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ATTORNEYS FOR SIGNAL PEAK ENERGY, LLC

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

350 MONTANA, MONTANA ENVIRONMENTAL INFORMATION CENTER, SIERRA CLUB, WILDEARTH GUARDIANS, Plaintiffs, vs. DEB HAALAND, in her official capacity as Acting Secretary of the Department of the Interior, UNITED STATES OFFICE OF SURFACE MINING, an agency within the U.S. Department of Interior, et al, Defendants. and SIGNAL PEAK ENERGY, LLC, Defendant-Intervenor.	Case No. 9:19-cv-00012-DWM **SIGNAL PEAK ENERGY, LLC'S BRIEF ON THE CONSEQUENCES OF VACATUR AND THE NEED FOR AN EVIDENTIARY HEARING**

INTRODUCTION

Plaintiffs 350 Montana, Montana Environmental Information Center, Sierra Club, and Wildlife Guardians (together "MEIC") seek to vacate the Office of Surface Mining's approval of a mine permit amendment and enjoin mining federal coal at Signal Peak Energy's Bull Mountains Mine. Prohibiting mining federal coal will cause significant and immediate harm: the risk of employee injury and death will increase, carbon emissions will rise, and the State of Montana, the federal government, and local communities will lose hundreds of millions of dollars in tax and royalty revenues. A federal coal mining moratorium also risks permanent mine closure, gambling with the lives of 235 Montanans and their families. Enjoining this mining will yield no environmental benefit. Signal Peak will mine non-federal coal during remand, or, if forced to close, the global market will immediately replace its coal production (approximately 0.08% of annual global coal production). Thus, the equities strongly favor maintaining the status quo and denying MEIC's request to halt federal coal mining during remand. Regardless, an evidentiary hearing should be held on any disputed fact before vacatur or a moratorium can be ordered.

BACKGROUND

The Mine. This Court is well-versed in the mine's history. *See MEIC v. OSM*, 274 F. Supp. 3d 1074, 1082-85 (D. Mont. 2017). The Office of Surface

mining first approved Amendment 3 in 2015 and is on track to complete a ***fourth*** environmental review, per the Ninth Circuit's remand order. *350 Mont. v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022).

Courts have rejected attempts to shut down the mine.[1] In 2017, this Court considered the mandatory *Monsanto* factors and found that an injunction on mining federal coal was not warranted. *MEIC v. OSM*, 2017 U.S. Dist. LEXIS 182814 (D. Mont. Nov. 3, 2017). Again in 2020, this Court declined to enjoin mining. *350 Mont. v. Bernhardt*, 443 F. Supp. 3d 1185, 1202 (D. Mont. 2020).[2]

Remand & Potential Suspension of Federal Coal Mining. Employing 235 area residents, the mine is responsible 69% of Musselshell County's and 12% of Yellowstone County's tax revenues. **Ex. C**, Declaration of Parker Phipps ¶¶ 22,

[1] The Ninth Circuit rejected Plaintiffs' NEPA challenges to the underlying leases. *N. Plains Res. Council, Inc. v. BLM*, 725 Fed. App'x. 527 (9th Cir. Feb. 27, 2018). The Montana Board of Environmental Review and state courts have repelled every effort to suspend Amendment 3 mining. **Ex. A**, Final Order, *In the Matter of: Appeal Amendment Application AM3, Signal Peak Energy LLC's Bull Mountains Mine No.1, Permit No. C1993017*, Case No. BER 2016-07 SM (AM3 Final Order) (judicial review pending, *Mont. Env't Info. Ctr. v. MDEQ*, Case. No. DV-56-2022-0000722-JR, 2022 Mont. Dist. (July 21, 2022)). Recently, both the Montana Department of Environmental Quality and Office of Surface Mining rejected Plaintiffs' "citizen complaints." **Ex. B**, Citizen Complaint Correspondence.

[2] The Court found a single NEPA error in the Office of Surface Mining's second EA—the failure to adequately assess the risk of train derailments, which analysis was provided in a third supplemental EA. *See* Final EA (Oct. 2020), *available at* https://www.osmre.gov/laws-and-regulations/nepa/projects.

26 (based on estimated 2023 coal prices). Checkerboard mineral ownership means that federal coal is integral to the mine plan (i.e., 30% of the permitted federal coal reserves). *Id*. ¶ 8. Signal Peak has already engaged with the Office of Surface Mining to prepare an Environmental Impact Statement, which will take approximately two years to complete. *Id*. ¶ 33.

Without access to federal coal, the mine will have two dire choices when the longwall reaches federal coal in October 2023—(1) shut down or (2) if market conditions allow, move the longwall to non-federal coal, abandoning federal (and associated state and private coal). During the estimated two years needed to prepare the Environmental Impact Statement, Signal Peak would need to conduct two unscheduled longwall moves, increasing safety risks, greenhouse gas emissions, and costs. Phipps Decl. ¶¶ 8, 10-12.

If Signal Peak can feasibly make these additional longwall moves in the next two years, it will abandon 11.7 million tons of coal (including associated state and private coal),[3] resulting in approximately $174 million in lost taxes and royalties, and $24 million in damages to Signal Peak. Phipps Decl. ¶¶ 8, 27 32. Indirect

[3] Once the longwall moves around the federal coal, it can never again be safely mined with current mining methods. Phipps Decl. ¶ 9.

costs to the local economies will be much higher—$444 million. **Ex. D**, Declaration of Timothy Considine ¶ 22.

If an injunction on mining federal coal extends beyond two years, Signal Peak will be forced to lay off its entire 235-person workforce and close the mine. *Id*. ¶¶ 21, 24. Federal coal is much more prevalent in subsequent panels, and the mine cannot feasibly operate while constructing recovery rooms, disassembling, moving, and reassembling the longwall every quarter. *Id*. ¶¶ 21, 23-24.

ARGUMENT

I. MEIC BEARS THE BURDEN OF DEMONSTRATING AN INJUNCTION IS WARRANTED.

Vacatur and injunction both require weighing the equities to determine the appropriate remedy. *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").

"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." ECF No. 84 (quoting *Nat'l Family Farm Coal v. EPA*, 966 F.3d 893, 929 (9th Cir. 2020)). Vacatur itself is "clearly a form of equitable relief that the Court may award, withhold, and craft to fit the circumstances of the case

before it." *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1105-06 (E.D. Cal. 2013) (summarizing Ninth Circuit law on vacatur as an equitable remedy), *see, e.g., Cook Inletkeeper v. Raimondo*, 541 F. Supp. 3d 987 (D. Alaska 2021) (crafting partial vacatur to fit equities).

Even if vacating the Environmental Assessment or part of the federal mine plan is appropriate, an injunction prohibiting federal coal mining is not automatic. "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.'" *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1054 (D.C. Cir. 2021). To take the extraordinary step of enjoining mining, the Court must weigh the equitable factors. MEIC's failure to demonstrate any one of the four factors militates against an injunction. *See MEIC v. OSM*, 2017 U.S. Dist. LEXIS 182814 (D. Mont. Nov. 3, 2017).

Under either test, the equities weigh heavily against MEIC given (1) the absence of environmental benefit from an injunction, (2) the major disruption, economic damages, and safety concerns to the mine, (3) hundreds of millions of dollars in lost revenue to the federal, state, and local governments, and (4) the

heightened risk of mine closure. This is particularly true where the remand arises from a NEPA procedural error limited to one issue, and the agency is likely to reaffirm Amendment 3 approval, as it has on three separate occasions in two different administrations.[4]

II. EQUITABLE CONSIDERATIONS FAVOR THE STATUS QUO.

A. Bypassing Federal Coal Increases Environmental and Safety Impacts Without Decreasing Emissions.

1. Avoiding Federal Coal Requires Extra Longwall Moves, Increasing Environmental Impacts.

MEIC will surely argue that continued mining will mean combustion of Signal Peak's coal in Asia, associated greenhouse gas emissions, global climate change, and irreparable injury to its members. The problem with MEIC's argument is that (1) greenhouse gas emissions of coal combustion will ***not*** change if the Court grants an injunction; and (2) an injunction requiring additional longwall moves will ***increase*** regional emissions and other environmental impacts from the mine.

If the mine closes, Signal Peak's customers will immediately replace Signal Peak's production from any of a multitude of sources in the international coal

[4] Amendment 3 has been approved three separate times by two prior federal administrations (Feb. 2015, May 2018, Oct. 2020) and nothing suggests the current administration will make a different decision on the basis of the narrow remand.

market. Considine Decl. ¶ 11. Signal Peak's 7.5 million tons is easily replaced in the nearly 9-billion-ton international coal market. *Id*.[5] Thus, an injunction will have ***no*** effect on coal combustion emissions. Similarly, if Signal Peak continues to mine in the next two years but is required to bypass federal coal,[6] the mine's annual production would not materially change.

A two-year injunction requiring two additional longwall moves will ***increase*** regional greenhouse gas emissions from equipment used in those moves. Each move requires the construction of an underground recovery room, requiring significant amounts of concrete and steel (the production, delivery, and use of which also produces greenhouse gas emissions). Two more recovery rooms will require approximately 22,000 cubic yards of cement, equivalent to 2,200 fully loaded cement trucks, and over 968,000 pounds of steel which alone costs

[5] Because Signal Peak's annual production only amounts to approximately 0.08% of the nearly nine-billion-ton global thermal coal market, removing Signal Peak coal from the market will have no effect on coal use or prices. Asian utilities would replace Signal Peak coal with coal from other sellers, and emissions would remain at current levels. Considine Decl. ¶¶ 5, 11.

[6] The mine is currently set to reach a small portion of federal coal at the end of Panel 9 in March 2023. Phipps Decl. ¶ 13; *see also* Ex. 1. Signal Peak has already constructed a recovery room at the end of Panel 9, and the longwall is too close to that recovery room to safely prepare another recovery room before reaching the federal coal. If enjoined from mining the federal coal at the end of Panel 9, Signal Peak will be forced to abandon all 185 longwall shields in the panel and allow the mine to collapse around them, resulting in significant economic losses. *Id.* ¶¶ 14-15.

$4 million.[7] Phipps Decl. ¶ 12. Thus, paradoxically, an injunction would increase regional greenhouse gas emissions without reducing global emissions.

2. Avoiding Federal Coal Presents Unnecessary Safety Risks.

Despite Signal Peak's commitment to safety and the use of all reasonable precautions, underground mining is a dangerous job, and moving the longwall system is easily the most dangerous aspect of this mining operation. Phipps Decl. ¶ 11. Not only is there an increased risk of roof or wall failure as the longwall is removed and repositioned, the task of disassembling and moving equipment weighing more than 10,000 tons (the equivalent weight of ***fifty*** Boeing 747 airplanes) through narrow enclosed underground spaces leads to increased risk of serious injury or even death.[8] *Id*. If the mine were to survive the economic consequences of a moratorium on federal coal mining over the next two years, enjoining Signal Peak from recovering federal coal will require the mine to scrap its existing mine plan and conduct at least two additional longwall moves, thereby exposing Signal Peak's employees to unnecessary and significant safety risks.

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[7] *See, e.g.*, "Concrete needs to lose its colossal carbon footprint," NATURE (Sept. 28, 2021), available at https://www.nature.com/articles/d41586-021-02612-5.

[8] *See also* "Hazards When Transporting Off-Track Equipment," Coal Mine Safety and Health Administration, P11-05 (Mar. 2011), available at https://arlweb.msha.gov/regs/complian/PIB/2011/pib11-05.asp.

B. Suspending Federal Coal Mining Will Cause Permanent Loss to Montana, the Federal Government, and Private Entities.

Signal Peak will be forced to abandon approximately 11.7 million tons of federal, State, and private coal if the mine is forced to bypass federal coal over the next two years. Phipps Decl. ¶ 17. The State will also permanently lose approximately $126 million in taxes and royalties because the mine will never return to recover this bypassed coal. *Id*. ¶ 27. Moreover, the federal government will lose approximately $27 million and private lessors will lose $20 million in royalties (the latter of which may give rise to lessor litigation seeking associated damages). *Id* ¶ 27. Finally, building the infrastructure necessary to safely perform two longwall moves will cost Signal Peak an additional $24 million. *Id*. ¶ 10. Again, these costs cannot be recovered. In total, bypassing federal coal will result in direct losses of approximately $200 million to the above parties. *Id*. ¶ ¶10, 27.

C. An Injunction of Federal Coal Mining Puts the Mine at Risk of Closure with Devastating Economic Impact.

While Signal Peak has every intention of continuing to operate the mine to employ its 235-person workforce, suspending federal coal mining puts the mine at significant risk of permanent closure. Phipps Decl. ¶ 21. Stated simply, the mine cannot withstand the significant costs of extraneous longwall moves and the permanent abandonment of coal reserves if current coal prices (which increased recently) revert to historic levels. *Id*. Mine closure would have a dramatic effect

on local communities, most significantly in Roundup, but also in neighboring Yellowstone County. Considine Decl. ¶ 24. Two years of no federal coal production would result in 1,734 jobs lost and the loss of $889 million in real value. *Id.* The mine shutting down permanently would result in the loss of $4.4 billion in real value added for the Montana economy. *Id.* When weighed against the minimal, if any, impacts to MEIC by maintaining the status quo, and the fact that the Office of Surface Mining is likely to approve (for the fourth time) Amendment 3 after the additional review, the environmental, safety, and economic impacts of a federal coal mining moratorium are far too great to warrant vacatur or an injunction.

III. PAST TRANSGRESSIONS BY FORMER SIGNAL PEAK EMPLOYEES HAVE NO BEARING ON THIS COURT'S ASSESSMENT OF THE EQUITIES.

MEIC points to past transgressions by former Signal Peak employees as a basis for vacatur. This "unclean hands" argument fails as a matter of fact and law.

A. MEIC's Accusations Are Not Relevant to the Court's Assessment of the Equities.

Even if the "unclean hands" doctrine were available in this case,[9] simply identifying past misconduct is not sufficient to prevail. Instead, MEIC must

[9] The doctrine only applies as an affirmative defense, and Signal Peak identifies no precedent of a plaintiff employing the doctrine in a NEPA case. *See Aguayo v. Amaro*, 213 Cal. App. 4th 1102 (2013); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1340

demonstrate that the alleged inequitable conduct ***directly relates to the subject matter of this action***. *DCR Mktg. v. U.S. All. Grp., Inc.*, 2022 U.S. Dist. LEXIS 230860, *24-25 (C.D. Cal. Dec. 22, 2022) (citation omitted); *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 668 (9th Cir. 2012) ("The misconduct that brings the clean hands doctrine into play must relate directly to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice."); *Meridian Financial Services, Inc. v. Phan*, 67 Cal. App. 5th 657, 685-686 (2021) ("The determination of whether the unclean hands defense applies 'cannot be distorted into a proceeding to try the general morals of the parties.'"). Accordingly, "[w]hat is material is not that the plaintiff's hands are dirty, but that he dirtied them in acquiring the right he now asserts, or that the manner of dirtying renders inequitable the assertion of such rights against the defendant." *Republic Molding Corp. v. B. W. Photo Utils.*, 319 F.2d 347, 349 (9th Cir. 1963).

Here, MEIC does not (because it cannot) establish a nexus between the alleged misconduct and the present action. In effect, MEIC asserts that ***any*** past

(10th Cir. 1982) (barring plaintiff's NEPA claim on basis of unclean hands where "it was unjust and inequitable to allow the [plaintiff] to use NEPA" when it was clear the plaintiff was motivated by "its desire to obtain the maximum possible compensation" rather than sincere environmental concerns).

transgressions by ***former*** Signal Peak employees, no matter how remote to the present action and regardless of whether such misconduct has any relation to Signal Peak's mine expansion, should bear on this Court's equitable decision. But no court has endorsed this standard.

B. MEIC Misrepresents the Facts.

MEIC mischaracterizes the facts surrounding these unrelated, past transgressions. With respect to the criminal activities identified by MEIC, ***Signal Peak was the victim, not the bad actor***. Rogue Signal Peak personnel stole over $20 million from Signal Peak over an 8-year period through a well-orchestrated, complex scheme of fraud and theft. **Ex. E,** Declaration of Brian Murphy ¶ 3. When these criminal activities were discovered, Signal Peak and its owners took swift and comprehensive action, terminating ***all*** employees involved in this criminal conduct, installing new executive leadership, revising internal policies, and implementing procedures to ensure that similar wrongdoing will not recur. *Id.* ¶¶ 4-15. Signal Peak ultimately settled misdemeanor charges relating to this misconduct, and the Assistant U.S. Attorney lauded Signal Peak's cooperation with the investigation at the sentencing hearing. *Id.* ¶¶ 13, 15. The Assistant U.S. Attorney explained that the U.S. Attorney's Office agreed to the misdemeanor charges based on Signal Peak's cooperation and "willingness to change both

management and the structure of Signal Peak in terms of making sure that what happened there does not happen again." *Id*.

With respect to the unpermitted slurry disposals that occurred in 2013 and 2015, DEQ ordered monitoring to confirm there was no impact to surface water and no other environmental hazards resulting from these disposals; SPE complied with all requests. Murphy Decl. ¶ 6. Further, as the Department of Environmental Quality explained: "Such disposal could be accomplished within the law, provided the operator first received an approved minor revision from Montana Department of Environmental Quality (DEQ) and a permit from the Mine Safety and Health Administration (MSHA)." **Ex. F**, Order of Abatement (Dec. 7, 2021). Signal Peak fully complied with the Order of Abatement, and the Department of Environmental Quality terminated its prior notice of noncompliance.

All told, Signal Peak has fully cooperated with every regulator at every stage of each investigation and continues to implement significant remedial measures to ensure legal and ethical compliance and best management practices at the mine.

IV. TO THE EXTENT MEIC DISPUTES RELEVANT FACTS, AN EVIDENTIARY HEARING IS APPROPRIATE.

In this case, the Ninth Circuit determined that "[a]dditional factfinding is necessary to determine whether vacatur of the [Amendment 3] approval is warranted at this juncture." *350 Mont. v. Haaland*, 50 F.4th 1254, 1273 (9th Cir.

2022). This Court previously held an evidentiary hearing before crafting the equitable relief in MEIC's first challenge to Amendment 3, noting that "an evidentiary hearing is generally required before issuing a permanent injunction 'unless the adverse party has waived its right to a hearing or the facts are undisputed.'" *MEIC v. OSM*, 2017 U.S. Dist. LEXIS 182814, *4 n.1 (Nov. 3, 2017) (quoting *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1139-40 (9th Cir. 2006) *rev'd on other grounds,* Monsanto, 561 U.S. 139). Here, Signal Peak does not waive its right to a hearing. To the extent MEIC disputes the facts summarized in this brief and set out in more detail in Signal Peak's supporting declarations, an evidentiary hearing is needed.

CONCLUSION

MEIC has failed to meet its burden to demonstrate that suspending federal coal mining is warranted. An injunction would not change coal combustion emissions, but rather would cause increased regional emissions, unnecessary safety risks to Signal Peak miners, and economic damages to the company and federal, state, and local government. An injunction also risks mine closure. Thus, the equities weigh heavily against an injunction and in favor of the status quo.

Dated this 20th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2023, 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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