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

WILDEARTH GUARDIANS, *et al.*, Plaintiffs, v. RYAN ZINKE, in his official capacity of Secretary of the Interior, *et al.*, Defendants, and SPRING CREEK COAL LLC, Defendant-Intervenor.	)	CV 17-80-BLG-SPW-TJC **DEFENDANT-INTERVENOR SPRING CREEK COAL LLC'S RESPONSE TO PLAINTIFFS' OBJECTIONS TO MAGISTRATE CAVAN'S FINDINGS AND RECOMMENDATIONS**

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GLOSSARY OF ABBREVIATIONS

BLM	U.S. Bureau of Land Management
Corps	Army Corps of Engineers
EA	Environmental Assessment
EIS	Environmental Impact Statement
FONSI	Finding of No Significant Impact
GHG	Greenhouse Gas
MDEQ	Montana Department of Environmental Quality
MEIC	Montana Environmental Information Center
MLA	Mineral Leasing Act of 1920
NEPA	National Environmental Policy Act
OSMRE	U.S. Office of Surface Mining Reclamation and Enforcement
OSM#####	Document pages in the Administrative Record, which have the prefix "OSM"
Secretary	U.S. Secretary of the Interior
Spring Creek	Spring Creek Coal LLC

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.3, Defendant-Intervenor Spring Creek Coal LLC ("Spring Creek") submits this Response to Plaintiffs' Objections (ECF 78) to the Findings and Recommendations of Magistrate Judge Timothy J. Cavan.

INTRODUCTION

Plaintiffs object to two aspects of the Findings and Recommendations: (1) the Magistrate Judge's findings that the Office of Surface Mining Reclamation and Enforcement ("OSMRE") did not improperly piecemeal or segment its National Environmental Policy Act ("NEPA") analysis, (*see* ECF 71 at 30-34); and (2) the Magistrate Judge's recommendation that the Court deny Plaintiffs' requested relief of immediately vacating OSMRE's Environmental Assessment ("EA"), Finding of No Significant Impact ("FONSI"), and mining plan decision and enjoining operations at the Spring Creek Mine (*id.* at 41-42). *See* ECF 78 at 1. Plaintiffs are wrong on both counts.

This Court should reject Plaintiffs' objections on segmentation and adopt the Magistrate Judge's findings that OSMRE did not improperly piecemeal its NEPA analysis. OSMRE's EA and FONSI properly evaluated the "proposed action" as required by NEPA—mining of the federal coal in Spring Creek's federal lease MTM-94378. OSMRE also satisfied NEPA by appropriately considering the cumulative impacts of mining federal lease MTM-94378 in conjunction with

current and ongoing mining operations in other state, federal, and private leases at the Spring Creek Mine. While Plaintiffs believe that *past* NEPA analyses for the mine have been inadequate, they cannot use their *current* challenge to OSMRE's EA in this case to collaterally attack past administrative decisions and related NEPA analyses that were not ever challenged within the applicable statute of limitations.

Further, no vacatur or injunction is warranted under the circumstances even if the Court were to find that OSMRE's robust environmental analysis violated NEPA, which it did not. *See* Spring Creek's Summary Judgment briefs (ECF 63 at 25-30 and ECF 69 at 12-15) and Spring Creek's Objections to Magistrate Cavan's Findings and Recommendations (ECF 76 at 26-28). The U.S. Supreme Court made clear in *Monsanto* that there is no presumption that an injunction should issue for a NEPA violation. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010). Instead, Plaintiffs must satisfy the traditional four-factor test before an injunction may issue. *Id.* Plaintiffs have failed to satisfy any of the four factors and, most significantly, Plaintiffs' broad-sweeping request for an injunction goes far beyond the specific NEPA harms they allege in this lawsuit.

Therefore, as set forth in Spring Creek's and Federal Defendants' briefs, the Court should grant the Defendants' Cross Motions for Summary Judgment on all counts and affirm OSMRE's NEPA analysis and mine plan decision in its entirety.

ARGUMENT

I. The Magistrate Judge Properly Found That OSMRE Did Not Improperly Segment or Piecemeal Its NEPA Analysis.

The Magistrate Judge rejected Plaintiffs' argument that OSMRE improperly piecemealed or segmented its NEPA analysis for the challenged mine plan modification upon finding that: (1) the Mineral Leasing Act ("MLA") contemplates incremental expansion of coal mines through the lease modification process, which in this case, defined the proposed action as the mining of federal coal in Spring Creek's new lease MTM-94378; (2) NEPA only requires agencies to consider the cumulative impacts of reasonably foreseeable future actions, which did not include the proposed expansion into the area known as TR1 or other unknown or speculative future mining activities; and (3) OSMRE properly included in its NEPA analysis consideration of Spring Creek's ongoing mining operations in the lease at issue (MTM-94378) as well as in other federal, state, and private coal leases at the Spring Creek Mine. ECF 71 at 30-34. These findings support the conclusion that OSMRE's NEPA analysis was appropriately tailored to evaluate the proposed action and fully satisfied NEPA's requirement to consider connected, cumulative, or similar actions.

A. OSMRE's NEPA Analysis Was Consistent with the Mineral Leasing Act's Framework.

In objecting to the Magistrate Judge's Findings, Plaintiffs once again ignore the statutory and regulatory framework surrounding federal coal leasing. Plaintiffs

erroneously argue that Spring Creek has somehow "gerrymandered [a] series of permit applications" or purposely "evad[ed] preparation of a comprehensive [Environmental Impact Statement] . . . through a series of incremental mine expansions." ECF 78 at 3-4. But that is simply not the case.

Spring Creek has complied with the MLA's statutory and regulatory processes for applying for and obtaining new federal coal leases as the need arises. Each time that Spring Creek has obtained a new federal coal lease, the applicable federal agencies (the Bureau of Land Management ("BLM") and OSMRE) have performed the necessary NEPA analysis at that stage. OSMRE's NEPA duty is not so broad as to require OSMRE to conduct a NEPA analysis to *re-evaluate* mining all coal reserves (federal, state, and private) in the entire area surrounding the Spring Creek Mine every time the mine expands. Proper NEPA analysis has already been conducted for Spring Creek's existing federal leases and prior mining plans. Indeed, Plaintiffs have never before challenged any of the NEPA analyses for Spring Creek's prior leases or mine plans. It was not until WildEarth Guardians challenged OSMRE's 2012 mining plan decision for federal lease MTM-94378 that any complaint about the NEPA analysis for the Spring Creek Mine has been made. *See* ECF 63 at 5.

As the Magistrate Judge properly recognized, the MLA's framework was specifically established to allow for incremental expansion of existing coal mines,

while operating on existing federal leases, in accordance with market demands and the nation's energy needs. *See* ECF 60 at 26; 30 U.S.C. §§ 201(a), 203; 43 C.F.R. § 3432.2(a). Plaintiffs cannot contend that Spring Creek's and Federal Defendants' compliance with the MLA is designed to evade NEPA review.

B. OSMRE's NEPA Analysis Properly Considered the Impacts of Spring Creek's Mining Operations As A Whole.

Contrary to Plaintiffs' assertion (ECF 78 at 8), the EA does not merely make a "brief reference to the existence of the larger mining operation . . . without analysis" in an attempt to downplay the significance of the mining plan decision. OSMRE's EA and FONSI analyzed the impacts of mining the *entire* MTM-94378 lease in sequence with mining other federal, state, and private coal leases that were already part of Spring Creek's overall mining plan and approved permits. *See, e.g.,* OSM10723-28; OSM10735; OSM10738.

For example, OSMRE's air quality analysis—which is the focus of Plaintiffs' NEPA challenge—was based on an estimated annual production level for the entire Spring Creek Mine, recognizing (1) Spring Creek's plan to mine the MTM-94378 lease *along with* coal in eight other state, federal, and private leases at a total rate of 18 million tons per year, and (2) Spring Creek's ability to mine up to 30 million tons per year and remain within the limits of its current air quality permit. OSM10723-28; OSM10734; OSM10738; OSM10775-84. In other words,

OSMRE analyzed the environmental impacts for mining all *approved* permit areas at the Spring Creek Mine.

Plaintiffs mischaracterize certain language in the FONSI to support their argument that OSMRE improperly "considered *only* the impacts of the 503.7-acre expansion[.]" ECF 78 at 8. But their cited quotation is taken out of context and ignores the rest of the FONSI, which makes clear, "OSMRE evaluated the possible issues in context of past, present, and reasonably foreseeable actions, *including past, present, and reasonably foreseeable mining* for the [Spring Creek Mine] and other mining operations in the region[.]" OSM10698 (emphasis added). The FONSI specified that the proposed action was "authorizing *continuation* of mining operations for approximately 9 more years and *additional* surface disturbance of approximately 504 acres . . ." OSM10694 (emphasis added).

The EA, FONSI, and administrative record therefore support the Magistrate Judge's conclusion that OSMRE's NEPA analysis did not improperly piecemeal or segment the proposed action to minimize its impacts.

C. Plaintiffs' Cited Cases Do Not Alter The Magistrate Judge's Findings And Recommendations on Segmentation.

Plaintiffs rely entirely on three cases for their argument that OSMRE improperly piecemealed or segmented its NEPA analysis. *See* ECF 78 at 2-5 (citing *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985); *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005); *Cady v. Morton*, 527 F.2d 786,

793 (9th Cir. 1975)). But none of these cases is on point. And because the factual circumstances surrounding OSMRE's approval of Spring Creek's mining plan modification are vastly different, the cases actually support the Magistrate Judge's finding that OSMRE's analysis was properly tailored to evaluate the proposed action.

In *Thomas*, the court evaluated whether a timber road and future timber sales were sufficiently related (*i.e.* "connected actions" or "cumulative actions") so as to require combined treatment in a single EIS that covers the cumulative effects of the road and the sales. 753 F.2d at 757. In its analysis of "connected" and "cumulative" actions, the court recognized that the road's purpose was to "access the timber lands to be developed over the next twenty years." *Id.* at 758. Applying Ninth Circuit precedent, the court considered whether (1) the "dependency" between the road and the timber sales "is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken"; or (2) the road had "independent utility . . . such that the agency might reasonably consider constructing only the segment in question." *Id.* at 759-60 (quotations and citations omitted). The *Thomas* court concluded that the road did not have independent utility and therefore severance of the road from the timber sales for purposes of NEPA was impermissible. *Id.* at 760.

Here, by contrast, there is no "related" proposed or future action that OSMRE should have considered as "dependent" on the approval of the mining plan for MTM-94378. The mining plan has "independent utility" – *i.e.* to authorize Spring Creek to exercise its valid existing rights to mine for and remove coal from the BLM-issued MTM-94378 lease. Plaintiffs concede that their reference to the potential expansion area known as TR1 was not made for the purpose of identifying a future connected action that should be analyzed under *Thomas'* holding. *See* ECF 78 at 7. Rather, Plaintiffs now suggest that the identification of TR1 "was intended to be an example of the agencies' broader failure to conduct a comprehensive analysis." *Id.* But as discussed in Spring Creek's and Federal Defendants' briefs, NEPA does not require a broad-sweeping analysis of speculative, future development. It requires an analysis of the proposed action and cumulative actions, which OSMRE properly analyzed. *See* OSM10769 (OSMRE properly recognized in its Cumulative Impacts analysis that the TR1 application has been pending before the Montana Department of Environmental Quality ("MDEQ") since September 2013).

In *Save Our Sonoran*, a land developer proposed to construct an upscale, gated residential community on 608 acres, which included about 31.3 acres of washes and arroyos that required dredge and fill permits from the Army Corps of Engineers ("Corps"). 408 F.3d at 1118. The developer had submitted an

application for a permit covering 66 different projects across the various washes and arroyos in the development area. *Id*. The Corps issued an EA and FONSI "that examined only the washes rather than the entire project." *Id.* The court concluded (1) that the Corps had the responsibility to analyze the entire project area, including the impacts of developing non-jurisdictional land adjacent to jurisdictional waters; and (2) the developer's submission of an application covering 66 different permit sites did not alter the Corps' responsibility to analyze the entire 608 acres. *Id.* at 1121-22.

Similarly, in *Cady,* the Secretary had approved two coal leases covering almost 31,000 acres of tribal land. 527 F.2d at 789. No state permitting was involved, and the *only* NEPA analysis for the mine—done at the mine plan stage—covered only 770 acres (a fraction of one 16,000-acre lease). *Id.* The Ninth Circuit held the NEPA analysis in that case to be inadequate because it failed to cover "the entire project contemplated by the leases which the Secretary approved." *Id.* at 795.

Here, unlike in *Save Our Sonoran* and *Cady*, OSMRE's NEPA analysis followed BLM's and MDEQ's prior environmental analysis and considered impacts from mining the *entire* MTM-94378 lease "in sequence with mining other state and private coal leases" (OSM16984) that were already part of Spring Creek's overall mining plan and approved state permits. *See*, *e.g.,* OSM16987;

OSM16972-77; *see also* OSM17023 (discussing cumulative impacts of development at nearby coal mines, as well as development of coalbed natural gas). Neither Spring Creek's single mining plan application nor OSMRE's NEPA analysis sought to cover or analyze less than "the entire project contemplated by the leases." *Cady*, 527 F.2d at 795. Therefore, as the Magistrate Judge correctly found, Plaintiffs' reliance on *Save Our Sonoran* and *Cady* is misplaced. ECF 71 at 32.

In sum, Plaintiffs' objections to the Magistrate Judge's finding that OSMRE did not improperly segment its NEPA analysis are without merit and should be rejected. The Court should adopt the Magistrate Judge's Findings and Recommendations on this claim.

II. The Magistrate Judge Properly Recommended Denial of Plaintiffs' Requested Remedy.

The Magistrate Judge rejected Plaintiffs' requested remedy that the Court immediately vacate the EA, the FONSI, and the mining plan approval, and immediately enjoin further mining in the MTM-94378 expansion area. ECF 71 at 41. The Magistrate Judge properly found that the "reasoning previously articulated by this Court [that vacatur 'would have detrimental consequences for [Spring Creek] and its employees, for the State of Montana, and for other agencies involved in this process'] continues to be valid today." *Id.* Ultimately, the Magistrate Judge recommended that vacatur be deferred for a period of 240 days

from the date of the final order from this Court and, during this time, Federal Defendants should be directed to correct the NEPA violations found in the Magistrate Judge's Findings and Recommendations. *Id.* at 41-42.

For the reasons set forth in Spring Creek's summary judgment briefs and objections, any recommendation for vacatur or injunctive relief is unwarranted. First, OSMRE's NEPA analysis was legally sufficient and should be upheld in its entirety. Second, Plaintiffs have failed to meet their burden of satisfying the traditional four-factor test for permanent injunctions. Most significantly, the harms to Spring Creek, its employees, the surrounding communities, the environment, and the State of Montana far outweigh the fly-specking NEPA harms that Plaintiffs suggest.

A. There is No Presumption that an Injunction Should Issue for a NEPA Violation.

The U.S. Supreme Court made clear in *Monsanto* that there is no presumption that an injunction should issue for a NEPA violation. 561 U.S. at 157. "No such thumb on the scales is warranted." *Id*. Subsequently, the Ninth Circuit recognized that *Monsanto* "undermine[s] the theoretical foundation for [the Ninth Circuit's] prior rulings on injunctive relief in *Thomas*, [753 F.2d 754] and its progeny" and, therefore, the court can no longer presume irreparable injury in the NEPA context. *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1090 (9th Cir. 2015); *W. Watershed Project v. Abbey*, 719 F.3d 1035, 1054 (9th

Cir. 2013) ("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. Def. Council, Inc*., 555 U.S. 7, 31-33 (2008)). The Plaintiffs bear the burden to "satisfy" the four-factor test "before a court may grant [a permanent injunction]." *Id*. at 156. The Plaintiffs 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 (quoting *eBay Inc. v. MercExchange, L.L.C*., 547 U.S. 388, 391 (2006)). "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." *Id*. 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); *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir.

2017), *rev'd and remanded on other grounds*, 138 S. Ct. 2392 (2018). 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. Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012); *see also Or. Nat. Desert Ass'n v. Sabo*, 854 F. Supp. 2d 889, 897 (D. Or. 2012) ("the court may not presume irreparable harm upon . . . a finding of a NEPA . . . violation." (citing *Flexible Lifeline Sys. v. Precision Lift, Inc*., 654 F.3d 989, 994-1000 (9th Cir. 2011))). It simply is not the case that "any potential environmental injury warrants an injunction." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotation and citation omitted).

"Whether agency action should be vacated depends on how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed." *Cal. Cmtys. Against Toxics*, 688 F.3d at 992 (internal quotation and citation omitted). Put differently, "courts may decline to vacate agency decisions when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *League of Wilderness Defenders/Blue Mts. Biodiversity Project v. U.S. Forest Serv.,* 2012 WL 13042847, at *2 (D. Or. Dec. 10, 2012). *See also Beverly Hills Unified Sch. Dist. v. Fed.*

Transp. Admin., 2016 WL 4445770 (C.D. Cal. Aug. 12, 2016) (holding vacatur was not appropriate in case in which supplemental EIS was ordered in light of disruptive consequences of delaying subway extension project).

B. Plaintiffs Cannot Satisfy the Four-Factor Test for Obtaining Injunctive Relief.

1. Plaintiffs Will Not Be Irreparably Harmed.

Plaintiffs contend that irreparable harm will result from continued mining at the Spring Creek Mine because there will be (1) land surface disturbed by coal mining, and (2) climate change impacts. ECF 78 at 11-14. Plaintiffs, however, did not challenge OSMRE's NEPA analysis based on these alleged harms. Plaintiffs did not challenge OSMRE's analysis of the surface disturbance at the mine (including related impacts to vegetation, water quality, erosion, etc.). Nor did Plaintiffs challenge OSMRE's analysis of greenhouse gas ("GHG") emissions *impacts* from coal transportation or combustion. *See* ECF 38 at 6-8, 11-16.

Plaintiffs instead challenged OSMRE's decision to forgo analysis of broad-sweeping impacts related to rail transportation (i.e. impacts to wildlife, vegetation, air and water quality, and other impacts such as noise and rail congestion). ECF 38 at 6. Noticeably absent from Plaintiffs' objections are *any* alleged irreparable harms arising from rail transportation similar to those harms Plaintiffs claim OSMRE failed to analyze. Plaintiffs have not identified any particular species of plants or wildlife or any environmentally sensitive areas that would be irreparably

harmed by coal transportation, let alone any particular rail line route that would contribute to such irreparable harm. Nor could they. Because Spring Creek coal is transported across thousands of miles of rail lines all over the United States and into various Canadian provinces, it is entirely speculative and practically impossible to attribute any of these broad-sweeping impacts as being *caused by* the transportation of Spring Creek's coal from federal lease MTM-94378.

In addition, as it relates to GHG emissions from coal combustion, Plaintiffs only challenged OSMRE's failure to do a cost-benefit analysis using the Social Cost of Carbon Protocol to analyze the impacts of GHG emissions on climate change. ECF 38 at 11-16. Plaintiffs did not contend that OSMRE's NEPA analysis failed to analyze, quantify, or disclose to the public the *impacts* from GHG emissions. The procedural decision to forgo a cost-benefit analysis—which is not required by NEPA—cannot lead to the conclusion that irreparable harm would result from mining and combusting this coal. On the contrary, OSMRE analyzed the climate change impacts, concluded they would not be significant *over the life of the mining operations*, and Plaintiffs only challenged this conclusion on the basis that the economic analysis of the impacts was insufficient. *See id.* Plaintiffs have made no showing that they would suffer irreparable harm in the months it would take for OSMRE to undertake any additional NEPA analysis or to do a cost-benefit analysis, if required to do so by this Court.

Lastly, Plaintiffs have challenged OSMRE's decision not to analyze the localized non-GHG air quality impacts from the combustion of Spring Creek coal at power plants across the United States, Canada, and Asia. ECF 38 at 8-10. Plaintiffs' objections broadly claim that combustion of Spring Creek's coal will cause irreparable harm because "dangerous pollution" would be emitted, leading to premature death and sickness. ECF 78 at 11-12. But this broad, speculative allegation concerning future harms is insufficient to warrant injunctive relief because Plaintiffs have failed to show that its members will suffer any particularized irreparable harm from non-GHG emissions emitted from burning Spring Creek coal during the time is takes for OSMRE to complete additional NEPA analysis, if required. *See Monsanto*, 561 U.S. at 163 (court may not relieve party seeking injunction of making specific evidentiary showing of irreparable harm).

Moreover, Plaintiffs' broad claim of harms fails to acknowledge that the power plants combusting Spring Creek's and other mines' coal are regulated by the U.S. Environmental Protection Agency and various state and local governments, which impose strict pollution control requirements and air permit limitations that are designed to protect the public's health and the environment. Plaintiffs have not alleged that any of the power plants which combust Spring Creek coal are out of compliance with their air quality permits, let alone that Plaintiffs' members will

suffer irreparable harm from any such noncompliance. In sum, Plaintiffs have entirely failed to satisfy their evidentiary burden of showing irreparable harm to their members.

In a Final Order issued last year by the Montana District Court's Great Falls Division in *Western Organization of Resource Councils v. U.S. BLM*, No 4:16-cv-00021-BMM, Final Order, ECF 124 (D. Mont. July 31, 2018), attached as Exhibit A, the court addressed the appropriate remedy upon finding that the BLM had violated NEPA when it analyzed the environmental impacts of two resource management plans, which authorized present and future oil and gas and coal mining development. Plaintiffs had requested injunctive relief, which would have enjoined future oil and gas and coal development approvals and ongoing operations on existing oil and gas and coal leases. *See W. Org. of Res. Councils v. U.S. BLM*, No 4:16-cv-00021-BMM, Plaintiffs' Remedy Brief, ECF 115 at 1-2 (D. Mont. May 25, 2018), attached as Exhibit B.

In support of their request, the plaintiffs in that case alleged irreparable harm based on surface disturbance and climate change impacts caused by GHG emissions from fossil fuel combustion. *Id.* at 9 ("Once coal is strip-mined, and oil and gas resources are drilled and extracted, they cannot be put back—the injury will therefore be irreparable." (quotations omitted)); *id.* at 11 ("the worsening impacts of climate change from continued large-scale fossil fuel combustion—

including from issuance of new leases during remand that lock-in years of emissions—constitutes irreparable harm."). The court rejected these alleged irreparable harms and denied the plaintiffs requested relief finding that the "Plaintiffs have failed to demonstrate an irreparable injury, or that that [sic] the balance of hardships favors a more restrictive injunction." Exhibit A at 3-4.

As in the *Western Organization of Resource Councils* case, this Court should also find that no irreparable harm would result from continued mining, transporting, and combusting Spring Creek's coal pending the preparation of any additional NEPA analysis the Court may require.

2. Additional NEPA Analysis Is An Adequate Remedy For A NEPA Violation.

NEPA is a procedural statute. It does not mandate certain results. NEPA's "twin aims" are to ensure that members of the public and the agency are adequately informed in their decision-making process. *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). Plaintiffs' claims in this lawsuit are strictly NEPA claims—*i.e.* that OSMRE failed to consider or adequately inform the public about certain impacts from the mining plan approval. If NEPA violations are indeed found by this Court, a remand for additional NEPA analysis of the particular impacts Plaintiffs have identified would adequately remedy Plaintiffs' alleged NEPA harms. *See Cal. Cmtys. Against Toxics*, 688 F.3d at 992 (vacatur of an agency's decision is not the presumptive remedy for a NEPA violation).

3. A Balance of the Equities Does Not Favor An Injunction.

The balance of the equities does not favor an injunction because the harms to Spring Creek, its employees, the State of Montana, and the environment far outweigh the harms arising from the few alleged procedural NEPA violations. *See* ECF 63 at 25-30.

As discussed above, Plaintiffs have failed to identify any particularized irreparable harm that is related to the alleged NEPA violations. By contrast, vacatur of the mining plan would require Spring Creek to immediately halt all mining and reclamation operations in federal lease MTM-94378. *See* 30 C.F.R. § 746.11(a) ("[n]o person shall conduct *surface coal mining and reclamation operations* on lands containing leased Federal coal until the Secretary has approved the mining plan." (emphasis added)). Vacatur of the Spring Creek mining plan modification would cause serious injury to Spring Creek's economic interests and its 280 employees, the surrounding communities, and the environment. *See* ECF 63 at 27-29; ECF 63-2, Declaration of David Schwend, at ¶¶ 13-21; ECF 63-3, Letter from Steve Bullock, Governor of Montana. If the Court were to vacate Spring Creek's mine plan modification, all operations at the Spring Creek Mine must cease immediately. ECF 63-2 at ¶ 9. Spring Creek would be forced to lay off approximately 95% of its employees. *Id.* ¶¶ 16-17. These layoffs would have a

significant adverse impact on Spring Creek's employees, their families, and their communities. *Id.*

In addition, if the mining plan is vacated and operations must cease, Spring Creek may be unable to meet its commitments under existing commercial agreements. *Id.* ¶ 19. The Spring Creek Mine would lose the economic benefit of its previous investments in land, leases, equipment, and other capital expenditures made in reliance on the mining plan approval, including the $19,902,200 bonus Spring Creek paid for lease MTM-94378. *Id.* ¶ 20. Moreover, the Federal and Montana governments would lose approximately $56 million per year in tax and royalty payments. *Id.* ¶ 18.

Plaintiffs' suggested remedy of "partially vacat[ing]" the mining plan so as to only enjoin mining operations, but not reclamation operations (ECF 78 at 18) is (1) contrary to the law that requires a valid mining plan in place for *mining and reclamation* activities (*see* 30 C.F.R. § 746.11(a)), and (2) ignores the practical realities of surface mine reclamation, which is entirely dependent on the continued advancement of mining so that the overburden removed from one section of the mine to access the coal may be used as backfill in the previously mined out section. ECF 63-2 at ¶ 14.

Moreover, Plaintiffs' suggestion that Spring Creek could fund ongoing reclamation activities through its reclamation bond (ECF 78 at 18) has no basis in

federal or Montana bonding laws. Reclamation bonds do not serve as some sort of savings account that the Mine can access whenever it needs to; instead, only the State of Montana can access the bond amounts through a bond forfeiture proceeding *if* Spring Creek has failed to meet its reclamation or other bonding obligations to the State of Montana. *See* Mont. Code Ann. § 82-4-223(a) ("the operator shall file with the department a bond *payable to the state of Montana* . . ." (emphasis added)); Mont. Admin. R. 17.24.1117 – 1120 (addressing bond forfeiture).

Plaintiffs' alternative suggested remedy of enjoining the shipping and burning of federal coal pending remand (ECF 78 at 20) should also be rejected. As discussed above, Plaintiffs have failed to identify particularized and specific potential irreparable harm that is related to coal transportation or combustion. Plaintiffs have not identified any species, watershed, or environmentally sensitive area (*see* ECF 38 at 6) that would be irreparably harmed by shipping Spring Creek coal during remand. Nor have Plaintiffs shown that any of the power plants combusting Spring Creek coal have violated their air quality permits or exceeded pollution emission limits, which are specifically designed to protect public health. And, in any event, neither Spring Creek, OSMRE, nor the Court have authority over whether these power plants can burn the Spring Creek coal they have previously purchased under valid, existing contracts.

As a result, any injunction that prohibits the shipping or burning of Spring Creek's federal coal from lease MTM-94378 would not be narrowly "tailored to remedy the specific harm alleged" by Plaintiffs—i.e., the alleged procedural NEPA violations that relate solely to the alleged failure to inform the public of downstream, indirect impacts that are already regulated by other federal agencies. *Park Village Apartment Tenants Ass'n*, 636 F.3d at 1160; *Hawaii*, 878 F.3d at 701.

Moreover, in the *MEIC* case, the ordered remedy did not halt mining operations or require layoffs at Signal Peak's mine because Signal Peak had adequate private coal reserves to keep mining. *See MEIC v. OSMRE*, No. 9:15-cv-00106-DWM, Signal Peak Energy LLC's Emergency Brief In Support of Motion To Amend Judgment, Motion for Remedies Hearing, and Motion to Stay Injunction Pending Remedies Hearing, ECF 70 and 70-1 (D. Mont. Sept. 11, 2017), attached as Exhibit C. Signal Peak explained that as of September 2017 it had sufficient private coal reserves to continue mining through June 2019 – well beyond the time it would take for OSMRE to complete any NEPA analysis on remand. Exhibit C, ECF 70-1 at 8, ¶ 34. Therefore, Signal Peak itself requested the limited injunctive relief ultimately ordered by the court because the minimal tons of federal coal that would be displaced while mining private coal were not necessary to keep the mine operating or to meet contractual obligations. *See id.* ¶¶ 47-49.

By contrast, Spring Creek does not have adequate private reserves that it can mine pending remand. ECF 63-2 at ¶¶ 9-10. An injunction preventing Spring Creek from shipping its federal coal would cause drastic, irreparable economic injury to Spring Creek, its employees, and the surrounding communities. This harm far outweighs the severity of OSMRE's alleged analytical violations. Even if the Court finds that OSMRE violated NEPA, the equities disfavor vacatur or any injunctive relief.

4. The Public Interest Would Be Disserved By An Injunction.

There is a strong public interest in keeping the Spring Creek Mine open and operating. Spring Creek employs hundreds of people in Montana and is one of the largest contributors to the state's treasury through payment of applicable taxes and royalties. ECF 63-2 at ¶¶ 16, 18.

The potential harm to the public if mining were enjoined is so great that Governor Steve Bullock of Montana has written to express his "concern[] about the potential impacts this litigation could have for employees of the Spring Creek Mine and for nearby communities" and his "hope[] that any resolution… can be achieved without unnecessary disruption to the operations and the employees of the Spring Creek Mine." ECF 63-3.

While there is a public interest in Federal Defendants' compliance with its NEPA obligations (*see* ECF 78 at 15), the public interest could be served through a

remand order requiring additional, specific NEPA analysis. An injunction is not necessary.

CONCLUSION

For the reasons stated above, the Court should reject both of Plaintiffs' objections. Spring Creek requests that the Court grant the Defendants' Cross Motions for Summary Judgment on all counts and affirm OSMRE's NEPA analysis and mine plan decision in its entirety.

Dated this 22nd day of April, 2019.

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EXHIBIT LIST

Exhibit	Description
A	*W. Org. of Res. Councils v. U.S. BLM*, No 4:16-cv-00021-BMM, Final Order, ECF 124 (D. Mont. July 31, 2018)
B	*W. Org. of Res. Councils v. U.S. BLM*, No 4:16-cv-00021-BMM, Plaintiffs' Remedy Brief, ECF 115 (D. Mont. May 25, 2018)
C	*MEIC v. OSMRE*, No. 9:15-cv-00106-DWM, Signal Peak Energy LLC's Emergency Brief In Support of Motion To Amend Judgment, Motion for Remedies Hearing, and Motion to Stay Injunction Pending Remedies Hearing, ECF 70 and 70-1 (D. Mont. Sept. 11, 2017)

CERTIFICATE OF COMPLIANCE

The undersigned, Andrew C. Emrich, certifies that this Response complies with the requirements of Rules 7.1(d)(2) and 72.3. 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 5,341 words, excluding the caption, the tables, exhibit index, and certificates of compliance and service. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Andrew C. Emrich
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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2019, I electronically filed the foregoing document, Defendant-Intervenor Spring Creek Coal LLC's Response to Plaintiffs' Objections to Magistrate Cavan's Findings and Recommendations, with the clerk of the court for the United States District Court for the District of Montana using the CM/ECF system.

/s/ Kristina R. Van Bockern
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