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

WILDEARTH GUARDIANS and MONTANA ENVIRONMENTAL INFORMATION CENTER, Plaintiffs, vs. DAVID BERNHARDT, in his official capacity of Secretary of the Interior, *et al.*, Federal Defendants. SPRING CREEK COAL, LLC, Intervenor Defendant.	Case No. CV-17-80-BLG-SPW-TJC **MEMORANDUM IN SUPPORT OF MOTION FOR STAY PENDING APPEAL**

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Defendant-Intervenor Navajo Transitional Energy Company ("NTEC") submits this memorandum in support of its motion pursuant to Rule 62(c) to stay the Court's February 3, 2021 Order adopting the Magistrate's Findings and Recommendations, granting Plaintiffs' motion for summary judgment in part, and ordering deferred vacatur of the Federal Defendants' approval of the 2016 mining plan modification ("2016 Mining Plan") for the Spring Creek Mine ("Spring Creek") in the form of a revised National Environmental Policy Act ("NEPA") analysis (ECF 102). NTEC requests a stay of this Court's order pending resolution of this matter on appeal to prevent irreparable harm to NTEC.

NTEC, its employees, their families, and the greater community of Montana will be irreparably harmed if Spring Creek's mining operations are curtailed. Delaying vacatur for 240 days—now 180 days—does not solve that problem. The threat of vacatur is nearly as destructive to NTEC and its dependents as vacatur itself, and it will cause avoidable harm in the form of unnecessary human and monetary costs. Those costs—including loss of NTEC's skilled workforce, irreparable harm to its customer relationships, and substantial economic loss—can be prevented if the threat of vacatur is taken off the table until the appeal runs its course.

Critically, NTEC has no control over the timing of OSMRE's preparation of a revised NEPA document. OSMRE is contending with a new administration

rolling out its environmental policies as well as conflicting precedent related to the issues at hand. If OSMRE fails to meet the 240 day deadline, it is NTEC and its dependents who will bear the financial and human cost, not OSMRE. Finally, delay of the vacatur will not harm plaintiffs. Plaintiffs have not alleged that NTEC or Spring Creek has violated any applicable environmental protection statutes, and the Federal Defendants' alleged NEPA shortcomings are purely procedural.

Spring Creek is not harming the public. To the contrary, the public interest—including the interests of the Montana community surrounding the mine and all of the individuals and businesses that rely on the mine for their livelihood—lies staunchly in favor of continued operations of the mine and a stay of the deferred vacatur order. NTEC requests that this Court stay the deferred vacatur of the mining plan approval pending NTEC's appeal.

PROCEDURAL BACKGROUND

Full procedural and factual backgrounds are set forth in the Findings and Recommendations issued by Magistrate Judge Cavan on February 11, 2019 (ECF 71) and the Court's Order Re Magistrate's Findings and Recommendations (the "Order") issued on February 3, 2021 (ECF 102). For the Court's convenience, NTEC submits this condensed synopsis of relevant factual and procedural information.

Spring Creek is a surface coal mine located in Big Horn County, Montana.

Coal has been mined on a commercial scale at Spring Creek since 1979. ECF 102 at 3. In 2008, the then-owner of the mine, Spring Creek Coal, LLC ("SCC") submitted a permit application to the state to extend coal mining onto Federal Coal Lease MM 94378 (the "Federal Lease"). In June 2011, the Montana Department of Environmental Quality ("MDEQ") approved the permit. In connection with that permit approval, Spring Creek proposed a mining plan modification to the Office of Surface Mining Reclamation and Enforcement ("OSMRE"). On June 5, 2012, OSMRE issued an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") pursuant to NEPA, and the mining plan modification was approved.

In 2013, WildEarth Guardians ("WildEarth") filed a lawsuit arguing that OSMRE violated the public participation and notice provisions of NEPA, as well as failed to take the requisite "hard look" at the consequences of approving the plan. *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't, et al.*, 15-CV-13-BLG-SPW-COS ("*WildEarth I*"). After granting summary judgment in WildEarth's favor on those issues, the Court remanded the matter to OSMRE for further proceedings, but allowed mining to continue pending remand. *Guardians v. U.S. Off. of Surface Mining, Reclamation & Enf't*, No. CV 14-103-BLG-SPW, 2016 WL 259285 (D. Mont. Jan. 21, 2016).

In response to the court's ruling, OSMRE prepared an updated EA in

September 2016, reissued the FONSI on October 3, 2016, and the mining plan modification was again approved. This lawsuit constitutes Plaintiffs' challenges to that approval.

On February 11, 2019, Magistrate Judge Cavan issued the Findings and Recommendations addressing cross-motions for summary judgment filed by Plaintiffs WildEarth and Montana Environmental Center ("MEIC") (ECF 37), Federal Defendants (ECF 59), and Spring Creek Coal as Intervenor-Defendant (ECF 62). Judge Cavan recommended that Plaintiffs' motion be granted in part, and that Federal Defendants' and Spring Creek Coal's cross motions be denied. All parties filed objections to Judge Cavan's recommendations. (ECF 76, 77, 78).

Before the Court addressed the merits of the parties' objections, SCC, along with its parents and affiliates, filed voluntary petitions in the United States Bankruptcy Court for the District of Delaware, seeking relief under Chapter 11. On October 24, 2019, NTEC acquired ownership of the Spring Creek Mine and all of SCC's rights in the Federal Lease. ECF 90. The Court subsequently granted NTEC permission to intervene as defendant in place of SCC. ECF 99.

On February 2, 2021, the Court entered the Order adopting Judge Cavan's Findings and Recommendations in full. The Court also adopted Judge Cavan's recommendation that the mining plan be vacated, following a 240-day deferral period, during which time the court directed the Federal Defendants "to complete a

corrective NEPA analysis and prepare an updated EA." Judge Cavan, in turn, relied on the Court's analysis in *WildEarth I*, in recommending that vacatur be deferred. ECF 71 at 41. In *WildEarth I*, the Court explained:

> The Secretary's decision to approve the mining plan amendment at issue here was the result of a long application process involving multiple state and federal agencies. A vacatur at this point, seven years after the initial application for the mining plan amendment was filed and three years after its approval, would have detrimental consequences for SCC and its employees, for the State of Montana, and for other agencies involved in this process. Not only production at the mine, but also reclamation and remediation efforts, would come to a halt. Additionally, a vacatur may result in duplication of efforts regarding the State permitting process, which was accomplished in what appears to be a correct and thorough manner, with proper notice. Equity warrants a decision to allow the mining plan amendment approval to remain in force, provided that Federal Defendants must correct the errors in its NEPA process.

WildEarth Guardians v. U.S. Off. of Surface Mining, Reclamation & Enf't, No. CV 14-103-BLG-SPW, 2015 WL 6442724, at *9 (D. Mont. Oct. 23, 2015), *report and recommendation adopted in part, rejected in part sub nom. WildEarth Guardians v. U.S. Off. of Surface Mining, Reclamation & Enf't*, No. CV 14-103-BLG-SPW, 2016 WL 259285 (D. Mont. Jan. 21, 2016).[1]

[1] *See also, e.g., Wildearth Guardians v. United States Off. of Surface Mining, Reclamation & Enf't*, 104 F. Supp. 3d 1208, 1232 (D. Colo. 2015), *order vacated, appeal dismissed as moot*, 652 F. App'x 717 (10th Cir. 2016) ("However, given the fact that mining in this area has occurred since the mid–1970's; that the environmental impacts have been studied over the years; that the state agency considered the environmental impacts from these mining

In deferring vacatur in the instant case, the Court rejected Plaintiffs' request for an immediate injunction of mining operations, finding that the same equitable factors at play in *WildEarth I* warranted deferring vacatur pending the Federal Defendants' corrective NEPA analysis. As discussed in detail below, those same equitable factors warrant a full stay of the vacatur order, pending appeal on the merits. And for all the reasons described below, the Court should also stay its order requiring Federal Defendants to engage in a revised NEPA analysis until a reviewing court has had the opportunity to weigh in on the appropriate scope and extent of NEPA review in this context.

LEGAL STANDARD

A stay pending appeal is an exercise of judicial discretion, and "the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009). The following factors are relevant to the exercise of that discretion: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public

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plan revisions; and that government counsel noted during the hearing that OSMRE has changed its notice practices and procedures, I find that the benefits of immediate vacatur do not outweigh the potential harms.").

interest lies." *Id.* at 434 (internal quotation marks omitted). The party requesting a stay pending appeal bears the burden of showing that the circumstances justify an exercise of the court's discretion. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). Although the standard for granting a stay pending appeal is similar to that for obtaining a preliminary injunction, the Ninth Circuit has emphasized that "stays are typically less coercive and less disruptive than are injunctions," so a flexible balancing approach that considers all of the parties' respective harms is appropriate. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).

ARGUMENT

A stay in this case is warranted, and all the *Nken* factors have been satisfied. As the Court has already effectively recognized, vacatur of the 2016 Mining Plan will cause immediate and irreparable harm to NTEC and the Navajo Nation. And that harm will not be limited to Spring Creek and its owners. Hundreds of mine workers and their families, as well as local communities and the State of Montana, all depend upon continued operations at Spring Creek for their livelihoods and financial well-being. On the other hand, allowing the status quo of uninterrupted mining operations—which have been ongoing for more than four decades—to continue during the pendency of the appeal will not irreparably harm Plaintiffs or their members. These factors led the Court to defer vacatur for 240 days. But deferral of vacatur for 240 days—now less than 180 days—is not adequate to avoid

the risk of serious harm and disruption to NTEC.

To start, NTEC cannot control whether OSMRE meets the 240-day deadline. That time period coincides with a new federal administration implementing processes and procedures which may affect OSMRE's overall policies and regulation strategy. The risk and consequences of not meeting that deadline, however, fall squarely upon NTEC's employees, and the families and communities that rely on the mine. The 240-day deferral period likely is insufficient for resolution of the appeal, leaving OSMRE and the parties to potentially engage in unnecessary tasks. The substantial harms to the Montana community associated with an imminent risk of shutdown of a significant portion of the mine can be substantially mitigated by a stay of the Order pending appeal, at little cost. That result is appropriate here.

I. NTEC will be irreparably harmed absent a stay.

Vacatur of the 2016 Mining Plan will cause irreparable personnel, operational, and economic harm to NTEC and its owner, the Navajo Nation, and the surrounding communities, even if deferred for 240 days.

A. Harm to NTEC is harm to the Navajo Nation.

NTEC is a relative newcomer to this case, having taken over ownership of Spring Creek after the issuance of the Findings and Recommendations. NTEC is an autonomous Navajo corporation, and its sole shareholder is the Navajo Nation.

(Mosely Decl. ¶ 3). The Navajo Nation formed NTEC in 2013 as part of a pioneering effort to achieve sovereign immunity and autonomy over the Navajo Nation's natural resources and to protect and promote the interests of the Navajo people. (*Id.* at ¶ 4). As such, NTEC is permitted to make dividend payments to the Navajo Nation from its net income. (*Id.* at ¶ 5). Funds attributable to NTEC and its operations currently account for approximately a third of the Navajo Nation's annual revenue. (*Id.* at ¶ 5). As such, a curtailment or shut down of operations at the Spring Creek mine will harm the Navajo Nation and its people.

B. Vacatur the 2016 Mining Plan would cause a cascade of complications at Spring Creek.

Spring Creek is required to have a federal mining plan in place in order to carry out a number of interrelated mining and reclamation operations on the Federal Lease. (Schwend Decl. ¶ 18). Because all five active mining areas at Spring Creek draw from at least a portion of the Federal Lease, vacatur of the 2016 Mining Plan could require Spring Creek to cease all mining operations—including reclamation and remediation efforts—and could result in a temporary shutdown of the mine, which would have a crippling effect on Spring Creek's operations, personnel, and finances. (*Id.*). Whether, when, and how mining activities could resume after an initial shutdown is unclear and highly dependent on how state agencies direct Spring Creek to proceed with respect to the other lease areas. (*Id.* at ¶ 19–20).

Even if NTEC could reconfigure its operations to mine coal from leases outside of the Federal Lease at some point, the curtailment would likely continue for one or two years, while NTEC seeks the necessary regulatory approvals to begin mining on alternative state and private coal leases. (Schwend Decl. ¶ 20). Performing the necessary development work to mine the unrecovered coal inventory outside of the Federal Lease would be an expensive and inefficient venture, and NTEC would not be able to replace the coal subject to the 2016 Mining Plan with coal from other parts of the mine. (*Id.* at ¶ 21).

Deferring vacatur for 240 days—now 180 days—does not adequately protect against these operational harms. (Schwend Decl. ¶ 40–41). Closure of a large mining operation (or a sizeable portion of the mining operation) like Spring Creek is a substantial undertaking and will require Spring Creek to revamp its current operations to ensure that no coal is left uncovered in the event that the mine plan is vacated on October 1. (*Id.* at ¶ 40). Spring Creek will need to stop mining of new coal, and to begin backfilling over currently-exposed coal, immediately, to ensure that the mine is in compliance with OSMRE regulations if the mine plan is vacated. (*Id.* at ¶ 40).[2] Shifting resources to make these planning changes will

[2] In addition to planning for safety and environmental impacts from a shutdown, a large-scale shutdown will trigger NTEC's obligation to provide notice to its employees under the Worker Adjustment and Retraining Notification ("WARN") Act, which requires employers to give employees 60-day notice when closure of a facility will lead to the loss of employment for at least 50 employees. (Schwend Decl. ¶ 42). With that notice requirement looming, NTEC will

reduce the entire mine's efficiency—and could even hamper Spring Creek's ability to satisfy existing customer contracts—during the deferral period. (*Id.* at ¶¶ 38, 41). All in all, NTEC could be exposed to tremendous costs and potential liability—to the tune of millions of dollars—not only due to the expense of shifting operations and loss of coal production, but also because of the potential loss of critical customer relationships in the future.

C. The threat of vacatur will cause upheaval to Spring Creek's personnel.

Most importantly, vacatur would cause substantial irreparable harm to NTEC's personnel. A shutdown of the mine would result in layoffs of up to 95% of Spring Creek's workforce. (*Id.* at ¶¶ 29, 32). Since Spring Creek provides many of the region's most attractive employment opportunities—with living wages and strong benefits for its 245 full time employees—this will have an immediate harmful effect on the public and surrounding communities, as discussed in more detail below. (*Id.* at ¶ 32). It will also cause irreparable harm to NTEC and the Navajo Nation because many of these skilled employees are likely to seek employment elsewhere or leave the area altogether. (*Id.* at ¶¶ 42–45). This loss of skilled and experienced workers will be detrimental to any future operation of

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have two choices: (1) either it will need to provide WARN Act notices to its employees 60 days before the anticipated closure date; or (2) it will have to pay employees whose jobs have been eliminated as a result of vacatur for 60 after Spring Creek has already closed. (*Id.*).

Spring Creek because it will be difficult or impossible to replace these valued employees in the event operations are permitted to resume. (*Id.* at ¶ 44). Deferring vacatur for 240 days is insufficient to protect against these personnel harms because even the threat of vacatur will have a real and immediate impact on the lives, family budgets, and other decisions of Spring Creek employees, even if deferred. (*Id.* at ¶¶ 43–46).

D. The threat of vacatur will irreparably harm Spring Creek's good will and customer relationships.

Vacatur will also cause substantial irreparable economic harm to Spring Creek's customer relationships. If the mine closes, NTEC and the Navajo Nation will be deprived of the mine's income-producing potential. (Schwend Decl. ¶ 37). At the same time, NTEC will continue to incur the expense of maintaining the mine, including for safety hazards, during any period of shut down. (*Id.* at ¶ 37). Spring Creek will also be unable to meet its commitments to customers under existing commercial agreements and would likely face legal challenges from its customers due to its inability to perform. (*Id.* at ¶ 38). Thus, NTEC will be left in a scenario where it is paying to maintain a mine that is not generating any revenue while being exposed to huge potential contract liability to its customers. (*Id.* at ¶¶ 37–39). This equation is not sustainable in the long term and is likely to result in severe adverse economic consequences to the Nation as well.

For many of the same reasons, the mere threat of vacatur will cause

substantial irreparable harm to Spring Creek's customer relationships and its longstanding reputation for reliability, timeliness, and quality. (Schwend Decl. ¶¶ 38, 41). Spring Creek's customers include utilities in the United States and Asia providing electricity to business and individuals. (*Id.* at ¶ 38). For many of these customers, coal is the only viable source of energy. (*Id.*; Moseley Decl. ¶¶ 9–12). These customers currently contract with Spring Creek because it is known for being consistent and timely, but if they believe that the mine will be forced to shut down as of October 1, 2021, or even that a temporary interruption of mining activities is looming, they are likely to seek alternative sources of coal immediately and into the future. (Schwend Decl. ¶ 41).

E. Forcing the Federal Defendants to prepare a revised NEPA analysis before the Ninth Circuit has addressed the scope and extent of their NEPA obligations will be prejudicial to NTEC.

In addition to the adverse consequences of closure itself, NTEC will suffer direct harm if the Federal Defendants are ordered to perform the corrective NEPA analysis before a reviewing court has had a chance to weigh in the requisite scope of that review. (Schwend Decl. ¶ 27). Given the short-turnaround required under the Order, NTEC has already devoted significant staff and financial resources to providing factual and technical support to the Federal Defendants with respect to the revised NEPA analysis. (*Id.*). As part of that effort, NTEC has hired a third-party consultant to assist the Federal Defendants in performing the corrective

NEPA analysis, and has agreed to pay the consultant up to $150,000 for those efforts. (*Id.*). In the event that the Ninth Circuit rejects or narrows the scope of the Order as to what additional analyses will be required, those will have been sunk costs, and an overly expansive NEPA analysis by the Federal Defendants could prejudice NTEC's rights in the Federal Lease.

II. A stay will not injure Plaintiffs or any other interested party.

In contrast to the significant threats to NTEC and the Navajo Nation, the continued viability of the mine, the surrounding community, and the State of Montana, harm to Plaintiffs from a stay—if any harm exists at all—is minimal.

Mining at Spring Creek is rigorously planned and regulated, and it has been ongoing since the 1970s, with a strong safety and environmental record. (Schwend Decl. ¶¶ 9–12; Moseley Decl. ¶¶ 6–7). The 2016 Mining Plan pertains to only a portion of the mine, and Spring Creek is not the only mine in the area, the surrounding communities, or the country at large. Plaintiffs' challenges to the 2016 Mining Plan are limited to their generalized objections to the NEPA analysis prepared by the Federal Defendants and their contention that the Federal Defendants failed to adequately discuss discrete categories of information at the level of detail Plaintiffs would prefer before approving the 2016 Mining Plan. This is in stark contrast to the very real effects vacatur will have on the citizens of Montana. As described in detail below and throughout the parties' merits briefing,

Plaintiffs' arguments that the Federal Defendants failed to take the requisite "hard look" at the indirect effects of the 2016 Mining Plan are disputed.

Even so, Plaintiffs' interest in this litigation is limited to the *NEPA process*, not the actual operation of the mine. Plaintiffs have not asserted claims against NTEC or Spring Creek or alleged that continued operation of the mine is harming endangered species or violating applicable water or air quality standards. It is not. To the contrary, the mine has a stellar safety record and has won multiple awards for its innovative and effective reclamation work, which demonstrates Spring Creek's commitment to environmental stewardship. (Schwend Decl. ¶¶ 10–11). As such, any alleged harm related to ongoing operations is too generalized and speculative to warrant denial of a stay in this case.

Accordingly, neither Plaintiffs nor any other party would be injured by a stay of the vacatur order.

III. The public interest heavily supports a stay.

The public interest lies staunchly in favor of a stay. Vacatur would harm the local community in numerous predictable ways, including through the loss of jobs, revenue, and Spring Creek's direct and indirect contributions to the local economy. It would also have unexpected impacts, including harm to the family farming industry, the environment, and even national and international energy security. Given the substantial public harm that would be caused by vacatur, and the fact

that mining in the region is the long-term status quo, the public interest lies in favor of stay.

A. The threat of vacatur will cause real harm to real Montanans.

To begin, even the threat of vacatur will cause real harm to real people throughout the local community. As noted, the mine currently employs approximately 245 full-time employees and offers salaries and benefits far greater than what is typical for the region. (Schwend Decl. ¶ 29; O'Hair Decl. ¶ 5; Cross Decl. ¶ 3; Leider Decl. ¶¶ 7–8; Murdock Decl. ¶ 4; Whiteman Decl. ¶ 5). The average full-time salary for hourly employees at Spring Creek is $115,900, including benefits, which is more than five times the average income for Big Horn County residents. (Schwend Decl. ¶ 29; O'Hair Decl. ¶ 5). Because the mine is situated in a remote location, many workers commute long distances to work at the mine due to the lack of other similar paying jobs. (O'Hair Decl. ¶ 5). If Spring Creek is required to halt mining operations as a result of vacatur, it will have no choice but to lay-off up to 95% of the mine's workforce, which would be devastating to the employees and their families. (Schwend Decl. ¶ 32).

Eli Whiteman is one of the employees who would be affected. He is a member of the Crow Nation and long-time employee of the mine. (Whiteman Decl. ¶ 2). Mr. Whiteman's job at Spring Creek, and the living wage it pays, would be difficult to replace. (*Id.* at ¶ 5). Mr. Whiteman supports his wife and daughter

with his salary from the mine, as well as members of his extended family. (*Id.* at ¶ 6). His job at the mine has allowed him to support his daughter in college, where she's currently studying social work with the goal of supporting disadvantaged youth on the Crow Nation. (*Id.* at ¶ 6). If the mine is forced to close, Mr. Whiteman would have to travel hundreds of miles to find an equivalent job and potentially move away from his home and his family. (*Id.* at ¶ 5).

Vanessa Leider would also be harmed. She is a 27-year old member of the Crow Nation and has lived her whole life in Montana. (*Id.* at ¶ 1). Ms. Leider is a single mother and has worked as a welder at Spring Creek for more than a year. (*Id.* at ¶¶ 3–4). She values her job because it allows her to be close to her son and mother, whom she supports with the wages and benefits she earns at the mine. (*Id.* at ¶¶ 5–7). If Ms. Leider lost her job at Spring Creek, she would be forced to travel to North Dakota to find comparable employment, which would require her to move away from her native Crow culture and either raise her son without the support of her family in the area or leave him behind. (*Id.* at ¶ 8).

Augustus Murdock provides yet another example of a mine employee who would be devastated by vacatur. He is a 27-year-old father of three daughters and the primary breadwinner in his family. (Murdock Decl. ¶ 2). Mr. Murdock has worked as a diesel mechanic at the mine for seven years. (*Id.* at ¶ 3). Mr. Murdock notes that the mine pays the best wages in the region and characterizes his job as

"irreplaceable." (*Id.* at ¶ 4). To obtain comparable employment, Mr. Murdock would have to either move his family hundreds of miles away to North Dakota or incur substantial expense for travel and temporary lodging, which would require him to be away from his young family for weeks at a time. (*Id.* at ¶ 5). In either event, Mr. Murdock would no longer be able to contribute to his family's farm in the region, which would suffer from his absence. (*Id.* at ¶ 6).

Vacatur of the 2016 Mining Plan would directly affect these and other Spring Creek employees in a real and negative way. In addition to the direct harm to Spring Creek employees, vacatur would decimate the regional economy.

NTEC employs local contractors for various services at the Spring Creek Mine, such as housekeeping, security, blasting, maintenance, and labor services. (Schwend Decl. ¶ 30). These roles account for approximately 20 additional full time jobs for local residents. (*Id.*). Many local businesses, including grocery stores, gas stations, and others, rely on serving the mine, which has made a conscious effort to support Montana businesses. (O'Hair Decl. ¶¶ 9–10; Murdock Decl. ¶ 8; Schwend Decl. ¶ 31; Cross Decl. ¶ 6). The mine purchases everything from janitorial supplies to tires and vehicles from businesses in the area, and allows local ranchers to graze cattle on its lands. (O'Hair Decl. ¶ 9).

Since 2010, Spring Creek has contributed more than $163 million to the regional economy in expenditures for goods, services, and donations. (Schwend

Decl. ¶ 34). In 2020 alone, Spring Creek expended $11,250,768 on goods, services, and donations. (*Id.*). If the mine is required to cease operations, all of these contributions to the local economy will be eliminated, and the local and regional businesses that rely on the mine will be negatively impacted.

B. Vacatur would cause environmental harm because Spring Creek's reclamation efforts would be forced to stop.

Vacatur of the mining plan would also cause Spring Creek's reclamation efforts to come to a halt, which, unlike plaintiffs' alleged NEPA violations, indisputably *will* be harmful to the environment. As noted above, vacatur of the mining plan would require all active mining operations to cease immediately. (Schwend Decl. ¶ 18). That includes NTEC's reclamation, maintenance, and safety operations on the Federal Lease, all of which would be required to halt if the mining plan is vacated. (*Id.* at ¶¶ 24–26). Reclamation on lands not subject to the mining plan would also be severely limited because the process of reclamation is dependent upon the continued advancement of mining operations, which provides the earthen material used for back-fill. (*Id.* at ¶ 25). Put simply, successful reclamation depends upon, and is contemporaneous with, the continued development and mining operations at the Spring Creek Mine. If mining operations stop as a result of vacatur, so will reclamation activities.

The inability to perform reclamation activities would cause serious environmental and safety harms in the area surrounding the mine, including soil

erosion, runoff, reduced water quality, the potential for fires, unmitigated dust generation, and weed propagation. (Schwend Decl. ¶¶ 24–26). It would also be harmful to the animals that use the mine property as a refuge. (*Id.* at ¶ 4).

C. Vacatur will cause Montana and Big Horn County to lose substantial tax and royalty revenue.

The mine contributes directly to the public by providing tax and royalty revenue to the state and federal governments. Since 2005, Spring Creek has paid approximately $708,396,753 to the federal government and the State of Montana in production taxes and royalties, including federal royalties, black lung taxes, abandoned mine reclamation taxes, Montana severance taxes, and county gross proceeds taxes. (Schwend Decl. ¶ 35). In 2020 alone, Spring Creek paid more than $32 million in taxes and royalties. (*Id.*). In 2019, Spring Creek's tax and royalty payments neared $38 million, and in 2018 those payments exceeded $48 million. (*Id.*). If operations cease at Spring Creek due to vacatur of the 2016 Mining Plan, these payments to the federal and state governments will also cease. In addition, other derivative revenue to the federal government and the State of Montana from Spring Creek and its contractors, such as sales, income, payroll, and property taxes, would also be significantly diminished. (*Id.*).

The impact of this lost revenue will almost certainly be felt by local residents and governmental officials. Historically, 70% of Big Horn County's revenue comes from coal. (O'Hair Decl. ¶ 8). The county is already struggling to

make-up for reductions in that revenue source caused by the closure of other mines in the area due to the large-scale attacks on the industry. (*Id.*).

If Spring Creek is forced to shut down as a result of vacatur, Big Horn County will lose between $400,000 and $500,000 in revenue *per month*. (Schwend Decl. ¶ 36). This would be devastating to the county, which relies on coal revenue to provide essential services such as schools, elections, road crews, fire service, public safety, and other general services. (Real Bird Decl. ¶¶ 4–7, 9). Much of the county is situated on tribal lands, and the county serves many members of the Crow Nation and Northern Cheyenne Nation, who already face significant obstacles to obtaining basic services. (*Id.* at ¶ 5). Any loss of revenue from Spring Creek would only exacerbate these disparities. (*Id.*). The county's budget for next year is based on the assumption that the county will continue to receive revenue from the mine. (*Id.* at ¶ 10). If that were to change, replacing the lost funds will be difficult or impossible. (*Id.* at ¶¶ 11–12).

The county has already begun planning for a future with substantially less revenue from coal. (Real Bird Decl. ¶ 13). For example, the county has sought funding for an economic development advisor to help the county visualize its changing economy, and the county hopes to make large infrastructure investments while coal revenue is still available. (*Id.* at ¶ 13). But shortening the timeline for phasing out coal revenue would be extremely harmful to the community. (*Id.* at

¶ 14). The county has not planned—and is not prepared—for a situation where coal revenue comes to an end in the next five years, much less 180 days from now. (*Id.*). Forcing the mine to close without warning would cause substantial hardship to Big Horn County and the people it serves.

D. Spring Creek's support for community programs and family farms would come to an end if the 2016 Mining Plan is vacated.

The mine has also provided substantial support for the community, which would come to an end if the mine is forced to close. For example, the mine supports youth sports, job fairs, and rodeos for community members, and during the COVID-19 pandemic, it distributed essential supplies to its employees and the community. (Whiteman Decl. ¶ 7; Murdock Decl. ¶ 7; Cross Decl. ¶ 4). NTEC would have no choice but to stop making these and other charitable contributions if Spring Creek is forced to cease operations.

One unexpected rippling effect of mine closure will be the decimation of family farms in the region. Agriculture is one of Big Horn County's most important industries. (Real Bird Decl. ¶¶ 7–8). Many local farmers and ranchers do not earn a sustainable income based solely on their agricultural operations and thus rely on other forms of income. (*Id.* at ¶ 8; O'Hair Decl. 6; Murdock Decl. ¶ 6; Schwend Decl. ¶ 33). Many of Spring Creek's employees and contractors are members of families who operate these small farms, and they use their income from Spring Creek to keep their farms afloat. (Real Bird Decl. ¶ 8; O'Hair Decl. 6;

Murdock Decl. ¶ 6; Schwend Decl. ¶ 33). If Spring Creek closes, these families may be unable to support their farms. In addition, Spring Creek is essential to funding grasslands firefighters in Big Horn County, who are necessary to protect vital grazing lands throughout the community. (Real Bird Decl. ¶ 7). Thus, closure of the mine would have a substantial detrimental effect on the family farming industry—including the loss of farms that have been in a single family for generations.

E. Vacatur would harm the public's interest in energy security.

On a national and international scale, vacatur would harm the public interest in energy security. Coal remains a crucial energy source across the globe. (Moseley Decl. ¶ 9). Many of Spring Creek's customers do not have sufficient or economic access to natural gas, wind, solar, or other alternative sources of energy sources for various reasons, including due to the unavailability of the necessary physical infrastructure, landmass, or natural resources. (*Id.* at ¶¶ 9–12; Schwend Decl. ¶ 38). In the United States, Spring Creek provides coal to utilities that serve a diverse array of end users, as well as to multiple industrial and agricultural clients, for whom coal is the only viable energy source. (Schwend Decl. ¶ 38; Moseley Decl. ¶ 11). Spring Creek also provides coal to multiple Asian countries, many of whom lack the infrastructure, land, or natural resources to provide a domestic source of energy. (Schwend Decl. ¶ 38; Moseley Decl. ¶¶ 9–10). For them, having

a consistent and reliable source of coal is a matter of national security. (Moseley Decl. ¶ 10). Vacatur of the 2016 Mining Plan would threaten all of these end users, and the cost of losing this critical energy source could be catastrophic.

F. Requiring the Federal Defendants to prepare a revised NEPA analysis before the Ninth Circuit has decided the merits will result in an unnecessary drain on public resources and could result in delays to unrelated projects.

Finally, the Order requires the Federal Defendants to conduct substantially more analysis of the indirect effects of the 2016 Mining Plan than has ever been required under NEPA. As explained in more detail below, the Court's holding in that regard is based largely on district court cases and is not insulated from being modified or overturned on appeal. Nevertheless, federal agencies are likely to take note of the decision during the interim as they perform NEPA analyses for other projects. This new mandate would not be limited to surface mine operations such as Spring Creek but would invariably apply to a broad swath of federal projects, potentially throughout the country. In attempting to do so, federal agencies will be forced to devote more tax dollars and government time to NEPA reviews than is contemplated by the statute or required under its implementing regulations, which could unnecessarily impede or delay projects all across the country. In this way, allowing the ordered corrective NEPA analysis to remain in place during the pendency of the appeal would harm the public interest as well.

IV. The appealing parties have made a strong showing that they are likely to succeed on the merits.

The Ninth Circuit has explained that a petitioner seeking stay pending appeal must show only a "substantial case for relief on the merits." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir 2012). "The standard does not require the petitioners to show that 'it is more likely than not that they will win on the merits.'" *Id.* (quoting *Leiva–Perez v. Holder*, 640 F.3d 962, 966 (9th Cir.2011) (per curiam)). That's because "[a] more stringent requirement would either, in essence, put every case in which a stay is requested on an expedited schedule, with the parties required to brief the merits of the case in depth for stay purposes, or would have the court attempting to predict with accuracy the resolution of often-thorny legal issues without adequate briefing and argument." *Leiva-Perez v. Holder*, 640 F.3d at 967. Imposing a more demanding threshold for relief "would defeat the purpose of a stay, which is to give the reviewing court time to 'act responsibly,' rather than doling out 'justice on the fly." *Id.* (quoting *Nken*, 556 U.S. at 429).

Here, the appealing parties have demonstrated a substantial case for relief on the merits regarding their appeal of the Court's Order. Although the Court thoroughly analyzed the parties' respective arguments, that analysis does not insulate the Order from being overturned on appeal.[3] To the contrary, the

[3] *See, e.g., W. Watersheds Project v. Zinke*, No. 1:18-CV-00187-REB, 2020 WL 2462817, at *4 (D. Idaho May 12, 2020) ("But, as with any trial court decision, [the fact that the

appealing parties' likelihood of success on appeal is at least "better than negligible" with respect to the following dispositive issues: (1) whether MEIC has standing; (2) whether WildEarth's claims are barred by principles of res judicata; (3) whether the expansive corrective analysis mandated under the Order for indirect impacts of coal transportation, non-greenhouse gas emissions, and the social cost of greenhouse gas emissions is actually required under NEPA; and (4) and the validity of the Federal Defendants' decision not to prepare an EIS for the 2016 Mining Plan. Accordingly, a stay of the vacatur order is warranted.

G. Standing and Res Judicata

The Federal and Intervenor Defendants have argued that MEIC lacks standing, and that WildEarth is barred by principles of res judicata and collateral estoppel from re-litigating claims that were raised or could have been raised in the first mine plan challenge. Although the Court sided with Plaintiffs' on both issues, those issues will be substantial questions on appeal.

1. MEIC lacks standing.

MEIC's alleged harm is too vague and attenuated to support standing in this case. The Court disagreed, finding that MEIC had demonstrated standing through its sole organizational declarant, Steve Gilbert. The Court concluded that the

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trial court was persuaded by the plaintiffs' arguments on the merits] does not mean that an appeal is doomed from the start or even has only a slight chance of success.").

allegations in Mr. Gilbert's declaration were sufficient to support MEIC's organizational standing because they demonstrate that Mr. Gilbert's aesthetic and recreational interests in the area surrounding the mine would be harmed by the 2016 Mining Plan. But as described in detail in the parties' merits briefing and below, the harms alleged in Mr. Gilbert's declaration are far too abstract and generalized to confer organizational standing to MEIC, and the appealing parties have thus presented a substantial case for relief on the merits on this issue.

Mr. Gilbert provided testimony related to his use of Rosebud Battlefield area and the Tongue River Reservoir, which are seven and four miles away from Spring Creek, respectively. With regard to the Rosebud Battlefield, Mr. Gilbert attested that "the joy [he] experience[s] while hunting in this area is diminished by [his] knowledge of the nearby Spring Creek Mine and its negative impacts on wildlife and their habitat, including the upland game birds that I enjoy hunting and observing in the area." ECF 102 at 11 (quoting ECF 38-2 at 4). With respect to Tongue River, Mr. Gilbert alleges that Spring Creek is in the same drainage basin as the Tongue River, but he does not allege that Spring Creek negatively impacts the river itself, or the wildlife and fish nearby. Instead, he claims only that his enjoyment of the area "will be compromised by knowing that coal shovels are grinding away in the earth just over the hill." ECF 38-2 at 5. Mr. Gilbert also contends that he experiences "disgust" when he drives by the railroad and observes

trains that he knows are carrying coal, but he admits that neither the trains nor the mine itself are visible from the areas where he recreates or otherwise within his sensory perception while using the Rosebud Battlefield and Tongue River areas. ECF 38-2 at 5–6. Crucially, Mr. Gilbert gives no time frame for his assertions.

Thus, Mr. Gilbert's allegedly injury is limited to the malcontent he feels knowing that mining, and the transportation of coal, are happening elsewhere, outside of his sensory perception, while he is engaging in recreational pursuits. Importantly, Mr. Gilbert does not allege that his enjoyment of his recreational activities is lessened because of air or water pollution or visual impacts or noise—but rather merely that he is troubled by environmental impacts occurring somewhere else, at a mining property he has never visited.

Moreover, he has alleged no facts that would attribute his frustration and anger to Spring Creek specifically, as opposed to the other mining operations in the area. In addition, although he refers to his anger at observing "coal trains" he does not contend that the trains he has observed are carrying Spring Creek coal or why he believes the trains are carrying coal at all.

Mr. Gilbert does not allege that he—or the animals he hunts and fishes—have been exposed to offensive pollutants or claim that pollutants are flowing or otherwise migrating to his place of recreation. Instead, he's troubled by circumstances outside of his immediate observation. Even if one could connect Mr.

Gilbert's vague assertions to Spring Creek, that kind of harm does not support standing because it does not differentiate Mr. Gilbert from the generalized grievances of any other citizen who might object in the abstract to mining of federal coal. To put a different way, Mr. Gilbert's allegations do not set him apart from any other member of the public, including, for example, a person sitting in a New York City apartment looking at pictures of Montana on the internet who might also disagree with the concept of coal mining.

In this way, Mr. Gilbert's alleged harm is not "concrete and particularized," "actual or imminent," nor "fairly traceable" to the Federal Defendants' approval of the 2016 Mining Plan. Accordingly, Mr. Gilbert's declaration does not satisfy the standing requirements set forth in *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992), and *Friends of the Earth v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167 (2000). Indeed, Plaintiffs have cited no case in which this kind of mere discontent about remote environmental impacts was deemed sufficient to constitute a harm to a recreational or aesthetic interest, and the Court's conclusion in this regard is contrary to the standards set forth in *Lujan*, *Laidlaw*, and the other standing cases cited in the Federal and Intervenor Defendants' merits briefing. As such, the appealing parties have a substantial case for relief on the merits as to MEIC's standing.

2. Plaintiffs' claims are barred by the doctrine of res judicata.

Because the Court found that MEIC had demonstrated standing, it did not reach the Federal and Intervenor Defendants' arguments concerning res judicata and collateral estoppel, since MEIC was not a party to WildEarth's first challenge to the mining plan. But if the Ninth Circuit accepts the appealing parties' standing arguments, the res judicata/collateral estoppel arguments must be addressed. And on that issue, the appealing parties have already demonstrated a substantial case for relief on the merits.

H. NEPA Hard Look

Even if the Ninth Circuit were to accept the Court's determinations that MEIC has standing—or that WildEarth's claims are not precluded by res judicata—the appealing parties have a substantial case for the relief on the merits with respect to the Court's determination that the Federal Defendants' NEPA analysis erred by not taking a "hard look" at the indirect effects of coal transportation, non-greenhouse gas emissions, and greenhouse gas emissions resulting from the mining modification plan.

Those very specific effects from operations of third-parties, however, are not proximately caused by the federal action, and the Federal Defendants appropriately considered and disclosed impacts that could reasonably be ascertained. Whether the Federal Defendants' were also obligated to engage in the speculation necessary

to examine those impacts that are farther afield from the federal action under *Department of Transportation v. Public Citizen*, 541 U.S. 752, 757 (2004) and its progeny will be a significant issue on appeal. Likewise, the Court's determination regarding the quantification of the social impacts of greenhouse gas emissions is unsupported by the applicable statutory and regulatory provisions and intrudes on the agency's discretion to select the appropriate methodology for analyzing the impacts of greenhouse gas emissions. For all the reasons described in the Federal and Intervenor Defendants' merits briefing and below, the appealing parties have presented a sufficient showing of likely success on the merits to warrant a stay of the Court's deferred vacatur order.

1. Coal Transportation and Non-Green House Gas Emissions

The Court concluded that OSMRE's failed to take a hard look at the indirect impacts of coal transportation and non-greenhouse gas emissions. In so holding, the Court acknowledged that federal agencies are only required to consider indirect effects that are reasonably foreseeable, and that highly speculative or indefinite potential impacts need not be considered. ECF 102 (quoting *Presidio Golf Club v. Nat'l Park Serv.*, 115 F.3d 1153, 1163 (9th Cir. 1998). However, relying heavily on a single district court case—*Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F.Supp.3d 1074 (D. Mont. 2017) ("*MEIC*")—the Court determined that, because the Federal Defendants had access to historical

information about where Spring Creek coal is shipped and combusted, the indirect effects of transportation and non-greenhouse gas emissions from Spring Creek were reasonably ascertainable and that the Federal Defendants was required to consider those impacts.

That finding is subject to challenge, for all the reasons stated in the appealing parties' prior briefing and summarized below. In short, the Federal Defendants reasonably considered and disclosed impacts that could be reasonably ascertained and declined to examine those that would require substantial speculation or are otherwise too remote to have been proximately caused by the federal action here. The EA and other record evidence reflect a reasonably detailed examination of the impacts of transportation of coal and non-greenhouse gas emissions from coal combustion.

The additional analysis required under the Order would require substantial guesswork because once the coal leaves Spring Creek, it enters the national market for coal, and the quantities, destinations, and routes used to ship Spring Creek coal are inconsistent and unpredictable, given that each of those variables fluctuates year over year. As a result, those impacts are not reasonably foreseeable and need not be considered under NEPA. In addition, the Federal Defendants were not required to consider the transportation and non-greenhouse gas emission effects under *Public Citizen* and its progeny because the federal action is not the

proximate cause of such impacts and OSMRE lacks the statutory and regulatory authority to prohibit or limit Spring Creek from transporting federal coal by rail.

(1) **Reasonable Foreseeability**

With regard to reasonable foreseeability, this case is distinguishable from *MEIC.* There, 95% of the mined coal was to be exported, in predictable quantities, through ports in Vancouver, Duluth, and Quebec. The same level of certainty does not exist here because Spring Creek coal is shipped to a diverse and numerous group of customers. Indeed, Spring Creek coal is transported by rail to customers in various states and Canada and for export to various Asian countries. ECF 76-1 at 3.

For example, coal destined for the Asian market is transported by rail to the Pacific Northwest, where it is loaded onto ships for delivery to utilities in several Asian countries, including South Korea and Japan. *Id.* Spring Creek's contracts with these foreign customers vary throughout the year through annual, quarterly, and spot sales negotiations. *Id.* As a result, both the customers and destinations are subject to change, both throughout the year and from year to year. *Id.* Given the nature of these contracts, Spring Creek will not know exactly which international customers will purchase Spring Creek coal for each quarter of every year during the duration of the 2016 Mining Plan, *id.*, and historical sales therefore are not a reliable predictor of future impacts.

In addition, although coal destined for Asia is currently shipped from the Westshore Terminal in Vancouver, British Columbia, there are various routes (and route segments) a train may take to transport coal to this terminal from Spring Creek, and the total distance of track can vary between 1,000 and 2,000 miles for this single destination. *Id.* Likewise, multiple coal producers in Montana ship coal to the Westshore Terminal by train, and this coal likely travels along the same routes as Spring Creek's coal. As a result, it would be very difficult to attribute any particular transportation impact from Spring Creek coal as opposed to the coal that is shipped from other mines in Montana, or shipments of other consumer goods on the same rail lines. *Id.* at 4.

Domestically, Spring Creek coal is shipped to electric utilities and industrial customers in the Northwest, Midwest, Northeast, and Southwest. For example, Spring Creek coal is transported to the Superior Midwest Energy Resources Company ("MERC") Terminal in Superior, Wisconsin, to be transported across the Great Lakes region for ultimate use at power plants and other end-users in other parts of the United States. ECF 76-1 at 4. In recent years, Spring Creek also sold coal to domestic customers in Washington, Arizona, Montana, Colorado, North Dakota, South Dakota, Minnesota, Michigan, and Alabama, typically through annual contracts. *Id.* Because the customers and destinations for these domestic coal shipments can change from year-to-year, it would be impossible to know

exactly which domestic customers will purchase Spring Creek coal—and in what volume—for every year during the duration of the 2016 Mining Plan. *Id.* at 4–5.

As with Spring Creek's international shipments, the routes used to ship domestic coal from Spring Creek are unpredictable. Currently, Spring Creek coal is shipped primarily by BNSF Railway. ECF 76-1 at 5. These trains travel a variety of routes to transport coal to geographically disparate regions, and routes may vary depending on the location of each customer, weather conditions, and/or rail congestion. *Id.* The railway determines which routes are taken, and neither Spring Creek nor the Federal Defendants has control over that determination. *Id.* Further, because coal from other mines in the Powder River Basin and other coal-producing regions in the United States is transported along most, if not all, of these same routes, attributing particular impacts to coal shipments from Spring Creek as opposed to the other mines—or even rail shipments of other consumer goods—would be very difficult. *Id.* at 5–6.

Some of Spring Creek's customers purchase and combust primarily coal from Spring Creek. ECF 76-1 at 6. Others may combust Spring Creek coal along with coal from other mines. *Id.* Because Spring Creek's customers and end-users vary from year-to-year, are located in a variety of domestic and internal locations, and may alter their own mix of Spring Creek coal with coal from other mines, it would be nearly impossible to accurately assess the combustion impacts from

Spring Creek Coal over the life of the 2016 Mining Plan. Moreover, all of the regions to which Spring Creek coal is shipped have different Clean Air Act air quality "attainment" statuses for criteria pollutants, National Ambient Air Quality Standards ("NAAQS"), and equivalent state air quality standards. The communities adjacent to the power plant are also impacted by local land use regulations, state environmental policies, and the decisions of the customer in operations of its facility. As a result, the amount of emissions from combusting coal from Spring Creek and other sources varies substantially from plant to plant. Without knowing those variables—including how coal emissions are regulated in each discrete location at which Spring Creek coal is combusted—the Federal Defendants could not assess the non-greenhouse gas emissions from Spring Creek coal with any level of certainty.

All of these facts—which were not addressed in the Findings and Recommendation or Order—distinguish this case from *MEIC* and render any attempt to determine the transportation and non-greenhouse gas impacts from Spring Creek coal an exercise in guesswork. Simply put, the extent of speculation required to evaluate the transport and non-greenhouse gas emissions would not provide a basis for a meaningful assessment of these impacts. For that reason, the Federal Defendants were not required to consider those indirect effects of the 2016 Mining Plan, and the appealing parties have a substantial case for relief on the

merits on that issue.

(2) Control and Causation under *Public Citizen*

In addition, the Court's conclusion that *Department of Transportation v. Public Citizen*, 541 U.S. 752, 757 (2004), and its progeny do not discharge the Federal Defendants from having to consider the indirect impacts from coal transportation and combustion is subject to challenge on appeal. SCC's arguments in that regard are well set-out in its prior merits briefing. To summarize, in *Public Citizen*, the Supreme Court made clear that federal agencies are only required to gather and consider environmental information that the agency has statutory and regulatory authority to act on. 541 U.S. at 770. Additionally, the Court explained that "NEPA requires a reasonably close causal relationship between the environmental effect and the alleged cause." *Id.* at 767. In this regard, "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Id.* Rather, NEPA requires a "reasonably close causal relationship" akin to proximate cause in tort law. *Id.* (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

Here, based on *Public Citizen*, the Federal Defendants had no duty to consider rail transportation impacts because: (1) the OSMRE lacks the statutory and regulatory authority to prohibit or limit Spring Creek from transporting federal

coal by rail; and (2) the requisite causal relationship between OSMRE's approval of the 2016 Mining Plan and rail transportation impacts is lacking, since rail routes vary greatly and coal from other mines (as well as countless other consumer goods) are transported along the same rail lines. Likewise, the unpredictable variability of the end-users of Spring Creek coal and the environmental and land use regulations applicable in the jurisdictions where those users are located—and the fact that many of those end users also combust coal from other sources—all break the chain of causation such that coal from Spring Creek is not the proximate cause of the cited impacts. As such, the Federal Defendants had no obligation to consider those indirect effects under *Public Citizen* and its progeny.

The Court rejected these arguments without substantial discussion. But the scope and extent of *Public Citizen* is subject to dispute, and other courts have come to the opposite conclusion in similar contexts. *See, e.g.*, *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 53 (D.D.C. 2019). Accordingly, the appealing parties have a substantial case for relief on the merits regarding this issue as well.

2. Greenhouse Gas Emissions

Relying solely on district court cases, the Court also found that the Federal Defendants erred by not monetizing the socioeconomic impacts of carbon emissions despite monetizing some of the other socioeconomic impacts of expanded coal mining. This conclusion is contrary to NEPA's implementing

regulations and improperly intrudes on the agency's discretion to choose the appropriate methodology and is thus subject to challenge on appeal.

As noted in the Federal and Intervenor Defendants' merits briefing, nothing in NEPA or its implementing regulations requires reviewing agencies to weigh the economic costs and benefits of a proposed action or stating that an agency can monetize some impacts only if is prepared to monetize all of them. To the contrary, 40 C.F.R. § 1502.23 specifically states that agencies need not engage in a cost-benefit analysis and that they should avoid doing so where, as here, the NEPA analysis involves important qualitative considerations. Likewise, section 1502.23 assumes that cost-benefit analyses will *not* be comprehensive, and provides that an agency need only "discuss the relationship between that [cost-benefit] analysis and any analyses of unquantified environmental impacts, values, and amenities." 40 C.F.R. § 1502.23.

This approach makes sense, given the broad range of "effects" agencies are required to consider, and it preserves substantial discretion for federal agencies to use the metrics and methodologies best suited for the issues at hand. Requiring federal agencies to quantify socioeconomic costs *every time* they quantify other impacts would create a substantial burden and improperly intrude on the agencies' discretion. *See Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1109–10 (9th Cir. 2016) ("[I]n the face of competing reasonable methodologies, we do not

substitute our judgment for that of the agency."); *accord Comm. To Pres. Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993).

To be sure, the Court's suggestion that the Federal Defendants' failure to quantify the costs of greenhouse gas emissions improperly inflated the benefits of the action while minimizing its impacts, and that the agency failed to adequately explain its justification for not using the Social Cost of Carbon protocol is not accurate. To the contrary, the agency presented a robust qualitative discussion of costs of greenhouse gas emissions after explaining why it decided not to apply the Social Cost of Carbon protocol, as described in detail in the Federal Defendants merits briefing.

In light of the foregoing, the Federal Defendants were not required to quantify the cost of greenhouse gas emission impacts, and the Court's finding to the contrary impermissibly intrudes on the agency's discretion to select the appropriate methodology for analyzing these impacts. In coming to opposite conclusion, the court relied on a district court case from another circuit, *High Country Conservation Advocates v. U.S. Forest Service*, 52 F.Supp.3d 1174 (D. Colo. 2014), and on *MEIC*. But *High County* is of limited applicability here because in this case, unlike in *High County*, the Court has twice recognized that a cost-benefit analysis was not required *at all*. In addition, the court's decision in *High County* turned on its finding that the environmental impact statement at issue

"offere[ed] a factually inaccurate justification for why it omitted the social cost of carbon protocol." *High Country*, 52 F. Supp. 3d at 1191. Those factors are not present in this case.

And even if *High County* and *MEIC* could be read to require an agency to "quantify costs" any time it quantifies other socioeconomic impacts of a proposed action, NTEC respectfully submits that those cases were wrongfully decided for all the reasons discussed in the parties' merits briefing and because the Ninth Circuit has reaffirmed that an agency's choice of methodology in its analysis is subject to deference. *Friends of Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 922 (9th Cir. 2018) (*citing Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007)).

Most notably, if that were the requirement, an agency opting to describe socioeconomic impacts in monetary terms would have the burden of also monitoring all other impacts addressed in an EA or EIS, or explaining as to each category of impacts why monetization is not possible, which would effectively flip the regulatory presumption against a monetary cost-benefit analysis in 40 C.F.R. § 1502.23. Alternatively, agencies ostensibly could avoid this substantial burden by limiting their description all socioeconomic impacts—including items like royalty and tax revenue—in purely qualitative terms, which would degrade the quality of their analyses. This result is not mandated by controlling case law and

would frustrate NEPA's twin goals of ensuring informed decision-making and effective public involvement in the decision process.

Accordingly, the appealing parties have a substantial case for the relief on the merits as to the Court's determination regarding the Federal Defendants' analysis of greenhouse gas emissions as well.

3. An EIS was not required.

The Court determined that the Federal Defendants' decision not to prepare an EIS was arbitrary and capricious largely based on its findings that the Federal Defendants failed to adequately analyze the impacts of coal transportation, non-greenhouse gas emissions, and the costs of greenhouse gas emissions. As discussed in detail above, the Federal Defendants' analysis of those issues was satisfactory and, as a result, so too was their decision not to prepare an EIS. For the same reason, the decision not to prepare an EIS did not contravene OSMRE's own guidelines, which do not require an EIS where the environmental impacts of the proposed mining operation are adequately analyzed in earlier environmental documents covering the specific leases or mining activities. *Department of Interior, Department Manual*, at 516 DM § 13.4A(4) (May 27, 2004).

Here, the EA for the 2016 Mining Plan adequately analyzed the foreseeable environmental impacts of the proposed mining operation, and additional analysis occurred at the leasing stage in the form of an EA and FONSI prepared by the

Bureau of Land Management. Accordingly, and EIS was not required, and the appealing parties have presented a substantial case for relief on the merits on that question.

V. CONCLUSION

For all the foregoing reasons, NTEC respectfully requests that its Motion for Stay Pending Appeal be granted in full.

Dated this 5th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned, Lindsay Thane, certifies that this Brief complies with the requirements of Local Rule 7.l(d)(2), with the exception of the 6,500 word-count limit set forth in Local Rule 7.1(d)(2)(A). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 10,415 words, excluding the caption, certificates of compliance and service, table of contents and authorities. The undersigned relies on the word count of the word processing system used to prepare this document. Contemporaneously with the filing of this Brief, the undersigned filed a motion seeking leave to exceed the 6,500 word limit.

Dated this 5th day of April, 2021.

s/ Lindsay Thane
Lindsay Thane

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2021, I electronically filed the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR STAY PENDING APPEAL with the clerk of the court for the United States District Court for the District of Montana using the CM/ECF system.

s/ Lindsay Thane
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