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

350 MONTANA, et al.,)	No. 9:19-cv-00012-DWM
)	
Plaintiffs,)	FEDERAL DEFENDANTS'
)	BRIEF REGARDING
v.)	VACATUR
)	
DEBRA HAALAND, in her official)	
capacity as Secretary of the United States)	
Department of the Interior, et al.,)	
)	
Federal Defendants,)	
)	
and)	
)	
SIGNAL PEAK ENERGY, LLC,)	
)	
Defendant-Intervenor.)	
_____)	

INTRODUCTION

Federal Defendants hereby respond to the Court's December 15, 2022 Order, ECF No. 84, instructing the parties to provide their positions regarding the issue of vacatur. The Ninth Circuit remanded to this court two issues: (1) whether the Office of Surface Mining Reclamation and Enforcement ("OSMRE") should be ordered to prepare an environmental impact statement ("EIS") to address the National Environmental Policy Act ("NEPA") violations found by the Ninth Circuit, and (2) whether vacatur of the Department of the Interior's approval of Signal Peak's mining plan modification is warranted at this time. *350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022). As the court is aware, OSMRE has decided to prepare an EIS to address the deficiencies in its earlier NEPA analysis identified by the Ninth Circuit. As such, the only remaining issue before the court is whether vacatur of the current mining plan modification should be deferred while OSMRE prepares the EIS and the Department issues a new mining plan modification. OSMRE currently expects the preparation of an EIS and the issuance of a new decision regarding a mining plan modification to take approximately twenty months. Declaration of Marcelo Calle ¶ 7. As discussed below, Federal Defendants support deferring vacatur pending OSMRE's completion of those actions.

BACKGROUND

Plaintiffs challenged OSMRE's August 3, 2018 mining plan modification for the Bull Mountains Mine No. 1 ("Bull Mountains Mine"), asserting claims under NEPA and the Endangered Species Act ("ESA"). This Court ruled on summary judgment that OSMRE should have conducted additional analysis of the potential risk of train derailments but otherwise rejected Plaintiffs' arguments under NEPA, including the claim that the agency's analysis of greenhouse gas ("GHG") emissions was insufficient. *See* March 9, 2020 Opinion and Order at 4-25, ECF No. 59. The Court also ruled in favor of the government on the ESA claims. *Id.* at 25-31. The Court vacated the 2018 Environmental Assessment ("EA"), but not the Department's approval of the mining plan approval, and remanded to OSMRE for further proceedings. *Id.* at 32. Plaintiffs appealed.

On appeal, the Ninth Circuit held that OSMRE's analysis of GHG emissions violated NEPA. *See 350 Montana*, 50 F.4th at 1264-70. Specifically, the Ninth Circuit ruled that the agency failed to support its finding of no significant impact ("FONSI") because, although the EA "thoroughly supported the relationship between GHG emissions and climate change" and disclosed the total GHG emissions generated over the lifecycle of the mine, OSMRE failed to substantiate its conclusion in the FONSI that such emissions would be minor. *Id.* at 1265-1266, 1269. The court rejected Plaintiffs' argument that the agency was required to use a

social cost of carbon metric in its analysis of GHG emissions, but it ruled that the agency must provide some science-based standard for determining the significance of those emissions. *Id.* at 1266, 1271-72.

The Ninth Circuit remanded to this Court with instructions to reconsider, based on the existing record, whether to order an EIS or remand to the agency so that it may determine in the first instance the appropriate level of NEPA analysis. *Id.* at 1272-73. And it directed this Court to undertake additional factfinding to determine whether vacatur of the mining plan modification approval is warranted. *Id.* at 1273.

ARGUMENT

I. The Court Should Remand the Matter to OSMRE to Prepare Additional NEPA Analysis.

The first issue to be addressed on remand has been overtaken by events, because OSMRE has already opted to prepare an EIS to address the deficiencies identified by the Ninth Circuit. Calle Decl. ¶ 5. Based on the parties' representations at the hearing in December, Federal Defendants understand that that Plaintiffs do not object to OSMRE's preparation of an EIS, and Signal Peak also does not object so long as the mining plan approval at issue is not vacated in the interim. Accordingly, this issue appears to be resolved subject to the Court's resolution of the deferred vacatur proposal discussed below.

II. The Equities Favor a Deferred Vacatur While the Agency Prepares an EIS and Reaches a New Decision.

Federal Defendants estimate that, once the matter is remanded to OSMRE, it will take approximately twenty months for OSMRE to go through the steps necessary to prepare an EIS and for the Department to issue a new decision regarding the mining plan modification for the Bull Mountains Mine. *See Calle Decl.* ¶¶ 6-7.

Federal Defendants estimated schedule is as follows:

Activity	Approximate Timeline
Publish Notice of Intent to prepare an EIS in the Federal Register	Two months from Court’s order
Publish Notice of Availability of a Draft EIS in the Federal Register	Six months after Notice of Intent
Publish Notice of Availability of the Final EIS in the Federal Register	Six months after Notice of Availability of Draft EIS
Sign Record of Decision	Three months after Notice of Availability of Final EIS
Decision on the mining plan modification issued by the Assistant Secretary for Land and Minerals Management	Three months after Record of Decision

Id. ¶ 8. This timeline incorporates a short period of time to allow the Assistant Secretary to review the Final EIS, Record of Decision, and other materials, and to issue a decision regarding the mining plan modification. *Id.*

The Court should defer vacatur of the mining plan modification pending OSMRE’s NEPA process and new decision regarding the Bull Mountains Mine.

Vacatur of a challenged action does not automatically flow from a NEPA violation. “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. Cmty. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (internal quotation marks and citation omitted). “[W]hen equity demands,” an agency’s decision may “be left in place while the agency follows the necessary procedures.” *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995).

Consistent with these principles, numerous courts have deferred vacatur or remanded without vacatur after balancing the equities and assessing the seriousness of the agency’s legal deficiencies. *See Montana Environmental Information Center v. Haaland*, No. CV 19-130-BLG-SPW, 2022 WL 4592071, at *13 (D. Mont. Sept. 30, 2022) (deferring vacatur for 19 months for the agency to complete a corrective EIS and issue a new mining plan); *WildEarth Guardians v. Haaland*, No. CV-17-80-BLG-SPW, 2021 WL 4133949, at *1-2 (D. Mont. Sept. 10, 2021) (extending deadline for the government to complete a corrective NEPA analysis and deferring vacatur during that time); *WildEarth Guardians v. U.S. OSMRE*, No. CV 14-13-BLG-SPW, 2016 WL 259285, at *3 (D. Mont. Jan. 21, 2016) (deferring vacatur pending corrective NEPA analysis); *WildEarth Guardians v. Steele*, 545 F. Supp. 3d 855, 885 (D. Mont. 2021) (remanding a NEPA document

without vacatur); Order Granting Federal Defendants’ Motion for Voluntary Remand, ECF 98 at 9, *WildEarth Guardians v. OSMRE*, No. 1:14-cv-00112 (D.N.M. Aug. 31, 2016) (granting OSMRE’s motion for voluntary remand and deferred vacatur to prepare an EIS within three years).

As in those cases, the legal errors identified by the Ninth Circuit are not so serious as to warrant vacatur. On summary judgment, this Court rejected most of the NEPA arguments advanced by Plaintiffs, and the Ninth Circuit reversed only as to the analysis of GHG emissions.¹ *See 350 Montana*, 50 F.4th at 1269-73. Further, the court rejected the Plaintiffs’ argument that OSMRE was required to use a social cost of carbon metric in its NEPA analysis and instead remanded to OSMRE to conduct a further analysis using a methodology of the agency’s choosing. *Id.* at 1272. That OSMRE has already begun the process of attempting to correct the legal errors identified by the Ninth Circuit on remand—including by preparing an EIS on remand—counsels in favor of deferring any vacatur to

¹ To the extent Plaintiffs proffer evidence of alleged transgressions by the operator to show a history of misconduct, *see, e.g.*, Plaintiffs’ Response to Order on Special Master, ECF No. 90, at 4-10, such evidence is irrelevant to the vacatur inquiry because it is unrelated to the NEPA violations identified by the Ninth Circuit. Further, such other legal violations and alleged violations have been addressed, or are being addressed, in separate legal proceedings. In addition, to the extent that Plaintiffs may rely on alleged violations of the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), Plaintiffs may pursue such allegations through the applicable mechanisms in the statute. Specifically, Plaintiffs must first notify OSMRE of alleged violations, and if the agency fails to act, then Plaintiffs may file a citizen suit against OSMRE. *See* 30 U.S.C. §§ 1267(h)(1), 1270.

accommodate OSMRE's ongoing decision process. *See Nat'l Family Farm Coal. v. U.S. EPA*, 966 F.3d 893, 929 (9th Cir. 2020) (remanding without vacatur where the agency would "likely be able to offer better reasoning" on remand and "could adopt the same rule on remand" (internal quotation marks and citation omitted)).

The equities similarly favor a deferred vacatur while the agency conducts its analysis. *See, e.g., Wildearth Guardians*, 2021 WL 4133949, at *2 (deferring vacatur after balancing the equities). The mining plan modification has been in place since 2018, and Federal Defendants seek only to keep that modification in place an additional twenty months to complete a corrective NEPA process to address the issues identified by the Ninth Circuit. Federal Defendants expect that Signal Peak will offer additional information regarding the impacts of vacating the mining plan modification for the Bull Mountains Mine.

CONCLUSION

For the foregoing reasons, Federal Defendants request that vacatur of OSMRE's mining plan modification be deferred for twenty months to allow the agency to prepare an EIS and reach a new decision regarding the mining plan modification.

Respectfully submitted this 20th day of January, 2023

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/s/ Luther L. Hajek

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2023, I electronically filed the foregoing Federal Defendants' Brief Regarding Remedy with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Luther L. Hajek _____
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