STATE OF COLORADO

Simmons - DNR, Leigh <leigh.simmons@state.co.us>

Fwd: Petition for MLRB Hearing - Mountain Coal Co. Permit MR-446

Simmons - DNR, Leigh <leigh.simmons@state.co.us> Fri, Jun 26, 2020 at 7:02 AM
To: "Welt, Kathy" <KWelt@archrsc.com>

Kathy,

Please see attached updated objection to MR-446.

Leigh Simmons
Environmental Protection Specialist
COLORADO
Division of Reclamation, Mining and Safety
Department of Natural Resources

P 303.866.3567 x 8121 | C 720.220.1180 | F 303.832.8106
1313 Sherman Street, Room 215, Denver, CO 80203
leigh.simmons@state.co.us | http://mining.state.co.us/

---------- Forwarded message ---------
From: **Daniel Timmons** <dtimmons@wildearthguardians.org>
Date: Thu, Jun 25, 2020 at 7:48 PM
Subject: Re: Petition for MLRB Hearing - Mountain Coal Co. Permit MR-446
To: Simmons - DNR, Leigh <leigh.simmons@state.co.us>

You are correct - I forwarded the original filing. Here is the updated filing from today.
My apologies for the confusion.
-Daniel

30 YEARS
WildEarth GUARDIANS

DANIEL TIMMONS
Staff Attorney

(505) 570-7014
www.wildearthguardians.org

On Thu, Jun 25, 2020 at 7:32 PM Simmons - DNR, Leigh <leigh.simmons@state.co.us> wrote:

> Is this different to the original filing? It's still dated June 19, 2020, and I didn't see any obvious changes when I skimmed it.
>
> Leigh Simmons
> Environmental Protection Specialist
> COLORADO
> Division of Reclamation, Mining and Safety
> Department of Natural Resources
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> 1313 Sherman Street, Room 215, Denver, CO 80203
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On Thu, Jun 25, 2020 at 6:09 PM Daniel Timmons <dtimmons@wildearthguardians.org> wrote:

Mr. Simmons,
As a courtesy, please see the attached updated petition for an MLRB hearing that was filed with the MLRB earlier today. This is related to MR-446 for the West Elk mine and supplements and replaces the similar petition that was filed last week.
Best,
Daniel Timmons

---------- Forwarded message ---------
From: **Daniel Timmons** <dtimmons@wildearthguardians.org>
Date: Fri, Jun 19, 2020 at 5:35 PM
Subject: Petition for MLRB Hearing - Mountain Coal Co. Permit MR-446
To: <Camille.mojar@state.co.us>
CC: <dan.gibbs@state.co.us>, <ginny.brannon@state.co.us>, <jim.stark@state.co.us>

Ms. Mojar,
For filing with the MLRB, please see the attached petition for an MLRB hearing with respect to permit revision MR-446 for the West Elk Mine (Permit No. C-1980-007). A hard copy was also sent by priority mail to the MLRB earlier today.
Please let me know if you have any questions.
Thank you.
-Daniel Timmons

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2020.06.25 - Supplemental Request for Formal Hearing MR-446 .pdf
4950K

June 25, 2020

Colorado Mined Land Reclamation Board
1313 Sherman Street, Room 215
Denver, CO 80203

By U.S. Mail and Email to Camille Mojar, Board Secretary at Camille.mojar@state.co.us

Amended and Supplemented Request of WildEarth Guardians et al. for Formal Hearing on the Decision by the Colorado Division of Reclamation, Mining and Safety to Approve Minor Revision No. 446 ("MR-446") for the West Elk Mine (Permit No. C-1980-007)

Dear Board Members:

On behalf of WildEarth Guardians ("Guardians"), High Country Conservation Advocates ("HCCA"), Sierra Club, Center for Biological Diversity (the "Center"), and Wilderness Workshop (together, "Conservation Groups"), in accordance with MLRB Rules 2.08.4(6)(c) and 2.07.4(3) of the Regulations of the Colorado Mined Land Reclamation Board for Coal Mining, Conservation Groups request a formal hearing before the Colorado Mined Land Reclamation Board ("the Board") to contest the proposed decision by the Colorado Division of Reclamation, Mining and Safety ("DRMS") to approve Minor Revision No. 446 ("MR-446") for the West Elk Mine (Permit No. C-1980-007) near Gunnison, Colorado. This Supplemental Petition amends, supplements, and replaces Conservation Groups' original Petition dated June 19, 2020. Below we detail the reasons for our request and objections to the proposed decision, in accordance with MLRB Rule 2.08.4(6)(c)(iii). Conservation Groups ultimately request that DRMS withdraw its June 15, 2020 approval of MR-446 as unlawfully and improvidently granted.

TIMELY SUBMISSION OF REQUEST

Notice of this decision was posted on the DRMS website on June 15, 2020. MLRB rule 2.08.4(6)(c)(iii) provides that requests must be made within 10 days of such notice. Consequently, this request is timely.

STATEMENT OF FACTS

Underlying this request is a March 2, 2020 federal court decision from the Tenth Circuit ordering vacatur of the North Fork Exception to the Colorado Roadless Rule. *High Country Conservation Advocates v. U.S. Forest Serv*. ("*High Country II*"), 951 F.3d 1217, 1229 (10th Cir. 2020) (Exhibit A). The North Fork Exception was formally vacated by the U.S. District Court for the District of Colorado on June 15, 2020. Minute Order, *High Country Conservation Advocates v. U.S. Forest Serv*., No. 1:17-cv-03025-PAB, ECF No. 78 (June 15, 2020) (Exhibit B). Vacatur

of the Exception means that the Colorado Roadless Rule remains in effect with no exception authorizing temporary road-building to support coal mining. Because the Colorado Roadless Rule generally prohibits road construction, tree cutting, and linear construction activities within designated roadless areas, including the Sunset Roadless Area at issue here, 36 C.F.R. § 294.42–.44, the North Fork Exception was an essential legal underpinning for DRMS's authorization of Mountain Coal's expansion of the West Elk Mine, including construction of roads and methane drainage wells ("MDWs"), in the Sunset Roadless Area. 36 C.F.R. § 294.43(c)(1)(ix). Vacatur of the North Fork Exception renders the Exception void and DRMS's approvals for Mountain Coal's surface activities in the Sunset Roadless Area – including MR-446 – unlawful. Mountain Coal consequently lacks a legal right of entry to conduct surface-disturbing activities in violation of the Colorado Roadless Rule. Despite this lack of legal authority, we understand that during the week of June 1, the company illegally entered and completed approximately one mile of road construction and extensive tree cutting above the Sunset 2 panel. *See* Conservation Groups, Request for DRMS Inspection (June 11, 2020) (attached as Exhibit C). On June 16, 2020 DRMS granted Conservation Groups' request for inspection related to Mountain Coal's road-building activities within the Sunset Roadless Area, and a formal inspection took place on June 18, 2020. The inspection disclosed that Mountain Coal had, since June 11, constructed two drilling pads for methane drainage wells along the illegally constructed route. Below are photos taken at this inspection by Juli Slivka of Wilderness Workshop.

Above: Newly bulldozed road.

Above: One of the drilling pads bulldozed since Thursday, June 11, 2020.

Above: The newly-bulldozed road with drilling pad in the distance.

Against this backdrop, DRMS inexplicably approved MR-446 – authorizing road-building within the Sunset Roadless Area – without delay or any apparent consideration of Mountain Coal's lack of a legal right of entry to conduct such activities in light of the federal court decisions vacating the North Fork Exception. In fact, DRMS issued its approval of MR-446 the next business day after receipt of the application, despite regulations providing for up to a ten-day period for DRMS review. MLRB Rule 2.08.4(6)(c)(1). In light of DRMS's ongoing investigation into Mountain Coal's lack of legal authority to construct roadless in federally-designated roadless areas, the Division's rush to approve MR-446 is troubling. DRMS's approval of MR-446 provided the State's approval for Mountain Coal to continue its unlawful construction activities, authorizing roadbuilding of more than three miles of new roads, the vast majority illegally located within the Sunset Roadless Area

Two days after approving MR-446, on June 17, DRMS issued a Cessation Order based on the Division's determination that "Mountain Coal has failed to maintain its legal right to enter the Sunset Roadless area at the West Elk Mine," and directing the company to "immediately cease all surface-disturbing activities in longwall panels LWSS-1, LWSS-2, LWSS-3, and LWSS-4 at the West Elk Mine." Cessation Order No.: CO-2020-001 (attached as Exhibit D). Because Mountain Coal lacks a legal right to build roads or scrape drilling pads in the Sunset Roadless Area under the Colorado Roadless Rule absent the North Fork Exception, DRMS lacked the authority to approve MR-446.

Further, in its rush to approve MR-446, DRMS failed to fully evaluate the need for the newly-proposed roads or their impact on critical environmental resources, such as riparian and floodplain areas. Mountain Coal provided no narrative explanation for its proposed changes, and DRMS lacked sufficient information to determine the necessity of the proposed changes. Of particular note, DRMS approved a new road crossing South Prong Creek despite previously-approved roads providing a practical alternative that would not require a new stream crossing.

I. General Background.

The Colorado Roadless Rule, which the Forest Service adopted in 2012, generally prohibits road construction in designated areas but initially included an exception for the North Fork Coal Mining Area (the "North Fork Exception"). *See* Special Areas; Roadless Area Conservation; Applicability to National Forests in Colorado, 77 Fed. Reg. 39,576, 39,578 (July 3, 2012). In 2014, however, a federal court concluded that the Forest Service's 2012 promulgation of the North Fork Exception violated the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"), and the court vacated the North Fork Exception. *High Country Conservation Advocates v. U.S. Forest Serv*. ("*High Country I*"), 67 F. Supp. 3d 1262, 1266-67 (D. Colo. 2014).

In 2016, the Forest Service prepared a Supplemental Final Environmental Impact Statement ("North Fork SFEIS") and readopted the North Fork Exception, Roadless Area

Conservation. National Forest System Lands in Colorado, 81 Fed. Reg. 91,811 (Dec. 19, 2016). Mountain Coal then submitted lease modification requests to expand existing coal leases (COC-1362, COC-67232) into the Sunset Roadless Area, which were consented to by the Forest Service and approved by the Bureau of Land Management ("BLM").

Conservation Groups filed suit, alleging that the federal agencies' issuance of the North Fork Exception and leases violated NEPA and the APA. The district court initially rejected these challenges. On appeal, however, the Tenth Circuit held that the Forest Service's promulgation of the North Fork Exception violated NEPA and remanded to the District Court with instructions to vacate the North Fork Exception in its entirety. *High Country II*, 951 F.3d at 1229. On June 15, 2020, the District Court entered an order formally vacating the North Fork Exception. Exhibit B.

II. Legal Background.

The Tenth Circuit's March 2, 2020 decision specifically ordered the vacatur of the entire North Fork Exception, rendering the Exception void. *High Country II*, 951 F.3d at 1229. Black's Law Dictionary defines "vacate" as "[t]o nullify or cancel; make void; invalidate." Black's Law Dictionary (11th ed. 2019); *see also Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 824 F.3d 33, 52 (3d Cir. 2016) (Vacatur "wipe[s] the slate clean.").[1] Federal case law further provides that vacatur of unlawful agency action renders that action a nullity, and there is a return to the status quo—federal appellate orders "must be given full retroactive effect . . . as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1995); *see, e.g.*, *High Country I*, 67 F. Supp. 3d at 1265 (recognizing the point of vacatur in a NEPA case is to provide a "clean slate"); *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (holding that vacatur "had the effect of reinstating the rules previously in force"); *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) ("When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect."). In other words, the agency action lacks any legal significance and is treated as if it never happened.

The Tenth Circuit vacated the entire North Fork Exception knowing that Mountain Coal believes that such a remedy would preclude mining activity at least until the agencies cured the NEPA defects. Mountain Coal's counsel, under a duty of candor to the Tenth Circuit, argued that vacating the entire North Fork Exception would bar the West Elk mine from undertaking coal mining or road building in the area:

> As is likely hoped by the Conservation Groups, vacatur of the entire North Fork Exception would again freeze coal exploration in the entire North Fork Coal Mining Exception Area and prevent Mountain Coal from further roadbuilding and mining

[1] *See also* Black's Law Dictionary 1388 (Spec. Deluxe 5th ed. 1979) (defining "vacate" as "To annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment.").

> in the Lease Modifications. This would certainly result in bypass of the coal in the Lease Modifications.

Br. of Intervenor-Appellee, App. Ct. ECF No. 25 at 49 (excerpt attached as Exhibit E). But the Court squarely rejected Mountain Coal's request that the Court not vacate, holding that the "appropriate remedy [was] vacatur of the entire North Fork Exception." 951 F.3d at 1229. Thus, the Tenth Circuit understood that its direction to vacate the North Fork Exception would terminate Mountain Coal's right to construct roads to access coal in the Lease Modifications Area, including the area covered by MR-446.[2]

On June 15, 2020, the Federal District Court entered an order formally vacating the North Fork Exception. Exhibit B. Accordingly, the Colorado Roadless Rule is in still in effect, but there is no longer an exception for coal mining in the North Fork Exception area, and activity premised on that unlawful exception may not occur. Both the Tenth Circuit and District Court orders have immediate and retroactive effect. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) (A "principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.").

The vacatur of the North Fork Exception strips federal and state agencies of their authority to allow Mountain Coal to conduct surface coal mining activities—activities such as road-building and tree cutting are prohibited within the Sunset Roadless Area. *See* 36 C.F.R. § 294.43(a). Further, because the Tenth Circuit and District Court vacatur orders have retroactive effect, Mountain Coal never obtained a valid right to construct roads or other surface-disturbing activities through approval of the lease modifications or mine plan approval. Nor does Mountain Coal have any pre-existing lease, permit, or other rights to access the Sunset Roadless Area issued prior to the promulgation of the Colorado Roadless Rule on July 3, 2012.[3] The Rule's preamble makes it clear that while "it does not affect the terms or validity of leases existing prior to the promulgation date of the final rule,"[4] it was meant to limit surface-disturbing activities under any future leases.[5] Here, Mountain Coal's access to the Sunset Roadless Area directly stems from the unlawfully adopted North Fork Exception to the Colorado Roadless Rule, which has been formally vacated. Accordingly, Mountain Coal lacks any legal right to build roads or

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[2] Further, Mountain Coal, once it took this legal position, is judicially estopped from making contrary arguments concerning the impact of the Tenth Circuit's vacatur. Judicial estoppel is an equitable doctrine that precludes a party "from adopting a legal position in conflict with one earlier taken in the same or related litigation." *Allen v. Zurich Ins. Co*., 667 F.2d 1162, 1166 (4th Cir. 1982). Its purpose is "to protect the integrity of the judicial process," *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), and "may be invoked to prevent a party from playing fast and loose with the courts," *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980). In evaluating judicial estoppel, courts "inquire whether a party has succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled," and "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire*, 532 U.S. at 750.

[3] 36 C.F.R. § 294.48(a).

[4] 77 Fed. Reg. 39576, 39579 (July 3, 2012).

[5] 36 C.F.R. § 294.48(a).

cut trees within the Sunset Roadless Area, and DRMS lacked the authority to issue MR-446, which improperly purports to authorize Mountain Coal to continue its unlawful road-building activities.

In issuing the June 17, 2020 Cessation Order, DRMS expressly recognized that the federal court orders have stripped Mountain Coal of a lawful right of entry to conduct road-building and tree-cutting activities on the Sunset Roadless Area:

> Notwithstanding BLM coal leases C-1362 and COC-6732, after reviewing the relevant facts and Orders from the 10th Circuit and the United States District Court, the Division has determined that Mountain Coal has failed to maintain its legal right to enter the Sunset Roadless area at the West Elk Mine. Mountain Coal must immediately cease all surface disturbing activities in in longwall panels LWSS-1, LWSS-2, LWSS-3, and LWSS-4 at the West Elk Mine.[6]

Having recognized Mountain Coal's lack of authority to continue road-building activities in the Sunset Roadless Area, DRMS must promptly withdraw its approval of MR-446. DRMS should not stand idly by while Mountain Coal seeks to thwart the clear mandate from the Tenth Circuit by continuing to seek state approvals for road-building activities within the Sunset Roadless Area. Further, a decision by DRMS to grant Mountain Coal approval to construct roads into the Sunset Roadless Area with the cessation order in place would be contradictory, arbitrary and capricious.

Moreover, even if it remained in place at the time of DRMS's approval of MR-446, the North Fork Exception only permitted construction of roads "needed for coal exploration and/or coal-related surface activities" within the areas covered by the Exception. 36 C.F.R. § 294.43(c)(1)(ix) (invalidated by *High Country II*, 951 F.3d at 1229). Mountain Coal's MR-446 application, however, provided no information to show that any of the newly-proposed roads are "needed" for its coal-mining operations. Exhibit F. Two segments, in particular, are plainly not needed and will cause excessive environmental degradation, as compared to previously-approved roads. First, the lengthy road segment connecting MVB SS3-2 north to the existing roadway is not needed in light of the much-shorter previously approved roadway segment connecting to this MVB location from the west. *See* Map, MR-446 Application (attached as Exhibit F). Similarly, the substantial new road segment connecting from SS3-1 south to SS4-2, including a brand new crossing of South Prong Creek, is unnecessary in light of the significantly shorter road connection to SS4-2 previously approved by DRMS that would not have required a stream crossing. Exhibit F. Given that shorter, less-destructive roads were previously approved by DRMS, the new roads are not "needed" to support coal-mining at West Elk. Accordingly, such

[6] Cessation Order at 3 (Ex. D).

new roads would be impermissible even if the North Fork Exception remained in place, which it does not.

Mountain Coal's federal coal lease further stipulates that "[s]urface use or disturbances [except for inapplicable exceptions] will avoid riparian, wetland or floodplain areas, and a buffer zone surrounding these areas [as defined by federal guidelines] *unless no practical alternatives exist*." *See* Modified Coal Lease COC1362 at 14 (Dec. 1, 2017) (attached as Exhibit G). DRMS's approval of an unnecessary stream crossing along the new road to SS4-2 and SS4-1 therefore violates the terms of Mountain Coal's lease. As demonstrated by the previously-approved road alignment connecting to the SS4-2 and SS4-1 location without a stream crossing, there is a viable practical alternative to reaching these MVBs without crossing the steep terrain, riparian area, and floodplain of South Prong Creek. SS4-2 and SS4-1 could readily be connected to SS4-3 without requiring crossing any riparian areas or floodplains. Mountain Coal provided DRMS with *no evidence* showing that the previously-approved road is no longer a practical alternative. Accordingly, this new road segment violates the terms of Mountain Coal's lease, and DRMS's approval of MR-446 was unlawful.

III. MR-446's Adverse Effects to Conservation Groups and Members

Conservation Groups will be adversely affected if the proposed decision is approved. *See* MLRB Rule 2.07.4(3)(a). In addition to specific interests described below, members of the Conservation Groups use lands in the vicinity of the West Elk Mine, including the area proposed under MR-446 for road-building and MDW pad construction, for hiking, photography, wildlife viewing, and other recreational, aesthetic, and educational purposes and intend to continue to do so. Members of the organizations are also residents of Colorado, and individuals who are and will be impacted by the expanded mining area's effects on wildlife, surface water availability, and vegetation on public and private lands used by the groups and their members. Specifically, road construction will destroy wildlife habitat and vegetation, and adversely affect Conservation Groups' members' enjoyment of wildlife, photography, recreation, and the natural and wild character of the Sunset Roadless Area. Below, we detail the specific effects to Conservation Groups and their members.

A. WildEarth Guardians

Guardians is a non-profit environmental advocacy organization dedicated to protecting and restoring the wildlife, wild places, and wild rivers throughout the American West. Guardians is headquartered in Santa Fe, New Mexico, and has offices in Denver, Colorado and throughout the American West. Guardians has over 200,000 members and activists. Through its Climate and Energy Program, Guardians aims to combat global climate change to protect the American West's wildlife, wild places, and wild rivers. Guardians works for clean energy solutions that can help our society shift away from the use of fossil fuels in order to safeguard our climate, our clean air, and our communities.

B. High Country Conservation Advocates

HCCA is a non-profit conservation organization headquartered in Crested Butte, Colorado. Founded in 1977 as High Country Citizens' Alliance to keep Mount Emmons molybdenum mine-free, the group's work now addresses other issues that affect Gunnison County's clean air, clean water, public lands, and healthy wildlife. HCCA has approximately 1,000 members who live, recreate, and enjoy the rural and wild character of Gunnison County and its public lands. HCCA is an active participant in public lands management in Gunnison County, including the lands at issue in this case.

C. Sierra Club

Sierra Club is America's largest grassroots environmental organization, with approximately 800,000 members nationwide, including more than 23,000 members in Colorado. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

D. Center for Biological Diversity

Center for Biological Diversity is a non-profit environmental organization with over 74,000 active members, many of whom live and recreate in western Colorado. The Center is headquartered in Tucson, Arizona, with offices in a number of states and Mexico. The Center uses science, policy, and law to advocate for the conservation and recovery of species on the brink of extinction and the habitats they need to survive. The Center has and continues to actively advocate for increased protections for species and their habitats in Colorado.

E. Wilderness Workshop

Wilderness Workshop is a non-profit organization engaged in research, education, legal advocacy and grassroots organizing to protect the ecological integrity of local public lands. Wilderness Workshop is based in Carbondale, Colorado and has approximately 800 members. Wilderness Workshop not only defends pristine public lands from new threats, but also strives to restore the functional wildness of landscapes fragmented by human activity. Wilderness Workshop works to protect and preserve existing wilderness areas, advocate for expanding wilderness, defend roadless areas from development that would destroy their wilderness character, and safeguard the ecological integrity of all federal public lands in the vicinity of the White River National Forest, including the lands at issue in this case.

Conservation Groups' specific concerns with DRMS' MR-446 decision are discussed briefly below.

REASONS FOR OBJECTION

The Tenth Circuit decision to vacate the North Fork Exception eliminates the legal basis for DRMS's authorization of Permit Revision 15 (PR-15) to Permit C-1980-007, as further amended by MR-446, which authorized surface coal mining and reclamation operations at West Elk within the Sunset Roadless Area. As explained, vacatur of the North Fork Exception means that the Exception was *never* lawfully in place, and that Mountain Coal did not obtain any right to violate the Colorado Roadless Rule in its leases or permit approvals. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. at 97; *Sec. Indus. Bank*, 459 U.S. at 79.

Mountain Coal itself recognized in its Tenth Circuit briefing that a vacatur order would preclude its ability to construct roads within the Lease Modifications. *See* Exhibit D. Yet despite its clear representations, Mountain Coal has sought legal cover from DRMS to greenlight the company's plans to continue road-building and mining-related activities within the Sunset Roadless Area, through DRMS approval of MR-446.

Absent the North Fork Exception, Mountain Coal lacks a legal right of entry onto the Sunset Roadless Area in violation of MLRB Rule 2.03.6(1). Consequently, any surface coal mining activities, including road-building and tree cutting, are unlawful within the Sunset Roadless Area. 36 CFR § 294.42–.44. Despite the Tenth Circuit's vacatur and Mountain Coal's admitted lack of legal right to enter the Sunset Roadless Area and to conduct surface coal mining activities[7], including road construction and tree cutting, we understand that during the week of June 1, the company illegally entered the roadless area and completed about a mile of road construction and extensive tree cutting. *See* Exhibit C. Since June 11, Mountain Coal constructed two drilling pads adjacent to their illegal road. Through its MR-446 application (attached as Exhibit F), Mountain Coal has now sought DRMS approval of the company's plans to continue its illegal construction activity, including additional road and MDW pad construction. In approving MR-446, however, DRMS ignored the governing statute and its own regulations. As a prerequisite to any approval for additional road-building, including through MR-446, DRMS had an affirmative obligation to confirm Mountain Coal's legal authority to build new roads within the Sunset Roadless Area. MLRB Rule 2.03.6(1).

With the Tenth Circuit's order to vacate the North Fork Exception, Mountain Coal lacks a legal right of entry to conduct surface-disturbing activities on the Sunset Roadless Area, in violation of its permit obligations. Consequently, DRMS's decision to approve MR-446 violated MLRB regulations, which specifically require permit applicants to provide "a complete and detailed legal description of the proposed permit boundary, a description of the documents upon which the applicant bases his or her legal right to enter and begin surface coal mining operations in the permit area, and a statement as to whether that right is the subject of pending litigation."

[7] Mountain Coal's unlawful road-building and tree cutting constitute surface coal mining activities that are part of surface coal mining operations consistent with MLRB definitions set forth at Rule 1, Section 1.04(131) and (132).

MLRB Rule 2.03.6(1). Moreover, "[t]he permit application, all supporting documentation and any stipulations or conditions" are a "binding part of the permit." DRMS, Proposed Decision and Findings of Compliance for the West Elk Mine C-1980-007, Permit Revision No. 15, at 3 (Sept. 4, 2018). At the time of DRMS's initial decision to approve PR-15, the legality of Mountain Coal's purported right of entry upon lands within the Sunset Roadless Area was under litigation, as described above. That litigation has now been resolved by the Tenth Circuit's decision ordering vacatur of the North Fork Exception, leaving Mountain Coal without a legal right of entry upon the Sunset Roadless Area, as DRMS explained in its June 17 Cessation Order. Absent a legal right of entry for Mountain Coal's proposed road-building activities, DRMS's approval of MR-446 violated MLRB regulations.

The District Court order formally vacating the North Fork Exception and DRMS's approval of MR-446 each issued on the same day, June 15, 2020. But even if the North Fork Exception remained in place at the time of DRMS's approval, DRMS's approval was still unlawful. The North Fork Exception only ever permitted construction of temporary roads "needed for coal exploration and/or coal-related surface activities" within the areas covered by the Exception. 36 C.F.R. § 294.43(c)(1)(ix) (invalidated by *High Country II*, 951 F.3d at 1229. Mountain Coal provided DRMS with no evidence to demonstrate that any of the newly-proposed roads are "needed" for its coal-mining operations. Two segments, in particular, are plainly unnecessary and will cause excessive environmental degradation, as compared to previously-approved roads. First, the lengthy road segment connecting MVB SSS3-2 north to the existing roadway is unnecessary, in light of the much-shorter previously approved roadway segment connecting to this MVB location from the west. Similarly, the new road segment approved from SS3-1 south to SS4-2, including a brand new crossing of South Prong Creek, is not needed in light of the previously approved road connection to the location of these MVBs from the west, an alignment that does not require a stream crossing. Given that shorter, less-destructive roads were previously approved by DRMS, the new roads are not "needed" to support coal mining at West Elk.

Further, as noted above, Mountain Coal's federal coal lease further stipulates that "[s]urface use or disturbances [except for inapplicable exceptions] will avoid riparian, wetland or floodplain areas, and a buffer zone surrounding these areas [as defined by federal guidelines] *unless no practical alternatives exist*." Exhibit G. Yet the previously-approved road connection to the location of SS4-2 and SS4-1 – which crossed no riparian, wetland or floodplain areas – remains a practical alternative to the newly-approved road, as demonstrated by Mountain Coal's proposal (and DRMS's approval) of this alternative. Despite previously proposing this alternative road segment, Mountain Coal has provided DRMS with *no evidence* showing that the previously-approved road is not a practical alternative. There is no reason that SS4-2 and SS4-1 could not connect west to the new SS4-3 location (or the previously-approved SS4-7 location) without crossing South Prong Creek, including its riparian area and floodplain. Accordingly, this

new road segment violates the terms of Mountain Coal's lease, and DRMS's approval of the new road was unlawful.

ISSUES TO BE RAISED AT THE HEARING

The Applicant bears the burden of providing evidence that the application is complete and accurate. MLRB Rule 1.4.1(3). Additionally, permit applications "shall contain [] a description of the documents upon which the applicant bases his or her legal right to enter and begin surface coal mining operations in the permit area[.]" MLRB Rule 2.03.6(1). As explained above, Mountain Coal has failed to establish that it has a legal right of entry to conduct road-building and tree-cutting activities within the Sunset Roadless Area. Accordingly, DRMS's completeness finding was premature and the Division's decision to approve MR-446 was unlawful.

I. DRMS's Completeness Finding Was Premature.

Mountain Coal failed to provide any documents with its MR-446 application demonstrating any legal right to enter and conduct surface coal mining operations, including road-building, within the Sunset Roadless Area, as required for permit approval under MLRB Rule 2.03.6. In light of the vacatur of the North Fork Exception and Conservation Groups' then-pending request for inspection related to West Elk's unlawful road-building activities, DRMS had an obligation to confirm the validity of Mountain Coal's legal right of entry to conduct road-building activities within the Sunset Roadless Area, under MLRB Rule 2.03.6(1). Mountain Coal, however, provided no documents to DRMS confirming a legal right to build roads within the designated roadless area.

Because DRMS lacked sufficient information needed to verify whether Mountain Coal had a legal right of entry to conduct road-building activities on the Sunset Roadless Area, the Division's completeness finding with respect to the MR-446 application was premature.

II. Mountain Coal Lacks a Legal Right of Entry to Build Roads within the Sunset Roadless Area.

With the vacatur of the North Fork Exception, Mountain Coal lacks a legal right of entry to conduct surface-disturbing activities on the Sunset Roadless Area. Consequently, DRMS's decision to approve MR-446 violated MLRB regulations, which specifically require permit applicants to provide "a description of the documents upon which the applicant bases his or her legal right to enter and begin surface coal mining operations in the permit area." MLRB Rule 2.03.6(1). The decision by DRMS to approve MR-446 despite the federal court decision vacating the North Fork Exception – an essential underpinning of West Elk's claim to have a legal right to construct roads within the Sunset Roadless Area – was arbitrary, capricious, and unlawful.

III. Multiple Newly-Approved Road Segments are not "Needed" to Support Mountain Coal's Coal-Mining Activities as Required by the North Fork Exception.

Even if the North Fork Exception were still in place, DRMS's approval of MR-446 would still have been unlawful because the Exception only permitted roads "needed" to support coal-mining activities. 36 C.F.R. § 294.43(c)(1)(ix) (abrogated by *High Country II*, 951 F.3d at 1229. As demonstrated by DRMS's prior approvals of shorter, less-destructive roadways to the locations of the new SS3-2, SS4-1, and SS4-2 MVBs, the new roads are not "needed" for coal mining at West Elk.

IV. MR-446 Violates Mountain Coal's Lease Terms Because It Allows Crossing of Riparian and Floodplain Areas Despite Available Practical Alternatives.

The terms of Mountain Coal's federal coal lease (COC-1362) prohibit surface disturbance in riparian and floodplain areas and a buffer zone around these sensitive areas "unless no practical alternatives exist." Exhibit G at 14. The new road to SS4-2 and SS4-1 violates this lease term because it crosses the riparian area and floodplain of South Prong Creek despite the availability of practical alternatives to this stream crossing. As shown by DRMS's prior approval of roads from the west to the SS4-2 and SS4-1 locations, which do not require any stream crossing, it would be practical to connect these MVB locations to the roadway system to the west without crossing any streams. Accordingly, DRMS's approval of MR-446 violated the terms of federal coal lease COC1362.

CONCLUSION

DRMS has an obligation to ensure that Mountain Coal's coal mining activities are lawfully conducted in accordance with CO SCMRA, MLRB Rules, and the conditions of its permit. With the vacatur of the North Fork Exception underlying Mountain Coal's purported claim to legal entry upon the Sunset Roadless Area, Mountain Coal lacks a legal right of entry to conduct road-building and tree-cutting activities within the Sunset Roadless Area. Accordingly, DRMS's decision to deem complete Mountain Coal's MR-446 application was premature, and the Division's decision to approve MR-446 was unlawful. Further, because the new roads are not needed for coal mining at West Elk and practical alternatives exist to the stream crossing of South Prong Creek, DRMS's approval of MR-446 violated the North Fork Exception and the terms of Mountain Coal's lease.

We appreciate DRMS's issuance of the June 17 Cessation Order immediately halting further unlawful development on the Sunset Roadless Area. However, it is troubling that DRMS failed to confirm Mountain Coal's legal right of entry prior to issuing MR-446, or the need for the new roads and crossing of South Prong Creek. Accordingly, we request that DRMS withdraw its June 15, 2020 approval of MR-446 as unlawfully and improvidently granted.

If you have any questions about this request, please contact Daniel Timmons at (505) 570-7014. We look forward to the scheduled hearing within 30 days of receipt of this request, according to MLRB Rule 2.7.4(3)(a). Thank you for your attention to this matter.

Sincerely,

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Attachments:

Exhibit A: *High Country Conservation Advocates v. U.S. Forest Serv*. ("*High Country II*"), 951 F.3d 1217, 1229 (10th Cir. 2020).

Exhibit B: Minute Order, *High Country Conservation Advocates v. U.S. Forest Serv*., No. 1:17-cv-03025-PAB, ECF No. 78 (June 15, 2020).

Exhibit C: Conservation Groups, Request for DRMS Inspection (June 11, 2020).

Exhibit D: Cessation Order No.: CO-2020-001.

Exhibit E: Excerpt - Br. of Intervenor-Appellee, App. Ct. ECF No. 25 at 49.

Exhibit F: Arch Coal MR-446 Application.

Exhibit G: Federal Coal Lease COC-1362 (Dec. 1, 2017).

Exhibit A

High Country Conservation Advocates v. U.S. Forest Serv. ("*High Country II*"), 951 F.3d 1217, 1229 (10th Cir. 2020).

951 F.3d 1217
United States Court of Appeals, Tenth Circuit.

HIGH COUNTRY CONSERVATION ADVOCATES; WildEarth Guardians; Center for Biological Diversity; Sierra Club; Wilderness Workshop, Plaintiffs - Appellants,
v.
UNITED STATES FOREST SERVICE; United States Department of Agriculture; Daniel Jirón, in his official capacity as Acting Under Secretary of Agriculture for Natural Resources and Environment, U.S. Department of Agriculture; Scott Armentrout, in his official capacity as Supervisor of the Grand Mesa Uncompahgre, and Gunnison National Forests; United States Department of Interior; Bureau of Land Management; Katherine MacGregor, in her official capacity as Deputy Assistant Secretary, Land and Minerals Management, U.S. Department of Interior, Defendants - Appellees,
and
Mountain Coal Company, LLC, Intervenor Defendant - Appellee.

No. 18-1374
|
FILED March 2, 2020

Synopsis

Background: Environmental advocacy organizations brought action alleging that United States Forest Service and Bureau of Land Management (BLM) violated National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA) when they approved mining exploration activities, including road construction, in roadless areas located on national forest lands and modifications to mine operator's lease adding new lands for mine located on national forest lands. The United States District Court for the District of Colorado, Philip A. Brimmer, J., 333 F.Supp.3d 1107, entered judgment in defendants' favor, and plaintiffs appealed.

Holdings: The Court of Appeals, Lucero, Circuit Judge, held that:

[1] Forest Service acted arbitrarily and capriciously in eliminating proposed alternative that would remove roadless portion of project area from mining area, and

[2] Forest Service and BLM did not act arbitrarily and capriciously in eliminating detailed study of methane flaring alternative.

Vacated and remanded.

Kelly, Senior Circuit Judge, concurred in part, dissented in part, and filed opinion.

West Headnotes (15)

[1] Administrative Law and Procedure Review for arbitrary, capricious, unreasonable, or illegal actions in general

Agency action is arbitrary and capricious if agency has relied on factors that Congress has not intended it to consider, entirely failed to consider important aspect of problem, offered explanation for its decision that runs counter to evidence before agency, or agency action is so implausible that it could not be ascribed to difference in view or product of agency expertise. 5 U.S.C.A. § 706(2)(A).

[2] Administrative Law and Procedure Presumptions and Burdens on Review

In performing arbitrary and capricious review under Administrative Procedure Act (APA), court must accord agency action presumption of validity; burden is on petitioner to demonstrate that action is arbitrary and capricious. 5 U.S.C.A. § 706(2)(A).

[3] Administrative Law and Procedure Theory or grounds not provided or relied upon by agency

Administrative Law and Procedure Sufficiency of theory or grounds provided by agency

Court will uphold agency's decision of less than ideal clarity if agency's path may reasonably be discerned but will not supply reasoned basis for agency's action that agency itself has not given. 5 U.S.C.A. § 706(2)(A).

[4] **Environmental Law** Duty of government bodies to consider environment in general

NEPA requires federal agencies to pause before committing resources to project and consider likely environmental impacts of preferred course of action as well as reasonable alternatives. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[5] **Environmental Law** Duty of government bodies to consider environment in general

Twin aims of NEPA are to require agencies to consider every significant aspect of proposed action's environmental impact and to facilitate public involvement. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[6] **Environmental Law** Duty of government bodies to consider environment in general

NEPA is strictly procedural statute that does not mandate substantive results. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[7] **Environmental Law** Assessments and impact statements

In reviewing adequacy of agency's analysis of alternatives in environmental impact statement (EIS), court must apply rule of reason, determining whether statement contained sufficient discussion of relevant issues and opposing viewpoints to enable agency to take hard look at environmental impacts of proposed action and its alternatives, and to make reasoned decision. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C)(iii); 40 C.F.R. § 1502.14(a).

[8] **Environmental Law** Consideration of alternatives

In preparing environmental impact statement (EIS) pursuant to NEPA, once agency establishes proposed action's objective—which it has considerable discretion to define—agency need not provide detailed study of alternatives that do not accomplish that purpose or objective, as those alternatives are not reasonable, but agency may not define proposed action's objectives so narrowly as to preclude reasonable consideration of alternatives. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C)(iii); 40 C.F.R. § 1502.14(a).

[9] **Environmental Law** Consideration of alternatives

NEPA does not require agency to consider alternative in evaluating environmental impact of proposed agency action unless it is significantly distinguishable from alternatives already considered. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C)(iii); 40 C.F.R. § 1502.14(a).

[10] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

Court must judge agency action's reasonableness against two guideposts: (1) agency's statutory mandate, and (2) agency's objectives for particular project. 5 U.S.C.A. § 706(2)(A).

[11] **Environmental Law** Mining; oil and gas

United States Forest Service acted arbitrarily and capriciously in eliminating proposed alternative that would remove roadless portion of project area from mining area in supplemental

final environmental impact statement (SFEIS) prepared in connection with mining exploration activities, including road construction, in roadless areas located on national forest lands, even though alternative would foreclose access to existing federal coal leases or private leases and recoverable coal, and would protect more land and provide access to less coal than alternative selected, where alternative appeared to fit within stated project goals, Forest Service did not address its objective of providing management direction for conserving roadless areas in state, its proffered explanation did not establish that alternative was rejected as too remote, speculative, impractical, or ineffective, and alternative was significantly distinguishable from other alternatives. 5 U.S.C.A. § 706(2)(A); 16 U.S.C.A. §§ 528, 551; National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C)(iii); 40 C.F.R. § 1502.14(a).

[12] Environmental Law Consideration of alternatives

Where agency omits alternative but fails to explain why that alternative is not reasonable, environmental impact statement (EIS) is inadequate. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C)(iii); 40 C.F.R. § 1502.14(a).

[13] Environmental Law Assessments and impact statements

Court cannot consider post-hoc rationalization for eliminating alternative from consideration in environmental impact statement (EIS). National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C)(iii); 40 C.F.R. § 1502.14(a).

[14] Environmental Law Mining; oil and gas

United States Forest Service and Bureau of Land Management (BLM) did not act arbitrarily and capriciously in eliminating detailed study of methane flaring alternative in promulgation of supplemental final environmental impact statement (SFEIS) prepared in connection with modifications to coal mine operator's lease adding new lands for mine located on national forest lands, where there was no evidence that available information was sufficient to analyze feasibility and environmental impacts of methane flaring without site-specific exploration data and engineering designs deemed necessary by agencies, and Mine Safety and Health Administration (MSHA) had not approved any flaring operations at active coal mines. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C)(iii); 40 C.F.R. §§ 1501.2, 1502.14(a).

[15] Environmental Law Remand to administrative agency

Typical remedy for environmental impact statement (EIS) in violation of NEPA is remand to district court with instructions to vacate agency action, but court may partially set aside regulation if invalid portion is severable, that is, if severed parts operate entirely independently of one another, and circumstances indicate that agency would have adopted regulation even without faulty provision. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

***1220 Appeal from the United States District Court for the District of Colorado (D.C. No. 1:17-CV-03025-PAB)**

Attorneys and Law Firms

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Michael Drysdale, Dorsey & Whitney LLP, Minneapolis, Minnesota (Sarah Goldberg, Dorsey & Whitney LLP, Salt Lake City, Utah, with him on the brief), for Intervenor Defendant-Appellee.

Before BRISCOE, KELLY, and LUCERO, Circuit Judges.

Opinion

LUCERO, Circuit Judge.

This appeal is the latest installment in a long-running dispute concerning road construction and coal leases in National Forest lands near the North Fork of the Gunnison River in Colorado. The Colorado Roadless Rule, which the Forest Service adopted in 2012, prohibits road construction in designated areas but included an exception for the North Fork Coal Mining Area (the "North Fork Exception"). See Special Areas; Roadless Area Conservation; Applicability to National Forests in Colorado, 77 Fed. Reg. 39,576, 39,578 (July 3, 2012). In prior litigation, a district court concluded agency decisions violated the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"), High Country Conservation Advocates v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1181 (D. Colo. 2014) ("High Country I"), and vacated the North Fork Exception, High Country Conservation Advocates v. U.S. Forest Serv., 67 F. Supp. 3d 1262, 1266-67 (D. Colo. 2014) ("High Country II").

Following these decisions, the Forest Service prepared a Supplemental Final Environmental Impact Statement ("North Fork SFEIS") and readopted the Exception, Roadless Area Conservation; National Forest System Lands in Colorado, 81 Fed. Reg. 91,811 (Dec. 19, 2016). Mountain Coal Company, LLC, submitted lease modification requests in connection with coal leases in the area. In response, the Forest Service and the Bureau of Land Management ("BLM") issued a Supplemental Final Environmental Impact Statement ("Leasing SFEIS") and approved the requests.

In the instant litigation, a coalition of environmental organizations alleges that the agencies violated NEPA and the APA by unreasonably eliminating alternatives from detailed study in the North Fork SFEIS and the Leasing SFEIS. The district court rejected these challenges. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse as to the North Fork SFEIS, ***1221** holding that the Forest Service violated NEPA by failing to study in detail the "Pilot Knob Alternative" proposed by plaintiffs. Accordingly, we remand to the district court with instructions to vacate the North Fork Exception. With respect to the Leasing SFEIS, we hold NEPA did not require consideration of the "Methane Flaring Alternative" proposed by plaintiffs.

I

The North Fork Coal Mining Area includes parts of three roadless areas: Pilot Knob, Sunset, and Flatirons. The Flatirons and Sunset Roadless Areas are south of the North Fork River and Highway 133. The Pilot Knob Roadless Area is separated from the others, lying north of the river and highway. Mountain Coal operates the West Elk Mine, which is the only operating coal mine in the valley and is located in the Sunset Roadless Area. There is also an idled mine, the Elk Creek Mine, partially located in the Pilot Knob Roadless Area. Coal production at that mine ceased in 2013; as of 2015, its operator was focused on final reclamation work.

In 2012, after the Forest Service adopted the Colorado Roadless Rule, BLM approved lease modifications extending Mountain Coal's leases in the Sunset Roadless Area. Conservation groups filed suit challenging the Colorado Roadless Rule, the lease modifications, and a related exploration plan. The district court concluded that the agencies violated NEPA in analyzing the North Fork Exception and the lease modifications. High Country I, 52 F. Supp. 3d at 1181. After additional briefing on remedies, it severed and vacated the North Fork Exception and vacated the approval of the lease modifications. High Country II, 67 F. Supp. 3d at 1266-67.

The Forest Service initiated a new rulemaking process to reimplement the Exception. In response to a draft of the North Fork SFEIS, conservation groups submitted a comment requesting that the Forest Service analyze an alternative that would prohibit road construction in the Pilot Knob Roadless Area but permit it in the other two areas. The groups stated that this alternative—the Pilot Knob Alternative—would protect 5000 acres, permit mining on 14,800 acres and make available 128 million short tons of coal while preserving a geographically and ecologically distinct roadless area. In the North Fork SFEIS, the Forest Service eliminated the Pilot Knob Alternative from detailed study with the following explanation:

> This alternative would remove the Pilot Knob Roadless Area, about 5,000 acres (about 25%) of the project area, from the North Fork Coal Mining Area. This alternative was dismissed from detailed analysis because the Colorado Roadless Rule is considering access to coal resources within the North Coal Mining Area [sic] over the long-term based on where recoverable coal resources might occur. The Rule preserves the option of future coal exploration and development by allowing temporary road construction for coal exploration and coal-related surface activities. One of the State-specific concerns is the stability of local economies in the North Fork Valley and recognition of the contribution that the coal industry provides to those communities. Preserving coal exploration and development opportunities in the area is a means of providing community stability.

Instead, the Forest Service offered detailed analyses of three options: (A) no action, which would preserve all three areas as roadless; (B) promulgation of the entire North Fork Exception, permitting mining on 19,700 acres and providing access to 172 million short tons of coal; and (C) promulgation of the North Fork Exception excluding "wilderness capable" lands in the Sunset and Flatirons Roadless ***1222** Areas, which would protect 7100 acres, permit mining on 12,600 acres, and provide access to 95 million short tons of coal. Ultimately, the Forest Service adopted Alternative B, reimplementing the entire North Fork Exception.

Subsequently, Mountain Coal resubmitted two applications for lease modifications, seeking to add a total of approximately 1720 acres to federal coal leases adjacent to the West Elk Mine. Approximately 1700 acres of the area at issue were within the Sunset Roadless Area and covered by the North Fork Exception. In response to the requests, the Forest Service and BLM issued a draft of the Leasing SFEIS. Environmental groups requested that the agencies analyze a Methane Flaring Alternative in the final version. Flaring converts methane, an especially potent greenhouse gas, to carbon dioxide, a less potent greenhouse gas. Under the Methane Flaring Alternative, Mountain Coal would be required to flare methane, thereby mitigating the environmental impact. In the Leasing SFEIS, the agencies eliminated the Methane Flaring Alternative from detailed study, concluding that evaluating methane mitigation measures requires site-specific data and engineering designs unavailable at the leasing stage. With consent from the Forest Service, BLM approved the modifications.

In the instant litigation, plaintiffs challenge the elimination from detailed study of the Pilot Knob Alternative in the North Fork SFEIS and the Methane Flaring Alternative in the Leasing SFEIS. The district court denied them relief, ruling the agency actions under NEPA did not violate the APA. Plaintiffs timely appealed. [1]

II

Because NEPA does not provide a private right of action, the agencies' promulgation of the North Fork SFEIS and the Leasing SFEIS are reviewed as final agency actions under the APA. See Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1226 (10th Cir. 2011). We review the district court's decision de novo. Id.

[1] **[2]** **[3]** Under the APA, we will set aside agency action only if it "fails to meet statutory, procedural or constitutional requirements, or ... is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1281 (10th Cir. 2001) (quotation omitted). Agency action is arbitrary and capricious if an agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or the agency action "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). "In performing arbitrary and capricious review, we accord agency action a presumption of validity; the burden is on the petitioner to demonstrate that the action is arbitrary and capricious." ***1223** Copar Pumice Co. v. Tidwell, 603 F.3d 780, 793 (10th Cir. 2010) (quotations omitted). We will

"uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," but will not "supply a reasoned basis for the agency's action that the agency itself has not given." State Farm, 463 U.S. at 43, 103 S.Ct. 2856 (quotations omitted).

[4] **[5]** **[6]** "NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives." N.M. ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 703 (10th Cir. 2009). The "twin aims" of NEPA are to require agencies to "consider every significant aspect of the environmental impact of a proposed action" and to facilitate public involvement. Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). NEPA creates "a set of action-forcing procedures that require that agencies take a hard look at environmental consequences, and that provide for broad dissemination of relevant environmental information." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989) (quotations and citation omitted). However, it "is strictly a procedural statute" that "does not mandate substantive results." Wyoming, 661 F.3d at 1237.

Under NEPA, an agency must include an environmental impact statement ("EIS") in reports on "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). An EIS must include, inter alia, "alternatives to the proposed action." § 4332(C)(iii). As explained in NEPA regulations, an EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a); see also Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 868 (9th Cir. 2004) ("The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." (quotation omitted)).

[7] In reviewing the adequacy of an agency's analysis of alternatives in an EIS, we apply a "rule of reason," determining whether the "statement contained sufficient discussion of the relevant issues and opposing viewpoints to enable the [agency] to take a hard look at the environmental impacts of the proposed [action] and its alternatives, and to make a reasoned decision." Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1174 (10th Cir. 1999). This "reasonableness standard applies both to which alternatives the agency discusses and the extent to which it discusses them." Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1166 (10th Cir. 2002), as modified on reh'g, 319 F.3d 1207 (10th Cir. 2003).

[8] **[9]** "[O]nce an agency establishes the objective of the proposed action—which it has considerable discretion to define—the agency need not provide a detailed study of alternatives that do not accomplish that purpose or objective, as those alternatives are not 'reasonable.' " Wyoming, 661 F.3d at 1244 (citations omitted). But agencies may not "define the objectives of a proposed action so narrowly as to preclude a reasonable consideration of alternatives." Id. (quotation and alteration omitted). In short, "NEPA does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective." Richardson, 565 F.3d at 708 (quotation omitted). Moreover, "an agency need not consider an alternative unless it is significantly distinguishable from the alternatives already considered." Id. at 708-09.

***1224 A**

[10] Turning to the North Fork SFEIS, we must determine whether the Forest Service reasonably eliminated the Pilot Knob Alternative from detailed study. We judge the reasonableness of the agency action against two guideposts: (1) "the agency's statutory mandate" and (2) the "agency's objectives for a particular project." Id. at 709. With respect to the first guidepost, the Forest Service's statutory mandate grants it "broad discretion to regulate the national forests, including for conservation purposes." Wyoming, 661 F.3d at 1234 (citing 16 U.S.C. § 551). It similarly possesses the authority "to manage the national forests for 'multiple uses,' including 'outdoor recreation, range, timber, watershed, and wildlife and fish purposes.' " Id. at 1235 (quoting 16 U.S.C. § 528). We have little trouble concluding that the Pilot Knob Alternative, which would preserve one roadless area and open two others for coal mining, falls within the Forest Service's statutory mandate.

As to the Forest Service's objectives for the particular project, the North Fork SFEIS states, "the specific purpose and need for reinstating the North Fork Coal Mining Area exception is to provide management direction for conserving about 4.2 million acres of [Colorado roadless areas] while addressing the state's interest in not foreclosing opportunities for exploration and development of coal resources in the North

Fork Coal Mining Area." More specifically, the North Fork SFEIS recognizes the "need ... to provide for the conservation and management of roadless area characteristics," including "sources of drinking water, important fish and wildlife habitat, semi-primitive or primitive recreation areas ... and naturally appearing landscapes." It also recognizes the need to "facilitat[e] exploration and development of coal resources in the North Fork coal mining area." The specific project purpose thus echoes the Forest Service's general statutory mandate of balancing multiple possible uses. And the Pilot Knob Alternative would appear to fit within the stated project goals: it provides for conservation in one roadless area and facilitates the development of coal resources in two others.

[11] However, the Forest Service dismissed this alternative from detailed consideration "because the Colorado Roadless Rule is considering access to coal resources within the North [Fork] Coal Mining Area over the long-term based on where recoverable coal resources might occur." Its explanation is based solely on the fact that the Pilot Knob Alternative would protect more land and provide access to fewer tons of coal than Alternative B (reinstating the entire North Fork Exception). But that factor is relevant to only one of the agency's established objectives—providing for long-term coal-exploration and mining opportunities. It does not address the Forest Service's other objective—providing management direction for conserving roadless areas in Colorado. This one-sided approach conflicts with the agency's obligation under NEPA to "provide legitimate consideration to alternatives that fall between the obvious extremes." Dombeck, 185 F.3d at 1175. Under the agency's logic, every alternative except Alternative B could have been eliminated from detailed study merely because it forecloses long-term coal mining opportunities.

[12] QED: The Forest Service's rationale for eliminating the Pilot Knob Alternative is arbitrary. In light of the agency's stated objectives, the proffered explanation does not establish that the alternative was rejected as too remote, speculative, impractical, or ineffective. Where the agency omits an alternative but fails to explain why that alternative is not reasonable, ***1225** the EIS is inadequate. See Utahns for Better Transp., 305 F.3d at 1170-71.

This failure is similar to BLM's failure in Richardson. In that case, BLM eliminated an alternative that would have closed the Otero Mesa to mining, stating it was inconsistent with the project purpose of determining which lands "are suitable for leasing and subsequent development." 565 F.3d at 710. We explained that the project "purpose does not take development of the Mesa as a foregone conclusion. To the contrary, the question of whether any of the lands in the plan area [we]re 'suitable' for fluid minerals development ... [was] precisely the question the planning process was intended to address." Id. at 711 (emphasis omitted). We rejected the argument "that it would be impractical or ineffective under multiple-use principles to close the Mesa to development," holding the agency "was required to include such an alternative in its NEPA analysis, and the failure to do so was arbitrary and capricious." Id. (quotations omitted). Similarly, the agency's elimination of an alternative from detailed study in this case was arbitrary and capricious because its explanation for doing so was inconsistent with its stated purpose. [2]

[13] In its briefs, the Forest Service asserts that the idled Elk Creek Mine, located in the Pilot Knob Roadless Area, presents distinct long-term opportunities for coal access that would be foreclosed by the Pilot Knob Alternative but not by Alternative C. But this is not the explanation the Forest Service gave for eliminating the Pilot Knob Alternative. We "may affirm agency action, if at all, only on the grounds articulated by the agency itself." Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1565 (10th Cir. 1994). We cannot consider a "post-hoc rationalization" for eliminating an alternative from consideration in an EIS. Utahns for Better Transp., 305 F.3d at 1165. Because the North Fork SFEIS does not state that the Pilot Knob Alternative was eliminated from detailed study because of the existence of the Elk Creek Mine, we cannot affirm the agency's decision on that basis. [3]

The dissent adds that the Pilot Knob Alternative, unlike Alternative C, would foreclose access to existing federal coal leases or private leases and recoverable coal. But this fact does not render the Pilot Knob Alternative unreasonable. Alternative A—the no-action alternative—would also have foreclosed access to existing federal coal leases, private leases, and recoverable coal. But that did not prevent the Forest Service from considering it. Further, although Alternative C would not ***1226** foreclose access to any existing federal coal leases, it would nevertheless prohibit coal mining in part of the Sunset Roadless Area subject to a proposed lease modification.

The Forest Service also argues that the Pilot Knob Alternative is not significantly distinguishable from Alternative C. [4] We disagree. Alternative C would protect 7100 acres of wilderness, whereas the Pilot Knob Alternative would protect 4900 acres. That is, the Pilot Knob Alternative would protect

2100 fewer acres—nearly 30% less land. This 2100-acre difference represents more than 10% of the entire North Fork Coal Mining Area.

The difference in accessible tons of coal is even greater. Alternative C would allow access to 95 million short tons of coal, whereas the Pilot Knob Alternative would allow access to 128 million short tons of coal. This represents 33 million short tons, which is approximately 35% more coal than Alternative C and 19% of the total amount of coal recoverable in the entire North Fork Coal Mining Area.

Further, the Pilot Knob Alternative is significantly distinguishable from Alternative C because it would affect entirely separate coal resources. The record indicates that if the North Fork Exception were reimplemented, mining would be less likely to occur in the areas protected under the Pilot Knob Alternative than in the areas protected under Alternative C. The Pilot Knob Alternative would foreclose mining on land adjacent to the idle Elk Creek Mine, which has not produced any coal since December 2013. The mine does not appear likely to resume production, as its operator has auctioned off mining equipment and demolished mining infrastructure within the mine. In contrast, Alternative C would foreclose mining in the Flatirons and Sunset Roadless Areas adjacent to an active coal mine—the West Elk Mine. The operator of the West Elk Mine, moreover, has applied for lease modifications that would extend the mine into areas that would be protected under Alternative C. In short, the Pilot Knob Alternative would foreclose mining only if production at the Elk Creek Mine resumed, whereas Alternative C would foreclose expansion of coal leases already sought by the operator of the West Elk Mine.

Moreover, the two alternatives would result in significantly different environmental impacts because the Pilot Knob Roadless Area is geographically separate from, and has habitat features dissimilar to, the Sunset and Flatirons Roadless Areas. We have recognized, albeit in a different context, that "location, not merely total surface disturbance, affects" environmental impacts and that "the location of development greatly influences the likelihood and extent of habitat preservation." Richardson, 565 F.3d at 706, 707. Of the three roadless areas, only the Pilot Knob Roadless Area contains a winter range for deer and bald eagles, a severe winter range for elk, and a historic and potential future habitat for the Gunnison sage-grouse. See Balt. Gas, 462 U.S. at 97, 103 S.Ct. 2246 (NEPA requires agencies to "consider every significant aspect of the environmental impact of a proposed action"). [5]

***1227** In sum, we conclude that the Pilot Knob Alternative and Alternative C are significantly distinguishable because they differ in acreage of protected land, amounts of recoverable coal, likelihood of coal mining activity, and environmental impacts. We recognize that agencies must engage in line-drawing and are due deference in that exercise. See Wyoming, 661 F.3d at 1250. "By necessity, an agency must select a certain number of [alternatives] for serious study and eliminate the rest without detailed analysis," Prairie Band Pottawatomie Nation v. Fed. Highway Admin., 684 F.3d 1002, 1012 (10th Cir. 2012). Nevertheless, NEPA and the APA require agencies to act reasonably in eliminating alternatives from detailed study. In this case, the Forest Service failed to provide a logically coherent explanation for its decision to eliminate the Pilot Knob Alternative. That alternative was not "remote, speculative, or impractical or ineffective" as judged against the Forest Service's statutory mandate and the project goals. Richardson, 565 F.3d at 708 (quotation omitted). And it was "significantly distinguishable from the alternatives already considered." Id. at 708-09. We thus conclude that the Forest Service's elimination of the Pilot Knob Alternative from detailed study in the North Fork SFEIS was arbitrary and capricious.

B

Plaintiffs also challenge the elimination from detailed study of the Methane Flaring Alternative in the agencies' promulgation of the Leasing SFEIS. The Leasing SFEIS's stated purpose was to "facilitate recovery of federal coal resources in an environmentally sound manner." It provided two bases for the agencies' decision to eliminate the Methane Flaring Alternative from detailed study.

First, the Forest Service and BLM included a section on their elimination from detailed study of alternatives requiring Mountain Coal to use methane-mitigation measures. They noted that assessing any potential methane-mitigation measure requires "site-specific exploration data" and "resultant engineering designs," which would be part of the mine-permitting process conducted by state agencies, OSM, and the federal Mine Safety and Health Administration ("MSHA"). And the agencies found that the effectiveness of portable methane flares in the lease modification area is uncertain because the effectiveness of a flare depends on a

particular methane drainage well's gas composition, which was not available at the leasing stage. [6]

[14] Plaintiffs argue that the Forest Service and BLM had sufficient data to evaluate the Methane Flaring Alternative from the existing operation at the West Elk Mine and the lease-modifications proposal. But they do not offer evidence indicating that the information available at the time was sufficient to analyze the feasibility and environmental impacts of methane flaring without the site-specific exploration data and engineering designs deemed necessary by the agencies. We are mindful that environmental analyses under NEPA must be conducted at "the earliest possible time." 40 C.F.R. § 1501.2. Nonetheless, given the plaintiffs' lack of evidence, we conclude that the elimination of the Methane Flaring Alternative was reasonable.

***1228** Second, the Leasing SFEIS explains that MSHA approval, which occurs later in the mine-permitting process, is required for any flare-use proposal. It also notes that, at the time it was issued, MSHA had not approved any flaring operations at active coal mines. [7] In response, plaintiffs contend that the Forest Service and BLM are authorized to condition leases to protect the environment and that BLM in particular is required to ensure that coal leases contain provisions "for the safeguarding of the public welfare." 30 U.S.C. § 187. We agree that the Forest Service and BLM are broadly authorized to create conditions for coal leasing. But they are not the agencies charged with approving flaring. Because at the time they issued the Leasing SFEIS, it was uncertain whether MSHA would approve methane flaring for an active coal mine, we conclude it was reasonable for the Forest Service and BLM to eliminate the Methane Flaring Alternative from detailed study. [8]

Because the Leasing SFEIS contains sufficient discussion of the relevant issues, we are convinced that the agencies took a hard look at the Methane Flaring Alternative. Their elimination from detailed study of the alternative was not arbitrary and capricious.

III

With respect to the North Fork SFEIS, plaintiffs seek vacatur of the North Fork Exception. Mountain Coal contends that the appropriate remedy is vacatur of the Exception only as applied to the Pilot Knob Roadless Area. "Under the APA, courts 'shall' 'hold unlawful and set aside agency action' that is found to be arbitrary or capricious. Vacatur of agency action is a common, and often appropriate form of injunctive relief granted by district courts." WildEarth Guardians v. U.S. Bureau of Land Mgmt., 870 F.3d 1222, 1239 (10th Cir. 2017) (quoting 5 U.S.C. § 706(2)(A)).

[15] We have taken several different steps when reversing a district court decision and finding a violation of NEPA. We have: "(1) reversed and remanded without instructions, (2) reversed and remanded with instructions to vacate, and (3) vacated agency decisions." Id. The typical remedy for an EIS in violation of NEPA is remand to the district court with instructions to vacate the agency action. See, e.g., Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 859 (10th Cir. 2019). But a court "may partially set aside a regulation if the invalid portion is severable," ***1229** that is, "if the severed parts operate entirely independently of one another, and the circumstances indicate the agency would have adopted the regulation even without the faulty provision." Ariz. Pub. Serv. Co. v. U.S. E.P.A., 562 F.3d 1116, 1122 (10th Cir. 2009) (quotation omitted).

The Colorado Roadless Rule includes a severability clause providing that, "[i]f any provision in this subpart [C.F.R. Title 36, Chapter II, Part 294, Subpart D] or its application to any person or to certain circumstances is held to be invalid, the remainder of the regulations in this subpart and their application remain in force." 36 C.F.R. § 294.48(f). The record of decision accompanying the final rules clarifies that "[t]his provision identifies the Department's intention that, in the event any provision is determined invalid, the remaining portions of the rule would remain in force." Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3260 (Jan. 12, 2001). The North Fork Exception is codified in the same subpart as the severability clause. Accordingly, the regulations contemplate vacatur of any provision of the North Fork Exception that is held to be invalid.

Mountain Coal urges us to sever and vacate the North Fork Exception only as applied to the Pilot Knob Roadless Area. We turn to the language of the Exception as promulgated to determine whether it contains a severable provision applying only to the Pilot Knob Area. The regulation permits temporary road construction for coal-related surface activities on "certain lands with Colorado Roadless Areas within the North Fork Coal Mining Area of the Grand Mesa, Uncompahgre, and Gunnison National Forests as defined by the North Fork Coal Mining Area displayed on the final

Colorado Roadless Areas map." 36 C.F.R. § 294.43(c)(ix). There is no provision in the Rule that relates only to the Pilot Knob Roadless Area; rather, severing and vacating the North Fork Exception as applied only to the Pilot Knob Roadless Area would require rewriting the regulation. Mountain Coal specifically asks us to add the words "except Pilot Knob" to the regulation rather than striking any portion of the text. In light of the structure of the rule, we conclude that the portion of the North Fork Exception applying to the Pilot Knob Roadless Area is not severable from the remainder of the Exception because it does not operate independently.

Moreover, the North Fork SFEIS dealt with the North Fork Coal Mining Area as a whole, [9] rather than only with the Pilot Knob Roadless Area. We conclude that the Forest Service acted arbitrarily and capriciously in its analysis of the entire North Fork Exception by failing to study in detail the Pilot Knob Alternative. Under our traditional equitable powers to fashion appropriate relief, which are retained under the APA, 5 U.S.C. § 702, the appropriate remedy is vacatur of the entire North Fork Exception.

IV

For the foregoing reasons, we **VACATE** the district court's judgment and **REMAND** the case for entry of an order vacating the North Fork Exception.

KELLY, Circuit Judge, concurring in part and dissenting in part.

I concur in the court's decision that NEPA did not require consideration of the methane flaring alternative but respectfully ***1230** dissent from the conclusion that U.S. Forest Service was required to consider the Pilot Knob alternative in detail. This time around, the Forest Service considered three alternatives in detail and eliminated 12 others from such consideration, including the Pilot Knob alternative. Those three alternatives, Alternatives A, B, and C, represented a reasonable range of acreage available for mining, within which the Pilot Knob alternative fell. An agency is not required to consider alternatives that do not meet the purposes or objectives of the federal action. Biodiversity Conservation All. v. Jiron, 762 F.3d 1036, 1085 (10th Cir. 2014). The categorical prohibition on access to coal in Pilot Knob, given "the State's interest in not foreclosing opportunities for exploration and development of coal resources," III Aplt. App. 266, was a sufficient reason for not considering it in greater detail.

The "alternatives analysis" need only satisfy a "rule of reason." Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1174 (10th Cir. 1999). This is not a case where the agency defined the objectives in such a manner that they could only be satisfied by one alternative. Agencies need only briefly discuss their reasons for rejecting a possible alternative. Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1166 (10th Cir. 2002) (quoting 40 C.F.R. § 1502.14(a)).

The court concludes that the Pilot Knob alternative advances the purposes of the action, and that the Forest Service's explanation for rejecting it is arbitrary and capricious. According to the court, the rejection "is based solely on the fact that the Pilot Knob Alternative would protect more land and provide access to fewer tons of coal than Alternative B (reinstating the entire North Fork Exception)," which it argues is a rationale that could be applied to every other alternative. [1] The court also concludes that because the rejection did not mention the Elk Creek Mine (which is within Pilot Knob), the argument that Alternative C did not foreclose future access to existing federal coal or private leases constitutes a post-hoc rationalization.

Both the Pilot Knob alternative (5,000 acres) and Alternative C (7,100 acres) removed acreage from coal development in order to preserve certain roadless areas. Unlike the Pilot Knob alternative, however, Alternative C did not foreclose future access to existing federal coal leases or private leases and recoverable coal. The SFEIS contained a map that identified existing and proposed coal leases and indeed mentioned the Elk Creek Mine, although it did point out that production idled in December 2015, in favor of final reclamation. III Aplt. App. 272, 273 Fig. 3-1; see also IV Gov't Supp. App. 940 (noting that the operator continued to show interest and another operator could theoretically operate in the future).

On this record, I disagree with the court's conclusion that the agency engaged in a "post-hoc rationalization" regarding the Elk Creek Mine. The agency clearly articulated that it excluded the Pilot Knob alternative because it failed to "preserve[ ] the option of future coal exploration and coal-related surface activities." III Aplt. App. 270. It then discussed sites where coal mining has taken place and where existing mines sit on federal leases within the affected area, including the Elk Creek Mine. Id. at 272. The Pilot Knob alternative foreclosed access to that mine, idled or not, which

fits squarely within the agency's rationale for rejection. The agency was not required to explicitly "state that the Pilot ***1231** Knob Alternative was eliminated from detailed study because of the existence of the Elk Creek Mine" in order to allow a court to affirm on those grounds. Rather, its reasoning needed to be "clearly disclosed in, and sustained by, the record." Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994). I believe that standard was met here. The court's contrary holding risks distorting the administrative record by ignoring obviously relevant facts that were considered but not expressly mentioned in an agency's brief discussion of its reasons for eliminating an alternative.

I disagree that this case is analogous to N.M. ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683 (10th Cir. 2009), where the agency took oil and gas development of Otero Mesa as a foregone conclusion and should have analyzed an alternative that would have precluded development. Here, the agency evaluated in detail a no-action alternative (Alternative A) that would have preserved all 19,700 acres of the North Fork area as roadless. A no-action alternative that continues existing development in an area is a "far cry" from an alternative that would prohibit development entirely. Id. at 711.

The court is correct that we cannot sustain the agency's decision on the ground that the Pilot Knob alternative was not "significantly distinguishable" from Alternative C. Id. at 708–09. The agency did not advance this reason for elimination in its SFEIS and we must affirm, "if at all, on grounds articulated by the agency itself." Utahns for Better Transp., 305 F.3d at 1165. Yet the court's analysis of this issue necessarily grafts arbitrary benchmarks onto the rule of reason test and consequently curtails the discretion Congress vested in agencies through NEPA.

The court observes that the Pilot Knob alternative protects "nearly 30% less land" and affords access to "35% more coal" than Alternative C while affecting "entirely separate coal resources." The court also accepts plaintiffs' portrayal of the record as establishing that "the two alternatives would result in significantly different environmental impacts because the Pilot Knob Roadless Area is geographically separate from [the other roadless areas] and has dissimilar habitat features." I doubt that geographic separation of the areas, standing alone, renders the Pilot Knob alternative significantly distinguishable. Plaintiffs also assert that Pilot Knob is "ecologically unique" because it "contains the only winter range for deer and bald eagles, the only severe winter range for elk, and the only historic and potential future habitat for the imperiled Gunnison sage-grouse." Aplt Br. at 7. But the portions of the record cited demonstrate that these ecological features exist in other parts of the state, just not in other parts of the areas under consideration. See III Aplt. App. 279, 325, 328–39, 331. The record may establish that Pilot Knob is ecologically different from the other roadless areas, but it falls fall short of establishing that it is "ecologically unique," even assuming that such a standard would properly factor into the significantly distinguishable branch of the rule of reason analysis.

The court identifies distinctions between the alternatives, but it is not at all clear that they are significant enough to trigger NEPA's statutory mandates. The court does not provide a limiting principle for this method of reexamining the merits of alternatives. Future parties are likely to seize on catchwords like "30% less land protected," "35% more coal made accessible," and "dissimilar habitat features" for what makes an alternative sufficiently distinguishable, notwithstanding a lack of grounding in NEPA or its implementing regulations. The court's opinion may provide a roadmap for delaying federal action rather than promoting informed decision-making ***1232** through careful consideration of reasonable alternatives. Perhaps some other case may necessitate such line-drawing, but this is not it. Because this analysis is not necessary to the court's conclusion, prudence counsels against conducting it.

The Colorado Roadless Rule, including the 19,700-acre North Fork Exception, was the product of years of deliberation, periods of notice and comment, and compromise. Our review of an agency's decision to eliminate an alternative must be informed by a "rule of reason and practicality." Biodiversity Conservation All. v. Bureau of Land Mgmt., 608 F.3d 709, 714 (10th Cir. 2010). "The range of reasonable alternatives is not infinite," Jiron, 762 F.3d at 1083 (internal quotation and citation omitted), and agencies cannot be expected to consider alternatives of finer and finer distinction. See Prairie Band Pottawatomie Nation v. Fed. Highway Admin., 684 F.3d 1002, 1012 (10th Cir. 2012) ("By necessity, an agency must select a certain number of [alternatives] for serious study and eliminate the rest without detailed analysis."). This court's role under NEPA is not to "substitute our judgment" about what alternatives are most effective to achieve an action's purpose, but only to "determine whether the necessary procedures have been followed." Assocs. Working for Aurora's Residential Env't v. Colo. Dep't

of Transp., 153 F.3d 1122, 1130 (10th Cir. 1998). The agency met its mandate here by considering a reasonable range of alternatives and "briefly discuss[ing]" its reasons for eliminating others from detailed analysis. 40 C.F.R. § 1502.14(a); see also 42 U.S.C. § 4332(C). For these reasons, I would affirm the district court's judgment.

All Citations

951 F.3d 1217

Footnotes

1 After this appeal was filed, the Office of Surface Mining Reclamation and Enforcement ("OSM") adopted the Leasing SFEIS and recommended that the Secretary of the Interior approve a mining plan modification proposed by Mountain Coal. Notice of Record of Decision for the West Elk Mining Plan Modification, 84 Fed. Reg. 9554, 9556 (Mar. 15, 2019). The Department of the Interior approved the mining plan modification, and the plaintiffs in this case filed a separate lawsuit challenging OSM's decision. WildEarth Guardians v. Bernhardt, No. 19-CV-001920-RBJ, —— F.Supp.3d ——, 2019 WL 5853870 (D. Colo. Nov. 8, 2019). The district court remanded the decision to OSM and enjoined coal mining pursuant to approval of the mining-plan modification. Id. at ——, at *15.

2 The dissent attempts to distinguish Richardson because in that case, BLM "took oil and gas development of Otero Mesa as a foregone conclusion and should have analyzed an alternative that would have precluded development," whereas the Forest Service in this case did evaluate such an alternative—Alternative A. But Richardson is not limited to cases in which the proposed action would prohibit development. The Forest Service's consideration of a no-action alternative in this case does not excuse the unreasonableness of its explanation for excluding the Pilot Knob Alternative from detailed study.

3 The dissent would hold that the inclusion of findings with respect to the Elk Creek Mine in a different part of the North Fork SFEIS shows that the agency dismissed the Pilot Knob Alternative from detailed analysis because of the presence of the Elk Creek Mine. This is inconsistent with the administrative record. In the Forest Service's explanation of why it eliminated the Pilot Knob Alternative from detailed study, the agency mentions access to coal "over the long term," "future coal exploration and development," and "the stability of local economies." It does not mention the Elk Creek Mine or compare the potential of the Elk Creek Mine with the long-term coal mining opportunities foreclosed by Alternative C.

4 This, too, is a post-hoc rationalization not mentioned in the agency's discussion of why it eliminated the Pilot Knob Alternative from detailed study.

5 The dissent correctly notes that some of these ecological features occur in other parts of the state outside of the three roadless areas at issue in this case. But this is irrelevant; our inquiry is whether the ecological consequences of the Pilot Knob Alternative would be significantly distinguishable from those of the other alternatives. We therefore consider whether the Pilot Knob Roadless Area is ecologically unique with respect to the areas protected under the other alternatives, not with respect to the entire state.

6 The Leasing SFEIS states that the engineering designs would become available during the state and OSM mine-permitting processes. In reviewing the OSM decision issued after the filing of this appeal, the district court vacated the approval of the mining-plan modification partly because OSM did not rigorously explore and objectively evaluate methane flaring. WildEarth Guardians v. Bernhardt, —— F.Supp.3d ——, —— – ——, 2019 WL 5853870, at *9-10.

7 After this appeal was filed, Mountain Coal submitted to MSHA a proposal for a methane flaring system at the active West Elk Mine. WildEarth Guardians v. Bernhardt, —— F.Supp.3d ——, —— n.4, 2019 WL 5853870, at *14 n.4. Mountain Coal represents that MSHA has approved the proposed flaring system and that the Assistant Secretary of Land and Minerals Management has authorized it. The Colorado state permitting process for the system, however, is not yet complete. These recent developments are not relevant to our analysis of whether the Leasing SFEIS complied with NEPA.

8 When promulgating the North Fork SFEIS earlier in the mine-permitting process, the Forest Service declined to study methane flaring in detail, stating that "methane flaring is best considered at the leasing stage when there is more information on the specific minerals to be developed and the lands that would be impacted by a flaring operation." Plaintiffs contend this statement is inconsistent with the agencies' present position that the leasing stage is too early to study the Methane Flaring Alternative in detail. Although this factor weighs against concluding that it was reasonable for the agencies to eliminate the Methane Flaring Alternative, we must address the reasonableness of the agencies' actions based on the reasons provided in the Leasing SFEIS. Further, the other reason the Forest Service declined to study methane flaring in detail in the North Fork SFEIS is that MSHA could decide not to allow flaring, resulting in contradictory agency rules. This reason is consistent with the Leasing SFEIS.

9 In High Country II, the district court cited the Colorado Roadless Rule's severability clause, severed the North Fork Exception from the remainder of the Rule, and vacated the Exception. 67 F. Supp. 3d at 1266. At issue in this case is the re-promulgation of the North Fork Exception.

1 While simple, this characterization is not a reasonable reading of the agency's rationale. The agency did not expressly or tacitly reject every alternative because it did not mirror the alternative selected.

End of Document

Exhibit B

Minute Order, *High Country Conservation Advocates v. U.S. Forest Serv.*, No. 1:17-cv-03025-PAB, ECF No. 78 (June 15, 2020).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-03025-PAB

HIGH COUNTRY CONSERVATION ADVOCATES,
WILDEARTH GUARDIANS,
CENTER FOR BIOLOGICAL DIVERSITY,
SIERRA CLUB, and
WILDERNESS WORKSHOP,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,
U.S. DEPARTMENT OF AGRICULTURE,
DANIEL JIRÓN, in his official capacity as Acting Under Secretary of Agriculture for Natural Resources and Environment, U.S. Department of Agriculture,
SCOTT ARMENTROUT, in his official capacity as Supervisor of the Grand Mesa, Uncompahgre, and Gunnison National Forests,
UNITED STATES DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT, and
KATHARINE MACGREGOR, in her official capacity as Deputy Assistant Secretary, Land and Minerals Management, U.S. Department of the Interior,

Defendants, and

MOUNTAIN COAL COMPANY, LLC,

Defendant-Intervenor.

MINUTE ORDER

Entered by Chief Judge Philip A. Brimmer

This matter is before the Court on Plaintiffs' Unopposed Motion for Entry of Tenth Circuit Mandate [Docket No. 76] and Plaintiffs' Emergency Motion to Enforce Remedy [Docket No. 77]. This Court entered judgment in favor of defendants on August 16, 2018. Docket No. 63. On appeal, the Tenth Circuit vacated the judgment and remanded the case for entry of an order vacating the North Fork Exception, 81 Fed. Reg. 91,811 (Dec. 19, 2016). Docket No. 69-1 at 22. The Tenth Circuit's mandate issued on April 24, 2020. Docket No. 74. It is

ORDERED that the Final Judgment [Docket No. 63] is **VACATED**. It is further

ORDERED that the North Fork Exception, 81 Fed. Reg. 91,811 (Dec. 19, 2016), is **VACATED**. It is further

ORDERED that Defendants and Defendant-Intervenor shall respond to Plaintiffs' Emergency Motion to Enforce Remedy [Docket No. 77] on or before **Monday, June 22, 2020**.

DATED June 15, 2020.

Exhibit C

Conservation Groups, Request for DRMS Inspection (June 11, 2020).

June 11, 2020

BY ELECTRONIC MAIL AND U.S. PRIORITY MAIL

Ginny Brannon
Director
Colorado Division of Reclamation, Mining and Safety
1313 Sherman St., Rm. 215
Denver, CO 80203
Ginny.brannon@state.co.us

Re: Request for Inspection Over Failure of West Elk Mine, Permit Number C-1980-007, to Comply With Applicable State Coal Mining Laws and Regulations and Permit Requirements

Dear Ms. Brannon:

Pursuant to the Colorado Surface Coal Mining Reclamation Act ("CO SCMRA"), C.R.S. 34-33-122(7), and Colorado Mined Land Reclamation Board ("MLRB") Regulation 5.02.5(1), High Country Conservation Advocates, WildEarth Guardians, Center for Biological Diversity, Sierra Club, and Wilderness Workshop (collectively, "Conservation Groups") write to inform the Colorado Division of Reclamation, Mining and Safety ("DRMS") of apparent ongoing violations of CO SCMRA, MLRB Rules, and permitting requirements at the West Elk coal mine in Gunnison County, Colorado, Permit No. C-1980-007, operated by Arch Resource's (AKA Arch Coal's) subsidiary Mountain Coal Co. We request that CDRMS inspect and take appropriate action to address these violations pursuant to MLRB Rules 5.02.5 and 5.03.2. Further, because it appears that Mountain Coal lacks a legal right of entry to conduct surface coal mining activities within the Sunset Roadless Area, we request that DRMS issue a cessation order pursuant to MLRB Rule 5.03.2. At a minimum, DRMS must issue an order of cessation until such time as Mountain Coal demonstrates why and how it has a valid right of entry in light of the Tenth Circuit's ruling ordering the vacatur of the North Fork Exception.

Underlying this request is a March 2, 2020 federal court decision from the Tenth Circuit ordering vacatur of the North Fork Exception to the Colorado Roadless Rule. *High Country Conservation Advocates v. U.S. Forest Serv*. ("*High Country II*"), 951 F.3d 1217, 1229 (10th Cir. 2020) (Exhibit A). Vacatur of the Exception means that the Colorado Roadless Rule remains in effect with no exception authorizing temporary road-building to support coal mining. Because the Colorado Roadless Rule generally prohibits road construction, tree cutting, and linear

construction activities within designated roadless areas, including the Sunset Roadless Area at issue here, 36 C.F.R. § 294.42–.44, the North Fork Exception was an essential legal underpinning for DRMS's authorization of Mountain Coal's expansion of the West Elk Mine, including construction of roads and methane drainage wells ("MDWs"), in the Sunset Roadless Area. 36 C.F.R. § 294.43(c)(1)(ix). Vacatur of the North Fork Exception renders the Exception void and DRMS's approvals for Mountain Coal's surface activities in the Sunset Roadless Area unlawful. Mountain Coal consequently lacks a legal right of entry to conduct surface-disturbing activities in violation of the Colorado Roadless Rule. Despite this lack of legal authority, we understand that during the week of June 1, the company illegally entered and completed more than a mile of road construction and extensive tree cutting. *See* Exhibit B (Aerial Photos of June 2020 West Elk Road Construction (June 10, 2020), (courtesy of EcoFlight)). Mountain Coal representatives have further indicated that they plan to continue to build roads, construct MDWs, and cut trees over the course of this summer, including as soon as this Friday. Accordingly, immediate action by DRMS is required to prevent further illegal surface coal mining-related activity within the Sunset Roadless Area.

I. General Background.

The Colorado Roadless Rule, which the Forest Service adopted in 2012, generally prohibits road construction in designated areas but initially included an exception for the North Fork Coal Mining Area (the "North Fork Exception"). *See* Special Areas; Roadless Area Conservation; Applicability to National Forests in Colorado, 77 Fed. Reg. 39,576, 39,578 (July 3, 2012). In 2014, however, a federal court concluded that the Forest Service's 2012 promulgation of the North Fork Exception violated the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"), and the court vacated the North Fork Exception. *High Country Conservation Advocates v. U.S. Forest Serv*. ("*High Country I*"), 67 F. Supp. 3d 1262, 1266-67 (D. Colo. 2014).

In 2016, the Forest Service prepared a Supplemental Final Environmental Impact Statement ("North Fork SFEIS") and readopted the North Fork Exception, Roadless Area Conservation; National Forest System Lands in Colorado, 81 Fed. Reg. 91,811 (Dec. 19, 2016). Mountain Coal then submitted lease modification requests to expand existing coal leases (COC-1362, COC-67232) into the Sunset Roadless Area, which were consented to by the Forest Service and approved by the Bureau of Land Management ("BLM").

Conservation Groups filed suit, alleging that the federal agencies' issuance of the North Fork Exception and leases violated NEPA and the APA. The district court initially rejected these challenges. On appeal, however, the Tenth Circuit held that the Forest Service's promulgation of the North Fork Exception violated NEPA and remanded to the district court with instructions to vacate the North Fork Exception in its entirety. *High Country II*, 951 F.3d at 1229.

II. Legal Background.

The Tenth Circuit's March 2, 2020 decision specifically ordered the vacatur of the entire North Fork Exception, rendering the Exception void. *High Country II*, 951 F.3d at 1229. Black's Law Dictionary defines "vacate" as "[t]o nullify or cancel; make void; invalidate." Black's Law Dictionary (11th ed. 2019); *see also Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 824 F.3d 33, 52 (3d Cir. 2016) (Vacatur "wipe[s] the slate clean.").[1] Federal case law further provides that vacatur of unlawful agency action renders that action a nullity, and there is a return to the status quo—federal appellate orders "must be given full retroactive effect . . . as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1995); *see, e.g.*, *High Country I*, 67 F. Supp. 3d at 1265 (recognizing the point of vacatur in a NEPA case is to provide a "clean slate"); *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (holding that vacatur "had the effect of reinstating the rules previously in force"); *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) ("When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect."). In other words, the agency action lacks any legal significance and is treated as if it never happened.

The Tenth Circuit vacated the entire North Fork Exception knowing that Mountain Coal believes that such a remedy would preclude mining activity at least until the agencies cured the NEPA defects. Mountain Coal's counsel, under a duty of candor to the Tenth Circuit, argued that vacating the entire North Fork Exception would bar the West Elk mine from undertaking mining coal or building roads in the area:

> As is likely hoped by the Conservation Groups, vacatur of the entire North Fork Exception would again freeze coal exploration in the entire North Fork Coal Mining Exception Area and prevent Mountain Coal from further roadbuilding and mining in the Lease Modifications. This would certainly result in bypass of the coal in the Lease Modifications.

Br. of Intervenor-Appellee, App. Ct. ECF No. 25 at 49 (excerpt attached as Exhibit C). But the Court squarely rejected Mountain Coal's request that the Court not vacate, holding that the "appropriate remedy [was] vacatur of the entire North Fork Exception." 951 F.3d at 1229. Thus, the Tenth Circuit understood that its direction to vacate the North Fork Exception would terminate Mountain Coal's right to construct roads to access coal in the Lease Modifications Area.[2]

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[1] *See also* Black's Law Dictionary 1388 (Spec. Deluxe 5th ed.1979) (defining "vacate" as "To annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment.").

[2] Further, Mountain Coal, once it took this legal position, is judicially estopped from making contrary arguments concerning the impact of the Tenth Circuit's vacatur. Judicial estoppel is an equitable doctrine that precludes a party "from adopting a legal position in conflict with one earlier taken in the same or

Accordingly, under the Tenth Circuit order, the Colorado Roadless Rule is in still in effect, but there is no longer an exception for coal mining in the North Fork Exception area, and activity premised on that unlawful exception may not occur. While the District Court has yet to enter the formal vacatur order, this is a ministerial task that the District Court is required to take. *See e.g., Colo. Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1534 (10th Cir. 1992) (explaining that it is "well established that a district court must comply strictly with the mandate rendered by the reviewing court."); *Litchfield v. Dubuque & P.R. Co.*, 74 U.S. 270, 271 (1868) ("After the decision by this court, the court below had no power but to enter a judgment according to the mandate, and to carry that judgment into execution. This was the end of the case."). The Tenth Circuit order has immediate and retroactive effect. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) (A "principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."). DRMS should not stand idly by while Mountain Coal seeks to thwart the clear mandate from the Tenth Circuit by taking advantage of court delays in implementing the vacatur order during a pandemic that has resulted in significant court delays.

The vacatur of the North Fork Exception strips federal and state agencies of their authority to allow Mountain Coal to conduct surface coal mining activities—activities such as road-building and tree cutting are prohibited within the Sunset Roadless Area. *See* 36 C.F.R. § 294.43(a). Further, because the Tenth Circuit order has retroactive effect, Mountain Coal never obtained a valid right to construct roads or other surface-disturbing activities through approval of the lease modifications or mine plan approval. Nor does Mountain Coal have any pre-existing lease, permit, or other rights to access the Sunset Roadless Area issued prior to the promulgation of the Colorado Roadless Rule on July 3, 2012.[3] The Rule's preamble makes it clear that while "it does not affect the terms or validity of leases existing prior to the promulgation date of the final rule,"[4] it was meant to limit surface-disturbing activities under any future leases.[5] Here, Mountain Coal's access to the Sunset Roadless Area directly stems from the unlawfully adopted North Fork Exception to the Colorado Roadless Rule, which the Tenth Circuit ordered to be vacated. Accordingly, Mountain Coal lacks any legal right to build roads or cut trees within the

---

related litigation." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). Its purpose is "to protect the integrity of the judicial process," *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), and "may be invoked to prevent a party from playing fast and loose with the courts," *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980). In evaluating judicial estoppel, courts "inquire whether a party has succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled," and "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire*, 532 U.S. at 750.

[3] 36 C.F.R. § 294.48(a).

[4] 77 Fed. Reg. 39576, 39579 (July 3, 2012).

[5] 36 C.F.R. § 294.48(a).

Sunset Roadless Area, and DRMS must take all appropriate action needed to ensure Mountain Coal does not continue to rely on PR-15 as legal cover for its unlawful activities.

III. Mountain Coal's Violations Necessitate Inspection and Enforcement.

The Tenth Circuit decision ordering vacatur of the North Fork Exception eliminates the legal basis for DRMS's prior authorization of Permit Revision 15 (PR-15) (and subsequent minor and technical revisions) to Permit C-1980-007, which authorized surface coal mining and reclamation operations at West Elk within the Sunset Roadless Area. As explained, vacatur of the North Fork Exception means that the Exception was *never* lawfully in place, and that Mountain Coal did not obtain any right to violate the Colorado Roadless Rule in its leases or permit approvals. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. at 97; *Sec. Indus. Bank*, 459 U.S. at 79.

Mountain Coal itself recognized in its Tenth Circuit briefing that a vacatur order would preclude its ability to construct roads within the Lease Modifications. *See* Exhibit C. Yet despite its clear representations, Mountain Coal now plans to continue road-building and mining-related activities within the Sunset Roadless Area, knowing full well the implications of the Tenth Circuit's decision.

Absent the North Fork Exception, Mountain Coal lacks a legal right of entry onto the Sunset Roadless Area in violation of MLRB Rule 2.03.6(1). Consequently, any surface coal mining activities, including road-building and tree cutting, are unlawful within the Sunset Roadless Area. 36 CFR § 294.42–.44. Despite the Tenth Circuit's vacatur and Mountain Coal's admitted lack of legal right to enter the Sunset Roadless Area and to conduct surface coal mining activities[6], including road construction and tree cutting, we understand that during the week of June 1, the company illegally entered the roadless area and completed more than a mile of road construction and extensive tree cutting. *See* Exhibit B. Moreover, the company has indicated in calls to Conservation Groups' attorneys that it plans to continue its illegal construction activity, including additional road and MDW pad construction. Accordingly, Mountain Coal is in violation of state and federal law, as well as the permit requirements of PR-15.

With the Tenth Circuit's order to vacate the North Fork Exception, Mountain Coal lacks a legal right of entry to conduct surface-disturbing activities on the Sunset Roadless Area, in violation of its permit obligations. MLRB regulations specifically require permit applicants to provide "a complete and detailed legal description of the proposed permit boundary, a description of the documents upon which the applicant bases his or her legal right to enter and begin surface coal mining operations in the permit area, and a statement as to whether that right

[6] Mountain Coal's unlawful road-building and tree cutting constitute surface coal mining activities that are part of surface coal mining operations consistent with MLRB definitions set forth at Rule 1, Section 1.04(131) and (132).

is the subject of pending litigation." MLRB Rule 2.03.6(1). Moreover, "[t]he permit application, all supporting documentation and any stipulations or conditions" are a "binding part of the permit." DRMS, Proposed Decision and Findings of Compliance for the West Elk Mine C-1980-007, Permit Revision No. 15, at 3 (Sept. 4, 2018). At the time of DRMS's decision to approve PR-15, the legality of Mountain Coal's purported right of entry upon lands within the Sunset Roadless Area was under litigation, as described above. That litigation has now been resolved by the Tenth Circuit's decision ordering vacatur of the North Fork Exception, leaving Mountain Coal without a legal right of entry upon the Sunset Roadless Area. Accordingly, Mountain Coal is now in violation of MLRB Rule 2.03.6(1) and PR-15.

IV. The Duty to Inspect, Enforce, and Issue a Cessation Order.

Any person may provide a written request to DRMS for an inspection of surface coal mining operations. *See* C.R.S. 34-33-123(1); MRLB Rules, Section 5.02.5(1). Where the request gives DRMS "sufficient basis to believe" that any violation of CO SCMRA, MLRB Rules, or any condition of a permit has occurred, DRMS is required to conduct the inspection within 10 days C.R.S. 34-33-123(1); MRLB Rules, Section 5.02.5(1)(a). DRMS will have "sufficient basis to believe" that a violation exists if, "[t]he request alleges facts that, if true, would constitute [such a] violation[]." MLRB Rules, Section 5.02.5(1)(b)(i). Here, Conservation Groups' allegations meet this standard, as they allege and demonstrate that Mountain Coal lacks a legal right of entry onto the Sunset Roadless Area lands covered by PR-15, in violation of MLRB Rule 2.03.6(1), and that Mountain Coal's surface-disturbing activities are in violation of the Colorado Roadless Rule. 36 C.F.R. §§ 294.42-44.

If an inspection confirms that a violation of CO SCMRA, MLRB Rules, or any condition of a permit exist at a surface coal mining operation, DRMS shall issue a notice of violation to the operator. *See* MLRB Rules, Section 5.03.2(2). However, where a violation "creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant environmental harm to land, air, or water resources," DRMS "shall immediate order a cessation of surface coal mining and reclamation operations … or of the relevant portion thereof." MLRB Rules, Section 5.03.2(1)(a). Given Mountain Coal's recent and imminently planned road-building and other construction activities within the Sunset Roadless Area, these violations are causing or can reasonably be expected to cause significant, imminent environmental harm to the relatively undisturbed sub-alpine environment of the Sunset Roadless Area. At an absolute minimum, DRMS must issue an order of cessation until such time as Mountain Coal demonstrates why and how it has a valid right of entry in light of the Tenth Circuit's ruling ordering the vacatur of the North Fork Exception.

Accordingly, DRMS should promptly conduct an inspection and take enforcement action, including ordering Mountain Coal to cease road-building, tree cutting, and any other activities inconsistent with the Colorado Roadless Rule.

V. Conclusion.

It is critical that this matter be immediately and effectively addressed. DRMS has an obligation to ensure that Mountain Coal's coal mining activities are lawfully conducted in accordance with CO SCMRA, MLRB Rules, and the conditions of its permit. With the Tenth Circuit invalidating and ordering the vacatur of the North Fork Exception underlying Mountain Coal's purported claim to legal entry upon the Sunset Roadless Area, Mountain Coal's ongoing construction activities represent a blatant disregard of its legal obligations. The Forest Service has abdicated its authority to protect the Sunset Roadless Area and has ignored requests from Conservation Groups to provide any explanation or legal authority for allowing Mountain Coal's continued construction activities. It is clear that Mountain Coal will continue to bulldoze the Sunset Roadless Area unless and until DRMS asserts its authority to stop this unlawful activity. We respectfully request DRMS conduct an immediate inspection and take all appropriate enforcement action needed to address Mountain Coal's unlawful behavior.

Sincerely,

Matt Reed
Public Lands Director
High Country Conservation Advocates
716 Elk Avenue
Crested Butte, CO 81224
866-349-7104
matt@hccacb.org

Nathaniel Shoaff
Senior Attorney
Sierra Club Environmental Law Program
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Oakland, CA 94612
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Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
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jnichols@wildearthguardians.org

Allison N. Melton
Center for Biological Diversity
P.O. Box 3024
Crested Butte, CO 81224
970-309-2008
amelton@biologicaldiversity.org

Attachments:

Exhibit A: *High Country Conservation Advocates v. U.S. Forest Serv*. ("*High Country II*"), 951 F.3d 1217, 1229 (10th Cir. 2020).

Exhibit B: Aerial Photos of June 2020 West Elk Road Construction (June 10, 2020), (courtesy of EcoFlight).

Exhibit C: Excerpt - Br. of Intervenor-Appellee, App. Ct. ECF No. 25 at 49.

Exhibit D

Cessation Order No.: CO-2020-001.

COLORADO
Division of Reclamation, Mining and Safety
Department of Natural Resources

1313 Sherman St. Room 215 Denver, CO 80203
P (303) 866-3567 F (303) 832-8106
https://colorado.gov/drms

CESSATION ORDER

Cessation Order No.	**CO-2020-001**	**Mine:**	**West Elk Mine**
Permit No.:	**C-1980-007**	**County:**	**Delta, Gunnison**
Type of Mine:	**Underground**	**Permittee:**	**Mountain Coal Company, LLC**
Operator (If Other than Permittee):	**Mountain Coal Company, LLC**	**Mail Address:**	**5174 Highway 133 Somerset, CO 81434**
Mail Address:	**5174 Highway 133 Somerset, CO 81434**	**Date/Time of Inspection:**	**June 10, 2020**
Inspector:	**Leigh Simmons**	**Served by:**	**James Stark**
Person Served:	**Weston Norris**		

(Signature of Authorized Representative of the Division of Reclamation, Mining and Safety)

(Signature of Person Served)

(Please Print Name and Title)

CERTIFIED MAIL NO.

Date and Time of Service:

The Division of Reclamation, Mining and Safety has conducted an inspection of the above mine, has made the findings stated in the attached schedule and hereby finds, for good cause shown, that a Cessation Order must be issued with respect to each of the conditions, practices, or violations listed in the attached schedule. This Order constitutes a separate Cessation Order for each condition, practice, or violation listed.

In accordance with Section 34-33-123 of the Colorado Surface Coal Mining Reclamation Act, you are ordered to CEASE IMMEDIATELY the operations described in the attached schedule and to perform the affirmative obligations (if applicable) described in the attached schedule within the designated time for abatement. Reclamation operations not directly the subject of this Order shall continue while this Order is in effect.

You are responsible for doing all work in a safe manner in compliance with applicable laws and regulations.

The undersigned finds that cessation of mining is ____ is not __X_ expressly, or in practical effect, required by this Notice. For this purpose, "mining" means extracting coal from the earth or from a waste pile and transporting it within or from the mine site.

This Order shall remain in effect until the condition, practice, or violation has been abated, or until it is modified, terminated or vacated in writing by an authorized representative of the Division, or by the Mined Land Reclamation Board.

1. **Expiration Date of Notice - Informal Hearing at Site.** If this Order requires cessation of mining, expressly or in practical effect (but not otherwise), it will expire automatically 30 days after service upon you, unless, within that time, (a) an informal hearing on the cessation has been held at or near the site, or (b) the operator has waived the holding of such a hearing. The informal hearing will be presided over by representatives of the Division other than the representative who issued the Order. Temporary relief from the Order may be requested at such hearing. Your right to a formal review is not affected by any waiver on your part of an informal hearing.

2. **Formal Review and Temporary Relief**. The Operator has the legal right to a review of this Order or Violation in a formal public hearing before the Colorado Mined Land Reclamation Board. You may apply for review by submitting a Request for Review within 90 days of the issuance of this Order. The Request for Review must be submitted to:

   Mined Land Reclamation Board
   1313 Sherman Street, Room 215
   Denver, Colorado 80203

   If you request a formal hearing, you may request temporary relief from this Order, pending hearing, but the filing of a request for review does not operate as a stay of any Order or Notice. Procedures in this regard are found in C.R.S. 1973, 34-33-124.

3. **Mandatory Minimum Penalties**. C.R.S. 1973, 34-33-123(8)(1) requires that a mandatory minimum penalty of $750.00 or more must be assessed for each day during which the violation(s) continues beyond the abatement period set forth in this Order or in any Notice of Violation.

   If you willfully and knowingly fail or refuse to comply with this Order, you will be subject to criminal prosecution and will, upon conviction, be punished by a fine of not more than $10,000.00 or by imprisonment for not more than one year, or both.

4. **Effect on Permit**. In addition, if it is determined that a pattern of violations exists, and that the violations were caused by unwarranted failure to comply, or were willful, your permit may be suspended or revoked.

   C.R.S. 1973, 34-33-123(8) provides for imposition of civil penalties of up to $5,000.00 for each violation listed in the schedule and provides that each day of continuing violation may be deemed a separate violation.

Cessation Order No.: **CO-2020-001**

Nature of Condition, Practice, or Violation:

On April 24, 2020 the United States Court of Appeals for the Tenth Circuit issued a mandate ordering the United States District Court for the District of Colorado to vacate the North Fork Exception to the Colorado Roadless Rule. On June 15, 2020 the United States District Court for the District of Colorado entered an order vacating the North Fork Exception to the Colorado Roadless Rule, 81 Fed. Reg. 91,811 (Dec. 19, 2016). Notwithstanding BLM coal leases C-1362 and COC-67232, after reviewing the relevant facts and Orders from the 10th Circuit and the United State District Court, the Division has determined that Mountain Coal has failed to maintain its legal right to enter the Sunset Roadless area at the West Elk Mine. Mountain Coal must immediately cease all surface disturbing activities in longwall panels LWSS-1, LWSS-2, LWSS-3, and LWSS-4 at the West Elk Mine. If Mountain Coal is currently conducting any surface disturbing activities, it must immediately stop and stabilize the area(s) to prevent any off-site impacts pursuant to the Colorado Surface Coal Mining Reclamation Act. The Division further determines that a condition of significant imminent environmental harm exists.

ACT, REGULATION, OR PERMIT PROVISION(S) VIOLATED:

ACT SECTION(S): **C.R.S. 34-33-110(2)(j) and 34-33-114(2)(f)**

REGULATIONSECTION(S): **Rules 2.03.6 and 2.07.2**

PERMIT SECTION(S): **Permit Section 2.03 and Exhibit 4**

Portion of the Operation to which Order applies:

This order applies to all surface disturbing activities in the Sunset Roadless area, including longwall panels LWSS-1, LWSS-2, LWSS-3, and LWSS-4, except as expressly permitted herein. Mountain Coal may access and continue current operations in longwall panel LWSS-1 and may conduct maintenance and surface stabilization activities in longwall panel LWSS-1 to prevent any off-site impacts pursuant to the Colorado Surface Coal Mining Reclamation Act. Mountain Coal may conduct ground stabilization activities in longwall panels LWSS-2, LWSS-3, and LWSS-4.

Findings - (Check the appropriate blank):

_____ The condition, practice, or violation is creating an imminent danger to the health or safety of the public.

X The condition, practice or violation is causing or can reasonably be expected to cause significant imminent environmental harm to land, air, or water resources.

_____

_____ The Permittee or Operator has failed to abate violation(s) No. _____ included in Notice of Violation No. _____ within the time for abatement originally fixed or subsequently extended.

Operation(s) to be Ceased Immediately:

1. All surface disturbing activities in the Sunset Roadless area must cease immediately, except as expressly permitted herein.
2. All travel on roads and drill pads constructed in longwall panels LWSS-2, LWSS-3, and LWSS-4 that are within the Sunset Roadless Area.
3. All equipment must be removed from the Sunset Roadless area unless it is actively being used for surface stabilizing activities and maintenance to prevent offsite impacts.
4. Mountain Coal may continue to access the roads and drill pads in longwall panel LWSS-1 and conduct surface stabilization and maintenance activities as necessary. No new construction activities are permitted in LWSS-1.
5. Mountain Coal may conduct ground stabilization activities in longwall panels LWSS-2, LWSS-3, and LWSS-4 to prevent offsite impacts pursuant to the Colorado Surface Coal Mining Reclamation Act.

STEPS NECESSARY TO ABATE VIOLATION (REMEDIAL ACTION):

Abatement #	Step	Description
1		Notwithstanding BLM leases C-1362 and COC-67232, Mountain Coal must provide the Division with detailed information regarding its assertion that it maintains legal right of entry to the Sunset Roadless area and why it is not in direct conflict with the District Court order vacating the North Fork Exception to the Colorado Roadless Rule.

TIME FOR ABATEMENT (NOT MORE THAN 90 DAYS):
ON OR BEFORE last abatement due date

Abatement Step #	Due Date
1	September 14, 2020

Affirmative Obligation(s) to Abate Imminent Danger or Harm, if Applicable*:

Mountain Coal must immediately cease all surface disturbing activities in the Sunset Roadless area at the West Elk Mine. Mountain Coal may conduct surface stabilization activities as necessary to prevent off-site impacts pursuant to the Colorado Surface Coal Mining Reclamation Act.

* If imminent danger to public health and safety or imminent environmental harm is found to exist.

Exhibit E

Excerpt - Br. of Intervenor-Appellee, App. Ct. ECF No. 25 at 49.

No. 18-1374

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HIGH COUNTRY CONSERVATION ADVOCATES, *et al.*,

Plaintiffs-Appellants,

v.

U.S. FOREST SERVICE, *et al.*,

Defendants-Appellees

and

MOUNTAIN COAL COMPANY, LLC,

Intervenor-Appellee.

On appeal from the United States District Court for the District of Colorado
The Honorable Phillip A. Brimmer, Case No. 1:17-cv-03025-PAB

BRIEF OF THE INTERVENOR-APPELLEE

Michael Drysdale
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(801) 933-7360
goldberg.sarah@dorsey.com

Attorneys for Intervenor-Appellee Mountain Coal Company, LLC

ORAL ARGUMENT REQUESTED

Secondly, in contrast to the lack of significant error, vacating the entire Exception pending review of the Pilot Knob Alternative would have significantly disruptive consequences. As is likely hoped by the Conservation Groups, vacatur of the entire North Fork Exception would again freeze coal exploration in the entire North Fork Coal Mining Exception Area and prevent Mountain Coal from further roadbuilding and mining in the Lease Modifications. This would certainly result in bypass of the coal in the Lease Modifications. In effect, the Purpose and Need of the CRR and Lease Modifications would be thwarted, as applied to the Sunset CRA, because of a completely unrelated NEPA error associated with another CRA.

Consequently, under any test or equitable analysis, any remedy should be confined to the Pilot Knob CRA while allowing the remainder of the North Fork Exception to remain in effect.

2. Remand without Vacatur to the District Court is the Only Appropriate Remedy for any Prejudicial APA Violation Related to Methane Flaring.

The same law and logic is applicable to the Lease Modifications. The choice presented by the Conservation Groups' advocacy of methane flaring was whether to approve the Lease Modifications with, or without, a flaring mitigation requirement. Approval of the Lease Modifications was the baseline assumption for both paths, and consequently it would be unnecessary and overbroad to vacate the

Exhibit F

Arch Coal MR-446 Application

STATE OF COLORADO

DRMS_CoalAdmin - DNR, DNR <dnr_drms_coal_admin@state.co.us>

Fwd: Minor Revision No. MR-446: Reduced and Revised Longwall Panels SS2, SS3 & SS4 MVBs & Roads

1 message

Simmons - DNR, Leigh <leigh.simmons@state.co.us> Sat, Jun 13, 2020 at 8:00 AM
To: Susan Burgmaier - DNR <susan.burgmaier@state.co.us>, DNR DRMS_CoalAdmin - DNR <dnr_drms_coal_admin@state.co.us>

Susan, Alysha,

I haven't seen any notifications from e- permitting for this. If there's still a glitch in the matrix can you get the MR started from this email?

Thanks,

--------- Forwarded message ---------
From: **Welt, Kathy** <KWelt@archrsc.com>
Date: Sat, Jun 13, 2020, 07:17
Subject: Minor Revision No. MR-446: Reduced and Revised Longwall Panels SS2, SS3 & SS4 MVBs & Roads
To: Leigh.Simmons@state.co.us <Leigh.Simmons@state.co.us>
Cc: Munz, Robert <rmunz@archrsc.com>, Poulos, John <JPoulos@archrsc.com>, cpagano@gunnisoncounty.org <cpagano@gunnisoncounty.org>

Leigh,

I've submitted this MR on e-permitting, but here's a copy in case it doesn't work again, along with the revision submittal thank you page.

Thanks!

Kathy Welt,

Environmental Engineer III

Mountain Coal Company, LLC

West Elk Mine

5174 Highway 133

Somerset, CO 81434

Phone (970) 929-2238

Cell (970) 433-1022

Please note the change in email address to KWelt@archrsc.com

*** I'm out of the office and sent this from my phone

3 attachments

Sunset Trail Panel 3 and 4 -New Alignment MVBs.pdf
465K

MR-446 Reduced and Revised Longwall Panels SS3 & SS4 MVBs & Roads.pdf
513K

Thank you.pdf
139K

ARCH
WEST ELK

Kathleen G. Welt
Environmental Engineer III
kwelt@archrsc.com
Phone: 970.929.2238

Mountain Coal Company, LLC
A subsidiary of Arch Resources, Inc.
West Elk Mine
5174 Highway 133
Somerset, CO 81434

June 12, 2020

Mr. Leigh D. Simmons
Colorado Division of Reclamation, Mining and Safety
Office of Mined Land Reclamation
1313 Sherman Street, Room 215
Denver, Colorado 80203

Re: Mountain Coal Company, LLC, West Elk Mine; Permit No. C-1980-007; Minor Revision No. MR-446: Reduced and Revised Longwall Panels SS2, SS3 & SS4 MVBs & Roads

Dear Mr. Simmons:

Mountain Coal Company, LLC (MCC) submits this letter and map entitled, "MR-446 – Revised MVB Road and Pad Locations for Sunset Trail Panels 2, 3 & 4" for Minor Revision MR-446 to reduce and revise the MVBs and roads for longwall Panels SS2, SS3 & SS4. MCC staff and US Forest Service personnel have completed field reviews of the currently approved pad locations and road alignments resulting in the proposed location adjustments shown on the map. Seven (7) pads and more than 17,157' of road, totaling about 13.4 acres, will be eliminated by this revision.

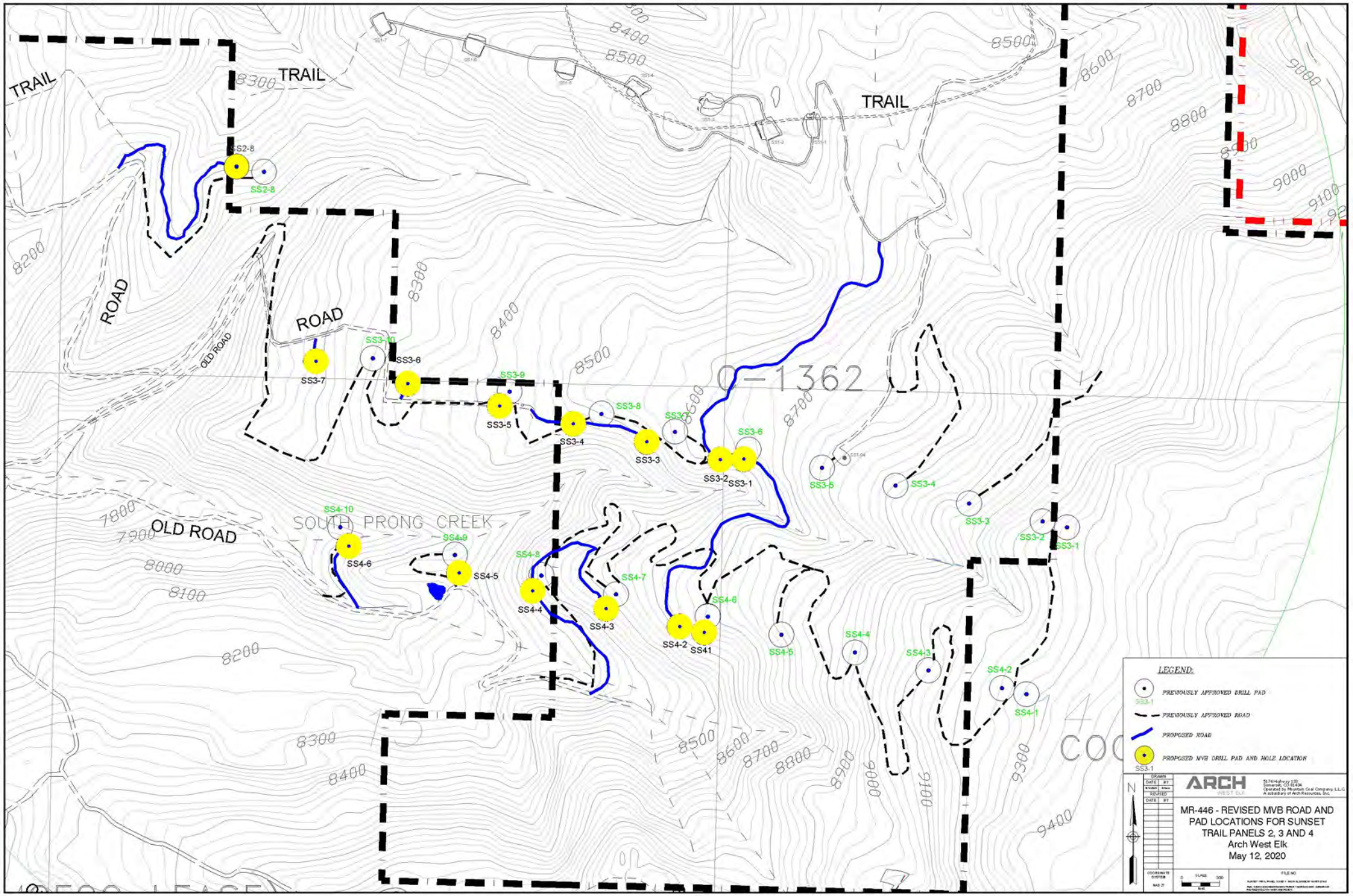
Please contact me at (970) 929-2238 or by e-mail should you have questions regarding this submittal.

Sincerely,

Kathleen G. Welt

Kathleen G. Welt,
Environmental Engineer III

cc: Dan Gray – USFS
John Poulos - MCC
Cathie Pagano - Gunnison Co.


TRAIL
TRAIL
TRAIL
ROAD
ROAD
OLD ROAD
OLD ROAD
SOUTH PRONG CREEK
C-1362
SS2-8
SS3-10
SS3-7
SS3-6
SS3-9
SS3-5
SS3-4
SS3-8
SS3-3
SS3-2
SS3-1
SS4-10
SS4-6
SS4-9
SS4-5
SS4-8
SS4-4
SS4-7
SS4-3
SS4-6
SS4-2
SS41
SS4-5
SS4-4
SS4-3
SS4-2
SS4-1
LEGEND:
PREVIOUSLY APPROVED DRILL PAD
PREVIOUSLY APPROVED ROAD
PROPOSED ROAD
PROPOSED MVB DRILL PAD AND HOLE LOCATION
ARCH
MR-446 - REVISED MVB ROAD AND PAD LOCATIONS FOR SUNSET TRAIL PANELS 2, 3 AND 4
Arch West Elk
May 12, 2020

DRMS Coal New Revision Application

COLORADO
Division of Reclamation, Mining and Safety
Department of Natural Resources

Login

General Information

Revision Application Form Selection *
MR (Minor Revision Application)

Permit Number *
C1980007

Operation Name
West Elk Mine

The following pages will show the contact information we have on file for this permit. If any of it is inaccurate, you will have the opportunity to correct it after this form has been submitted.

1. **Upon submission of this form you will be presented with a link to the contact information update form.**
2. **There is a question asking about the accuracy of this information. Indicating that it is inaccurate will send an e-mail to notify your administrator to make the appropriate changes.**

Contact Information

Permittee Contact Information

Permittee Name
Mountain Coal Company, LLC

Permittee Contact
Weston Norris

Permittee Address 1
5174 Highway 133

Permittee Address 2

Permittee City
Somerset

Permittee State
CO

Permittee Zip Code
814340000

Permittee Contact Email Address
wnorris@archrsc.com

Permittee Contact Phone Number

Permitting Contact Info

Permitting Name
Mountain Coal Company, LLC

Permitting Contact
Kathleen Welt

Permitting Address 1
5174 Highway 133

Permitting Address 2

Permitting City
Somerset

Permitting State
CO

Permitting Zip Code
814340000

Permitting Contact Email Address
kwelt@archrsc.com

Permitting Contact Phone Number
9709292238

Inspection Contact Info

Inspection Name
Mountain Coal Company, LLC

Inspection Contact

Kathleen Welt

Inspection Address 1

5174 Highway 133

Inspection Address 2

Inspection City	Inspection State	Inspection Zip Code
Somerset	CO	814340000

Inspection Contact Email Address

KWelt@archrsc.com

Inspection Contact Phone Number

9709292238

Is the contact information listed above correct? If it is not correct your organization's Administrator will receive an email notification. *

(•) Yes ( ) No

Once this form is submitted you will see a link to update contact information, which you may do if you're an admin.

Surface Area Changes

Revision

Revision Title * (?)

Minor Revision No. MR-446

Short description

Narrative Description of Revision * (?)

Minor Revision No. MR-446: Reduced and Revised Longwall Panels SS2, SS3 & SS4 MVBs & Roads

Detailed description used for notifications

Bond Amount Change? *

Yes No

Additional Surface Disturbance? *

Yes No

Proposed Acreage Revisions

Permit Area

Current Value	Proposed Change Value * (?)	Calculated Revised Total
19854.90	0.00	19854.90 This value must equal the total of all Surface and Mineral Acreage changes

Affected Area

Current Value	Proposed Change Value * (?)	Calculated Revised Total
15953.10	0.00	15953.10

Disturbed Area

Current Value	Proposed Change Value * (?)	Calculated Revised Total
590.34	-13.40	576.94

Attachments & Maps

Do you have attachments? *

Yes No

Attachments

Standard Uploads

Document, NOT Confidential

MR-446 Reduced and Revised Lon... 512.1KB

Map, NOT Confidential

Sunset Trail Panel 3 and 4 -New Al... 464.7KB

Confidential Uploads

CONFIDENTIAL Document

CONFIDENTIAL Map

Document / Map List

New or Revised Documents / Pages *

If none exist, enter NONE in the comment box below.

Minor Revision No. MR-446: Reduced and Revised Longwall Panels SS2, SS3 & SS4 MVBs & Roads letter

New or Revised Maps *

If none exist, enter NONE in the comment box below.

Minor Revision No. MR-446: Reduced and Revised Longwall Panels SS2, SS3 & SS4 MVBs & Roads map

Deleted Documents / Pages *

If none exist, enter NONE in the comment box below.

None

Deleted Maps *

If none exist, enter NONE in the comment box below.

None

Signature

Date

06/13/20

By checking this box you have thoroughly reviewed this Coal Revision form and are ready to submit this form to DRMS.

I Agree

Exhibit G

Federal Coal Lease COC1362

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
MODIFIED COAL LEASE

Serial No.: COC1362
Date of Lease: September 1, 1967

PART I.

THIS MODIFIED COAL LEASE is entered into on DEC 0 1 2017 by and between the UNITED STATES OF AMERICA, hereinafter called the Lessor, through the Bureau of Land Management, and

Mountain Coal Company, LLC
One CityPlace Drive, Ste. 300
St. Louis, MO 63141

hereinafter called Lessee.

This modified lease shall retain the effective date September 1, 1967, of the original Coal Lease COC1362, and is effective for a period of 20 years therefrom, and for so long thereafter as coal is produced in commercial quantities from the leased lands, subject to readjustment of lease terms at the end of the 20th lease year (September 1, 1987), and each 10-year period thereafter.

Sec. 1. This lease is issued pursuant and subject to the terms and provisions of the Mineral Lands Leasing Act of 1920, as amended, 41 Stat. 437, 30 U.S.C. 181-287, hereinafter referred to as the Act; and to the regulations and formal orders of the Secretary of the Interior which are now or hereafter in force, when not inconsistent with the express and specific provisions herein.

Sec. 2. Lessee as the holder of Coal Lease COC1362, issued effective September 1, 1967, was granted the exclusive right and privilege to drill for, mine, extract, remove or otherwise process and dispose of the coal deposits in, upon, or under the lands described below as Original Lease and Modification 1.

The Lessor in consideration of fair market value, rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, hereby grants and leases to Lessee the exclusive right and privilege to drill for, mine, extract, remove, or otherwise process and dispose of the coal deposits in, upon, or under the lands described below as Modification 2:

Original Lease: Sixth Principal Meridian, Colorado
T. 13 S., R. 90 W.,
secs. 27 and 28;
sec. 29, lots 1 thru 14;
sec. 30, lots 5, 6, and 9;
sec. 32, lots 1 thru 9, excluding 24.8 acres in Independent Reservoir;
secs. 33 and 34.
T. 14 S., R. 90 W., 6th P.M.
sec. 3;
sec. 4, lots 1 thru 3, S½NE¼, SE¼NW¼, E½SW¼, and SE¼;
sec. 9, N½NE¼, and SE¼NE¼;
sec. 10, N½.
Containing 4,836.36 acres in Gunnison County, Colorado.

Modification 1: Sixth Principal Meridian, Colorado
T. 13 S., R. 90 W.,
sec. 35, lots 3, 4, 19, 27, 29, 31, and 34.
Containing 160.92 acres in Gunnison County, Colorado.

Modification 2: Sixth Principal Meridian, Colorado
T. 14 S., R. 90 W.,
sec. 10, NE¼SW¼, and SE¼;
sec. 11, S½NW¼, and SW¼;
sec. 14, NE¼NW¼, NW¼NW¼, SW¼NW¼, W½SE¼NW¼, W½NE¼SW¼, and NW¼SW¼;
sec. 15, E½NE¼, and N½SE¼.
Containing approximately 800 acres, more or less, in Gunnison County, Colorado.

containing 5,797.280 acres, more or less, together with the right to construct such works, buildings, plants, structures, equipment and appliances and the right to use such on-lease rights-of-way which may be necessary and convenient in the exercise of the rights and privileges granted, subject to the conditions herein provided.

Part II. TERMS AND CONDITIONS

Sec. 1. (a) RENTAL RATE - Lessee shall pay lessor rental annually and in advance for each acre or fraction thereof during the continuance of the lease at the rate of $3.00 for each lease year.

(b) RENTAL CREDITS - Rental shall not be credited against either production or advance royalties for any year.

Sec. 2. (a) PRODUCTION ROYALTY. The royalty shall be 8 percent of the value of the coal as set forth in the regulations. Royalties are due to Lessor the final day of the month succeeding the calendar month in which the royalty obligation accrues.

(b) ADVANCE ROYALTIES - Upon request by the Lessee, the authorized officer may accept, for a total of not more than 20 years, the payment of advance royalties in lieu of continued operation, consistent with the regulations. The advance royalty shall be based on a percent of the value of a minimum number of tons determined in the manner established by the advance royalty regulations in effect at the time the Lessee requests approval to pay advance royalties in lieu of continued operation.

Sec. 3. BONDS - Lessee shall maintain in the proper office a lease bond in the amount of $2,800,000. The authorized officer may require an increase in this amount when additional coverage is determined appropriate.

Sec. 4. DILIGENCE - This lease is subject to the conditions of diligent development and continued operation, except that these conditions are excused when operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the Lessee. The lessor, in the public interest, may suspend the condition of continued operation upon payment of advance royalties in accordance with the regulations in existence at the time of the suspension. Lessee shall submit an amended operation and reclamation plan pursuant to Section 7 of the Act (30 U.S.C. 207(c) within 3 years of the date of modification or prior to approval to commence mining operations.

Lessor reserves the power to assent to or order the suspension of the terms and conditions of this lease in accordance with, inter alia, Section 39 of the Mineral Leasing Act, 30 U.S.C. 209.

Sec. 5. LOGICAL MINING UNIT (LMU) – Either upon approval by the lessor of the lessee's application or at the direction of the lessor, this lease will become an LMU or part of an LMU, subject to the provisions set forth in the regulations.

The stipulations established in an LMU approval in effect at the time of LMU approval or modification will supersede the relevant inconsistent terms of this lease so long as the lease remains committed to the LMU. If the LMU of which this lease is a part is dissolved, the lease shall then be subject to the lease terms which would have been applied if the lease had not been included in an LMU.

Sec. 6. DOCUMENTS, EVIDENCE AND INSPECTION - At such times and in such form as Lessor may prescribe, Lessee shall furnish detailed statements showing the amounts and quality of all products removed and sold from the lease, the proceeds therefrom, and the amount used for production purposes or unavoidably lost.

Lessee shall keep open at all reasonable times for the inspection of any duly authorized officer of Lessor, the leased premises and all surface and underground improvements, works, machinery, ore stockpiles, equipment, and all books, accounts, maps, and records relative to operations, surveys, or investigations on or under the leased lands.

Lessee shall allow lessor access to and copying of documents reasonably necessary to verify Lessee compliance with terms and conditions of the lease.

While this lease remains in effect, information obtained under this section shall be closed to inspection by the public in accordance with the Freedom of Information Action (5 U.S.C. 552).

Sec. 7. DAMAGES TO PROPERTY AND CONDUCT OF OPERATIONS - Lessee shall comply at its own expense with all reasonable orders of the Secretary, respecting diligent operations, prevention of waste, and protection of other resources.

Lessee shall not conduct exploration operations, other than casual use, without an approved exploration plan. All exploration plans prior to the commencement of mining operations within an approved mining permit area shall be submitted to the authorized officer.

Lessee shall carry on all operations in accordance with approved methods and practices as provided in the operating regulations, having due regard for the prevention of injury to life, health, or property, and prevention of waste, damage or degradation any land, air, water, cultural, biological, visual, and other resources, including mineral deposits and formations of mineral deposits not leased hereunder, and to other land uses or users. Lessee shall take measures deemed necessary by lessor to accomplish the intent of this lease term. Such measures may include, but not limited to, modification to proposed siting or design of facilities, timing of operations, and specifications of interim and final reclamation procedures. Lessor reserves to itself the right to lease, sell, or otherwise dispose of the surface or other mineral deposits in the lands and the right to continue existing uses and to

authorize future uses upon or in the leased lands, including issuing leases for mineral deposits not covered hereunder and approving easements or rights-of-way. Lessor shall condition such uses to prevent unnecessary or unreasonable interference with rights of Lessee as may be consistent with concepts of multiple use and multiple mineral development.

Sec. 8. PROTECTION OF DIVERSE INTERESTS, AND EQUAL OPPORTUNITY - Lessee shall pay when due all taxes legally assessed and levied under the laws of the State or the United States; accord all employees complete freedom of purchase; pay all wages at least twice each month in lawful money of the United States; maintain a safe working environment in accordance with standard industry practices; restrict the workday to not more than 8 hours in any one day for underground workers, except in emergences; and take measures necessary to protect the health and safety of the public. No person under the age of 16 years shall be employed in any mine below the surface. To the extent that laws of the State in which the lands are situated are more restrictive than the provisions in this paragraph, then the State laws apply.

Lessee will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and the rules, regulations, and relevant orders of the Secretary of Labor. Neither Lessee nor Lessee's subcontractors shall maintain segregated facilities.

Sec. 9. (a) TRANSFERS - This lease may be transferred in whole or in part to any person, association or corporation qualified to hold such lease interest.

Transfers of record title, working or royalty interest must be approved in accordance with the regulations.

(b) RELINQUISHMENTS - Lessee may relinquish in writing at any time all rights under this lease or any portion thereof as provided in the regulations. Upon lessor's acceptance of the relinquishment, lessee shall be relieved of all future obligations under the lease or the relinquished portion thereof, whichever is applicable.

Sec. 10. DELIVERY OF PREMISES, REMOVAL OF MACHINERY, EQUIPMENT, ETC. - At such times as all portions of this lease are returned to lessor, lessee shall deliver up to lessor the land leased, underground timbering, and such other supports and structures necessary for the preservation of the mine workings on the leased premises or deposits and place all workings in condition for suspension or abandonment. Within 180 days thereof, lessee shall remove from the premises all other structures, machinery, equipment, tools, and materials that it elects to or as required by the authorized officer. Any such structures, machinery, equipment, tools, and materials remaining on the leased lands beyond 180 days, or approved extension thereof, shall become the property of the lessor, but lessee shall either remove any or all such property or shall continue to be liable for the cost of removal and disposal in the amount actually incurred by the lessor. If the surface is owned by third parties, lessor shall waive the requirement for removal, provided the third parties do not object to such waiver. Lessee shall, prior to the termination of bond liability or at any other time when required and in accordance with all applicable laws and regulations, reclaim all lands the surface of which has been disturbed, dispose of all debris or solid waste, repair the offsite and onsite damage caused by lessee's activity or activities incidental thereto, and reclaim access roads or trails.

Sec. 11. PROCEEDINGS IN CASE OF DEFAULT – If lessee fails to comply with applicable laws, existing regulations, or the terms, conditions and stipulations of this lease, and the noncompliance continues for 30 days after written notice thereof, this lease shall be subject to cancellation by the lessor only by judicial proceedings. This provision shall not be construed to prevent the exercise by lessor of any other legal and equitable remedy, including waiver of the default. Any such remedy or waiver shall not prevent later cancellation for the same default occurring at any other time.

Sec. 12. HEIRS AND SUCCESSORS - IN-INTEREST - Each obligation of this lease shall extend to and be binding upon, and every benefit hereof shall insure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

Sec. 13. INDEMNIFICATION - Lessee shall indemnify and hold harmless the United States from any and all claims arising out of the Lessee's activities and operations under this lease.

Sec. 14. SPECIAL STATUTES - This lease is subject to the Federal Water Pollution Control Act (33 U.S.C. 1151 - 1175); the Clean Air Act (42 U.S.C. 1857 et seq.), and to all other applicable laws pertaining to exploration activities, mining operations and reclamation, including the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.)

Sec. 15. SPECIAL STIPULATIONS: (For Forest Service Stipulations, see Attachment B)

(a) Cultural Resources. (1) Before beginning any surface disturbing activities on the leased lands, lessee shall conduct a cultural resource intensive field inventory on those portions of the mine plan area and adjacent areas, or exploration plan area, which may be adversely affected by lease-related activities and which were not previously inventoried at such a level of intensity. The inventory shall be conducted by a qualified professional cultural resource specialist (i.e., archaeologist or historian, as appropriate) approved by the authorized officer of the Bureau of Land Management (BLM) and shall be conducted in the manner that the authorized officer specifies.

(2) Lessee shall submit an inventory report, including recommendations for protecting any significant cultural resources, to the Regional Director, Western Regional Coordinating Center, Office of Surface Mining Reclamation & Enforcement (OSMRE), and the BLM authorized officer. Lessee shall not begin surface disturbing activities until permission to proceed is given by the appropriate authorized officer.

(3) Lessee shall protect all known cultural resource properties within the lease area from lease-related activities until cultural resources avoidance or mitigation measures can be implemented as part of an approved exploration plan or an approved mining and exploration plan.

(4) The cost of conducting the inventory, preparing reports, and carrying out mitigation measures shall be borne by the lessee.

(5) If cultural resources are discovered during operations under the lease, lessee shall immediately notify the authorized officer of the BLM or OSMRE. Lessee shall not disturb such discovered resources except as subsequently authorized. Within two (2) working days of notification, the authorized officer will evaluate, or have evaluated, any cultural resources discovered and will determine if any action may be required to protect or preserve such discoveries. Cost of data recovery for cultural resources discovered during lease operations shall be borne by the surface managing agency unless otherwise specified by the BLM authorized officer.

(6) All cultural resources discovered shall remain under the jurisdiction of the United States until ownership is determined under applicable law.

(b) Paleontological Resources. (1) Before beginning surface disturbing activities on the leased lands, lessee shall contact the BLM authorized officer to determine whether lessee will be required to conduct a paleontological appraisal of lease areas that may be adversely affected by lease-related activities. Any paleontological appraisal required shall be conducted by a qualified paleontologist approved by the BLM authorized officer and in the manner the authorized officer specifies.

(2) Lessee shall submit an appraisal report, including recommendations for protecting any larger and more conspicuous fossils of significant scientific interest identified on the leased lands to the BLM authorized officer.

(3) If vertebrate fossil resources are encountered during underground mining, activities shall be halted and the BLM notified of the occurrence immediately. A BLM approved paleontologist would then visit the site and make site-specific recommendations for impact avoidance. Operations in the area of the discovery would not resume until authorization to proceed has been received from the BLM Authorized Officer.

(4) Lessee shall not knowingly disturb, alter, destroy, or take any larger and more conspicuous fossils of significant scientific interest and shall protect all such fossils in conformance with the measures included in the approved mining and reclamation plan or exploration plan.

(5) These conditions apply to all such fossils of significant scientific interest discovered within the leased lands, whether discovered in the overburden, interburden, or coal seam or seams.

(6) All fossils of significant scientific interest shall remain under the jurisdiction of the United States until ownership is determined under applicable law.

(7) The cost of any required recovery of such fossils shall be borne by the United States. Copies of all paleontological resource data shall be provided to the Regional Director, OSMRE.

(c) Resource Recovery and Protection. (1) Notwithstanding the approval of a resource recovery and protection plan (R2P2) by the BLM, lessor reserves the right to seek damages against the operator/lessee in the event (i) the operator/lessee fails to achieve maximum

economic recovery (MER) (as defined at 43 CFR 3480.0-5(21) of the recoverable coal reserves or (ii) the operator/lessee is determined to have caused a wasting of recoverable coal reserves. Damages shall be measured on the basis of the royalty that would have been payable on the wasted or unrecovered coal.

(2) The parties recognize that under an approved R2P2, conditions may require a modification by the operator/lessee of that plan. In the event a coalbed or portion thereof is not to be mined or is rendered unmineable by the operation, the operator/lessee shall submit appropriate justification to obtain approval by the AO to leave such reserves unmined. Upon approval by the AO, such coalbeds or portions thereof shall not be subject to damages as described above. Further, nothing in this section shall prevent the operator/lessee from exercising its right to relinquish all or portion of the lease as authorized by statute and regulation.

(3) In the event the AO determines that the R2P2, as approved, will not attain MER as the result of changed conditions, the AO will give proper notice to the operator/lessee as required under applicable regulations. The AO will order a modification, if necessary, identifying additional reserves to be mined in order to attain MER. Upon a final administrative or judicial ruling upholding such an ordered modification, any reserves left unmined (wasted) under that plan will be subject to damages as described in the first paragraph under this section.

(4) Subject to the right to appeal hereinafter set forth, payment of the value of the royalty on such unmined recoverable coal reserves shall become due and payable upon determination by the AO that the coal reserves have been rendered unmineable or at such time that the operator/lessee has demonstrated an unwillingness to extract the coal.

(5) The BLM may enforce this provision either by issuing a written decision requiring payment of the MMS demand for such royalties, or by issuing a notice of non-compliance. A decision or notice of non-compliance issued by the lessor that payment is due under this stipulation is appealable as allowed by law.

Mountain Coal Company, LLC
(Company or Lessee Name)

By _____
(Signature of Lessee)

Vice President & Treasurer
(Title)

December 20, 2017
(Date)

THE UNITED STATES OF AMERICA

By Lawson, acting for
Suzanne Mellhoff

Deputy State Director, Division of Energy, Lands and Minerals
(Title)

December 22, 2017
(Date)

Title 18 U.S.C. Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious or fraudulent statements or representations as to any matter within its jurisdiction.

Attachment B- Stipulations for National Forest System Lands Federal Coal Lease COC-1362 & COC-67232

Resource Area	Stipulations Carried Forward from Parent Lease COC-1362 Specific to Forest Service Lands	Stipulations Carried Forward from Parent Lease COC-67232 Specific to Forest Service Lands	Stipulations Specific to Lease Modifications
Cultural and Paleontological Resources	The FS is responsible for assuring that the leased lands are examined to determine if cultural resources are present and to specify mitigation measures. Prior to undertaking any surface-disturbing activities on the lands covered by this lease, the lessee or operator, unless notified to the contrary by the FS, shall: • Contact the FS to determine if a site specific cultural resource inventory is required. If a survey is required then: • Engage the services of a cultural resource specialist acceptable to the FS to conduct a cultural resource inventory of the area of proposed surface disturbance. The operator may elect to inventory an area larger than the area of proposed disturbance to cover possible site relocation which may result from environmental or other considerations. An acceptable	The FS is responsible for assuring that the leased lands are examined to determine if cultural resources are present and to specify mitigation measures. Prior to undertaking any surface-disturbing activities on the lands covered by this lease, the lessee or operator, unless notified to the contrary by the FS, shall: • Contact the FS to determine if a site specific cultural resource inventory is required. If a survey is required then: • Engage the services of a cultural resource specialist acceptable to the FS to conduct a cultural resource inventory of the area of proposed surface disturbance. The operator may elect to inventory an area larger than the area of proposed disturbance to cover possible site relocation which may result from environmental or other considerations. An acceptable	Use language from parent leases (required Standard Notice for Lands under the Jurisdiction of the Department of Agriculture.)

	inventory report is to be submitted to the FS for review and approval at the time a surface disturbing plan of operation is submitted. • Implement mitigation measures required by the FS and BLM to preserve or avoid destruction of cultural resource values. Mitigation may include relocation of proposed facilities, testing, salvage, and recordation or other protective measures. All costs of the inventory and mitigation will be borne by the lessee or operator, and all data and materials salvaged will remain under the jurisdiction of the U.S. Government as appropriate. • The lessee or operator shall immediately bring to the attention of the FS and BLM any cultural or paleontological resources or any other objects of scientific interest discovered as a result of surface operations under this license, and shall leave such discoveries intact until directed to proceed by FS and BLM.	inventory report is to be submitted to the FS for review and approval at the time a surface disturbing plan of operation is submitted. • Implement mitigation measures required by the FS and BLM to preserve or avoid destruction of cultural resource values. Mitigation may include relocation of proposed facilities, testing, salvage, and recordation or other protective measures. All costs of the inventory and mitigation will be borne by the lessee or operator, and all data and materials salvaged will remain under the jurisdiction of the U.S. Government as appropriate. • The lessee or operator shall immediately bring to the attention of the FS and BLM any cultural or paleontological resources or any other objects of scientific interest discovered as a result of surface operations under this license, and shall leave such discoveries intact until directed to proceed by FS and BLM.	
Endangered or Threatened Species	The FS is responsible for assuring that the leased land is examined prior to undertaking	The FS is responsible for assuring that the leased land is examined prior to undertaking	Use language from parent leases, required Standard Notice for Lands

	any surface-disturbing activities to determine effects upon any plant or animal species listed or proposed for listing as endangered or threatened, or their habitats. The findings of this examination may result in some restrictions to the operator's plans or even disallow use and occupancy that would be in violation of the Endangered Species Act of 1973 by detrimentally affecting endangered or threatened species or their habitats. The lessee/operator may, unless notified by the FS that the examination is not necessary, conduct the examination on the leased lands at his discretion and cost. This examination must be done by or under the supervision of a qualified resource specialist approved by the FS. An acceptable report must be provided to the FS identifying the anticipated effects of a proposed action on endangered or threatened species or their habitats.	any surface-disturbing activities to determine effects upon any plant or animal species listed or proposed for listing as endangered or threatened, or their habitats. The findings of this examination may result in some restrictions to the operator's plans or even disallow use and occupancy that would be in violation of the Endangered Species Act of 1973 by detrimentally affecting endangered or threatened species or their habitats. The lessee/operator may, unless notified by the FS that the examination is not necessary, conduct the examination on the leased lands at his discretion and cost. This examination must be done by or under the supervision of a qualified resource specialist approved by the FS. An acceptable report must be provided to the FS identifying the anticipated effects of a proposed action on endangered or threatened species or their habitats.	under the Jurisdiction of the Department of Agriculture.
	If there is reason to believe that Forest Service Sensitive species, Threatened or Endangered species of plants or animals, or migratory bird species of high Federal interest are present, or become present in the lease area, the Lessee/Operator shall be required to conduct an intensive field inventory of the area to be disturbed and/or impacted. The inventory shall include species or groups of species identified by the FS, and will be conducted to by a qualified specialist. A report of findings will be prepared and provided to the FS. A plan	If there is reason to believe that Sensitive, Threatened or Endangered species of plants or animals, or migratory bird species of high Federal interest are present, or become present in the lease area, the Lessee/Operator shall be required to conduct an intensive field inventory of the area to be disturbed and/or impacted. The inventory shall be conducted by a qualified specialist, and a report of findings prepared. A plan will be made that recommends protection for these species or action necessary to mitigate the disturbance. The	Use language from parent leases, required Standard Notice for Lands under the Jurisdiction of the Department of Agriculture.

	will be made that recommends protection for these species or action necessary to mitigate the disturbance consistent with the Forest Plan. The cost of conducting such inventory, preparing reports and carrying out mitigation measures shall be borne by the Lessee/Operator.	cost of conducting such inventory, preparing reports and carrying out mitigation measures shall be borne by the Lessee/Operator.	
Canada Lynx	To comply with the USDA Forest Service Conservation Agreement with Fish and Wildlife Service, to follow the conservation measures in the Canada Lynx Conservation Assessment and Strategy (Ruediger et al. 2000), the following special constraints will apply if surface use on the lease is proposed in lynx habitat: • Winter access will be limited to designated routes. • Further, should surface disturbing operations be proposed on the lease in lynx habitat, the following special constraints may apply, depending on site-specific circumstances: • Remote monitoring of the development sites and facilities may be required to reduce snow compaction. • A reclamation plan (e.g. road reclamation and vegetation rehabilitation) for sites and facilities that promotes the restoration of lynx habitat may be required.	To comply with the Canada Lynx Assessment and Strategy (Ruediger *et al.* 2000), the following special constraints will apply if post-lease surface use is proposed in lynx habitat: • Winter access will be limited to designated routes. Further, should post-lease operations be proposed on the lease in lynx habitat, the following special constraints may apply, depending on site-specific circumstances: • Remote monitoring of the development sites and facilities may be required to reduce snow compaction. • A reclamation plan (e.g. road reclamation and vegetation rehabilitation) for sites and facilities that promotes the restoration of lynx habitat may be required. • Public motorized use on new roads constructed for project-specific purposes will be	To comply with the GMUG Forest Plan 2008 amendment, the following special constraints will apply if surface use on the lease is proposed in lynx habitat: • Winter access will be limited to designated routes. Further, should surface disturbing operations be proposed on the lease in lynx habitat, the following special constraints will apply: • Remote monitoring of the development sites and facilities will be required to reduce snow compaction. • A reclamation plan (e.g. road reclamation and vegetation rehabilitation) for sites and facilities that promotes the restoration of lynx habitat will be required. • Public motorized use on new roads constructed for project-specific purposes will be restricted. • Access roads will be designed

	• Public motorized use on new roads constructed for project-specific purposes will be restricted. • Access roads will be designed to provide for effective closures and will be reclaimed or decommissioned at project completion if they are no longer needed for other management objectives. • New permanent roads will not be built on ridge tops or in saddles, or in areas identified as important for lynx habitat connectivity. New roads will be situated away from forested stringers.	restricted. • Access roads will be designed to provide for effective closures and will be reclaimed or decommissioned at project completion if they are no longer needed for other management objectives. • New permanent roads will not be built on ridge tops or in saddles, or in areas identified as important for lynx habitat connectivity. New roads will be situated away from forested stringers. • If post lease surface use occurs in lynx habitat, the Lessee will be required to submit an annual report to the USDA-FS and USFWS of all activities having occurred in lynx habitat.	to provide for effective closures and will be reclaimed or decommissioned at project completion if they are no longer needed for other management objectives. • New permanent roads will not be built on ridge tops or in saddles, if possible, or in areas identified as important for lynx habitat connectivity. New roads will be situated away from forested stringers, if possible.
Raptors	For raptors (except American kestrel) the Lessee will be required to: • Conduct surveys for nesting raptors on the lease prior to development of any surface facilities, and • No surface activities will be allowed within ¼ mile radius of active nest sites between the dates of February 1 and August 15, unless authorized by the Forest Service on a site-specific basis. • No surface activities will be	For raptors (except American kestrel) the Lessee will be required to: • Conduct surveys for nesting raptors on the lease prior to development of any surface facilities, and • No surface activities will be allowed within ½-mile radius of active nest sites between the dates of February 1 and August 15, unless authorized by the Forest Service on a site-specific basis.	Use combined language from COC-67232 and COC-1362 which reflects Forest Plan standards as well as guidelines from the Biological Evaluation for this project: • Conduct surveys for nesting raptors on the lease prior to development of any surface facilities, and • No surface activities will be allowed within ½-mile radius of active nest sites between the dates of February 1 and August 15, unless authorized by the Forest Service on a site-specific basis.

	allowed within 1-mile radius of active bald eagle or peregrine falcon nest sites between the dates of February 1 and August 15, unless authorized by the Forest Service on a site-specific basis.		• No surface activities will be allowed within 1-mile radius of active bald eagle or peregrine falcon nest sites * between the dates of February 1 and August 15, unless authorized by the Forest Service on a site-specific basis. (* No bald eagle or peregrine falcon nest site habitat has been identified within the lease modifications as indicated in the Biological Evaluation prepared for this analysis.)
Big game winter range	In order to protect big game wintering areas, elk calving areas, and other key wildlife habitat and/or activities, specific surface use may be curtailed during specific times of year. Specific time restrictions for specific species will be evaluated by the Forest Service at the individual project stage, and any additional site specific conditions of use developed at that time.	In order to protect big game wintering areas, elk calving areas, and other key wildlife habitat and/or activities, specific surface use may be curtailed during specific times of year. Specific time restrictions for specific species will be evaluated by the Forest Service at the individual project stage, and any additional site specific conditions of use developed at that time.	Use language from parent leases.
Water depletions	In the future, if water to be used for mine related activities is taken from a source that is not considered to be non-tributary waters by the U.S. Fish and Wildlife Service, or which exceeds a depletion amount previously consulted upon, the permitting agency must enter into consultation with the U.S. Fish and Wildlife Service to determine appropriate conservation measures to offset effects to listed fish and critical habitat in the upper Colorado River Basin.	In the future, if water to be used for mine related activities is taken from a source that is not considered to be non-tributary waters by the U.S. Fish and Wildlife Service, or which exceeds a depletion amount previously consulted upon, the permitting agency must enter into consultation with the U.S. Fish and Wildlife Service to determine appropriate conservation measures to offset effects to listed fish and critical habitat in the upper Colorado River Basin.	Based on the CRR Section 7 consultation effort for the CRR's NFCMA in 2016, the Forest Service took on the responsibility for reinitiating consultation if minor water depletion caps were exceeded. The Forest Service wants to ensure the lessee provides the necessary information from monitoring and reporting to determine if minor water depletion caps are exceeded, and, in the highly unlikely event that the depletion caps were exceeded, the lessee would meet any additional conservation

			measures the USFWS might require. This updated stipulation provides clarification to the process that has been occurring on the parent leases regarding water depletion. Changes to stipulation are in italics. In the future, if water to be used for mine related activities is taken from a source that is not considered to be non-tributary waters by the U.S. Fish and Wildlife Service, or which exceeds a depletion amount previously consulted upon, *the surface management agency* must enter into consultation with the U.S. Fish and Wildlife Service to determine appropriate conservation measures to offset effects to listed fish and critical habitat in the upper Colorado River Basin.*The lessee shall monitor and report all depletions to the Forest Service. Notwithstanding the fact that the surface management agency has the obligation to consult, the Lessee has the obligation to comply with all appropriate conservation measures to offset effects to listed fish and critical habitat in the upper Colorado River Basin in the event the depletion threshold is exceeded and additional reasonable and prudent actions are required.*
Breeding birds	If surface disturbance is proposed on the lease, the lessee/operators will be required to conduct breeding bird surveys prior to surface disturbance as prescribed by the Forest Service.	If surface disturbance is proposed on the lease, the lessee/operators will be required to conduct breeding bird surveys prior to surface disturbance.	Use language from COC-1362 parent lease on both modifications.

Geologic hazards	No surface occupancy would be allowed in areas of high geologic hazard or high erosion potential, or on slopes which exceed 60%.	No surface occupancy would be allowed in areas of high geologic hazard or high erosion potential.	Use language from parent lease COC-1362 on both modifications.
	Special interdisciplinary team analysis and mitigation plans detailing construction and mitigation techniques would be required on areas where slopes range from 40-60 percent. The interdisciplinary team could include engineers, soil scientist, hydrologist, landscape architect, reclamation specialist and mining engineer.	Special interdisciplinary team analysis and mitigation plans detailing construction and mitigation techniques would be required on areas where slopes range from 40-60 percent. The interdisciplinary team could include engineers, soil scientist, hydrologist, landscape architect, reclamation specialist and mining engineer.	Use language from parent leases.
Baseline Information	The operator/lessee would be required to perform adequate baseline studies to quantify existing surface and subsurface resources. Existing data can be used for baseline analyses provided that the data is adequate to locate, quantify, and demonstrate interrelationships between geology, topography, hydrogeology, and hydrology. Baseline studies are critical to the success of future observation and assessment of mining related effects on resources.	The operator/lessee would be required to perform adequate baseline studies to quantify existing surface and subsurface resources. Existing data can be used for baseline analyses provided that the data is adequate to locate, quantify, and demonstrate interrelationships between geology, topography, hydrogeology, and hydrology. Baseline studies are critical to the success of future observation and assessment of mining related effects on resources in the Dry Fork lease tract.	Use language from parent leases.
Monitoring Program	The operator/lessee would be required to establish or amend a monitoring program to be used as a continuing record of change over time of area resources in order to assess mining induced impacts. The monitoring program shall provide the procedures and methodologies to adequately assess interrelationships between geology, topography,	The operator/lessee of the lease tract would be required to establish or amend a monitoring program to be used as a continuing record of change over time of area resources in order to assess mining induced impacts. The monitoring program shall provide the procedures and methodologies to adequately assess interrelationships between geology,	Use language from parent leases.

	hydrogeology, and hydrology identified in the baseline assessment to mining activities on the lease area. The monitoring program shall incorporate baseline data so as to provide a continuing record over time.	topography, hydrogeology, and hydrology identified in the baseline assessment to mining activities in the lease tract area. The monitoring program shall incorporate baseline data so as to provide a continuing record over time.	
Riparian, wetland or floodplain	Surface use or disturbances (except for surface subsidence and resource monitoring purposes defined in the approved mining permit) will avoid riparian, wetland or floodplain areas, and a buffer zone surrounding these areas (the definition of riparian areas and appropriate buffer zone will be consistent with that defined in the Forest Service Manual and Water Conservation Practices Handbook. Wetland definition will follow Army Corps of Engineers guidelines) unless no practical alternatives exist.	Surface use or disturbances (except for surface subsidence and resource monitoring purposes defined in the approved mining permit) will not be permitted in riparian, wetland or floodplain areas, or within a buffer zone surrounding these areas (the definition of riparian areas and appropriate buffer zone will be consistent with that defined in the Forest Service Manual and Water Conservation Practices Handbook. Wetland definition will follow Army Corps of Engineers guidelines) unless no practical alternatives exist.	Use language from parent leases.
Subsidence	If subsidence adversely affects surface resources in any way (including, but not limited to a documented water loss), the Lessee, at their expense will be responsible to: restore stream channels, stock ponds, protect stream flow with earthwork or temporary culverts, restore affected roads, or provide other measures to repair damage or replace any surface water and/or developed ground water source, stock pond, water conveyance facilities, with water from an alternate source in sufficient quantity and quality to maintain existing riparian habitat, livestock and wildlife use, or other land uses as authorized by 36 CFR 251.	If subsidence adversely affects surface resources in any way (including, but not limited to a documented water loss), the Lessee, at their expense will be responsible to: restore stream channels, stock ponds, protect stream flow with earthwork or temporary culverts, restore affected roads, or provide other measures to repair damage or replace any surface water and/or developed ground water source, stock pond, water conveyance facilities, with water from an alternate source in sufficient quantity and quality to maintain existing riparian habitat, livestock and wildlife use, or other land uses as authorized by 36 CFR 251.	Use language from parent leases.

	The Lessee/Operator shall be responsible for monitoring, repairing and/or mitigating subsidence effects on existing facilities under Special Use Permit with the Forest Service. Monitoring, repair and/or mitigation, if needed, would be performed at the Lessee's expense. These requirements will be coordinated with the District Ranger and the Special Use Permittee.	The Lessee/Operator shall be required to perform the following with respect to monitoring, repairing and/or mitigating subsidence effects on existing facilities under Special Use Permit with the Forest Service. Monitoring, repair and/or mitigation will be performed at the Lessee's expense. The Lessee may request variations on timing for surveys, monitoring and reporting. Approving such requests would be at the discretion of the District Ranger. a. Baseline condition surveys of existing facilities will be completed the Fall following award of lease. Reports of this survey will be deliverable to the Forest Service by December 1 of that same year. b. In consultation with the Special Use Permittee and the Forest Service, install equipment to monitor flow on water conveyance facilities during the Fall following award of lease. Flow monitoring shall commence the following spring and continue until one year post mining. Flow data shall be provided to the Forest Service annually by December 1. c. A Surface Facility Monitoring and Mitigation Plan (Plan) will be submitted to the Forest Service for review and approval not later than 12 months prior to scheduled undermining. The Plan will detail measures to be taken to monitor, repair and mitigate subsidence effects of the facilities during actual mining and for one year.	As parent lease for COC-67232 deals specifically with an irrigation ditch on that lease, use language from COC-1362 on both lease modifications.
Roadless	The permittee/lessee must comply with all the rules and regulations of the Secretary of	All or parts of the following lands encompassed in this lease are in the West	On the following lands within the Sunset CRA, surface operations incident to

Agriculture set forth at Title 36, Chapter II, of the Code of Federal Regulations governing the use and management of the National Forest System (NFS) when not inconsistent with the rights granted by the Secretary of Interior in the permit. The Secretary of Agriculture's rules and regulations must be complied with for (1) all use and occupancy of the NFS prior to approval of an exploration plan by the Secretary of the Interior, (2) uses of all existing improvements, such as forest development roads, within and outside the area permitted by the Secretary of the Interior, and (3) use and occupancy of the NFS not authorized by the permit/operation approved by the Secretary of the Interior.

Federal Coal Lease C-1362, as modified October 2001

All or parts of the following lands encompassed in this lease are in the West Elk Inventoried Roadless Area and may be subject to restrictions on road-building pursuant to rules and regulations of the Secretary of Agriculture applicable at the time any roads may be proposed on the lease.

Legal descriptions are approximate. Locations of any proposed surface use would be verified for relationship to IRA boundaries using site-specific maps if/when surface operations are proposed.

Elk Inventoried Roadless Area and may be subject to restrictions on road-building pursuant to rules and regulations of the Secretary of Agriculture applicable at the time any roads may be proposed on the lease.

All or parts of the following lands encompassed in this lease are in the West Elk Inventoried Roadless Area and may be subject to restrictions on road-building pursuant to rules and regulations of the Secretary of Agriculture applicable at the time any roads may be proposed on the lease.

underground coal mining are subject to regulations in 36 CFR 294, subpart D:

- All roads that may be constructed must be temporary.
- All temporary road construction must be consistent with applicable land management plan direction
- Road construction may only occur if motorized access has been deemed infeasible by the responsible official; unless a temporary road is needed to protect public health and safety in cases of an imminent threat of flood, fire or other catastrophic event that, without intervention, would cause the loss of life or property
- Temporary road construction must be completed in a manner that reduces effects on surface resources, and prevents unnecessary or unreasonable surface disturbance
- All temporary roads must be decommissioned and affected landscapes restored when it is determined that the road is no longer needed for the established purpose
- All temporary roads must prohibit public motorized vehicles (including off-

highway vehicles) except:

I. Where specifically used for the purpose for which the road was established; or
II. Motor vehicle use that is specifically authorized under a Federal law or regulation.

For any linear construction zone (LCZ) over 50 inches wide used to install pipelines, the Regional Forester must determine that they are needed, and the responsible official must determine that motorized access without a linear construction zone is not feasible.

- Construction and use of linear construction zones must be consistent with the GMUG Forest Land and Resource Management Plan, and may be no wider than their respective intended uses.
- Installation of linear construction zones will be done in a manner that minimizes ground disturbance.
- Reclamation of a linear construction zone will not diminish, over the long-term, roadless area characteristics. All authorizations approving the installation of linear facilities

			through the use of a linear construction zone shall include a responsible official approved reclamation plan for reclaiming the affected landscape while conserving roadless area characteristics over the long-term. Upon completion of the installation of a linear facility via the use of a linear construction zone, all areas of surface disturbance shall be reclaimed as prescribed in the authorization and the approved reclamation plan and may not be waived.
Visuals	n/a	n/a	Within the lease modification areas, the lessee will work with the District Ranger and his/her representative to see that all mine operations are situated on the ground in such a manner that reasonably minimizes impacts to the scenic integrity of that landscape as prescribed in the Forest Plan.
Methane use	n/a	n/a	If flaring or other combustion is prescribed as part of any future mitigation measure, lessee will be required to submit a fire prevention and protection plan subject to responsible Forest Service official for approval.

BLM-specific Lease Stipulations for Protection of Non-Mineral (Surface) Resources

Resource Area	Addendum Carried Forward from Parent Lease COC-1362 Specific to Forest Service Lands	Addendum Carried Forward from Parent Lease COC-67232 Specific to Forest Service Lands	Revised Addendum per BLM IM 2017-037 (January 20, 2017)
Methane Flaring, Capture/Use or other	Sec. 3. Notwithstanding the language in	Sec. 3. Notwithstanding the language in	"Section 3. Notwithstanding the

alternatives to venting	Sec.2 of this lease and subject to the terms and conditions below, lessee is authorized to drill for, extract, remove, develop, produce and capture for use or sale any or all of the coal mine methane from the above described lands that it would otherwise be required to vent or discharge for safety purposes by applicable laws and regulations. For purposes of this lease, "coal mine methane" means any combustible gas located in, over, under, or adjacent to the coal resources subject to this lease, that will or may infiltrate underground mining operations. Sec. 4. Notwithstanding any other provision of this lease, nothing herein shall, nor shall it be interpreted to, waive, alter or amend lessee's right to vent, discharge or otherwise dispose of coal mine methane as necessary for mine safety or to mine the coal deposits consistent with permitted underground mining operations and federal and state law and regulation. Lessee shall not be obligated or required to capture for use or sale coal mine methane that would otherwise be vented or discharged if the capture of coal mine methane, independent of activities related to mining coal, is not economically feasible or if the coal mine methane must be vented in order to abate the potential hazard to the health or safety of the coal miners or coal mining activities. In the	Sec.2 of this lease and subject to the terms and conditions below, lessee is authorized to drill for, extract, remove, develop, produce and capture for use or sale any or all of the coal mine methane from the above described lands that it would otherwise be required to vent or discharge for safety purposes by applicable laws and regulations. For purposes of this lease, "coal mine methane" means any combustible gas located in, over, under, or adjacent to the coal resources subject to this lease, that will or may infiltrate underground mining operations. Sec. 4. Notwithstanding any other provision of this lease, nothing herein shall, nor shall it be interpreted to, waive, alter or amend lessee's right to vent, discharge or otherwise dispose of coal mine methane as necessary for mine safety or to mine the coal deposits consistent with permitted underground mining operations and federal and state law and regulation. Lessee shall not be obligated or required to capture for use or sale coal mine methane that would otherwise be vented or discharged if the capture of coal mine methane, independent of activities related to mining coal, is not economically feasible or if the coal mine methane must be vented in order to abate the potential hazard to the health or safety of the coal miners or coal mining activities. In the	language in Section 2 of the lease and subject to the terms and conditions below, lessee is authorized to drill for, extract, remove, develop, produce and capture for use or sale any or all of the waste mine methane for the above described lands that it would otherwise be required to vent or discharge for safety purposes by applicable laws and regulations. For purposes of this lease, "waste mine methane" means any combustible methane gas located in, over, under, or adjacent to the coal resources subject to this lease, that will or may infiltrate underground mining operations and that must be vented to protect the health and safety of the mine workers. Section 4. Notwithstanding any other provision of this lease, nothing herein waives, alters, or amends lessee's right to vent, discharge or otherwise dispose of waste mine methane as necessary for mine safety or lessee's obligation to mine the coal deposits consistent with Federal and state law and regulation and with safety requirements contained in permits applicable to underground mining operations subject to this lease. Lessee is not obligated or required to capture for use or sale waste mine methane that would otherwise be vented or discharged if the capture of waste mine methane, independent of the activities related to mining coal, is

event of a dispute between lessor and lessee as to the economic or other feasibility of capturing for use or sale the coal mine methane, lessor's remedy as a prevailing party shall be limited to recovery of the compensatory royalties on coal mine methane not captured for use or sale by lessee. Lessee shall have the right to continue all mining activities under the lease, including venting coal mine methane, pending resolution of any dispute regarding the application of the terms of Sections 3 and 4.

Sec. 2 (c) COAL MINE METHANE OPERATIONS AND ROYALTIES- Notwithstanding the language in Part II, Section 2 (a) of this lease, the royalty shall be 12.5 percent of the value of any coal mine methane that is captured for use or sale from this lease. For purposes of this lease, the term "capture for use or sale" shall not include and the royalty shall not apply to coal mine methane that is vented or discharged and not captured for the economic or safety reasons described in Part I, Section 4 of this lease. Lessee shall have no obligation to pay royalties on any coal mine methane that is used on or for the benefit of mineral extraction at the West Elk coal mine. When not inconsistent with any express provision of this lease, the lease is subject to all rules and regulations related to Federal gas royalty collection in Title 30 of the Code of

event of a dispute between lessor and lessee as to the economic or other feasibility of capturing for use or sale the coal mine methane, lessor's remedy as a prevailing party shall be limited to recovery of the compensatory royalties on coal mine methane not captured for use or sale by lessee. Lessee shall have the right to continue all mining activities under the lease, including venting coal mine methane, pending resolution of any dispute regarding the application of the terms of Sections 3 and 4.

Sec. 2 (c) COAL MINE METHANE OPERATIONS AND ROYALTIES- Notwithstanding the language in Part II, Section 2 (a) of this lease, the royalty shall be 12.5 percent of the value of any coal mine methane that is captured for use or sale from this lease. For purposes of this lease, the term "capture for use or sale" shall not include and the royalty shall not apply to coal mine methane that is vented or discharged and not captured for the economic or safety reasons described in Part I, Section 4 of this lease. Lessee shall have no obligation to pay royalties on any coal mine methane that is used on or for the benefit of mineral extraction at the West Elk coal mine. When not inconsistent with any express provision of this lease, the lease is subject to all rules and regulations related to Federal gas royalty collection in Title 30 of the Code of

not economically feasible, or if the waste mine methane must be vented in order to abate the potential hazard to the health or safety of the miners or mining activities. In the event of a dispute between the lessor and the lessee as to the economic or technical feasibility of capturing the waste mine methane for use or sale, lessor's remedy as a prevailing party is limited to recovery of compensatory royalties on the waste mine methane not captured for use or sale by the lessee. Lessee retains the right to continue all mining activities under the lease, including venting waste mine methane, pending resolution of any dispute regarding the application of the terms of Sections 3 and 4.

PART II. TERMS AND CONDITIONS (c) WASTE MINE METHANE OPERATIONS AND ROYALTY – Notwithstanding the language in Part II, Sec.2(a) of this lease, the royalty will be 12.5 percent of the value of any waste mine methane that is captured for use or sale from this lease. For purposes of this lease, the term "capture for use or sale" does not include, and the royalty will not apply to, waste mine methane that is vented, or otherwise discharged and not captured, for the economic feasibility or safety reasons described in Part I, Section 4 of this lease. Lessee will have no obligation to pay royalties on any waste mine methane that is used on or for the

	Federal Regulations now or hereinafter in effect and lessor's rules and regulations related to applicable reporting and gas measurement now or hereinafter in effect SEVERABILITY- In the event any provision of this addendum is subject to a legal challenge or is held to be invalid, unenforceable or illegal in any respect, the validity, legality and enforceability of this lease will not in any way be affected or impaired thereby and lessee will retain, in accordance with the terms of this lease, the exclusive right and privilege to drill for, mine, extract, remove or otherwise process and dispose of the coal deposits ,upon, or under the lands described in this lease, including the right to vent or discharge coal mine methane for safety purposed as required by applicable laws and regulation.	Federal Regulations now or hereinafter in effect and lessor's rules and regulations related to applicable reporting and gas measurement now or hereinafter in effect SEVERABILITY- In the event any provision of this addendum is subject to a legal challenge or is held to be invalid, unenforceable or illegal in any respect, the validity, legality and enforceability of this lease will not in any way be affected or impaired thereby and lessee will retain, in accordance with the terms of this lease, the exclusive right and privilege to drill for, mine, extract, remove or otherwise process and dispose of the coal deposits ,upon, or under the lands described in this lease, including the right to vent or discharge coal mine methane for safety purposed as required by applicable laws and regulation.	benefit of mineral extraction at the (insert mine name here) coal mine. When not inconsistent with any express provision of this lease, this lease is subject to all the rules and regulations related to Federal gas royalty collection in Title 30 of the Code of Federal Regulations now or hereinafter in effect and the lessor's rules, regulations, notices, and orders related to applicable reporting and gas measurement now or hereinafter in effect. SEVERABILITY – In the event any provision of this addendum is subject to a legal challenge or is held to be invalid, unenforceable, or illegal in any respect, the validity, legality, and enforceability of this lease will not in any way be affected or impaired thereby and lessee will retain, in accordance with the terms of this lease, the exclusive right and privilege to drill for, mine, extract, remove, or otherwise process and dispose of the coal deposits in, upon, or under the lands described in this lease, including the right to vent or otherwise discharge waste mine methane for safety purposes as required by applicable laws and regulations.
			West Elk Mine shall provide to BLM an updated report on the economic feasibility of capturing or flaring the mine's mine methane for beneficial use or abatement, and should provide it to BLM no later than 1 year after the

modification is approved.

United States
Department of the Interior
Bureau of Land Management

Coal Lease Addendum

Serial Number

C-1362

Coal Lease C-1362 is hereby amended by this addendum:

PART I. LEASE RIGHTS GRANTED

* * * *

Sec. 3. Notwithstanding the language in Sec. 2 of this lease and subject to the terms and conditions below, lessee is authorized to drill for, extract, remove, develop, produce and capture for use or sale any or all of the coal mine methane from the above described lands that it would otherwise be required to vent or discharge for safety purposes by applicable laws and regulations. For purposes of this lease, "coal mine methane" means any combustible gas located in, over, under, or adjacent to the coal resources subject to this lease, that will or may infiltrate underground mining operations.

Sec.4. Notwithstanding any other provision of this lease, nothing herein shall, nor shall it be interpreted to, waive, alter or amend lessee's right to vent, discharge or otherwise dispose of coal mine methane as necessary for mine safety or to mine the coal deposits consistent with permitted underground mining operations and federal and state law and regulation. Lessee shall not be obligated or required to capture for use or sale coal mine methane that would otherwise be vented or discharged if the capture of coal mine methane, independent of activities related to mining coal, is not economically feasible or if the coal mine methane must be vented in order to abate the potential hazard to the health or safety of the coal miners or coal mining activities. In the event of a dispute between lessor and lessee as to the economic or other feasibility of capturing for use or sale the coal mine methane, lessor's remedy as a prevailing party shall be limited to recovery of compensatory royalties on coal mine methane not captured for use or sale by lessee. Lessee shall have the right to continue all mining activities under this lease, including venting coal mine methane, pending resolution of any dispute regarding the application of the terms of Sections 3 and 4.

PART II. TERMS AND CONDITIONS

Sec. 2

* * * *

(c) COAL MINE METHANE OPERATIONS AND ROYALTIES - Notwithstanding the language in Part II, Sec. 2 (a) of this lease, the royalty shall be 12.5 percent of the value of any coal mine methane that is captured for use or sale from this lease. For purposes of this lease, the term "capture for use or sale" shall not include and the royalty shall not apply to coal mine methane that is vented or discharged and not captured for the economic or safety reasons described in Part I, Sec. 4 of this lease. Lessee shall have no obligation to pay royalties on any coal mine methane that is used on or for the benefit of mineral extraction at the West Elk coal mine. When not inconsistent with any express

provision of this lease, this lease is subject to all rules and regulations related to Federal gas royalty collection in Title 30 of the Code of Federal Regulations now or hereinafter in effect and lessor's rules and regulations related to applicable reporting and gas measurement now or hereinafter in effect.

* * * *

SEVERABILITY - In the event any provision of this addendum is subject to a legal challenge or is held to be invalid, unenforceable or illegal in any respect, the validity, legality and enforceability of this lease will not in any way be affected or impaired thereby and lessee will retain, in accordance with the terms of this lease, the exclusive right and privilege to drill for, mine, extract, remove, or otherwise process and dispose of the coal deposits in, upon or under the lands described in this lease, including the right to vent or discharge coal mine methane for safety purposes as required by applicable laws and regulations.

This Coal Lease Addendum is effective as of the date all parties have executed the Addendum.

MOUNTAIN COAL COMPANY, LLC

Name: D E Quandis
Title: President
Date: 1-13-09

THE UNITED STATES OF AMERICA

Name:
Title: Associate State Director
Date: 1-14-09