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

MONTANA ENVIRONMENTAL INFORMATION CENTER, INDIAN PEOPLE'S ACTION, 350 MONTANA, SIERRA CLUB, WILDEARTH GUARDIANS, Plaintiffs, vs. DEB HAALAND, et al., Defendants, and WESTMORELAND ROSEBUD MINING LLC and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, Intervenors.	Case No. 1:19-cv-00130-SPW-TJC **INTERVENORS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO FINDINGS AND RECOMMENDATIONS** **(ORAL ARGUMENT REQUESTED)**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

TABLE OF ACRONYMS AND ABBREVIATIONS

AR	Administrative Record
BLM	Bureau of Land Management
EIS	Environmental Impact Statement
MDEQ	Montana Department of Environmental Quality
NEPA	National Environmental Policy Act
OSM	United States Office of Surface Mining, Reclamation and Enforcement
Westmoreland	Westmoreland Rosebud Coal LLC

Defendant-Intervenors Westmoreland Rosebud Coal LLC ("Westmoreland") and the International Union of Operating Engineers, Local 400 ("Westmoreland/Local 400"), submit this response to Plaintiffs' Objections to the Magistrate Judge's Findings and Recommendations. ECF No. 182.

Magistrate Judge Cavan correctly determined that the Office of Surface Mining Reclamation and Enforcement ("OSM") considered an adequate range of alternatives in the Area F Environmental Impact Statement ("EIS"). Judge Cavan recognized the distinction between the alternatives considered and properly deferred to the agency's reasoned justifications for deciding not to consider the "mid-range" alternative in detail.

Judge Cavan was also correct in deciding that immediate vacatur is not an appropriate remedy, even if the Court were to find National Environmental Policy Act ("NEPA") procedural errors. In weighing the equities, Judge Cavan appropriately considered the dire effects to the Mine, the Colstrip Power Plant, and the community, if Area F were forced to shut down while OSM addresses procedural NEPA concerns. Any vacatur or injunctive relief in this case is not supported.

For these reasons, the Court should adopt Judge Cavan's findings regarding the adequacy of OSM's alternatives analysis, and the decision that immediate vacatur is not the appropriate remedy in this case.

ARGUMENT

I. OSM CONSIDERED A REASONABLE RANGE OF ALTERNATIVES.

Rejecting Plaintiffs' arguments that OSM's alternatives violated NEPA, Judge Cavan determined that (1) the similarity between Alternatives 2 and 3 was not in and of itself a NEPA violation, and (2) OSM's decision to eliminate the mid-range alternative from detailed consideration was reasonable and entitled to deference. ECF No. 177 at 32–36. Judge Cavan was correct on both scores.

A. Consideration of Similar Alternatives Does Not Violate NEPA.

NEPA requires agencies to consider alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii). Agencies, however, need only evaluate "reasonable" alternatives. 40 C.F.R. § 1502.14(a). Whether an alternative is reasonable is evaluated "in light of the ultimate purposes of the project," and the agency's determination "merit[s] particular deference." *Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 580–81 (9th Cir. 2016) (citations omitted). There is no minimum number of alternatives required to comply with NEPA—courts should focus on "the substance of the alternatives" and "not the sheer number." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005).

Judge Cavan properly found that the similarities between Alternatives 2 and 3 did not render the alternatives analysis deficient. Moreover, Judge Cavan found that Alternatives 2 and 3 were sufficiently distinguishable given the additional protection measures, water management plan, wetland mitigation requirements,

enhanced reclamation and revegetation efforts, geological survey requirement, and paleontological mitigation incorporated into Alternative 3. ECF No. 177 at 34.

Plaintiffs' objections are not convincing. They claim that OSM's characterization in the EIS of Alternative 3 as providing only "negligible benefits" proves that the two alternatives were too closely related. ECF 182 at 5–6. Plaintiffs' argument misses the point. Even if the two alternatives were substantially similar, or even identical (which Westmoreland/Local 400 do not concede and Judge Cavan did not find), NEPA does not demand a minimum number of alternatives. *Native Ecosystems Council*, 428 F.3d at 1246. Plaintiffs fail to respond to this point, instead alleging that the similarity of alternatives is a NEPA violation of its own accord. The case law, however, does not support Plaintiffs' position.

Plaintiffs rely heavily on *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013), in which they claim the Ninth Circuit found NEPA error when the Bureau of Land Management ("BLM") considered four alternatives authorizing the same level of grazing in the challenged grazing allotment. But in *Abbey*, the NEPA error was *not* BLM's consideration of similar grazing alternatives. As the court explained, BLM's error was the failure to include the "no grazing" and "reduced-grazing" alternatives, which the court determined would also have met BLM's purpose and need and therefore should have been

considered. *Id*. at 1051–52. The similarity among the alternatives considered was not relevant to the court's decision.

Though Plaintiffs attempt to distinguish the case, Judge Cavan correctly relied on *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp*., 42 F.3d 517, 524–25 (9th Cir. 1994). In that case, the Ninth Circuit upheld the agency's alternatives analysis despite the similarity of the two action alternatives, both of which included an eight-lane highway expansion. Alternatives with fewer lanes were rejected because they failed to meet the purpose and need to reduce traffic congestion and air emissions. *Id*. at 524. The court upheld the agency's analysis, holding first that NEPA does not demand a minimum number of alternatives, and finding that the four-lane alternative proposed by plaintiffs had been appropriately rejected. As in all the cases cited by Plaintiffs and relied on by the Court, the issue in *Laguna Greenbelt*, was not the *presence* of alternatives that were too similar, but the alleged *absence* of plaintiffs' proposed alternative. *See* ECF No. 161 at 16.

As Judge Cavan recognized, the relevant question for this Court too is not whether OSM considered two similar alternatives,[1] but whether OSM failed to consider a reasonable alternative identified by Plaintiffs.

[1] Though the similarity of alternatives is not itself a NEPA violation, Judge Cavan was correct in recognizing the meaningful distinctions between Alternatives 2 and 3. ECF No. 177 at 34–35.

B. OSM's Justifications for Eliminating the "Mid-Range" Alternative Were Reasonable.

Judge Cavan explained that OSM eliminated the so-called "mid-range" alternative because it was not feasible and failed to meet OSM's purpose and need "to provide [Westmoreland] the opportunity to exercise its valid existing rights" under pre-existing coal leases. ECF No. 177 at 35. An agency need only "briefly discuss [its] reasons" for not analyzing an alternative in detail, 40 C.F.R. § 1502.14(a), which decision "merit[s] particular deference." *Protect Our Cmtys. Found.*, 825 F.3d at 580–81. Here Judge Cavan appropriately deferred to OSM's reasoning.

Plaintiffs raise the same objections they did in briefing before Judge Cavan—that OSM's final mine plan approval, which removed 74 acres from the 6746-acre Area F proves that a "mid-range" alternative was reasonable, notwithstanding that Plaintiffs' proposal would put approximately 3,250 acres of Area F off limits.[2] *See* ECF No. 182 at 10–14. Here, OSM's removal of 74 acres from the approved mine plan was mandated by the Montana Department of Environmental Quality's

[2] Plaintiffs did not even ask OSM to consider a "mid-range" alternative in their comments on the draft EIS, and their arguments should be waived. *See* AR-117-31574-578 (commenting that OSM did not consider "clean energy alternatives"); *see generally* AR-117-31367–443, AR-117-31512–580. Absent exceptional circumstances, "belatedly raised issues may not form a basis for reversal of an agency decision." *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65 (2004) (plaintiffs "forfeit[] any objection" not identified in their comments).

("MDEQ") findings regarding those acres and the MDEQ's decision to deny a state permit. MDEQ's decision as to 74 acres did not prove that an alternative denying Westmoreland access to half of its valid existing lease rights was reasonable, especially in light of the Westmoreland's congressionally mandated obligation to achieve maximum economic recovery of the leased coal. 30 U.S.C. § 201(a)(3)(C); *see also* 30 C.F.R. § 816.59.

As OSM set out in the EIS, AR-116-30523–33, and Westmoreland explained in its prior briefing, ECF No. 161 at 17–18, the "mid-range" alternative is impermissible under Montana law, which requires recovery of all "minable and marketable" coal. ARM 17.24.322(2)(b), (c). Leaving coal unmined can be excused *only* if the coal (a) cannot be mined based on the method of operation or marketability, or (b) if it is necessary to leave coal in the ground to comply with the Montana Strip and Underground Mine Reclamation Act ("MSUMRA"). ARM 17.24.322(2)(b). MDEQ's decision to withhold the 74 acres from the final permit was based on its determination under Montana law that mining those acres would result in material damage to the hydrologic balance outside of the mine permit area, in violation of MSUMRA. ARM 17.24.405(4), AR-124-37310–11. In other words, the 74 acres was not "minable" under Montana law because it could not be

mined in compliance with MSUMRA.[3] OSM merely removed the 74 acres from its final mine plan modification consistent with MDEQ's determination.

The decision to withhold 74 acres from the mine permit under Montana law proves nothing about the remaining 6,672 acres in Area F. Westmoreland is still obligated under Montana law to remove all "minable and marketable" coal within Area F. ARM 17.24.322. And OSM is still obligated under federal law to approve a mining plan that achieves "maximum economic recovery" of the coal. 30 U.S.C. § 201(a)(3)(C) ("[N]o mining operating plan shall be approved which is not found to achieve the maximum economic recovery of the coal within the tract."); 30 C.F.R. § 816.59. An alternative that would arbitrarily put off-limits half of the previously leased and minable area would both violate Montana and federal law and fail to meet OSM's purpose and need,[4] as Judge Cavan held.

OSM's limited role in reviewing the proposed mine plan modification for previously leased coal does not break with settled law, as Plaintiffs allege. In both

[3] This reasoning applies equally to the "other proposed expansion" Plaintiffs allude to in their Brief at 11 (citing ECF No. 169-2 at 1–2). For that other proposed mine permit, to the extent MDEQ has requested that the mine plan area be reduced, it is based on findings that the area is not "minable" within the constraints of MSUMRA and Montana law. Such a determination by the state agency does not grant OSM unilateral authority to arbitrarily cut a mine plan in half where the state has determined the area to be minable.

[4] Westmoreland explained in its earlier briefing that Area F was leased altogether by BLM as a logical mining unit, AR-116-30532, foreclosing piecemeal review and approval, 40 C.F.R. § 1508.25(a)(1).

High Country Conservation Advocates v. U.S. Forest Service, 951 F.3d 1217, 1224 (10th Cir. 2020), and *Western Organization of Resource Councils v. BLM*, 2018 U.S. Dist. LEXIS 49635 (D. Mont. Mar. 26, 2018), the agencies were making land use planning decisions guided by principles of multiple use—no resources had been leased and the agency was under statutory directives to consider the full panoply of management options. Not so here where BLM already leased the coal as a logical mining unit, Westmoreland holds valid existing lease rights, and the state and federal agencies were under statutory and regulatory obligations to "maximize economic recovery" and allow for mining of all "minable and marketable" coal. Thus, Judge Cavan was correct in finding that the "mid-range" alternative was not reasonable.

II. NEITHER VACATUR NOR INJUNCTION IS WARRANTED.

Judge Cavan recommended that this Court exercise its discretion to remand without immediate vacatur. Instead, Judge Cavan found that vacatur should be deferred for 365 days from the date of a final order to allow OSM to address any NEPA procedural violations identified in the order. ECF No. 177 at 36–37. While Westmoreland does not concede that vacatur of any kind, even "deferred" vacatur, is warranted, certainly, Plaintiffs' claim that vacatur is mandatory is not correct.

First, case law is clear that vacatur is not a mandatory remedy. *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018). Rather,

the court must consider the effect of the remedy in determining whether to apply it. *Samuels v. Mackell*, 401 U.S. 66, 71–73 (1971) (when "the practical effect of two forms of relief will be virtually identical," the "propriety of declaratory and injunctive relief should be judged by essentially the same standards"); *cf. Alsea Valley Alliance v. Department of Commerce* 358 F.3d 1181, 1186 (9th Cir. 2004) (applying the *Carson v. Am. Brands, Inc.*, 450 U.S. 79 (1981), framework to determine whether vacatur has the practical effect of injunction for purposes of determining appealability). The Court must "weigh the seriousness of the agency's errors against 'the disruptive consequences'" of vacatur. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015).

Second, when vacatur would have the effect of injunctive relief, the court must consider the equitable factors for injunction. Indeed, the D.C. Circuit cautioned in *Standing Rock Sioux v. U.S. Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021) that merely recharacterizing relief as "vacatur" instead of "injunction" does not relieve Plaintiffs of their obligation to make the showing that the extraordinary relief they seek is warranted. *See id.* at 1054 (if "a district court could, in every case, effectively enjoin agency action simply by recharacterizing its injunction as a necessary consequence of vacatur, that would circumvent the Supreme Court's instruction in *Monsanto* that 'a court must determine that an injunction *should* issue under the traditional four-factor test.'") (quoting *Monsanto*

Co. v. Geertson Seed Farms, 516 U.S. 139, 156–58 (2010)); *see also* ECF No. 29 at 29-34; ECF No. 161 at 24–26. The Ninth Circuit too has held that the courts "are bound by precedent to hold that a NEPA violation is subject to traditional standards in equity for injunctive relief and does not require an automatic blanket injunction against all development." *Northern Cheyenne Tribe v. Norton,* 503 F.3d 836, 842 (9th Cir. 2007) (affirming injunction issued by Magistrate Judge Anderson that allowed development pending further NEPA compliance).

Here Plaintiffs fail to show that the seriousness of OSM's errors outweigh the disruptive consequences of vacatur. Plaintiffs misapply the "serious errors" prong of the *Pollinator* test when they argue that the "harms from mining and burning coal in area F are 'serious and significant.'" ECF No. 182 at 15. The "errors" at issue in the *Pollinator* analysis were procedural errors supporting a decision to vacate an agency action—not parties' (or the Court's) disagreement with the policy implications of the agency's substantive decision. *See Pollinator*, 806 F.3d at 532 (the court considers "whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand"); *see also Lands Council v. McNair*, 537 F.3d 981, (9th Cir. 2008) (en banc) (a court does "not substitute [its] judgment for that of the agency"). Here, Judge Cavan properly noted, and Plaintiffs do not dispute, that "OSM may be able to cure the deficiencies" identified in the Findings. ECF No.

177 at 37. Plaintiffs' generic assertion in a footnote (ECF No. 182 at 15 n.7) that "NEPA errors are serious" says nothing about the errors at issue here, particularly where, in the case they cite, *Standing Rock Sioux*, 985 F.3d at 1053, the agency did not prepare an EIS, and here OSM did.

Plaintiffs claim that no serious disruptive consequences would result from immediate vacatur (i.e., the equities should be weighed in favor of injunction) because Westmoreland could just shift production from Area F to other areas of the Mine. ECF No. 182 at 15–16. However, as Westmoreland explained in its briefing and supporting declarations, even if the Mine could temporarily maintain coal deliveries to the Colstrip Power Plant, doing so would be more expensive, costing the Mine approximately $2.5 million per year. ECF No. 73-2 ¶ 6.

Further, the uncertainty surrounding Area F re-authorization itself would have serious effects. ECF No. 150 at 35. There is no guarantee that if this Court orders immediate vacatur and injunctive relief, OSM will be able to complete the NEPA on remand in 365 days. Indeed, OSM has already submitted its filing indicating almost two years is needed to address the purported errors identified by Judge Cavan. ECF No. 180. Even then, NEPA and agency decision making are fraught with political and regulatory uncertainty, and it is entirely possible that OSM could take even longer to complete the remand process. Westmoreland has been firm in its assertion that coal at other areas of the Mine will last only three to

five years. ECF No. 73-2 ¶ 7. A remand process lasting even two years would put the Mine in a precarious situation to meet its existing coal contracts. Throwing the Mine, the Power Plant, and the community of Colstrip into the realm of regulatory uncertainty associated with an indefinite vacatur and remand period is not warranted, where, as here, after correcting any procedural errors on remand, OSM is likely to justify its decision on remand. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 99 (D.D.C. 2017).

CONCLUSION

For the reasons discussed above, Westmoreland/Local 400 respectfully ask this Court to adopt Magistrate Judge Cavan's finding that OSM considered a reasonable range of alternatives and properly dismissed from detailed consideration the "mid-range" alternative. ECF 177 at 32–36. Further, even if the Court finds a procedural NEPA error in this case, it should reject Plaintiffs' request for vacatur and injunctive relief. Westmoreland/Local 400 requests that the Court grant the Federal Defendants' and Intervenor-Defendants' cross motions for summary judgment and affirm OSM's NEPA analysis and mine plan decision in their entirety.

Dated this 15th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to L.R. 72.3(b) the foregoing brief is double-spaced, has a typeface of 14 points or more, and contains 2840 words, exclusive of the caption, table of contents, tables of authorities, and certificates.

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2022, I filed the foregoing document electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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