STATE OF COLORADO

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

FW: Cessation Order No. CO-2020-001

Drysdale.Michael@dorsey.com <Drysdale.Michael@dorsey.com> Thu, Jul 2, 2020 at 9:42 AM
To: leigh.simmons@state.co.us

Leigh, sorry, forgot to copy you on the attached.

Michael R. Drysdale

Of Counsel

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From: Drysdale, Michael
Sent: Thursday, July 2, 2020 10:13 AM
To: 'ginny.brannon@state.co.us' <ginny.brannon@state.co.us>
Cc: Jason Musick <jason.musick@state.co.us>; Jim Stark - DNR <jim.stark@state.co.us>; Jeff Fugate <Jeff.Fugate@coag.gov>
Subject: Cessation Order No. CO-2020-001

Please see the attached correspondence and Request for Hearing regarding the above-referenced Cessation Order. Thank you.

Michael R. Drysdale

Of Counsel

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5 attachments

Brannon Ginny ltr 7-2-20 final.pdf
77K

West Elk Corrected Brf Resp to Ps Mot to Enforce Remedy 062320.pdf
96K

West Elk Resp to Emerg Motion -- Norris Decl.pdf
37K

West Elk Resp to Emerg Motion -- Dry decl.pdf
33K

USFS Resp Ps Emerg Motion - brief.pdf
62K

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July 2, 2020

VIA ELECTRONIC MAIL

Ms. Ginny Brannon
Director
Colorado Division of Reclamation, Mining and Safety
1313 Sherman St., Rm. 215
Denver, CO 80203

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

Dear Ms. Brannon:

On behalf of Mountain Coal Company, LLC ("Mountain Coal"), I write to respond to Cessation Order CO-2020-001, issued by the Colorado Division of Reclamation, Mining and Safety ("CDRMS") to Mountain Coal and its West Elk Mine on June 17, 2020. Mountain Coal respectfully requests that CDRMS immediately terminate the Cessation Order for good cause pursuant to Colorado Revised Statutes § 34-33-123(5), because the Cessation Order exceeds CDRMS' statutory authority under the Colorado Revised Statutes ("CRS"), the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. ("SMCRA"), the Mineral Leasing Act of 1920, 30 U.S.C. 201 et. seq. ("MLA") and the Order violates Colorado's Cooperative Agreement with the United States Department of Interior, 30 C.F.R. § 906.30 ("Cooperative Agreement"). Each day the Cessation Order remains in effect is an ongoing violation of the Cooperative Agreement and federal law, and Mountain Coal reserves all rights under the CRS and federal law.

In the alternative, Mountain Coal requests a hearing on the Cessation Order before the Mined Lands Reclamation Board ("MLRB").

The remainder of this letter describes the bases for these requests.

1. Background and Alleged Violations in the Cessation Order

The Cessation Order arose from a June 11, 2020 Citizens Request for Inspection ("Citizens Request") filed by WildEarth Guardians, High Country Conservation Advocates, the Sierra Club, the Center for Biological Diversity, and Wilderness Workshop ("Conservation Groups"). In the Citizens Request, the Conservation Groups alleged that by constructing roads and constructing other surface facilities authorized by its federal coal leases and its CDRMS Permit, Mountain Coal was acting in violation of a March 2, 2020 decision by the federal Tenth Circuit Court of Appeals. *High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020)("*High Country 2020*").

High Country 2020 concerned a federal National Environmental Policy Act ("NEPA") action brought by the Conservation Groups, challenging the North Fork Coal Mining Area Exception to the Colorado Roadless Rule, 36 C.F.R. § 294.43(c)(1)(ix) ("North Fork Exception"), and federal coal Lease Modifications COC-1362 and 67232 ("Lease Modifications"), issued by the United States Bureau of Land Management ("BLM"), with the consent of the United States Forest Service ("USFS"). The federal district court for the District of Colorado affirmed both the North Fork Exception and the Lease Modifications in *High Country Conservation Advocates v. United States Forest Service*, 333 F. Supp. 3d 1107 (D. Colo. 2018) ("*HCCA 2018*"). The Conservation Groups appealed. They challenged the North Fork Exception and the Lease Modifications. They did not appeal the USFS consent.

In *High Country 2020,* the Tenth Circuit held that the USFS had violated NEPA in promulgating the North Fork Exception, and ordered that the federal district court to vacate the North Fork Exception on remand. 951 F.3d at 1229. In that same decision, however, the Tenth Circuit affirmed the Lease Modifications. *Id.* at 1228-29. Proceedings on remand are ongoing in federal district court. The Conservation Groups have filed a motion requesting emergency temporary and permanent injunctive relief, seeking to revoke the USFS consent as a result of vacatur of the North Fork Exception.

Mountain Coal and the Federal Defendants are opposing the Conservation Groups request, and Mountain Coal is confident the Conservation Groups' motion will be denied. The respective briefs are attached for reference. But the details of the motion and responses are ultimately irrelevant, because CDRMS lacks any jurisdiction over the claims or issues raised in the litigation.

In addition to requesting relief in federal court, the Conservation Groups filed the Citizens Request. Critically, *all* the allegations in the Citizens Request concern the scope of Mountain Coal's rights on *federal* land, pursuant to *federal* leases issued under the MLA. Under political pressure from the Conservation Groups, on an accelerated timeline, and without apparent consultation with either BLM or the USFS, CDRMS accepted the Conservation Groups allegations and issued the Cessation Order.

The Cessation Order asserts that "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." The Cessation Order also demands the following showing of abatement: "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."

Detailed information is provided in the attached briefs. In addition, the Cessation Order states a non-sequitur. Lease Modifications C-1362 and COC-67232 *are* the legal right of entry for the subject lands. There is no dispute the Lease Modifications are valid. In effect, the

Cessation Order demands that Mountain Coal provide legal right of entry information without reference to the legal right of entry documents.

Finally, the Cessation Order alleges violations of the following CRS provisions and Mined Land Reclamation Board Regulations: C.R.S. § 34-33-110(2)(j); C.R.S. § 34-33-114(2)(f); MLRB Reg. § 2.03.6; and MLRB Reg. § 2.07.2. The Cessation Order also alleges violations of Permit Condition 2.07 and Exhibit 4 to the Permit.

2. The Allegations in the Cessation Order Exclusively Concern Non-Delegable Matters of Federal Law Reserved to the United States Secretaries of the Interior and Agriculture

SMCRA is an exercise in cooperative federalism. *Hodel v. Va. Surface Min. & Recl. Ass'n*, 453 U.S. 264, 289 (1981). In enacting SMCRA, Congress established federal minimum standards for regulation of surface coal mining operations. *Id.* But once a State enacts regulations that meets the federal standards, it can enter into a cooperative agreement with the Secretary of the Interior, under which the State is authorized to administer the federal program, subject to oversight by the Office of Surface Mining, Reclamation and Enforcement ("OSMRE"). SMCRA further required the Secretary to establish a federal lands program, "which shall be applicable to all surface coal mining and reclamation operations taking place pursuant to any Federal law on any Federal lands." 30 U.S.C. § 1273(a). Congress provided that a State with an approved state program could administer SMCRA on federal lands. *Id.* Any State seeking to administer SMCRA on federal lands is required to enter in a Cooperative Agreement with the Secretary by which the State's rights and responsibilities are delineated. 30 U.S.C. § 1273(c). All SMCRA authority exercised by the State of Colorado on federal lands is pursuant to this delegation and subject to the requirements of the Cooperative Agreement.

Nevertheless, SMCRA also expressly designates certain federal functions on federal lands as *non-delegable*. 30 U.S.C. § 1273. Specifically, Section 1273(a) provides that the Secretary of the Interior "shall retain his duties under sections 201(a), (2)(B) and 201(a)(3) of this title." In turn, Section 201(a) authorizes the Secretary to lease federal coal, and Section 201(a)(3)(A)(iii) requires the Secretary to obtain the consent of the federal surface management agency (along with conditions) as a component of coal leasing. Because these functions were "retained" by the Secretary, they are *not* part of the authority delegated to the State of Colorado. Any claim that a lease or surface management agency consent is not valid, or the permittee is not complying with the terms of a federal coal lease or the conditions of consent by the surface management agency, are exclusively within the jurisdiction of the Secretary and/or the federal surface management agency. When a question arises, the State SMCRA authority certainly may and should consult with the relevant federal agencies to ascertain their views on the validity of a lease or related federal consents, but the State does not have the authority to second guess the positions of the federal agencies or make its own independent judgments on the legallity of those instruments or a permittee's compliance with them.

These requirements are all reflected in the Cooperative Agreement between Colorado and the Secretary. Since the Cessation Order reflects an enforcement action, it is governed by Article VIII, ¶ 17, which reads:

> MLRD shall be the primary enforcement authority under the Act concerning compliance with the requirements of this Agreement and the Program. *Enforcement authority given to the Secretary under other laws and orders including, but not limited to, those listed in appendix A is reserved to the Secretary*.

(emphasis added). The Mineral Leasing Act is specifically listed in Appendix A as one of the laws to which enforcement authority is reserved to the Secretary.

Even as to review of permit applications, compliance with leasing requirements is carved out. As provided in Article VI:

> The Department shall concurrently carry out its responsibilities which cannot be delegated to the State under the MLA, National Environmental Policy Act (NEPA), and other public laws (including, but not limited to, those in appendix A) according to the procedures set forth in appendix B so as, to the maximum extent possible, not to duplicate the responsibilities of the State as set forth in this Agreement and the Program. *The Secretary shall* consider the information submitted in the permit application package and, when appropriate, *make the decisions required by the Act, MLA*, NEPA and other public laws as described above.

(Emphases added). Under Appendix B, the Department's responsibilities regarding matters reserved to the Secretary are strictly limited to consultation and coordination with the Secretary and the applicant. There is no authority for the Department to make its own independent judgments on the validity or terms of leasing instruments or surface management agency consents.

This allocation of responsibilities is further restated throughout Cooperative Agreement via repeated provisions where the State agrees not to duplicate the efforts or role of the Secretary (and vice versa). *Id*. at Article I.2(b), V.2, VI.8, V.12, App. B.V.A.2-5.

In sum, the Cessation Order violates multiple provisions of federal law and the clear terms of the Cooperative Agreement, and must be expeditiously terminated.

3. None of the Cited CRS Provisions or MLRB Regulations Provide Authority for Issuance of the Cessation Order

Unsurprisingly, the requirements of federal law and Cooperative Agreement are reflected in Colorado Revised Statutes and MLRB regulations. Review of the provisions cited in the Cessation Order demonstrate that they are on their face inapplicable to Mountain Coal's actions on federal land. For example, C.R.S. § 34-33-114(2)(f) provides:

> **(f)** In cases where the applicant proposes to extract coal by surface methods[1] and where the ***private*** mineral estate has been severed from the ***private surface estate***, the applicant has submitted to the office:
>
> **(I)** The written consent of the surface owner to the extraction of coal by surface coal mining; or
>
> **(II)** A conveyance that expressly grants or reserves the right to extract the coal by surface coal mining, but, if the conveyance does not expressly grant the right to extract coal by surface coal mining, the surface-subsurface legal relationship shall be determined in accordance with state law; except that nothing in this article shall be construed to authorize the board to adjudicate property rights disputes; . . .

(emphasis added). This section in on its face limited to ***private*** lands, and simply cannot form a lawful basis for the Cessation Order or any other enforcement action against Mountain Coal on federal land.

Similarly, C.R.S. § 34-33-110(2)(j) requires that Mountain Coal provide:

> **(j)** An accurate map or plan, of an appropriate scale, clearly showing the land to be affected as of the date of the application and the area of land within the permit area upon which the applicant has the legal right to enter and commence surface coal mining operations and a statement of those documents upon which the applicant bases such legal right to enter and commence surface coal mining operations on the area affected and whether that right is the subject of pending court litigation; *except that nothing in this article shall be construed as vesting in the board or office the jurisdiction to adjudicate property rights disputes*;

(emphasis added). Mountain Coal (and the USFS) fully complied with these requirements in connection with PR-15. It is undisputed that Mountain Coal provided a statement to CDRMS

[1] Mountain Coal notes that it operates an underground mine, and is not "extracting coal by surface methods." This phrasing is distinguished from "surface coal mining operations," which under SMCRA includes the surface impacts of underground mining. C.R.S. § 34-33-114(2)(f) is inapplicable for this additional reason.

that the Lease Modifications provide it with the legal right to enter the property, and the USFS concurred with PR-15 with an express statement that the matter was subject to pending litigation. Nothing has changed. The Lease Modifications were affirmed by the Tenth Circuit, the USFS concurrence is undisturbed, and the matter remains subject to pending litigation. The Tenth Circuit's decision can be an occasion for *consulting* with the Secretary or USFS on the continuing validity of their approvals, but it cannot be the basis for unilateral enforcement action.

This is all driven home by the express statement in the statute that the provision does *not* vest the Board or office with jurisdiction to adjudicate property rights disputes. The Cessation Order is all the more egregious in that the property rights dispute at issue is not the typical dispute between lessor/lessee or surface/mineral estate, but a claim raised by a *third party* without *any evidence* that there is an actual dispute between the actual rights-holders. The Cessation Order far exceeds any plausible reading of CDRMs' authority under C.R.S. § 34-33-110(2)(j).

The same conclusions are true under the cited provisions of the MLRB regulations. MLRB Reg. § 2.03.6 simply restates, word-for-word, the requirements of C.R.S. § 34-33-110(2)(j). And MLRB Reg. § 2.07.2 simply states "objectives" for public, prompt, and effective review of permit applications. It does not convey any substantive enforceable standards whatsoever.

Permit Section 2.03 provides information on "Legal, Financial, Compliance, and Related Information." Based on the allegations, CDRMS appears to be focused on Section 2.03.6, related to right-of-entry. Mountain Coal clearly identified C-1362 as providing its right-of-entry, and provided detailed information on the lease in Exhibit 4. And, as discussed, the validity of Lease C-1362 was *affirmed* in *HCCA 2020*. There is nothing in error or in violation of any Permit term or regulation.

Collectively, even if CDRMS' authority was not expressly limited by federal law as discussed in Section 2 above, the Cessation Order does not cite a single valid basis for asserting that Mountain Coal is in violation of any of the requirements of the CRS, the MLRB regulations, or its Permit. It must therefore be immediately terminated.

Conclusion

Mountain Coal has an excellent compliance record and has long had a collaborative and productive relationship with CDRMS and the Board. It is regrettable that CDRMS and the Board have been drawn in once again to the scorched earth litigation tactics of the Conservation Groups, and Mountain Coal understands how the complexity of the federal litigation and its recent developments could have caused uncertainty and confusion. However, the law is extremely clear on the limits of CDRMS authority over the claims asserted by the Conservation Groups, and there is no basis for the Cessation Order to remain in effect. Mountain Coal is concerned that continuation of the Cessation Order in the face of the foregoing authority not only is untenable against Mountain Coal, but is such a clear violation of federal law and the Cooperative Agreement that it could be the basis for enforcement action by the Secretary against the State. That would be in no one's interest except those who seek to foment federal-state conflict.

As stated, we request termination of the Cessation Order, or failing that, that our objections and request be placed for hearing at the next scheduled meeting of the MLRB. Thank you for your consideration, and please contact me with any questions or concerns.

Very truly yours,

DORSEY & WHITNEY LLP

Michael Drysdale

Michael Drysdale
Of Counsel

Attorneys for Mountain Coal Company, LLC

MD:aj

Enclosures

Cc: Jason Musick, CDRMS
Leigh Simmons, CDRMS
Jim Stark, CDRMS
Jeff Fugate, Asst. Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 17-cv-3025-PAB
HIGH COUNTRY CONSERVATION ADVOCATES, *et al.*
Plaintiffs,

v.

UNITED STATES FOREST SERVICE, *et al.*
Federal Defendants,

and

MOUNTAIN COAL COMPANY LLC,
Intervenor-Defendant.

MOUNTAIN COAL COMPANY'S OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION TO ENFORCE REMEDY

Plaintiffs style their Motion as one to "Enforce the Remedy," but the Court fully and completely enforced the remedy in its Minute Order of June 15, 2020, in granting Plaintiffs' unopposed motion to vacate the North Fork Coal Mining Area Exception ("North Fork Exception") to the Colorado Roadless Rule ("CRR") 36 C.F.R. § 294.43(c)(1)(ix). *High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217, 1229 (10th Cir. 2020) ("*HCCA 2020*"). As a result, Plaintiffs' Motion is in fact a request for a *new*, additional remedy, based on new, extra-record evidence, outside the bounds of the mandate and barred by the law of the case. Moreover, all the complained-of past and planned actions are fully lawful under valid lease rights and express provisions of the CRR. Plaintiffs further request injunctive relief without

even attempting to satisfy the applicable four-part test, and which they cannot satisfy. The Court should therefore deny Plaintiffs' Motion.

FACTUAL AND PROCEDURAL BACKGROUND

This Court previously described the extensive litigation history surrounding the North Fork Exception and Lease Modifications COC-1362 and 67232 ("Lease Modifications") in *High Country Conservation Advocates v. United States Forest Service*, 333 F. Supp. 3d 1107 (D. Colo. 2018) ("*HCCA 2018*"). Specifically, Plaintiffs sought review under the Administrative Procedure Act ("APA") of four separate decisions:

(1) United States Forest Service ("USFS") promulgation of the North Fork Exception, following preparation of a Supplemental Final Environmental Impact Statement ("North Fork Exception SFEIS") under the National Environmental Policy Act ("NEPA");

(2) USFS consent to issuance of the Lease Modifications;

(3) The Bureau of Land Management's ("BLM") issuance of the Lease Modifications, after preparation of an additional environmental impact statement ("Leasing SFEIS"), that tiered to and relied upon the North Fork Exception SFEIS, while also analyzing site-specific impacts; and

(4) BLM approval of an Exploration Plan for the Lease Modifications.

Amended Complaint, Dkt. 39 at Prayer for Relief ¶¶ 3–8.

Plaintiffs alleged a wide array of NEPA deficiencies. Notably, Plaintiffs argued that the invalidation of an agency rule or decision *necessarily* invalidates decisions predicated upon it, such that invalidation of the North Fork Exception would necessarily invalidate the USFS consents, the Lease Modifications, and Exploration Plan. Dkt. 47 at 45.

This Court upheld all the challenged decisions. *High Country 2018*, 333 F. Supp. 3d at 1133. Plaintiffs appealed. Dkt. 64. Plaintiffs presented *only two* issues on appeal: (1) evaluation of a proposed "Pilot Knob Alternative" in the North Fork Exception SFEIS; and (2) the USFS's and BLM's decision to defer consideration of the safety and economic feasibility dimensions of methane flaring as mitigation until the mine planning and permitting stage. *HCCA 2020*, 951 F.3d at 1221. Plaintiffs *did not appeal* this Court's determination that the USFS consent to the Lease Modifications was valid. Plaintiffs requested that the Tenth Circuit vacate the North Fork Exception "and/or" the Lease Modifications. App'ls' Brief p. 50.

The Tenth Circuit addressed both issues on appeal, ultimately finding the North Fork Exception SFEIS arbitrary and capricious but upholding the Lease Modifications. *HCCA 2020*, 951 F.3d at 1228-29. Judge Kelly's opinion concurring in part and dissenting in part confirmed the two distinct holdings—"concur[ring] in the court's decision that NEPA did not require consideration of the methane flaring alternative but respectfully dissent[ing] from the conclusion that U.S. Forest Service was required to consider the Pilot Knob alternative in detail." *Id* at 1229-30 (Kelly, J. concurring/dissenting). Using its "traditional equitable powers," the Tenth Circuit remanded for the limited and defined purpose of "entry of an order vacating the North Fork Exception." *Id.* at 1229. The Tenth Circuit did not invalidate the Lease Modifications and did not authorize this Court to take further action regarding the Lease Modifications. *See id.* Instead, all three judges explicitly agreed and upheld this Court's determination that their issuance was not arbitrary or capricious. The mandate issued on April 24, 2020.

Following review of the decision, Mountain Coal concluded that it had the right to continue roadbuilding, as necessary to access the coal in the Lease Modifications, under the

Mineral Leasing Act ("MLA"), the express terms of the Lease, and a separate exception to the CRR that allows roadbuilding when roads are needed to exercise statutory rights. 36 C.F.R. § 294.43(c)(1)(i). Before commencing any work, Mountain Coal confirmed with the USFS that its consents remained valid and USFS did not oppose resumption of roadbuilding. Declaration of Weston Norris ("Norris Decl.") ¶ 5. Mountain Coal did not receive any communications from Plaintiffs. Declaration of Michael Drysdale ("Drysdale Decl.") ¶ 2. On June 2, 2020, Mountain Coal commenced construction on the next phase of roads needed to comply with its statutory duty to diligently mine the coal. Norris Decl. ¶ 6.

Plaintiffs contacted Mountain Coal for the first time on June 3, 2020, and the parties discussed their differing views on June 4, 2020. Drysdale Decl. ¶¶ 2-3. They were unable to reach agreement on a briefing schedule, because Plaintiffs demanded an indefinite cessation of *all* surface-disturbing activity, including activity not regulated by or expressly permitted under the CRR. *Id.* ¶ 4. Nevertheless, Mountain Coal has not undertaken any roadbuilding in the Lease Modifications since June 4, 2020. Norris Decl. ¶ 6. Mountain Coal has undertaken other non-roadbuilding work, *id.* ¶ 7, which as discussed below is permitted under the CRR.

ARGUMENT

Plaintiffs' Motion should be denied because it seeks relief that this Court is not authorized to grant in light of the procedural posture of the case and because it fails on the merits. Mountain Coal's authority to build roads and construct drill pads is not dependent upon

the North Fork Exception but rather arises under consents that were upheld by this Court and not appealed, and Lease Modifications upheld by the Tenth Circuit.[1]

I. Plaintiffs' Motion Seeks Relief Beyond the Court's Authority.

The Tenth Circuit's mandate direct the Court to enter an order vacating the North Fork Exception to the CRR and restrict the Court from entering relief inconsistent with the mandate and Tenth Circuit's opinion. Nonetheless, Plaintiffs ask this Court to enter a much broader and inconsistent order, requiring the USFS to temporarily and then permanently withdraw its consent to the Lease Modifications and order Mountain Coal to cease roadbuilding, tree cutting, and any other surface-disturbing activity such as drill pad construction. Dkt. No. 77 at 13; 77-4. Notably, Plaintiffs do not request invalidation of the Lease Modifications themselves. Plaintiffs' requested relief cannot be granted for two reasons: (1) it exceeds the Court's authority under the mandate rule; (2) it is barred by the law of the case.

A. The Mandate Rule Bars this Court from Entering Any Order on the Claims in the Complaint that Does More than Vacate the North Fork Exception.

The Tenth Circuit's instructions on remand are clear. This Court may only enter "an order vacating the North Fork Exception." *HCCA 2020*, 951 F.3d at 1229. The Plaintiffs newly requested relief would exceed the scope of the mandate and, therefore, violate the mandate rule.

Under the mandate rule, a district court's authority on remand is limited to entering of "a judgment according to the mandate" from the appellate court and carrying "that judgment into

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[1] As explained herein, Mountain Coal commenced roadbuilding because it has the right to do so independently of the vacatur of the North Fork Exception. In addition, all roadbuilding to date preceded the June 15, 2020 vacatur, and even the June 11, 2020 motion to vacate. *See* Norris Decl. ¶ 6. For that additional reason, all Mountain Coal's actions have been entirely lawful.

execution." *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1534 (10th Cir. 1992). The "mandate" includes the Circuit's express instructions to the district court as well as the entire opinion, *Walker*, 918 F.3d at 1144, and bars reconsideration of issues "expressly or impliedly disposed of on appeal," *P&G Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003)

Depending on the specifics of the mandate, that may or may not leave with the Court with a degree of discretion. As the Court explained in *Entek GRB LLC v. Stull Ranches LLC, 113* F. Supp. 3d 1113, 1116 (D. Colo. 2015), *aff'd*, 840 F.3d 1239 (10th Cir. 2016):

> [T]he scope of the mandate on remand in the Tenth Circuit is carved out by exclusion: unless the district court's discretion is specifically cabined, it may exercise discretion on what may be heard. Thus, when a remand is general, the district court is free to decide anything not foreclosed by the mandate. In other words, although the district court is bound by the mandate, and the mandate controls all matters within its scope, ... a district court on remand is free to pass upon any issue which was not expressly or impliedly disposed of on appeal.

(Internal citations and quotations omitted).

This case does not involve a general remand, but rather provides specific and narrow instructions. The mandate and accompanying decision also expressly and impliedly dispose of all the relief Plaintiffs request. The USFS consents were not appealed, and consequently have not been re-opened for review by the mandate. The Lease Modifications were affirmed, and thus cannot be revisited. Where, as is the case here, the Tenth Circuit's "ruling le[aves] nothing for the district court to address beyond the 'ministerial dictates of the mandate'" the district court lacks "authority to depart from an appellate mandate." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 114 F.3d 1513, 1521 (10th Cir. 1997).

Because the Tenth Circuit expressly ruled on Plaintiffs' challenge to the Lease Modifications, it is not within the scope of this Court's authority to reconsider the Lease

Modifications on remand. *See SOLIDFX, LLC v. Jeppesen*, 11-cv-1468, 2018 U.S. Dist. LEXIS 21661 (D. Colo. Feb. 9 2018) ("But this is neither an open-ended general remand nor a circumstance where the Court of Appeals was not presented with the issues now re-raised . . . on remand."); *see also Colo. Interstate Gas Co.*, 962 F. 2d at 1534 ("Following appellate disposition, however, the judgment is no longer subject to district court amendment beyond the ministerial dictates of the mandate, which encompasses the full scope of jurisdictional power granted to the district court on remand.").

Conversely, the Court does have the authority to consider, should it choose, Mountain Coal's ability to build roads under the statutory-rights exception to the CRR, 36 C.F.R. § 294.43(c)(1)(i), or Lease terms, *infra.* Argument Section 2, because neither of these issues were expressly or impliedly addressed by the Tenth Circuit mandate or opinion. Put another way, the issue of what rights Mountain Coal possesses under the combination of vacatur of the North Fork Exception and affirmance of the Lease Modifications is new legal terrain, not barred by the mandate rule. There may be prudential or other reasons not to venture into that territory, such as the limited scope of APA record review or the lack of citizen-suit provisions under the National Forest Management Act, *Utah Envtl. Cong. v. Troyer*, 479 F.3d 1269, 1280 (10th Cir. 2007) and Organic Act of 1897, 16 U.S.C. §§ 473-75, 477-78, 482, 479, 480-82, 551. But the mandate rule does not foreclose the exercise of that authority.

B. Plaintiffs' Arguments to the Contrary Disregard the Tenth Circuit's Holding on the Lease Modifications and Therefore Fail.

Plaintiffs spend substantial time in their Motion arguing that vacatur eliminates the existing North Fork Exception, leaving the CRR otherwise intact. But Plaintiffs fail to address

the Tenth Circuit's decision not to vacate the Lease Modifications pursuant to which Mountain Coal has engaged in roadbuilding. Of course it is true that after vacatur the North Fork Exception no longer exists and the USFS could not authorize new actions under that authority. But it is also true that, although the Tenth Circuit clearly could have invalidated and vacated the Lease Modifications because of their reliance on North Fork Exception, the Circuit did not. *HCCA 2020*, 951 F. 3d at 1229. The Tenth Circuit also could have given this Court discretion to consider the effect of vacating the North Fork Exception on the Lease Modifications, but it did not. *Id.* Instead, the Tenth Circuit exercised its "traditional equitable powers to fashion appropriate relief," and affirmed the Lease Modifications and handed down a narrow instruction focused only on the North Fork Exception. *Id.* Thus, Plaintiffs' argument that vacatur of the North Fork Exception eliminates rights conferred by other decisions is contrary to the clear equitable determination of the Tenth Circuit and must be rejected.

Plaintiffs are simply incorrect when they contend that a NEPA violation necessarily requires invalidation of the resulting action or of other actions premised upon the rule or decision. Plaintiffs' contention is contradicted by *HCCA 2020* itself and, more extensively, by *WildEarth Guardians v. United States Bureau of Land Management*, 870 F.3d 1222, 1239-40 (10th Cir. 2020). A federal appeals court has a broad range of equitable authority to fashion a remedy following a finding of an APA violation, including but not limited to allowing the affected decisions to stand (*see id.* at 1240 ("we decline to vacate the leases")), which it may exercise itself or convey with instructions to the district court on remand. Were it true that invalidation of the North Fork Exception necessarily required invalidation of the Lease

Modifications or USFS consent, then the Tenth Circuit would surely have done so in its mandate or afforded the Court the opportunity to consider the issue. It did neither.

Moreover, under Plaintiffs' theory, the entirety of the second half of *HCCA 2020* was dicta. Judge Kelly's concurrence then begins by stating that he concurs "in the court's *decision* that NEPA did not require consideration of the methane flaring alternative." *Id.* at 1230 (Kelly, J., concurring) (emphasis added). Had vacatur of the North Fork Exception resulted in vacatur of the USFS consents or Lease Modifications, then mining would have to halt and the viability of the Methane Flaring Alternative would be moot. Consequently, Judge Kelly would not have needed to address it and would simply have written a dissent.

Focusing on a point that Mountain Coal argued rather than what the Tenth Circuit held, Plaintiffs contend that the Court should invalidate the USFS consents under the doctrine of judicial estoppel. Judicial Estoppel is a discretionary doctrine that applies when three factors are satisfied: (1) "a party's subsequent position [is] 'clearly inconsistent' with its former position;" (2) "the suspect party succeeded in persuading a court to accept [its] former position;" and (3) "the party seeking to assert an inconsistent position would gain an unfair advantage in the litigation if not estopped." *Eastman v. Union Pac. R.R.*, 493 F.3d 1151, 1156 (10th Cir. 2007) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)). None of these criteria are satisfied. Mountain Coal did not articulate a position as to what the consequence of would be if the Tenth Circuit vacated the North Fork Exception and in the same decision affirmed the Lease Modifications that relied upon the Exception. Mountain Coal was anticipating what the Tenth Circuit would order (vacatur of the Lease Modifications), based on what Plaintiffs were contending. The Tenth Circuit *did not grant that relief.* Furthermore, Mountain Coal made the

statement in question in furtherance of its argument *against* vacatur of the entire North Fork Exception. It did not prevail on that argument, so there can be no concern that Mountain Coal "succeeded in persuading a court to accept [its] former position" and there can be no "perception that either the first or the second court was misled." *Eastman*, 493 F.3d at 1156. And there is no unfairness in Mountain Coal exercising rights that were affirmed on appeal.

C. The Law of the Case Also Bars Plaintiffs' Requested Relief.

Even if the mandate did not limit the Court as argued herein, this Court's decision on the validity of the Lease Modifications and, necessarily the USFS's consent to those modifications, is the law of the case. The law of the case doctrine is a corollary to the mandate rule and specifies that a final legal determination by a district court governs the case. *See McIlravy v. Kerr McGee Coal Corp.*, 204 F.3d 1031, 1034 (10th Cir. 2000). The doctrine serves the interests of finality and judicial economy. *See id.* at 1035. It applies whether the prior ruling is explicit or implicit. *Id.* at 1036 (quoting *Rishell v. Jane Phillips Episcopal Memll Med. Ctr.*, 94 F.3d 1407, 1410 (10th Cir. 1996)) ("Law of the case applies to issues that are resolved implicitly as well as to those decided explicitly.").

Here, this Court fully resolved Plaintiffs' challenge to the adequacy of the Lease Modification SFEIS and the USFS's consent to the Lease Modifications, *HCCA 2018*, 333 F. Supp. 3d at 1133. On appeal, Plaintiffs challenged the validity of the Leasing SFEIS and Lease Modifications. *See HCCA 2020*, 951 F.3d at 1227. The Tenth Circuit rejected their theory, concluding that "[b]ecause 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." *Id.* at 1228. And being presented with no other express challenge to the Lease Modification

SFEIS or the lease modifications, the Tenth Circuit declined to disturb the district court ruling. *See id.* at 1229. Therefore, this Court's final legal determination upholding the Lease Modifications and the consents thereto governs this case, and Plaintiffs' request that the Court impose a remedy contrary to that prior determination should be denied for that reason.

II. The Statutory-Rights Exception to the CRR and Lease Terms Permit the Roadbuilding.

Given that the Lease Modifications were upheld on appeal, both the CRR's statutory-rights exception and the Lease terms permit roadbuilding. Separate from the North Fork Exception, the CRR allows roadbuilding if "[a] road is needed . . . as provided for by statute."[2] 36 C.F.R. § 294.43(c)(1)(i). The MLA authorizes the Secretary of Interior to lease federal coal and requires that all federal coal leases be "subject to the conditions of diligent development and continued operation of the mine." 30 U.S.C. § 207(b)(1). It has repeatedly been confirmed that roadbuilding is necessary to develop the coal covered by the Lease Modifications, and is uncontested here. *See, e.g., WildEarth Guardians v. U.S. Forest Service,* 828 F. Supp.2d 1223, 1227 (D. Colo. 2011). Thus, "[a] road is needed . . . as provided for by statute."

The preamble to the CRR explains the purpose behind the statutory-rights exception:

> The rule allows motorized and non-motorized access into [Colorado Roadless Areas] and does not affect reasonable exercise of . . . statutory . . . rights of access, occupancy and use of [national forest system] lands within [Colorado Roadless Areas] when the Agency lacks legal discretion to forbid such activities, for example exploration and mining of locatable minerals under the 1872 Mining Law.

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[2] Contrary to the Conservation Group's suggestion, Pl.'s Emergency Mot. at 11 n.1, Mountain Coal does not argue that it has the right to build roads "pursuant to reserved or outstanding rights," which must predate the Rule. Rather, Mountain Coal may build roads because they are "needed . . . as provided for by statute." 36 C.F.R. § 294.43(c)(1)(i).

Special Areas; Roadless Area Conservation; Applicability to the National Forest in Colorado, 77 Fed. Reg. 39,576, 39,585 (July 3, 2012). Although Mountain Coal's rights derive from the MLA, not the 1872 Mining Law, the USFS similarly lacks legal discretion to forbid roadbuilding once the Lease Modifications were issued and upheld. Again, the Tenth Circuit *could* have ordered vacatur of the Lease Modifications, which would have extinguished Mountain Coal's rights and obligations and prevented roadbuilding. But because, in its equitable discretion, the Tenth Circuit invalidated the North Fork Exception, while expressly upholding the Lease Modifications, the USFS has no discretion to deny Mountain Coal the beneficial use of the Lease Modifications. Stated another way, the USFS and BLM may not require rental payments from Mountain Coal and mandate that it diligently develop the Leases, while at the same time preventing Mountain Coal from developing the Leases by prohibiting roadbuilding. Under the Lease Modifications, the USFS has no discretion to deny the roadbuilding so long as Mountain Coal remains in compliance lease terms. For this reason, the CRR permits roadbuilding, independently of the vacatur of the North Fork Exception. 36 C.F.R. § 294.43(c)(1)(i).

The Leases themselves further confirm these rights. USFS's lease stipulation mandating compliance with all USFS regulations is qualified by a special stipulation. That stipulation provides, "The permittee/lessee must comply with all the rules and regulations . . . 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 . . . in the permit.*" FSLeasing-0069933 (emphasis added). Plaintiffs argue that this stipulation effectively incorporates the CRR into the Lease Modifications to prohibit roadbuilding. Dkt. 77 at 11-12. But they have it backwards. In fact, the stipulation *exempts* Mountain Coal from the CRR where

application of the CRR would be inconsistent with rights conferred under the Lease. As explained, Mountain Coal cannot exercise its rights to access the leased coal without roads. Once the Lease Modifications were affirmed by the Tenth Circuit, any USFS regulation categorically prohibiting roadbuilding, including the CRR, is "inconsistent with the rights granted by the Secretary of the Interior in the" Lease Modifications. FSLeasing-0069933. Therefore, neither the CRR nor the lease stipulation bars the challenged roadbuilding.

III. Plaintiffs Have Not Satisfied Any of the Requirements for Injunctive Relief.

Plaintiffs seek both temporary and permanent injunctive relief. Dkt. 77-4. Such relief requires them to satisfy all the traditional elements for issuance of an injunction. *See Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). This requires a showing of a likelihood of success (or actual success) on the merits, a demonstration of irreparable harm, and confirmation that the extraordinary relief of an injunction is warranted by the public interest and the balancing of interests. *Coal. of Concerned Citizens v. Fed. Transit Admin. of U.S. DOT*, 843 F.3d 886, 901 (10th Cir. 2016) (quoting *Winter*, 555 U.S. at 20). They have not even attempted to do so.

The foregoing arguments demonstrate why Mountain Coal has the right to build roads. In addition, Plaintiffs' request is wildly overbroad. Plaintiffs seek an injunction against all "surface-disturbing activities," but the CRR does not purport to regulate all such conduct. For the first time in the near-decade of litigation involving the CRR in this area, Plaintiffs argue that "tree-cutting" in the Lease Modifications is banned under 36 C.F.R. § 294.42(c), but tree-cutting is expressly permitted when it is incidental to an approved management activity, such as coal mining in this portion of the Forest under a federal coal lease. *Id.* § 294.42(c)(5).

The degree of harm to Plaintiffs is minimal. The Court had to confront this issue in considering Plaintiffs' request for temporary injunctive relief at the commencement of this action in 2017. In that proceeding, the Court determined that surface disturbance can constitute irreparable harm, but the Court must also evaluate the *quantum* of harm threatened. Dkt. 26. The North Fork Exception encompassed 19,700 acres. *HCCA 2020*, 951 F.3d at 1227. The total surface disturbance accrued since the Tenth Circuit's decision totals 1.3 acres of roads and a single acre of methane drainage well pads, all within the Lease Modification area. Norris Decl. ¶¶ 6-7. Remaining planned disturbance consists of another 1.3 acres of roads and 5.2 acres of well pads, all in necessary furtherance of extracting leased federal coal. Norris Decl. ¶ 3.

In contrast, the degree of harm to Mountain Coal and the surrounding economy from granting the relief Plaintiffs request would be severe. If Mountain Coal is unable to drill methane ventilation boreholes this construction season, it will be unable to fulfill its obligations under the Lease Modifications, experience a several month shutdown of the Mine, and require layoffs of a large percentage of the Mine's 316 employees. Norris Decl. ¶ 8.

The equities weigh even more acutely against Plaintiffs when the public interest and balancing of interests are considered. Importantly, one of Plaintiffs' central arguments throughout this litigation (made persuasively to the Tenth Circuit) was that the exclusion of Pilot Knob Roadless Area should have been evaluated more thoroughly in the North Fork Exception SFEIS, because exclusion of Pilot Knob *would allow roadbuilding* for coal mining and exploration throughout the remainder of the North Fork Valley, and thereby meet the purpose and need for the Rule. *HCCA 2020*, 951 F.3d at 1224 ("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, [including the Sunset Roadless Area]") (emphasis added). The Tenth Circuit concluded that it did not have the authority to sever Pilot Knob from the remainder of the North Fork Exception Area, but did employ its equitable authority to uphold the Lease Modifications. *HCCA 2020*, 951 F.3d at 1229. Plaintiffs cannot now claim the equities favor them when roadbuilding entirely outside of Pilot Knob is occurring under valid lease rights, as they expressly argued would be allowed. Of course, the Court can no more narrow the remedy ordered by the Tenth Circuit than it can expand it as requested by Plaintiffs. But the reason for invaliding the North Fork Exception is certainly relevant to the advisability and scope of any injunctive relief the Court might order following vacatur. That reason weighs strongly against Plaintiffs' request.

Plaintiffs have not met their burden to obtain injunctive relief, and the facts and law show each element of the test favors Mountain Coal and the Federal Defendants.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied.

DATED this 23rd day of June, 2020.

DORSEY & WHITNEY LLP

s/ Michael Drysdale

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Attorneys for Mountain Coal Company LLC

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2020, I caused the foregoing document, **MOUNTAIN COAL COMPANY'S OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION TO ENFORCE REMEDY,** to be electronically filed with the Clerk of the Court using the CM/ECF system on counsel of record.

s/ *Vanessa Thompson*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 17-cv-3025-PAB
HIGH COUNTRY CONSERVATION ADVOCATES, *et al.*
Plaintiffs,

v.

UNITED STATES FOREST SERVICE, *et al.*
Federal Defendants,

and

MOUNTAIN COAL COMPANY LLC,
Intervenor-Defendant

DECLARATION OF WESTON NORRIS

Weston Norris declares and states pursuant to 28 U.S.C. § 1746:

1. My name is Weston Norris, and I am the General Manager for the West Elk Mine in the North Fork Valley in Colorado, owned and operated by Mountain Coal Company, LLC ("Mountain Coal"). I have personal knowledge of all the facts alleged in this Declaration.

2. Following review of the Tenth Circuit's decision in March 2020 and consultation with the United States Forest Service ("USFS"), Mountain Coal determined that it had rights to continue building roads as authorized in federal coal Lease Modifications COC-1362 and 67232.

3. Mountain Coal's construction plans for the Summer of 2020 call for the construction of roads to support coal mining for longwall panels LW-SS2 through LW-SS4. They also call for the construction of methane ventilation borehole ("MVB") pads for each

panel. The total disturbance expected for roads on land within the Lease Modifications is 8,095 lineal feet, equating to 2.6 acres. The total acreage disturbance for pads is 6.5 acres.

4. Mountain Coal had several communications with the USFS regarding the implications and next steps following the Tenth Circuit's decision. On each occasion, Mountain Coal inquired about the timeline to re-instate the North Fork Exception, but also asserted its rights to construct roads and associated mining facilities under the terms of its leases, lease terms, and the Colorado Roadless Rule, following affirmance of the Lease Modifications by the Tenth Circuit and in advance of re-instatement of the North Fork Exception. On May 7, 2020, Mountain Coal had a telephone conference with representatives of the USFS Grand Mesa, Uncompahgre, and Gunnison ("GMUG") National Forest, along with USFS representatives in Washington DC. During this meeting, Mountain Coal stated that if the North Fork Exception could not be reinstated in a timely fashion, Mountain Coal restated its rights to construct roads, and that it would be facing a shut-down scenario if it did not exercise those rights to construct roads during the 2020 construction season.

5. During a May 21, 2020 meeting with GMUG representatives (and USFS Washington DC representatives on the phone), Mountain Coal inquired whether USFS would object if Mountain Coal commenced road construction. The USFS stated that their consents had not been disturbed. Mountain Coal staff then contacted CDRMS to inform the agency that it would be starting road construction on June 2, 2020.

6. Mountain Coal commenced construction on roads for LW-SS2 on June 2, 2020. Mountain Coal constructed approximately 3,937 lineal feet of roads, totaling 1.3 acres, through

June 4, 2020. Since June 4, 2020, Mountain Coal has not constructed any additional roads on land within the Lease Modifications.

7. Mountain Coal commenced construction of MVB pads on LW-SS2 on June 12, 2020. Mountain Coal has constructed one acre of pads to date. Mountain Coal ceased construction at the end of the day on June 16, 2020, at the direction of the Colorado Division of Mining Reclamation and Safety ("CDRMS") due to allegations made by Plaintiffs in this matter.

8. Mountain Coal presently employs 316 people. In the event that Mountain Coal is not able to complete methane ventilation borehole construction for longwall panel SS-2 this construction season, it will face a shutdown of operations of at least several months, which will result in layoffs of a large portion of its workforce. The specific number of layoffs cannot be predicted at this time.

9. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on June 22, 2020.

s/Weston Norris
Weston Norris

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 17-cv-3025-PAB
HIGH COUNTRY CONSERVATION ADVOCATES, *et al.*
Plaintiffs,

v.

UNITED STATES FOREST SERVICE, *et al.*
Federal Defendants,

and

MOUNTAIN COAL COMPANY LLC,
Intervenor-Defendant

DECLARATION OF MICHAEL DRYSDALE

Michael R. Drysdale declares and states pursuant to 28 U.S.C. § 1746:

1. My name is Michael R. Drysdale, and I have represented Mountain Coal Company, LLC ("Mountain Coal") throughout this litigation. I have personal knowledge of all the facts alleged in this Declaration.

2. I was first contacted by Plaintiffs' counsel regarding the Tenth Circuit decision at 6:02 pm CDT on June 3, 2020, via email. I responded that evening proposing that we talk in the early afternoon on June 4, 2020. That call occurred as scheduled.

3. During the call, I briefly explained Mountain Coal's position regarding the legality of roadbuilding in the Lease Modifications, and listened to Plaintiffs' position. I volunteered that roadbuilding had commenced on June 2, 2020. I represented that following our discussion, I would advise Mountain Coal to temporarily cease roadbuilding that day pending

discussions between the parties as to a potential briefing schedule and process for addressing differences in interpretation of the Tenth Circuit's decision, including execution of the mandate.

4. Over the next few days the parties exchanged positions and proposals. We were unable to reach agreement. The principal disagreement was whether Mountain Coal would agree to cease all surface disturbance activities in Lease Modifications, not just those prohibited by the CRR.

5. The parties did reach agreement on an unopposed motion to execute the mandate, which Plaintiffs filed on June 11, 2020.

6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on June 22, 2020.

s/Michael R. Drysdale
Michael R. Drysdale

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-3025-PAB

HIGH COUNTRY CONSERVATION ADVOCATES, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Federal Respondents,

and

MOUNTAIN COAL COMPANY, LLC,

Intervenor-Respondent.

FEDERAL RESPONDENTS' OPPOSITION

TO EMERGENCY MOTION TO ENFORCE REMEDY

Petitioners have filed an Emergency Motion to Enforce Remedy. ECF No. 77 (the "Motion"). Essentially, the Motion seeks to enforce vacatur of the North Fork Exception to the Colorado Roadless Rule, which was ordered by the Tenth Circuit and recently effectuated by this Court. Petitioners contend that without the Exception, "the Colorado Roadless Rule prohibits road construction for mining purposes in the roadless areas" and that road construction activity occurring during the week of June 1, 2020, while prior to entry of any vacatur order, was illegal. *Id.* at 1. Petitioners seek to "maintain the status

quo" by requesting that the Court require the United States Forest Service ("Forest Service") to withdraw its purported approval of recent road building and coal leasing exploration activities and to order the mining company "to immediately halt all surface disturbing activities[.]" *Id*. at 2.

As for the requested relief regarding the Forest Service, the motion should be denied because, as Petitioners acknowledge, the activities at issue took place after the Tenth Circuit's order, but prior to this Court effectuating the Tenth Circuit's mandate by entering an order vacating the North Fork Exception. Petitioners' requested relief goes beyond the Tenth Circuit's mandate, as the Tenth Circuit did not vacate the lease modifications, under which the mining company conducts activities associated with its leases. Before the North Fork Exception was actually vacated, the Forest Service had no opportunity to revisit prior decisions authorizing the mining company from building roads associated with its leases. Petitioners are seeking injunctive relief without offering a legal basis for such relief. Accordingly, their Motion should be denied.

BACKGROUND

Petitioners brought National Environmental Policy Act ("NEPA") challenges to agency actions relating to coal mining exploration and leasing. Specifically, they challenged "the approval of the North Fork Exception to the Colorado Roadless Rule ("CRR") by the [Forest Service] and the joint approval of lease modifications in favor of defendant-intervenor Mountain Coal Company, LLC ("Mountain Coal") by the Forest Service and Bureau of Land Management ("BLM")[.]" ECF No. 62 at 1-2. The re-promulgation of the North Fork Exception was supported by a Supplemental

Environmental Impact Statement (the "North Fork SFEIS") and approval of the lease modifications was supported by a separate Supplemental Environmental Impact Statement (the "Leasing SFEIS"). This Court upheld the challenged agency actions and entered judgment on August 16, 2018. ECF No. 63.

Petitioners appealed, and the Tenth Circuit issued an opinion on March 2, 2020. *High Country Conservation Advocates v. U. S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020). That decision focused on two issues – whether the North Fork SFEIS violated the "arbitrary and capricious" standard of review for failing to sufficiently consider Petitioners' proposed "Pilot Knob Alternative" and whether the Leasing SFEIS was similarly deficient with regard to Petitioners' proposed "Methane Flaring Alternative." *Id*. at 1220-21. The Tenth Circuit panel majority found:

> we reverse as to the North Fork SFEIS, 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.

Id. The panel majority concluded "we **VACATE** the district court's judgment and **REMAND** the case for entry of an order vacating the North Fork Exception." *Id*. at 1229.

The activities at issue involve Mountain Coal's operations in conjunction with the West Elk mine, as governed by the Mineral Leasing Act of 1920, as amended, Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), and Energy Policy Act of 2005. *See* Declaration of Chad Stewart ¶ 2 ("Stewart Decl.") (Ex. 1 hereto). These laws and

accompanying regulations establish a system in which BLM issues the lease (and any modifications) but the Forest Service "decides whether to consent to BLM leasing and prescribes stipulations for the protection of NFS lands and/or reviews existing stipulations on the parent coal leases to determine if the restrictions are adequate to protect the non-mineral resources." *Id.*; *see* 30 U.S.C. § 201(a)(3)(A)(iii), 43 C.F.R. § 3425.3(b). The Motion addresses activities authorized by lease modifications COC-1362 and COC-67232, which include potential effects, as disclosed and analyzed in the Leasing SFEIS, associated with construction "of about 6.5 miles of roads as a portion of 72 acres of total surface disturbance" on National Forest lands within the lease modification area in the Sunset Colorado Roadless Area. Stewart Decl. ¶ 3. The SFEIS also analyzed on-lease exploration, including the potential effects from 17.76 acres of disturbance from temporary road location. *Id.*

During 2017 and 2018 the Forest Service consented to, and BLM approved, the lease modifications, construction of exploration roads, and SMCRA permit revisions. *Id.* ¶¶ 4-8. With respect to the roadbuilding activities at issue, on July 2, 2018, Mountain Coal applied to the Colorado Division of Reclamation, Mining and Safety ("CDRMS") for a SMCRA permit revision (Permit Revision 15) for the modified leases that would allow methane drainage wells and associated access roads. The Forest Service provided a letter of concurrence in Permit Revision 15 dated July 31, 2018, which advised "these lease modifications are still in active litigation. However, there is no preliminary injunction or temporary restraining order in place as of the date of this letter affecting the implementation of the proposed PR-15." *Id.* ¶ 8, Ex. 1-C. CDRMS approved Permit

Revision 15 by letter dated November 15, 2018, providing "authorization to construct approximately 6.5 miles of roads . . . on PR-15 maps for panels SS1 through SS4" including National Forest lands primarily within the Sunset Roadless Area. *Id*. ¶ 9. During summer, 2019, the Company "completed about 7,308 feet of access road (main SS1 panel road and SS1-2/3 spur) and 7 well pads" resulting "in approximately 7.7 acres of total disturbance (4.2 acres of road disturbance + 3.5 acres pad disturbance)." *Id*. ¶ 10.

Road construction and related activity under the Company's permit had ceased for the winter at the time of the Tenth Circuit's decision on March 2, 2020. In a May 21, 2020, meeting, representatives of the Company and the Forest Service discussed the agency's "plans to initiate the necessary administrative process and environmental analysis to consider amendment of the Colorado Roadless Rule to reinstate the North Fork Coal Mining Area Exception." *Id*. ¶ 13. The Company did not announce road building plans at this meeting, but did so in a May 29, 2020, phone call to the Forest Service, during which a Company representative said "they would be preparing June 1, 2020 to commence road construction activities for panel SS2 and would begin road construction on June 2, 2020." *Id*. ¶ 14. Petitioners learned of this activity and filed an unopposed Motion for Entry of Tenth Circuit Mandate on June 11, 2020. ECF No. 76. On June 12, 2020, Petitioners filed the Emergency Motion to Enforce Remedy. ECF No. 77.[1]

[1] On June 17, 2020, CDRMS ordered "all surface disturbing activities in the Sunset Roadless area must cease immediately, except as expressly permitted herein." Order 4 (ECF No. 79-1). To "abate violation" the Order states "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." *Id*.

LEGAL STANDARDS

A motion to enforce remedy "is the usual method for requesting a court to interpret its own judgment." Motion 5 (quoting *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004), *aff'd*, *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24 (D.C. Cir. 2005)). The court "should grant a motion to enforce if a 'prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it.'" *Sierra Club v. McCarthy*, 61 F. Supp. 3d 35, 39 (D.D.C. 2014) (quoting *Heartland Hosp.*, 328 F. Supp. 2d at 11). However, "[i]f the plaintiff has received all relief required by that prior judgment, the motion to enforce is denied." *Heartland Hosp.*, 328 F. Supp. 2d at 11. At most, "a motion to enforce a judgment gets a plaintiff only 'the relief to which [the plaintiff] is entitled under [its] original action and the judgment entered therein.'" *Heartland Reg'l Med. Ctr.*, 415 F.3d at 29 (quoting *Watkins v. Washington*, 511 F.2d 404, 406 (D.C. Cir. 1975)). A motion to enforce judgment "does not provide a means for a court to reconsider its judgment or for a plaintiff to raise new arguments that should have been offered in prior proceedings." *Resolute Forest Products, Inc. v. U. S. Dep't of Agric.*, 427 F. Supp. 3d 37, 41 (D.D.C. 2019), *appeal dismissed*, No. 20-5027, 2020 WL 1918282, (D.C. Cir. Apr. 1, 2020).

ARGUMENT

Petitioners' motion requests that the Court: (1) order the Forest Service "to immediately withdraw consent to any approvals authorizing Mountain Coal to engage in surface disturbing activities within the North Fork Exception area" and (2) order Mountain Coal "to immediately halt all surface disturbing activities within the North Fork Exception

area . . . . " Motion 2-3, 13. Petitioners' motion should be denied because, at the time of the road construction activities at issue, this Court had not yet vacated the North Fork Exception. Further, the request to halt all surface disturbing activities is overly broad and is not properly supported. The Court should deny Petitioners' motion.

I. Petitioners Seek Relief Exceeding the Scope of the Mandate.

Petitioners have not satisfied their burden in seeking emergency relief. Further, Petitioners requested belief goes beyond what is required by the mandate and seeks detailed, but unsupported, injunctive relief.

The motion is styled as one "to enforce remedy" through which the Court can "interpret its own judgment" or address "a defendant [who] has not complied with a judgment entered against it." Motion 5-6 (citations omitted). A motion to "enforce remedy" is confined by the judgment sought to be enforced. "The Court 'is generally the authoritative interpreter of its own remand.'" *Anglers Conservation Network v. Ross*, 387 F.Supp.3d 87, 93 (D.D.C. 2019) (quoting *AT & T Wireless Servs., Inc. v. FCC*, 365 F.3d 1095, 1099 (D.C. Cir. 2004)). However, "a motion to enforce a judgment gets a plaintiff only 'the relief to which [the plaintiff] is entitled under [its] original action and the judgment entered therein.'" *Heartland Reg'l Med. Ctr.*, 415 F.3d at 29 (quoting *Watkins*, 511 F.2d at 406).

Petitioners incorrectly characterize the "mandate rule." They assert the "district court's entry of the mandate is a purely non-discretionary task." Motion 9 (citing *Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co.*, 962 F.2d 1528, 1534 (10th Cir. 1992)). That case does say "a district court must comply strictly with the mandate rendered by the

reviewing court" and further advises "the district court must be circumscribed by our mandate." *Colo. Interstate Gas Co.*, 962 F.2d at 1534.[2] Some earlier Tenth Circuit decisions reflect this narrow interpretation of the mandate rule. *See e.g. El Paso Nat. Gas Co. v. Kelly*, 321 F.2d 645, 645 (10th Cir. 1963) ("Upon remand from an appellate court with a specific mandate the trial court is limited to the imperative of the mandate and is without jurisdiction to vary or extend it." (quoting *Britton v. Dowell, Inc*., 243 F.2d 434, 434-35 (10th Cir. 1957)). However, this narrow interpretation does not accurately reflect the current state of the law or the full range of circumstances. When the mandate directs that the district court decision is "vacated and the case is remanded for further proceedings consistent with the terms of [the Circuit Court] opinion . . . the mandate does not expressly limit the Court's discretion to hear matters on remand that are not foreclosed by the terms of the Tenth Circuit's opinion." *Entek GRB LLC v. Stull Ranches LLC*, 113 F. Supp. 3d 1113, 1116 (D. Colo. 2015), *aff'd*, 840 F.3d 1239 (10th Cir. 2016). Despite their insistence to the contrary, Petitioners' request for emergency relief goes far beyond a ministerial response by the district court to the mandate. Instead, their request is one for injunctive relief – they are asking the Court, not only to vacate the North Fork Exception, but also to issue specific directions to the parties about future acts they must take or refrain from taking.

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[2] The early Supreme Court case Petitioners cite similarly provides "[a]fter 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." *Litchfield v. Dubuque & R.R. Co.*, 74 U.S. 270, 271 (1868).

The relief that Petitioners seek is beyond the scope of the mandate. While the Tenth Circuit ordered vacatur of the North Fork Exception, it did not similarly vacate the lease modification decisions. Yet Petitioners' motion seeks relief which would modify, if not nullify, the lease modifications. Petitioners describe the mandate as requiring this Court to fashion a judgment or remedy that is ministerial in nature, yet in the present motion advances "arguments . . . wholly untethered to the dictates of [any] remedial order." *Anglers Conservation Network*, 387 F. Supp. 3d at 96-97. Petitioners "have no basis to seek, by a motion to enforce a remedial order related to their [North Fork SFEIS] claim, to have the Court determine that Defendants have now violated the [Leasing SFEIS claim] and order relief accordingly." *Id*. at 97; *Compare WildEarth Guardians v. Bernhardt*, Civ. A. No. 16-1724 (RC), 2019 WL 3253685, at *3 (D.D.C. July 17, 2019) ("Plaintiffs' argument fails because they have received all relief required by the text of this Court's March 19, 2019 injunctive order."), *with High Country Conservation Advocates v. U, S. Forest Serv.*, 67 F. Supp. 3d 1262, 1266-67 (D. Colo. 2014) (vacating North Fork Exception and vacating lease modifications). Petitioners' motion strays beyond the issues which now remain in this case.

Petitioners cannot ask this Court to "enforce" a remedy that is inconsistent with the Tenth Circuit's mandate. Therefore, their emergency motion should be denied.

II. The Forest Service Did Not Act Improperly by Allowing Road Building Activities Prior to the Court's Vacatur of the North Fork Exception.

Previously issued decisions authorizing any temporary road building remained in place before this Court entered an order vacating the North Fork Exception. Indeed, it was

incumbent upon the Petitioners to assess, and if necessary, protect their own interests by requesting that this Court enter an order vacating the exception, which they eventually did. Petitioners contend the Tenth Circuit's holding "had immediate and retroactive legal effect." Motion 9. That is incorrect. The North Fork Exception was not vacated until this Court entered its order in response to the Tenth Circuit's ruling. Therefore, the inaction of the Forest Service vis-à-vis previously authorized interim road building was appropriate. Petitioners acknowledge as much, recognizing in their June 11, 2020, unopposed motion that "this Court has not executed the mandate" and that such an order was necessary "[t]o carry out the Tenth Circuit's mandate . . . . " ECF No. 76 at 2.

The Forest Service was not able to act upon the Circuit Court's mandate before this Court entered an order effectuating that mandate. The mandate is the mechanism by which the district court "reacquire[s] jurisdiction over the case." *Burton v. Johnson*, 975 F.2d 690, 693 (10th Cir. 1992). This allows "the district court to carry out some further proceedings" which can range from being "purely ministerial" to "more significant proceedings." *Exxon Chem. Patents, Inc. v. Lubrizol Corp*., 137 F.3d 1475, 1483 (Fed. Cir. 1998). Despite these differences "[t]here is no separate rule for 'ministerial' mandates as opposed to more complicated mandates" because "such a rule would leave uncertain who should determine whether a mandate rises above the 'ministerial' level." *Crickon v. United States*, No. 3:12-cv-0684-SI, 2013 WL 2359011, at *7 (D. Or. May 28, 2013). Thus, "the parties to the case are generally not obligated to act on the appellate mandate until after the district court issues its order implementing the mandate. At that time, the parties are obligated to follow the district court's order." *Id*. To require the parties to act upon the

mandate would contravene basic purposes of the mandate rule, which include "to preserve the finality of judgments, to prevent 'continued re-argument of issues already decided, . . . and to preserve scarce court resources.'" *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1132–33 (10th Cir. 2003) (quoting *Huffman v. Saul Holdings Ltd. P'ship* , 262 F.3d 1128, 1132 (10th Cir. 2001)). Thus, the activities of the mining company were allowed to occur largely due to the Plaintiffs' own inaction in seeking to have the mandate executed.

Petitioners do not directly address this issue, but instead contend that the other parties have attempted to "exploit the lag time between the Tenth Circuit's vacatur order and this Court's formal entry of that order . . . . " Motion 9. Petitioners have failed to cite any authority suggesting the Forest Service had an obligation to act before issuance of the order implementing the mandate. Nor have they explained their own inaction between issuance of the mandate and filing of the present motion. "[I]t is important that both private litigants seeking to enforce environmental statutes and judges presiding over environmental cases remain aware at all times of the practical aspects of the litigation, and guide their actions accordingly. Primary responsibility rests, of course, with the private litigants, as it is their duty to seek the necessary relief in a timely manner and to keep the court informed of all developments." *Kettle Range Conservation Grp. v. U.S. Bureau of Land Mgmt.*, 150 F.3d 1083, 1088 (9th Cir. 1998) (Reinhardt, J., concurring). It is not unusual in cases of this nature for parties on any side to perceive or anticipate a need to request appropriate judicial action. *See e.g., Cal. ex rel Lockyer v. U. S. Dep't of Agric.*, 468 F. Supp. 2d 1140, 1141-42 (N.D. Cal. 2006) (granting request for "further injunctive relief" following the district court's earlier order awarding initial relief).

In sum, the mandate is the procedural mechanism by which the district court will effectuate the appellate court's disposition of the case. The Forest Service was not obligated to act in advance of any district court order following remand, and therefore had no obligation or authority to prevent road building activities prior to the issuance of the mandate.

III. Petitioners Have Not Met the Requirements for Injunctive Relief.

The second prong of Petitioners' requested relief outlines an injunction addressing numerous specific activities. Petitioners request that the Court:

> order Mountain Coal to comply with the vacatur order by refraining from constructing or re-constructing any roads or tree cutting in the Sunset Roadless Area and from engaging in any further surface disturbing activity that could not occur but for Mountain Coal's unlawful act of bulldozing a road through that protected area, including but not limited to drilling pad construction.

Motion 13. This request is flawed on multiple levels.

Petitioners have failed to properly present a request for injunctive relief. This is a critical shortcoming, for "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (citation omitted). Further, a sufficient showing on each of the four factors of the injunctive relief standard are necessary "in assessing the propriety of any injunctive relief, preliminary or permanent." *Id*. A proper injunction order must reflect the Court's analysis and exercise of discretion on each of the four elements. *Id.* at 32; *Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1223 (D. Colo. 2011), *amended by*, Civ. A. No. 08-cv-01624-WJM, 2012 WL 628547 (D. Colo. Feb. 27, 2012)

("Injunctive relief does not automatically issue, nor is it presumptively proper, upon a finding of a NEPA violation."). The posture of the case further requires Petitioners to address the different considerations "governing preliminary and permanent injunctions." *DTC Energy Grp., Inc. v. Hirschfeld*, Civ. A. No. 17-cv-01718-PAB-KLM, 2020 WL 1333090, at *4 (D. Colo. Mar. 23, 2020).

There is simplistic appeal in the assumption that no roads can exist in Roadless Areas, but the cases reflect far more nuanced applications. For example, temporary vehicle and heavy equipment use associated with construction of a pipeline has been allowed, where any prohibition on "roads" was reasonably construed "narrowly as referring to an area whose exclusive purpose is for motor vehicle through-traffic, rather than the localized use of motorized equipment ancillary to an altogether different, and non-prohibited, purpose." *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1226-27 (10th Cir. 2008).[3]

Even if temporary road placement is deemed inconsistent with the CRR, the Court is not obligated to impose an injunction, and any injunctive relief might take various forms. In the 2001 Roadless Rule litigation, the district court initially ordered "[t]he parties shall meet and confer regarding any specific language that they believe should be included in the

[3] The Colorado Roadless Rule provides other exceptions to the prohibition on road construction for roads needed for reserved or outstanding rights, 36 C.F.R. § 294.43(b)(1), (c)(1)(i). The lease stipulations further demonstrate the need to interpret Forest Service regulations and conditions within the framework of other rights, conditions or obligations under different agency interpretations and other authority. *See* FSLeasingII 0000037-39. Petitioners ignore this analysis, simply presuming that all road construction and any activity facilitated by road access is legally prohibited upon vacatur of the North Fork Exception.

Court's injunction." *Cal. ex rel Lockyer v. U.S. Dep't of Agric*., 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006). Later, the district court issued a series of orders following motions seeking clarification and emergency injunctive relief, noting "the equities weigh against applying the Court's ruling retroactively to enjoin this particular project." *California ex rel Lockyer v. U.S. Dep't of Agric.*, Nos. C05-03508/C05-04038 EDL, 2006 WL 2827903, at *2 (N.D. Cal. Oct. 3, 2006). In a subsequent motion for "further injunctive relief" plaintiffs apparently "followed the Court's admonition not to seek to enjoin projects that are already underway based on the Court's previous balancing of the equities in declining to enjoin the timber harvesting that had already commenced on the ground in the Mike's Gulch and Blackberry projects." *California ex rel Lockyer*, 468 F. Supp. 2d at 1141-42. The extent of activities which might occur during any "lag time" is similarly demonstrated in *Organized Vill. of Kake v. U.S. Dep't of Agric*., 776 F. Supp. 2d 960, 976-77 (D. Alaska 2011), *aff'd*, 795 F.3d 956 (9th Cir. 2015) (en banc). Petitioners cite the case for the proposition that the typical remedy following vacatur of a regulation is to reinstate the rule previously in force (Motion 7) but this overlooks the nuance of the district court's remedy, which outlined a long list of projects allowed to continue, notwithstanding any inconsistency with the reinstated Roadless Rule. *See* Judgment, *Organized Vill. of Kake*, 776 F. Supp. 2d 960 (D. Alaska 2011) (No. 1:09-cv-00023 JWS) (Ex. 2 hereto).

This case departs notably from the parties' prior litigation, in which both the North Fork Exception and the lease modifications were vacated. *High Country Conservation Advocates*, 67 F. Supp. 3d at 1264-1265 (finding circumstances there to be "more like a Gordian knot that needs cutting than a simple tangle that the government can untie with a

little extra time"); *see also Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1259 (D. Colo. 2012) (denying request to "set aside" oil and gas leases "to the fullest possible extent" based, in part, on the Court's "concerns as to whether such relief falls within the scope of the instant action" targeting NEPA compliance but "not to the decision to issue leases"). These distinctions are not mere semantics, for the Circuit Court has "done all of the following when placed in a similar posture: (1) reversed and remanded without instructions, (2) reversed and remanded with instructions to vacate, and (3) vacated agency decisions." *WildEarth Guardians v. U. S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239-40 (10th Cir. 2017) (declining request to vacate leases while recognizing "the question remains . . . whether mining the lease tracts should be enjoined"). Here, the lease modifications remain intact following remand solely on the North Fork Exception.

It is incumbent upon the moving party to provide a basis for a favorable ruling. Petitioners' motion fails this requirement and neglects several important elements. Petitioners have not attempted the presentation required to support their request for detailed injunctive relief.

CONCLUSION

The Court should deny Petitioners' Emergency Motion to Enforce Remedy.

DATE: June 22, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2020, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ *Paul A. Turcke*
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