STATE OF COLORADO

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

Fwd: West Elk: Opposition to Request to Life Modified Cessation Order 2020-001

Stark - DNR, Jim <jim.stark@state.co.us> Wed, Dec 29, 2021 at 10:13 AM
To: Leigh Simmons <leigh.simmons@state.co.us>

James R Stark
Coal Program Director

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

P 303.866.3567 | C 720.724.0486 | F 303.832.8106
1313 Sherman Street St., Suite 215, Denver, CO 80203
jim.stark@state.co.us | http://www.drms.colorado.gov

---------- Forwarded message ---------
From: **Robin Cooley** <rcooley@earthjustice.org>
Date: Wed, Dec 22, 2021 at 4:26 PM
Subject: West Elk: Opposition to Request to Life Modified Cessation Order 2020-001
To: <ginny.brannon@state.co.us>
Cc: <jim.stark@state.co.us>, <jason.musick@state.co.us>, <leigh.simmons@state.co>, <jeff.fugate@coag.gov>

Director Brannon,

On behalf of High Country Conservation Advocates, WildEarth Guardians, Center for Biological Diversity, Sierra Club, and Wilderness Workshop, I'm attaching information that they would like you to consider in response to Mountain Coal's apparent request to lift Cessation Order 2020-001. Thank you for your consideration of this matter. And please contact me at this email or (303) 996-9611 if you have any questions.

Happy holidays,

Robin

Robin Cooley (she/her)

Deputy Managing Attorney

Earthjustice Rocky Mountain Office

633 17th Street, Suite 1600

Denver, CO 80202

T: 303.623.9466

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5 attachments

Letter in Opposition to Lifting Cessation Order.pdf
150K

Exhibit 1 C0-2020-001 Amendment - 9-1-2020 FINAL.docx.pdf
171K

Exhibit 2 CO-2020-001 C-1980-007 Mountain Coal Co. LLC.pdf
207K

Exhibit 3 MCC Interv Brief.pdf
214K

Exhibit 4 2020-08-25_ENFORCEMENT - C1980007 - Drysdale letter.pdf
577K

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ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

December 22, 2021

BY ELECTRONIC 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: Response to Mountain Coal Company's Request to Lift Cessation Order CO-2020-001 Regarding the West Elk Mine

Dear Ms. Brannon:

High Country Conservation Advocates, WildEarth Guardians, Center for Biological Diversity, Sierra Club, and Wilderness Workshop (collectively, "Conservation Groups") provide the following information in opposition to Mountain Coal Company's ("Mountain Coal's") request to lift Cessation Order CO-2020-001, as modified on September 17, 2020 (attached as Ex. 1). Conservation Groups request that the Colorado Division of Reclamation, Mining, and Safety (DRMS) not lift the Modified Cessation Order or, at a minimum, that DRMS first obtain written confirmation from the Forest Service—the federal land manager for the national forest roadless areas—of its legal position that future road construction is not permissible. Additionally, Conservation Groups request written confirmation that DRMS will provide Conservation Groups with notice of any future request to construct roads in the Sunset Roadless Area and will not treat any such request as a minor permit revision.

Conservation Groups understand that Mountain Coal has asked DRMS to lift the Modified Cessation Order in its entirety. Conservation Groups urge DRMS not to take this step. As DRMS previously recognized in the Modified Cessation Order, the courts ordered vacatur of the North Fork Exception—the only basis for Mountain Coal to construct roads within the roadless area. Accordingly, DRMS determined that Mountain Coal lacks a "legal right" of entry to construct roads. Modified Cessation Order at 3. This determination was upheld by the Mined Land Reclamation Board. MLRB Order at 4 ("Vacatur of the North Fork Exception to the Colorado Roadless Rule caused Operator to lose its legal right to enter and build roads on lands within the Sunset Roadless Area.") (attached as Ex. 2). The Modified Cessation Order was necessary because, despite the courts' orders, Mountain Coal rushed to construct a road and drilling pads in the Sunset Roadless, causing irreparable harm. Notably, however, Mountain Coal has now determined the constructed road was actually unnecessary to mine the coal and has taken steps to reclaim the road. But Mountain Coal continues to maintain that it has a legal right to construct future roads pursuant to its lease modifications. *See* Brief of the Intervenor-Appellee at 33, No. 20-1358 (10th Cir. Feb. 26, 2021) (attached as Ex. 3). Because there is still a dispute regarding Mountain Coal's rights and given Mountain Coal's previous rushed road construction in the roadless area, Conservation Groups urge DRMS to maintain the Modified Cessation Order

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prohibiting road construction until Mountain Coal has fully mined longwall panels SS2, SS3, and SS4.

In the alternative, Conservation Groups request that—prior to lifting the Cessation Order—DRMS obtain a written statement from the Forest Service regarding their position as to the effect of vacatur of the North Fork Exception on Mountain Coal's ability to construct any future roads, as DRMS did prior to modifying the cessation order in September 2020. In the original Cessation Order, DRMS stated that to abate the violation Mountain Coal needed to provide detailed information to show why its assertion that it has a legal right of entry was not inconsistent with the court orders. In response, Mountain Coal requested confirmation of its rights regarding road and rill pad construction related to longwall panel SS2 from the Bureau of Land Management, who in turn requested input from the Forest Service. *See* Letters from BLM and the Forest Service to Mountain Coal (attached as Ex. 4). DRMS then modified the Cessation Order in accordance with BLM's and the Forest Service's position.

However, BLM's and the Forest Service's letters do not address future construction related to panels SS3 and SS4 other than the Forest Service's statement that "future construction of any unbuilt roads . . . are subject to the [Colorado Roadless Rule] prohibitions, unless other exceptions apply." Forest Service letter at 4. The letter did not address whether the Forest Service believes any such other exceptions apply here. Accordingly, although DRMS modified the Cessation Order to allow additional drill pad construction for panel SS2, the Modified Cessation Order continues to prohibit future road construction related to SS3 and SS4.

Prior to lifting this remaining protection for the Sunset Roadless Area, DRMS should be clear as to the Forest Service's legal position regarding any future construction related to panels SS3 and SS4. As discussed above, Mountain Coal maintains that it has the legal right to construct such roads, if necessary. Based on briefing before the Tenth Circuit, Conservation Groups understand that the Forest Service believes that there are no other relevant exceptions and therefore future road construction is prohibited under the Colorado Roadless Rule due to vacatur of the North Fork Exception. DRMS should clarify the federal agencies' position in writing prior to lifting the Cessation Order. This clarification is important both to guide DRMS in assessing any future request by Mountain Coal to construct additional roads and to provide clarity to the public.

Finally, Conservation Groups also request assurance from DRMS that if Mountain Coal seeks to construct additional roads in the future that DRMS will not treat such request as a "minor revision" and will provide adequate time for public involvement. *See* 2 Colo. Code Regs. § 407-2:1.04(73), 2.08. Conservation Groups also request assurance that they will be notified well before DRMS makes a final decision on any such request.

Please feel free to contact me at rcooley@earthjustice.org if you have any questions regarding these requests.

Sincerely,

Robin Cooley
Earthjustice

Attorney for High Country Conservation Advocates, WildEarth Guardians, Center for Biological Diversity, Sierra Club, and Wilderness Workshop

Enclosure cc:
Jim Stark, DRMS
Jason Musick, DRMS
Leigh Simmons, DRMS
Jeff Fugate, Asst. Attorney General

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

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CESSATION ORDER
MODIFIED EFFECTIVE SEPTEMBER 17, 2020

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 Somerset, CO 81434**	**Date/Time of Inspection:**	**June 10, 2020**
Inspector:	**James Stark**	**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 ____ 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.

On August 25, 2020 Mountain Coal Company provided the requested abatement documentation from the US Forest Service and the Bureau of Land Management. The letters from USFS and BLM, the Federal land management agencies, provided clarity regarding their interpretation of the Colorado Roadless Rule and associated rights under the Federal leases related to work associated with panel SS2. Specifically, the letters clarified Mountain Coal's right of entry to access and use the existing road in longwall panel SS2, which was constructed prior to the Federal District Court's vacatur of the North Fork Exception; right of entry to access the two drill pads constructed prior to the vacatur of the North Fork Exception; right of entry to construct two additional drill pads in the Sunset Roadless area for longwall panel SS2; and right of entry to drill mine ventilation boreholes on the drill pads constructed for longwall panel SS2. The letter from USFS provided its determination that the activities outlined herein are consistent with exceptions to the Colorado Roadless Rule, 36 C.F.R. § 294.42(c)(5). The letter from USFS further stated that construction of roads in the Sunset Roadless area for longwall panels SS3 and SS4 is not allowed because of the vacatur of the North Fork Exception.

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

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

REGULATIONSECTION(S): **Rules 2.03.6**

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.

<u>Cessation Order CO-2020-001 is modified on September 17, 202 as follows</u>: Mountain Coal Company (MCC) is permitted access and use of the existing, temporary road constructed in the Sunset Roadless area for longwall panel SS2 prior to the vacatur of the North Fork Exception, and authorized under PR-15. MCC is permitted to access the two drill pads that were constructed in the Sunset Roadless area for longwall panel SS2 prior to the vacatur of the North Fork Exception. MCC is permitted to construct two additional drill pads in the Sunset Roadless area for longwall panel SS2. MCC is permitted to drill mine ventilation boreholes on the drill pads constructed in the Sunset Roadless area for longwall panel SS2.

MCC is not permitted to construct any additional roads in the Sunset Roadless area for longwall panel SS2. MCC is not permitted to conduct any ground disturbing activities in the Sunset Roadless area for longwall panels 3 or 4, or any area not discussed above.

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 (**Amended on 9/17/2020**):

1. All surface disturbing activities in the Sunset Roadless area must cease immediately, except as expressly permitted herein.

2. **Mountain Coal may not conduct any ground disturbing activities in the Sunset Roadless area for longwall panels SS3 and SS4.**

STEPS NECESSARY TO ABATE VIOLATION (REMEDIAL ACTION):

Abatement Step #	Description
1	Abated on 9/14/2020.
2	**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. This abatement step is specific to longwall panels SS3 and SS4 in the Sunset Roadless area.**

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

Abatement Step #	Due Date
1	September 17, 2020
2	December 11, 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. **Cessation Order CO-2020-001 is modified on September 17, 2020. This modification allows for access for limited activities in the Sunset Roadless area for panel SS2 as described above and more fully described in abatement documentation letters provided to DRMS on August 25, 2020. No additional surface disturbing activities in the Sunset Roadless area, including for panels SS3 and SS4, are allowed and are still subject to this CO.**

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

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

October 12, 2020

Mountain Coal Company, LLC
5174 Highway 133
Somerset, CO 81434

Re: Findings of Fact, Conclusions of Law, and Order, Mountain Coal Company, LLC
File No. CO-2020-001, C-1980-007

On October 8, 2020 the Mined Land Reclamation Board signed the enclosed Board Order for the above captioned operation. Because this document is the final order of the Board, it is legally binding on and affects the above-captioned operation, and we strongly advise that you read this document carefully.

Sincerely,

Camille Mojar
Board Administrator

Enclosure(s)

Certified Mail
7018 2290 0001 8923 1243

cc:
Leigh Simmons
Jason Musick
Jim Stark
Jeff Fugate
Scott Schultz
Charles Kooyman
Michael Drysdale, Esq.
Dan Timmons, Esq.
John Poulos, PE

BEFORE THE MINED LAND RECLAMATION BOARD
STATE OF COLORADO

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

IN THE MATTER OF CESSATION ORDER No. CO-2020-001, MOUNTAIN COAL COMPANY, LLC, File No. C-1980-007

THIS MATTER came before the Mined Land Reclamation Board ("Board") on July 23, 2020 via video conference for a hearing on Cessation Order CO-2020-001 issued to Mountain Coal Company, LLC ("Operator"), Permit No. C-1980-007. James Stark and First Assistant Attorney General Jeff Fugate appeared on behalf of the Division of Reclamation, Mining and Safety ("Division"). Michael Drysdale, Esq. and John Poulos, P.E., appeared on behalf of Operator. Dan Timmons, Esq. appeared on behalf of Wild Earth Guardians, High Country Conservation Advocates, Sierra Club, the Center for Biological Diversity, and Wilderness Workshop (collectively "Intervenors").

The Board, having considered the presentations, testimony, and evidence of the Division, Operator, and Intervenors, and being otherwise fully informed of the facts in the matter, enters the following:

FINDINGS OF FACT

1. Operator holds reclamation permit number C-1980-007 for an underground coal mine located in Section 16, Township 13 South, Range 90 West, 6th Principal Meridian, Gunnison County, Colorado. The site is known as the West Elk Mine.

2. On June 10, 2020, the Division conducted an inspection of the site.

3. On June 17, 2020, the Division issued Operator Cessation Order CO-2020-001 (the "Cessation Order"). The Cessation Order noted that the federal district court for the District of Colorado had vacated the North Fork Exception to the Colorado Roadless Rule and that the invalidation meant that Operator had failed to maintain its legal right to enter the Sunset Roadless area. The Division ordered Operator to cease all surface disturbing activities in the Sunset Roadless area, 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, and remove all equipment in the Sunset Roadless area. The Cessation Order allowed Operator to continue to access certain areas for stabilization activities necessary to prevent offsite impacts in the Sunset Roadless area. The Division found that the Cessation

Order was necessitated by the potential for the prohibited activities to "cause[ ] or ... reasonably be expected to cause significant imminent environmental harm to land, air, or water resources."

4. The Cessation Order also required Operator to provide the Division with detailed information regarding its assertion that it maintained legal right of entry to the Sunset Roadless area and how that was not in direct conflict with the federal district court's vacatur of the North Fork Exception to the Colorado Roadless Rule.

5. Operator responded to the Cessation Order through a letter dated July 2, 2020, arguing that the Cessation Order exceeded the Division's authority under state and federal law as well as Colorado's Cooperative Agreement with the federal Office of Surface Mining (OSM). Operator requested that the Division terminate the Cessation Order and, in the alternative, requested a hearing before the Board at its next scheduled meeting.

6. At the Board's July 23, 2016 hearing, the Division presented testimony regarding the Cessation Order and the history of site and federal litigation involving the North Fork Exception to the Colorado Roadless Rule. The North Fork Exception had allowed surface activities on federal land that would otherwise be subject to prohibitions on roadbuilding. Operator has a lease for coal mining on federal lands in the Sunset Roadless area, which was covered by the North Fork Exception. With the vacatur of the North Fork Exception, the Division concluded that Operator had lost its legal right of entry to build roads and pads in the Sunset Roadless area.

7. At the hearing, the Division explained that if Operator continued construction of roads in an area that was required by federal law to remain roadless, those actions would result in significant harm to the environment. The Division described discussions with the Operator, the federal Bureau of Land Management ("BLM"), and the U.S. Forest Service ("USFS"). During those conversations, the Operator indicated that it would continue building roads and well pads, and that the BLM and USFS did not take a definitive position.

8. The Division also discussed its authority to issue the Cessation Order, including that Colorado had gained primacy for regulating coal mining under federal law in 1980. Under Colorado's cooperative agreement with OSM, the Division has primacy for enforcement and issuing orders of cessation. The Division explained that it was not adjudicating the validity of Operator's lease with the federal government or Operator's rights under the lease, an issue where the federal government retains primacy. Rather, the Division is questioning the Operator's legal right of entry in the roadless areas now that the North Fork Exception has

been vacated. The Division also explained that it had discussed the Cessation Order with the OSM. During that discussion, OSM did not raise any issue of whether the Division had exceeded its authority in issuing the Cessation Order.

9. At the hearing, Operator argued that the Cessation Order exceeded Colorado's authority and that its past and future work were lawful under the Colorado Roadless Rule. Regarding the federal litigation that led to the vacatur of the North Fork Exception, Operator explained that its federal lease modifications had been affirmed. It constructed the roads that are subject to the Cessation Order before the Roadless Rule was vacated, and, according to Operator, it was allowed to build those roads at the time it did under both its lease and the then-in-effect North Fork Exception.

10. Operator also argued that even with the North Fork Exception's vacatur, it is allowed to construct well pads for mine ventilation boreholes. That work, according to Operator, involves cutting trees, which is an "approved management activity" under its leases. Drilling bore holes on the pads is also not prohibited. Accordingly, Operator argued that it is authorized to complete the drill pads and use the roads it constructed under its federal lease and applicable federal rules.

11. Intervenors argued at the hearing that the vacatur of the North Fork Exception eliminated Operator's right to build roads or cut trees for drill pads. Intervenor also argued that if Operator's federal lease provided a separate authority for roadbuilding in the Sunset Roadless Area, it would not have needed to rely on the North Fork Exception in the first place. Intervenors also argued that Operator's filings in the Tenth Circuit indicated that it knew the vacatur of the North Fork Exemption would eliminate its ability to build roads and, as a practical matter, continue mining in new panels. According to Intervenors, Operator assumed the risk that the North Fork Exception could be invalidated when it entered into the federal lease at issue here.

CONCLUSIONS OF LAW

12. The Board has jurisdiction over this matter pursuant to section 34-33-124(1) of the Colorado Surface Coal Mining Reclamation Act ("Act") and Rule 5.01.3(2)(6) of the Regulations of the Colorado Mined Land Reclamation Board for Coal Mining ("Rules").

13. The Division and Board have the full power and authority to carry out and administer the provisions of this article. C.R.S. § 34-33-104.

14. Under section 34-33-110(2)(j), C.R.S., and Rule 2.03.6, a permitee must establish that it has a legal right to enter and commence coal mining operations. An operator must maintain its legal right to enter throughout the life of the permit. Vacatur of the federal North Fork Exception to the Colorado Roadless Rule, caused Operator to lose its legal right to enter and build roads on lands within the Sunset Roadless Area.

15. Section 34-33-123(1), C.R.S. requires the Division to issue cessation orders whenever an inspection allows it to determine that any violation of the Act or Rules causes or can reasonably be expected to cause "significant imminent environmental harm to land, air, or water resources." Continued roadbuilding and other surface disturbances in the Sunset Roadless Area without an exemption or other right to enter and conduct those operations causes or can be reasonably expected to cause significant environmental harm to land resources.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board hereby AFFIRMS the Division's Cessation Order CO-2020-001.

DONE AND ORDERED this 8 day of October 2020.

FOR THE COLORADO MINED LAND RECLAMATION BOARD

Nell Wareham-Morris, Chair

NOTICE OF JUDICIAL REVIEW RIGHTS

This order becomes effective and final upon mailing. Any party adversely affected or aggrieved by agency action may commence an action for judicial review by filing a complaint with the district court within thirty-five (35) days after the effective date of this order, pursuant to section 24-4-106, C.R.S. (2019) and the Colorado Rules of Civil Procedure. In the event that a complaint for judicial review is filed, designations of record made in accordance with section 24-4-106(6), C.R.S. should be served on the Board at: 1313 Sherman Street, Room 215, Denver, CO 80203, Attention: Camie Mojar.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 12th day of October 2020 addressed as follows:

By certified mail:
7018 2290 0001 8923 1243

Mountain Coal Company, LLC
5174 Highway 133
Somerset, CO 81434

By electronic mail:

Michael Drysdale, Esq.
Drysdale.Michael@dorsey.com

Dan Timmons
dtimmons@wildearthguardians.org

John Poulos, PE
JPoulos@archrsc.com

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Assistant Attorney General
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Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th floor
Denver, CO 80203

Camille Mojar, Board Administrator

No. 20-1358

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
Dorsey & Whitney LLP
50 South Sixth Street, Ste. 1500
Minneapolis, MN 55402
(612) 340-5652
drysdale.michael@dorsey.com

Attorneys for Intervenor-Appellee Mountain Coal Company, LLC

ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Defendant-Appellee Mountain Coal Company, L.L.C. is 100% owned by Arch Western Bituminous Group, LLC, which is 100% owned by Arch Western Resources, LLC. Arch Western Resources, LLC is 99.5% owned by Arch Western Acquisition Corporation and .5% owned by Arch Western Acquisition, LLC, which is 100% owned by Arch Western Acquisition Corporation. Arch Western Acquisition Corporation is 100% owned by Arch Resources, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF RELATED APPEALS

This appeal is a successor to the appeal in *High Country Conservation Advocates v. United States Forest Service*, 951 F.3d 1217 (10th Cir. 2020).

GLOSSARY

Agencies – U.S. Forest Service and Bureau of Land Management

APA – Administrative Procedure Act

App – Appellant Conservation Groups' Appendix

BLM – Bureau of Land Management

CDRMS – Colorado Division of Reclamation, Mining and Safety

CRA – Colorado Roadless Area

CRR – Colorado Roadless Rule

GMUG – Grand Mesa, Uncompahgre, and Gunnison National Forests

Leases – Federal Coal Leases C-1362 and COC-67232

MVB – Methane Ventilation Borehole

Mountain Coal – Mountain Coal Company, LLC

MCAPP – Mountain Coal Company Appendix

MSHA – Mine Safety and Health Administration

NEPA – National Environmental Policy Act

North Fork Exception – North Fork Coal Mining Area Exception, 33 C.F.R. § 294.43(c)(1)(ix)

RACR – Roadless Area Conservation Rule

ROD – Record of Decision

SFEIS – Supplemental Final Environmental Impact Statement

Statutory Rights Exception – Exception for reserved or outstanding rights, or as provided for by statute or treaty, 33 C.F.R. § 294.43(c)(1)(i)

USFS – United States Forest Service

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion in declining to reach the merits of the Conservation Groups' post-mandate "Motion to Enforce the Remedy"?

2. Does the Court have jurisdiction to grant the Conservation Groups' requested relief against federal coal lessee Mountain Coal Company, LLC ("Mountain Coal") in this action under the Administrative Procedure Act?

3. If this Court reaches the merits, did the Colorado Roadless Rule invalidate the authorization Mountain Coal possessed to conduct roadbuilding within federal coal lease modifications C-1362 and COC-67232 during the period after release of this Court's opinion in *High Country Conservation Advocates v. United States Forest Service*, 951 F.3d 1217 (10th Cir. 2020) but before the district court actually vacated the North Fork Coal Mining Area Exception, 36 C.F.R. § 294.43(c)(1)(ix), on June 15, 2020?

4. If this Court reaches the merits, did the Forest Service correctly conclude that Mountain Coal's tree-cutting for methane ventilation borehole pads is permissible under 36 C.F.R. § 294.42(c)(5)?

5. Is there any basis in this action under which to adjudicate Mountain Coal's contract and statutory rights under the Leases?

STATEMENT OF THE CASE

This dispute principally turns on the interpretation and scope of the Court's holding in *High Country Conservation Advocates v. United States Forest Service*, 951 F.3d 1217 (10th Cir. 2020) ("*High Country III*") and events that post-dated that opinion. However, because there may not be complete identity of persons who worked on *High Country III*, Mountain Coal provides a brief explanation of the site and regulatory context in Sections A-B(4) below. For those already familiar with the site, regulatory framework, and case history, the post-mandate events are described in Sections B(5)-(6).

A. The West Elk Mine and the Role of Temporary Roads.

The West Elk Mine ("West Elk") is an underground coal mine in operation since 1981, owned by Mountain Coal. MCAPP 015.[1] Mountain Coal mines high energy, low ash, low sulfur, Clean Air Act compliant and super-compliant coal from West Elk. MCAPP 12 (explaining coal characteristics). These coal resources include both privately-owned coal and federal coal leased by the BLM, as the

[1] Many of the documents included in Mountain Coal's Appendix were part of the Government's Appendix in *High Country III*, and therefore also bear the Government's Appendix label "G.A." and the bates labelling from the Agencies' Administrative Records. For example, the document here contains the label G.A. 545, and the Administrative Record label FSLeasingII-0000204.

manager of the federal mineral estate, under the Mineral Leasing Act. 30 U.S.C. § 181 *et seq*. MCAPP 004, 009.

Portions of the underground mine are located under the Grand Mesa, Uncompahgre, and Gunnison National Forests ("GMUG"), in the "North Fork Valley" of the North Fork of the Gunnison River. MCAPP 013. The surface within the GMUG is managed by the United States Forest Service ("USFS"), and the sub-surface federal coal is managed by the Bureau of Land Management ("BLM"). *Id*. The North Fork Valley is also the location of several other underground coal mines, which have historically been important contributors to the regional economy. MCAPP 008 (map of federal coal leases in the North Fork Exception area).

Coal is produced from West Elk through the "longwall mining method," in which continuous mining equipment mines around a large block of coal and longwall mining equipment then mines that large block from the coal seam. MCAPP 005. After the longwall equipment removes the coal, the roof rock collapses in a controlled manner behind the longwall mining equipment. *Id.* This process releases methane gas that had been locked in the native rock. *Id.*; MCAPP 017-018.

Methane is highly dangerous in a confined underground mining environment. *Id.* For this reason the federal Mine Health and Safety Administration

("MSHA") imposes strict ventilation requirements. MCAPP 014. Methane is kept at safe levels through two primary mechanisms: (1) ventilation fans that maintain air flow and appropriate oxygen and methane levels throughout the mine, and (2) methane ventilation boreholes ("MVBs")[2] vertically drilled from the surface. MCAPP 005, 014. MVBs allow excess methane levels to vent to the surface (and away from the mine workers). *Id.* Venting through MVBs is an element of West Elk's current MSHA-approved mine ventilation plan. *Id.*

Coal resources are typically described in terms of "seams," reflecting distinct strata of coal. West Elk is presently mining the "E Seam" of coal in federal coal leases C-1362 and COC-67232 ("Leases"),[3] and in fee coal reserves adjacent to the Leases. MCAPP 006, 016. Longwall mining at West Elk generally progresses from southeast to northwest through a "panel" (block) of coal. MCAPP 019. When mining a panel is complete, the mining equipment is transferred to the next panel. In this fashion, mining has been progressing north-to-south, from longwall panel to longwall panel.

In the 1990s, West Elk determined that there were likely recoverable federal and fee coal reserves to the south of the Leases, between West Elk's private leases

[2] Also sometimes referred to as "Methane Drainage Wells" or "MDWs."

[3] Lease C-1362 is held by Mountain Coal, and Lease COC-67232 is held by Arch Resources, Inc., affiliate Ark Land LLC.

and the West Elk Wilderness Area. However, if West Elk exhausts the reserves in the Leases and moves mining operations to the north, any federal and fee coal south of the Leases will in all likelihood be isolated and no longer economically recoverable. In industry and regulatory parlance, the coal would be "bypassed." MCAPP 004, 011. Consequently, Mountain Coal has advocated that exploration and mining of this coal be allowed and provisionally applied for the Lease Modifications as long ago as January 2009. MCAPP 011. However, access to the coal was faced with regulatory obstacles erected in 2001.

B. Procedural and Legal History.

1. Roadless Disputes

The roadless dimension of the current dispute has its origins on January 12, 2001, with the promulgation of the Roadless Areas Conservation Rule, 36 C.F.R. Part 294 ("RACR"). The RACR was one of the last acts of the Clinton Administration, and generally prohibited road-building on nearly 60 million acres of National Forest System Lands, most of which lie in the western States. The RACR was highly controversial, and prompted a wave of litigation not finally resolved until this Court's decision in *Wyoming v. Department of Agriculture,* 661 F.3d 1209 (10th Cir. 2011).

Among the criticisms of the RACR was that the Rule was developed with too little consultation with the States, contained numerous mapping errors, and was

overly restrictive of important activities such as timber management and mining. *Id.* at 1226. The coal mining operations in the North Fork Valley were materially affected by the RACR. Significant coal resources adjacent to West Elk and other mines in the North Fork Valley lie under RACR-designated Roadless Areas, which were subject to the prohibition on roadbuilding. Like West Elk, other coal mines in the North Fork Valley are also required to vent methane for safety purposes. MCAPP 014. Because of the rugged terrain and general depth of the coal strata in the GMUG, MVBs generally cannot be drilled and operated without temporary roads constructed to access the drill sites. *Id.* As a result, the RACR severely curtailed coal exploration and most mining in areas underlying roadless areas in the North Fork Valley.

Consequently, in parallel to the ongoing RACR litigation, USFS's 2005 State Petitions Rule amended 36 CFR Part 294 to authorize state-specific supplemental rulemaking actions to revise and update the RACR as applied to those States. 70 Fed. Reg. 25,654. One of these initiatives was the Colorado Roadless Rule ("CRR"). The CRR was a collaborative effort between the State of Colorado, the USFS, and a wide array of private and public stakeholders in the uses of the National Forest System in Colorado. Collectively, they sought to better customize the RACR for the specific needs of Colorado. The CRR was promulgated at 36 C.F.R. Part 294 on July 12, 2012. 77 Fed. Reg. 39,576.

Included among the Colorado-specific changes in the CRR was a substantial strengthening of environmental protections. The CRR extended roadless protections to over 400,000 acres not protected in the RACR, and tightened restrictions on another 1.2 million acres. *See* 77 Fed. Reg. 39,577-78. The CRR also removed acres determined to be substantially altered and created exceptions for a variety of specific activities in selected areas. *Id.* The CRR resulted in revised roadless designations known as Colorado Roadless Areas ("CRAs"). And one of the regulatory exceptions was the North Fork Coal Mining Area Exception, encompassing 19,700 acres of the North Fork Valley. 36 C.F.R. § 294.43(c)(1)(ix) ("North Fork Exception"). The Lease Modifications lie within the "Sunset" CRA.

Promulgation of the CRR and North Fork Exception thus renewed the potential for coal exploration and mining in the Sunset CRA. Mountain Coal moved forward with its application to modify the Leases to allow access for exploration and possible mining on 1701 acres south of the Leases. The Agencies approved the Lease Modifications and a concurrent exploration plan ("Exploration Plan") in a series of decisions in 2012 and 2013. *See High Country Conservation Advocates v. U.S. Forest Service*, 52 F.Supp. 3d 1174, 1184-85 (D. Colo. 2014) ("*High Country I*").

In 2013, a subset of the Appellant Conservation Groups ("Conservation Groups")[4] then challenged the CRR, the Lease Modifications, and the Exploration Plan in a single action in the District Court for the District of Colorado. *Id.* at 1185. As to the CRR, the Conservation Groups focused exclusively on the North Fork Exception. *Id.* at 1194-95.

The district court identified National Environmental Policy Act ("NEPA") /Administrative Procedure Act ("APA") violations for each of the North Fork Exception, the Lease Modifications, and the Exploration Plan. *Id.* at 1189-1193, 1195-1201. None of the issues that the *High Country I* Court found deficient were at issue in *High Country III*. Additionally, in a subsequent decision the *High Country* district court severed the North Fork Exception from the remainder of the CRR. *High Country Conservation Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1266 (D. Colo. 2014) ("*High Country II*"). As a result, all elements of the CRR other than the North Fork Exception have been in effect since promulgation in 2012. This includes a separate and independent exception for roadbuilding as needed to effectuate rights granted by statute. 36 C.F.R. § 294.43(c)(1)(i) ("Statutory Rights Exception").

[4] The subset that challenged the original CRR and other decisions was High Country Conservation Advocates, the Sierra Club, and WildEarth Guardians.

2. Re-Promulgation of the North Fork Exception, and Re-Issuance of the Lease Modifications and Exploration Plan

Sent back the drawing board by the first two *High Country* decisions, the Agencies set about addressing the identified NEPA/APA deficiencies. The Agencies prepared an extensive analysis of the climate change issues that the *High Country* Court identified in the EISs for the North Fork Exception and Lease Modifications, and corrected the errors in the Exploration Plan. The North Fork Exception was re-promulgated following a Supplemental Final Environmental Impact Statement ("North Fork Exception SFEIS"), and the Lease Modifications and Exploration Plan were re-issued following the preparation of an additional Supplemental Final Environmental Impact Statement ("Leasing SFEIS").[5]

3. Renewed Litigation in the District Court

After the Lease Modifications were issued, the Conservation Groups immediately challenged the re-promulgated North Fork Exception, the Lease Modifications, and the Exploration Plan. Conservation Groups' Appendix ("App.") Volume 1, pp. 019-57 (Dist. Ct. Dckt. #1). They sought a temporary restraining order to prevent exploration, 1 App. 007 (Dist. Ct. Dckt. #8), which was denied. 1 App. 009 (Dist. Ct. Dckt. #26). They then scheduled, but later withdrew, a request

[5] Copies of the two EIS's are not included in Mountain Coal's appendix due to volume and because they are referenced here only for the uncontroverted fact that the two EIS's were prepared.

for preliminary injunctive relief. 1 App. 009 (Dist. Ct. Dckt. #28). They filed an Amended Complaint on March 23, 2018. 1 App. 009 (Dist. Ct. Dckt. #39).

In their Amended Complaint, the Conservation Groups sought review under the APA of four separate decisions:

(1). USFS promulgation of the North Fork Exception;

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

(3). The Bureau of Land Management's ("BLM") issuance of the Lease Modifications; and

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

1 App. 110-111 (Dist. Ct. Dckt. #39 at Prayer for Relief ¶¶ 3–8).

As set forth in their Amended Complaint and their briefing to the district court, the Conservation Groups alleged a wide array of new NEPA/APA deficiencies. Notably, the Conservation Groups argued that the invalidation of an agency rule or decision *necessarily* invalidates all later decisions predicated upon it, such that invalidation of the North Fork Exception would necessarily invalidate the USFS consents, the Lease Modifications, and Exploration Plan. 2 App. 211 (Dist. Ct. Dckt. #47 at 45).

This district court upheld all the challenged decisions. *High Country Conservation Advocates v. United States Forest Service*, 333 F. Supp. 3d 1107, 1133 (D. Colo. 2018) ("*High Country 2018*"). The Conservation Groups appealed.

2 App. 368-69 (Dist. Ct. Dckt. #47 at 45). The Conservation Groups presented *only two* issues on appeal: (1) evaluation of a proposed "Pilot Knob Alternative" in the North Fork Exception SFEIS that proposed to carve out a portion of another CRA, "Pilot Knob," several miles away from West Elk, from the North Fork Exception; 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. 4 App. 711. Plaintiffs *did not appeal* the district court's determination that the USFS consent to the Lease Modifications was valid. *Id*. The Conservation Groups requested that the Tenth Circuit vacate the North Fork Exception and the Lease Modifications. 4 App. 766. It was unclear on appeal whether the Conservation Groups were continuing to argue their "necessary invalidation" theory. *Id.*

4. The Tenth Circuit's Holding in *High Country III*.

The Tenth Circuit addressed these two, and only these two, issues on appeal, ultimately finding the North Fork Exception SFEIS arbitrary and capricious but upholding the Lease Modifications. *High Country III*, 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 the district court to take further action regarding the Lease Modifications. *See id.* Instead, all three judges explicitly determined that issuance of the Lease Modifications was not arbitrary or capricious. The mandate issued on April 24, 2020.

5. Post-Mandate Conduct and the Conservation Groups Motion to Enforce the Remedy.

Following issuance of the *High Country III* decision, Mountain Coal consulted with the USFS and BLM. Mountain Coal naturally inquired about the time required to re-promulgate the North Fork Exception, because quick re-promulgation could be consistent with uninterrupted operations at West Elk and would eliminate all ambiguity regarding the right to conduct roadbuilding for coal exploration and mining anywhere within the North Fork Exception Area. 3 App. 526 at ¶ 4.

After further analysis of the *High Country III* decision, Mountain Coal concluded that it had the right to continue roadbuilding within the confines of the Lease Modifications, as necessary to access the coal in the Lease Modifications, under the Mineral Leasing Act, the express terms of the Leases, and the separate

Statutory Rights Exception in the CRR. 3 App. 526 at ¶ 4; 36 C.F.R. § 294.43(c)(1)(i). Roadbuilding at West Elk can only occur once ground conditions dry in the late Spring or Summer, and a new temporary road was needed to transition mining from longwall panel LW-SS1 to longwall panel LW-SS2. 3 App. 526 at ¶ 3.

Before commencing any such work, Mountain Coal confirmed with the USFS and BLM that that Mountain Coal's permit and Leases remained valid and inquired whether the Agencies opposed resumption of roadbuilding. 3 App. 526 at ¶ 5. The Agencies did not communicate opposition. *Id.* Mountain Coal further provided advance notice to the Agencies that it was going to build the LW-SS2 temporary road. *Id.*

Mountain Coal did not receive any communications from the Conservation Groups. 3 App. 528 at ¶ 2. On June 2, 2020, Mountain Coal commenced construction on the next phase of temporary roads needed to comply with its statutory duty to diligently mine the coal, the temporary road to service longwall panel LW-SS2. 3 App. 526-27 at ¶ 6. The road was completed in the morning of June 4, 2020. *Id.*

After-hours on June 3, 2020, Mountain Coal's counsel received a communication from the Conservation Groups' counsel requesting a telephone call to discuss Mountain Coal's plans. 3 App. 528 ¶ 2. Mountain Coal's counsel

responded and offered to talk the next day. *Id*. The discussion occurred on June 4, 2020, as offered. *Id*. During the call, Mountain Coal explained that it had the right to build roads under its valid Leases and volunteered that construction had begun. 3 App. 528-29 at ¶ 3. Mountain Coal further unilaterally offered to temporarily halt road construction to see if a resolution or briefing schedule could be agreed upon, and indeed temporarily ceased all surface-disturbing activity on June 4, 2020. *Id.*; 3 App. 526 at ¶ 6.

The parties were unable to reach agreement. 3 App. 529 at ¶ 4. Specifically, the Conservation Groups demanded an indefinite cessation of *all* surface-disturbing activity, including activity not regulated by or even expressly permitted under the CRR. *Id.* Mountain Coal agreed to not oppose a motion by the Conservation Groups for vacatur of the North Fork Exception, *id.* ¶ 5, and Mountain Coal has not undertaken any roadbuilding in the Lease Modifications since June 4, 2020. 3 App. 526-27 at ¶ 6. Mountain Coal has constructed two of the four MVB drill pads associated with LW-SS2. 3 App. 527 at ¶ 7.

On June 11, 2020, the Conservation Groups filed an unopposed motion to vacate the North Fork Exception, which the district court granted on June 15, 2020. 1 App. 014 (Dist. Ct. Dckt. #78). On June 12, 2020, the Conservation Groups also filed an "Emergency Motion to Enforce the Remedy." 1 App. 014 (Dist. Ct. Dckt. #77). On June 22 and 23, 2020, the USFS, BLM, and Mountain Coal filed

oppositions to the motion. 1 App. 014 (Dist. Ct. Dckt. ##s 80, 84). The Agencies' opposition confirmed that construction of the LW-SS2 road was lawful. 1 App. 457-460.

On June 17, 2020, after intense lobbying by the Conservation Groups, *see, e.g.*, 7 App. 1482-84, the Colorado Division of Mining Reclamation and Safety ("CDRMS") served a cessation order on Mountain Coal, without consultation with either the USFS or Mountain Coal. 3 App. 444-48 (Dist. Ct. Dckt. #79-1). CDRMS asserted that it needed confirmation that Mountain Coal maintained a valid right entry onto the Lease Modifications. *Id.* As a result of the cessation order, the Conservation Groups represented to the district court that it was no longer an "emergency" that the court rule on their motion to enforce to the remedy. 3 App. 440-43 (Dist. Ct. Dckt. #79).

On August 25, 2020, the USFS and BLM provided a letter to CDRMS confirming in further detail that construction of the road servicing LW-SS2 was lawful, as is tree-cutting and MVB drilling to service LW-SS2. 3 App. 631-638 (Dist. Ct. Dckt. #96-1). As a result, on September 17, 2020, CDRMS lifted the cessation order as to the use of the LW-SS2 temporary road, MVB drilling, and tree-cutting to service LW-SS2. 3 App. 622-27 (Dist. Ct. Dckt. #94-1).

6. The Conservation Groups' Renewed Motion to Enforce the Remedy and the District Court's Denial.

CDRMS' modification of the cessation order lifted the CDRMS restriction on completing the MVB pads and drilling for LW-SS2. The Conservation Groups viewed this as a renewal of their "emergency," and on September 18, 2020, they filed a motion to expedite consideration of their motion. 3 App. 618-21 (Dist. Ct. Dckt. #96).

The district court denied their motion on October 2, 2020. Conservation Groups' Attachment; *see also,* 3 App. 647-657 (Dist. Ct. Dckt. #99). The district court provided four reasons for denying the motion:

(1). The mandate directed the district court to vacate the North Fork Exception, and nothing else;

(2). Nothing in the mandate or opinion contained an express or implied directive to vacate the Lease Modifications;

(3). The Conservation Groups were raising an "entirely new claim, targeted not at the agency defendants, but at Mountain Coal;" and

(4). Such a claim was not properly encompassed by the APA and NEPA action before the court, and "must therefore be brought in some other posture that would permit review."

Id. at 9-10; 3 App. 656-657.

This appeal followed. The Court granted an injunction pending appeal, without an accompanying memorandum, on October 29, 2020. 8 App. 1724-25.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in denying the additional post-mandate relief requested by the Conservation Groups. It is undisputed that the district court fully and correctly executed this Court's mandate.

The additional relief requested by the Conservation Groups challenges post-mandate conduct by a private party that was never addressed in *High Country III* or the Amended Complaint or is part of the administrative record in this action under the APA, and under new theories of law not adjudicated in *High Country III*. As such, the district court correctly concluded that such allegations must be raised in a new action under authority that would confer federal court jurisdiction, which the Conservation Groups have not identified.

Should this Court reach the merits, the USFS, BLM, CDRMS, and Mountain Coal correctly concluded that Mountain Coal retained the authorization to build roads within the Lease Modifications, at a minimum until the district court vacated the North Fork Exception on June 15, 2020. Consequently, the LW-SS2 temporary road was lawfully conducted and all other surface work accessed by LW-SS2 conducted to date and is planned is also lawful. In addition, the USFS and BLM

correctly confirmed that tree cutting as needed to service LW-SS2 is expressly permitted by 36 C.F.R. § 294.42(c)(5).

Mountain Coal also maintains that it had independent authority to construct the LW-SS2 road under the Leases and the statutory rights exception of the CRR at 36 C.F.R. § 294.43(c)(1)(i), but this issue is not properly before the Court. Determination of Mountain Coal's rights under these authorities would require an entirely separate set of proceedings involving agency determinations, exhaustion of remedies, and/or judicial proceedings over which the other tribunals may (or may not) have exclusive jurisdiction.

Finally, the Conservation Groups' request for injunctive relief is without merit. In addition to many jurisdictional defects, they have failed to address, let alone satisfy, any of the requirements for injunctive relief.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review a district court's compliance with the mandate. *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1125 (10th Cir. 2003) ("*P&G Co.*"). The mandate consists of the instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions. *Id.* at 1126. Although a district court is "free to pass upon any issue which was not expressly or impliedly disposed of on appeal," *id.*, such issues must

still fall within the scope of the underlying action and the statutory jurisdiction of district court. The mandate is not an independent grant of jurisdiction.

This Court does not have jurisdiction over the Conservation Groups' entirely new claims challenging Mountain Coal's compliance with the CRR prior to the date the North Fork Exception was vacated by the district court, with the tree cutting restrictions in the CRR at 36 C.F.R. § 294.42, or Mountain Coal's contract or statutory rights under the Leases. *See, e.g.*, *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1573 (10th Cir. 1994) ("Judicial review of both formal and informal *agency action* is governed by § 706 of the APA.") (emphasis added); *Lystn, LLC v. Food & Drug Admin.*, 2020 U.S. Dist. LEXIS 167375, at *24 n.7 (D. Colo. Sept. 14, 2020) ("The APA does not permit actions against private parties."); *Midland Farms, LLC v. U.S. Dept. of Agric.*, 35 F. Supp. 3d 1056, 1062 (D.S.D. 2014) ("The APA is not an independent source of jurisdiction, nor does it provide a private right of action against a private party.") (internal citations omitted).

STANDARD OF REVIEW

An appellate court reviewing the district court's application of a mandate considers whether the district court "abused the limited discretion that [the] mandate left to it." *P&G Co.*, 317 F.3d at 1125. A district court's interpretation of the mandate is an issue of law that an appellate court reviews de novo. *Id*. *See also*

United States v. Shipp, 644 F.3d 1126, 1129 (10th Cir. 2011). The scope of federal jurisdiction to hear a citizen enforcement claim is also an issue of law.

An agency interpretation of its own regulation, as in the case of the application of the tree-cutting regulations and exceptions at 36 C.F.R. § 294.42 and 294.42(c)(5) is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal citations and quotations omitted). *See also Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

ARGUMENT

The Conservation Groups' appeal should be dismissed because it seeks relief not only beyond the scope of the mandate, but also beyond the scope of their Amended Complaint, and because it fails on the merits. This Court issued a mandate to "entry of an order vacating the North Fork Exception." *High Country III*, 951 F.3d at 1229. The district court did so in June 15, 2020, and the case should be over.

A. The District Court Correctly and Fully Executed the Mandate.

A district court has power to enforce the terms of a mandate, but is bound by the mandate rule, which requires the court to "carry the mandate of the upper court into execution" and deprives the court of the authority to consider "the questions which the mandate laid at rest." *Estate of Cummings v. Cmty. Health Sys.*, 881 F.3d 793, 801 (10th Cir. 2018) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161

(1939). *See also United States v. Walker*, 918 F.3d 1134, 1143 (10th Cir. 2019) (holding "an inferior court has no power or authority to deviate from the mandate issued by an appellate court.") (quoting *Briggs v. Pa. R.R. Co.*, 334 .S. 304, 306 (1948)). The mandate rule also bars reconsideration of issues "expressly or impliedly disposed of on appeal." *P&G Co*., 317 F.3d at 1126.

This Court's mandate was "for entry of an order vacating the North Fork Exception." *High Country III*, 951 F.3d at 1229. The district court entered that order on June 15, 2020. 1 App. 014 (Dist. Ct. Dckt. #78). The Conservation Groups do not allege any error in the execution of the mandate. Instead, the Conservation Groups advocate for a different mandate. They argue that because this Court's mandate directed the district court to vacate the North Fork Exception, the post-opinion CRR "precluded all road construction in the Sunset Roadless Area, unless and until a valid exception is in place." Appellants' Br. at 26. And therefore, they argue, Mountain Coal did not comply with the mandate when it commenced temporary road construction in the Sunset Roadless Area to service longwall coal panel LW-SS2. *Id*. Stretching the mandate even further, they also argue that because the LW-SS2 road is unlawful, then all "surface disturbance" that might arise through use of LW-SS2 is similarly tainted and in violation of the mandate. *Id*. at 12.

But this Court's mandate did not include any instruction enjoining Mountain Coal from road construction or any other activities in the Sunset Roadless Area. *See generally High Country III*, 951 F.3d at 1217-29. Neither did the mandate or opinion offer any direction or opinion as to what future conduct might be allowed or prohibited by the CRR in the Lease Modifications following vacatur of the North Fork Exception. This Court's decision includes three specific and limited holdings: 1) the USFS violated NEPA because it failed to adequately analyze the Pilot Knob Alternative in the Exception SFEIS; 2) the USFS did not violate NEPA by not considering a Methane Flaring Alternative in the Leasing SFEIS; and 3) the appropriate remedy for the NEPA violation in promulgating the North Fork Exception was vacatur of the entire North Fork Exception. *Id*. at 1224-29. Judge Kelly dissented in the first holding, concurred in the second, and did not comment on the remedy. *Id*. at 1229-32 (Kelly, J., dissenting).

Because this Court specifically ruled on the Conservation Groups' challenge to the Lease Modifications and held that issuance was not arbitrary and capricious, the district court lacked authority to reconsider the validity of the Lease Modifications on remand. And the mandate certainly did not authorize the district court to review alleged violations of the CRR by Mountain Coal. Where, as is the case here, this Court's ruling leaves "nothing for the district court to address beyond the 'ministerial dictates of the mandate,'" the district court lacked

"authority to depart from an appellate mandate" and did not err in its execution of the mandate. *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 114 F.3d 1513, 1521 (10th Cir. 1997) (internal citation omitted).

B. The District Court Did Not Abuse its Discretion in Declining to Address the Conservation Groups' Post-Mandate Allegations and Arguments.

In their Amended Complaint, the Conservation Groups challenged four federal agency decisions, raising eight claims alleging the federal agencies violated NEPA and the APA. *See generally* 1 App. 104-110. These decisions were reviewed on the basis of the administrative record compiled by the agencies. That administrative record closed in 2017. All of the claims challenging the Lease Modifications were resolved in the Agencies' favor. *See High Country 2018*, 333 F. Supp. 3d at 1123-27; *High Country III*, 951 F.3d at 1228.

Now, three years later, the Conservation Groups allege that Mountain Coal violated the CRR in constructing a temporary road from June 2-4, 2020, after release of this Court's opinion, but before the district court's vacatur of the North Fork Exception, and further violated the tree cutting restrictions in the CRR at 36 C.F.R. § 294.42. For relief, they ask this Court to "enjoin[] any further road construction or tree-cutting related to mining activities in the Sunset Roadless Area . . . ." Appellants' Br. at 13, 31. Notably, their request for relief is a moving target. The Conservation Groups asked the district court to enjoin "any further surface disturbing activity. . . " 3 App. 418. They requested, and received, similarly broad

relief from this Court when the Court granted their injunction pending appeal. 8 App. 1724-25.

However the request for relief has evolved, it is predicated on entirely new legal theories, never articulated in the Amended Complaint, adjudicated by this Court or the district court, or even referenced in any filing in the district court or this Court prior to the Conservation Groups' post-mandate motion. Indeed, the first time 36 C.F.R. § 294.42 was even mentioned in any filing was in the Conservation Groups' post-mandate brief on June 12, 2020.

The district court gave four reasons for declining to reach the merits of the Conservation Groups' motion: (1) the mandate directed the district court to vacate the North Fork Exception, and nothing else; (2) the mandate contained no express or implied directive to vacate the Lease Modifications; (3) the Conservation Groups were alleging an entirely new claim outside of the Amended Complaint, directed at Mountain Coal, for alleged violations of the CRR; and (4) such claims against a private party cannot be asserted under the APA, and would need to brought under another authority that would permit review. Conservation Groups' Attachment at 9-10; 3 App. 656-657.

The Conservation Groups do not dispute that the mandate was limited to vacating the North Fork Exception. They also do not dispute that nothing in the mandate expressly or impliedly vacated the Lease Modifications, and indeed they

expressly disavow they were or are seeking such relief. App. Brf. at 9. They also do not dispute that their new claims are directed at Mountain Coal, and are not found within the confines of the Amended Complaint. They also offer no authority for the proposition that the APA confers a private right of action against other private parties.

Instead, the Conservation Groups broadly claim that absent injunctive relief, this Court's decision in *High Country III* will be rendered "meaningless" and a "nullity." Appellants' Brf. at 17-19. This argument is patently false. The North Fork Exception has been vacated, exactly as this Court ordered. Roadbuilding for coal exploration and mining is now prohibited throughout the 18,000 acres of the North Fork Coal Mining Exception Area outside the Lease Modifications. If the Conservation Groups view that achievement as worthless, one wonders why so much energy was spent on advocating and litigating the merits of the Pilot Knob Alternative in *High Country III*. In addition, the USFS and BLM have confirmed that following the district court's vacatur on June 15, 2020, additional roadbuilding within the Lease Modifications is only allowable to the extent the proposed roadbuilding falls within another exception to the CRR. 3 App. 631-638.

It is true that in briefing in *High Country III*, Mountain Coal argued that vacatur of the North Fork Exception would halt roadbuilding and mining in the Lease Modifications, but Mountain Coal in no way conceded that vacatur would

impair Mountain Coal's specific rights before vacatur was actually entered by the district court. In addition, the Lease Modifications were themselves under attack in *High Country III*, and Mountain Coal had not fully evaluated what rights the CRR and the Leases would confer if the Lease Modifications survived. Mountain Coal did not waive its statutory and regulatory rights.[6]

Regardless, the Conservation Groups' new claim is aimed at Mountain Coal, not the federal agencies. In effect, the Conservation Groups seek to enforce the CRR itself against Mountain Coal in a citizen suit enforcement action under the pretense of enforcing the mandate. But neither the APA nor the CRR allows the Conservation Groups to enforce these statutes against Mountain Coal as a private attorney general against private parties. *See, e.g.*, *Olenhouse*, 42 F.3d at 1573 ("Judicial review of both formal and informal *agency action* is governed by § 706 of the APA.") (emphasis added); *Lystn*, 2020 U.S. Dist. LEXIS 167375, at *24 n.7 ("The APA does not permit actions against private parties."); *Midland Farms*, 35 F. Supp. 3d at 1062 ("The APA is not an independent source of jurisdiction, nor

[6] In briefing to the district court and this Court on their request for an injunction pending appeal, the Conservation Groups argued that Mountain Coal is judicially estopped from contending that it had any rights to build roads after issuance of the opinion in *High Country III*. Mountain Coal explained why the doctrine of judicial estoppel is inapplicable. *See* 8 App. 1603-1605. The Conservation Groups have abandoned that argument in their brief on the merits.

does it provide a private right of action against a private party.") (internal citations omitted).

The Conservation Groups also argue that the district court's refusal to address their theories on the merits renders Mountain Coal's conduct unreviewable because there may be no further agency action. Appellants' Br. at 25. This argument is misguided on several levels. First, it ignores that the USFS is entrusted in the first instance with enforcing its regulations and enabling statutes. Second, it also ignores that other State and federal agencies administer critical elements of the federal coal regulatory program, as vividly demonstrated by the State of Colorado's intervention and cessation order, followed by the USFS's and BLM's carefully reasoned letter addressing the State's concerns, which in turn persuaded the State to lift the cessation order as applied to longwall panel LW-SS2. There has been no lack of regulatory attention and oversight of Mountain Coal's conduct.

Third, even in the absence of new final agency action, the APA affords a limited path to private enforcement if an agency has failed to carry out a mandatory, non-discretionary duty. 5 U.S.C. § 706(1); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62-63 (2004). The Conservation Groups sidle up to such an allegation when they criticize the USFS's "acquiescence" to Mountain Coal's actions. Appellants' Brf. at 10, 17 n. 2. The fact that they selected a substitute for the word "inaction" speaks more to their understanding that they do

not have a valid claim than that there is an injustice or loophole in the statutory or jurisdictional scheme.

Ultimately, however, the resort to a plea of unreviewability proves the error in the Conservation Groups' arguments. It concedes that there is no citizen suit provision under the CRR, and that the Conservation Groups cannot enforce these statutes as a private attorney general against private parties. The argument also fails to address the district court's conclusion that the Conservation Groups' allegations are not fairly encompassed by the Amended Complaint. The district court did not abuse its discretion in declining to address these new facts and legal theories; determining that whether a private entity's actions are prohibited under a regulation is not within the scope of APA review.

The Conservation Groups are advocating a breathtaking expansion of the Court's jurisdiction. This Court in *High Country III* simply ordered the vacatur of a rule of general application, and ordered no specific relief against Mountain Coal. Consequently, if "violating the Court's order" in *High Country III* is sufficient to confer jurisdiction, the Conservation Groups could file a motion for injunctive relief against *any* party at *any* time who might undertake any action in the North Fork Coal Mining Exception Area that the Conservation Groups believe is in violation of the CRR. Under the Conservation Groups' theory, if there is no change in the regulations and Mountain Coal engages in tree-cutting in the Lease

Modifications a decade from now, they could again directly file a motion in the district court for "violating the Court's order" in this APA case. Similarly, they could immediately sue Oxbow, should Oxbow undertake roadbuilding at the Elk Creek Coal Mine across the North Fork Valley. The Conservation Groups' theory would bypass any procedures or requirements for citizen enforcement of the enabling substantive statutes, as well as the provisions and limitations for invoking federal jurisdiction under the APA. That is not the law.

C. The District Court Did Not Commit Reversible Error in Concluding that the Conservation Groups were Challenging the Lease Modifications.

The Conservation Groups assert that the district court erred in thinking that the Conservation Groups were seeking vacatur of the Lease Modifications, and they aver to this Court that they are not in any way contesting the validity of the Lease Modifications. Appellants' Br. at 9.[7] Mountain Coal takes the Conservation Groups at their word.

Even if the district court misunderstood their motion, the Conservation Groups do not explain how that constitutes reversible error, or compelled the district court to reach the merits of their motion. The district court premised its

[7] "The Conservation Groups did not request vacatur of the lease modifications as part of the emergency motion, nor did they suggest that the Court intended to so in in it March 2, 2020 Order."

denial of the Conservation Groups' motion on the fact that nothing in the mandate required the district court to examine the validity of the Lease Modifications and that claims related to post-mandate conduct are not fairly within the scope of the Amended Complaint. These reasons for denial stand completely apart from whether the district court correctly intuited the Conservation Groups' posture toward the Lease Modifications, and therefore even if the district court got that part wrong, it does not demonstrate an abuse of discretion.[8]

[8] Moreover, the district court cannot be faulted for concluding that the Conservation Groups were in fact seeking vacatur of the Lease Modifications, because the Conservation Groups' arguments all pointed in that direction. First, the Conservation Groups expressly requested the Court to order the USFS to "withdraw *any consent* authorizing Mountain Coal to engage in surface disturbing activities within the North Fork Exception unless and until the Forest Service adopts a lawful exemption to the Colorado Roadless Rule." 3 App. 407 (Dist. Ct. Dckt. #77-4 at 2) (emphasis added). The Lease Modifications confer rights upon Mountain Coal that include the right to engage in surface disturbance as necessary to extract the leased coal, and consequently a request to withdraw consent could reasonably be interpreted as a request to vacate the Lease Modifications.

Second, the Conservation Groups contended to the district court, and continue to do so here, that vacatur of the North Fork Exception is retroactive to the date of the North Fork Exception's promulgation, thereby undercutting any and all "events" that assumed its existence. Appellants' Brf. at 15. Such "events" could include the Lease Modifications, which post-dated promulgation of the North Fork Exception. Consequently, it was entirely reasonable for the district court to conclude they were seeking such relief, their protestations notwithstanding, and to examine this Court's opinion and mandate for any clue that was an intended result.

D. The USFS, BLM, and Mountain Coal Correctly Concluded that Roadbuilding Prior to the June 15, 2020 Vacatur of the North Fork Exception was Lawful.

The core of the Conservation Groups' argument on the merits is that the North Fork Exception was formally vacated on either March 2, 2020 with the issuance of this Court's opinion, or April 24, 2020 with the issuance of the mandate, rather than entry of the vacatur order by the district court on June 15, 2020. Further, the Conservation Groups contend that mandate, rather than the vacatur order, revoked any authority Mountain Coal possessed to build roads. This argument misreads both the mandate and misapplies the mandate rule. Under the Conservation Groups' interpretation, this Court's directive and remand to the district court to "enter an order vacating the North Fork Exception" was mere surplusage, because the North Fork Exception was legally vacated upon release of the panel opinion and/or the mandate.

The Conservation Groups cite no published law for this proposition. They invoke case law indicating that *once a regulation is vacated*, it is as if the regulation was never enacted, but these cases say nothing about *when vacatur is effective*. They further cite an unpublished district court decision from the Ninth Circuit, *Crickon v. United States*, No. 3:12-CV-0684-SI, 2013 WL 2359011, at *5 (D. Or. May 28, 2013) for the argument that a regulation of general application is effectively invalidated as of the date an appellate mandate ordering invalidation

is issued. Not only was the posture of that case quite different (there was no order to the district court to enter vacatur), but that same decision also makes clear there is no duty on the *parties* to a particular dispute to act upon the appellate mandate until further action by the district court on whatever the appellate court has directed the district court to undertake. *Id.* Consequently, Mountain Coal was entirely within its rights to act upon its permits from the Agencies, at a minimum through the district court's vacatur on June 15, 2020.[9]

It is especially misguided to elide the distinction between general rules and specific authorizations in the context of a finding of error in an action challenging a NEPA document under the APA. An agency's NEPA analysis, the immediate agency decisions(s) that were informed by the NEPA analysis, and later decisions that tiered to and relied upon the NEPA analysis are all separate events and actions. An error in a NEPA analysis does not automatically result in vacatur of subsequent decisions, especially decisions for which additional later NEPA analyses were

[9] Notably, the district court in *Crickon* also explained that if earlier party-specific relief is warranted, that can be accomplished through injunctive relief. *Id.* at *5 n. 3. The availability of such additional injunctive relief addresses the parade-of-horribles scenario spun up by the Conservation Groups, in which some "unseemly" event might occur between the mandate and district court vacatur. Mountain Coal wholly rejects any argument that constructing 1.3 acres of temporary roads during that window, 3 App. 526, visited any material harm on the Conservation Groups or the environment, but there are multiple tools available to the appeals and district courts to address that concern where it exists.

conducted. *WildEarth Guardians v. U.S. Bur. of Land Mgmt.*, 870 F.3d 1222, 1239-40 (10th Cir. 2017). As explained in *WildEarth Guardians*, upon the finding of a NEPA error, the appeals court has several remedial options at its disposal:

> In the past, we have 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.

Id. at 1239. The mandate from *High Country III* expressly adopted Option No. 2 from the foregoing list. The Conservation Groups' interpretation would eliminate the distinction between Option No. 2 and Option No. 3, and convert them both into Option No. 3. This is not a colorable reading of the mandate, and the actual language of the mandate confirms that none of Mountain Coal's authorizations were impaired at least until the district court entered vacatur. Consequently the road servicing LW-SS2 was lawfully constructed, and use of the road to access sites for MVB pad construction and drilling is also lawful.

E. Mountain Coal's Tree-Cutting Has Been Lawful, and Mountain's Coal's Rights Under the Lease and Statutory Rights Exception are Not Properly before the Court.

Because the district court properly declined to address the Conservation Groups on the merits, and because all the roadbuilding at issue in this appeal occurred under valid authorizations and predated the district court's vacatur of the North Fork Exception, the Court need not address the extent of Mountain Coal's right to conduct incidental tree-cutting under 36 C.F.R. § 294.42(c)(5), and/or

roadbuilding rights under the terms of the Leases and the statutory rights exception at 36 C.F.R. § 294.43(c)(1)(i). Nevertheless, 36 C.F.R. § 294.42(c)(5) confirms the legality of Mountain Coal's tree-cutting, and Mountain Coal's rights under the Leases and 36 C.F.R. § 294.43(c)(1)(i) cannot be adjudicated by this Court.

1. The Forest Service Correctly Concluded that Mountain Coal's Tree-Cutting is Authorized Under 36 C.F.R. § 294.42(c)(5).

At no point in the decade-long litigation over the CRR and the West Elk Mine had the Conservation Groups argued that tree-cutting as needed to service coal mining is prohibited, prior to their motion for post-mandate relief on June 12, 2020. The USFS and BLM concluded that tree-cutting is permissible when incidental to an approved management activity, including a coal lease, under 36 C.F.R. § 294.42(c)(5). 3 App. 633, 637. The Conservation Groups' *only* argument to the contrary is that *any* "surface disturbance" for MVB pads *should* be prohibited as a matter of equity, because they believe that the temporary road constructed to reach the pads to service LW-SS2 was unlawful.

This argument fails because the LW-SS2 road was lawful, as discussed in Sections D, *supra*. But even if LW-SS2 was constructed in error, it does not follow that tree-cutting, much less drilling or "surface disturbance," should be enjoined. 36 C.F.R. § 294.42 does not regulate drilling at all, and does not prohibit "surface disturbance," only tree-cutting. And tree-cutting is expressly *permitted* when incidental to an approved use. 36 C.F.R. § 294.42(c)(5). The Conservation Groups

concede that the Lease Modifications are valid, even after the vacatur of the North Fork Exception. Appellants' Brf. at 9.

The BLM and USFS appropriately determined that tree-cutting was permissible because it was incidental to the operation of Mountain Coal's lease and allowed by the lease terms, and therefore an approved management activity under 36 C.F.R. § 294.42(c)(5). 3 App. 637. The Conservation Groups do not allege any ambiguity in the lease terms or the regulation. They appear to be arguing that although the Lease Modifications (and therefore coal mining) are lawful, the allegedly unlawfully constructed access road to get there somehow removes the mining from "approved" status. They offer no support for this argument, and to the extent that they are saying the meaning of "approved" in this context is ambiguous or contestable, USFS's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal citations and quotations omitted); *Kisor*, 139 S. Ct. 2400. Consequently, there is no basis to enjoin the remaining tree-cutting to be conducted, or MVB drilling in any form.

2. Mountain Coal's Rights Under the Lease Terms and 36 C.F.R. § 294.43(c)(1)(i) are Not Before the Court.

A central flaw in the Conservation Groups' motion is that it presumes that the *only* relevant authority conferring rights and obligations on Mountain Coal is the North Fork Exception, and therefore the vacatur of the North Fork Exception

standing alone inexorably leads to a conclusion that Mountain Coal's conduct was illegal and injunctive relief is an appropriate remedy. To the contrary, Mountain Coal's conduct is authorized and regulated by a vast array of other interlocking instruments and laws, including but not limited to the remainder of the CRR, the Leases, and the Mineral Leasing Act.

Mountain Coal believes that it possesses rights not extinguished by the vacatur of the North Fork Exception that permitted building the LW-SS2 road, independently of the specific date of the vacatur. The Agencies have not opined on any of these. Even if the Agencies were to disagree with Mountain Coal, that does not end the inquiry. Mountain Coal would have the right to challenge the Agencies' views through administrative proceedings and/or judicial review, which would allow a determination as to how Mountain Coal's valid Leases interact with the CRR following vacatur, an issue on which no court has previously opined.

Moreover, even if the result of such proceedings was a conclusion that Mountain Coal had no authority to construct the temporary road for LW-SS2, the Leases provide specific procedures for managing alleged non-compliance with applicable regulations, none of which have been triggered, much less resolved. *See* Lease C-1362 § 11, MCAPP 022. Injunctive relief directed at future conduct is not a presumed remedy in such proceedings. *Id.* Indeed, potential remedies run the gamut from waiver of the violation all the way through judicial cancellation of the

Lease. *Id.* And Mountain Coal has the right to contest any such adverse determination through administrative or judicial proceedings, which may (or may not) fall under the exclusive jurisdiction of other courts. *Id.*[10]

In short, the Conservation Groups ask a federal appellate court to adjudicate issues and rights that are not within the scope of the Amended Complaint, have not been addressed by any lower body or court, and which may fall under the exclusive jurisdiction of *other* courts. Their effort to get this Court to opine in the first instance on Mountain Coal's rights under the Leases and 36 C.F.R. § 294.43(c)(1)(i) takes all the deficiencies of their CRR citizen enforcement claim and multiplies them several times over. The Court should therefore decline to adjudicate the Conservation Group's arguments regarding the interpretation or application of the Leases and 36 C.F.R. § 294.43(c)(1)(i).

F. The Conservation Groups Have Neither Established Jurisdiction Nor the Elements for Injunctive Relief.

The Conservation Groups offer no authority for the proposition that a violation of a USFS regulation warrants a third party to obtain a judicial injunction against any and all future actions that may in any way be linked to the violation. If indeed there was a violation of a regulation, determining remedies is the purview

[10] *See, e.g., Robbins v. U.S. Bur. of Land Mgmt.*, 438 F.3d 1074, 1080-85 (10th Cir. 2006) (discussing the interplay between the APA, the Tucker Act, and different forms of claims related to contract disputes with the BLM).

of the enforcing agency. Only after the USFS and/or BLM takes a final agency action on enforcement, and a third party shows it is entitled to judicial review of that determination, does the Court sit in judgment.

Overall, the Conservation Groups' request for injunctive relief is completely untethered to the case or the law. This case is about the validity of an agency rule of general application, under the APA on an administrative record that closed in 2017. Now the Conservation Groups ask a federal court of appeals to enjoin future private conduct, without even attempting to satisfy the four elements of injunctive relief, on a theory of law never even articulated, much less adjudicated, in the underlying case. The days of presumptive injunctions are long over. *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)). The Court should reject the request.

CONCLUSION

For the reasons expressed herein, the Court should affirm the order of the district court.

STATEMENT REGARDING ORAL ARGUMENT

Mountain Coal believes that oral argument would be beneficial in this case in that the appeal turns almost entirely on conduct not in the administrative record,

and many of the theories of law asserted in the appeal were not passed upon by the district court or even the administrative agencies.

DATED this 26th day of February, 2021.

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this document contains 8,958 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) and Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman Font.

February 26, 2021

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ADDITIONAL CERTIFICATIONS

I hereby certify that, with respect to the foregoing **BRIEF OF INTERVENOR-APPELLEE**:

1. All required privacy redactions have been made in accordance with 10th Cir. R. 25.5;

2. The ECF submission was scanned for viruses with McAfee Endpoint Security, v. 10.6.1.2182, updated on February 11, 2021, and, according to the program, is free of viruses.

February 26, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, I electronically filed the foregoing **BRIEF OF INTERVENOR-APPELLEE** using the court's CM/ECF system which will send notifications of such filing to the following:

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STATE OF COLORADO

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West Elk Mine and Abatement of Cessation Order 2020-001

1 message

Drysdale.Michael@dorsey.com <Drysdale.Michael@dorsey.com> Tue, Aug 25, 2020 at 3:34 PM
To: ginny.brannon@state.co.us
Cc: jim.stark@state.co.us, jason.musick@state.co.us, leigh.simmons@state.co.us, Jeff.Fugate@coag.gov, dsiple@blm.gov, edith.burkett@usda.gov

Director Brannon, please see the attached correspondence related to the West Elk Mine and abatement of Cessation Order No. 2020-001. Thank you.

Michael R. Drysdale

Of Counsel

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4 attachments

- **20.08.25 MCC Response Final.pdf** 264K
- **Brannon Ginny ltr 8-25-20 final.pdf** 50K
- **COC1362 USFS Letter.pdf** 179K
- **Siple Ltr Re West Elk Mine-CDRMS CO 2020-001.pdf** 53K

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August 25, 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 – Abatement Information

Dear Ms. Brannon:

On behalf of Mountain Coal Company, LLC ("Mountain Coal"), I write to further address 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 initially addressed Cessation Order CO-2020-001 in correspondence dated July 2, 2020, and at a hearing before the Mined Land Reclamation Board ("MLRB") on July 23, 2020.

At the hearing, the MLRB affirmed the Cessation Order. However, testimony by CDRMS personnel at the hearing was extremely helpful in clarifying what specific information CDRMS needed to abate the Order, as well as CDRMS' interpretation of its authority to evaluate lessees' rights-of-entry on federal lands. *See* testimony in response to question from Board Member Utterback-Normann commencing at 2:57:58 of the hearing, available at https://www.youtube.com/watch?v=0CTSIkPUk78 (last visited August 25, 2020). Moreover, CDRMS confirmed to the MLRB that upon receipt of sufficient abatement information, CDRMS can administratively withdraw or modify the Cessation Order.

With the clarification provided at the hearing and in subsequent discussions, Mountain Coal made a written request to the United States Bureau of Land Management ("BLM") and the United States Forest Service ("USFS") for a written statement addressing a subset of the surface use and access rights Mountain Coal believes it possesses under its valid federal coal leases. Mountain Coal focused its request on the immediate issue of its rights to resume use of the already-completed temporary road to service longwall panel LW-SS2, and to complete drill pad work and drilling of methane ventilation boreholes ("MVBs") for LW-SS2. Mountain Coal deferred resolution of any federal lease rights it possesses for future longwall panels LW-SS3 and LW-SS4 (the road and pad locations for LW-SS3 and LW-SS4 were approved by CDRMS in Minor Revision 446, and affirmed at the July 23, 2020 MRLB hearing), so as to expedite BLM and USFS consideration, and to facilitate timely modification of the Cessation Order. Before transmittal, Mountain Coal reviewed the substance of the request with CDRMS personnel and the Attorney General's office. The request is attached.

Earlier today, the BLM responded, enclosing correspondence from the USFS as well. The BLM and USFS correspondence are also attached. The letters are self-explanatory, and confirm that Mountain Coal has the federal lease rights (whether styled as right-of-entry or otherwise) to complete the planned work associated with LW-SS2. As anticipated, the USFS makes clear that new road construction in the Sunset CRA (i.e., roads to be constructed after the June 15, 2020 vacatur of the North Fork Exception; the temporary road servicing LW-SS2 was entirely constructed before June 15, 2020) is prohibited "unless other exceptions under the CRR apply." USFS does not address whether other exceptions apply, because Mountain Coal did not request such an analysis at this time.

Importantly, the communications provide *exactly* the information stated in the Cessation Order and that CDRMS personnel testified under oath to the MLRB was needed to administratively modify the Cessation Order with respect to work related to LW-SS2. Under CDRMS' *own* interpretation of its authority, there is no colorable basis to maintain the Cessation Order's restrictions on surface use related to LW-SS2. Continuance of the restrictions would directly contradict CDRMS' sworn testimony and the Cooperative Agreement with the Department of the Interior.

Mountain Coal therefore respectfully requests that CDRMS administratively modify Cessation Order CO-2020-001 to withdraw all restrictions imposed by the Order on the use of the temporary road servicing LW-SS2, completion of MVB drill pads associated with LW-SS2, and drilling of MVBs on the LW-SS2 drill pads. Mountain Coal requests that the modification occur as quickly as possible, so that this critically important and time-sensitive work can proceed.

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Michael Drysdale

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Enclosures

Cc: Jim Stark, CDRMS
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Leigh Simmons, CDRMS
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Douglas Siple, BLM
Edith Burkett, USFS

United States Department of the Interior

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In Reply Refer To:
3432 (CO-921)
COC1362, COC67232

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RE: Re: Federal Coal Lease COC-1362 and COC-67232

Dear Mr. Drysdale:

The Bureau of Land Management (BLM) has received your July 28, 2020 letter in which Mountain Coal Company, LLC (MCC) requested confirmation of certain rights to access and construct facilities on the surface of Leases COC-1362 and COC-67232 in light of the vacatur of the North Fork Exception to the Colorado Roadless Rule. *See High Country Conservation Advocates et al. v. United States Forest Service*, 1:17-cv-03025-PAB (D. Colo. June 15, 2020); *see also High Country Conservation Advocates et al., v. U.S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020). The leases contain United States Forest Service (USFS) special stipulations, because the USFS manages the surface of the leases and administers the Colorado Roadless Rule. The BLM sent your letter to the USFS for input, and the USFS response to your letter is attached and incorporated herein.

MCC's letter requested confirmation of the following subset of rights to access and construct facilities on the surface of the leases related to mining longwall panel LW-SS2 (permitted by the Colorado Division of Reclamation Mining and Safety through Permit Revision 15 (PR-15) and Minor Revision 441 (MR-441)):

1. Mountain Coal may travel on, maintain, and otherwise use the temporary road and already completed drill pads for LW-SS2 as permitted by PR-15 and MR-441, under the Leases following the vacatur of the North Fork Exception;
2. Mountain Coal may construct the remaining drill pads approved in PR-15 and MR-441, under the Leases following the vacatur of the North Fork Exception. This includes tree-cutting as needed for the drill pads, as provided in 36 C.F.R. § 294.42(c)(5), or other authority; and
3. Mountain Coal may drill the [Methane Vent Boreholes] approved in PR-15 and MR-441, under the Leases following the vacatur of the North Fork Exception.

Section 2 of the modified coal leases, as authorized under the Mineral Leasing Act of 1920 (30 U.S.C. § 181 *et seq.*) granted the 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 in the Leases; and 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.

The USFS consented to the lease modifications and included special stipulations in its Record of Decision, Federal Coal Lease Modifications COC-1362 & COC-67232, signed December 11, 2017. The BLM formally adopted the USFS Supplemental Final Environmental Impact Statement for Federal Coal Lease Modifications COC-1362 and COC-67232 and authorized the lease modifications in its December 15, 2017 Record of Decision. Per requirements set forth in the Mineral Leasing Act, BLM's lease modifications included the USFS Special Stipulations pertaining to surface uses (as explained in more detail in the attached USFS Letter). *See also* 30 U.S.C. § 201. On August 19, 2020, the BLM received a letter from the USFS confirming that the USFS Special Stipulations, lease notices, and the Colorado Roadless Rule do not prohibit MCC from travelling on and maintaining or using existing roads, nor do they prohibit construction and use of drill pads for LW-SS2 (authorized under PR-15 and MR-441), nor do they prohibit tree cutting or drilling of methane ventilation boreholes. *See* Attached USFS Letter.

Based on the above information, BLM confirms that MCC is not prohibited from conducting the activities described in 1 - 3 above.

Sincerely,

Doug Siple
Acting Branch Chief, Solid Minerals
Division of Energy, Lands and Minerals

1 Attachment:
1 - Federal Coal Lease COC-1362 and COC-67232.pdf (5 pp)

USDA United States Department of Agriculture | Forest Service | Rocky Mountain Region

1617 Cole Blvd
Lakewood, CO 80401
303-275-5350
Fax: 303-275-5366

File Code: 2820
Date: August 19, 2020

Doug Siple
Acting Branch Chief, Branch of Solid Minerals
BLM Colorado State Office
2850 Youngfield St.
Lakewood, CO 80215

Dear

Thank you for your letter of July 30, 2020, in which you requested USDA - Forest Service input regarding the effect of Forest Service special stipulations on federal coal leases COC-1362 and COC-67232. Your letter relays a request from the federal lessees, Mountain Coal Company (MCC) and ArkLand LLC, seeking confirmation of certain rights of access and to construct certain facilities on the surface of its leases. The surface lands are National Forest System lands that lie in whole or in part within the Sunset Colorado Roadless Area (CRA) of the Gunnison National Forest. MCC seeks confirmation of its rights in light of the vacatur of the North Fork Coal Mining Area Exception (North Fork Exception) to the Colorado Roadless Rule (CRR), by the U.S. District Court for the District of Colorado on June 15, 2020[1] pursuant to the mandate issue by the Court of Appeals, and the Cessation Order (CO) issued by the Colorado Division of Mining, Reclamation and Safety (CDRMS) on July 30, 2020, CO 2020-001. MCC holds the coal mining permit issued by the CDRMS.

MCC has requested confirmation of its rights to conduct certain surface activities related to mining longwall panel LW-SS2 under the lease. CDRMS permitted these activities in Permit Revision PR-15 (2018) and Minor Revision MR-441 (2019) to MCC's surface coal mining permit issued pursuant to the Colorado Surface Coal Mining Reclamation Act. MCCs surface operations involve lands in federal coal leases COC-1362 and COC-67232; specifically, these operations would be on lands added to the parent leases through lease modifications made in December 2017. Surface operations approved in PR-15 and MR-441 involve lands within non-upper tier acreage of the Sunset CRA. MCC has been required to provide CDRMS with "detailed information regarding its assertion that it maintains the 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 [CRR]." In addition to providing lease stipulations as a condition of consenting to coal leasing on National Forest System lands under the Mineral Leasing Act (MLA), the Forest Service administers the CRR.

[1] *High Country Conservation Advocates v. United States Forest Service*, 1:17-cv-03025-PAB (D. Colo. June 15, 2020) (entering mandate from the Tenth Circuit Court of Appeals).

Lease No. COC-1362

Lease COC-1362 was issued on September 1, 1967. The lease was readjusted in the 1980s with the following Notice for Lands of the National Forest System Under the Jurisdiction of the Department of Agriculture:

> The permittee/lessee must comply with all rules and regulations of the Secretary of Agriculture set forth at Title 36, Chapter II, of the Code of Federal Regulations governing the use and Management of the National Forest System when not inconsistent with the rights granted by the Secretary of the Interior in the permit.[2] The Secretary of Agriculture's rules and regulations must be complied with for (1) all use and occupancy for the National Foresty System 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 National Forest System not authorized by an exploration plan approved by the Secretary of the Interior.

The Bureau of Land Management (BLM) modified lease COC-1362 in October 2001 to add approximately 161 acres. The 2001 lease modification carried forward the original Lease Notice for National Forest System land from the COC-1362 parent lease and added another lease notice applicable to the lands added in the modification. That notice provided that the lease modification lands were subject to Final Roadless Area Conservation Rule published in Federal Register, January 12, 2001. The 2001 lease notice is incorrectly described in the table of stipulations provided by the Forest Service with its stipulations for the 2017 lease modifications, described below. For this item, the BLM should refer to its original leasing documents when administering the leases for operations involving the original leased lands and lands added by the 2001 modification, and not the 2017 table provided by the Forest Service. Still, the operations referred to by MCC in its letter of July 28, 2020, do not involve the lands covered by the 2001 lease modification and Notice. Moreover, the 2001 Roadless Area Conservation Rule was repealed for national forests in Colorado upon promulgation of the CRR in 2012, and therefore the 2001 lease notice no longer has practical effect.

In December 2017, the BLM again modified the lease to add another 800 acres, including the area for longwall panel LW-SS2. Approximately 786 acres of that lease modification area is within non-upper tier acreage of the Sunset CRA. As conditions of the Forest Service's consent to the lease modification, the original National Forest System lease notice was carried forward from the parent lease, and new stipulations specific to the lease modification were added. Regarding roadless areas, the 2017 lease stipulation provides, in part:[3]

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[2] This is boilerplate language that was used by the Forest Service for all authorizations and should have referred to the "lease" not "permit." The following sentence in the Notice is explicit as to the types of authorizations to which the rules and regulations of the Secretary of Agriculture apply.

[3] Not pertinent here, the 2017 roadless area stipulation also addresses construction and use of linear construction zones.

On the following lands within the Sunset CRA, surface operations incident to 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 events 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 Federal law or regulation.

The referenced regulations generally prohibit road construction and reconstruction in the Sunset CRA, except as needed for coal lease operations, as allowed by the "North Fork Exception." This is the exception in the CRR that was vacated by the ruling of the Tenth Circuit. They are not applicable to lands within the area of the lease modification that are not within the Sunset CRA.

Lease No. COC-67232

The BLM originally issued lease COC-67232 in March 2007 with the same lease notice as was on COC-1362 for National Forest System lands. The lease was also issued with a special lease notice applicable to the West Elk Inventoried Roadless Area (IRA), which provided notice that certain described leases lands were within the IRA and "may be subject to restriction on road-building pursuant to rules and regulations of the Secretary of the Agriculture applicable at the time any roads may be proposed on the lease." As with lease COC-1362, in December 2017 lease COC-67232 was modified to add about 920 acres, including approximately 915 acres within non-upper tier acreage of the Sunset CRA. The 2017 modification added the same roadless rule stipulation as was added to COC-1362 in 2017.[4] As with COC-1362, they are not applicable to lands within the area of the lease modification that are not within the Sunset CRA.

[4] The 2007 lease notice for the West Elk IRA was carried forward in the 2017 lease modification to lease COC-67232. Still, the activities approved in PR-15 and MR-441 proposed by MCC in its letter of July 28, 2020 do not involve the lands on lease COC-67232 subject to the 2007 IRA lease notice.

The 2017 roadless area stipulations make clear surface use for operations incidental to federal coal leases COC-1362 and COC-67232 are subject to the CRR, 36 C.F.R. part 294, subpart D. Within designated roadless areas, the CRR primarily prohibits: 1) road construction and reconstruction; 2) tree cutting, sale, and removal; and 3) linear construction zones. 36 C.F.R. §§ 294.42 - 294.44. The prohibition on road construction and reconstruction, however, did not apply to temporary roads for coal-related surface activities within the area covered by the North Fork Exception at the time of the lease modification, when the North Fork exception was in effect. 36 C.F.R. § 294.43(c)(1)(ix).

In March 2020, the Tenth Circuit Court of Appeals ordered the U.S. District Court for Colorado to vacate the North Fork Exception. *High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020). The District Court entered the vacatur order on June 15, 2020. Due to the vacatur of the North Fork Exception, and under the terms of the 2017 lease modification all coal-related surface operations within the lease modification area are currently subject to the CRR's prohibitions on road construction and reconstruction contained in 36 C.F.R. § 294.43, unless other exceptions under the CRR apply.

As relayed in your letter, MCC first requests clarification as to whether it has a right to " travel on, maintain, and otherwise use the temporary road and already completed drill pads for LW-SS2 as permitted by PR-15 and MR-441, under the Leases following the vacatur of the North Fork Exception[.]" The Forest Service lease notices and stipulations applicable to these lands do not prohibit MCC from travelling on, maintaining, and using existing roads, nor from constructing or using drill pads for LW-SS2. This is because the CRR, as referenced in the lease stipulations, does not prohibit travel, maintenance, or use of existing roads, nor construction and use of drill pads for LW-SS2 as permitted by PR-15 and MR-441. Any reconstruction of existing roads and future construction of any unbuilt roads approved by PR-15 and MMR-441 are subject to the CCR prohibitions, unless other exceptions apply.

Second, MCC seeks confirmation as to whether it "may construct the remaining drill pads approved in PR-15 and MR-441, under the Leases following the vacatur of the North Fork Exception. This includes tree cutting as needed for the drill pads, as provided in 36 C.F.R. § 294.42(c)(5), or other authority." The applicable lease notices and stipulations and the CRR do not prohibit the construction of well pads authorized under PR-15 and MMR-441. Access within the Sunset CRA to those sites, however, is limited to the existing temporary roads. Nor do the leases or the CRR prohibit incidental tree cutting associated with well pad construction, as a rule excepts tree cutting and removal incidental to not otherwise prohibited management activities from the general prohibition on tree cutting. 36 C.F.R. § 294.42(c)(5).

Third, MCC requests confirmation that it "may drill the methane ventilation boreholes approved in PR-15 and MR-441, under the Leases following the vacatur of the North Fork Exception." Neither the applicable lease notices and stipulations nor the CRR prohibit the drilling of methane ventilation boreholes on the well pads approved under PR-15 and MMR-441. However, access within the Sunset CRA to well pads for the methane ventilation drilling purposes is limited to the existing temporary roads.

Thank you for consulting with the Forest Service on the special lease notices and stipulations for NFS land. If you have any questions, please contact E. Lynn Burkett at (303) 275-5135 or edith.burkett@usda.gov.

Sincerely,

acting for E. Lynn Burkett

JASON ROBERTSON Digitally signed by JASON ROBERTSON Date: 2020.08.19 12:23:41 -06'00'

JASON ROBERTSON
Deputy Director Recreation, Lands, Minerals, and Volunteers

cc: Arthur Klevin, E. Lynn Burkett, Liane Mattson, Sherri Thompson, Thomas L. Williams

MICHAEL DRYSDALE
Of Counsel
(612) 340-5652
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July 28, 2020

VIA ELECTRONIC MAIL

Mr. Douglas Siple
Acting Branch Chief, Solid Minerals
Colorado State Office
United States Bureau of Land Management
2850 Youngfield St.
Lakewood, CO 80215

Re: Federal Coal Leases C-1362 and COC-67232

Dear Mr. Siple:

On behalf of Mountain Coal Company, LLC ("Mountain Coal") and Ark Land LLC ("Ark Land"), I write to request confirmation of certain surface access rights held by Mountain Coal and Ark Land under Federal Coal Leases C-1362 and COC-67232 ("Leases"), following the June 15, 2020 vacatur of 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).

Specifically, the Leases are among several federal coal leases held by Mountain Coal and Ark Land located at the West Elk Mine, operated by Mountain Coal. A portion of the Leases is located in the "Sunset Roadless Area," and subject to the CRR. In March 2020, the Tenth Circuit Court of Appeals ordered the District Court for the District of Colorado to vacate the North Fork Exception in the decision *High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020)("*High Country* 2020"). The District Court entered the vacatur order on June 15, 2020.

Prior to the vacatur order, Mountain Coal constructed a temporary road for the purpose of accessing the surface before coal mining begins underground in planned longwall panel LW-SS2, as permitted by Permit Revision PR-15 and Minor Revision MR-441 to Mountain Coal's SMCRA permit. A temporary road is required so that drill rigs can access this area to drill holes for Mine Ventilation Boreholes ("MVBs") needed to safely ventilate coal mine methane pursuant to Mountain Coal's MSHA-approved ventilation plan for the West Elk Mine. As of June 15, 2020, the temporary road to service LW-SS2 had been completed, as had the drill pad for one of five MVBs needed for LW-SS2 within the Leases. A second drill pad for LW-SS2 was commenced before the vacatur order and completed on June 16, 2020.

On June 17, 2020, the Colorado Division of Mining, Reclamation, and Safety ("CDRMS") conducted a site inspection and issued Cessation Order 2020-001 ("CO 2020-001") (attached). CO 2020-001 ordered Mountain Coal to halt all surface activities associated with LW-SS2, as

well as all other surface activity in that portion of the Leases subject to the CRR, other than use of previously constructed facilities associated with an older temporary road constructed to service longwall panel LW-SS1. As abatement, CO 2020-001 ordered Mountain Coal to provide a statement that:

> 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.

The Colorado Mined Land Reclamation Board affirmed CO 2020-001 after a hearing conducted on July 23, 2020.

Mountain Coal's overall post-vacatur rights under the Leases are among several issues presently subject to litigation in the federal District Court matter *High Country Conservation Advocates v. United States Forest Service*, 1:17-cv-03025-PAB. However, it is not known when the District Court will rule, or whether the District Court will reach the merits of Mountain Coal's rights.

For this reason, as well as the need to complete construction of the drill pads and MVBs needed for LW-SS2 and abate that portion of CO 2020-001 applicable to LW-SS2, Mountain Coal respectfully requests that the BLM (in consultation with the United States Forest Service, as needed), confirm in writing the following subset of Mountain Coal's rights to access and construct facilities on the surface of the Leases:

(1). Mountain Coal may travel on, maintain, and otherwise use the temporary road and already completed drill pads for LW-SS2 as permitted by PR-15 and MR-441, under the Leases following the vacatur of the North Fork Exception;

(2). Mountain Coal may construct the remaining drill pads approved in PR-15 and MR-441, under the Leases following the vacatur of the North Fork Exception. This includes tree-cutting as needed for the drill pads, as provided in 36 C.F.R. § 294.42(c)(5), or other authority; and

(3). Mountain Coal may drill the MVBs approved in PR-15 and MR-441, under the Leases following the vacatur of the North Fork Exception.

The foregoing does not exhaust the surface access rights Mountain Coal believes it possesses under the Leases and its SMCRA permit under the post-vacatur CRR, and Mountain Coal reserves all rights as to such surface access. However, at this time Mountain Coal is seeking only to abate CO 2020-001 as it relates to LW-SS2, pending any forthcoming order from the federal District Court.

Thank you for your prompt attention to this request, and please let me know any questions.

Very truly yours,

DORSEY & WHITNEY LLP

Michael Drysdale

Michael Drysdale
Of Counsel

Attorneys for Mountain Coal Company, LLC

MD:aj

Enclosures

Cc: Ms. Sherri Thompson, USFS