103-2529

James M. Auslander
Peter J. Schaumberg
BEVERIDGE & DIAMOND, PC
1350 I Street NW
Suite 700
Washington, D.C. 20005

Melissa A. Schlichting
Timothy C. Fox
MONTANA ATTORNEY GENERAL
P.O. Box 201401
215 North Sanders
Helena, MT 59620-1401

s/ Shiloh Hernandez