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ATTORNEYS FOR SIGNAL PEAK ENERGY, LLC

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

350 MONTANA, MONTANA ENVIRONMENTAL INFORMATION CENTER, SIERRA CLUB, WILDEARTH GUARDIANS, Plaintiffs, vs. DAVID BERNHARDT, in his official capacity as Acting Secretary of the Department of the Interior, UNITED STATES OFFICE OF SURFACE MINING, an agency within the U.S. Department of Interior, et al, Defendants. and SIGNAL PEAK ENERGY, LLC, Defendant-Intervenor.	Case No. 9:19-cv-00012-DWM **SIGNAL PEAK ENERGY'S BRIEF IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

This case is driven by the Plaintiffs' opposition to coal mining, and there is no scenario under which these Plaintiffs would be satisfied that the Office of Surface Mining Reclamation and Enforcement ("Office of Surface Mining") fulfilled its National Environmental Policy Act ("NEPA") and Endangered Species Act ("ESA") obligations in approving the mine plan modification for the Bull Mountain Mine. The Environmental Assessment ("EA") and record on remand demonstrate that the Office of Surface Mining undertook detailed analyses of coal transportation and combustion impacts to address the NEPA errors this Court identified. But that is not enough for these Plaintiffs who renew the same claims and attempt to tack on others that could have been raised in the prior litigation.

The EA at issue, together with the previous environmental analyses, demonstrate that the Office of Surface Mining took the requisite "hard look" at impacts and properly considered threatened species. The Office of Surface Mining's decision should be upheld because:

- The EA addresses coal train impacts, including noise and vibration, coal dust emissions, and rail safety and congestion.
- The EA calculates and assesses the impacts of non-greenhouse gas emissions associated with coal transportation and combustion.

- The Office of Surface Mining carefully considered the quantified social costs of carbon associated with eventual coal combustion and reasonably determined that the analysis was not useful to its decision-making.
- The Office of Surface Mining was not required to consult regarding species not affected by the Mine.

Thus, Signal Peak Energy, LLC ("Signal Peak") requests that the Court affirm the Office of Surface Mining's mine plan modification.

RELEVANT FACTUAL BACKGROUND[1]

The Bull Mountain Mine and Signal Peak's Mine Plan Modification

In 2008, Signal Peak Energy applied to the Bureau of Land Management for a lease of approximately 2,680 acres of federally owned coal adjacent to the existing Mine. AR000014. In 2011, the Bureau approved the coal lease. AR000015.[2] Advocacy groups attacked this leasing decision on NEPA grounds and, eventually, the Ninth Circuit Court of Appeals rejected their arguments.

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[1] This Court is well versed on the background of the Bull Mountain Mine, so only minimal discussion is included here. *See Mont. Envtl. Info. Ctr. v. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017) (AR016637-016700).

[2] [2] Unless otherwise specifically stated, Signal Peak's record citations are either (1) to the Bates-labeled pages on Disc 2 of the 2019 Administrative Record (designated as "AR") or (2) to the U.S. Fish and Wildlife Service's record (designated as "FWS").

Northern Plains Resource Council v. U.S. Bureau of Land Mgmt, 725 Fed. Appx. 527 (9th Cir. Feb. 27, 2018).

In 2012, Signal Peak submitted separate applications to the Montana Department of Environmental Quality and the Office of Surface Mining for approval of Amendment 3 to its existing mine permit to allow development of the federal coal. AR000015. The proposed expansion would extend the duration of mining by approximately nine years and the Mine would produce an additional 86.7 million tons of saleable coal. AR000086. The Department of Environmental Quality approved the Mining Permit in 2013. AR000015. The Plaintiffs have challenged the Department's permit in two successive actions, one of which remains pending before the Montana Board of Environmental Review. *In re Appeal of Amendment Application AM3*, Case No. BER 2017-07 SM. In 2015, the Office of Surface Mining approved the mine plan modification.

The Previous Litigation

Environmental groups, including the Montana Environmental Information Center, a party here, challenged the EA supporting the Office of Surface Mining's initial decision. The Court accepted three of Plaintiffs' original claims:

- First, train transportation was a reasonably foreseeable indirect effect of the plan modification and the agency should consider "the health, economic, and

environmental impacts of diesel emissions, noise, vibrations, rail congestion, and coal dust." *MEIC*, 274 F. Supp. 3d at 1091-92.

- Second, the agency should have considered the non-local impacts of non-greenhouse gas emissions. *Id*. at 1093-94.
- Third, because the EA quantified socioeconomic benefits of the Mine, it must also consider the quantified "social costs" of greenhouse gas emissions. *Id*. at 1098-99.

Based on these predicate findings, the Court held that the record did not support the decision that an Environmental Impact Statement ("EIS") was unnecessary. *Id*. at 1101-04.

On remand, the Office of Surface Mining addressed each of the issues identified by the Court. Nonetheless, Plaintiffs remain dissatisfied and, in fact, raise new contentions that were not included in the prior litigation.

STANDARD OF REVIEW

The Administrative Procedure Act ("APA") applies to review of NEPA compliance. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Courts may set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Although this review is "searching and careful," the standard is "narrow, and [the Court] cannot substitute [its] own judgment for that of the [agency]." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2005) (citations omitted). "In general, a court will uphold agency decisions so long as the agencies have considered the relevant factors and articulated a rational connection between the fact found and the choices made. This deference is particularly appropriate when a court is reviewing issues of fact, where analysis of the documents requires a high level of technical expertise." *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 578 (9th Cir. 2016) (citations omitted). Accordingly, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Nat. Res. Council,* 490 U.S. 360, 378 (1989).

ARGUMENT

I. THE EA COMPLIES WITH NEPA'S REQUIREMENTS.

As this Court is well-aware, NEPA is a procedural statute, the dual purposes of which are to inform agency decision-makers and the public of the environmental effects of proposed federal actions. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). NEPA requires that agencies prepare an EIS for "major Federal actions significantly affecting the quality of the human

environment." 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3. Not every major Federal action requires an EIS. If an agency prepares an EA, and concludes that project impacts will be insignificant, it may issue a Finding of No Significant Impact. *See* 40 C.F.R. §§ 1501.3, 1501.4(c)-(e), 1508.9.

"[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, . . . the agency need not consider these effects" in its NEPA analysis. *Dept. of Trans. v. Pub. Citizen*, 541 U.S. 752, 770 (2004); *see also Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 555 (1978). In other words, "[a]n agency has no obligation to gather or consider environmental information *if it has no statutory authority to act on that information*." *Sierra Club v. FERC*, 867 F.3d 1357, 1382 (D.C. Cir. 2017) (emphasis added).

Building on *Public Citizen*, federal appellate courts have held that an agency is not required to "examine everything for which the [project] could conceivably be a but-for cause" in order to satisfy NEPA. *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016); *Sierra Club*, 867 F.3d at 1372. An agency's NEPA analysis need not address the indirect effects of activities that another agency "has sole authority" to regulate. *Sierra Club*, 827 F.3d at 47. The courts, including the Ninth Circuit, have held that lack of regulatory authority "breaks the NEPA causal chain and

absolves [the agency] of responsibility to include in its NEPA analysis considerations that it 'could not act on' and for which it cannot be 'the legally relevant cause.'" *Id.* at 48 (quoting *Pub. Citizen*, 541 U.S. at 769); *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1225-26 (9th Cir. 2015).

A. The Office of Surface Mining Took a Hard Look at Coal Train Impacts.

This Court held that the Office of Surface Mining was required to consider the indirect impacts of Bull Mountain coal trains beyond the Broadview Spur. *MEIC*, 274 F. Supp. 3d at 1092. On remand, the Office did precisely that. The EA took a hard look at the impacts of the continued operation of 3.6 trains per day beyond the Broadview Spur on rail congestion (AR000065), noise and vibration (AR000082-83, 84-85), non-greenhouse gas and greenhouse gas emissions from locomotives and coal dust (AR000111-14, 121, 124-26, 128-29), and human and ecological health (AR000113-114).

Now that the analyses are complete, perhaps not surprisingly, Plaintiffs want more. They propose that the agency should have taken a closer look at the impacts of (1) coal trains on wildlife, and grizzly bears in particular, (2) emissions from coal train locomotives, and (3) coal train derailments. Pl. Br. at 4-14. But the agency's analysis of coal trains was more than adequate, particularly in light of the Office of Surface Mining's lack of authority to control or mitigate coal train effects

and the relative insignificance of those potential impacts in the agency's decision-making process.

1. Grizzly Bears

Agencies are directed to examine environmental impacts in proportion to their significance. 40 C.F.R. §§ 1500.1(b), 1500.4(g) ("Agencies shall reduce excessive paperwork by: . . . deemphasiz[ing] insignificant issues, narrowing the scope of the [review] process accordingly[.]"). And impacts that are remote, highly speculative, or not reasonably foreseeable need not be considered in detail. *Ground Zero Center for Non-Violent Action v. U.S. Dept. of Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004) (the Ninth Circuit has "rejected the notion that every conceivable environmental impact must be discussed in an EIS;" "[a]n EIS need not discuss remote and highly speculative consequences").

Here the Office of Surface Mining determined that because the rail line was already in existence and would operate beyond the Broadview Spur regardless of the mine plan modification, the EA was not required to review grizzly bear impacts in detail. AR000199. Even the evidence offered by Plaintiffs highlights the infrequency of bear-train collisions. For instance, the 2012 Cabinet-Yaak population research report noted that only three of 65 total known grizzly mortalities in 30 years (1982-2012) were caused by trains, i.e., one per decade. AR012841. The 2016 Cabinet-Yaak and Selkirk Mountains Grizzly Bear

Ecosystems Update noted one additional grizzly killed by a train. AR017588-89.[3] The other statistics cited by Plaintiffs are second-hand information reported in 2004 and 2017 newspaper articles. AR016591, AR013732. Regardless, there is no way to know whether the continued passage of 3.6 trains per day along tracks that carry at least three times that volume of traffic from other shippers would measurably decrease the likelihood of collisions, which are already few and far between.

Plaintiffs' logic allows for no end to the chain of effects that an agency must examine. At some point, the exercise becomes so attenuated that the causal chain falls apart. For instance, by Plaintiffs' logic, must the Office of Surface Mining also account for impacts to sea life from the barges shipping the coal overseas? Even Plaintiffs would surely draw the line somewhere. But in this case, it is for the agency to decide where that line should be drawn, and the Court should defer to its reasoned judgment. *Protect Our Communities*, 825 F.3d at 578. Here, where grizzly bear impacts from Bull Mountain coal trains are highly unlikely and any possible causal chain is very attenuated, the agency's decision not to examine them

[3] This citation is to the Bates-labeled pages in the supplemental record filed on June 19, 2019.

in detail was well within the "reasonable" latitude granted agencies under NEPA. *Id*.

2. Coal Train Locomotives

On remand, the Office of Surface Mining specifically examined the effects of coal train locomotives beyond the Broadview Spur. AR000067-69, AR000111-12. Plaintiffs now attempt to flyspeck the analysis, questioning the agency's technical judgment and demanding (1) a more detailed discussion of how locomotive emissions will affect air quality in Missoula, (2) an analysis of alleged increases in cancer risk, and (3) review of cumulative emissions from *all* train traffic on the Burlington Northern Railway train routes. Pl. Br. at 8-13. None of these arguments are persuasive.

First, the EA explains that under the Clean Air Act, the Environmental Protection Agency has "sole authority" to adopt and enforce locomotive emissions standards. AR000111. However, some localities have worked with rail operators to limit emissions. *Id*. In 2011, Missoula County developed the Montana Rail Link Idling Emissions Reduction Project, which has led to reduced emissions in the area, although the EA addressed the fact that Missoula remains in non-attainment for some criteria pollutants. AR000110-11. Further, the EA calculated total emissions from criteria pollutants per train trip and per mile, AR000112 (Table B-5), AR000128-29, AR000135-37 (Table 2-2), and concluded that their

contribution to air quality impacts will be negligible for the nine additional years of train traffic, AR000067-68. Thus, the EA took into account Missoula's pre-existing air quality in the analysis.

Second, the EA acknowledged that emissions from diesel train locomotives include "diesel particulate matter." AR000112. However, the Office of Surface Mining noted that diesel particulate matter is a portion of ambient $PM_{2.5}$, which is regulated under the National Ambient Air Quality Standards so that measures to reduce $PM_{2.5}$ would be expected to offer protections from diesel particulate matter as well. *Id*. Addressing the Health Impact Assessment from the Washington coal terminal EIS cited by the Plaintiffs (Pl. Br. at 11), the agency distinguished the action, which included additional operations of at least four times as many trains (AR004050 (16 trains)), and concluded that the mine plan modification was "unlikely to cause a notable increase in cancer risk to people and communities along the train line." AR000222. No more detailed review of cancer risk was required.

Finally, the Office of Surface Mining adequately considered the cumulative effects of Bull Mountain Mine coal train emissions over the nine-year period, concluding they would be "minor and short term." AR000068-69 (referencing calculations at AR000040). Plaintiffs' claim that the agency should have accounted for cumulative impacts of all coal train traffic in the mountain west,

including "thousands of other trains shipping coal annually to the same coal port and coal plants in Oregon and Washington," defies logic. *See* Pl. Br. at 12-13. The agency action under review here is a mine plan modification in Montana. This Court determined coal train transportation was a reasonably foreseeable indirect effect of that decision [*MEIC*, 274 F. Supp. 3d at 1092-93], but Plaintiffs now want a cumulative impact analysis of coal train traffic as if the coal trains were the proposed action. There is no NEPA requirement to analyze the cumulative impacts of an indirect project effect.

Further, given that the Environmental Protection Agency regulates locomotive emissions, that the Burlington Northern Railway as the owner and operator of the trains must ensure compliance with air quality standards, and that the Office of Surface Mining simply has no authority over these impacts of train traffic, the agency's analysis of locomotive emissions was reasonable. *Sierra Club*, 827 F.3d at 47. Here, the Office of Surface Mining addressed the impacts of train locomotive emissions in proportion to their significance and NEPA requires no more.

3. Train Derailments

The Office of Surface Mining took into account train derailments in the EA, particularly in the context of coal dust emissions, which, if excessive, can potentially increase the risk of derailment on heavily used rails. AR000039.

Given the Surface Transportations Board's regulation of train traffic and the requirements imposed on train operations by the Burlington Northern Railway's imposition of a Coal Loading Rule, the agency determined that the risk of coal train derailments was sufficiently mitigated. AR000065, AR000222-23, AR000243-44; *see also Paradise Ridge Defense Coal. v. Hartman*, 757 Fed. Appx. 536 (9th Cir. 2018) (agency can rely on industry standards set by other federal agencies to predict relative safety). To the extent a derailment might occur, it would not be a normal or predictable part of rail operations, and attempting to analyze the impacts of such a worst-case scenario would be highly speculative. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-56 (1989) (NEPA does not require agencies to consider a "worst case analysis"); 40 C.F.R. § 1502.22 (analysis is confined to "reasonably foreseeable" significant adverse effects). Thus, the agency's decision not to attempt an analysis of coal train derailments was reasonable.

4. The Office of Surface Mining's Analysis Exceeded NEPA's Requirements Given the Agency's Limited Statutory Authority.

As the U.S. Supreme Court has held, the scope of the agency's decision-making authority circumscribes the impacts that must be considered by an agency in NEPA review. The *Public Citizen* Court asked the fundamental question: "What factors can [the agency] consider when regulating in its proper sphere?" *Pub.*

Citizen, 541 U.S. at 770. If the agency is "forbidden to rely on the effects … *as a justification for* denying" the action, then its NEPA analysis need not consider the impacts. *Sierra Club v. FERC*, 867 F.3d at 1373 (emphasis in original). "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Pub. Citizen*, 541 U.S. at 770.

The Office of Surface Mining's authority to approve, disapprove, or conditionally approve the mining plan (*see* 30 C.F.R. § 746.1) is derived from the Mineral Leasing Act and the Surface Mining Control and Reclamation Act. *See* 30 U.S.C. §§ 201(a)(3)(C), 1211(c)(1), 1273(c); 30 C.F.R. § 746.13. Those Acts establish the factors that the agency may consider in reviewing a mine plan and the limits on the agency's regulatory authority, which in turn, establish the proper scope of NEPA review for a mine plan decision. The factors the agency may consider in its substantive mine plan approval process relate to *mining* of federally leased coal—not the transportation or end-use of the coal. *See id*.

By the time the Office of Surface Mining reviews a mine plan modification, the Bureau of Land Management has made its decision to lease the coal and the state agency has permitted the mining operation. The issuance of a coal lease grants both a right and an obligation under the Mineral Leasing Act to diligently mine commercial quantities of the coal. 30 U.S.C. §§ 201(a)(3)(C), 207(a), (b)(1);

43 C.F.R. § 3480.0-5(a)(21). While the agency can properly condition *mining* on compliance with environmental laws, it lacks authority to recommend modifications to, or disapprove Signal Peak's mining plan based on indirect impacts caused by transporting the coal away from the Mine, an activity over which the Office of Surface Mining has no regulatory control. *See WildEarth Guardians v. Zinke,* 368 F. Supp. 3d 41, 78 (D.D.C. 2019) (holding once BLM issues an oil and gas lease under the Mineral Leasing Act it lacks authority to preclude development). It follows, under *Public Citizen* and its progeny, that the Office of Surface Mining was not required to evaluate these downstream impacts over which it has no control. Nevertheless, as discussed above, the Office of Surface Mining took a "hard look" at rail transportation impacts.

B. The Office of Surface Mining Sufficiently Considered the Social Costs of Carbon.

In 2017, this Court did not dispute that the Office of Surface Mining "conducted a full and thorough analysis of the greenhouse gas emissions from the Mine." *MEIC,* 274 F. Supp. 3d at 1098. The agency's original EA quantified the likely emissions of eventual downstream coal combustion and compared those emissions to global annual emissions to determine that on a global scale the incremental impacts of the mine plan modification would be minor and temporary. *Id*. at 1096. However, the Court faulted the Office of Surface Mining for its

cursory review of the social cost of carbon. More specifically, the Court explained that the agency had erred in quantifying "social benefits" in the socioeconomic impact discussion and not quantifying the social costs of greenhouse gasses. *Id*. at 1098-99. On remand, the Office of Surface Mining has now carefully evaluated the social cost of carbon methodology, examined the calculations of cost pursuant to Plaintiffs' preferred methodology, and determined that the resulting information is not useful to its decision-making. That determination was not arbitrary and capricious.

1. The Office of Surface Mining Evaluated the Social Cost of Carbon for the Mine Expansion.

On remand, at the Court's direction, the Office of Surface Mining re-examined its analysis of greenhouse gas emissions on climate change and society at large. Specifically, the agency calculated the quantity of greenhouse gas emissions that would result from mining, transporting, and combusting the coal (99% of which would be emitted outside the U.S.) and compared that figure to total global greenhouse gas emissions. AR000070. The agency estimated that the proposed mine expansion would contribute 0.04% to annual global emissions. *Id*.; AR000247 (explaining calculation). While the mine expansion arguably would contribute to the effects of climate change, the Office of Surface Mining concluded that those contributions relative to global sources would be minor over the short-

and long-term.[4] AR000070. Considering the social costs of those emissions, the Office of Surface Mining discussed the effects of climate change at a global, national, and state level. AR000043-46; AR000070; AR000150-57.

In this EA, the Office of Surface Mining carefully considered quantification of social costs. Indeed, the agency evaluated social cost of carbon calculations from both the Plaintiffs and from Signal Peak. *See, e.g.*, AR000192, AR000226-28. Employing the methodology Plaintiffs prefer, these calculations showed social costs of carbon ranging from $247 million to $10.5 billion, but, as the expert economist explained, "this enormous variation" rooted in "dubious assumptions" "casts considerable doubt on the practicality and usefulness" of the metric. AR005518-19, 20.[5] After considering these calculations, the Office of Surface Mining concluded that the social cost of carbon methodology was unsound, and that quantifications of social cost for this individual project would not be helpful to its decision-making. AR000155-57, AR000192. The Office of Surface Mining

[4] In contrast to the initial EA, on remand, the Office of Surface Mining did not rely on a "perfect substitution" argument, but instead quantified impacts of downstream emissions. AR000225. If Signal Peak coal were removed from the international market, there would likely be no discernible effect on the coal burnedand, in turn, no discernible effect on the volume of greenhouse gas emissions. AR005514-16.

[5] Dr. Timothy Considine's report also noted that a calculation of this sort is flawed, in part, because it neglects to consider the *benefits* associated with carbon combustion in its determination of carbon's cost to society. AR014076-86.

explained that "this analysis and its wide margin of error support our conclusion that such analysis was not needed because the social cost of carbon without a full cost-benefit analysis is of very limited utility to the decision maker." AR000192.

2. The Court Should Defer to the Office of Surface Mining's Assessment of the Social Cost of Carbon.

Case law demonstrates that the Office of Surface Mining acted well within its discretion. Applying the APA's review standards, other courts have upheld agency decisions not to apply the social cost of carbon metric for precisely the same reasons enunciated in the Office of Surface Mining's EA. *Western Org. of Resource Councils v. Bureau of Land Mgmt.*, 2018 WL 1475470, *14 (D. Mont. Mar. 26, 2018) (BLM not required to calculate social cost of carbon in EIS for resource management plan decision); *EarthReports, Inc. v. Fed. Energy Regulatory Comm'n*, 828 F.3d 949, 956 (D.C. Cir. 2016) (deferring to similar reasons why Federal Energy Regulatory Commission need not calculate social cost of carbon for conversion of a liquid natural gas terminal from import to import/export); *Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017) (requiring quantification of downstream emissions from combustion, but not mandating monetization by social cost of carbon metric); *WildEarth Guardians*, 368 F. Supp. 3d at 78 (same). In *WildEarth Guardians*, Judge Contreras rejected the very argument Plaintiffs advance in this case, that BLM engaged in a cost-benefit

analysis by providing minimal quantification of socioeconomic impacts. 368 F. Supp. 3d at 78. There, the court deferred to BLM's "reasoned determination" that the extreme variability in the social cost of carbon outputs rendered the resulting values "less than helpful in informing the public and the decisionmaker." *Id.*

The Council on Environmental Quality's recently released draft NEPA guidance on consideration of greenhouse gas emissions advises precisely the same result. 84 Fed. Reg. 30,097 (June 26, 2019). While the guidance encourages agencies to quantify emissions of downstream activities when practicable and not "overly speculative," the agencies need not prepare a cost-benefit analysis. *Id*. at 30,098. Nor is the quantification of some effects an indication that the agency intends to prepare a full-blown cost-benefit analysis. *Id*. at 30,099. As the guidance explains,

> There may be some effects that are more capable of monetization or quantification, such as employment or other socio-economic impacts, and that the agency may determine are useful to include in its NEPA review. *Monetization or quantification of some aspects of an agency's analysis does not require that all effects, including potential [greenhouse gas] emissions, be monetized or quantified*.

Id. (emphasis added).

Here, the Office of Surface Mining's inclusion of quantified measures of some socioeconomic impacts did not amount to initiation of a cost-benefit analysis.

See AR000205-206 (in response to comments, BLM explained how socioeconomic impacts are distinct from "economic benefits" as defined in economic theory and methodologies for cost-benefit analyses (citing Watson et al. 2007, Kotchen 2011)); *see also* AR014076-86 (Considine expert report explaining same).[6] The agency's decision not to quantify social cost of carbon is consistent with the Council on Environmental Quality's direction and other judicial determinations. Thus, the Office of Surface Mining acted well within its discretion to choose from among differing expert opinions. *See, e.g., WildEarth Guardians*, 368 F. Supp. 3d at 78.

C. The Office of Surface Mining's Finding of No Significant Impact Was Not Arbitrary and Capricious, and No EIS Is Required.

Relying on their previous arguments regarding coal train impacts and greenhouse gas emissions, Plaintiffs claim that the Office of Surface Mining should have concluded that the mine plan modification would result in significant impacts and prepared an EIS. Pl. Br. at 20-26. Because the agency's Finding of No Significant Impact is well supported by the record and because the Office of

[6] Even though quantified socioeconomic analyses such as project revenues, royalties, and wages have been commonplace in NEPA documents for decades, agencies have not been required to monetize environmental impacts to other resources such as wildlife, air, and water as part of that analysis. If, as Plaintiffs suggest, analysis of socioeconomic impacts necessarily triggers a cost-benefit analysis, one would expect that the agency would have to monetize a full range of adverse environmental effects. *See* AR000201-202..

Surface Mining's Finding is plainly not arbitrary and capricious, the Court should affirm the agency's decision. None of the issues examined on remand support Plaintiffs demand for an EIS.

First, the mine plan modification will not cause significant public health impacts or increase cancer rates. Having taken a "hard look" at the effects of train emissions (locomotive and coal dust) and downstream greenhouse gas emissions of combustion, the agency concluded that locomotive emissions would be minor and short-term and that combustion emissions would be negligible to minor. AR000003; *see also supra* Part I.A.2, I.B. Specific to cancer rates, the agency acknowledged that diesel emissions have been deemed carcinogenic by the Environmental Protection Agency but concluded that this action would not meaningfully increase cancer risks. AR000222; *see also supra* Part I.A.2. Plaintiffs fail to meet their burden to demonstrate those findings were arbitrary and capricious.

Second, the impacts of the mine plan modification are not "highly controversial" or "highly uncertain." 40 C.F.R. § 1508.27(b)(4), (b)(5). As the Office of Surface Mining explained, "[t]here is little scientific controversy over the nature of the impacts" of coal mining, and the agency has "experience implementing similar actions in similar areas." AR000005. "While there is some uncertainty about the long-term cumulative effects of greenhouse gases . . . and

how these effects can be managed when not currently quantifiable or predictable, the potential intensity of effects to the human environment is minimal." AR000005. These uncertainties do not rise to the level of "highly uncertain" outcomes "[s]imply because a challenger can cherry pick information and data out of the administrative record to support its position." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005). Indeed, if uncertainty around climate change impacts required an EIS, no project could ever make use of an EA again.

Third, that climate change is a significant global concern does not mean that any project contributing incrementally to its effects, no matter how small, by default must have significant *cumulative* impacts. To find otherwise would require that any project tied to greenhouse gas emissions at any level would be called to account for the significant effects of climate change worldwide, making the EA process a nullity. Here, the Office of Surface Mining conservatively projected downstream greenhouse gas emissions related to combustion, compared the total emissions of mine activity to the average global emissions and determined that the mine plan modification would account for only 0.04%. AR000070, AR000247. Plaintiffs do not question that analysis, which was sufficient to put the project in context as it relates to cumulative emissions worldwide. Thus, the agency's

Finding of No Significant Impact on this issue is well beyond the threshold of a "reasoned" conclusion.

Fourth, as discussed in Part I.A.1, *supra*, and Part II.B, *infra*, data shows that impacts to grizzly bears are highly unlikely, and it is impossible to show that the continued operation of 3.6 trains per day increases the risk of collisions. This does not demonstrate significant effects. Similarly, given that available data do not indicate the presence of northern long-eared bats in the Mine vicinity, significant impacts to the species are not likely. *See* Part II.A, *infra*.

Fifth, while an action may be significant if it "threatens a violation of Federal" law, the Plaintiffs have lost sight of what the action is in this case, i.e., approval of the mine plan modification. Pl. Br. at 25. There is no basis to assert that mining under the approved modification itself will violate the Clean Water Act. Whether coal trains require a Clean Water Act permit covering coal deposition to adjacent waters is irrelevant. Coal trains are operated by the Burlington Northern Railway, not Signal Peak, and train traffic is regulated by the Surface Transportation Board, not the Office of Surface Mining. Without conceding the point, to the extent a Clean Water Act permit were required, it would be Burlington Northern Railway's responsibility to secure one, and Plaintiffs cannot presume that the railroad would not.

In sum, the Office of Surface Mining took a "hard look" at the effects of the mine plan modification decision and its Finding of No Significant Impact was supported by the record.

II. GRIZZLY BEARS AND NORTHERN LONG-EARED BATS WILL NOT BE ADVERSELY AFFECTED BY THE PROPOSED ACTION; THE ESA DOES NOT REQUIRE CONSULTATION.

Plaintiffs argue for the first time that the Office of Surface Mining's ESA consultation was deficient. Ignoring the U.S. Fish and Wildlife Service's ("Service's") expert opinion that neither the northern long-eared bat nor the grizzly bear is among the species that could be affected by the Mine, Plaintiffs nevertheless contend that the Mine will adversely affect these species.

ESA Section 7(a)(2) requires a federal agency proposing to undertake an action ("action agency") to consult with the federal agency with jurisdiction over species in the area (here, the Service) to determine whether the proposed action is likely to "jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat." 16 U.S.C. § 1536(a)(2). But, as a threshold matter, the action agency must first determine whether any listed species exist in the potentially affected areas, usually by requesting that the Service prepare a list of such species. *See* Final ESA Section 7 Consultation Handbook, March 1998, Fig. 3-1.

The Service identified protected species potentially affected by the Mine. AR016593-98 ("Species on this list should be considered in an effects analysis for your project and could include species that exist in another geographic area. For example, certain fish may appear on the species list because a project could affect downstream species."). The Service determined that two species – the red knot and whooping crane – may be present in the area affected by the Office of Surface Mining mine plan approval. The Service did not identify northern long-eared bats or grizzly bears for purposes of ESA consultation.

A. Plaintiffs Do Not Provide Evidence of Northern Long-Eared Bats Sufficient to Override the Expert Agencies' Determination that Northern Long-Eared Bats are Not Present.

The Office of Surface Mining relied on the expert opinions of federal and state expert wildlife agencies to conclude that the northern long-ear bat is not present. *See* AR016598 (Service species list); AR000052 (citing report on northern long-eared bat from Montana Natural Heritage Program and Montana Fish Wildlife Parks, Montana Field Guide (2018)). The Office of Surface Mining properly gave great weight to data from the Montana Natural Heritage Program because it is a "program of the Montana State Library's Natural Resource Information System" that is the "state's resource for reliable, objective information and expertise to support stewardship of [the state's] native species and habitats, emphasizing those of conservation concern." Montana Natural Heritage Program,

http://mtnhp.org/about/. Nevertheless, Plaintiffs, citing information both pre-dating and post-dating the decision, argue that the Service and the Office of Surface Mining erred in relying on these expert determinations.

The only pre-decisional evidence Plaintiffs provide of northern long-eared bats in the action area is a single 2006 acoustic observation. Pl. Br. at 32. That information was well-known to all expert agencies involved. And they had all determined that it was "most likely [] a misidentification" because the Mine is "well outside of the known and predicted range" of the species and because "the occurrence of northern long-eared myotis in Montana is considered accidental." AR000052. The agencies are entitled to rely on their expert opinions, particularly within their areas of expertise. *Marsh*, 490 U.S. at 378. This well-analyzed observation is no basis upon which to find the agency's analysis lacking.

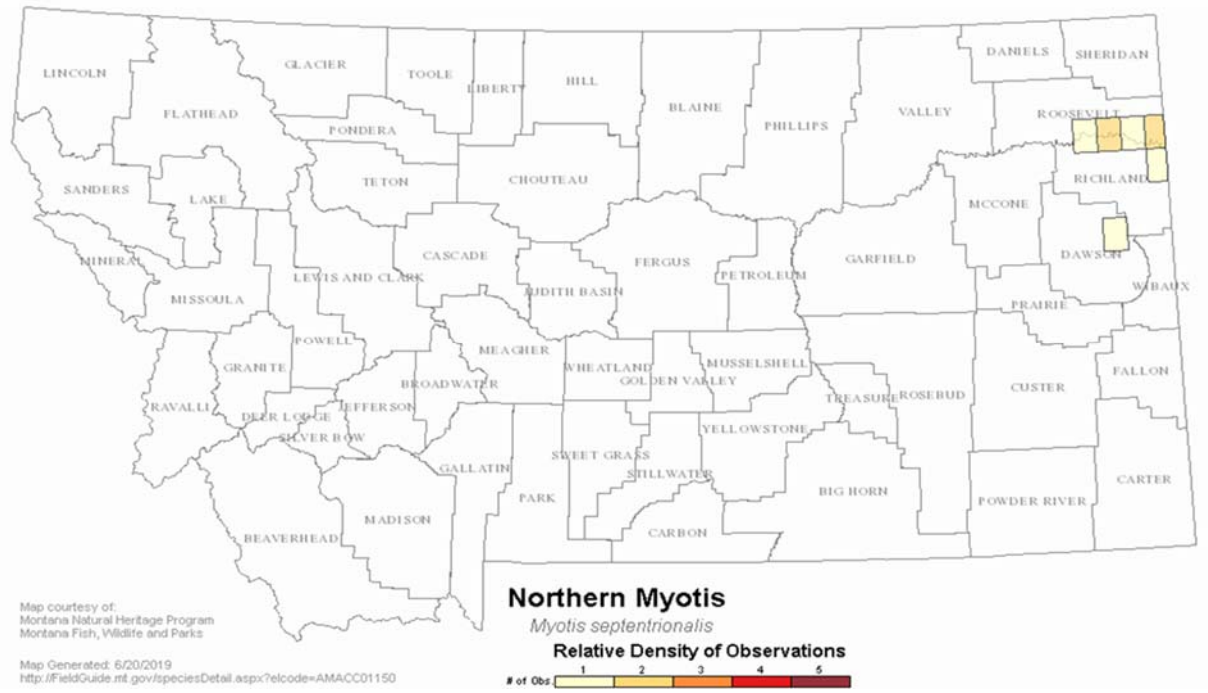
After the Office of Surface Mining issued its decision, Plaintiffs submitted a Notice of Intent to Sue, to which they attached two documents they now cite in support of their claim that northern long-eared bats can be found near the Mine. The first is an unidentified spreadsheet that Plaintiffs assert in a separate letter was derived from the Montana Natural Heritage Program. FWS000137 (un-paginated

spreadsheet, Ex. 2);[7] FWS000143 (letter purporting to identify spreadsheet).[8] The second is an analysis of the data commissioned by the Plaintiffs. FWS000137 (Ex. 3).

The ESA requires the agency to use the "best scientific and commercial data *available*." 16 U.S.C. § 1536(a)(2) (emphasis added). The information provided, with unknown provenance, is not such information. Even assuming the data was properly obtained from the Montana Natural Heritage Program, Plaintiffs provide no explanation for why the Montana Heritage Program identifies *no* northern long-eared bat observations in the vicinity of the Mine:

[7] The Service's record includes exhibits to Plaintiff's Notice to Sue (FWS000137) that are not Bates-labeled, but identified in the record index and found in the same folder as the Notice letter.

[8] The index to the record notes that this information "post-dates OSM's decision." *See* FWS Administrative Record Index, Row 25.



See AR000052.[9] Because the expert agencies agree that the northern long-eared bat species is not present near the Mine, the Office of Surface Mining had no consultation obligation regarding the species.

B. Grizzly Bears Are Not in the Action Area and Any Effects Are Not Reasonably Certain to Occur.

Plaintiffs do not dispute that grizzly bears are not found in the vicinity of the Mine. They argue the Office of Surface Mining should have consulted on impacts to grizzlies that may take place during rail transport of coal in the "Northern Continental Divide, Cabinet-Yak and Selkirk ecosystems." Pl. Br. at 29. To get to this contention, Plaintiffs overstate the likelihood of any train taking a grizzly bear

[9] *See* http://fieldguide.mt.gov/speciesDetail.aspx?elcode=AMACC01150.

and incorrectly assume that the mine plan approval will predictably increase rail traffic to broadly expand the scope of the ESA review.

The regulations implementing the ESA define the "effects of the action" as the project's immediate impacts on the species ("direct effects") and "those impacts that are *reasonably certain to occur in the future* ('indirect effects')." *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987) (quoting 50 C.F.R. § 402.02) (emphasis added). While rail transport is a reasonably certain indirect effect of the mine plan approval, grizzly mortality is *not*. As noted previously, the evidence Plaintiffs present shows that grizzly mortality due to train collision is extremely rare. *See supra* Part I.A.1.[10] When such incidental take occurs less than once a decade for *all* rail travel in the areas in question, it cannot be said to be "reasonably certain" to result from a train carrying coal from this mine approval.

"Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration." *Sierra Club v. Bureau of Land Management*, 786 F.3d 1219, 1225 (9th Cir. 2015) (quoting *Sierra*

[10] Plaintiffs proffer extra-record evidence that paints a different picture of grizzly mortality than the information in the administrative record. *See* Pl. Br. at 37-39 (citing Mattson Declaration). This information was not timely presented to the decisionmakers and the Court should disregard the information in the Mattson Declaration.

Club, 816 F.2d at 1387). "The test for interrelatedness or interdependentness is 'but for' causation: but for the *federal* project, these activities would not occur." *Id.* (emphasis in original). Plaintiffs assume that "but for" the Office of Surface Mining's approval, the rail traffic on the Burlington Northern Railway system (which presents a small risk to grizzly bears, *see supra* at I.A.1.) will be unchanged, and that the approval *will* result in 3.6 trains per day above this static baseline. This assumption is not supported.

Neither the tracks nor the trains are owned or operated by Signal Peak. AR000028. Plaintiffs assume that the "coal trains" leaving from the Mine will be additive to existing traffic in the system, *i.e.*, that transporting coal from the Amendment 3 area will have some effect on grizzly mortality over and above the risk from other rail traffic. Pl. Br. at 29-30. This is not accurate. When the Office of Surface Mining inquired with Burlington Northern Railway about the "additional" number of trains, Burlington Northern Railway clarified that there is "no 'baseline' number of trains per day on [the Burlington Northern Railway] system, as the dynamic nature of the rail system does not lend itself to that type of analysis." AR016353. Thus, it cannot be said that the Office of Surface Mining's approval will result in *any* increase in rail traffic.

Thus, Plaintiffs' contention, when properly articulated, is that the trains carrying the coal require consultation, even though there is no way to predict

whether they will actually increase rail traffic through the ecosystems of concern to the Plaintiffs. The ESA does not require agencies to consult on *anything* that could happen to a listed species anywhere that could possibly be tied to a federal action. The statute provides reasonable limits on consultation, requiring agencies to consider impacts that are "reasonably certain to occur" and other actions that are so closely related that they are "interdependent" with the action at issue. Scenarios straying beyond these confines – such as Plaintiffs' concern for rare grizzly mortality – do not require consultation.

III. IF PLAINTIFFS PREVAIL ON A MERITS ARGUMENT, THE REMEDY MUST BE NARROWLY TAILORED TO REDRESS THE SPECIFIC DEFECT IN THE AGENCY'S DECISION.

Plaintiffs have not properly supported their request for vacatur and injunction. If the Court identifies an agency error, the appropriate remedy is remand to the agency to resolve the issue without vacatur.

A. Injunction

Plaintiffs argue that an injunction is warranted under both the ESA and NEPA. Pl. Br. at 36-43. The traditional four-factor test (irreparable injury, inadequacy of remedies at law, balance of the hardships, and the public interest) applies to injunction requests for NEPA violations; for ESA violations, the Court reviews only irreparable injury. *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018).

1. No Injunction is Justified for Alleged ESA Violations.

The ESA does not "restrict" the Court's "discretion to decide whether a plaintiff has suffered an irreparable injury." *Id*. Nor is there a "presumption of irreparable injury where there has been a procedural violation in ESA cases." *Id.* (quoting *Cottonwood Evnt'l Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1090 (9th Cir. 2015)). Plaintiffs must do more than identify a "possible" irreparable harm to obtain an injunction to remedy a procedural ESA injury – they must "demonstrate that irreparable injury 'is *likely* in the absence of injunction.'" *Id.* (quoting *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008)) (emphasis in *Winter*). Further, the injury demonstrated must be to Plaintiffs themselves. *Id.* at 822.

Plaintiffs cannot meet this bar and therefore are not eligible for injunctive relief under the ESA because they have not demonstrated that it is *likely* that they will suffer irreparable harm. Plaintiffs' declarants do not profess any interest in the well-being of the northern long-eared bat or alleged injury resulting from impacts to the species and are therefore ineligible for injunctive relief for any alleged violation related to that species. Plaintiffs have also failed to demonstrate that it is even *likely* that a northern long-ear bat could be found within 50 miles of the Mine, let alone harmed by the Mine operations. Similarly, they have failed to demonstrate that it is *likely* that a rail car carrying coal from the Mine will

adversely affect a grizzly. Because Plaintiffs must do more than construct theoretically possible scenarios, no injunction should issue even in the event that the Court finds that additional consultation is warranted.

2. No Injunction is Justified for Alleged NEPA Violations.

The Supreme Court has clearly stated that there is no "thumb on the scales" in favor of injunctive relief in NEPA matters. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010). "It is not enough for a court considering a request for injunctive relief to ask whether there is good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test . . . ." *Id.* Here, Plaintiffs cannot make the required showing.

As noted above, Plaintiffs must demonstrate that irreparable harm is *likely* to obtain an injunction. Plaintiffs mix environmental with other harms, alleging that all are irreparable. Pl. Br. at 39-41. However, the record contradicts Plaintiffs' claims of injury. Taking their alleged injuries in order, although subsidence is permanent, the record calls Plaintiffs' claims that subsidence is an "injury" into question. The record shows that subsidence at the Mine has consistently been, at most, 5-8 feet, with little observable change to the landscape (which are easily repaired) and minor impacts to water resources, which will be mitigated. AR000072-73. Such minor, mitigatable impacts cannot be considered "irreparable

harm." Further, the agency determined that air quality impacts will be "negligible" and "short-term." AR000067-68. And, as noted above, Plaintiffs have not demonstrated that harm to grizzlies from train strikes is "likely." *See supra* at I.A.1.

Finally, Plaintiffs blame the federal coal from Amendment 3 for the "existential" threat of climate change. Pl. Br. at 40. In contrast, the agency conducted a reasoned analysis and determined that the emissions attributable to coal from Amendment 3 to be minor. AR000070. If Plaintiffs are permitted to claim irreparable injury for any action that will *contribute* (even in a minor and non-permanent way) to climate change, they would be relieved of proving an element of the traditional four-factor test. The Supreme Court has cautioned against applying such a presumption. *See Monsanto*, 561 U.S. at 157-58.

Further, contrary to Plaintiffs' contention, many of the alleged injuries they cite have adequate remedies at law. For example, Montana law already requires Signal Peak to repair and make whole any water users who are affected by subsidence. *See* Mont. Code Ann. § 82-4-243(1)(b); Mont. Admin. R. 17.24.648.

The balance of the hardship tips sharply in favor of Signal Peak. Plaintiffs complain of minor and fleeting injuries; the impacts of an injunction on Signal Peak will be real, immediate, and long-lasting. Signal Peak has been mining within the Amendment 3 area since 2015. Farinelli ¶5. An injunction would force

the Mine to cease normal mining operations, either immediately or within a few months, depending upon the location of the Mine's longwall mining operations at the time. *Id*. ¶¶ 2-5. Because of the location of current mining – in an area with a greater percentage of Federal Coal "checkerboard squares" -- Signal Peak has much less ability to withstand a lengthy injunction than it did in 2017. *Id*. ¶¶ 4-5, 15-17.

Signal Peak would be forced to begin laying off employees within a few weeks. *Id*. ¶ 6. Eventually, Signal Peak would be required to lay off nearly all its approximately 300 employees. *Id*. If the Mine is forced to lay off its people, it will lose the specialized work force that it has built: those individuals are unlikely to return. *Id*. ¶9. Further, even if the injunction is eventually lifted, a cessation of production will put Signal Peak's current coal supply contracts at risk and will most likely mean that the Mine will not survive. *Id*. ¶¶7-8. These immediate and tangible harms outweigh any procedural harms to Plaintiffs.

Finally, the public interest does not favor an injunction. Amendment 3 will not significantly change the rate of mining at the Mine – it merely extends operations an additional nine years. AR000031. Thus, there are no "new" environmental impacts associated with the approval. What the approval does provide is an additional nine years that the Mine will continue to contribute to the

local community and state and local governments through employment and taxes. AR000086.

3. Vacatur is Not Warranted.

The decision to vacate an agency decision is "controlled by principles of equity." *Alliance for the Wild Rockies v. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018). The Court must "weigh the seriousness of the agency's errors against 'the disruptive consequences'" of vacatur. *Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). Here, the errors Plaintiffs allege go to, at most, judgment calls about the outer scope of the agency's NEPA and ESA reviews. Plaintiffs do not dispute that the Office of Surface Mining appropriately analyzed the primary impacts of Amendment 3 within the vicinity of the Mine. Their disputes generally concern far downstream impacts that many courts have held are not properly the subject of NEPA review. *See supra* at I.B.2. Thus, to the extent the Office of Surface Mining erred, the errors are not central to its analysis. However, as discussed above, the disruptive impact of vacating the Amendment 3 approval would be severe for Signal Peak. *See supra* Section III.A.2. Therefore, principles of equity counsel in favor of remand without vacatur should the Court find that the Office of Surface Mining erred.

CONCLUSION

For the reasons discussed above, the Office of Surface Mining's mine plan modification and finding of no significant impact should be affirmed.

Dated this 29th day of July, 2019.

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