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

350 MONTANA et al.,

Plaintiffs,

vs.

DAVID BERNHARDT, et al.

Defendants,

and

SIGNAL PEAK ENERGY, LLC,

Defendant-Intervenor.

CV 19-12-M-DWM

COMBINED RESPONSE-REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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ABBREVIATIONS AND SHORT FORMS

APA	Administrative Procedure Act
BA	Biological assessment
BLM	U.S. Bureau of Land Management
CO_2	Carbon dioxide
CO_2e	Carbon dioxide equivalent
CWA	Clean Water Act
EA	Environmental assessment
EIS	Environmental impact statement
ESA	Endangered Species Act
FONSI	Finding of no significant impact
GHG	Greenhouse gas
Lbs.	Pounds
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act
NO_x	Nitrogen oxides
Office	U.S. Office of Surface Mining, U.S. Department of Interior, and officer defendants
$PM_{2.5}$	Particulate matter 2.5 micrometers in diameter and smaller
PM_{10}	Particulate matter 10 micrometers in diameter and smaller

Service	U.S. Fish and Wildlife Service
Signal Peak	Signal Peak Energy, LLC
SO_2	Sulfur dioxide

ATTACHMENTS

Attachment 1	Copy of Montana Natural Heritage Program acoustic call log with information from Excel file shown that was omitted in portable document file (pdf) in administrative record
Attachment 2	*Signal Peak Energy, LLC v. MEIC*, No. DV 18-869 (13th Jud. Dist. Ct. Mar. 25, 2019)

INTRODUCTION

Federal regulators have repeatedly truncated their environmental review of the Bull Mountains Mine to expedite mining. Here, the Office's shortcutting again violated federal laws protecting communities and the environment. Because continued mining operations will cause irreparable harm to the public and to threatened species and because defendants evince no intention to take their environmental obligations seriously, this Court should vacate approval of the mine expansion and enjoin mining (but not reclamation).

ARGUMENT

I. The Office violated the National Environmental Policy Act.

A. The Environmental Assessment failed to take a hard look at indirect and cumulative impacts of 12,000 coal trains.

1. The Office does not dispute that the Environmental Assessment failed to assess the impacts of coal trains on wildlife, including grizzlies, despite knowing that trains are a significant source of mortality.

Defendants fail to identify any instance where the EA evaluated the indirect and cumulative impacts of coal trains on wildlife, including grizzlies. Moreover, the Office does not attempt to defend the basis on which the EA refused to undertake such an evaluation, i.e., that trains beyond the Broadview spur are not "interrelated or interdependent" actions and therefore need not be analyzed. *Cf.*

AR:E-16925.[1] This is fatal because "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 50 (1983).

Instead, the Office attempts to shift the burden to the Conservation Groups to demonstrate that "increased coal train traffic from the mine would *invariably* result in increased grizzly bear mortality." (Doc. 44 at 16 (emphasis added).) In addition to being an improper post hoc rationalization, this argument fails for two principal reasons. First, it ignores the Conservation Groups' broader argument about the EA's failure to assess *any* impacts of coal trains on *wildlife* generally. (*See* Doc. 37 at 5-7 (challenging failure to assess "indirect and cumulative impacts of coal trains on wildlife or listed species").) There is no credible dispute that the mine's 12,000 coal trains will strike and kill wildlife. *See* AR:2-2019-21-4481. The Office's complete failure to assess coal-train impacts to wildlife was error. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

Second, contrary to the Office's argument, NEPA places the initial burden on the "*agency* [to] inform the *public* that it has indeed considered environmental concerns in its decisionmaking." *Te-Moak Tribe v. U.S. Dep't of Interior*, 608 F.3d

[1] This Court required the Office to assess trains beyond the spur as indirect and cumulative effects. *MEIC v. OSM* (*MEIC I*), 274 F. Supp. 3d 1074, 1090-93 (D. Mont. 2017).

592, 606 (9th Cir. 2010) (quoting *Balt. Gas & Elec. v. NRDC*, 462 U.S. 87, 97 (1983)) (emphasis in original). Thus, when raising a cumulative impacts claim on judicial review, as here, plaintiffs "need not show what cumulative impacts would occur" but "must show only *the potential for cumulative impact*." *Id.* at 605 (emphasis added). This standard "is not an onerous one," *id.*, and the Conservation Groups have well surpassed it here. The cumulative impacts of train traffic in western Montana—25% of which is from the Bull Mountains Mine and 71% of which is coal, AR:E-16760, -16787—result in multiple grizzly mortalities each year. AR:2-2019-344-16591 (35 mortalities in 20 years in Northern Continental Divide Ecosystem); AR:2-2019-238-12825 (3 mortalities since 2001 in Cabinet-Yaak Ecosystem); AR:2-2019-92-13732; AR:Supp-15-17589.[2] Moreover, in addition to train-strike mortalities, trains can cause avoidance and impede grizzly movement, fragmenting populations. Adding 12,000 more coal trains to these rail lines for nine more years plainly has the *potential* for additional indirect and cumulative impacts to grizzlies.

The Office cites *Sierra Club v. Department of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017), but that case is significantly different because there the agency

[2] Indeed, trains killed three more grizzlies this spring. Nick Mott, *Trains Kill Three Grizzlies Near Marias Pass*, MTPR (June 17, 2019), *available at* https://www.mtpr.org/post/trains-kill-three-grizzlies-near-marias-pass.

"offered a reasoned explanation" for why it could not assess the indirect effects of fracking operations that might be induced by the proposal at issue (construction of a liquefied gas export facility)—after *analyzing the issue*, the agency remained uncertain whether the facility would induce more fracking and had no way of knowing where any induced fracking operations might occur. *Id.* Here, by contrast, the EA *never* analyzed whether or how the indirect and cumulative effect of 12,000 coal trains would impact wildlife, including grizzlies, even though the agency knew exactly how many trains would ship from the mine (3.6 per day, AR:E-16786), how many total trains would be on the track (14.5 per day, AR:E-16760), and where the trains would travel (across the two lines in western Montana, both of which intersect grizzly habitat). For this same reason, Signal Peak's request for "defer[ence] to [the Office's] reasoned judgment," misses the mark—no such "reasoned judgment" exists, aside from the EA's refusal to evaluate impacts beyond the spur. AR:E-16925.

Signal Peak's complaint about a "chain of effects" with "no end" is hyperbole and without merit. Because this Court already determined the impacts of coal trains are foreseeable, the Office was required to assess the impacts, including cumulative impacts, of those trains on wildlife. *MEIC I*, 274 F. Supp. 3d at 1093; *S. Fork Band v. U.S. Dep't of Interior*, 588 F.3d 718, 725 (9th Cir. 2009)

("transport and off-site processing" of ore from mine expansion "are prime examples of indirect effects that NEPA requires to be considered").

2. The Environmental Assessment's analysis of locomotive emissions was demonstrably erroneous and arbitrary.

The EA's assessment of public health impacts from coal trains was fatally flawed. The Office's legal argument fails to resuscitate it. First, neither defendant defends the EA's conclusion that emissions are "negligible" because locomotive emissions are "transitory." (AR:E-16791; *cf.* Doc. 44 at 17-20; Doc. 42 10-12.) That conclusion "runs counter to the evidence before the agency," *Motor Vehicle Mfrs.*, 463 U.S. at 43, which showed that locomotive emissions in fact "accumulate[] in the local airshed" and can cause violations of National Ambient Air Quality Standards. (Doc. 37 at 11 (quoting AR:2-2019-110-6130).) Nor do defendants attempt to distinguish *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006), which prohibits such unsupported claims of "dispersion." This point may therefore be deemed conceded. *Rosenblatt v. Fenty*, 734 F. Supp. 2d 21, 22 (D.D.C. 2010).

Second, defendants fail in their attempt to distinguish the Washington Department of Ecology's conclusion that diesel particulate matter from coal trains increases cancer risks. Defendants cite the EA's assertion that the Bull Mountains Mine has fewer trains (3.6 daily) than were assessed in the Washington study (16

daily). (Doc. 44 at 18.) But that distinction fails because the *cumulative train traffic* in Montana communities—25% of which will be trains from the mine—totals at least 14.5 trains per day, AR:E-16760, equivalent to the number of trains that the Washington study found would "significant[ly]" increase cancer risk in communities along the tracks. AR:2-2019-21-4049 to -4050.[3] The Washington study is thus squarely on point. Because the record demonstrated "potential for cumulative impact" from the locomotives' diesel emissions, *Te-Moak Tribe*, 608 F.3d at 605, the Office was required to evaluate the issue, rather that dismiss it on invalid grounds.[4]

Third, the Office's attempt to defend the EA's assessment of fine particulate matter ($PM_{2.5}$) demonstrates the EA's flaws. While the EA considered short-term concentrations of fine particulates ($PM_{2.5}$), *it got the standard wrong*, erroneously

[3] The Office mistakenly contends that the cancer risk in the Washington study was due to actions other than locomotive emissions. (Doc. 44 at 18.) That study, however, specifies that the increased cancer risk was "primarily from Proposed Action-related train locomotives." AR:2-2019-21-4050.

[4] The Office's citation to a Surface Transportation Board (Board) regulation (49 C.F.R. § 1105.7) is irrelevant. (Doc. 44 at 18.) That regulation contains a non-exclusive list of information for railroads to include in applications for certain actions by the Board. It says nothing about what actions may have significant impacts and it does not prevent the Board from seeking additional information where relevant. *See* 49 C.F.R. § 1105.7(f). Moreover, it requires analysis of air impacts if a project involves more than "three trains a day" that may affect nonattainment or Class I areas, *id.* § 1105.7(e)(5)(ii)(A), as here.

stating that it was *twice* what it currently is. *See* AR:E-16832 (listing 24-hour $PM_{2.5}$ standard as 65µg/m^3); *but* 71 Fed. Reg. 61,144, 61,144 (Oct. 17, 2006) (changing 24-hour $PM_{2.5}$ standard from 65µg/m^3 to 35µg/m^3). The EA's reliance on an incorrect, outdated standard was arbitrary. *See NRDC v. USFS*, 421 F.3d 797, 812 (9th Cir. 2005). Similarly, while the Office cites the EA's statement that "[n]one of these nonattainment areas have recorded a certified NAAQS exceedance for at least the last five years (EPA 2018c)," (Doc. 44 at 19 (citing AR:E-16836)), that too is demonstrably false. The American Lung Association identified numerous exceedances of the 24-hour $PM_{2.5}$ standard in these communities. AR:Supp-11-17207, -17210 to -17211, -17241 to -17242 (describing methodology). Missoula County's air monitoring identified 21 exceedances in 2017 alone. AR:Supp-12-17357 to -17362. And even the source cited in the EA—"EPA 2018c"—identified repeated exceedances of the 24-hour $PM_{2.5}$ standard (35µg/m^3) in Missoula, Ravalli, Lincoln, Lewis and Clark, and Flathead counties from 2013 to 2018.[5]

[5] This source—EPA 2018c—is identified in the EA as "Webpage: EPA, Air Quality Design Values. 2016 Design Value Reports available for download. Modified February 2018. Available at: https://www.epa.gov/air-trends/air-quality-design-values#report." AR:E-16994. While the source is not included in the administrative record, it is available at the identified web address. *See* EPA 2018 Design Value Reports, *available at* https://www.epa.gov/air-trends/air-quality-design-values#report (follow "PM2.5 Design Values 2018" hyperlink; in linked Excel spreadsheet see tab labeled "Table 6b, 24hr Site DV History"). The EA's

Again, the EA's reliance on incorrect information about air quality exceedances undermined its entire analysis. *NRDC*, 421 F.3d at 812.

Fourth, Signal Peak's statement that the Environmental Protection Agency has "sole authority" over locomotive emissions is neither here nor there. (Doc. 42 at 10.) NEPA expressly contemplates that agencies will evaluate impacts beyond their immediate jurisdiction: "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain comments of any Federal agency which has jurisdiction by law or special expertise with respect to environmental impacts involved." 42 U.S.C. § 4332(2)(C). This is a bedrock NEPA principle, as demonstrated by this Court's prior ruling. *MEIC I*, 274 F. Supp. 3d at 1091-99 (Office failed to adequately assess transportation and combustion impacts); *accord S. Fork Band*, 588 F.3d at 725-26; *N. Plains Res. Council v. STB*, 668 F.3d 1067, 1081-82 (9th Cir. 2011); *Sierra Club v. FERC*, 867 F.3d 1357, 1370-75 (D.C. Cir. 2017).

This Court and others have also repeatedly rejected Signal Peak's related argument (Doc. 42 at 13-15) based on *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), that the Office lacks authority to deny a mining plan

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misreading of these tables was likely due to its erroneous determination that the applicable standard was 65µg/m^3, not 35µg/m^3. AR:E-16832.

modification on the basis of transportation or combustion impacts (and therefore need not analyze such impacts). *E.g.*, *WildEarth Guardians v. Zinke* (*Guardians*), No. CV 17-80-BLG-SPW-TJC, 2019 WL 2404860, at *6 (D. Mont. Feb. 11, 2019); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213 (9th Cir. 2008).[6] The coal company's citation to *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019), is inapposite because there the court's conclusion rested on the language of 43 C.F.R. § 3101.1-2, which expressly limits federal authority to prevent development of oil-and-gas leases. *Zinke*, 368 F. Supp. d at 65; *cf. Guardians*, 2019 WL 2404860, at *6 (explaining Office's authority); 30 C.F.R. § 746.13(b) (granting Office broad authority to recommend disapproval of mining plan modification based on NEPA analysis or—relevant here—violations of other federal laws, such as the ESA or Clean Water Act); 30 U.S.C. § 207(c); *see also* 42 U.S.C. § 4332(1) (congressional mandate that all laws and regulations be interpreted to further goals of NEPA).[7]

[6] *Accord Diné Citizens Against Ruining Our Env't v. OSM*, 82 F. Supp. 3d 1201, 1217 (D. Colo. 2015), *vacated as moot*, 643 F. App'x 799 (10th Cir. 2016); *WildEarth Guardians v. OSM*, 104 F. Supp. 3d 1208, 1230 (D. Colo. 2015), *vacated as moot*, 652 F. App'x 717 (10th Cir. 2016); *San Juan Citizens Alliance v. BLM*, 326 F. Supp. 3d 1227, 1242 (D.N.M. 2018) (collecting cases).

[7] *Romer v. Carlucci*, 847 F.2d 445, 468 (8th Cir. 1988) (Arnold, J. concurring in part dissenting in part) (explaining that 42 U.S.C. § 4332(1) is a "Congressionally

Finally, Signal Peak is mistaken that "[t]here is no NEPA requirement to analyze the cumulative impacts of an indirect project effect." (Doc. 42 at 12.) "Cumulative impact" is the incremental "impact of the action" added to other past, present, and reasonably foreseeable actions. 40 C.F.R. § 1508.7. The "impact[s] of the action" include direct and indirect effects. *Id.* § 1508.8(a), (b). Thus, the Council on Environmental Quality explains: "Cumulative effects are the total effect, *including both direct and indirect effects*, on a given resource, ecosystem, and human community of all actions taken, no matter who (federal, nonfederal, or private) has taken the actions." Council on Envtl. Quality, Considering Cumulative Effects at 8 (1997), *available at* https://ceq.doe.gov/publications/cumulative_effects.html (emphasis added).

3. The Office is not excused from evaluating potentially significant and predictable accidents, like derailments.

Defendants insist the EA adequately evaluated derailments because the word appears once in an acknowledgement that coal dust degrades track stability. (Doc. 44 at 21; Doc. 42 at 12-13.) But a passing statement about efforts to mitigate *one potential cause* of derailments says nothing about the overall risks from

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mandated rule of construction" in which disputed interpretations "should be resolved in favor of the policies expressed in NEPA").

derailments. *Standing Rock Sioux v. Army Corp of Eng'rs*, 255 F. Supp. 3d 101, 134 (D.D.C. 2017) (passing statement that action would "minimize" impacts from oil spill says nothing about "what th[e] effects would be" from spill).

Further, defendants are simply mistaken that NEPA does not require analysis of potential accidents. For example, *Standing Rock Sioux*, 255 F. Supp. 3d at 133-34, held the agency failed adequately to assess potential impact of oil spills on wildlife, even though spills, like derailments, are not normal parts of pipeline operations. *See also Ocean Advocates v. Army Corps of Eng'rs*, 402 F.3d 846, 868-69 (9th Cir. 2004) (agency failed adequately to assess impact of potential oil spills due to dock extension at refinery).

Finally, *Robertson v. Methow Valley Citizens*, 490 U.S. 332 (1989), does not change the analysis. There the Court merely noted that NEPA does not require "worst case" analysis untethered to scientific opinion. *Id.* at 354-56. But the Court explained that NEPA regulations do require agencies to assess "the consequences of remote, but potentially severe impact[s]," when such analysis is grounded in credible science. *Id.* at 354; 40 C.F.R. § 1502.22(b). Here, neither defendant disputes that current science can predict and analyze train accidents and derailments or that such derailments may result in significant impacts. (*See* Doc.

37 at 13-14.[8]) Thus, the EA's refusal and complete failure to assess potential impacts of coal train derailments violated NEPA.

B. The Environmental Assessment failed to take a hard look at the effects of the expansion's 240 million tons of greenhouse gas emissions.

The Office's continued excuses for monetizing—and inflating—benefits while refusing to monetize climate costs lack merit. First, the Office does not dispute that it must evaluate economic and environmental concerns on an equal basis. *Found. for N. Am. Wild Sheep v. Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982); 42 U.S.C. § 4332(2)(B). Nor does the Office dispute that it monetized the economic benefits of the mine ($1.39 billion in revenue) while zeroing out its social costs ($3-32 billion in climate damages). (Doc. 44 at 23.) By thus placing its "thumb on the scale" the EA violated NEPA. *MEIC I*, 274 F. Supp. 3d at 1098-99.

Nevertheless, the Office argues its thumbing the scale was so "brief" and "abbreviated" that it did not need to be balanced by a parallel monetization of the social costs of the mine, as in *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41,

[8] The Office attempts to distinguish the Washington study's analysis of coal train derailments on the grounds that it involved more trains. (Doc. 44 at 21-22.) The Office's point is irrelevant because the derailment analysis in that study proceeded from the proposition that train accidents occur at *regular intervals* and provided a simple *mathematical formula* for assessing such accidents, which the EA could have employed here. AR:2-2019-21-4528.

78 (D.D.C. 2019). But *Zinke* is nothing like this case. Whereas in *Zinke*, at 78, the agency's discussion of economic benefits was "cursory," "involved little quantification," and showed relatively small benefits from the challenged action ($152,364 from sale of oil-and-gas leases), here, as in *High Country v. USFS*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014), the EA conducted a robust assessment of economic benefits, including revenues, royalties, payroll, and local business transactions, and claimed "nearly a billion dollars in lost revenue" would occur under the no-action alternative. AR:E-16810 ($957 lost under no-action); *see* AR:E-16809 to -16811, -16908 to -16914. Indeed, on remand from this Court's prior order to balance *costs*, the Office removed its thumb and placed both hands on the scale, increasing estimated economic *benefits* nearly *fifty-fold*, while again zeroing costs. *MEIC I*, 274 F. Supp. 3d at 1096 ($23 million in benefits identified in prior analysis); AR:E-16810. Thus, here, as in *High Country*, 52 F. Supp. 3d at 1191-92, it was arbitrary and capricious for the agency to place significant economic benefits on the scale while zeroing out even greater environmental costs.[9]

[9] The Office cherry-picks language from *Zinke* to make it appear as a rebuke of the social cost of carbon, when the contrary is true. While *Zinke*, 368 F. Supp. 3d 41, at 78 & n.31, stopped short of mandating use of the social cost of carbon across-the-board, the court reaffirmed that NEPA requires a "robust discussion of GHG

Second, the Office argues that deference to agencies' "chosen methodology" provides a safe harbor. (Doc. 44 at 24.) This argument is unavailing. Deference does not shield misleading analyses. *NRDC*, 421 F.3d at 811-12. An analysis is misleading if it prevents "the decisionmaker and the public" from "mak[ing] an informed comparison of the alternatives," as here. *Id.* at 811 (quoting *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988)); *Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983). It is unquestionably misleading for an agency to omit monetizable environmental costs, which, if considered, would reveal that the federal action will produce, not a net benefit, but a *net loss* for society. *Johnston*, 698 F.2d at 1094-95; *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983).

Third, the Office claims it reasonably articulated why it declined to use the social cost of carbon protocol—because "the SCC protocol does not measure the actual incremental impacts at the project-level on the environment and does not include all costs or benefits from carbon emissions." (Doc. 44 at 24.) This rationalization is unreasonable and irrelevant. It is unreasonable because, in fact, the social cost of carbon "directly reflects the 'actual incremental environmental

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emissions," which "may one day soon be a necessary component of NEPA analyses," regardless whether, as here, agencies monetize substantial benefits.

impacts' of emissions on climate change,"AR:2-2019-93-5525,[10] and the omitted information—e.g., tipping points and catastrophic risk—would only make the damage estimates higher, AR:2-2019-93-5531. It is irrelevant because when, as here, an agency trumpets economic benefits of an action, it must also disclose monetizable environmental costs. *Johnston*, 698 F.2d at 1094-95; *Sigler*, 695 F.2d at 979; *High Country*, 52 F. Supp. 3d at 1191-92; *MEIC I*, 274 F. Supp. 3d at 1098-99; *Guardians*, 2019 WL 2404860, at *10.

Signal Peak argues the Office acted reasonably when it quantified the greenhouse gas emissions from the mine expansion, calculated what percentage of total annual global emissions the mine's emissions represent (0.04%), and determined that the mine expansion's contribution would be minor. (Doc. 42 at 16.) The comparison of the mine expansion's emissions to global emissions is not reasonable; it is misleading; and it is unlawful. *See supra* note 10. It is easy, but misleading, to make highly significant effects appear trivial, merely by swelling the denominator, as the EA did. *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1032-33 (5th Cir. 2019) (a "very small portion" of a "gargantuan source of [harmful]

[10] Agencies must disclose and consider "actual environmental effects." *Balt. Gas & Elec.*, 462 U.S. at 96. The EA's chosen analysis of greenhouse gases—comparing project emissions to global emissions, AR:E-16793 to -16794, does not disclose "actual environmental effects."

pollution" may nevertheless "constitute[ ] a gargantuan source of [harmful] pollution on its own terms"); *accord Guardians*, 2019 WL 2404860, at *9 (dilution misleading).

Finally, Signal Peak's citation to cases declining to require the use of the social cost of carbon is inapposite because those cases did involve the situation here, where the agency has monetized economic benefits but declined to monetize climate costs. *See MEIC I*, 274 F. Supp. 3d at 1097-98; *Guardians*, 2019 WL 2404860. On the contrary, as noted, where an agency monetizes significant economic benefits it must monetize climate costs.

C. The Office's excuses for failing to prepare an environmental impact statement lack merit.

1. The record showed substantial questions about adverse effects to the environment and to public health.

As noted, the 12,000 coal trains from the mine expansion will further deteriorate already unhealthy air quality in multiple Montana communities. (*See supra* Part I.A.2; Doc. 37 at 8-13.) The Office's dismissal of these concerns was irrational, constituting neither a "hard look" nor a "convincing statement of reasons" for not preparing an EIS. *Ocean Advocates*, 402 F.3d at 865.

2. The Office demonstrates controversy and uncertainty by controverting contrary expert opinions and admitting uncertainty.

The Conservation Groups need not prove the existence of controversy or uncertainty, but only raise "'substantial question[s]' as to the[ir] existence." *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 235 (D.D.C. 2003). Here numerous experts scathingly criticized the EA's analyses, to which the EA chiefly responded, if at all, that the issues were uncertain. (*See* Doc. 37 at 23-24.) This is, thus, "precisely the type of 'controversial' action for which an EIS must be prepared." *Sierra Club v. USFS*, 843 F.2d 1190, 1193-94 (9th Cir. 1988); *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1084-85 (D.C. Cir. 2019).

(a) Numerous experts controverted the Environmental Assessment's analysis and the Finding of No Significant Impact's conclusions regarding the magnitude of the expansion's impacts.

The Office erroneously responds that these experts disputed the EA's methodology, not the size, nature, or magnitude of the mine expansion's effects. Not so. For example, while the EA stated that the magnitude of the mine's greenhouse gas emissions impacts would be "minor," AR:E-16794, Dr. Thomas Power demonstrated that the magnitude of these impacts would be $3-30 billion of harm, exceeding the all benefits of the expansion and the total value of the coal. AR:Supp-18-17084 to -17085; AR:E-16913 (mine's benefits $1.3 billion). Dr.

Power further explained that monetizing all air pollution from the project showed the magnitude of harm exceeded the value of the coal by four- to ten-fold. AR:Supp-18-17096. Dr. Hansen warned that global greenhouse gas concentrations are "now well into the danger zone" of "significant carbon overshoot" and that the mine expansion would be an "unacceptable danger" and "a major step in precisely the wrong direction." AR:Supp-32-17100, -17112.[11] Contrary to the Office's arguments, these comments dispute the size, nature, and magnitude of the project's effects. *MEIC I*, 274 F. Supp. 3d at 1103.

Regarding methodology, Dr. Greenstone, a preeminent expert on the social cost of carbon, criticized the EA for containing "no" "useful analysis" "based on high quality information" about climate change. AR:2-2019-96-5606. Experts from the New York University School of Law, the Union of Concerned Scientists, Environmental Defense Fund, and Sierra Club excoriated the EA for "fundamentally misunderstanding the social cost of greenhouse gas metric" and explained that the EA was mistaken that the social cost of carbon does not "reflect[] the 'actual incremental impacts' of emissions on climate change." AR:2-2019-93-5525, -5527. Dr. Power showed that "there is no economic literature

[11] The Office's entire response to Dr. Hansen's detailed analysis was: "Comment noted." AR:E-16975; *see Standing Rock Sioux*, 255 F. Supp. 3d at 129 (finding controversy where agency failed to respond to expert comments).

documenting" or supporting the EA's excuses for not using the social cost of carbon (i.e., that there are some unidentified and unquantified social benefits from using coal). AR:Supp-18-17075. If these comments do not raise substantial questions about the EA's methodology and analysis it is unclear what would. *Semonite*, 916 F.3d at 1083-84.

While defendants fail even to attempt to distinguish the binding Ninth Circuit authorities cited by the Conservation Groups (*compare* Doc. 37 at 22-24, *with* Doc. 44 at 27-28 *and* Doc. 42 at 21-22), the Office relies on *Zinke*, 368 F. Supp. 3d at 81-82, which found that climate impacts from oil-and-gas leases were not highly controversial. But that case is fundamentally different. The emissions in that case were miniscule—a total of less than *one ton* of carbon dioxide. *Id.* at 55-56. Here, by contrast, the mine expansion will cause approximately 240 *million tons* of carbon dioxide equivalent emissions. AR:E-16793. Thus, while in *Zinke*, 368 F. Supp. 3d at 82, the record did not show "the magnitude of" the project's greenhouse gas emissions would be "significantly higher" than the agency's representations, here, the magnitude of these emissions would render the mine expansion uneconomical, contrary to the agency's representations. AR:Supp-18-

17084 to -17085, 17094.[12] Further, unlike there, in the instant case, as noted, numerous commenters with "special expertise" opposed the EA's analysis and conclusions. *Zinke*, 368 F. Supp. 3d at 82; *see Sierra Club*, 843 F.2d at 1193-94 (controversy demonstrated by experts who critiqued agency's analysis and conclusion). Finally, it was controversial for the EA to dismiss the social cost of carbon, which was developed by experts from six federal agencies and six offices from the Executive Office of the President, AR:2-2019-96-5604, based in part on the current administration's political decision to promote energy development. AR:E-16881 (citing Ex. Order 13783 (Mar. 28, 2017)); *Semonite*, 916 F.3d at 1084 (finding controversy because agency methodology conflicted with methodologies proposed by agencies with special expertise); *see supra* Part I.B (cataloguing errors in EA's rejection of social cost of carbon).

(b) The Finding of No Significant Impact's dismissal of uncertainty contradicted the Environmental Assessment's repeated claims of uncertainty.

Defendants fail to resolve the inconsistency between the FONSI's statement that none of the mine expansion's effects are "highly uncertain or involve unique

[12] *Cascadia Wildlands v. USFS*, 937 F. Supp. 2d 1271, 1282 (D. Or. 2013) (finding controversy in part based on project size).

or unknown risks," AR:E-16728, and the EA's repeated retreat to "uncertainty" to avoid what the social cost of carbon reveals: that the mine's environmental costs are gargantuan, making it uneconomical for the public. AR:E-16882 to -16956 (citing uncertainty at least 12 times). This unresolved inconsistency is arbitrary. *Native Fish Soc'y v. NMFS*, 992 F. Supp. 2d 1095, 1109 (D. Or. 2014); *Humane Soc'y v. Dep't of Commerce*, 432 F. Supp. 2d. 4, 21 (D.D.C. 2006).

The Office again tries to have it both ways, arguing that the EA's repeated statements of uncertainty do not trigger an EIS because the mine expansion does not involve "unique or unknown risks." (Doc. 44 at 28.) But the record belies the Office: uncertainties related to the social cost of carbon specifically involve the "unique or unknown risks" of climate change, namely, "tipping points, catastrophic risks, and unknown unknowns." AR:2-2019-93-5528.[13] These climate risks are unique: few other activities "increase the likelihood of severe, pervasive and irreversible impacts for people, species and ecosystems." AR:E-16879.

Finally, Signal Peak complains that requiring more analysis of uncertain climate impacts could prolong NEPA reviews. (Doc. 42 at 22.) But the purpose of NEPA is for agencies to look before they leap. If, as here, there is risk that a

[13] If anything, this "uncertainty supports higher estimates for the social cost of greenhouse gas methodologies." AR:2-2019-93-5528.

project will increase the likelihood of "severe, pervasive, and irreversible impacts" to people and the environment, agency decisionmaking should be thoughtful.

3. The Environmental Assessment identified significant cumulative effects, which the Finding of No Significant Impact arbitrarily ignored.

Defendants similarly fail to resolve the inconsistency between the FONSI's statement that the EA identified "no significant cumulative effects," AR:E-16728, and the EA's statement that the cumulative effects of greenhouse gas emissions will be severe, pervasive, and irreversible, AR:E-16879; *Humane Soc'y*, 432 F. Supp. 2d at 21-22. Defendants' argument that the 240 million tons of greenhouse gas emissions from the expansion are *individually* insignificant overlooks the requirement to consider whether "the action is related to other actions with *individually insignificant but cumulatively significant impacts*." 40 C.F.R. § 1508.27(b)(7). Further, it is misleading to dismiss, as the EA did, a project's greenhouse gas emissions on the basis that they are less than 1% of global emissions. Without addressing its many incremental and cumulative contributors, climate change cannot be resolved. Stack & Vandenbergh, *The One Percent Problem*, 111 Colum. L. Rev. 1385, 1388-89 (2011); *Sw. Elec. Power Co.*, 920 F.3d at 1032-33 (small contribution to "gargantuan" problem may still be "gargantuan").

Finally, Signal Peak objects that under this analysis "any project contributing incrementally" to climate change "no matter how small" will require an EIS. Not so. The mine expansion's 240 million tons of greenhouse gases are uniquely large, AR:E-16793—six times the total annual emissions from Montana, AR:E-16767. On the other hand, to accept the coal company's position—climate change is too big to analyze—would mean no contributions, matter how gargantuan, to an enormous cumulative impacts problem would ever require an EIS. That would nullify 40 C.F.R. § 1508.27(b)(7); *cf.* 42 U.S.C. § 4332(1).

4. The mine expansion may adversely affect grizzlies and northern long-eared bats.

The mine expansion may adversely affect threatened species, *see infra* Argument Part II, further warranting an EIS. 40 C.F.R. § 1508.27(b)(9).

5. Defendants do not dispute coal trains will violate the Clean Water Act, but claim it doesn't matter.

Defendants do not dispute that the coal trains from the mine are point sources, will discharge coal into water, and have no permit to so. (Doc. 44 at 29-30; Doc. 42 at 23.) The trains therefore threaten to violate the Clean Water Act, warranting preparation of an EIS. 40 C.F.R. § 1508.27(b)(10). Defendants would ignore these threatened violations because the trains are outside the Office's direct jurisdiction. But this is yet another improper attempt to re-litigate this Court's prior

order to the Office to evaluate the impacts of coal trains. *MEIC I*, 274 F. Supp. 3d at 1093. Moreover, defendants cannot credibly claim that the Office has authority to evaluate coal trains' compliance with the *Clean Air Act* (Doc. 44 at 17-18; Doc. 42 at 11), but not the same trains' compliance with the *Clean Water Act*. (Doc. 44 at 29-30; Doc. 42 at 23.)

II. The Office violated the Endangered Species Act.

A. The Office ignored indirect effects of 12,000 trains on grizzlies.

Defendants' effort to excuse the Office's failure to assess impacts to grizzlies consists only of arguments of counsel. (Doc. 44 at 6-10; Doc. 42 at 28-31.) In fact, the record shows that from the outset, the agency improperly confined the action area to the *mine area* in Yellowstone and Musselshell Counties, without consideration of the project's foreseeable indirect effects (including 12,000 coal trains crossing western Montana). AR:2-2019-354-16603 to -16604; AR:2-2019-353-16580. When pressed by the public to evaluate the effects of coal trains on protected species, the agency refused on the incorrect legal basis that it did not have to consider impacts beyond the Broadview spur. AR:E-16925. The agency offered no *scientific* basis for narrowing the action area, and even though it was

aware that trains are a major source of grizzly mortality, AR:2-2019-344-16591,[14] the agency *never* considered *indirect* effects, which must be considered in developing an action area. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002) (agency violated ESA where record contained "no discussion of scientific methodology, relevant facts, or rational connections" to justify action area boundaries); *Nat'l Wildlife Fed'n v. Harvey*, 440 F. Supp 2d 940, 956-57 (E.D. Ark. 2006) (failure to consider indirect effects in designing action area unlawful); *see* FWS, ESA Consultation Handbook, at 4-17 (1998) (explaining action area for analogous circumstances).[15]

Furthermore, contrary to the defendants' litigation argument, the evidence shows that the mine's 12,000 coal trains will *likely* cause grizzly mortalities and will *certainly* adversely impact habitat, including by creating fracture zones of population fragmentation or isolation, particularly in light of baseline[16] conditions

[14] The 59 train-strike grizzly mortalities in the Northern Continental Divide and Cabinet-Yaak ecosystems since 1997 represent 9% of "total known and probable grizzly bear deaths in these ecosystems." (Doc. 37-4, ¶ 8.) This does not include at least three additional train strikes this spring. *See supra* note 2.

[15] *Accord Nat'l Wildlife Fed'n v. NMFS*, 254 F. Supp. 2d 1196, 1212 (D. Or. 2003); *Def's of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 126-30 (D.D.C. 2001).

[16] Agencies must assess the effects of an action in light of the environmental baseline, 50 C.F.R. § 402.02, which, here, includes existing train traffic.

causing regular grizzly mortalities. (Doc. 37-4, ¶¶ 9, 15[17]; *accord* AR:FWS-34-6; AR:FWS-36-16; AR:FWS-37-1; AR:FWS-31-17; AR:FWS-32-2; AR:2019-2-344-16591; AR:2-2019-238-12825; AR:2-2019-92-13732; AR:Supp-15-17589.) This evidence readily meets the "low threshold" for a "may affect" determination. *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1133, 1145 (D. Mont. 2014). The Office's citation to *Gallatin Wildlife Ass'n v. USFS*, No. 15-cv-27-BU-BMM, 2015 WL 4528611, at *11 (D. Mont. July 27, 2015), is inapposite because there—unlike here—the agency designed a broad action area and plaintiff cited no effects likely to occur outside that area. Nor is *Oceana v. Evans*, 384 F. Supp. 2d 203, 228 (D.D.C. 2005), relevant because there—also unlike here—the agency *in fact assessed* potential indirect effect and found none.

Finally, the Office claims it reasonably relied on efforts taken by the railroad operator, BNSF, to mitigate the risk of trains to grizzlies. (Doc. 44 at 9.) This argument is a slim reed that collapses under the weight of a closer look at the record. In support, the Office merely cites a news announcement of a plan to develop a habitat conservation plan in 2004, AR:2-2019-344-16591, and the EA's response to comments, which assures the reader only that, 15 years after the initial

[17] Contrary to the Office's argument, ESA claims are not limited to the administrative record. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011).

announcement, this plan-to-make-a-plan is still "in progress." AR:E-16925. Reliance on such "uncertain and contingent mitigation measures" is impermissible. *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1002 (D. Ariz. 2011). Further, if the agency were to rely on mitigation measures in the Northern Continental Divide Ecosystem, it would have to include that area in the action area, *Nat'l Wildlife Fed'n*, 254 F. Supp. 2d at 1212, and assess the indirect effects of trains there, which it failed to do. AR:2-2019-354-16603 to -16604; AR:2-2019-353-16580.

B. The Office ignored the best available science showing northern long-eared bats may be present in the mine area.

The Office objects to Conservation Groups' reliance on two documents—(1) a log of bat calls collected from the mine area from 2015-2018, 100+ of which were auto-identified as coming from northern long-eared bats and (2) an expert analysis of these calls confirming the presence of northern long-eared bats in the project area—on the basis that these documents are "extra-record." (Doc. 44 at 12.) This argument is a non-starter. Claims brought under the ESA citizen-suit provision, as here, are not limited to the administrative record. *Kraayenbrink*, 632 F.3d at 497. The Office's citation to *San Luis v. Locke*, 776 F.3d 971 (9th Cir. 2014), is inapposite because that case was a "biological opinion challenge[]," which is an "APA claim[], *not* [a] citizen suit claim[]." *Nw. Envtl. Advocates v.*

U.S Dep't of Commerce, No. C16-1866-JCC, 2017 U.S. Dist. LEXIS 185295, at *3 (W.D. Wash. Nov. 8, 2017) (emphasis in original) (citing *Bennett v. Spear*, 520 U.S. 154, 178-79 (1997)). Accordingly, the Conservation Groups' reliance on the 2015-2018 log of bat calls and expert analysis of those calls is proper.[18]

Together, these documents, the 2006 acoustic detection of northern long-eared bats by Signal Peak's consultants, AR:FWS-28-1 to -2; AR:E-16775; AR:2-2019-160-9758, and federal agencies' repeated reliance on the 2006 acoustic detection, AR:2-2019-255-14203 (BLM 2011 EA); AR:E-16738 (incorporating BLM 2011 EA); AR:2-2019-253-14415, -14417 (2015 EA),[19] well surpass the standard of "raise[ing] a possibility that [the bat] may be present," *Alliance for the Wild Rockies v. Kruger*, 950 F. Supp. 2d 1172, 1183-84 (D. Mont. 2013), triggering the Office's duty to assess whether the action "may affect" the listed species. *Id.* at 1184. The Office's contrary determination that the mine expansion

[18] On the other hand, the Office's threat to blindside the Conservation Groups with new evidence it its reply (Doc. 44 at 13 n.3) is improper. *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1027 (C.D. Cal. 2018). Having failed to present evidence in its opening brief, the Office may not do so in reply. *Id.*

[19] The Office's failure to provide a "reasoned explanation for disregarding its previous factual findings" crediting the 2006 acoustic detection as a "probable detection" was unlawful. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015). The only apparent change was the bat's ESA listing in 2015. 80 Fed. Reg. 17,974, 17,974 (Apr. 2, 2015).

would have "no effect" on northern long-eared bats based on "no species present and lack of suitable habitat" in the mine area was therefore arbitrary. *Id.*

The Office attempts to narrow the "may be present" standard into a more demanding "confirmed observation" standard. (Doc. 44 at 13.) But, as explained in *Kruger*, at 1184 (quoting 51 Fed. Reg. 19,926, 19,947 (June 3, 1986)), the Service has "clearly rejected a standard which would require a species to be 'actually known or believed to occur' in an area," i.e., the "confirmed observation" standard proposed here, "because it would conflict with the statutory language"—"may be present." 16 U.S.C. § 1536(c)(1).[20]

Setting the Office's incorrect legal arguments aside, its remaining arguments miss the mark because they fail to rebut the expert analysis of Dr. Robbins and Mr. Moore, *confirming the presence of northern long-eared bats in the project area*. (AR:FWS-28; *cf.* Doc. 44 at 13-14.)

[20] For this reason, Signal Peak's citation to the Montana Natural Heritage Program Field Guide is inapposite, as it only maps *confirmed* "*captures* within the state." Mont. Natural Heritage Program, Field Guide, Northern Myotis, http://fieldguide.mt.gov/speciesDetail.aspx?elcode=AMACC01150 (emphasis added). The program's partial analysis of bats calls from the mine area shows that it recognizes the bats "may be present." *See* Attachment 1 (copy of bat-call log with program comments for call 2510184 noting call is "real close to Myse [*Myotis septentrionalis*]" (this comment was omitted when the Office converted the original Excel spreadsheet to portable document format (pdf), AR:FWS-27-10; AR:FWS-25-143 (explaining log comment))).

REMEDY

I. The Court should vacate the Office's approval of the mine expansion, but allow reclamation to continue.

Vacatur is warranted because the Office's errors again go the heart of the environmental decisionmaking process—i.e., whether the environmental impacts outweigh the economic benefits of the mine expansion and whether the Office has fulfilled its duty use its authority to "conserve[e] . . . threatened species." *MEIC v. OSM* (*MEIC II*), No. 15-106-M-DWM, 2017 WL 5047901, at *6 (D. Mont. Nov. 3, 2017); *Calvert Cliffs v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971) (purpose of NEPA to balance environmental costs in decisionmaking so "optimally beneficial action is finally taken"); 16 U.S.C. § 1536(a)(1). The seriousness of the Office's errors outweigh any disruptive consequences. *See infra* Remedy Part II; *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1406 (9th Cir. 1995) (protecting species paramount).

While vacatur is warranted, the Court should in equity permit *reclamation* to continue during remand. *League of Wilderness Defs. v. USFS*, No. 3:10-CV-01397-SI, 2012 WL 13042847, at *2, 6 (D. Or. Dec. 10, 2012) (granting partial vacatur allowing environmentally beneficial actions to continue).

II. The Court should enjoin mining pending compliance with the Endangered Species Act and National Environmental Policy Act.

A. Defendants fail to contest evidence that 12,000 coal trains will take grizzlies and fragment habitat, warranting an injunction under the Endangered Species Act.

Defendants contest whether the mine's coal trains are likely to harm grizzlies, but they provide only arguments of counsel. The evidence demonstrates that "the increased train traffic generated by the AM3 expansion of the Bull Mountains Mine . . . will cause additional train strikes and resulting injuries and mortalities to grizzly bears" and "will likely further fragment the NCDE [Northern Continental Divide Ecosystem] grizzly bear population, and perpetuate the isolation of bear populations in the Cabinet Mountains and Yaak region of the CYE [Cabinet Yaak Ecosystem]." (Doc. 37-4, ¶ 9; Doc. 37-1, ¶ 17.)

The Office misses the mark in arguing that only significant harm to the overall grizzly *population* is irreparable. On the contrary, "harm to th[e] members" of a threatened species is "irreparable." *Nat'l Wildlife Fed'n v. NMFS*, 886 F.3d 803, 818 (9th Cir. 2018); *see Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (irreparable harm only means harm without legal remedy). The purpose of the ESA is to protect and *recover* species by, among other things, "protecting the remaining members of a species." *Id.*; 16 U.S.C. § 1538(a)(1)(B)

(take prohibition). Thus, "once a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult." *Id.* (bracket omitted) (quoting *FCC v. Rosboro Lumber*, 50 F.3d 781, 785 (9th Cir. 1995)). The mine expansion's likely harm to grizzlies and bats (Doc. 37 at 37) is irreparable.

B. The Office's repeated violations of the National Environmental Policy Act warrant an injunction.

1. Severe, pervasive, and irreversible harm to people and the environment is irreparable.

There is no credible dispute that the mine expansion will cause irreparable injury. It will cause 240 million tons of greenhouse gas emissions. AR:E-16793. The EA admits that "[c]ontinued emission of GHGs will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive, and irreversible impacts for people and ecosystems." AR:E-16879. "Without major reductions in emissions" the impacts could be globally catastrophic. AR:E-16880. Thus Dr. Hansen explains: "a vast expansion and operation of the Bull Mountain[s] Coal Mine is simply incompatible with the restoration of a habitable climate system on which the security of our nation and the fundamental interests of plaintiffs here alike depend." (Doc. 37-6 at 14.) These impacts are apparent in Montana's ever-worsening wildfires and air-quality. (*Id.* at 3-4.) For example, Missoula now "has the fifth highest number of

days per year nationally exceeding short-term particulate matter standards." (Doc. 37-5, ¶¶ 10, 17; Doc. 37-1, ¶ 17.) In what is almost certainly an underestimate, the climate impacts of the mine expansion will cause $3-30 billion dollars in damage. AR:Supp-18-17085; *see* AR:Supp-18-17081; AR:2-2019-93-5536 to -5541.[21]

In addition, expert evidence demonstrates that locomotive emissions will disproportionately harm the lungs of children (Doc. 37-5, ¶ 10), and coal trains will likely kill grizzlies and fragment habitat (Doc. 37-4, ¶ 9). Defendants disagree, but offer no contrary evidence. Finally, defendants' attempt to discount the impacts of long-wall mining fails because the EA itself admits that stream segments above the mine "may not exhibit intermittent or perennial flow after mining" and that the coal company will not be able to replace them with wells. AR:E-16897. State regulators subsequently admitted they did not "envision" replacing flowing streams and do not believe "there is a resolution" to the problem. AR:Supp-9-17168.

2. The equities favor an injunction against mining.

> The message is plain enough, and we have ignored it for too long: the great centralized economic entities of our time do not come into rural places to improve them by "creating jobs." They come to take as much of value as they can take, as cheaply and quickly as they can take it.

[21] The non-greenhouse gas pollution from the expansion will also be enormous. AR:Supp-17-17063 to -17072; AR:Supp-18-17095.

Wendell Berry, Another Turn of the Crank: Essays 11 (1995).

Defendants muster no evidence to dispute that the value of the harm caused by the mine expansion will significantly exceed the value of the coal and all benefits of the expansion. Nor do harms to the coal company outweigh the harm caused by the mine. Signal Peak is owned by the Gunvor Group, AR:2-2019-120-6237, a multinational company that is "one of the world's largest independent commodities trading houses."[22] Gunvor will not suffer significant hardship from an injunction pending compliance with NEPA and the ESA. *See Sardi's Rest. Corp. v. Sardie*, 755 F.2d 719, 726 (9th Cir. 1985) (relative size of parties relevant to equitable balancing); *Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1156 (D. Mont. 2004) ("A third party's potential financial damages . . . generally do not outweigh potential harm to the environment."). Further, any harm to Signal Peak is self-inflicted because it has continually pressured agencies to curtail their environmental analyses. *E.g.*, AR:2-2019-215-12423; AR:2-2019-145-8924; AR:2-2019-91-13987; *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1187 (9th Cir. 2000) (discounting self-inflicted harm).

Similarly, despite the Conservation Groups' repeated requests for the Office to develop a transition plan for workers and the community to lessen the impact of

[22] Gunvor Commodities Trading, https://gunvorgroup.com/en/.

the *inevitable* closure of the boom-bust operation, AR:2-2019-68-5351 to -5354; AR:2-2019-240-12957, both defendants *refused* to do so, belying their concerns for workers and the community. AR:E-16757; AR:2-2019-91-13993. Further, regarding community, Signal Peak's actions speak louder than its words. It has intimidated community members for speaking out. (Doc. 37-1, ¶ 6.[23]) It has also obtained numerous tax abatements, despite opposition from the Musselshell County Commission over crumbling infrastructure (Doc. 37-1, ¶¶ 6-7), all while benefiting from windfall international sales of coal purchased at below-market values, AR:2-2019-99-5707 to -5719. This Court should disregard Signal Peak's purported harms. *In re Beaty*, 306 F.3d 914, 925 (9th Cir. 2002) ("[O]ne seeking equity must do equity . . . ." (quoting *White v. Boston*, 104 B.R. 951, 957 (S.D. Ind. 1989))).

Finally, despite defendants' neglect of protections for workers and the community, an interim injunction against mining would allow *reclamation* to continue. The mine's existing impacts must be reclaimed, which is a long-term, labor-intensive process, funded by a $15 million reclamation bond. AR:E-16745. The reality in our carbon-constrained world is that the future of coal mining is

[23] *Signal Peak Energy, LLC v. MEIC*, No. DV 18-869, slip op. at 3-4 (13th Jud. Dist. Ct. Mar. 25, 2019) (sanctioning Signal Peak subpoenaing local ranchers) (Attachment 2).

reclamation, there is much reclamation to do, and it is funded. Further, Montana has received millions of dollars to retrain and transition workers in coal-impacted communities, like Roundup. AR:2-2019-68-5353. Unfortunately, while some private energy companies have established funds to supplement government transition programs, Signal Peak has not done so. AR:2-2019-68-5354.

3. Enjoining repeated unlawful action is necessary to ensure the rule of law.

For the reasons stated in the opening brief, which are unrebutted, the public interest strongly favors an injunction. (*See* Doc. 37 at 42.) Anything short of an injunction would "reward illegal behavior." *Fry*, 310 F. Supp. 2d at 1156.

CONCLUSION

The Office's decisions are indefensible. This Court should grant summary judgment to the Conservation Groups, vacate the mining plan modification and accompanying NEPA documents, and enjoin further mining of federal coal.

Respectfully submitted this 12th day of August 2019.

/s/ Shiloh Hernandez
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