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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE and GREATER YELLOWSTONE COALITION, *Plaintiffs*, v. U.S. FOREST SERVICE, *Defendant,* and OTIS CAPITAL USA CORP. *Defendant-Intervenor*.	No. 1:18-cv-504-BLW **ICL's BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT**

INTRODUCTION

In its December 18, 2019 Memorandum Decision and Order, this Court found Defendant U.S. Forest Service's August 20, 2018 Decision Notice and Finding of No Significant Impact (DN/FONSI) and May 2018 Final Environmental Assessment (EA) approving the Kilgore Project were unlawful, and the Court remanded this agency action to the Forest Service to correct the deficiencies. ECF 47, pp. 22–23. Specifically, this Court found that the Forest Service violated NEPA, NFMA, and the Organic Act by failing to gather baseline information, failing to monitor, and failing to adequately consider effects of the Project's effects on groundwater hydrology and Yellowstone cutthroat trout in the Dog Bone Ridge portion of the project site. On January 16, 2020, the Court entered Judgment, directing the case to be remanded to the Forest Service as set forth in the Memorandum Decision and Order. ECF No. 48.

After the Court issued the Memorandum Decision, and again after it entered Judgment, Defendant-Intervenor Otis Gold issued press releases stating the company intends to move forward—during the remand—with mine exploration activities in areas outside of Dog Bone Ridge that were approved under the unlawful DN/FONSI and EA. *See* Second Johnson Declaration (filed herewith), Exs. A & B. Otis Gold asserted that "Otis has a continued legal right to explore at Kilgore under its five-year Plan of Operation and applicable mining law," even while the Forest Service updates its analysis to include more information about Dog Bone Ridge. *Id.* Ex. A. Otis's Vice President of Exploration further stated: "We are now in a position to significantly expand exploration at Kilgore unencumbered by the complaint, and will be conducting a significant drill program in 2020." *Id.*

Plaintiffs Idaho Conservation League and Greater Yellowstone Coalition (ICL) respectfully request that the Court alter or amend the Judgment so as to vacate the Forest Service's DN/FONSI and EA and/or to clarify that during remand no exploration activities are

allowed to proceed under the unlawful agency action. Vacatur is the presumptive remedy for unlawful agency action under the APA, *see* 5 U.S.C. § 706(2), and vacatur is appropriate here. There is no guarantee Otis Gold will stay out of Dog Bone Ridge on remand; but even if there were such a guarantee, allowing exploration to proceed short-circuits the NEPA process by prejudging that the Forest Service will make a finding of no significant impact on remand. Such a determination, however, cannot be made until Forest Service adequately gathers, studies, and discloses effects to water quality and Yellowstone cutthroat trout impacts in the Dog Bone Ridge area, or the cumulative impacts of drilling in Dog Bone Ridge when considered together with entire Project. Additionally, without vacatur, the Forest Service can simply paper over the deficiencies in the DN/FONSI and EA during remand without the public participation and scrutiny NEPA requires.

The Court should, therefore, grant ICL's motion and should amend or alter the Judgment to vacate the DN/FONSI and EA and/or should clarify that no exploration can proceed under the unlawful DN/FONSI and EA.

ARGUMENT

I. THE JUDGMENT SHOULD BE ALTERED OR AMENDED TO FIX A CLEAR ERROR AND PREVENT MANIFEST INJUSTICE.

Rule 59(e) permits parties to move to alter or amend a judgment. The rule itself sets forth no substantive standards for granting such a motion. The Ninth Circuit has stated that relief under Rule 59(e) is appropriate if (1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening changing in controlling law. *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1100 (9th Cir. 2010). Rule 59(e) "may not be used to

relitigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008).

The Court should grant ICL's motion under Rule 59(e) because it was clear error to enter Judgment and remand without vacating the Forest Service's DN/FONSI and EA after finding them to be unlawful. As discussed in detail below, vacatur is the presumptive remedy for unlawful agency action, vacatur is the remedy ICL prayed for and requested, and neither the Forest Service nor Otis Gold made any showing of the "rare" or "limited" circumstances that can justify departing from the presumptive remedy.

ICL's motion should also be granted in order to prevent manifest injustice. As discussed in detail below, without vacating the Forest Service's DN/FONSI and EA, the Forest Service can circumvent the NEPA process, including both the requirement to take a hard look *before* approving action and to provide meaningful public participation. This is a manifest injustice because Otis Gold could proceed with ground disturbing activities on remand, including road construction and exploration drilling, that will degrade the environment and make the pre-project environment a thing of the past.

II. VACATING UNLAWFUL AGENCY ACTION IS THE PRESUMPTIVE REMEDY UNDER THE APA

Vacatur of unlawful agency action is the presumptive disposition under the APA, which directs that a "reviewing court *shall* . . . hold unlawful and *set aside* agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (emphasis added).

The Supreme Court has explained that if an agency's decision "is not sustainable on the administrative record made, then the [agency's] decision *must be vacated* and the matter remanded to [the agency] for further consideration." *Camp v. Pitts*, 411 U.S. 138, 143 (1973)

(emphasis added). *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413–14 (1971) ("[*i*]*n all cases* agency action *must be set aside* if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'" (quoting 5 U.S.C. § 706(2)(A) (emphasis added))); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) ("[A plaintiff who] prevails on its APA claim . . . is entitled to relief under that statute, which normally will be a vacatur of the agency's order").

Because vacatur is the presumptive statutory remedy under the APA, any departure from that presumptive remedy would be a form of equitable relief to the agency that has acted unlawfully. *See Curtis v. Loether*, 415 U.S. 189, 194–97 (1974) (distinguishing "legal rights and remedies" created by statute from "equitable relief"). The burden thus is on the defendant agency to show why "equity demands" anything less than vacatur of the unlawful agency action. *See Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1139 (9th Cir. 2006) (a party asserting an equitable defense "must show" that it satisfies all elements of the defense); *Allina Health Servs. v. Sibelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (evaluating and rejecting government arguments that vacatur was inappropriate); *Ctr. for Envtl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL 3383954, at *13 (N.D. Cal. June 20, 2016) ("given that vacatur is the presumptive remedy for a procedural violation such as this, it is Defendants' burden to show that vacatur is unwarranted").

The Ninth Circuit has authorized remand *without* vacatur only in "limited" or "rare" circumstances, and only when the agency opposing vacatur can show that "equity demands" a departure from the presumptive APA remedy. *See Oregon Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 575 (9th Cir. 2016) (directing district court to determine whether this is one of the "rare circumstances" when the agency action should remain in force until reconsidered or

replaced); *Cal. Cmtys; Against Toxics v. EPA*, 688 F.3d 989, 992, 994 (9th Cir. 2012) (per curiam) ("we have only ordered remand without vacatur in limited circumstances"); *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) ("In rare circumstances, when we deem it advisable that the agency action remain in force until the action can be reconsidered or replaced, we will remand without vacating the agency's action."). To determine whether a case presents one of the "limited" or "rare" circumstances where remand *without* vacatur may be appropriate, the Ninth Circuit has explained that courts should consider the (1) "seriousness of the agency's errors" and (2) "the disruptive consequences of an interim change that may itself be changed." *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015); *Cal. Cmtys*., 688 F.3d at 992.

III. THE DN/FONSI AND EA HERE SHOULD BE VACATED.

In the Complaint, ICL prayed for the Court to "[v]acate, set aside, reverse, and remand the EA and DN/FONSI." ECF No. 1, p. 43. And in its Motion for Summary Judgment, ICL asked the Court to grant summary judgment and "vacate, reverse, and remand" the DN/FONSI and EA. ECF No. 30 at 2. Neither the Forest Service nor Otis Gold offered argument opposing vacatur during summary judgment proceedings. Because vacatur is the presumptive remedy for unlawful agency action under the APA, and because the Court found the Forest Service's action approving the Kilgore Project to be unlawful, the Court should grant ICL's motion and should alter or amend the Judgment to vacate the DN/FONSI and EA and/or to clarify that no exploration activities can proceed under the unlawful DN/FONSI and EA.

There are no "limited" or "rare" circumstances warranting a departure from the presumptive remedy of vacatur. In environmental cases, the "rare circumstance" supporting non-vacatur is when leaving the unlawful agency action in place will prevent serious environmental

harm—the opposite of the situation here. *See Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1401–05 (9th Cir. 1995) (leaving unlawful ESA listing rule in place to protect imperiled snail until new listing rule is completed); *Klamath Siskiyou Wildlands Ctr. v. Grantham*, No. 13-16186, 2016 WL 1056556, at *2 (9th Cir. Mar. 17, 2016) (leaving decision in effect while agency completed a new NEPA analysis where vacatur of the challenged decision to issue grazing permits would result in reinstating prior permits containing terms less protective of National Forest).

By contrast, the Ninth Circuit routinely vacates unlawful agency action that would cause adverse environmental harm, even if there are adverse economic effects of vacatur on agencies or private parties. *See, e.g.*, *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1111–12 (9th Cir. 2016) (vacating Record of Decision for mine upon finding NEPA analysis unlawful); *Pollinator Stewardship Council*, 806 F.3d at 532–33 (vacating agency's approval of powerful new agricultural insecticides); *Ctr. for Biological Diversity v. BLM*, 698 F.3d 1101, 1128 (9th Cir. 2012) (vacating decision authorizing gas pipeline upon finding NEPA and ESA violations).

In this case, vacatur will *protect* the environment by ensuring the Forest Service takes a hard look at the impacts of drilling in Dog Bone Ridge and the effects to Yellowstone cutthroat trout, takes public comment, and develops feasible monitoring and mitigation measures for the Project moving forward. Furthermore, there is no evidence in the record that vacatur will have any economically disastrous consequences warranting a departure from the presumptive remedy. In fact, in its press release, Otis Gold indicates that much of the information needed to correct the deficiencies with the DN/FONSI and EA has already been gathered or is readily ascertainable. *See* Second Johnson Decl., Ex. A. Thus, there are no rare circumstances to support deviating from the presumptive remedy of vacatur.

Moreover, vacatur of an unlawful NEPA decision is vital because it forces the agency to make a new decision, after a new NEPA public notice and comment process, properly informed by an accurate understanding of the environmental baseline and effects of the proposed project, and "done under circumstances that ensure an objective evaluation free of the previous taint." *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000) (setting aside decision due to NEPA violations, suspending a whaling contract, and ordering agency to re-start the NEPA process and prepare a new environmental assessment before issuing a new decision). *See also Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1016–17 (9th Cir. 2007) (vacating Clean Water Act permit and remanding to agency where NEPA analysis failed to adequately consider and discuss mining discharges to creek); *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006) (vacating extensions of geothermal leases and decision approving geothermal plant upon finding NEPA violations).

By contrast, leaving an unlawful decision in place allows an agency to engage in a new review simply "'to rationalize or justify decisions already made.'" *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) (quoting 40 C.F.R. § 1502.5). *See also Metcalf*, 214 F.3d at 1146 (requiring a fresh decision because any NEPA analysis done while the agency was under contractual obligation to a developer risked "a classic Wonderland case of first-the-verdict, then-the-trial").

Additionally, "public scrutiny [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b). "NEPA's basic purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is 'almost certain to affect the agency's substantive decision[s].'" *Oregon Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1099 (9th Cir. 2010) (quoting *Robertson*, 490 U.S. at 350) (alteration in original).

"[B]y requiring agencies to take a 'hard look' at how the choices before them affect the environment, and then to place their data and conclusions before the public . . . NEPA relies upon democratic processes to ensure . . . that 'the most intelligent, optimally beneficial decision will ultimately be made.'" *Id*. at 1099–1100 (quoting *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971), internal citation omitted).

In short, NEPA is only effective if environmental considerations, accurate information, and meaningful public participation are involved in the decision-making process *prior to* the federal agency taking action. 40 C.F.R. § 1500.1(b). "[A]llowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007). *See also Metcalf*, 214 F.3d at 1141–42.

Consistent with these principles, Judge Lodge vacated Forest Service DN/FONSIs and EAs in two cases where the Forest Service violated NEPA when it approved a similar mine exploration project. *See ICL v. U.S. Forest Serv.*, No. 1:11-cv-00341-EJL, 2012 WL 3758161 at *7 (D. Idaho Aug. 29, 2012) (vacating and remanding DN/FONSI and EA where Forest Service violated NEPA by failing to take hard look at drilling impacts to groundwater); *ICL v. U.S. Forest Serv.*, No. 1:16-cv-0025-EJL, 2016 WL 3814021 at *17 (D. Idaho, Jul. 11, 2016) (vacating EA and DN/FONSI where Forest Service violated NEPA and NFMA by failing to take hard look at mine exploration impacts to sensitive plant).

Here, until the Forest Service gathers baseline information on groundwater hydrology at Dog Bone Ridge, considers the potential effects to water quality and Yellowstone cutthroat trout, and provides meaningful public participation, there is no way for the agency to take a hard look and objectively determine whether the Kilgore Project may have significant effects as required

by NEPA. Leaving the DN/FONSI and EA in place during remand and allowing Otis Gold to proceed with road construction, drilling, and other exploration activities improperly prejudges the outcome of the remand; it assumes—before an adequate analysis of effects has been completed—that the Forest Service will conclude that there will not be any significant effects and, therefore, that no environmental impact statement is required.

Furthermore, without vacating the DN/FONSI and EA, the Forest Service can cut out the public by simply papering over the deficiencies this Court identified and allowing the Kilgore Project to proceed without the kind of informed public participation NEPA requires. If the DN/FONSI and EA are vacated, the Forest Service will have to inform and engage the public in the environmental review process. *See Ocean Mammal Inst. v. Gates*, 546 F.Supp.2d 960, 972 (9th Cir. 2008) (under NEPA, agency must provide adequate pre-decisional opportunities for informed public involvement in the environmental review process when issuing an EA and FONSI). Vacatur would also require the Forest Service to involve the public in the administrative objection process required by its regulations before it can approve this kind of activity. *See* 36 C.F.R. 219. But without vacating the DN/FONSI and EA, the Forest Service can bypass the public.

Not only would this cut out Plaintiffs, it would cut out other members of the public and interested parties. For example, during the 30-day scoping period for the EA that started back in January 2018, the Idaho Governor's Office of Energy and Mineral Resources submitted comments raising concerns about the Project's potential adverse affects to Yellowstone cutthroat trout and to water quality and quantity, particularly in Corral Creek. *See* AR000428. These are the issues the Forest Service failed to adequately address in the DN/FONSI and EA and must now address. But there has been no public comment since the scoping period in January 2018,

see ICL's SOF (ECF No. 30-1), ¶ 10, and without vacatur there might not be any more opportunities for public involvement.

For these reasons, the DN/FONSI and EA should be vacated.

CONCLUSION

The Court should grant ICL's motion and should alter or amend the Judgment to vacate the Forest Service's unlawful DN/FONSI and EA approving the Kilgore Project and/or to clarify that no exploration activities can proceed under the unlawful DN/FONSI and EA.

Dated this 24th day of January, 2020.

Respectfully submitted,

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