No. 17-35808

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA ENVIRONMENTAL INFORMATION CENTER,
Plaintiff–Appellee,

v.

U.S. OFFICE OF SURFACE MINING, an agency within the U.S. Department of the Interior, et al.,
Defendants–Appellants,

and

SIGNAL PEAK ENERGY, LLC,
Intervenor-Defendant–Appellant.

On Appeal from the United States District Court for the District of Montana
District Court No. 9:15-cv-00106-DWM
Honorable Donald W. Molloy, District Judge

SIGNAL PEAK ENERGY, LLC'S EMERGENCY MOTION FOR STAY PENDING APPEAL UNDER CIRCUIT RULE 27-3(a) OR IN THE ALTERNATIVE FOR EXPEDITED CONSIDERATION

Action Needed By
October 26, 2017

CIRCUIT RULE 27-3 CERTIFICATE

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2. Facts Showing the Existence and Nature of the Emergency

As set forth more fully below, on August 14, 2017, the district court issued an order vacating and setting aside a challenged Mining Plan Environmental Assessment and enjoined all mining of federal coal within an amended permit area boundary at Signal Peak's Bull Mountain Mine in Montana. The district court issued its injunction before hearing any legal argument or factual evidence on the appropriate remedy, and without weighing the mandatory factors set out in *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 156-57 (2010). In response to Signal Peak's motion alerting the district court to this defect, on October 2, 2017, the district court declined to dissolve the injunction. The district court

nevertheless scheduled a one-hour oral argument on October 31 to address remedy but prohibited the parties from submitting briefing or evidence on the issue.

Signal Peak seeks (i) a stay of the August 14, 2017 injunction that would avert layoffs of 30 employees at the Bull Mountain Mine near the end of October, and (ii) an order requiring the district court to allow briefing and submission of evidence bearing on the *Monsanto* factors. If the injunction is not lifted by October 26, 2017, Signal Peak and its workforce will suffer irreparable injury. In short, Signal Peak will be forced to begin the process of laying off employees.

3. When and How Opposing Counsel Were Notified

Signal Peak and the Federal Defendants provided Counsel for Plaintiff/Appellee notice that it intended to file this motion on October 3, 2017. A copy of this motion was provided to Plaintiff/Appellee on October 5, 2017.

4. Submission to District Court

Signal Peak submitted argument to the district court explaining the grounds for relief advanced in this motion in its September 11, 2017 Emergency Motion to Amend Judgment, Motion for Remedies Hearing, and Motion to Stay Injunction Pending Remedies Hearing (Dkt. Nos. 69 and 70) and Reply Brief in Support of Emergency Motion to Amend Judgment, Motion for Remedies Hearing, and

Motion to Stay Injunction Pending Remedies Hearing, (Dkt. No. 84). On October 2, 2017, the district court scheduled an oral argument but barred the parties from briefing the issue, declined to hear evidence, and refused to dissolve the injunction pending the hearing. October 2, 2017 Order (Dkt. No. 86).

/s/ John C. Martin
John C. Martin

TABLE OF CONTENTS

Circuit Rule 27-3 Certificate i

Table of Contents v

Table of Authorities vii

Introduction 1

Factual and Procedural Background 2

Jurisdiction 6

Standard of Review 7

Argument 8

I. Appellant Is Likely to Succeed on the Merits of the Appeal. 8

II. Appellants Will Be Irreparably Injured Absent a Stay. 15

III. A Stay Will Not Injure the Appellee. 18

IV. The Public Interest Weighs in Favor of a Stay. 20

Request for Relief 21

Certificate of Service 23

TABLE OF AUTHORITIES

Page(s)

CASES

Beverly Hills Unified School Dist. v. Fed. Transit Admin.,
2016 WL 4445770 (C.D. Cal. Aug. 12, 2016) 11

Cal. Cmtys. Against Toxics v. U.S. Envtl. Protection Agency,
688 F.3d 989 (9th Cir. 2012) 10, 11

Charlton v. Estate of Charlton,
841 F.2d 988 (9th Cir. 1988) 13

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006)..9

Lair v. Bullock,
697 F.3d 1200 (9th Cir. 2012) 8

League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Connaughton,
752 F.3d 755 (9th Cir. 2014) 10

McCormack v. Hiedeman,
694 F.3d 1004 (9th Cir. 2012) 10

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010)..passim

N. Cheyenne Tribe v. Norton,
503 F.3d 836 (9th Cir. 2007) 14

Nken v. Holder,
556 U.S. 418 (2009)..7, 8

Northern Plains Resource Council v. BLM,
2005 WL 6258093 14

Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust,
636 F.3d 1150 (9th Cir. 2011) 10

Seattle Audubon Society v. Evans,
771 F. Supp. 1081 (W.D. Wash. 1991) 14

U.S. v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001)...14

Western Watersheds Project v. Abbey,
719 F.3d 1035 (9th Cir. 2013) 9, 10

WildEarth Guardians v. Bureau of Land Mgmt.,
---F.3d---, 2017 WL 4079137 (10th Cir. Sept. 15, 2017).................................11

Winter v. Natural Res. Defense Council, Inc.,
555 U.S. 7 (2008)..9, 12

STATUTES

5 U.S.C. §§ 705, 706..3

28 U.S.C. § 1292(a) 7

28 U.S.C. § 1331 3

28 U.S.C. §§ 2201, 2202...3

OTHER AUTHORITIES

Circuit Rule 27-3(a) 1

Federal Rule of Appellate Procedure 8..1

Federal Rule of Civil Procedure 59(e) 5

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 8 and Circuit Rule 27-3(a), to prevent irreparable and imminent injury to Signal Peak's Bull Mountains Mine No. 1 and its workforce, Signal Peak submits this Emergency Motion For Stay Pending Appeal Under Circuit Rule 27-3(a), Or, In The Alternative For Expedited Consideration ("Emergency Motion"). Signal Peak seeks (i) a stay of the district court's the August 14, 2017 injunction pending a hearing and decision on the equitable factors essential to the remedy and (ii) an order requiring that the district court allow briefing and evidence on the remedy question. In the alternative, Signal Peak seeks expedited consideration of its interlocutory appeal, which reaches the same questions by October 26, 2017.

Given that irreparable injury to the Mine and its employees is imminent, Signal Peak was compelled to file its Notice of Appeal and this accompanying Emergency Motion, or risk the livelihoods of approximately 30 employees who will become redundant at the end of the month. Any further Motion for Stay Pending Appeal submitted to the district court, or a remand to the district court to consider this motion, would be futile; a motion would assert the same arguments

from Signal Peak that the district court has rejected. Accordingly, Signal Peak seeks relief from this Court.

FACTUAL AND PROCEDURAL BACKGROUND

Signal Peak owns and operates the Bull Mountains Mine No. 1 (the "Mine"), an underground coal mine, in southcentral Montana. Signal Peak Energy, LLC's Statement of Undisputed Facts at 2 (Dkt. No. 53). The Mine employs approximately 260 individuals, 100 who work in surface operations, 80 who work on mine development—the process of preparing the coal seam for mining—and 80 who work on actual coal mining. Declaration of Bradley Hanson, ¶¶ 5, 16, 40 (Dkt. No. 70-1). The Mine has been in existence since the 1990s and produces a combination of private, state, and federal coal given the pattern of mineral ownership. August 14, 2017 Order at 6 (Dkt. No. 60).

In 2013, Signal Peak applied to the Office of Surface Mining Reclamation and Enforcement (the "Office of Surface Mining") for approval of a mining plan modification that would allow Signal Peak to continue its development operations by mining 2,539.76 acres of federal coal leases that are interspersed with the larger area of private coal. Dkt. No. 60, at 10-11. The Office of Surface Mining prepared an Environmental Assessment (the "Mining Plan EA") to evaluate the

environmental impacts of mining this federal coal. *Id*. at 11. The Mining Plan EA tiered to and incorporated by reference the environmental analyses in a prior Environmental Impact Statement that had been prepared for the original mine plan and an Environmental Assessment prepared by the Bureau of Land Management when it issued coal leases for the land subject to the Mining Plan EA. *Id*. at 29-30. The Office of Surface Mining approved the Mine Plan on February 24, 2015. (Dkt. No. 53, at 4)

Six months later, on August 17, 2015, Appellee filed this case in the U.S. District Court for the District of Montana, pursuant to 28 U.S.C. § 1331, as an Administrative Procedure Act challenge to the Office of Surface Mining's National Environmental Policy Act ("NEPA") review of and decision to authorize Signal Peak's Mine Plan. Appellee sought declaratory relief under 28 U.S.C. §§ 2201, 2202, and 5 U.S.C. §§ 705, 706. Over the ensuing two years, Appellee never sought a preliminary injunction, and Signal Peak continued its operations in the federal coal pursuant to the approved Mine Plan.

On August 14, 2017, the district court granted in part and denied in part the Appellee's Motion for Summary Judgment. Order dated August 14, 2017 (Dkt. No. 60) ("August 14 Order"). The Court rejected Appellee's claims that the Office

of Surface Mining's statement of purpose and need was invalid, August 14 Order at 18-25, but determined that the agency had not adequately (i) considered the indirect social, economic, and environmental effects of an increasing number of coal trains associated with the Mine Plan, August 14 Order at 28-33, (ii) addressed the indirect non-local impacts of non-greenhouse gas emissions associated with burning coal, Order at 33-35, nor (iii) quantified the social costs of greenhouse gas emissions associated with burning coal, August 14 Order at 35-47. Notably, none of the purported deficiencies concern an imminent injury to the limited interests asserted by the Appellee. *See* Dkt. No. 41-1 (Declaration of James D. Jensen (asserting injury to another rancher from water impacts, aesthetic harm to the Bull Mountains, and emotional harm suffered from viewing coal trains)).

In the Conclusion of the August 14 Order, August 14 Order at 63-64, the district court dismissed two plaintiffs found not to have standing (supporting analysis found at 14-18) and granted and denied summary judgment on the various claims asserted by the parties (supporting analysis found at 18-63). *Id.* The district court then ordered the Mining Plan EA be vacated and remanded to the

Office of Surface Mining.[1] The district court also enjoined "mining of the federal coal within the Amendment 3 permit boundary . . . pending compliance with NEPA." *Id.* The order did not include an explanation or analysis of this remedy.

Shortly after entry of the lower court's order, Signal Peak initiated discussion with the Appellee in an attempt to resolve potential remedy issues. The Appellee declined to negotiate concerning the remedy. In addition, Signal Peak initiated discussions with the Office of Surface Mining to begin the process of remedying the perceived defects in the Environmental Assessment. Declaration of Joseph Farinelli ¶ 3 (Dkt. No. 84-1).

On September 11, 2017, Signal Peak submitted a timely Emergency Motion to Amend Judgment, Motion for Remedies Hearing, and Motion to Stay Injunction Pending Remedies Hearing (Dkt. Nos. 69-70) ("Emergency Motion to Amend Judgment") pursuant to Federal Rule of Civil Procedure 59(e). In the motion, Signal Peak argued that the August 14 Order is flawed because it imposes an injunctive remedy without conducting the analysis required by the Supreme Court for such remedies in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57

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[1] The court explained that "Although this Order does not mandate the preparation of an EIS, an EIS may be required under NEPA." *Id.* at 64.

(2010) and its progeny in this Circuit. Signal Peak requested that the court, (i) stay its injunction, (ii) provide the parties with a briefing schedule and opportunity for an evidentiary hearing on the appropriate remedy, and (iii) consider a more narrowly tailored remedy after full consideration of the equitable factors. Emergency Motion to Amend Judgment at 3. The Federal Defendants joined in Signal Peak's motion. (Dkt. No. 71). Neither the Federal Defendants nor Signal Peak has yet been given the opportunity to submit evidence or briefing on the remedy.

Because the harms Signal Peak faces because of the injunction are imminent, Signal Peak subsequently requested a status conference to better understand the timing in which the district court would consider its Emergency Motion to Amend Judgment, but the district court denied the request for a status conference. Order dated September 20, 2017 (Dkt. No. 81).

On October 2, 2017, the district court issued a two-page order denying Signal Peak's request for a stay of the injunction, prohibiting the parties from submitting briefing on remedy, denying the request for an evidentiary hearing, and scheduling a one-hour oral hearing on October 31, 2017. Order dated October 2, 2017 (Dkt. No. 86) at 2 ("October 2 Order").

JURISDICTION

Signal Peak filed its Notice Appeal on October 5, 2017. This Court has jurisdiction to hear Signal Peak's interlocutory appeal and this accompanying Emergency Motion pursuant to 28 U.S.C. § 1292(a).

Section 1292(a) grants this Court jurisdiction to hear appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292(a). The October 2 Order declined to dissolve the injunction imposed by the August 14 Order, which enjoined "mining of the federal coal within the Amendment 3 permit boundary . . . pending compliance with NEPA" pending the October 31, 2017 hearing. August 14 Order at 64; October 2 Order at 2.

STANDARD OF REVIEW

A stay is "an exercise of judicial discretion" that is "dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quotations and citations omitted).

> Judicial discretion in exercising a stay is to be guided by the following legal principles, as distilled into a four factor analysis in *Nken:* "(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 interest lies."

Lair v. Bullock, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken* 556 U.S. at 434). The first two factors are the most important, and the last two are reached if the appellant satisfies the first two. *Nken*, 556 U.S. at 434-35. The party requesting the stay bears the burden to show that the Court should exercise its jurisdiction to issue a stay. *Lair*, 697 F.3d at 1203.

ARGUMENT

I. APPELLANT IS LIKELY TO SUCCEED ON THE MERITS OF THE APPEAL.

Signal Peak's Notice of Appeal challenges the remedy portion of the district court's August 14 Order and the October 2 Order, which (i) refused to set a process for addressing remedy under *Monsanto*, 561 U.S. at 156-57, and (ii) declined to dissolve the injunction on mining federal coal pending resolution of the remedy issues. The district court erred when issuing the injunction by failing to consider evidence and briefing under the mandatory *Monsanto* factors prior to imposing the injunction. The district court compounded its error in its October 2 Order in which

it refused to dissolve the injunction, notwithstanding the implicit acknowledgment that the required evaluation of the equitable factors has not yet occurred.

There is no presumption that an injunction should issue for a NEPA violation. *Monsanto*, 561 U.S. at 157 ("No such thumb on the scales is warranted."); *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013) (holding that the *Monsanto* "standard applies equally in NEPA cases – we put no thumb on the scale in favor of an injunction."). Rather, "[a]n injunction should issue only if the traditional four-factor test is satisfied." *Monsanto*, 561 U.S. at 157 (citing *Winter v. Natural Res. Defense Council, Inc*., 555 U.S. 7, 30-33 (2008)). In this case, the district court went beyond a "presumption" of injunction and imposed its injunction as a default remedy with no consideration of whether it was warranted under the mandatory four-factor test.

The plaintiff bears the burden to "satisfy" the four-factor test "before a court may grant [a permanent injunction]." *Id*. at 156 (quoting *eBay Inc. v. MercExchange, L.L.C*., 547 U.S. 388, 391 (2006)). The plaintiff must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and

defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id*. at 156-57; *Western Watersheds Project*, 719 F.3d at 1054. "It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test set out above." *Monsanto*, 561 U.S. at 158 (emphasis in original).

To the extent injunctive relief is granted, it must also be "tailored to remedy the *specific harm alleged*." *Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011) (emphasis in original) (quotations and citation omitted); *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014). A district court abuses its discretion by issuing an "overbroad" injunction. *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012) (citation omitted).

Further, vacatur of an agency's decision is not the presumptive remedy for a NEPA violation. *Cal. Cmtys. Against Toxics v. U.S. Envtl. Protection Agency*, 688 F.3d 989, 992 (9th Cir. 2012). "Whether agency action should be vacated depends on how serious the agency's errors are and the disruptive consequences of an

interim change that itself may be changed." *Id*. (internal quotation and citation omitted). *See also WildEarth Guardians v. Bureau of Land Mgmt.*, ---F.3d---, 2017 WL 4079137, *14 (10th Cir. Sept. 15, 2017) (declining to vacate challenged coal leases even though agency failed to undertake necessary climate change impact analysis under NEPA); *Beverly Hills Unified School Dist. v. Fed. Transit Admin*., 2016 WL 4445770 at *13-14 (C.D. Cal. Aug. 12, 2016) (holding vacatur was not appropriate in case in which supplemental Environmental Impact Statement was ordered in light of disruptive consequences of delaying subway extension project).

In the August 14 Order, the district court vacated the Office of Surface Mining's Mining Plan EA and issued a permanent injunction without consideration of the mandatory equitable factors.[2] There is no presumption favoring entry of an

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[2] Perhaps the *only* text from the Appellee on remedy in the litigation – prior to Signal Peak's Emergency Motion to Amend Judgment – is contained in its requested vacatur of the Office of Surface Mining's decision and injunctive relief in its Complaint, *see* Complaint, Requests for Relief B and D (Dkt. No. 1), and unsupported repetition of that request for relief in its briefing (Dkt. Nos. 41 at 28, 55 at 35). Of course, the Federal Defendants and Signal Peak denied that Appellee was entitled to relief. *See* Office of Surface Mining's Answer at 23 (Dkt. No. 6); Signal Peak's Answer, Requests for Relief B and D (Dkt. No. 13). Literally, none of the cases addressing the mandated review of equitable elements has ever

injunction, *Monsanto*, 561 U.S. at 157, and yet, the district court issued one without allowing the parties to present argument or facts on the mandatory equitable considerations.

In response to Signal Peak's Emergency Motion to Amend Judgment, the district court refused to dissolve the injunction and declined to allow a process for inquiry into the equitable factors. The district court justified its decision in two sentences. First, the district court stated that "[b]ecause" the August 14 Order "speaks at length to the specific infirmities" of the EA, Signal Peak's request to stay the injunction is denied. October 2 Order at 2. Thus, the Court essentially concluded that defects in NEPA compliance – by themselves – are sufficient to impose a pervasive injunction. The lower court adopted what amounts to a default remedy of vacatur for a NEPA violation. Both the Supreme Court and this Court have specifically disavowed such an approach.

Second, the district court claims that "[a] preliminary review of the *Winter* factors, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010), in tandem with the mining schedule Signal Peak sets forth in its briefing, indicates

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suggested that pleading a remedy or a naked request for relief without more is sufficient to meet a plaintiff's obligation under *Monsanto.*

that maintaining the injunction is appropriate for the time being." October 2 Order at 2. Yet, both authorities are quite clear that the court must weigh the equitable factors *before* entering either type of injunction. Here the district court inverted the process: it entered an injunction reflexively upon finding a NEPA deficiency without any evaluation of the equitable factors "for the time being" and offered to conduct a hearing (without the benefit of briefing or evidence) on the subject at a later time. Neither Signal Peak nor the Federal Defendants purport to have submitted evidence and briefing on the equitable factors mandated by *Monsanto*. Indeed, literally the only submission on the subject requests a *process* by which the parties could provide the necessary evidence and argument for the district court to assess the remedy in this case.

"Generally the entry or continuation of an injunction requires a hearing. Only when the facts are not in dispute, or when the adverse party has waived its right to a hearing, can that significant procedural step be eliminated." *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988) (citation and internal quotation marks omitted); *see also Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004) (an evidentiary hearing on whether to grant injunctive relief is required when "there are genuine issues of material fact" or "when a court must make

credibility determinations to resolve key factual disputes in favor of the moving party."). "A hearing on the merits – i.e., a trial on liability – does not substitute for a relief-specific evidentiary hearing unless the matter of relief was part of the trial on liability, or unless there are no disputed factual issues regarding the matter of relief." *U.S. v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001).[3] Where, as here, there is an apparent factual conflict (*see* Appellee's request to take deposition testimony of Mr. Bradley Hanson (Dkt. No. 82, at 19)), an evidentiary hearing is necessary. In any event, the record below is devoid of *any* factual development.

The October 31 hearing ordered by the district court does not satisfy this procedural requirement. The district court granted a one-hour hearing on remedy – an implicit acknowledgment that the lower court entered the injunction without the necessary predicate analysis – but prohibited the parties from briefing the issue and did not allow for any evidentiary presentation. As noted, neither the Federal

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[3] In *Northern Plains Resource Council v. BLM*, the district court convened a separate evidentiary hearing after he decided the underlying NEPA merits, and imposed an injunction tailored to BLM's NEPA violation. His injunction imposed specific limits without enjoining the natural gas development in its entirety. 2005 WL 6258093, *2 (D. Mont. April 7, 2005). The Court of Appeals upheld his order. *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 845-46 (9th Cir. 2007). *See also Seattle Audubon Society v. Evans,* 771 F. Supp. 1081, 1083 (W.D. Wash. 1991) (district court granted an evidentiary hearing to resolve equitable principles attendant to an injunction for violation of a series of environmental statutes).

Defendants nor Signal Peak purported to submit evidence or even briefing on the equitable factors. (Indeed, the Federal Defendants have only joined Signal Peak's request for process but have not independently briefed this subject.) Setting aside the fact that the district court is conducting the proceedings backwards – entering the injunction months before considering the equitable factors – the district court has denied the parties the opportunity to brief the issue or present testimony, confining the parties to thirty minutes a side in one hearing.

The categories of evidence the district court would consider in an evidentiary hearing might well include:

- Technical information supporting various ways in which an injunction could be tailored to avoid the Appellee's alleged injuries while, at the same time, saving jobs at the Mine;
- The impact of the loss of 30 jobs in October, 50 more in March 2018, and the remaining Mine jobs in June 2019 on the small community of Roundup, Montana, as well as on the surrounding communities;
- The long-term effect to the Mine of laying off its highly skilled workforce, even if temporarily; the likelihood of employees leaving

the small town of Roundup in search of other employment; and the difficulty in replacing them;

- The human impact to miners and their families of lost jobs;
- Impacts on the State of Montana;
- Rebuttal evidence addressing Appellee's injury allegations related to burning coal from Signal Peak's Bull Mountain Mine as opposed to alternative sources;
- The imminence of Appellee's injuries.
- The very limited injury inflicted on the Appellee by the asserted deficiencies in the Mining Plan EA; and
- Possible deposition testimony of Appellee's experts regarding alleged environmental injuries.

In addition, an opportunity for briefing and an evidentiary hearing would allow the Federal Defendants to present their own information for the district court's consideration.

The district court entered the injunction on August 14 without the mandatory evaluation of the equitable factors. The October 2 Order, in which the lower court declined to dissolve the injunction, similarly lacked the necessary evaluation. And

the very limited process established by the court to address remedy – a one-hour hearing without briefing or evidence – lacks any means to conduct the requisite analysis of the equitable factors. Therefore, Appellants are likely to succeed on the merits of their appeal.

II. APPELLANTS WILL BE IRREPARABLY INJURED ABSENT A STAY.

The district court's August 14 Order, which was maintained in its October 2 Order, enjoins all mining of the federal coal in the Amendment 3 permit boundary, and threatens to cause substantial hardship to the Mine and its employees, with 30 jobs at risk by the end of October 2017, another 50 jobs at risk in March 2018, and 80 more mining jobs and 100 surface jobs at risk in June 2019. The failure to allow a full briefing and evidentiary hearing process below increases the likelihood that these injuries will occur.

The President and Chief Executive Officer of Signal Peak, explained the mining process in detail in his declaration. Declaration of Bradley Hanson (Dkt. No. 70-1). Mining at the Bull Mountain Mine occurs in two stages. First, development operations occur. These require the construction of between three and eight parallel tunnels running north to south in the coal seam, connected every 150-250 feet with perpendicular cross tunnels. Hanson Decl. ¶¶ 11-14. These

tunnels, also called entries or roads, displace about five percent of the coal in the Mine, with the remaining 95 percent of the coal left in "panels" between the tunnels to be mined later by longwall mining. *Id.* ¶¶ 14, 17. After the tunnels are completed, the infrastructure needed for longwall mining is installed, including conveyors, pumps, electrical systems, and ventilation control devices, most of which the Mine Safety and Health Administration requires for safety reasons. *Id.* ¶ 15.

About 80 employees at the Mine are engaged in development operations in two crews of 30 and 50 people respectively. *Id.* ¶ 16. These are highly-skilled equipment operators and supervisors that, given their training and experience in the mine, are highly paid and difficult to replace. *Id.*

Once development operations are complete, longwall mining can begin. The area between the tunnels is referred to as a panel. *Id.* ¶ 17. Longwall panels are usually 1,250 feet wide and 20,000 feet long. *Id.* ¶ 18. The longwall equipment proceeds systematically through the panel, mining all the coal and moving it out of the Mine along a conveyor system. *Id.* ¶ 21. As the longwall advances along the panel, the empty space behind the longwall equipment is allowed to collapse, closing the area from further entry. Once a longwall panel has been completely

mined, approximately 10,000 tons of longwall equipment must be disassembled and moved to a new panel for mining, a process that requires three months of preparations and one month of suspension of production while the longwall mining equipment is moved. *Id.* ¶¶ 22, 28-29. Thus, development operations must continue in advance of the longwall, if mining is to proceed. *Id.* ¶¶ 23-25. Approximately 80 employees at the Mine are engaged in longwall mining. *Id.* ¶ 45. The balance of Signal Peak's 260 employees (approximately 100 people) work on the surface in processing and other operations. *Id.* ¶ 5.

Signal Peak is mining private coal reserves with the longwall operations, and is scheduled to continue longwall mining through private coal until June 2019. *Id.* ¶¶ 33-34. Development operations are also taking place in private coal. *Id.* ¶ 36. Development employees are installing some equipment and infrastructure in federal coal as part of development work, but, per the district court's August 14 Order, the Mine is not displacing federal coal. *Id.* ¶ 37. Near the end of October 2017, if the injunction remains in place, approximately 30 employees who work in development operations will have no available work. *Id.* ¶ 38. While Signal Peak will do everything in its power to keep employees on the job, these 30 highly-skilled employees will become redundant near the end of October 2017. *Id.* ¶ 41.

Another 50 employees will become redundant when their development operations require displacement of federal coal in March 2018, and the Mine will have to consider further layoffs. *Id*. ¶ 42. Ultimately, the cessation of development work may result in an indefinite idling of longwall mining, threatening 80 additional mining jobs and 100 surface jobs, as well as the economic value of the Mine. *Id*. ¶¶ 43-45.

On balance, the devastating and immediate threats to real people's livelihoods and to the Mine far outweigh any harms to the Appellee, all of which can be avoided pending this Court's review on appeal by the requested stay and an order allowing briefing and an evidentiary hearing before the district court below.

III. A STAY WILL NOT INJURE THE APPELLEE.

The Appellee Montana Environmental Information Center's alleged injuries are set out in a single standing declaration (Dkt. No. 41-1) and newly-filed declarations accompanying the Plaintiff's Response to Defendant-Intervenor's Emergency Motion to Amend Judgment, Motion for Remedies Hearing, and Motion to Stay Injunction Pending Remedies Hearing (Dkt. No. 82) ("Plaintiff's Response to Emergency Motion to Amend").

First, the eleven-month-old standing declaration offered by Appellee described the injuries to a single member who occasionally visits the Bull Mountains as including aesthetic and emotional impacts from ground subsidence as well as impact to water sources necessary for someone else's ranching operations; and the declarant's "anger" at coal transportation by train across Montana. Declaration of James D. Jensen ¶¶ 4-14 (Dkt. No. 41-1). These limited injuries have little to do with the claimed deficiencies in the Mine Plan EA and can be addressed with a narrowed injunction.

Second, in Plaintiff's Response to the Emergency Motion to Amend, Appellee asserted that it would suffer injury from global climate change if the injunction is lifted, attaching three declarations. None of the newly filed declarations accompanying the response is from the Appellee or any of its members. Nor do they refer to any imminent injury. Moreover, Appellee's global climate change argument ignores the fact that Signal Peak does not seek wholesale reversal of the district court's injunction; rather, Signal Peak has suggested a tailored injunction that would eliminate impacts to climate change, and impacts to transportation and combustion of the federal coal at issue that might occur before completion of the additional NEPA review.

More specifically, in an attempt to identify potential ways in which the injunction could be appropriately tailored, Signal Peak suggested an injunction in its Emergency Motion to Amend Judgment that would:

1. Allow development operations to continue—tunneling and installing equipment in preparation for mining—that may include displacement of a small volume of federal coal;
2. Preclude other mining of federal coal; and
3. Require stockpiling and preclude shipment and combustion of any federal coal displaced during development operations. Declaration of Bradley Hanson ¶¶ 47-48 (Doc. 70-1).

This compromise solution would avoid any sale, transportation, or combustion of federal coal, and, thus, avoid the harms Appellee alleges. Moreover, the Appellee will suffer no injury by a stay pending appeal.

IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF A STAY.

In addition to the direct hardships to the Mine and its employees, the public interest favors a stay of the injunction. The Mine is responsible for:

- Over 260 well-paid jobs and approximately $3.1 million in wages in south central Montana.

- Approximately $40 million annually in local business transactions.
- Approximately $22 million in annual tax revenue to the State of Montana and Montana counties.
- Approximately $500 million in capital infrastructure investments.
- Tens of millions of dollars in royalty payments under the Federal and State coal leases, with half of the Federal royalties flowing back to the State.

Hanson Decl. ¶ 9 (Dkt. No. 70-1). The current injunction will stop development operations in a part of the Mine by the end of October 2017 and in another portion in March 2018. Longwall mining would be idled indefinitely beginning in June 2019, cutting off tax and royalty revenues to the federal government, the State, and local counties. The economic impacts of lost jobs and tax base for nearby communities like Roundup, Montana, will be substantial.

The public interest is better served by a stay that balances the specific environmental harms alleged by the Appellee and noted by the district court, with the economic and social harms to the Mine, its employees, and southcentral Montana. A stay pending appeal will avoid significant injury to the public interest

pending the Court's consideration of whether the district court erred in failing to consider the equities before ordering a blanket injunction.

REQUEST FOR RELIEF

Signal Peak respectfully requests that the Court stay the district court's August 14 injunction prohibiting Signal Peak from mining federal coal in the Amendment 3 permit boundary pending the Court's review on appeal, and order the district court to (i) set an expedited briefing schedule and date for evidentiary hearing for full development of evidence necessary to weigh the *Monsanto* factors and (ii) enter a narrowly tailored remedy.

DATED October 5, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

In addition, an electronic copy was served by email on counsel for Appellee and the Federal Defendant Appellants given the emergency nature of the motion and that not all counsel may be registered CM/ECF users.

/s/ John C. Martin
John C. Martin

CERTIFICATE OF COMPLIANCE

I hereby certify that this Emergency Motion for Stay is in compliance with Federal Rule of Appellate Procedure 27(d)(2)(A) and Ninth Circuit Rule 27-1(d) (applying the page/word count conversion in Circuit Rule 32-3(2)). The total word count is 4,977, excluding caption, table of contents, table of authorities, and certificates, including the Circuit Rule 27-3 Certificate, Certificate of Service, and Certificate of Compliance. The undersigned relied on the word count of the word processing system used to prepare this document.

/s/ John C. Martin
John C. Martin

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