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

Counsel for Plaintiffs

Samantha Ruscavage-Barz (NM Bar #23276)
WildEarth Guardians
516 Alto St.
Santa Fe, NM 87501
(505) 401-4180
sruscavagebarz@wildearthguardians.org
Admitted pro hac vice

Counsel for Plaintiff WildEarth Guardians

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

WILDEARTH GUARDIANS and MONTANA ENVIRONMENTAL INFORMATION CENTER, Plaintiffs, vs. RYAN ZINKE, et al. Defendants.	Case No. CV 17-80-BLG-SPW-TJC **PLAINTIFFS' COMBINED RESPONSE-REPLY IN OPPOSITIONTO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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ABBREVIATIONS AND SHORT FORMS

APA	Administrative Procedure Act
2006 EA	2006 Environmental assessment by BLM for Lease MTM94378
BLM	U.S. Bureau of Land Management
CEQ	Council on Environmental Quality
CO_2	Carbon dioxide
Coal company	Spring Creek Coal, LLC
EA	Environmental assessment
EIS	Environmental impact statement
FONSI	Finding of no significant impacts
IBLA	Interior Board of Land Appeals
MEIC	Montana Environmental Information Center
Mine expansion	2016 Mining plan modification for coal lease MTM 94378
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act
OSM	U.S. Office of Surface Mining
PM_{10}	Particulate matter 10 microns in diameter and smaller
Secretary	U.S. Secretary of the Interior
TR1	TR1 Major Permit Revision

INTRODUCTION

The Conservation Groups respectfully submit the following combined response-reply in opposition to Defendants' cross-motions for summary judgment and in support of the groups' motion for summary judgment.

ARGUMENT

I. The Conservation Groups Both Have Standing.

No one disputes WildEarth Guardians' standing. Federal Defendants' challenge to the standing of Montana Environmental Information Center (MEIC) fails.

Standing guarantees a "personal stake in the outcome of the controversy as to assure . . . concrete adverseness" of the parties. *Baker v. Carr*, 369 U.S. 186, 204 (1962). MEIC member Steve Gilbert's four decades of visiting the land *affected by* the Spring Creek Mine demonstrate his personal stake in this controversy. (Doc. 38-2, ¶¶ 9-16; Supplemental Declaration of Steve Gilbert, ¶ 3 (attached as Exhibit 1).)

Federal Defendants are wrong that the affected area is limited to the mine itself. The "affected area" extends to all areas potentially affected by the operation. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181-83 (2000) (finding standing for people who lived 20 miles and recreated 40 miles, respectively, downstream of

polluting facility). *Id.* at 183.[1] Mr. Gilbert meets this standard. He has long visited and recreated "in the area immediately surrounding the Spring Creek Mine." (Doc. 38-2, ¶ 9; Gilbert Supp. Decl., ¶ 3). This includes land north (Rosebud Battlefield and BLM parcel on divide between Spring Creek and Monument Creek), south (CX Ranch), and east (Tongue River Reservoir) of the mine. (Doc. 38-2, ¶¶ 10-12; Gilbert Supp. Decl., ¶¶ 3-5.) In fact, Mr. Gilbert has gotten as close as possible to the mine by land, air, and water. He has hiked on adjacent BLM land, he has flown over the mine in a low speed airplane, and he has canoed and fished the Tongue River Reservoir—all spots where he has seen the mine, or emerging coal trains, or both. (Doc. 38-2, ¶¶ 9, 12; Gilbert Supp. Decl., ¶ 3.) As in *Laidlaw*, Mr. Gilbert's enjoyment of these lands is diminished by his concerns about the impacts of the 7,000 acre strip-mine on "wildlife [upland birds], vegetation, soils, water, air quality, and the climate." (*Id.* ¶ 14); *see Am. Bottom*, 650 F.3d at 657.

When Mr. Gilbert visits the area around the mine, he sees the mine or the coal trains leaving the mine, which reminds him "how much harm the mine has

[1] *Accord Sierra Club v. Franklin County Power of Ill.*, 546 F.3d 918, 925 (7th Cir. 2008) (standing for person who recreates three miles from proposed power plant); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000) (standing for people recreating downstream of lumber mill); *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 657 (7th Cir. 2011) (Posner, J.) (standing for people concerned with landfill impacts to birds in park one-half mile away).

inflicted—and continues to inflict—on the surrounding landscape and its wild creatures." (Doc. 38-2, ¶ 15; *see also id.* ¶ 9, 13-16; Gilbert Supp. Decl., ¶ 6.) This, alone, establishes standing. *Sierra Club v. Jewell*, 764 F.3d 1, 5-7 (D.C. Cir. 2014) (standing premised on plaintiffs' enjoyment of viewing landscape, which would be impaired by coal mining).[2] As in *Laidlaw*, Mr. Gilbert would like to recreate closer to the mine—to hunt on the divide between Monument Creek and Spring Creek and to recreate more often on the Tongue River Reservoir—but the view of the mine and its coal trains dissuades him. (Gilbert Supp. Decl., ¶¶ 3, 5, 7); *Laidlaw*, 528 U.S. at 181-83.

Mr. Gilbert's long-standing, concrete interests in the land surrounding the Spring Creek Mine are nothing like the "extremely vague" averments, *Ecological Rights Found.*, 230 F.3d at 1148, that "one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of governmental action." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990); (Doc. 60 at 11-12 (citing *Nat'l Wildlife Fed'n*).) Further, the fact that the adjacent Decker strip-mine

[2] The traceability and redressability elements of the standing test are also met because the expansion will cause more mining and trains, whereas a new NEPA analysis "could" lead Federal Defendants to forego the expansion or limit its impacts. (Doc. 38-2, ¶ 20); *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1155-56 (9th Cir. 2015) (standing in NEPA cases).

also harms Mr. Gibert's aesthetic and recreational interests (Doc. 38-2, ¶ 15), does not change the analysis. *WildEarth Guardians*, 795 F.3d at 1157 ("So long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury."); (*cf.* Doc. 60 at 10 (arguing about Decker).)

Finally, contrary to Federal Defendants' assertion, (Doc. 60 at 9-10), Mr. Gilbert has specific plans to return: "I plan to continue my annual visits to the upper Tongue River basin, in particular the Rosebud Battlefield and the Tongue River below the Tongue River dam into the foreseeable future as long as I am able." (Gilbert Supp. Decl., ¶ 4; *see also id.* ¶ 7 (returning for fall bird season); Doc. 38-2, ¶ 13 (noting planned spring visit)); *Ecological Rights Found.*, 230 F.3d at 1150 (annual visits sufficient for standing).

II. Res Judicata Does Not Apply to Different Cases with Different Parties Involving Different Governmental Conduct.

Federal Defendants' res judicata argument also lacks merit. First, there is no identity of parties in the two actions because MEIC, which has standing, was not a party to the prior action. *Ctr. for Envtl. Law & Policy v. FWS*, 228 F. Supp. 3d 1152, 1159 (E.D. Wash. 2017). This point is dispositive. Second, res judicata does not apply if "the claim raised in the second lawsuit could not have been raised in the first lawsuit because the governmental action that was the subject of the second

suit had not yet occurred." *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 919 (9th Cir. 2012); *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1399 (9th Cir. 1992). Here, at the time of the first suit, WildEarth Guardians could not have raised any claims against the EA challenged in the instant action because no EA had been prepared and, moreover, Federal Defendants *excluded* the public from the decision-making process. *WildEarth Guardians v. OSM*, No. CV 14-103-BLG-SPW, 2016 WL 259285, at **2-3 (D. Mont. Jan. 21, 2016).

As in *Tillett v. BLM*, No. CV 16-148-BLG-SPW-TJC, 2017 WL 6625111, at *4 (D. Mont. Dec. 5, 2017), res judicata does not preclude a plaintiff from challenging an agency's new NEPA analysis on remand—though it will preclude the plaintiff from re-litigating issues that have already been "finally decided." Here, the Conservation Groups cannot be faulted for failing to anticipate flaws in an analysis—Federal Defendant's new EA—that did not exist at the time of the prior case. *See Fund for Animals*, 962 F.2d at 1399. Federal Defendants, on the other hand, cannot claim surprise, for each of the issues pursued in this action was presented to the agencies in public comments on remand from the prior case. AR:2-774-17210 to -17219; AR:2-787-17324 to -17331; AR:2-789-17333 to -17336; AR:2-791-17371; AR:2-827-18249 to -18277.

III. Federal Defendants Violated NEPA.

A. The Agencies Failed Adequately to Consider Harmful Impacts of Coal Trains Beyond the Mine Site, Despite Knowing the Trains' Routes and Destinations.

Federal Defendants do not dispute that the impacts from the 2,300 coal trains traveling to and from the mine each year are indirect effects under NEPA. (Doc. 60 at 14-15.) Nor do the agencies distinguish this Court's assessment in *Montana Environmental Information Center v. OSM* (*MEIC*), 274 F. Supp. 3d 1074, 1091-93 (D. Mont. 2017), that Federal Defendants "failed to take a hard look at either the indirect or cumulative effects of transportation of . . . coal beyond the [railroad spur line]."

Instead, the agencies contend incorrectly that they *did* consider impacts beyond the spur line. (Doc. 60 at 14.) However, the record citations offered by the Federal Defendants—with one minor exception—only contain generalized statements about coal train impacts *at or near the mine site*. AR:2-664-10779 (air quality at mine site), -10744 (coal train pollution impacts on "the surface facilities area for the SCM [Spring Creek Mine]"), -10800 (limited coal train impacts "have been noted on the SCM"), -10808 to -10809 (impacts to traffic at nearby railroad crossing); AR:2-796-17488 (discussing cumulative impacts of "transportation facilities at the Decker and Spring Creek mines"). The 2006 EA by the Bureau of Land Management did contain one sentence recognizing "substantial increases . . .

in noise levels" from coal trains on their way to market but discounted such impacts. AR:2-796-17488. The cursory mention of one category of train impacts (increased noise) in the 2006 EA—like the analysis of only greenhouse gas emissions from trains, in *MEIC*, 274 F. Supp. 3d at 1092—merely demonstrates the inadequacy of the agencies' analysis. It demonstrates Federal Defendants could have analyzed (but chose not to analyze) other significant impacts along the train line—such as air pollution and coal dust; impacts to public health, protected species, sensitive areas, and vulnerable communities; and the economic costs that increased coal traffic will force onto local communities. AR:2-827-18257; AR:2-839-18755 to -18756; AR:2-840-18832.

For example, the Federal Defendants ignored how PM_{10} emissions from the 2,300 trains each year will worsen the air in Sheridan, Wyoming, which is already "a non-attainment area for PM_{10}," AR:2-664-10741, AR:2-839-18755; how coal train traffic in Billings, Montana, worsens air pollution, limits development of divided neighborhoods, and may ultimately cost the city tens of millions of dollars to fix, AR:2-840-18820, AR:2-839-18756; how coal trains will impact Glacier National Park, AR:2-839-18738, 18764; and how coal trains will impact endangered fish species with critical habitat along the route, AR:2-839-18755.

The argument of Spring Creek Coal (Coal company) about issue exhaustion (Doc. 63 at 10-11) fails because WildEarth Guardians thoroughly apprised the

agencies of its concerns with coal trains. *Or. Natural Desert Ass'n v. McDaniel*, 751 F. Supp. 2d 1151, 1158 (D. Or. 2011); *see* AR:2-785-17291 to -17292; AR:2-827-18257; AR:2-839-18702; AR:2-840-18766; *see also* AR:2-820-18215 to -18216.

The Coal company's argument that Federal Defendants need not analyze coal transportation and combustion also fails. *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767-68 (2004), held that agencies need not consider effects if they have "no statutory authority to *act on that information*." *Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017). But here Federal Defendants do have statutory authority to act on "[i]nformation prepared in compliance with the National Environmental Policy Act" by denying or modifying the mining plan modification. 30 C.F.R. §§ 746.13(b), 746.14; *see also* 30 U.S.C. § 207(c).[3] The rule from *Public Citizen* does not apply, as here, when an agency "possesses the power to act on whatever information might be contained in an EIS [environmental impact statement]." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213 (9th Cir. 2008); *accord Sierra Club*, 867 F.3d at 1373 (agency had authority and, thus, obligation to assess downstream GHG emissions). Courts have repeatedly held that combustion of fossil fuels (like transportation) is

[3] Tellingly, Federal Defendants do not contend that they are constrained, as the Coal company suggests, to grant all applications for mining plan modifications.

an indirect effect of fossil fuel extraction under NEPA. *San Juan Citizens Alliance v. BLM*, No. 16-CV-376-MCA-JHR, 2018 WL 2994406, at *10 (D.N.M. June 14, 2018) (collecting cases).

B. The Agencies Failed to Take a Hard Look at the Impacts of the Tens of Thousands of Tons of Non-Greenhouse Gas Pollution from Coal Combustion.

Neither Federal Defendants nor the Coal company attempts to defend the EA's tactic of comparing pollution from combustion of the strip-mine's coal with all air pollution in the United States, which is unsupportable. *Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 265 F.3d 1028, 1035-37 (9th Cir. 2001).

Instead Federal Defendants mistakenly assert that the EA actually analyzed how the pollution from combustion of the strip-mine's coal will affect human health. (*Cf.* Doc. 60 at 15-16.) But no such analysis is present in the EA, AR:2-664-10778, -10781, despite evidence in the record that such pollution causes widespread premature deaths and illnesses each year, with significant public costs. AR:2-827-18257 to -18259. Federal Defendants and the Coal company's argument about national ambient air quality standards (NAAQS) is also mistaken. (*Cf.* Doc. 60 at 16-17; Doc. 63 at 14-15.) While the EA did evaluate NAAQS, it did so *only* for air pollution from operations *at the mine site*, not from coal combustion. AR:2-664-10775 to -10782.

Finally, the Coal company repeats its argument that the agencies did not have to consider combustion impacts at all. (Doc. 63 at 13-14.) But, again, the argument has no merit and has been repeatedly rejected, *see supra* Part III.A, including in the case the coal companies cite, *Sierra Club*, 867 F.3d at 1373-74 (requiring FERC to consider combustion emission when approving gas pipeline).

C. The Agencies' Misleading Analysis of Greenhouse Gas Pollution—Which Ignored $5 Billion in Harm to the Public—Was Unlawful.

As in *MEIC*, Federal Defendants attempt to "sidestep" the Conservation Groups' social cost of carbon claims by noting that formal cost benefit analysis is generally not required by NEPA. (Doc. 60 at 17-18); *see MEIC*, 274 F. Supp. 3d at 1098. That's beside the point. While "a formal and mathematically expressed cost-benefit analysis is not *always* a required part of an EIS," *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 594 (9th Cir. 1981) (emphasis added), a "misleading" analysis that prevents "the decisionmaker and the pubic" from making "an informed comparison of the alternatives" violates NEPA. *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) (quoting *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1989)). When an agency quantifies economic benefits, it must also quantify social costs. *MEIC*, 274 F. Supp. 3d at 1096-99.

One fundamental purpose of NEPA was to "bring environmental factors to *peer status* with dollars and technology in [agency] decisionmaking." *Sierra Club v. Morton*, 510 F.2d 813, 826 (5th Cir. 1975) (emphasis added); 42 U.S.C. § 4332(2)(B). Thus, Federal Defendants' assertion that "impacts to natural resources are traditionally considered in qualitative terms" (Doc. 60 at 23) is anathema to NEPA.

"NEPA mandates a rather finely tuned and 'systematic' balancing analysis in each instance." *Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1113 (D.C. Cir. 1971). An agency's balancing analysis of costs and benefits is arbitrary and capricious if it "tip[s] the scales of an EIS by promoting possible benefits while ignoring costs." *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983); *see Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (Scalia, J.) ("[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.").

An agency "places [its] thumb on the scale" by trumpeting the economic benefits of fossil fuel development, while ignoring the economic costs of greenhouse gas emissions. *MEIC*, 274 F. Supp. 3d at 1096-99; *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014); *accord Ctr. for Biological Diversity*, 538 F.3d at 1198-1203. A benefits-only economic analysis is not allowed.

Here, Federal Defendants repeated the error they made in *MEIC* by again trumpeting economic benefits, while zeroing out the cost of greenhouse gases—i.e., conducting a benefits-only economic analysis. *Compare* AR:2-664-10810 (noting "substantial economic benefits"—$379.3 million—that would be entirely lost under no action alternative), AR:2-664-10697 (FONSI averring that "Proposed Action will result in considerable beneficial impacts to socioeconomics in the area of influence"), *and* AR:2-870-20270 (inflating economic benefits of mine), *with* AR:2-664-10786 to -10787 (refusing to monetize greenhouse gas emissions), *and* AR:2-664-10782 to -10784 (stating greenhouse gas emissions "represent only 0.54 percent" of U.S. emissions, climate impacts of mine expansion "moderate and short term," climate impacts of no action alternative "would be similar to those under the Proposed Action," and cumulative climate impacts "are expected to be minor and short term"). Yet, as Professor Greenstone explains, the climate impacts from the mine expansion cost the public approximately *$5 billion* (Doc. 51 at 5)—dwarfing the purported "substantial economic benefits."

As in *MEIC*, 274 F. Supp. 3d at 1104, the Federal Defendants presented a misleading economic analysis that "essentially zeroed the climate change impacts scale." The agencies ignored information, as in *Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983), that "the costs would outweigh the benefits over the life of the project." As in *NRDC*, 421 F.3d at 811, they failed to provide information—

the social cost of carbon—that would allow the public to "make an informed comparison of the alternatives." (*See* Doc. 51 at 4-6.)

Thus, contrary to Federal Defendants' assertion, it was not enough for the EA to tally total greenhouse gas emissions from coal combustion and provide a general description of the impacts of climate change. (*Cf.* Doc. 60 at 18-20.) While it is debatable whether such analysis is ever adequate, case law is clear that such analysis is insufficient when, as here, an agency trumpets the economic benefits of a fossil fuel project. *MEIC*, 274 F. Supp. 3d at 1094-99; *High Country*, 52 F. Supp. 3d at 1191; *Ctr. for Biological Diversity*, 538 F.3d at 1199-203. The cases Federal Defendants' cite—*EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016), *WildEarth Guardians v. Jewell*, No. 16-CV-605-RJ, 2017 WL 3442922, at *12 (D.N.M. Feb. 16, 2017), and *W. Organization of Res. Councils v. BLM*, No. CV-16-21-GF-BMM, 2018 WL 1475470, **13-14 (D. Mont. Mar. 26, 2018)—are inapposite because they did not address an agency monetizing economic benefits, while refusing to monetize the climate impacts of greenhouse gas emissions, as here, in *MEIC*, and in *High Country*. (*Cf.* Doc. 60 at 23-24 (attempting to distinguish *High Country* and contending that this Court was mistaken in *MEIC*).)

Federal Defendants' argument that monetizing greenhouse gas emissions would be "misleading" (Doc. 60 at 24) absent monetization of economic benefits fails because, as Professor Greenstone points out (Doc. 51 at 16), the agencies *did*

monetize—and, indeed, sought to inflate, AR:2-870-20270—economic benefits of the mine expansion. The agencies' speculation that there are some additional but unidentified economic benefits of burning coal that were omitted from the EA has no support in the record. (Doc. 60 at 24 (providing no record citations).) Federal Defendants' counsel offers the post hoc speculation that the value of coal should include the value of "affordable, reliable electricity" and associated amenities. (Doc. 60 at 24); *Michigan*, 135 S. Ct. at 2710 ("[A] court may uphold agency action only on the grounds that the agency invoked when it took the action."). But there is no evidence that the same value cannot be provided, as is increasingly the case, by cleaner, less polluting or non-polluting energy sources (e.g., solar, wind, hydroelectric). *See* AR:2-664-10786 (noting decline of coal and replacement by renewables and gas). If the agencies believed that additional evidence or analysis would have shown some unique value for coal, that was reason to prepare an EIS. *Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732 (9th Cir. 2001) ("Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data.").

Finally, Federal Defendants' arguments about uncertainty whether reduced strip-mining will cause reduced greenhouse gas emissions (because other coal may replace the coal from Spring Creek) are self-defeating. (Doc. 60 at 24-26). First, as this Court noted in *MEIC*, "uncertainty militates in favor of an EIS." 274 F. Supp.

3d at 1104; *Nat'l Parks Conservation Ass'n*, 241 F.3d at 732.[4] The Federal Defendants could have, but did not, run economic models to determine how much coal would be replaced by other coal and how much would be replaced by cleaner energy alternatives. (Doc. 51 at 14); *see* AR:2-774-17213 to -17215 (urging Federal Defendants to use economic models to resolve uncertainty). Having chosen not to obtain this information—the agencies cannot now rely on this uncertainty to justify ignoring the significant social costs of burning the coal at issue. 40 C.F.R. § 1506.22 (requiring agencies to obtain information to resolve uncertainties unless cost-prohibitive).

Further, inconsistently, the agencies raised concerns about "substitution" only for costs, AR:2-664-10786, but not benefits, AR:2-664-10810 to -10811, with the effect of minimizing costs, while inflating benefits. Similarly, the agencies diluted greenhouse gas emissions by comparing them to national totals, AR:2-664-10782 to -10783 (finding impacts "slight" because "only 0.54 percent" of total U.S. emissions), but did not do the same for purported economic benefits, AR:2-664-10810 (finding economic benefits "substantial" but not making nationwide comparison). (*See* Doc. 51 at 5 (noting minimizing effect of dilution).) Such "inconsistency . . . is, absent explanation, 'the hallmark of arbitrary action.'" *Nat'l*

[4] Inconsistently, the Federal Defendants stated in the FONSI that there were "no effects . . . that are highly uncertain." AR:2-664-10698.

Parks Conservation Ass'n v. EPA, 788 F.3d 1134, 1145 (9th Cir. 2015) (quoting *Sierra Club v. EPA*, 719 F.2d 436, 459 (D.C. Cir. 1983)); *MEIC*, 274 F. Supp. 3d at 1096, 1098 (noting inconsistent treatment of costs and benefits).

The Coal company inaccurately argues that Federal Defendants did not have to use the social cost of carbon protocol because it has been "rescinded" by the current administration. (Doc. 63 at 19.) While the current administration has "disband[ed]" the Interagency Working Group on the Social Cost of Carbon and "withdrawn" the documents it issued (Doc. 63, Ex. A at sec. 5(b)), it has never contested the scientific accuracy of the social cost of carbon or offered *any* reasoned basis for its action (other political preference for fossil fuels). The social cost of carbon, based on "the latest peer-reviewed science and economic models," "remain[s] the best method[] available to analyze the social cost of greenhouse gas emissions." Jayni Foley Hein, *Federal Lands and Fossil Fuels: Maximizing Social Welfare in Federal Energy Leasing*, 42 Harv. Envtl. L. Rev. 1, 30-31 (2018); *see also* AR:2-831-18347 (describing development of protocol based on consensus and academic literature). The executive order does not alter the scientific accuracy of the social cost of carbon (Doc. 51 at 8-10) and it cannot alter either agencies' obligation under NEPA to use "[a]ccurate scientific analysis," 40 C.F.R. §§ 1500.1(b), 1502.24; 42 U.S.C. § 4332(2)(A), or the corresponding prohibition against misleading economic analysis, *MEIC*, 274 F. Supp. 3d at 1098-99.

D. The Agencies' Piecemealed Analysis of Strip-Mining Impacts—Which Ignored the Interrelationship of All Operations of the Mine—Was Unlawful.

The Coal company effectively concedes the argument about piecemeal analysis by admitting that *all* other operations at the strip-mine are "interrelated" with this mine expansion so that cessation of mining in the expansion area would cause "immediate[e]" cessation of "all" other mining and would "substantially limit[]" all ongoing reclamation. (Doc. 63-2 at 3, ¶ 9, 13-15.) If *all other mining* cannot operate without the instant mine expansion, then *all other mining* was required to been included in a comprehensive NEPA analysis. *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005) (where "entire development was affected" by and "interconnect[ed]" with permits to fill wetlands the "NEPA analysis should have included the entire property"); *Cady v. Morton*, 527 F.2d 786, 790, 794-95 (9th Cir. 1975). Given that the Coal company's concession of this point establishes the NEPA violation, Defendants' other arguments about this are largely irrelevant. And they are also unavailing.

That Mineral Leasing Act allows incremental expansion of strip-mines does not condone piecemeal NEPA analysis. The Ninth Circuit prohibited just that in *Cady*, 527 F.2d at 790, 794-95. Defendants' attempt to distinguish *Cady* fails. This mine represents just what *Cady*, 527 F.2d at 795, sought to prevent: 40 years of

strip-mining operations over thousands of acres that have never been studied in a comprehensive EIS. AR:2-801-17989 (no EIS for mine).

Defendants erroneously suggest that Federal Defendants' EA constituted a "comprehensive" study. (Doc. 60 at 26-27; Doc. 63 at 21-22.) It did not. While the EA briefly mentions prior and anticipated mining, Federal Defendants unambiguously based their FONSI on the determination that "the Proposed Action is a site specific action . . . mining of approximately 84.8 Mt of federal coal at a maximum rate of 18 Mtpy [million tons per year] and a surface disturbance of 503.7 acres, excluding the 124.2 surface acres associated with MTM 94378 that has been disturbed through December 31, 2015," AR:2-664-10696, i.e., a piecemeal analysis. As the court stated in *Cady*, 527 F.2d at 795: "the environmental consequences of several strip-mining projects extending over 20 years or more within a tract of 30,876 acres will be significantly different from those associated with [the coal company's] activities on a single tract of 770 acres."

The piecemealing here was egregious because the Coal company was concurrently pursuing another mine expansion (TR1), which, when added to the current expansion, would "normally" require an EIS, due to its size. AR:2-664-10724 (mine expansion covers 1,117.7 acres), -10769 (identifying TR1 expansion, but not listing acreage); AR:2-785-17288 to -17289 (TR1 expansion is 498.11

acres); 516 DM 13.4(A)(4) (EIS normally required for strip-mines over 1,280 acres). Contrary to the Coal company's assertion (Doc. 63 at 20-21), a project need not be *approved* to be reasonably foreseeable—it is enough that there is a *proposal* with "estimated . . . quantities and timelines" allowing for reasonable analysis. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998); *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 762 (9th Cir. 2014). Here, the TR1 proposal included quantities of coal to be mined (68 million tons, 498.11 acres) and a timeline (3.8 years). AR:2-664-10769; AR:2-785 -17289. TR1 was reasonably foreseeable.

Federal Defendants' argument that combining the two expansions would only satisfy one of the three criteria in the agencies' own NEPA guidance for "normally" requiring an EIS (that the "area to be mined is 1280 acres or more") fails because Plaintiffs demonstrated that all three criteria are satisfied (Doc. 38 at 19, 23-24). Once these criteria are met, the burden shifts to the agencies to demonstrate why an EIS should not normally be prepared. *Davis v. Mineta*, 302 F.3d 1104, 1117 (10th Cir. 2002), *abrogated on different grounds*, *Diné CARE v. Jewell*, 839 F.3d 1276 (10th Cir. 2016). The agencies have not even attempted to meet this burden. (Doc. 60 at 28-29.)

E. The Agencies Failed to Put Forth a Convincing Statement of Reasons for Not Preparing an EIS.

Federal Defendants have failed to put forth a "convincing statement of reasons" why the mine expansion's impacts are insignificant, *WildEarth Guardians*, 2016 WL 259285, at *2, providing only an inconsistent, incomplete, and arbitrary statement of reasons.

Federal Defendants fail to address the Conservation Groups' arguments about context, cumulative impacts, and their refusal to consult their own NEPA guidance. (*Compare* Doc. 38 at 20-24, *with* Doc. 60 at 28-29.) They have, accordingly, conceded those arguments, *S. Nev. Shell Dealers Ass'n v. Shell Oil Co.*, 725 F. Supp. 2d 1104, 1109 (D. Nev. 1989), and may not address them for the first time in reply, *Spreadbury v. Bitterroot Pub. Library*, 856 F. Supp. 2d 1195, 1202 (D. Mont. 2012).

Federal Defendants' contention that the billions of dollars in harm to the public from the strip-mine's greenhouse gas emissions (dwarfing purported economic benefits) is neither highly uncertain nor highly controversial (Doc. 60 at 29) is belied by their own inconsistent assertions to the contrary. (*Id.* at 21 (asserting there is "no consensus" on social cost of carbon and a "wide range" of

values "spanning from $12 to $123 per metric ton"[5]), 25 (arguing that there is "no certainty" whether greenhouse gas emissions will be reduced if Spring Creek coal is not mined); *cf.* Doc. 51 (explaining sound basis of social cost of carbon and the exorbitant cost of impacts from the strip-mine expansion).) The agencies cannot have it both ways. If they refuse to use the rigorous, scientific social cost of carbon protocol on the basis of supposed *uncertainty and controversy*, they cannot then assert that the strip-mine's impacts are not *uncertain and not controversial*. *Cf.* AR:2-664-10697 to -10698 (finding that effects are not highly uncertain and not highly controversial); *see W. Watersheds Project v. USDA APHIS Wildlife Servs.*, No. 17-CV-206-BLW, 2018 WL 3097016, at **8-12 (D. Idaho June 22, 2018) (holding that controversy and uncertainty of action warranted an EIS). The agencies' inconsistent analysis of controversy and uncertainty is not a "convincing statement," *WildEarth Guardians*, 2016 WL 259285, at *2, but rather the "hallmark of arbitrary action." *Nat'l Parks Conservation Ass'n*, 788 F.3d at 1145.[6]

[5] The total value of the coal is only $16.41 per ton. AR:2-664-10765 (table 3-14). Each ton of coal produces 1.675 tons carbon dioxide. AR:2-664-10924. Thus, using the lowest estimate for the social cost of carbon ($12 per ton of carbon dioxide), the climate harm from a ton of coal from the Spring Creek Mine ($20.10) exceeds the *value* of the coal ($16.41).

[6] Federal Defendants erroneously state that there is no "disagreement on effect" of greenhouse gas emissions. (Doc. 60 at 29). But as the Conservation Groups pointed out, using the social cost of carbon, the harmful effects of the expansion to the public will be between $1.7 and $18 billion, which significantly exceeds the value

The Coal company's assertion that the agencies did not have to prepare an EIS because doing so would have been "impossible" is an impermissible post hoc rationalization, *Michigan*, 135 S. Ct. at 2710; an impermissible basis for foregoing an EIS, *Seattle Audubon Soc'y v. Moseley*, 798 F.Supp. 1494, 1497 (W.D. Wash. 1992) ("Difficulty of compliance will not permit an agency to avoid its duties under NEPA."); and contrary to the current policy of the Department of the Interior, Sec. Or. 3355, sec. 4(a)(2) (Aug. 31, 2017) (EISs should be prepared in less than one year). Finally, the Coal company's argument that the 2006 Lease EA adequately addressed environmental impacts (Doc. 63 at 23) was squarely rejected in this Court's prior decision and has no merit. *WildEarth Guardians*, 2016 WL 259285 at *2.

IV. The Agencies' Failure to Consider the Dubious Validity of the Underlying Lease Was Arbitrary and Capricious.

Defendants press multiple meritless arguments regarding the lease validity issue. First, they argue that it is an improper collateral attack on the underlying coal lease barred by the Administrative Procedure Act's (APA) six-year statute of limitations. (Doc. 60 at 31; Doc. 63 at 24.) Defendants' "collateral attack"

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of the project (Doc. 38 at 21-22; *see* Doc. 51 at 5 (citing central value of approximately $5 billion)). Federal Defendants, on the other hand, assert that the climate effects will be "minor and short term." (Doc. 38 at 21 (citing AR:2-664-10784).) Clearly, there is a "disagreement on effect."

argument misconstrues the nature of the Conservation Groups' claim. The cloud on lease validity resulting from authorization by BLM personnel lacking delegated authority is a relevant factor that Federal Defendants needed to fully consider because the Secretary is authorized to make mining plan decisions for "leased" federal coal. 30 C.F.R. § 746.11(a). Thus, the crux of the claim is not whether BLM properly issued the lease, but rather whether Federal Defendants meaningfully considered the issue and its implications in their mining plan decision, as they were required to do under 30 C.F.R. § 746.13 and the APA, 5 U.S.C. § 706(2)(A). The record is devoid of such evidence.

Second, Defendants dismiss the Interior Board of Land Appeals (IBLA) decisions regarding improper lease issuance because they relate to lease, rather than mining plan, challenges. (Doc. 60 at 31; Doc. 63 at 24.) However, the IBLA decisions stand for the principle that where, as here, a leasing decision "is not issued by an employee with delegated authority, the [leasing] decision has no legal effect." *WildEarth Guardians*, 189 IBLA 274, 275 (Feb. 7, 2017). And, as discussed above, lease validity has implications for the validity of mining plan approvals.

Finally, even after noting that the validity of the underlying lease is not at issue in this case and that Federal Defendants lack authority to second-guess BLM leasing decision, the agencies present arguments regarding the validity of BLM's

lease. The agencies claims that the lease was signed by an "authorized official" (Acting Chief of the Solid Mineral Branch, AR:2-669-10995) whereas the Decision Record authorizing the lease signed by the Acting Miles City Field Manager was simply a "*precursor* NEPA document" having no effect on the validity of lease issuance. (Doc. 60 at 30 (emphasis in original).) But this argument is incorrect. First, the IBLA decisions recognized that the authority to approve coal leases did not extend below the level of the Deputy State Director. *WildEarth Guardians*, 187 IBLA 349, 351 (May 6, 2016); *WildEarth Guardians*, 189 IBLA 274, 278 (Feb. 7, 2017). Second, the IBLA has recognized that the "[Decision Record] is neither a NEPA document nor part of the NEPA document preparation process." 189 IBLA at 281. Instead, the Decision Record authorizes a leasing action; signing the lease itself represents "execution of the document implementing that decision" and is "ministerial." *Id*. at 282. The Order on BLM's petition for Director's Review of an IBLA decision setting aside a Decision Record approving a lease that was signed by BLM personnel lacking delegated authority—(Doc. 60, Ex. 3)—directly contradicts the agencies' argument here. There, BLM acknowledged that the Decision Record was signed by the wrong person, and that a new Decision Record with the correct signatory was necessary. Thus, Federal Defendants' arguments have not resolved the cloud over lease validity.

V. In Light of the Significant Harm to the Conservation Groups and the Public from the Mine Expansion, Vacatur and an Injunction Are Warranted.

Federal Defendants' present no argument in opposition to vacatur and injunctive relief. (*See* Doc. 60 at 32.) The Coal company argues that the equities "disfavor" vacatur; however, the company does not dispute that the harm from the coal will exceed—by an order of magnitude—all benefits of the mine. (*Compare* Doc. 38 at 28-29, *with* Doc. 63 at 27-29.) Indeed, the harm to the public from just the CO_2 emissions from the coal *exceeds* the value of the coal. *See supra* note 5. Thus, the Coal company can only operate the strip-mine because it "externalize[s] [its] environmental costs onto . . . American citizens, taxpayers, and voters." Michael Burger, *A Carbon Fee as Mitigation for Fossil Fuel Extraction on Federal Lands*, 42 Colum. J. Envtl. L. 295, 301 (2017). More, the volumes of non-greenhouse gas pollution from coal combustion will cause many deaths each year and many more sicknesses, costing the public substantial sums. AR:2-827-18257 to -18258 (health impacts of coal); AR:2-664-10781 (mine's contribution to national air pollution).

The points the Coal company raises in opposition are unavailing. First, the company's citation to revenue generated by the mine fails because in an apples-to-apples monetary comparison, the mine causes more harm than good. Second, the company's assertions about vacatur causing a stoppage of reclamation are

disingenuous. The record demonstrates that reclamation is not a priority for the Coal company—in 40 years of strip-mining, which has impacted 4,626 acres, zero acres have been fully reclaimed, only 9% of the lands have been revegetated, and only 23% (1,042 acres) of the lands have even been backfilled (the first step in reclamation). AR:2-664-10739. The company admits that vacatur of the instant expansion does not create any legal barrier to its reclaiming the approximately 3,000 acres that are already permitted and that have not been reclaimed at all. (Doc. 63-2, ¶ 13.) The company's assertion that it must strip-mine to reclaim land (*id.* ¶ 14) is simply illogical—for it would mean that no strip-mine could ever be reclaimed.

Finally, the Coal company attempts to use its non-unionized employees as hostages by threatening lay-offs. (Doc. 63 at 28.) Let there be no doubt, the Conservation Groups support a just transition for fossil fuel workers, including policies like the Power Grant program that recently provided Montana with $4.6 million for worker retraining as the coal industry declines,[7] as well as efforts to diversify the economy of southeastern Montana through development of clean, renewable energy resources. There is no indication, however, that the Coal

[7] State of Montana, *Governor Bullock Secures Over $4.6 Million for the Community of Colstrip, available at* http://governor.mt.gov/Newsroom/governor-bullock-secures-over-46-million-for-the-community-of-colstrip.

company, a major corporation with significant assets, has made any efforts to protect workers. *See* AR:2-664-10786 (noting decline). The company has sufficient assets—and sufficient reclamation work to complete—to retain its employees pending an interim remand for compliance with NEPA.

If the Coal company elects, instead, to lay-off its employees, that is a decision for which the company must take responsibility. *Diné Citizens Against Ruining Our Environment v. OSM*, No. 12-CV-1275-JLK, 2015 WL 1593995, at *3 (D. Colo. Apr. 6, 2015) (noting "responsibility for . . . delay and expense [associated with vacatur of mine expansion] lies with Respondents [federal agencies] and not with Petitioners"); *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014) (discounting self-inflicted harm); *see also League of Wilderness Defenders*, 752 F.3d at 765 (temporary economic impacts do not outweigh permanent environmental harm).

The Coal company's suggestion that unlawful NEPA analysis is insignificant has recently been rejected by this Court. *Mont. Envtl. Info. Ctr. v. OSM*, No. CV 15-106-M-DWM, 2017 WL 5047901, at *6 (D. Mont. Nov. 3, 2017). The Coal company is also mistaken in its assertion that the Conservation Groups have not addressed each of the injunction factors. (Doc. 38 at 28-29.) And there is no obligation for the groups to have sought preliminary injunctive relief in order to now seek permanent injunctive relief.

The strip-mine at Spring Creek will cause billions of dollars of harm to the public and many premature deaths. The economic harm outweighs all identified economic benefits. The harm from the premature mortalities is incalculable. Vacatur and an interim injunction pending compliance with NEPA are warranted.

CONCLUSION

At its most basic, NEPA requires federal agencies to tell the public the environmental truth. Federal Defendants failed to tell the public the whole environmental truth about the proposed expansion of the Spring Creek strip mine. The Conservation Groups respectfully request that this Court vacate the mine expansion and enjoin operations in the expansion area pending compliance with NEPA.

Respectfully submitted this 29th day of September 2018.

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

Counsel for Plaintiffs

Samantha Ruscavage-Barz (NM Bar #23276)
WildEarth Guardians

516 Alto St.
Santa Fe, NM 87501
(505) 401-4180
sruscavagebarz@wildearthguardians.org
Admitted pro hac vice

Counsel for Plaintiff WildEarth Guardians

CERTIFICATE OF COMPLIANCE

I, the undersigned counsel of record, hereby certify that this brief is doublespaced, has a typeface of 14 points or more, and contains 6,401 words, excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index. I relied on Microsoft Word to obtain the word count.

/s/ Shiloh Hernandez
Shiloh S. Hernandez