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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' OBJECTIONS TO FINDINGS AND RECOMMENDATIONS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authorities

INTRODUCTION

Plaintiffs WildEarth Guardians and Montana Environmental Information Center (collectively, "Conservation Groups") object to the Findings and Recommendations (Findings (Doc. 71)) regarding (1) Federal Defendants' improper segmentation of their analysis and (2) the appropriate and equitable remedy for Federal Defendants' unlawful decision.

Regarding segmentation, the Spring Creek Mine is the seventh largest coal mine in the United States, yet through incremental expansions, it has evaded preparation of a comprehensive environmental analysis for nearly four decades. Because, as the coal company admits, the proposed strip-mine expansion is interdependent and interconnected with *all other* strip-mining and reclamation operations at the mine, Federal Defendants were required to base their assessment of significance under the National Environmental Policy Act (NEPA) on the impacts of *all* mining operations. Their decision to assess only the significance of the proposed incremental expansion, which represents only one-twelfth of the overall operation, in isolation was unlawful.

Regarding remedy, because the expansion will cause hundreds of millions of tons of pollution, causing the public at least ten-times more harm than benefit when social costs and benefits are monetized, equity supports a temporary injunction pending compliance with NEPA. The Findings, correct in almost all

other respects, fail to balance the harms from the strip-mine expansion and craft an injunction tailored to the necessities of the case. This Court should issue a tailored remedy that prevents significant harm to the environment and the public and upholds the rule of law, while also allowing reclamation operations to continue and minimizing impacts to mine workers.

STANDARD OF REVIEW

This Court reviews the findings of a magistrate judge *de novo*, and "may accept, reject, or modify" them "in whole or in part." 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

ARGUMENT

I. Segmentation: Federal Defendants' NEPA analysis must account for the entirety of the mine because all mining operations are interconnected.

The Ninth Circuit has long prohibited agencies from segmenting connected actions in a manner that evades preparation of an environmental impact statement (EIS). For example, *Thomas v. Peterson* held that it was unlawful for the Forest Service to analyze the impacts of a timber sale and road separately where "the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales." 753 F.2d 754, 758 (9th Cir. 1985), *abrogated on other grounds as recognized in Cottonwood Envtl. L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015); *accord Sierra Club v. BLM*, 786 F.3d 1219, 1226

(9th Cir. 2015) (interdependent projects must be analyzed together); 40 C.F.R. § 1508.25(a)(1) (same); *id.* § 1508.27(b)(7) ("Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts."). Agencies may not allow applicants for permits to evade preparation of a comprehensive EIS "by submitting a gerrymandered series of permit applications." *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005).

The Ninth Circuit has specifically prohibited agencies and coal companies from using incremental strip-mine mine expansions to evade preparation of a comprehensive NEPA analysis of the entire operation. In *Cady v. Morton*, a coal company leased 30,000 acres for strip-mining, but then, as here, sought approval of an initial mining plan for just 770 acres. 527 F.2d 786, 793 (9th Cir. 1975). The court rejected the agencies' and coal company2019s arguments that "an EIS need not be prepared covering an entire project when an adequate EIS covering a discrete phase or segment thereof has been prepared." *Id.* at 794. The court explained:

> While it is true that each mining plan prepared for tracts within the leased area is to a significant degree an independent project which requires a separate EIS with respect to each, it is no less true that the breadth and scope of the possible projects made possible by the Secretary's approval of these leases require the type of comprehensive study that NEPA mandates adequately to inform the Secretary of the possible environmental consequences of his approval. . . . [I]t cannot be denied that the environmental consequences of several strip mining projects extending over twenty years or more within a tract of

> 30,876.45 acres will be significantly different from those which will accompany Westmoreland's activities on a single tract of 770 acres.

Id. at 795.

Here the coal company has succeeded for decades in accomplishing what the court prohibited in *Thomas*, *Save Our Sonoran*, and *Cady*: evading preparation of a comprehensive EIS of the entire strip-mining operation through a series of incremental mine expansions. Since the strip-mining of Spring Creek began in 1979, it has expanded through at least eight separate leases to its present goliath size of nearly 6,000 acres. AR:2-664-10723 to -10724, -10735 (Table 2-1). It is now the seventh largest coal mine in the United States, stripping and shipping approximately 18 million tons of subbituminous coal per year. AR:2-785-17287; AR:2-664-10724. Yet the mine has never been subject to a comprehensive EIS. *See* AR:2-796-17390 (identifying prior analyses, none of which was an EIS for the mine).

Federal Defendants' decision to continue the piecemeal analysis of the Spring Creek Mine was unlawful. Here, as in *Cady*, 527 F.2d at 795, the environmental consequences of the approximately 6,000-acre mine "will be significantly different" from those of the "503.7 acre[]" expansion on which Federal Defendants premised their finding of no significant impact (FONSI). AR:2-664-10695. Moreover, the mandate to prepare a comprehensive EIS of all mining activity is stronger here than it was in *Cady* because, whereas the separate

mining activities in *Cady*, 527 F.2d at 795, were "to a significant degree . . . independent," here Spring Creek has admitted that *all* mining and reclamation operations across the 6,000-acre mine are "interrelated," such that cessation of mining in the expansion area "would require all active mining operations at the Spring Creek Mine to immediately cease." (Doc. 63-2 at 3-5, ¶¶ 9, 14.) Thus, like the timber sale and logging road in *Thomas*, 753 F.2d at 758, *all* mining and reclamation operations at the Spring Creek Mine are interdependent and connected actions that must be analyzed together.

Further, Spring Creek has treated the scope of the mine expansion inconsistently and tactically, reminiscent of the improper gerrymandering denounced in *Save Our Sonoran*, 408 F.3d at 1122. Thus, when assessing whether the expansion will result in significant environmental impacts, Spring Creek minimized the scope, maintaining that the operation is limited to a 503.7 acre expansion. AR:2-780-17246 to -17247. Yet, when opposing a meaningful remedy, Spring Creek maximized the scope, maintaining that all operations are "interrelated" and cessation of mining in the expansion areas will halt all operations at the mine. (Doc. 63-2 at 3-5, ¶¶ 9, 14.) The coal company cannot have it both ways. The Court should take Spring Creek at its word that all operations are interrelated and require all operations to be assessed in a single, comprehensive EIS.

While the Findings are correct in most respects, the Court should reject the Findings respecting segmentation. (*See* Doc. 71 at 30-34.) First, the Findings reason that segmentation was permissible because the Mineral Leasing Act (MLA) allows mines to expand in increments. (*Id.* at 31-32 (citing 30 U.S.C. § 203; 43 C.F.R. § 3432.2).) It is true that the MLA allows for such mine expansions; however, the Ninth Circuit has held that the sequential nature of the laws governing coal development are not a basis for truncating an environmental analysis under NEPA. Thus in *Cady*, 527 F.2d at 795, the Court required agencies to analyze "the entire project contemplated" on 30,000 leased acres, even though the coal company had only sought approval of a mining plan, as here, for only small portion of that acreage (770 acres). Further, while, as the Findings observe, the underlying leases in *Cady* had never been "subject to environmental review," (Doc. 71 at 32 (citing AR:2-796-17390)), that is not a basis for distinguishing that case. Here, as in *Cady*, there has never been a *comprehensive EIS* for the "entire" Spring Creek Mine. The prior analyses cited in the Findings did not assess the whole mine, but instead consisted of two *regional* EISs for the Powder River Basin, one draft EIS for a regional coal lease, an EIS for a dam on the Tongue River, a state EIS for oil and gas management, and an EA for one of the eight leases that make up the strip-mine. (*See* Doc. 71 at 32 (citing AR:2-796-17390).)

Second, the Findings focus on the Conservation Groups' analysis of the TR1 expansion (a separate, concurrent expansion of the strip-mine), but overlook the groups' broader point about analyzing the expansion at issue in this case in isolation from the rest of the mine. (*Compare* Doc. 71 at 33-34, *with* Doc. 38 at 18 (arguing agencies "isolated" the expansion from the "larger, long-term mining operation"), *and* Doc. 64 at 17 (arguing improper segmentation because Spring Creek admitted all operations were interdependent).) The Conservation Group's discussion of the TR1 expansion was intended to be an example of the agencies' broader failure to conduct a comprehensive analysis. (*See* Doc. 38 at 18 (stating TR1 expansion was an "instance" of continuing segmentation); Doc. 64 at 18-19 (treating TR1 as an example of the improper historical segmentation of the mine).) For this reason, questions of the foreseeability of the TR1 expansion are not dispositive of the Conservation Groups' segmentation claim. (*See* Doc. 71 at 32-33.)

The broader point about the agencies' improper analysis of the significance under NEPA of the present expansion in isolation from the larger existing operation was conclusively established in briefing by Spring Creek's admission that all operations—those of the expansion and those of the existing strip-mining and reclamation operations—are interdependent. (Doc. 63-2 at 3-5, ¶¶ 9, 14.)

Because these operations are interdependent and connected, they were required to be analyzed in a single EIS. *Thomas*, 753 F.2d at 758.

The Findings accurately note that Federal Defendants' environmental assessment (EA) makes brief reference to the existence of the larger mining operation (albeit without analysis). (Doc. 71 at 33-34.) The critical point, though, is that in the *FONSI* when Federal Defendants assessed whether the expansion would cause significant environmental impacts and thereby require an EIS, they considered *only* the impacts of the 503.7-acre expansion, but ignored the significance of the larger 6,000-acre operation. AR:2-664-10696 ("Approval of the Proposed Action is a site specific action that would authorize mining of approximately 84.8 Mt [million tons] of federal coal at a maximum rate of 18 Mtpy [million tons per year] and a surface disturbance of 503.7 acres . . . ."). NEPA prohibits agencies from making their significance determination on the basis of a segmented analysis. 40 C.F.R. § 1508.27(b)(7) ("Significance cannot be avoided by . . . breaking [an action] down into small component parts."). Here, as Spring Creek admits, *all* operations at the 6,000-acre mine are interdependent and connected, and *all* operations will have to cease if the expansion does not proceed (Doc. 63-2 at 3-5, ¶¶ 9, 14). Therefore, Federal Defendants' analysis of the significance of the proposed expansion had to be based on the significance of *all* mining operations. Their segmentation of this analysis was unlawful.

II. Remedy: The unlawful strip-mining operation must be limited pending compliance with the law to prevent irreparable harm to the plaintiffs, the public, and the environment, and to assure government agencies follow the law.

A. Legal standards for injunctive relief and vacatur.

A district court may issue an injunction when a plaintiff has made a sufficient showing under the following four factors: (1) the plaintiff has suffered "irreparable injury"; (2) remedies available at law, "such as monetary damages, are inadequate to compensate for that injury"; (3) the "balance of hardships" tips in the plaintiff's favor; and (4) "the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

When acting in equity, a court has discretion to "mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). "Flexibility rather than rigidity has distinguished it [equity jurisdiction]." *Id.* "The historic injunctive process was designed to deter, not to punish." *Id.*

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). A temporary delay in

economic activity does not outweigh permanent environmental harm. *See League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 765-66 (9th Cir. 2014).

In assessing whether injunctive relief is necessary for violation of a federal statute, a court considers "whether an injunction is necessary to effectuate the congressional purpose behind the statute." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002). The purpose of NEPA is to "prevent or eliminate damage to the environment and biosphere." 42 U.S.C. § 4321. "The preservation of our environment, as required by NEPA . . . is clearly in the public interest." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006). "[T]he interest in having government officials act in accordance with the law" is "a public interest of the highest order." *Seattle Audubon Soc'y v. Evans*, 771 F.Supp. 1081, 1096 (W.D.Wash.1991) (citing *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

When an agency action is found arbitrary and capricious under the Administrative Procedure Act (APA), the reviewing court "shall . . . set aside" the unlawful action. 5 U.S.C. § 706(2). In rare circumstances, "courts may decline to vacate agency decisions when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, No. 3:10-CV-01397-SI, 2012 WL 13042847, at *2 (D. Or. Dec. 10, 2012). Thus, a

court may grant partial vacatur when necessary to further important goals, such as environmental protection. *Id.* at *5.

B. The Findings fail to balance the irreparable harm to plaintiffs, the public, and the environment, and fail to accord appropriate weight to the preponderant interest in government agencies following the law.

Here, the Findings fail to balance the equities and mold a decree to afford appropriate relief. The four-factor injunction analysis supports injunctive relief and vacatur. There is little dispute that strip-mining, shipping, and burning coal is irreparable harm that cannot be repaired with money damages. *E.g.*, *MEIC v. OSM* (*MEIC II*), No. CV 15-106-M-DWM, 2017 WL 5047901, at *3 (D. Mont. Nov. 3, 2017) (finding irreparable harm because "federal coal, once mined, cannot be put back into the ground"); *NRDC v. Jamison*, 787 F. Supp. 231, 241 (D.D.C. 1990) ("[I]t cannot be seriously argued that environmental damage does not occur as a result of coal development."). The Conservation Groups therefore satisfy the first two factors. (Doc. 38-1, ¶ 20 ("Once land is mined, it cannot be restored for many years. Furthermore, once air pollution is released, including greenhouse gas pollution, it cannot be put back."); Doc. 38-2, ¶ 21 ("Once the first gouge is made there is no returning to pre-mining conditions.").)

The public interest also strongly supports an injunction. Combustion of the federal coal at issue will emit tens of millions of tons of dangerous pollution, including approximately 146 million metric tons of carbon dioxide (CO_2), 350

thousand tons of sulfur-dioxide (SO_2),[1] 130 thousand tons of oxides of nitrogen (NO_x), and 2,800 pounds of toxic mercury. AR:2-664-10781, -10783. These staggering amounts of pollution constitute a notable contribution to the total air pollution burden of the United States, i.e., 1 in every 200 units of CO_2, SO_2, and mercury pollution in the entire nation can be traced to this mine. AR:2-664-10781, -10783. This contributes significantly to the worsening impacts of climate change, AR:2-837-18650 to -18652, and the national and global epidemic of premature deaths and sicknesses caused by air pollution from coal, AR:2-827-18257. Regarding climate change, in order to keep global temperature increases below the internationally agreed-upon 2°C threshold, 95% of all coal reserves in the United States is unburnable. AR:2-842-18861 (Table 1); Copenhagen Accord, ¶¶ 1-2, Dec. 18, 2009, U.N. Doc. FCCC/CP/2009/11/Add. 1, *available at* https://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf (recognizing "the scientific view" that to "prevent dangerous anthropogenic interference with the climate system," "global temperature should be below 2°C," which will require "deep cuts in global emissions").

[1] Totals for SO_2, NO_x, and mercury are calculated by multiplying expected annual emissions, from Table 4-3, AR:2-664-10781, by the five years of expected production from the expansion.

Monetizing just the climate impacts at stake further demonstrates the magnitude of harm to the public from the mine expansion. The social cost of carbon protocol, the best available scientific methodology for calculating the expected monetary damages from greenhouse gas emissions, "reveals that the Expansion will cost society well over $5 billion from climate-related impacts." (Doc. 51 at 8-11.)[2] In addition to the climate impacts, the increased mortality and morbidity that will result from combustion of the coal from the expansion will cost the public many more millions of dollars. AR:2-827-18257 to -18258. Indeed, this strip-mine can only operate because it "externalize[s] [its] environmental costs onto . . . American citizens, taxpayers, and voters. All of which is to say: it's a bad deal. A terrible deal. We are all being utterly and completely taken." Michael Burger, *A Carbon Fee as Mitigation for Fossil Fuel Extraction on Federal Lands*, 42 Colum. J. Envtl. L. 295, 301 (2017).

In light of the magnitude of impacts from coal combustion, courts have enjoined unlawful operations at coal mines and coal plants. *E.g.*, *Diné Citizens Against Ruining Our Environment v. OSM*, No. 12-CV-1275-JLK, 2015 WL 1593995, at *3 (D. Colo. Apr. 6, 2015) (enjoining mine expansion); *Sierra Club v. U.S. Dep't of Agric.*, 841 F. Supp. 2d 349, 358-60 (D.D.C. 2012) (harm to public

[2] *See also* AR:2-829-18300 to -18301 (showing revised range of social cost of carbon values).

health from coal plant pollution outweighed harm from delaying construction of coal plant pending completion of EIS). Recently, an Australian court, the Land and Environment Court of New South Wales—relying in part on a recent decision from this Court—rejected a coal mine proposal, similar to the Spring Creek Mine, in part on the basis of its greenhouse gas emissions:

> The Project will be a material source of GHG emissions and contribute to climate change. Approval of the project will not assist in achieving the rapid and deep reductions in GHG emissions that are needed now in order to balance emissions by sources with removals by sinks of GHGs in the second half of this century and achieve the generally agreed goal of limiting the increase in global average temperature to well below 2°C above pre-industrial levels.
>
> . . . .
>
> In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time . . . . because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.

Gloucester Res. Ltd. v. Minister for Planning, [2019] NSWLEC 7, at ¶¶ 697, 699 (NSW Land & Env't Ct. Feb. 8, 2019) (attached as Exhibit 1); *see also id.* at ¶ 507 (citing *MEIC v. OSM* (*MEIC I*), 274 F. Supp. 3d 1074 (D. Mont. 2017)).

An injunction also supports the public interest in having the government follow the law. *E.g.*, *Seattle Audubon Soc'y*, 771 F.Supp. at 1096.[3] This is now the second time that Federal Defendants have violated the law in approving the expansion of the Spring Creek Mine. *See Guardians v. OSM* (*WildEarth I*), No. CV 14-103-BLG-SPW, 2016 WL 259285, at *3 (D. Mont. Jan. 21, 2016). The purpose of injunctive relief is to deter unlawful conduct. *Hecht Co.*, 321 U.S. at 329. Absent meaningful injunctive relief, there is no reason to believe that Federal Defendants will right their path and begin to tell the public the truth about the environmental harms of continued large-scale coal mining. *See Pub. Serv. Co. of Colo. v. Andrus*, 825 F. Supp. 1483, 1509-10 (D. Idaho 1993) (issuing injunction where agency "refus[ed] to comply with the law"). In light of the broad-scale and noxious impacts from coal mining and the significant interest in Federal Defendants' following the law, the public interest supports an injunction. *Earth Island Inst.*, 442 F.3d at 1177. An injunction will further NEPA's statutory objective of protecting the environment. 42 U.S.C. § 4321; *Biodiversity Legal Found.*, 309 F.3d at 1177.

[3] *Accord Indigenous Envtl. Network v. U.S. Dep't of State*, No. CV-17-29-GF-BMM, 2019 WL 652416, at *10 (D. Mont. Feb. 15, 2019) ("The public possesses an interest in the Department's compliance with NEPA's environmental review requirements and informed decision-making."); *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) ("[T]he public interest is best served when the law is followed.").

Finally, the balancing of hardships also favors an injunction. The economic costs to the Conservation Groups and the public from the mine's GHG emissions alone (approximately $5 billion (Doc. 51 at 11)) exceed the *total* economic benefits of the mine expansion by more than an order of magnitude. AR:2-664-10810 (total state ($236 million) and federal ($143.3 million) revenues of $379.3 million); *see also* AR:2-870-20270 (attempting to inflate economic benefits). This Court has previously recognized the social cost of carbon as a valid method for balancing equities. *MEIC II*, 2017 WL 5047901, at *5 ("In this vein, Plaintiff argues the harm to the public from mining coal 'will vastly exceed any benefits.' Plaintiff's argument has merit."). Further, the harm from strip-mining, shipping, and burning more coal will be permanent, whereas any delay in strip-mining pending remand will only be temporary. *League of Wilderness Defenders*, 752 F.3d at 765 (permanent environmental harm outweighed temporary delay in economic activity).

In opposing injunctive relief the coal company threatened to lay off employees, insisting that it would "ignore[] economic reality" for the company to retain employees pending remand. (Doc. 63 at 28; Doc. 69 at 14.) The coal company, however, should not be permitted in equity to use its employees as a stalking horse for the interests of executives and shareholders. The company's parent corporation, Cloud Peak Energy, recently announced bonuses for corporate

executives, while simultaneously ending medical benefits for retirees. Cooper McKim, *A Potential Company Sale, Exec Bonuses, Cut Benefits: What's Going on with Cloud Peak*, Wyoming Public Radio (Nov. 16, 2018).[4] One retiree who lost her medical benefits remarked:

> I did my part. I worked safely for twenty years. And, four months after I retire, this is what's done. It's maddening.
>
> . . . .
>
> [I]t seems so unjust. . . . The people that are in the trenches doing the work get the shaft and the people at the top of the food chain are making out like bandits.

Id. "[O]ne seeking equity must do equity . . . ." *In re Beaty*, 306 F.3d 914, 925 (9th Cir. 2002) (quoting *White v. Boston*, 104 B.R. 951, 957 (S.D. Ind. 1989)). The coal company's proffered hardships should not be considered. As explained below, under the groups' proposed partial injunction, employees would continue to work on much-needed reclamation.

In sum, consideration of the equities in this case supports an award of injunctive relief. While the Findings correctly recognize that there are considerations on the other side of the scale, they fail to acknowledge and weigh the significant considerations supporting equitable relief. Further, the Findings do

[4] *Available at* https://www.wyomingpublicmedia.org/post/potential-company-sale-exec-bonuses-cut-benefits-whats-going-cloud-peak#stream/0.

not attempt to use the Court's broad equitable authority to mold equitable relief to accommodate the "necessities of the particular case." *Hecht Co.*, 321 U.S. at 329. As elaborated below, the Court should exercise its discretion to shape relief to accommodate the countervailing considerations noted in the Findings.

C. This Court should partially enjoin mining operations and partially vacate the mining plan to protect plaintiffs, the public, and the environment, while allowing reclamation operations to continue.

To accommodate the competing interests in this case and to assure environmental protection and meaningful and lawful environmental review on remand, this Court should issue an order granting a partial injunction and partial vacatur to enjoin mining operations in the expansion area, but expressly permit reclamation activities to continue. The Court has broad discretion to issue such an order. *Hecht Co.*, 321 U.S. at 329; *League of Wilderness Defenders*, 2012 WL 13042847, at *2. This would address the Findings' valid concerns about not halting reclamation and remediation efforts. (Doc. 71 at 41.) It would also avoid impacts to employees (*id.* at 41), because the mine has decades worth of reclamation that it could complete during remand—in 40 years of operations, only one-fifth of the strip-mined land has even been backfilled, which is the first step (Phase I) of reclamation. AR:2-664-10739. Further, because reclamation operations are bonded, financing is available to support the operations. AR:2-664-10738 to -10739 (acknowledging operation's bonding). Ultimately, as the United States

transitions to clean energy, the greatest future employment at coal mines, like the Spring Creek Mine, will be in reclamation. And as the EA recognizes, there is much reclamation work to do.

Enjoining mining while allowing reclamation to continue would in no way duplicate any regulatory efforts of the State of Montana. (*Cf.* Doc. 71 at 41 (raising concerns about duplication).) During remand, Federal Defendants will address issues relating to regional and global impacts from climate change, air pollution, and coal-train traffic. By decision of the state legislature, Montana regulators are *prohibited* from addressing such concerns. Mont. Code Ann. § 75-1-201(2)(a) (Environmental review "may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in scope."). A partial injunction and partial vacatur would also address an important distinction between this case and this Court's prior ruling in *WildEarth I*: Federal Defendants have now twice violated the law in permitting the mine expansion. Absent such deterrent relief, Federal Defendants will have no incentive to change their ways and tell the public the full environmental truth about the mine expansion on remand. *Hecht Co.*, 321 U.S. at 329 (injunctions should deter); *Pub. Serv. Co. of Colo.*, 825 F. Supp. at 1509-10 (issuing injunction where agency repeatedly violated the law).

Alternatively, this Court could allow mining operations to continue, but enjoin any shipping or burning of federal coal, pending remand. This would prevent harm to the Conservation Groups and the public as a result of those activities—coal combustion and coal transportation—that were inadequately analyzed by Federal Defendants. (*See* Doc. 71 at 19, 24, 30.) This option would do less to address the backlog of reclamation because it would allow further disturbance from strip-mining. However, it may have the least near-term impact on employment at the mine.[5] Such a tailored injunction would be similar to the injunction this Court issued in *MEIC II*, which allowed mining of private coal and mining of some federal coal, but enjoined shipping or combustion of the federal coal. *See MEIC II*, 2017 WL 5047901, at *6; *MEIC v. OSM*, No. CV 15-106-M-DWM, slip op. at 2 (D. Mont. Oct. 31, 2017) (allowing coal to be mined, but requiring coal to "be stockpiled and stored at the Mine, and . . . neither sold nor shipped") (attached as Exhibit 2).

CONCLUSION

In sum, the Conservation Groups object to the otherwise well-reasoned Findings regarding segmentation and remedy. Because, as the coal company admits all activities at the mine are interdependent and connected, they had to be

[5] Ultimately, all employment at the mine will have to be in reclamation.

analyzed together, but were not. And "because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions," this Court should issue a tailored injunction to avoid "[t]hese dire consequences." *Gloucester Res. Ltd.*, [2019] NSWLEC 7, at ¶ 699.

Respectfully submitted this 21st day of March, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E) and Local Rule 72.3(b), I hereby certify that the foregoing objection, excluding caption, tables, signatures, and this certificate contains 4,741 words.

/s/ Shiloh Hernandez
Shiloh Hernandez