

Climate Science, Awareness and Solutions, Inc.

Earth Institute, Columbia University
475 Riverside Drive, Suite 520
New York, NY 10115

Judge Laurie A. Fontaine
District Court Judge
State of North Dakota
County of Pembina

Regarding: *State of North Dakota v. Michael Eric Foster*, Case No. 34-2016-CR-00187

December 12, 2017

Your Honor,

I write to request the most lenient allowable sentence for Michael Foster at his hearing before the Court set for January 20, 2018.

Mr. Foster was convicted by jury in October 2017 of several charges for his October 2016 unauthorized turning off of a valve on the Keystone 1 pipeline. At Mr. Foster's trial, Your Honor disallowed expert testimony in support of his defense. I was present for the trial, and had prepared to offer such testimony.

Here I offer that same testimony, by way of the attached "Expert Opinion Basis Report." While I think it would have been relevant to the jury's consideration of the basic elements of Mr. Foster's proffered necessity defense, as well as to Mr. Foster's relevant state of mind, I offer it to you here in aid of your consideration of the nature of Mr. Foster's action, including its relevant context. That in turn may assist your determination as to Mr. Foster's appropriate punishment.¹

In brief, the overwhelming scientific evidence establishes that we are, in fact, in a state of emergency with respect to fossil fuel emissions and the climate system on which we, our progeny, and nature as we know it, depend.

Your Memoranda Decision and Order of Sept. 29, 2017 makes the point that "Defendants cannot create necessity through their own impatience with less visible and more time-consuming alternatives." Patience and time-consuming alternatives may be appropriate in most cases, but here the science establishes that we are out of time. Our decisions today, allowing or challenging business as usual energy utilization and associated fossil fuel emissions, will determine, in large part, both our progeny's long-term future *and* the severity of associated global warming impacts over coming decades.

You also noted, in your decision and order, that the Defendants had referenced the Clean Power Plan and, *sui sponte*, you raised the Paris Climate Agreement. I agree with Mr.

¹ I am available as well, at your leave, to discuss further any of the points I make in the attached

Foster that these efforts at containing emissions were (and are) inadequate, even in combination, to preserve a viable climate system, and that much more must be done.²

More specifically, with respect to the impact of Mr. Foster's highly public protest, Your Honor might well take judicial notice of the fact that, in its waning days, the Obama Administration submitted to the United Nations repository for Paris Agreement-related commitments its Mid-Century Strategy for Deep Decarbonization (Nov. 16, 2016).

Had that Strategy been implemented, it would have led to deep emissions reductions in the United States over the next three decades. I review, on p. 31 of my Report to you, that this proposed commitment approximated the pace of emissions reductions that my colleagues and I have determined is needed to protect our nation and planet from dangerous climate change. Indeed, the Deep Decarbonization Strategy report stands out as a singular recent commitment by our government in the proper direction -- although, regrettably, that commitment has been abandoned by the Trump Administration's renunciation of its obligations under the Paris Agreement.

Importantly, the Nov. 16, 2016 US commitment, however short-lived, was rendered and filed five weeks *after* Mr. Foster's action.

I am not arguing, of course, that Mr. Foster's actions of Oct. 11, 2016, in shutting a Keystone 1 flow valve, directly induced the Obama Administration to take meaningful climate action five weeks later. Neither am I intimating that Mr. Foster anticipated this specific move. On the other hand, it is also true that Mr. Foster, in taking such great personal risk, was surely hoping that his action just might, however inconceivably, help to affect such responsible governmental action.

Clearly, Mr. Foster sought more, by his action, than a temporary halt or slowdown in the flow of emissions-intensive tar sands oil through the particular pipeline that garnered his immediate focus. Instead, by his action, Mr. Foster sought also to demand a change in policy and practice sufficient to prevent dangerous disruption of the climate system. Such a rational directional change would require, as I show in my Report, rapid phaseout of fossil fuel emissions and a drawdown of excess atmospheric carbon this century.

Accordingly, in combination with the call of others for meaningful action, Mr. Foster's demand conceivably may have been heard and responded to, in part, by our government -- at least for a moment in time. The plausibility of an effect is increased by the fact that Mr. Foster's actions were well-publicized. Arguably, then, even in the light of Mr. Foster's other options, his Oct. 11, 2016 action may have been his best choice to confront the imminent danger of catastrophic and lethal climate change.

In the Court's Sept. 29 Memoranda Decision, you pointed to U.S. v. Dorrell, 758 F.2d 427 (9th Cir. 1985) for the proposition that a lack of results from other, more ordinary, types of political action may not be taken to establish their relative uselessness -- in that

² The Court can take notice of the fact that the Trump Administration has moved swiftly to abandon even these mild strictures on fossil fuel emissions.

the unavailing impact of such other efforts “might mean only that the will of the majority, legitimately expressed, had prevailed.”

That may be true in the abstract, and yet still not pertain here where the fossil fuel industry has worked effectively to thwart democratic control of energy and climate policy, so as to protect its unfettered ability to spew CO₂. Indeed, it would be appropriate for the Court to take judicial notice of the well-documented efforts of the fossil fuel industry to widen the gap between what is understood by the relevant scientific community, on the one hand, and by policymakers and the public, on the other.³

Furthermore, with regard to the “will of the majority,” I note that public opinion polls repeatedly show that a majority of the American public want our government to take action to address and alleviate climate change. Rather than being a case of the will of the majority being legitimately expressed, it appears to be the will of the special financial interests being illegitimately expressed. By this I refer to the fact that the fossil fuel industry, purposely and effectively, has abused the very fundamentals of our democracy.

In that context, then, pointed, nonviolent action such as that by Mr. Foster may be especially needed to break through our lethal complacency with respect to the unexampled danger to civilization and nature presented by unarrested fossil fuel emissions.

Finally for here, Your Honor, I offer the observation that in your Memorandum Decision you appeared to reduce the harms of global warming to the growing risk of crossing irreversible climate tipping points, and thus to potential future dangers.

Additional emissions, in fact, are driving and enhancing climate changes that are occurring now. For instance, based on an examination of present ice sheet melting and the paleoclimate record, among other evidence, it is now clear that our continuing fossil fuel emissions are destabilizing the planet’s major ice sheets. This directly implies that, unless emissions are phased down rapidly, humanity will confront multi-meter sea level rise and associated consequences – including the lost functioning of coastal cities. My Report and its referenced associated studies document this anything-but-attenuated risk. As I outline there, these devastating consequences will be realized absent effective action. It is a question not of “if,” but “when.”

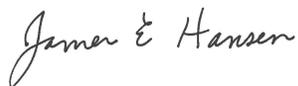
None of this can be taken to mean that continued high fossil fuel emissions present only an increasingly certain risk of later catastrophes. Such emissions also are *presently* disrupting the climate system with *current* lethal impacts to humans and other species. That point too is documented in the Report, and its associated documents. The footprint

³ See, for instance, The Center for International Environmental Law, Smoke and Fumes: The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis (Nov. 2017) at <http://www.ciel.org/wp-content/uploads/2017/11/Smoke-Fumes-FINAL.pdf> and Naomi Oreskes and Erik Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (New York: Bloomsbury Press 2010).

of climate change is presently visible in the calamitous wildfires that, at this writing, roar through Southern California, just as wildfire burned through Santa Rosa, recently, and consumed vast swaths of western forests this summer – with ensuing smoke blanketing the region and, via high-altitude transit, reaching mid-west and eastern states.⁴

In sum, the overwhelming scientific evidence establishes our emergency situation with the respect to climate. It is appropriate, in my view, for the Court to take account of these facts in evaluating the nature of Mr. Foster’s actions that aimed to respond to them. His actions were undertaken at a time when our government’s response to this ultimate threat was highly inadequate. In the intervening months, particularly since Jan. 20, 2017, that response has devolved to the equivalent of pouring oil on a raging fire. That oil is carried by the very pipeline that Mr. Foster sought to shut down, albeit temporarily, in his clarion call to us all to assume responsibility to halt this unfolding calamity and defend our children’s future. In the circumstance, in my view, he merits only the mildest punishment, if any at all.

Thank you for your consideration of these points. As I noted, *supra*, I am prepared to elaborate on any of them, or otherwise provide the Court with further support, at your request.



James E. Hansen, Director
Climate Science, Awareness and Solutions
Earth Institute, Columbia University
New York, New York, USA

⁴ NOAA, *Wildfire Smoke Crosses U.S. On Jet Stream*, <https://www.nasa.gov/imagefeature/goddard/2017/wildfire-smoke-crosses-us-on-jet-stream> (Sept. 5, 2017).