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Wildearth Guardians v. United States Office of Surface Mining, Reclamation and Enforcement

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***Wildearth Guardians v. United States Office of Surface Mining,
Reclamation and Enforcement*, No. CV 14-13-BLG-SPW, 2016 WL
259285, 2016 U.S. Dist. LEXIS 7223 (D. Mont. Jan. 22, 2016)**

Hallie E. Bishop

Wildearth Guardians v. United States Office of Surface Mining, Reclamation and Enforcement sprung from the approval of a modified mining plan for the Spring Creek Mine in Montana. *Wildearth Guardians* is the adoption of Magistrate Judge Ostby's Findings and Recommendations by United States District Judge, Susan Watters concluding that the Office of Surface Mining, Reclamation and Enforcement violated several provisions of NEPA.

I. INTRODUCTION

At issue in *Wildearth Guardians v. United States Office of Surface Mining, Reclamation and Enforcement* is whether the Office of Surface Mining, Reclamation and Enforcement ("OSMRE") violated the National Environmental Policy Act ("NEPA") by approving an amended mining plan for the Spring Creek Mine.¹ This Order and Opinion is an adoption of United States Magistrate Judge Carolyn S. Ostby's Findings and Recommendations.² Collectively, WildEarth Guardians and Northern Plains Resource Council, Inc. ("Plaintiffs") argued that the Defendants failed to provide notice of the Finding of No Significant Impact ("FONSI") to the public and failed to take the required "hard look" at the impacts of the mining plan as required by NEPA.³ OSMRE, joined by the State of Montana, and Spring Creek, L.L.C. ("Defendants"), argued the Plaintiffs' claims lack merit, and the Plaintiffs waived their claims because they failed to alert OSMRE of their concerns until filing this action.⁴ Judge Ostby found that the Defendants violated the applicable NEPA provisions and that the Plaintiffs did not waive their claims.⁵ United States District Judge Susan P. Watters of the United States District Court for the District of Montana adopted Judge Ostby's Findings and Recommendations, granting in part the Plaintiffs' motions

1. *Wildearth Guardians v. U.S. Office of Surface Mining, Reclamation and Enforcement*, No. CV 14-13-BLG-SPW, 2016 WL 259285 (D. Mont. Jan. 22, 2016) (opinion and order) [hereinafter *Wildearth Guardians II*].

2. *Id.* at *4.

3. *Id.* at *8.

4. *Id.* at *5.

5. *Id.* at *21.

for summary judgment and denying the Defendants' motions for summary judgment.⁶ Additionally, Judge Watters gave the Defendants 240 days to remedy the amended mining plan to comply with NEPA provisions.⁷

II. FACTUAL AND PROCEDURAL HISTORY

The Spring Creek Mine is a surface coal mine located in Big Horn County, Montana.⁸ The Spring Creek Mine has been mined since 1980.⁹ In 2005, Spring Creek Coal, L.L.C. filed an application to lease an additional 1,200 acres to extend the life of the mine.¹⁰ The Bureau of Land Management ("BLM") prepared and completed an Environmental Assessment ("EA") for the additional acres.¹¹ BLM issued the lease to Spring Creek Coal.¹² Subsequently, Spring Creek Coal submitted a permit application with the Montana Department of Environmental Quality ("DEQ") and OSMRE.¹³ The DEQ approved the permit to expand the Spring Creek Mine.¹⁴ In 2012, OSMRE issued a one page FONSI for the mining plan modification based on the 2006 EA report without further explanation or elaboration.¹⁵ On June 27, 2012, the mining plan modification was formally approved by the Assistant Secretary of the Interior.¹⁶ The mining plan modification extended the mine onto federal land, and increased the life of the mine for approximately eleven years, which would produce an added 117 million tons of federal coal.¹⁷

This action was originally filed in the United States District Court for the District of Colorado, along with additional challenges to other mine plans.¹⁸ The Colorado District Court severed all claims

6. *Wildearth Guardians v. U.S. Office of Surface Mining, Reclamation and Enforcement*, No. CV 14-14-BLG-SPW-CSO, 2015 WL 6442724, at *1 (D. Mont. Oct. 23, 2015) (finding and recommendations) [hereinafter *Wildearth Guardians I*].

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at *2.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at *1.

related to the Spring Creek Mine and transferred them to the Montana District Court.¹⁹ A hearing was conducted on the summary judgment motions filed with the court. Judge Ostby entered Findings and Recommendations to the presiding judge, Judge Watters.²⁰ The Defendants then objected to Magistrate Judge Ostby's Findings and Recommendations.²¹ Judge Watters reviewed de novo the Defendants' objections, rejected the objections, and adopted Judge Ostby's Findings and Recommendations with one exception pertaining to the remedy.²² Under Judge Watters order, the Defendant's have 240 days, rather than the recommended 180 days, to correct the NEPA violations by an updated EA.²³

III. ANALYSIS

NEPA is the national policy aimed at identifying environmental impacts and promoting harmony between humanity and the environment.²⁴ This procedural statute provides government agencies with a process to evaluate the environmental consequences of particular government actions.²⁵ NEPA requires that government agencies take a hard look and consider all environmental impacts of a proposed action, and that relevant information be made available to the public.²⁶ Courts defer to agency expertise if the agency's decision is informed and well-considered.²⁷

The Plaintiffs argued that the Defendants failed to give the required notice to the public of the environmental impacts related to the expansion of the Spring Creek Coal Mine.²⁸ NEPA, the Council of Environmental Quality, and the Department of Interior regulations all provide that public notice or involvement is required when evaluating an

19. *Id.*

20. *Id.*

21. *Wildearth Guardians II*, 2016 WL 259285, at *1.

22. *Id.*

23. *Id.* at *3.

24. *Wildearth Guardians I*, 2015 WL 6442724, at *5 (citing Dept. of Transp. v. Pub. Citizen, 541 U.S. 752, 756-57 (2004)).

25. *Id.* (citing High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 639-40 (9th Cir. 2004)).

26. *Id.* (citing Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 97 (1983); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)).

27. *Id.* (citing Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998)).

28. *Id.* at *1.

agency's environmental impacts report.²⁹ The United States Court of Appeals for the Ninth Circuit has not established a standard as to how much public involvement is required by these regulations, but has found that failure to inform or involve the public about an agency's preparation of its environmental report violates these regulations.³⁰ Judge Ostby concluded that the Defendants violated these regulations because the record included no suggestion of public notice of the FONSI.³¹ No notice was provided by the Defendants to the public regarding the existence of the FONSI, nor could these documents be found.³² Therefore, Judge Ostby recommended that the Plaintiff's motions be granted based on lack for public notice.³³

In their objection to Judge Ostby's recommendation, the Defendants argued that failure to provide public notice was harmless error.³⁴ However, an error cannot be harmless if it prevents public evaluation of the environmental impact of a project.³⁵ Failure to keep the public informed of environmental decisions contradicts one of the goals of NEPA, which is to ensure that members of the public are provided sufficient information about the environmental impacts of a particular project.³⁶ Judge Watters concluded that failure to provide public notice of the FONSI was not harmless error because it impaired the public's evaluation of the FONSI.³⁷ Therefore, Judge Watters adopted Judge Ostby's recommendation and granted the Plaintiff's motion in regard to the lack of public notice.³⁸

Next, the Plaintiff's argued that the Defendants failed to take a "hard look" at the possible environmental impacts of the expansion of the Spring Creek Coal Mine.³⁹ Based on an EA, an agency must provide a FONSI to explain why the proposed agency action will have no significant environmental impact.⁴⁰ When a court reviews a decision to

29. *Id.* at *6. (citing *Baltimore Gas & Elec. Co.*, 462 U.S. at 97; 40 C.F.R. § 1501.4(b) (2016); 43 C.F.R. §§ 46.30, 46.305(c) (2016)).

30. *Id.* (citing *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003)).

31. *Id.* at *7.

32. *Id.*

33. *Id.*

34. *Wildearth Guardians II*, 2016 WL 259285, at *1.

35. *Id.* at *2 (citing *Lands Council v. Powell*, 395 F.3d 1019, 1037 n.25 (9th Cir. 2005)).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Wildearth Guardians I*, 2015 WL 6442724, at *1.

40. *Id.* at *7 (citing *Pub. Citizen*, 541 U.S. at 757-58).

not prepare an Environmental Impact Statement and instead to issue a FONSI, it must determine “whether the agency has taken a ‘hard look’ at the consequences of its actions,” and “provide a convincing statement of reasons to explain why a project’s impacts are insignificant.”⁴¹ Judge Ostby found that the Defendants failed to analyze the mine expansion impacts because the FONSI neglected to explain how the defendants took a “hard look” at the impacts of the proposed mining expansion.⁴² The FONSI simply stated that based on the 2006 EA, the OSMRE had “adequately and accurately” analyzed the provided sufficient evidence and properly found no significant impact.⁴³ Judge Ostby concluded that such language did not comply with the regulations.⁴⁴ Therefore, Judge Ostby recommended that the Plaintiff’s motion be granted concerning the Defendants’ failure to take the requisite “hard look.”⁴⁵

The Defendants objected to Judge Ostby’s recommendation arguing that Judge Ostby failed to examine the entire record.⁴⁶ Judge Watters adopted Judge Ostby’s recommendation, stating that the Defendants did not provide a convincing statement of reason explaining why there were no significant environmental impacts.⁴⁷

Lastly, the Defendants argued that the Plaintiffs’ waived their claims because they did not alert the agencies of their concerns until filing their suit.⁴⁸ Generally, a party challenging an agency’s compliance with NEPA must advise the agency to their opposition to allow the agency to give those positions consideration.⁴⁹ Judge Ostby concluded that the Plaintiffs did not waive their claims because the Defendants never gave public notice, and therefore the plaintiffs could not raise their objections in advance of filing suit.⁵⁰ Judge Watters adopted Judge Ostby’s recommendation and denied the Defendants’ waiver argument, noting that the Plaintiffs never had the opportunity to object to the FONSI, and so could not waive their right to challenge it.⁵¹

41. *Id.* (quoting *In Def. of Animals, Dreamcatcher Wild Horse and Burro Sanctuary v. U.S. Dep’t of Interior*, 751 F.3d 1054, 1068 (9th Cir. 2014)).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Wildearth Guardians II*, 2016 WL 259285 at *2.

47. *Id.*

48. *Wildearth Guardians I*, 2015 WL 6442724, at *1.

49. *Id.* at *8. (citing *Pub. Citizen*, 541 U.S. at 764).

50. *Id.*

51. *Wildearth Guardians II*, 2016 WL 259285, at *2

Defendants' violations of NEPA must result in an appropriate remedy to cure those violations.⁵² Judge Ostby found that vacating the mining plan seven years after approval would be detrimental to all the Defendants.⁵³ Judge Ostby concluded that equity warranted the mining plan to remain in force, pending a correction of the errors Defendants committed in the NEPA process.⁵⁴ Judge Ostby recommended that a vacatur be deferred if the Defendants could remedy the NEPA violations within 180 days of the final order.⁵⁵ Judge Watters adopted this remedy and its reasoning in part, giving, instead, the Defendants 240 days to comply with the applicable NEPA provisions before vacatur would be enforced.⁵⁶ In addition, the Defendants were required to file monthly status reports.⁵⁷

IV. CONCLUSION

In conclusion, Judge Ostby determined that the Defendants violated several NEPA provisions which require compliance in order to protect the environment from detrimental effects.⁵⁸ Judge Watters adopted Judge Ostby's Findings and Recommendations in full with one exception.⁵⁹ Although the Spring Creek Mine could suffer repercussion from this decision, it is more likely that OSMRE will take the steps necessary to comply with federal regulations to approve the expansion of the mine. Indeed, OSMRE has already taken significant steps to comply with this decision.⁶⁰ OSMRE has given public notice of a new environmental review, and is soliciting public comments on the mine.⁶¹ OSMRE plans to update, clarify, and take a "hard look" at the environmental impacts of the mine expansion.⁶²

52. *Wildearth Guardians I*, 2015 WL 6442724, at *8.

53. *Id.* at *9.

54. *Id.*

55. *Id.*

56. *Wildearth Guardians II*, 2016 WL 259285, at *3.

57. *Id.*

58. *Id.* at *1.

59. *Id.* at *3.

60. U.S. DEP'T OF THE INTERIOR, U.S. OFFICE OF SURFACE MINING, RECLAMATION AND ENFORCEMENT, PUBLIC NOTICE: SPRING CREEK MINE MINING PLAN MODIFICATION: ENVIRONMENTAL ASSESSMENT (Feb. 11, 2016), *available at* http://www.wrcc.osmre.gov/initiatives/SpringcreekMineLBA1/documents/Public_Notice.pdf.

61. *Id.*

62. *Id.*