IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WILDEARTH GUARDIANS, *Plaintiff,*	§	
v.	§	**No. 1:14-CV-00112-RJ**
UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, *et al.*, *Federal Defendants,*	§	
and	§	
SAN JUAN COAL COMPANY, *Defendant-Intervenor.*	§	

ORDER GRANTING FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND

BEFORE THE COURT is a Motion for Voluntary Remand filed by Federal Defendants United States Office of Surface Mining, Reclamation, and Enforcement ("OSM"), an agency of the United States Department of the Interior, and the federal officials named as defendants herein (collectively, "Federal Defendants"). (Doc. 91). After due consideration of the Parties' briefing and the relevant law, the Court GRANTS in part Federal Defendants' Motion for Voluntary Remand (Doc. 91) and **REMANDS** this matter to OSM so that it may conduct further environmental analysis under the National Environmental Policy Act ("NEPA") and complete an environmental impact statement ("EIS") within three years from the date of this Order.

I. BACKGROUND

Plaintiff WildEarth Guardians ("Guardians") is a non-profit membership organization based in Santa Fe, New Mexico. (Doc. 1 at 3). Guardians and its members are dedicated to protecting and restoring the wildlife, wild places, and wild rivers of the American West. (*Id.*). In furtherance of these goals, "Guardians and its members work to replace fossil fuels with clean, renewable energy in order to safeguard public health, the environment, and the Earth's climate." (*Id.*). Guardians alleges

that some of its members live, work, recreate, and conduct other activities on lands affected by the mining plan approvals challenged herein. (*Id.*). Guardians claims these individuals have a substantial interest in ensuring they breathe the cleanest air possible as well as keeping "intact ecosystems free from permanent contamination of riverine habitats that destroy fish populations." (*Id.*). According to Guardians, its members are harmed by the aesthetic and environmental impacts of coal mining in New Mexico. (*Id.*).

The Secretary of the U.S. Department of the Interior is the ultimate decision-maker with respect to the mining plan at issue in this case. *WildEarth Guardians v. OSM*, 104 F. Supp. 3d 1208, 1214 (D. Colo. 2015). OSM, an agency of the U.S. Department of the Interior, has the initial responsibility for evaluating the environmental impacts of proposed mining plans or revisions of such plans and for making recommendations to the Secretary. *Id.* The federal officials named as defendants herein are being sued in their official capacities as Western Regional Director of OSM and the Secretary of the Interior. The OSM and the Secretary are both responsible for ensuring compliance with NEPA. *Id.* The intervenor-defendant, San Juan Coal Company, is the company that petitioned for and received the mining plan modifications at issue in this case.

On February 27, 2013, Guardians filed its Petition for Review of Agency Action in the United States District Court for the District of Colorado alleging 15 claims challenging various mining permits located in Colorado, Montana, Wyoming, and New Mexico. (Doc. 1). Specifically, the Complaint challenges the adequacy of OSM's environmental analysis under NEPA and the public participation allowed during agency proceedings. (*Id.*). In part, the Complaint challenges the 2008 approval of a federal mining plan modification known as the "Deep Lease Extension" at the San Juan Mine in San Juan County, New Mexico. (*Id.*).

On February 7, 2014, the New Mexico mine claims were severed and transferred to the United States District Court for the District of New Mexico. (Doc. 32). The Parties completed briefing on the merits in the New Mexico case on December 22, 2014. (Doc. 59). On May 21, 2015,

the Court granted the Parties' joint motion to stay all proceedings to allow the Parties to pursue settlement negotiations. (Doc. 69).

On July 18, 2016, Federal Defendants filed their Motion for Voluntary Remand explaining that "Federal Defendants have determined, based on recent rulings in similar mining plan challenges in Colorado and Montana, that remand is appropriate to allow the agency to conduct a new environmental analysis of project impacts." (Doc. 91 at 2). On August 2, 2016, Guardians filed its Response to the Motion to Remand indicating that Guardians is not opposed to remand with additional constrains imposed by the Court. (Doc. 95). On August 23, 2016, Federal Defendants filed their Reply Brief. (Doc. 97). This matter is now ready for disposition.

II. LEGAL STANDARD

As the Tenth Circuit has noted, "Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980). Upon an admission of error by an agency whose decision has been challenged, courts commonly remand the challenged decision to the agency without considering the underlying merits of the challenge. *See Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010). This is especially true when the agency's change in position results from either (1) new evidence which undermines the stated basis for the challenged action or (2) intervening events outside of the agency's control that have the potential to affect the validity of the agency's challenged action. *Id.* Even in the absence of such circumstances, courts have considerable discretion in determining whether remand is appropriate if the agency has raised a substantial and legitimate concern in support of their request for a remand. *Id.* Accordingly, courts commonly remand the challenged decision to the agency without considering the underlying merits of the challenge. *See Ctr. for Native Ecosystems v. Salazar,* 795 F. Supp. 2d 1236, 1239 (D. Colo. 2011).

Federal law typically directs a court to hold unlawful and to set aside agency action found to be arbitrary, capricious, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). Nonetheless, the Administrative Procedure Act ("APA") preserves the power of the courts to fashion an alternative remedy on other equitable or legal grounds. 5 U.S.C. § 702. Nothing in the APA "restricts the range of equitable remedies available to the Court, including the issuance of declaratory relief without setting aside agency action." *Guardians I*, 104 F. Supp. 3d at 1231 (citing *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1018 (E.D. Cal. 2014)). "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." *Id.* (internal quotation marks and citations omitted).

III. DISCUSSION

In the Motion to Remand, OSM proposes to remedy Federal Defendants' alleged errors by preparing an EIS that rigorously analyzes the reasonably foreseeable impacts of the mining plan approval, including examination of air quality impacts. (Doc. 91). Furthermore, OSM's proposed remedy would allow multiple opportunities for public participation in the development of the EIS, which Federal Defendants previously omitted. (*Id.*). OSM estimates that it will complete the NEPA process and publish a final EIS within three years. (*Id.*). Federal Defendants request that the decision approving the mining plan modification remain in effect and mining operations continue during development of the EIS to avoid adverse work force impacts and revenue disruptions affecting the State of New Mexico and the federal government, which is consistent with the rulings of the U.S. District Courts of Colorado and Montana in *WildEarth Guardians v. OSM*, 104 F. Supp. 3d 1208 (D. Colo. 2015) ("*Guardians I*") and *WildEarth Guardians v. OSM,* Nos. CV14-13-BLG-SPW, CV14-103-BLG-SPW, 2016 WL 259285 (D. Mont. Jan. 21, 2016) ("*Guardians II*").

In its Response to the Motion to Remand, Guardians does not oppose remanding the challenged decision to the agency to prepare an EIS. (Doc. 95 at 2). However, Guardians requests that the Court: (1) impose additional reasonable conditions on the remand Order to ensure the timely

completion of the EIS—specifically, deferred vacatur of the mining plan and quarterly progress reports to the Court by Federal Defendants; (2) declare that Guardians is a prevailing party; and (3) retain jurisdiction over this case to enforce the remand Order. (*Id.* at 2–3). In their Reply Brief, Federal Defendants oppose the additional constraints proposed by Guardians "chiefly because they require resolution of the case on the merits, which would undermine one of the central objectives of a motion for voluntary remand: judicial economy." (Doc. 97 at 2). Accordingly, Federal Defendants ask the Court to enter an order remanding this matter and dismissing it on the specific terms set forth in Federal Defendants' Motion to Remand. (*Id.*).

A. Vacatur

When agency action is found to be legally invalid, the ordinary result is vacatur. *See Salazar*, 734 F. Supp. at 1240 (citing *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)). Federal Defendants request remand without vacatur of their mining plan approval because the San Juan Mine would be harmed by immediate vacatur of the mining plan. (Doc. 91 at 11–12). The courts in the Colorado and Montana cases did not order immediate vacatur of the challenged mining plans, which would have resulted in immediate cessation of mining on federal leases covered by the challenged plan. *Guardians I*, 104 F. Supp. 3d at 1231–32; *Guardians II*, 2016 WL 259285, at *3. Rather, the courts in *Guardians I* and *Guardians II* imposed both a time frame for completion of the NEPA analyses and deferred vacatur of the mining plans until the close of the time period for completing the NEPA analyses. *Id.* Guardians requests the same conditions here. (Doc. 95 at 3).

Federal Defendants argue that the APA does not authorize a court to vacate an agency action without first making a determination, based on a review of the record, that the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A), or that it satisfied one of the other enumerated bases for vacatur under 5 U.S.C. §§ 706(2)(B)–(F). (Doc. 97 at 3). Federal Defendants do not question the appropriateness of vacatur

when agency action has been found legally invalid, as found by the Montana and Colorado courts in *Guardians I* and *Guardians II*. (*Id.*). Rather, Federal Defendants challenge whether vacatur is appropriate when the reviewing court has not made a decision on the merits of the challenged action. (*Id.*). This Court disagrees with Federal Defendants' interpretation of the APA's judicial review provision.

The language of § 706(2) is mandatory, but not exclusive. *See Salazar*, 734 F. Supp. at 1241. It does not expressly limit a reviewing court's authority to set-aside an agency's action. *Id.* Rather, it merely requires a reviewing court to do so in certain circumstances. *Id.* The lack of an express jurisdictional limitation is significant because, as the Supreme Court of the United States has stated, absent an express congressional mandate to the contrary, courts "retain traditional equitable discretion." *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 320 (1982). Because there is no express jurisdictional limitation in the APA, this Court retains its traditional equitable discretion. *Salazar*, 734 F. Supp. at 1241

As the Tenth Circuit has noted, "Vacatur is an equitable remedy. . . and the decision whether to grant vacatur is entrusted to the district court's discretion." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1139 (10th Cir. 2010). Thus, vacation of an agency action without an express determination on the merits is well within the bounds of traditional equity jurisdiction. *See Salazar*, 734 F. Supp. at 1241–42 (citing *Natural Res. Def. Council v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002)). Because vacatur is an equitable remedy, and since the APA does not expressly preclude the exercise of equitable jurisdiction, this Court is not prohibited from granting vacatur without a decision on the merits. *See Salazar*, 734 F. Supp. at 1242.

This Court exercises its equitable discretion in determining whether vacatur is appropriate if OSM does not timely complete required NEPA analysis, as recently ordered by the Colorado and Montana courts in *Guardians I* and *Guardians II*. The Court considers the seriousness of the agency's errors weighed against the disruptive consequences of an interim change. *Guardians I*, 104

F. Supp. 3d at 1231 (citing *Pac. Rivers Council*, 942 F. Supp. 2d at 1018). The Court begins by considering the alleged deficiencies in the agency's action.

Guardians contends that it initiated this litigation in 2013 "to remedy the chronic failure of the Federal Defendants to address the potentially significant environmental impacts of coal mining at the San Juan Mine in northwest New Mexico and to involve the public in their mining-related decision" in accordance with NEPA. (Doc. 95 at 1). In approving the San Juan mining plan challenged in this litigation, Guardians asserts Federal Defendants failed to comply with NEPA in two specific ways: (1) Federal Defendants failed to provide the public with any notice of or opportunity to participate in the NEPA process for the decision approving the San Juan mining plan and instead opted to conduct the NEPA process for the mining plan wholly within the confines of the OSM's Denver office; and (2) Federal Defendants failed to take a hard look at potentially significant environmental impacts, in particular, impacts to air quality from the expansion of coal mining at the San Juan Mine. (*Id.* at 1–2). Guardians alleges that to support the mining plan at issue, the OSM prepared a one-page Finding of No Significant Impact ("FONSI"), which purported to analyze the environmental impacts of expanded coal mining operations at the San Juan Mine "but did nothing more than reference existing NEPA and non-NEPA documents from nearly a decade earlier, [ ] rely[ing] on them for analysis of the environmental impacts of additional mining." (*Id.* at 2). Guardians conclude that "Federal Defendants made no effort to evaluate whether the decade-old documents they relied on were relevant to or sufficient for assessing impacts of mining additional coal from San Juan Mine almost 10 years later." (*Id.*).

In *Guardians I*, Guardians challenged Federal Defendants' approvals of two mining plans expanding mining of coal at two Colorado mines, claiming Federal Defendants failed to comply with NEPA in the same manner alleged in this case. 104 F. Supp. 3d at 1214. Ruling in Guardians' favor on all claims, the Colorado court ordered Federal Defendants to complete the NEPA analysis in 120

days and deferred entering a vacatur order at that time. *Id.* at 1231. The Colorado court in *Guardians I* also ordered that:

> If this process has not been completed within the 120-day window, then an order of vacatur will be immediately effective absent further court order based upon very good cause shown.

Id. Federal Defendants completed the court-ordered NEPA analysis and issued a new mining plan approval within the 120-day time period, rendering vacatur unnecessary.

In *Guardians II*, Guardians challenged Federal Defendants' approval of a mining plan for the Spring Creek Mine in Montana, alleging similar violations of NEPA as in the present case. 2016 WL 259285, at *1. The District Judge in *Guardians II* accepted the Magistrate Judge's recommended remedy with respect to deferred vacatur with the following modifications: (1) Federal Defendants would have 240 days to complete a new NEPA analysis; (2) Federal Defendants were required to file monthly status reports with the court within the 240-day period; and (3) Federal Defendants were allowed to "seek leave to extend the 240-day deadline upon a showing of good cause." *Id.* at *3. Currently, the NEPA process for the environmental assessment remains on schedule for completion within the court-ordered deadline. (Doc. 95 at 4).

The Colorado and Montana courts in *Guardians I* and *II* recognized that remand with vacatur is a typical remedy in APA cases and courts have the discretion to fashion a remedy on equitable grounds. *Guardians I*, 104 F. Supp. 3d at 1231; *Guardians II*, 2015 WL 6442724, at *8. Both courts applied the test for vacatur that balances the seriousness of the agency's errors with "the disruptive consequences of an interim change that may itself be changed" to determine that immediate vacatur of the mining plans was not warranted and instead deferred vacatur to provide incentive for Federal Defendants to complete new NEPA analyses in a timely manner. *Id.*

Here, Federal Defendants seek to invoke the Court's equitable jurisdiction, and therefore, equitable relief is consistent with the deference owed to Federal Defendants' agency action under the APA. Federal Defendants have admitted error in this mining plan challenge based on the recent

rulings of the Colorado and Montana courts against Federal Defendants in *Guardians I* and *II* and their concession that remand is appropriate in order to conduct a new environmental analysis of project impacts that will allow for public participation. (Doc. 91 at 2). Specifically, Federal Defendants admit that OSM needs to prepare an EIS "that rigorously analyzes the reasonable foreseeable impacts of the mining plan approval," including an "examination of air quality impacts," which OSM failed to do previously. (*Id.*). However, the disruptive consequences of an interim change do not justify immediate vacatur. Federal Defendants assert the following with regard to the San Juan Mine in their Motion to Remand:

> The San Juan Mine is the exclusive coal source for the nearby San Juan Generating Station – a 1,683 megawatt power plant – which supplies electricity for approximately two million customers in New Mexico, Arizona, Colorado, Utah, and Southern California. . . . The San Juan Mine employees members of the local community and generates a significant source of revenue for the federal and state government in the form of royalties and income taxes. . . . The mine currently employs 348 hourly employees and 108 salaried employees.

(*Id.* at 4).

In order to avoid potential layoffs, economic losses to the San Juan Coal Company, or potential hardship to the San Juan Generating Station, the Court finds that Federal Defendants' Motion to Remand shall be granted coupled with deferred vacatur of the mining plan and annual status reports to the Court. Federal Defendants' decision approving the mining plan modification shall remain in effect and mining operations shall continue during development of the EIS to avoid adverse work force impacts and revenue disruptions affecting the State of New Mexico and the federal government. This remedy is consistent with the remedies ordered by courts in other districts dealing with similar mining plan challenges. Federal Defendants have committed to completing an EIS for the San Juan Mining Plan in three years. Thus, deferring vacatur of the mining plan to a point three years in the future from the date of this Order is appropriate.

B. Prevailing Party Status

The Equal Access to Justice Act ("EAJA") provides that "a court shall award to a prevailing party other than the United States fees and other expenses. . . unless the court finds the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The term "prevailing party" in this statute is a term of art that courts must interpret consistently throughout the United States Code. *See Buckhannon Bd. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 603 (2001). This definition requires the party to have achieved "a material alteration in the legal relationship of the parties" that is "judicially sanctioned." *Id.* at 604–05 (internal quotation marks omitted).

The material alteration in the legal relationship of the parties must be relief that the would-be prevailing party sought, for "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). *Buckhannon* also emphasized the necessity of a "judicial imprimatur." 532 U.S. at 605. The lodestar of this requirement is that "a plaintiff is [not] a 'prevailing party' if it [only] achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601 (rejecting the so-called "catalyst theory").

Guardians brought the instant case seeking a remand order and an EIS that includes opportunities for public participation prior to a new decision on the mining plan. (Doc. 37 at 18–19). Because Guardians have secured a remand requiring further agency proceedings as a result of Federal Defendants' error, Guardians qualify as a prevailing party. Again, Federal Defendants have admitted error in this mining plan challenge based on the recent rulings of the Colorado and Montana courts against Federal Defendants in *Guardians I* and *II*. (Doc. 91 at 2). Federal Defendants have conceded that remand is appropriate in order to conduct a new environmental analysis of project impacts because OSM failed to previously allow public participation or prepare an EIS "that

rigorously analyzes the reasonable foreseeable impacts of the mining plan approval," including an "examination of air quality impacts." (*Id.*).

The Supreme Court's decision in *Melkonyan v. Sullivan*, 501 U.S. 89 (1991), is directly on point. In that case, the Parties filed cross motions for summary judgment, and during the pendency of these motions, the Secretary urged that the case be remanded to the agency and the district court granted a joint motion to remand. *Melkonyan*, 501 U.S. at 92. In remanding for clarification of the district court order, the Supreme Court ruled in *Melkonyan* that if the district court had intended to retain jurisdiction, the claimant was a prevailing party for the purposes of EAJA. *Id.* at 102. "If petitioner is correct that the court remanded the case" and retained jurisdiction, the Court held, "the Secretary must return to the District Court, at which time the court will enter a final judgment. Petitioner will be entitled to EAJA fees unless the Secretary's initial position was substantially justified." *Id.* Likewise, in *Environmental Defense Fund, Inc. v. Reilly*, 1 F. 3d 1254 (D.C. Cir. 1993), the District of Columbia Circuit held that when the Environmental Protection Agency ("EPA") filed a joint motion with a plaintiff for a remand to comply with notice and comment requirements which the plaintiff had alleged the EPA had violated, the plaintiff was a prevailing party under EAJA. 1 F.3d at 1256–57.

Thus, a consent remand is to be treated the same way as a contested remand. The same prevailing party rules apply. Having secured remand with retention of jurisdiction by this Court, Guardians is a prevailing party for the purposes of the EAJA. Accordingly, Guardians is entitled to attorney's fees. *See Rueda-Menicucci v. INS*, 132 F.3d 493, 495 (9th Cir. 1997) (holding a plaintiff is a prevailing party under EAJA where there has been a voluntary remand to an agency without a judgment on the merits and "the remand order terminated the litigation in favor of the claimant.").

In the Colorado and Montana cases, the courts found that the position of Federal Defendants was not substantially justified and no special circumstances made an award of attorney's fees unjust under 28 U.S.C. § 2412(d)(1)(A). Based on the rulings in the Colorado and Montana cases, Federal

Defendants sought remand in the present case to allow the agency to conduct a new environmental analysis of project impacts and correct its previous errors. The Court finds that Federal Defendants' failure to involve the public and Federal Defendants' omission of a rigorous analysis regarding "the reasonably foreseeable impacts of the mining plan approval," including an "examination of air quality impacts," was not substantially justified. (Doc. 91 at 2). Finally, no special circumstances make the award of reasonable attorney's fees and other expenses under the EAJA unjust. 28 U.S.C. § 2412(d)(1)(A).

It is therefore **ORDERED** that Federal Defendants' Motion to Remand is hereby **GRANTED** in part and the agency decision approving Mining Plan Modification No. 2 is **REMANDED** to the OSM for preparation of an EIS and new decision to be completed within three years from the date of this Order. (Doc. 91). Federal Defendants' decision approving the mining plan modification shall remain in effect and mining operations shall continue during development of the EIS to avoid adverse work force impacts and revenue disruptions affecting the State of New Mexico and the federal government.

It is further **ORDERED** that the Court will defer entering a vacatur order for a period of three years from the date of this Order. Mining Plan Modification No. 2 shall remain in full force and effect during the three-year period of remand. If OSM fails to complete the EIS and a new decision contemplated herein within the three-year window, then an order of vacatur will be immediately effective absent further court order based upon good cause shown.

It is further **ORDERED** that Federal Respondents shall file annual status reports setting forth their compliance with this Order on or before **September 1, 2017**, **September 1, 2018**, and **September 1, 2019**.

It is further **ORDERED** that Guardians is awarded its reasonable attorneys' fees and other expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412. The Court directs the Parties to

confer and attempt in good faith to reach an agreement to determine an amount. If agreement is not reached, the Parties may request an evidentiary hearing on the amount.

It is finally **ORDERED** that the Clerk of the Court administratively **CLOSE** this case, and upon completion of the remand ordered herein by this Court, final judgment shall be entered in accordance with Fed. R. Civ. P. 58.

It is so **ORDERED**.

SIGNED this 31st day of August 2016.

ROBERT A. JUNELL
Senior United States District Judge