IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-1920

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

Petitioners,

v.

DAVID L. BERNHARDT, in his official capacity as United States Secretary of the Interior;
UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT;
JOSEPH BALASH, in his official capacity as Assistant Secretary of Land and Minerals Management, U.S. Department of the Interior,
GLENDA OWENS, in her official capacity as Acting Director of U.S. Office of Surface Mining Reclamation and Enforcement;
DAVID BERRY, in his official capacity as Regional Director of U.S. Office of Surface Mining, Western Region;

Federal Respondents.

PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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GLOSSARY

BLM	Bureau of Land Management
CO_2e	Carbon Dioxide Equivalent
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
GHG	Greenhouse Gas
MLA	Mineral Leasing Act
MSHA	Mine Safety and Health Administration
NEPA	National Environmental Policy Act
OSM	Office of Surface Mining Reclamation and Enforcement
ROD	Record of Decision
SMCRA	Surface Mining Control and Reclamation Act
SFEIS	Supplemental Final Environmental Impact Statement
USFS	United States Forest Service

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INTRODUCTION

WildEarth Guardians, High Country Conservation Advocates, Center for Biological Diversity, Sierra Club, and Wilderness Workshop (collectively "Conservation Groups") move this Court for a preliminary injunction pursuant to Rule 65 to enjoin the U.S Office of Surface Mining Reclamation and Enforcement and its officials (OSM)[1] from allowing Arch Coal, Inc. and its subsidiaries (Arch) to bulldoze up to 8.4 miles of new roads, construct up to 43 methane drainage wells, and mine 17.6 million tons of coal from within the Sunset Roadless Area on National Forest lands and adjacent private lands in western Colorado. Unless this Court issues an order maintaining the status quo on the ground, Arch has indicated that the company will commence bulldozing and other construction activities as part of the planned expansion of the West Elk Mine beginning the week of July 1, 2019. This construction will ultimately degrade over 73 acres of land, requiring the toppling of 100-foot-tall aspen trees and the leveling of rough and hilly terrain. These imminent construction activities will degrade the scenic beauty, wildlife habitat, and largely undeveloped nature of this designated roadless area that Conservation Groups have long worked to protect and that their members enjoy. Moreover, according to counsel for Arch, the company may already have begun mining coal from certain lands underlying the Sunset Roadless Area pursuant to the Mining Plan.

A preliminary injunction is warranted to preserve the status quo pending resolution of the merits of this case. First, Conservation Groups are likely to prevail on the merits of their claims. Conservation Groups will show that OSM violated the National Environmental Policy Act (NEPA) by, among other things, failing to consider an alternative that would require Arch to

[1] Federal Defendants are collectively referred to as OSM throughout this brief.

greatly reduce the direct greenhouse gas (GHG) emissions from the Mine by flaring its methane emissions as a condition of mining publicly-owned coal beneath publicly-owned lands. In fact, OSM performed *no new* NEPA analysis whatsoever, but instead simply adopted by reference the existing Supplemental Environmental Impact Statement prepared for the prior lease modification (Leasing SFEIS) by the U.S. Forest Service and Bureau of Land Management (BLM).[2] NEPA requires federal agencies to consider "all reasonable alternatives" to their proposed actions. 40 C.F.R. § 1502.14. At the lease modification stage, however, the reviewing federal agencies deemed analysis of methane mitigation as premature at that time, explaining that flaring was not considered in detail "because it, like all other methane mitigation measures, requires detailed engineering and economic considerations that would occur later in the process." Forest Service Record of Decision (Ex. 8) at 35. The Forest Service's prior decision to authorize the lease modifications relied upon an assumption that analysis of methane mitigation, including flaring, would occur once the Mining Plan was available. In the Leasing SFEIS, BLM and the Forest Service acknowledged:

> We do not speculate whether [flaring] is infeasible or uneconomical, leasing is just not the appropriate time to address potential permitting actions that relate to in-mine safety for which no mine plan or ventilation plan has been prepared.

Leasing SFEIS (Ex. 6) at 971.

But now that mining and ventilation plans are available, OSM nonetheless failed to analyze a methane flaring alternative, relying on the erroneous assertion that BLM and the Forest Service concluded that flaring was technically or economically infeasible. Approval of the

[2] U.S. Dep't of Agric., Supplemental Final Environmental Impact Statement, Federal Coal Lease Modifications COC-1362 & COC-67232 (including on-lease exploration plan) (Aug. 2017), (attached as Exhibits 4, 5, and 6).

Mining Plan represents the end of the road, the last chance for OSM to perform such analysis before mining begins. Yet, OSM approved the Mining Plan without any additional consideration of a mandatory methane flaring alternative, violating NEPA.

OSM further violated NEPA by failing to take a hard look at impacts to water resources from mining activities. Although OSM identified previously-unknown perennial springs and streams within the mine expansion area in its NEPA Adequacy Review Form, OSM downplayed this important new information and failed to meaningfully assess the risk that such critical water resources could be permanently dewatered by mining activities, and completely ignored potential impacts to fish and other wildlife if that were to occur.

Finally, OSM failed to provide adequate supporting documentation to support its decision to adopt the Leasing SFEIS prepared by the Forest Service. OSM did not sufficiently evaluate whether the Leasing SFEIS adequately analyzed the environmental impacts of coal mining pursuant to NEPA, providing only cursory conclusions regarding new circumstances and new information bearing on the impacts of implementing the Mining Plan. For example, OSM never explained its conclusion that the new information regarding potential impacts to previously-unidentified water resources required only "minor edits and clarifications" to the Leasing SFEIS. NEPA Adequacy Review Form (Ex. 3) at 6–7.

The harm from Arch's construction and mining activities will also be irreparable. Once cut down, the trees cannot be put back; the 1,700 acres of affected roadless area cannot be "undeveloped;" the 17 million tons of mined coal cannot be put back in the ground; the subsidence of over a thousand acres of mined-out public cannot be undone; and the millions of tons of greenhouse gases directly and indirectly emitted from the mine cannot be removed from

the atmosphere. Leasing SFEIS (Ex. 4) at 66, 86, 92. These damaging actions may soon occur because OSM made unlawful decisions that allow Arch's coal mining and related activities.

In addition to demonstrating irreparable harm, Conservation Groups establish the remaining factors for preliminary relief. The balance of harms tips heavily in Conservation Groups' favor because any harm to OSM and Arch is speculative, short-term, and not irreparable. At current mining rates, Arch may continue to mine coal at West Elk for at least six more years without accessing the coal underlying the Sunset Roadless Area under the challenged Mining Plan. In addition, there is a strong public interest in protecting the environment and ensuring compliance with environmental laws.

This Court should therefore issue a preliminary injunction to maintain the status quo on the ground until the Court can fully review and rule on the merits of Conservation Groups' claims. This Court should also waive the requirement that Conservation Groups post a bond, or alternatively require only a nominal bond, because Conservation Groups are non-profits seeking to protect the public interest and the environment and in ensuring that their government obeys the law.

LEGAL BACKGROUND

I. The Mineral Leasing Act and Surface Mining Reclamation and Control Act

Under the Mineral Leasing Act (MLA), the Secretary of Interior has two primary responsibilities regarding the disposition of federally owned coal. First, the Secretary is authorized to lease federal coal resources, where appropriate. *See* 30 U.S.C. §§ 181 and 201. BLM, an agency within the Interior Department, is largely responsible for implementing the Secretary's coal leasing responsibilities.

The Secretary of the Interior's second responsibility is to authorize, where appropriate, the mining of federally owned coal through approval of a mining plan. The MLA sets forth the Secretary's authority to issue a mining plan, requiring that before any entity can take action on a leasehold that "might cause a significant disturbance of the environment," the operator must submit an operation and reclamation plan to the Secretary of the Interior for approval. 30 U.S.C. § 207(c). Referred to as a "mining plan" by the Surface Mining Control and Reclamation Act (SMCRA) and its implementing regulations, the Secretary "shall approve or disapprove the [mining] plan or require that it be modified." 30 U.S.C. § 1273(c); 30 C.F.R. § 746.14. By delegation, the Assistant Secretary of the Interior for Land and Minerals Management must approve the mining plan before any mining operations may commence on "lands contained leased Federal coal." 30 C.F.R. § 746.11.

Among other requirements, a mining plan must, at a minimum, assure compliance with applicable requirements of federal laws, regulations, and executive orders, and be based on information prepared in compliance with NEPA. *See* 30 C.F.R. § 746.13. A legally compliant mining plan is a prerequisite to an entity's ability to mine leased federal coal. 30 C.F.R. § 746.11(a). To this end, a mining plan is "binding on any person conducting mining under the approved mining plan." 30 C.F.R. § 746.17(b).

In addition to an approved mining plan, SMCRA requires that either the Secretary or a federally delegated state surface mining agency approve a surface mining permit application and reclamation plan (SMCRA permit) before an entity can commence mining. *See* 30 U.S.C. § 1256(a). The SMCRA permit governs surface disturbance for coal mining operations. In SMCRA, Congress authorized the Secretary to delegate administrative and enforcement of

SMCRA to states that have a federally-approved surface mining program. 30 U.S.C. § 1273(c). Interior has delegated SMCRA administration and enforcement authority to the State of Colorado. 30 C.F.R. § 903.30.

However, Congress has expressly prohibited the Secretary of Interior from delegating to states the duty to approve, disapprove, or modify mining plans for federally owned coal. *See* 30 U.S.C. § 1273(c); 30 C.F.R. § 745.13(i). SMCRA also prohibits the Secretary from delegating to states authority to comply with NEPA and other federal laws and regulations (other than SMCRA) with regard to the regulation of federally-owned coal resources. 30 C.F.R. § 745.13(b).

Although the Secretary is charged with approving, disapproving, or modifying a Mining Plan, OSM is charged with "prepar[ing] and submit[ting] to the Secretary a decision document recommending approval, disapproval or conditional approval of the mining plan . . . ." 30 C.F.R. § 746.13. Thus OSM plays a critical role in adequately informing the Secretary.

II. The National Environmental Policy Act

Congress enacted NEPA, 42 U.S.C. § 4321 *et seq*., to, among other things, "encourage productive and enjoyable harmony between man and his environment" and to promote government efforts "that will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. As a general matter, NEPA requires that federal agencies analyze and disclose to the public the environmental impacts of their actions. 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1500.1 (Council on Environmental Quality (CEQ) regulations implementing NEPA for all agencies).

To fulfill its mandates, NEPA requires federal agencies to prepare an environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the

human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The agency should describe "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii). Overall, an EIS must "provide [a] full and fair discussion of significant environmental impacts" associated with a federal decision and "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. NEPA mandates that an agency takes a "'hard look' at the environmental consequences" of a proposed action. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

Interior's NEPA regulations also explain that adoption of pre-existing EISs and EAs is allowed. 43 C.F.R. § 46.120. However, the NEPA regulations make clear that where an agency adopts an EIS or EA, the agency must determine "with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives." 43 C.F.R. § 46.120(c). Such supporting documentation "must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects." *Id*.

FACTUAL BACKGROUND

I. The Sunset Roadless Area

The Sunset Roadless Area is a 5,800 acre forested landscape which hugs the west flank of 12,700-foot Mount Gunnison and the West Elk Wilderness in northwestern Gunnison County, Colorado. Undisturbed until coal exploration activities began in late 2018, the area is characterized by wide swaths of aspen groves and mixed conifer forest; wildflowers, meadows,

natural springs, headwater streams, and beaver ponds are also found here.[3] These habitats support numerous different wildlife species, from black bear and the imperiled Canada lynx, to chorus frogs and snakes.[4] Visitors may delight in stunning views of Mount Gunnison, Mount Lamborn, and the Ragged Mountains while enjoying a quiet hike in the relatively intact forest.[5]

Operating the below-ground mine, however, requires substantial above-ground construction within the roadless area. OSM Record of Decision (Ex. 2) at 22. Expanding the West Elk Mine will result in a spiderweb network of bulldozed roads, the flattening and clearcutting of forest for drilling pads, and methane drainage wells that will directly release methane, a powerful greenhouse gas, to the atmosphere. *Id.*

With Interior's recent approval of a Mining Plan modification for the West Elk Mine (Federal Coal Leases COC-162, COC-67232), Arch is now poised to expand its coal mining operations into the Sunset Roadless Area, building miles of roads and dozens of drainage well pads across this relatively-undisturbed landscape at significant environmental cost. *Id.* While exploration activities since issuance of the lease for the mine expansion area have partially degraded the natural character of some of the area, these existing impacts are a small fraction of what the Mining Plan authorizes. Expanding the West Elk Mine will involve construction of about 8.4 miles of new roadway, fragmenting important wildlife habitat. *Id.* Expansion will

[3] Declaration of Jeremy Nichols (Nichols Dec.) (Ex. 20) at ¶ 10–11, 13; Declaration of Allison Melton (Melton Dec.) (Ex. 21) at ¶¶ 15–16, 19, 21, 22–24, 33; Declaration of Matt Reed (Reed Dec.) (Ex. 22) at ¶¶ 5-10; Declaration of Peter Hart (Hart Dec.) (Ex. 23) at ¶ 7-9,11–13, 15

[4] Nichols Dec. (Ex. 20) at ¶ 11, 13; Melton Dec. (Ex. 21) at ¶¶ 21–22, 33; Reed Dec. (Ex. 22) at ¶ 6–7, 9; Hart Dec. (Ex. 23) at ¶ 15, 18. The area is treasured by hunters and hikers alike for its remoteness and beauty. Nichols Dec. (Ex. 20) at ¶¶ 10, 13–14, 16); Melton Dec. (Ex. 21) at ¶¶ 15, 16, 19, 24; Reed Dec. (Ex. 22) at ¶¶ 5, 14, 16, 18; Hart Dec. (Ex. 23) at ¶ 16.

[5] Nichols Dec. (Ex. 20) at ¶ 10, 14 (and attached photos); Melton Dec. (Ex. 21) at ¶¶ 13, 21, 24; Reed Dec. (Ex. 22) at ¶¶8–9; Hart Dec. (Ex. 23) at ¶ 14.

involve installation of 43 methane drainage wells, mostly within the Sunset Roadless Area, releasing pollutants with significant impacts on local and regional air quality and the global climate. *Id.* And mining activities will lead to substantial land subsidence over a large area and potentially dewatering perennial headwater springs, critical resources in this semi-arid region. Leasing SFEIS (Ex. 4) at 230; NEPA Adequacy Review Form (Ex. 3) at 6–7.

II. Administrative Procedural History of the West Elk Mine Expansion

A. Leasing Approvals

For years, this forest has been threatened by a proposed expansion of the West Elk Mine, owned by the nation's second largest coal company, Arch Coal.[6] Since 2009, Arch has been seeking to expand the mine's underground operations beneath the Sunset Roadless Area. Leasing SFEIS (Ex. 4) at 3. In 2012 and 2013, the Forest Service and BLM issued a suite of decisions approving an expansion that would have led to the construction of more than 6 miles of roads and nearly 50 drilling pads within a 1,700-acre area at the heart of the Sunset Roadless Area, similar to the mine expansion area approved under the challenged Mining Plan. *High Country Conservation Advocates v. U.S. Forest Serv*. (*High Country I*), 52 F.Supp. 3d 1174, 1184 (D. Colo. 2014). First, in 2012, the Forest Service adopted the Colorado Roadless Rule, which included a North Fork Coal Mining Area "exception" allowing temporary road construction for coal mining in the Sunset Roadless Area and certain other roadless lands. 77 Fed. Reg. 39,576,

[6] Reportedly, Arch has recently entered into a joint venture with the nation's largest coal company, Peabody Coal, that is planned to take ownership and control of the West Elk Mine; however, Conservation Groups understand that this joint venture has not been finalized or received necessary regulatory approval, so Arch's subsidiary Mountain Coal Company remains the sole owner and operator of the West Elk Mine.
https://www.peabodyenergy.com/Home/Company-News-1038

39,576 (July 3, 2012). Second, the Forest Service officially consented to the Lease Modifications in 2012, paving the way for BLM to approve lease modifications on December 27, 2012. *High Country I*, 52 F. Supp. 3d at 1184. Third, BLM approved a coal exploration plan in late June 2013, with the purpose of allowing about six miles of road and multiple drilling pads to be constructed within the Sunset Roadless Area. *Id*. at 1185.

In 2014 however, Judge Jackson stopped this threatened destruction by vacating the federal agencies' decisions, which had been challenged by several of the current Petitioners. Judge Jackson held that the Forest Service and BLM violated the National Environmental Policy Act (NEPA) in their environmental review by turning a blind eye to the project's huge climate costs while carefully accounting for the alleged economic benefits of the expansion, an approach that subverted the law's mandate that agencies take a "hard look" at environmental impacts. *Id. a*t 1195–97.

In 2015, the Forest Service announced its intent to consider re-imposing the coal mine exception to the Colorado Roadless Rule and to prepare supplemental environmental analyses discussing the impacts of that proposal. 80 Fed. Reg. 18,598 (Apr. 7, 2015). After conducting new, still-flawed NEPA analysis, the Forest Service and BLM made a series of decisions that set the stage for Arch to move forward with the expansion.

First, effective April 17, 2017, the Forest Service reinstated an exception to the Colorado Roadless Rule, which otherwise generally prohibits road construction in Forest Service roadless areas. 81 Fed. Reg. 91,811 (Dec. 19, 2016); 82 Fed. Reg. 9,973 (Feb. 9, 2017). This loophole allows road construction for coal mining within the 19,700-acre "North Fork Coal Mining Area," which encompasses the Sunset Roadless Area as well as nearby Pilot Knob and Flatirons

Roadless Areas. *Id*. Second, on September 7, 2017, the Forest Service (with BLM as a cooperator) issued its Leasing SFEIS and a draft Record of Decision (ROD) to approve modification of two coal leases at West Elk. Leasing SFEIS (Ex. 4–6). Third, on December 11, 2017, the Forest Service consented to the modification of two coal leases, paving the way for the mine to expand into 1,700 acres of the Sunset Roadless Area, and access approximately 17.6 million tons of coal. Forest Service ROD (Ex. 8) at 20, 92 tbl. 3-1. Fourth, on December 15, 2017, the Department of the Interior Deputy Assistant Secretary for Land and Minerals Management issued a Record of Decision approving the lease modifications for West Elk. BLM ROD (Ex. 7) at 4; Leasing SFEIS (Ex. 4) at 85.

On the same day, December 15, 2017, citizen conservation groups brought a new legal challenge to these Forest Service and BLM actions, which opened up the Sunset Roadless Area to road-building for expanded coal mining at West Elk. Judge Brimmer upheld the agency decisions. *High Country Conservation Advocates v. U.S. Forest Serv*. (*High Country II*), 333 F. Supp. 3d 1107 (D. Colo. 2018). The district court's decision is currently on appeal. *High Country Conservation Advocates v. U.S. Forest Serv.,* No. 18-1374 (10th Circuit Appeal filed Sept. 11, 2018).

B. Approval of the Mining Plan

Following the issuance of the lease, Arch submitted a Permit Application Package for the West Elk Mine expansion to the state permitting agency, the Colorado Division of Reclamation, Mining, and Safety. The state agency approved Permit Revision No. 15 on September 4, 2018, effective on November 15, 2018. OSM Mining Plan Decision Document (Ex. 1) at 1-21. On March 12, 2019, OSM's Western Regional Director issued a memorandum recommending

approval of the proposed Mining Plan modifications for West Elk Mine and signed a Record of Decision adopting the Leasing SFEIS and formally recommending approval of the Mining Plan. *Id*. at 1-8. On March 15, 2019, OSM issued a Federal Register Notice announcing its intent to adopt the Leasing SFEIS for the Mining Plan modification. 84 Fed. Reg. 9554 (Mar. 15, 2019). On or about March 15, 2019, OSM staff completed a NEPA Adequacy Review Form, which found the Mining Plan action to be "substantially similar" to the Leasing Modifications analyzed in the Leasing SFEIS and concluded that "the environmental analysis completed in the [Leasing Modifications] SFEIS is adequate." NEPA Adequacy Review Form (Ex. 3) at 1. On or about March 15, 2019, OSM's Acting Director issued a memorandum to the Assistant Secretary Land and Minerals Management recommending approval of the West Elk expansion Mining Plan. OSM Mining Plan Decision Document (Ex. 1) at 1-7. On April 19, 2019, the Assistant Secretary Land and Minerals Management signed the formal Mining Plan Approval for the modification of Federal leases COC-1362 and COC-67232 for the West Elk Mine, the final step allowing Arch to begin on-the-ground construction activities on the 1,720 acres of land opened up for coal mining by the 2017 lease modifications. *Id*. at 1-88 to 1-90.

OSM provided no new environmental analysis or consideration of updated hydrologic information. Instead, the agency's NEPA Adequacy Review Form simply listed the NEPA adequacy criteria, and cursorily concluded that each of the criteria were met. NEPA Adequacy Review Form (Ex. 3) at 4–7. OSM failed to document any independent assessment of the Leasing SFEIS and its applicability to the Mining Plan approvals. *Id.*

OSM's standard practice before formally recommending approval of a mining plan is to issue a NEPA scoping notice for the proposed approval and solicit comments from the public

regarding the proper scope of the NEPA analysis. *See e.g.*, OSM ROD - Rosebud Mine (Ex. 16) at 8, 26. OSM then publicly releases a draft EA or EIS and solicits public comment regarding the draft EA or EIS. OSM routinely issues Records of Decision or FONSIs and recommendations for Secretarial approval of mining plans only after providing multiple opportunities for public involvement in the NEPA process does. *Id.*; *see also* OSM Public Notice – Centralia Mine (Ex. 17); OSM Public Notice – Spring Creek Mine (Ex. 18).

At no point prior to OSM's adoption of the Leasing SFEIS and decision to formally recommend the Mining Plan for Secretarial approval did Federal Defendants provide public notice of the agencies' ongoing review of the adequacy of existing NEPA analyses to cover approval of the Mining Plan. OSM did not solicit public comment regarding the agency's NEPA Adequacy Review Form or recommendation to the Assistant Secretary for approval of the Mining Plan. Thus, prior to the Mining Plan being approved, the general public, including Conservation Groups, were given no notice of an opportunity to provide OSM with comments or any new information regarding the impacts of the West Elk Mine expansion. On June 1, 2018, Conservation Groups did provide OSM with an unsolicited comment letter based upon their general understanding of potential impacts under the Mining Plan, Conservation Groups' Letter to OSM (Ex. 24), but were kept in the dark about OSM's review process, including the agency's identification of potentially-impacted perennial springs that were previously unknown.

ARGUMENT

To obtain a preliminary injunction, the moving party must establish: "(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the

opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007).

Conservation Groups satisfy each part of the four-part standard.[7]

I. CONSERVATION GROUPS ARE LIKELY TO SUCCEED ON THE MERITS.

OSM's Mining Plan approval violated NEPA by (1) failing to consider a reasonable alternative that would allow Arch to mine the same amount of coal as OSM's preferred alternative while minimizing some of the Mine's greenhouse gas emissions, and by (2) adopting the Leasing SFEIS without conducting any additional NEPA analysis for the Mining Plan, thereby failing to take a hard look at mining's impacts to perennial waters and fish that the record shows require additional analysis for OSM to make a fully informed decision about the

[7] Conservation Groups have standing to bring the claims pressed here. Article III standing requires "1) 'an injury in fact' that is 2) fairly traceable to the challenged action and 3) likely to be redressed by judicial intervention." *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1264-65 (10th Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Conservation Groups meet each part of this test. The attached declarations of Mr. Nichols, Mr. Reed, Ms. Melton, and Mr. Hart (Exs. 21–24) demonstrate that each plaintiff group has members: who use and enjoy the lands within the mine expansion area impacted by the Mining Plan; who assert that their recreational, aesthetic, and health interests will be harmed by bulldozing for road and pad clearing, methane emissions from the mine, and mining-induced land subsidence or collapse; and who intend to return to the area. The stated harm is a direct result of the inadequate agency analyses challenged here which, together, authorize construction within roadless national forest and prolong coal mining in the area by nearly three years. *See Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996) ("Under [NEPA], an injury results not from the agency's decision, but from the agency's *uninformed* decisionmaking."). A favorable decision will set aside agency decisions authorizing such damaging actions until the agencies appropriately evaluate environmental impacts. That is sufficient to satisfy the redressability requirement. *See, e.g., Sierra Club*, 287 F.3d at 1265-66. The Tenth Circuit and this Court have found many of these same organizations had standing to raise similar claims challenging coal leases based on similar allegations of injury. *High Country I*, 52 F. Supp. 3d at 1186-88; *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1230-32 (10th Cir. 2017); *High Country II*, 333 F. Supp. 3d at 1117.

Mining Plan. Conservation Groups are likely to succeed on the merits of their NEPA claims for two reasons. First, OSM violated NEPA by refusing to consider a reasonable alternative, put forward by Conservation Groups, that would require Arch to flare its methane emissions as a condition of mining publicly-owned coal. After the Forest Service and BLM kicked the can down the road at the rulemaking and leasing stages by not considering in detail a mandatory methane flaring alternative, OSM did the same, pointing back to BLM and the Forest Service. Here, at the end of the road for federal agency approvals, OSM continues to punt on this analysis, despite the availability of the mining and ventilation plans that BLM and the Forest Service previously maintained were needed to analyze such an alternative.

Second, although the Forest Service's 2017 SFEIS assessed impacts to non-perennial water resources at the leasing stage based upon a finding that there were no perennial springs on the mine expansion site, OSM subsequently disclosed that the SFEIS was mistaken and identified such on-site springs, NEPA Adequacy Review Form (Ex. 3) at 6–7, contradicting the underlying conclusion on which the prior analysis was based. Based on this new information, OSM must re-analyze the impacts of the expanded mining operations on these newly-identified springs. OSM recognizes that mining activities could potentially permanently dewater these important water resources. *Id.* But instead of taking a hard look at the risk of such potential impacts to such springs – and the ecologies they may support – OSM simply noted this new information as a "minor edit and clarification" to the SFEIS without any additional NEPA review at the mining plan stage. *Id.*

The Court's review of the merits of the NEPA claims is governed by the Administrative Procedure Act (APA). *Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1134 (10th Cir.

2006). Under the APA, courts must invalidate actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To survive scrutiny under this standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). An action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* OSM violated NEPA by failing to meet this standard.

A. OSM Violated NEPA By Failing to Consider a Mandatory Flaring Alternative.

1. NEPA Requires Federal Agencies to Consider All Reasonable Alternatives.

Through NEPA, Congress requires agencies to "study, develop, and describe" reasonable alternatives to the agency's proposed action. 42 U.S.C. § 4332(2)(C)(iii), (2)(E). This alternatives analysis forms the "heart" of the NEPA process. 40 C.F.R. § 1502.14. To fulfill this mandate, federal agencies must "[r]igorously explore and objectively evaluate *all* reasonable alternatives." 40 C.F.R. § 1502.14(a) (emphasis added); *N.M. ex rel. Richardson v. Bureau of Land Mgmnt.*, 565 F.3d 683, 708 (10th Cir. 2009). This includes reasonable alternatives not within the jurisdiction of the lead agency. 40 C.F.R. § 1502.14(c).

The Tenth Circuit uses two "guideposts" to evaluate whether a proposed alternative is reasonable: (1) whether the alternative "falls within the agency's statutory mandate," and (2) whether the alternative meets the purpose and need of the project. *Richardson*, 565 F.3d at 709.

The Court has recognized two exceptions under which an agency may decline to consider an otherwise reasonable alternative. First, an agency need not consider an alternative that it has in "good faith" found to be "too remote, speculative, or impractical or ineffective." *Id*. at 708 (quoting *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999)). Second, an agency may refuse to consider an alternative that is not "significantly distinguishable from the alternatives already considered." *Id.* at 708-09 (citing *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004)). When an alternative meets the guideposts, and is not subject to the exceptions, an agency must consider it in detail as part of the NEPA process. *Id.* at 711.

2. Mandatory Methane Flaring Is a Reasonable Alternative.

The West Elk Mine is the largest industrial source of methane in Colorado.[8] Flaring methane, as opposed to venting it directly into the atmosphere as OSM approved, would convert it to carbon dioxide and water, thus effectively reducing its global warming potency up to 87 percent. Leasing SFEIS (Ex. 4) at 59. Flaring in this manner could entail using surface equipment to capture methane the Mine currently vents directly into the atmosphere; transporting the methane via pipe along existing roads and rights-of-way (which the Mine does in the winter with some of its methane to heat other parts of the Mine); and combusting the methane via a central, enclosed flare. Raven Ridge Report (Ex. 10) at 11–12. Flaring technology is readily available – it is in use in other countries at active coal mines and at the inactive coal mine adjacent to West Elk – and in 2016 the State of Colorado concluded that a "properly engineered,

[8] E. Shogren, *Colorado's Biggest Methane Emitter May Get a Discount*, High Country News (Aug. 31, 2017) (HCN Article) (Ex. 13) at 1.

manufactured, and operated flare with redundant safety systems can fully address [safety] concerns." Colorado Energy Office, Methane Market Research Report (Ex. 11) at 13, 14.

OSM violated NEPA by refusing to consider a reasonable mine plan alternative that would require Arch Coal to flare the methane emitted from its drainage wells as a condition of mining publicly-owned coal from beneath publicly-owned lands. Although OSM asserted that methane flaring is "not technically or economically feasible," OSM ROD (Ex. 2) at 22, as described in detail below, that statement is arbitrary because it is not supported, and is in fact contradicted, by the record. Conservation Groups submitted an expert report to the Forest Service, and later to OSM, prepared by Raven Ridge Resources, Inc., which assessed publicly available data from the West Elk Mine and concluded that methane flaring at West Elk is both economically and technically feasible using technology now in use at the nearby inactive Elk Creek Coal Mine. Raven Ridge Report (Ex. 10) at 1. The Forest Service reviewed this report before issuing its decision to reinstate the coal road Exception and concluded that the Report presented a "reasonable way to assess flaring as a mitigation method." Forest Service ROD (Ex. 8) at 35.[9] Based on West Elk's self-reported and publicly-available methane emissions data, Raven Ridge concluded that not only could the Mine safely flare methane using available flaring technology, but the Mine could recoup 100 percent of its investment and make a profit within the first year of flaring operations. Raven Ridge Report (Ex. 10) at 1. EPA has noted that mines in this part of Colorado are particularly well situated to adopt methane flaring technology. EPA stated in comments on the Forest Service's Exception Draft EIS:

[9] OSM acknowledged receiving Conservation Groups' June 1, 2018 letter. OSM ROD (Ex. 2) at 21–24.

> All coal mines in the North Fork Mining Area are well informed about methane capture systems, as they all deploy gas drainage systems to supplement their ventilation fans. In fact, representatives of West Elk Mine and Elk Creek Mines have given presentations describing their gas drainage and use activities at past EPA Coalbed methane Outreach Program (CMOP) events . . . .

EPA Exception Comment Letter (Ex. 12) at 12-7. Thus, contrary to OSM's unsupported conclusion, record evidence shows that a methane flaring alternative is not "too remote, speculative, or impractical" to implement. *Richardson*, 565 F.3d at 708. *See* Part IV.A.3.

Conservation Groups' mandatory methane flaring alternative meets the standard for reasonable alternatives that require consideration under the Tenth Circuit's controlling framework. First, requiring flaring as a condition of mining is well within OSM's statutory mandate. *Richardson*, 565 F.3d at 708. As OSM explained in its ROD, its review of mining plans includes making an assessment of proposed mining and "recommending approval, disapproval, or *approval with condition(s)*." OSM ROD (Ex. 2) at 5 (citing 30 C.F.R. § 746) (emphasis added). Thus, although OSM decided to "recommend[] approval without conditions of the mining plan modification," *id.* at 24, it certainly had the statutory authority to require flaring as a condition of approving Arch's proposed mining plan.

Second, conditioning the mining of publicly-owned coal beneath publicly-owned lands on the permittee taking reasonable steps to mitigate the climate damage the mining imposes on the public is within the stated purpose and need of the project. *Richardson*, 565 F.3d at 708. OSM's ROD states that "the purpose of the Proposed Action is to evaluate the environmental effects of coal mining" and that the "need for this action is to provide [Arch] the opportunity to mine the Federal coal obtained" under the Leases. OSM ROD (Ex. 2) at 6. Here, a mandatory flaring alternative meets these standards by allowing Arch to mine precisely the same amount of

coal as under the preferred alternative, while requiring the company to drastically reduce the direct climate harms caused by its project.

Additionally, neither of the Tenth Circuit's recognized exceptions excuse OSM from considering a mandatory flaring alternative. There is no doubt that the alternative is significantly distinguishable from the proposed action alternative. *Richardson*, 565 F.3d at 708-09. The West Elk Mine is the largest industrial source of methane in Colorado, HCN Article (Ex. 13) at 1, and flaring reduces the global warming influence of methane up to 87 times (on a CO_{2e} basis), Raven Ridge Report (Ex. 10) at 10. This proposal is thus readily distinguishable from both the no action alternative, considered by the Forest Service in the Leasing SFEIS, which would preclude mining altogether, and the preferred alternative, which does not require Arch to take any steps to mitigate the climate harm caused by its proposed mining. NEPA requires agencies to "provide legitimate consideration to alternatives that fall between the obvious extremes," *Dombeck*, 185 F.3d at 1175, and a mandatory flaring alternative does just that. Because the Methane Flaring Alternative is significantly distinguishable from the alternatives analyzed in detail in the SFEIS and is reasonable, OSM's rejection of this alternative was arbitrary.

3. OSM Refused to Consider a Mandatory Flaring Alternative on the Erroneous Assertion that the Forest Service and BLM Determined Flaring Was Not Technically or Economically Feasible.

OSM's ROD asserts that the Leasing SFEIS "sufficiently addressed the alternative of methane flaring" and concluded that OSM "agree[s] with USFS and the BLM's determination that this alternative is not technically or economically feasible (SFEIS Section 2.3.7.5)." OSM

ROD (Ex. 2) at 21-22. Indeed, OSM's entire analysis of the alternative can be found in a single paragraph. *Id.* at 22.[10] But OSM's conclusion is directly contradicted by the record.

First, the Forest Service and BLM *did not* conclude that flaring was either technically or economically infeasible. Instead, in the Leasing FEIS, BLM and the Forest Service expressly made no such finding, stating: "*W*e *do not speculate whether [flaring] is infeasible or uneconomical*." Leasing SFEIS (Ex. 6) at 971 (emphasis added). Indeed, section 2.3.7.5. of the SFEIS, explicitly relied on here by OSM, consists of three paragraphs spanning two pages generally describing a methane flaring alternative. Leasing SFEIS (Ex. 4) at 59–60. Critically, *none of the three paragraphs state that methane flaring is technically or economically infeasible.* In fact, each paragraph tends to indicate the opposite, noting the existence of commercially available flares (paragraph 1), flaring at active coal mines around the globe (paragraph 2), and the Mine Safety and Health Administration's (MSHA) designated process to review coal mine flaring proposals in the U.S. (paragraph 3). *Id.*

Specifically, the first paragraph of the SFEIS relied on by OSM notes that flaring converts methane to carbon dioxide, and thus reduce the global warming potential of the emissions by approximately 87 times on a CO_2e basis. *Id.* at 59.[11] The SFEIS further states that

[10] As noted below in Part IV.A.4, the adequacy of BLM's justification for not analyzing a methane flaring alternative at the leasing stage is currently on appeal at the Tenth Circuit, and rests largely on the validity of BLM's insistence that such an alternative would be considered by MSHA as part of the ventilation plan or OSM as part of the mining plan review challenged here. Thus, even if the Forest Service and BLM's excuses for not evaluating a mandatory flaring alternative in detail at the leasing stage were legally sufficient (which they were not), that would not justify OSM's refusal to consider a flaring alternative at the mining plan stage.

[11] Agencies use "carbon dioxide equivalents" or "CO_2e" to compare the warming influence of different greenhouse gases (GHGs). Converting methane and other non-carbon dioxide GHGs to CO_2e is common practice in NEPA documents and allows for a unified comparison of methane and carbon dioxide from federal projects. Under this method, carbon dioxide is assigned a value

"[p]ortable methane flares are also commercially available," and notes that the mine would need to submit a fire prevention plan to the Forest Service if the Mine used methane flares. *Id.*

The second paragraph notes that while no active U.S. coal mines use methane flares, they are already in use at active coal mines in the United Kingdom, Ukraine, Australia, and South Africa. *Id.* Moreover, the SFEIS states that the "[methane drainage well] assumptions (percent methane content) used in the collection system analysis do not preclude the use of a centralized enclosed flare as a potential mitigation option." *Id.* The third paragraph of the SFEIS analysis OSM cites states that "use of a flare would have to be proposed to and approved by [MSHA]" and notes that MSHA "has a process in place to analyze the safety aspects of any design within an application." *Id.* at 60. Thus, nothing in the SFEIS section to which OSM specifically cites supports OSM's conclusion.

OSM's ROD provides further excuses for failing to consider a flaring alternative, but all are arbitrary. OSM notes that the "mine ventilation plan submitted" to the state by Arch "does not include information on how methane flaring would be technically feasible." OSM ROD (Ex. 2) at 22. But OSM does not suggest that either Arch or MSHA concluded here that methane flaring would be infeasible from a technical standpoint. Nor could it. As Arch stated in a 2009 report to BLM on methane mitigation opportunities, "it may be feasible to design and implement a safe flaring system." Leasing SFEIS (Ex. 5) at 319, 334. Moreover, OSM cannot dodge its responsibility to review "all reasonable alternatives," 40 C.F.R. § 1502.14, as part of the Mining

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of 1, and methane between 28 and 36, based on a 100 year timeframe. Leasing SFEIS (Ex. 4) at 98. When measured over a 20 year period, methane has a global warming effect 87 times that of carbon dioxide. Raven Ridge Report (Ex. 10) at 10.

Plan review based on Arch's self-serving omission of economic feasibility analysis to a *different* agency as part of a ventilation plan process.

Finally, OSM arbitrarily misrepresents BLM's post-SFEIS summary relating to the economic feasibility of methane mitigation. Relying on a BLM summary of an Arch report on the economic feasibility of methane mitigation, OSM ROD (Ex. 2) at 22, OSM accepted Arch's self-serving definition of "economic feasibility," which required the company to make an "internal rate of return" and "avoid sustaining an economic loss" on any flaring or other mitigation. *See* Leasing SFEIS (Ex. 5) at 318, 330 (attaching Arch's 2009 methane economic analysis). Abdicating its responsibility to independently assess reasonable Mining Plan alternatives, OSM predetermined the non-feasibility of any methane mitigation alternative by adopting Arch's arbitrary definition of "economic feasibility." OSM ROD (Ex. 2) at 22; BLM's Post-SFEIS Methane Review (Ex. 14) at 2.

To be clear, OSM's reliance on Arch's skewed definition of "economic feasibility" meant that Arch would have to avoid losing even $1 on any mitigation measure in order for OSM to even consider an alternative that requires flaring a condition of approving the Mining Plan. OSM offers no support in NEPA, the NEPA regulations, or any case law for such a proposition. The 2009 report states that Mountain Coal Company's parent company, Arch Coal, "is a broadly diversified, multi-billion dollar corporation with substantial assets, a proven market track record, and established, long term revenue streams." Leasing SFEIS (Ex. 5) at 330. OSM does not explain how such an important alternative—one designed to protect our planet from the ongoing climate crisis that presents an existential threat to humanity—can properly be considered "impractical" under these circumstances. OSM's failure to *even consider* a reasonable alternative

that would require a company worth billions to simply mitigate *some* of the climate harms caused by mining publicly-owned coal beneath publicly-owned lands renders the decision arbitrary and capricious.

4. OSM's Mine Plan Review Is the Final Stage of Federal Approvals for the West Elk Expansion, and Its Refusal to Consider Methane Flaring at this Stage Completes a Years-Long Shell Game By Federal Agencies to Avoid Evaluating a Methane Flaring Alternative.

OSM's assertion that BLM and the Forest Service concluded methane flaring was infeasible is incorrect, contradicted by the facts in the record, and arbitrary. The records that the Forest Service and BLM developed for the leasing approvals do not conclude that flaring was either technically or economically infeasible. Leasing SFEIS (Ex. 4) at 59–60; Forest Service ROD (Ex. 8) at 35. Instead, the records clearly indicate that each agency, at each step, considered flaring to be more appropriately considered at a later stage of the mine permitting process: the Forest Service pointed to BLM's review at the leasing stage; BLM pointed to OSM's review at the mining plan stage. Having now reached the mining plan stage, OSM points back to BLM and the Forest Service as having addressed the feasibility of methane flaring at the leasing stage. This shell game cannot stand as an adequate explanation for OSM's failure to consider a methane flaring alternative at this last stage of the mine permitting process.

The shell game starts at the Colorado Roadless Rule Exception stage, where the Forest Service stated that it was not appropriate to address flaring at the rulemaking stage in part because "methane flaring is best considered *at the leasing stage* when there is more information on the specific minerals to be developed and the lands that would be impacted by a flaring operation." Colorado Roadless Rule SFEIS (Ex. 9) at E-15 (emphasis added). Moving on to the leasing stage, in its Response to Comments included as part of their Leasing SFEIS, BLM and

the Forest Service stated "[w]e *do not speculate whether [flaring] is infeasible or uneconomical*, leasing is just not the appropriate time to address potential permitting actions that related to in-mine safety for which no *mine plan or ventilation plan* has been prepared." Leasing SFEIS (Ex. 6) at 971 (emphasis added). The agencies further stated that "[t]hese engineering designs would become part of the subsequent State or OSM[] mine permitting processes and MSHA ventilation plan process." Leasing SFEIS (Ex. 4) at 55. Indeed, the Forest Service's leasing ROD states that consideration of flaring "requires detailed engineering and economic considerations that *would occur later*." Forest Service ROD (Ex. 8) at 35 (emphasis added). Now that OSM has reached that later stage, it similarly refused to analyze flaring in detail, claiming that a flaring alternative has already been considered and rejected.

Indeed, the District Court explained that its holding rested in large part on the Forest Service's and BLM's determination that analysis of a methane flaring alternative was more appropriate at a later stage – not, as OSM claimed here – that such an alternative was either technically or economically infeasible.

> The Court finds that the Agencies' determination that, even if methane flaring can be shown to be economically feasible, detailed consideration of whether methane flaring should be used in the West Elk Mine would be more appropriate at a later date because it "requires detailed engineering and economic considerations" available at later stages in the process does not constitute a NEPA violation.

High Country II, 333 F. Supp. 3d at 1126. Because OSM has offered an explanation for its decision not to analyze a flaring alternative "that runs counter to the evidence before the agency," its Mining Plan approval is arbitrary. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

B. OSM Violated NEPA By Failing to Take a Hard Look at Mining's Impacts to Water Resources.

1. NEPA's Hard Look Requirement.

NEPA imposes "action-forcing procedures … requir[ing] that agencies take a hard look at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The purpose of the "hard look" requirement is to ensure that the "agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec.,* 462 U.S. at 97. These "environmental consequences" may be direct, indirect, or cumulative. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8; *see also Hillsdale Envtl. Loss Prevention v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1166 (10th Cir. 2012). Direct effects "are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R § 1508.8(b). "Indirect effects may include … effects on air and water and other natural systems, including ecosystems." *Id.* A cumulative impact is the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7; *see also* 40 C.F.R. § 1508.25.

An agency's hard look examination "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Forest Guardians v. U.S. Fish & Wildlife Serv.,* 611 F.3d 692, 712 (10th Cir. 2010). "Looking to the standards set out by regulation and by statute, assessment of all

'reasonably foreseeable' impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made." *Richardson,* 565 F.3d at 718; *see also* 42 U.S.C. § 4332(2)(C)(v); 40 C.F.R. §§ 1501.2, 1502.22; *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) (holding agencies are to perform hard look NEPA analysis "before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values.").

2. OSM Failed to Analyze Impacts to Perennial Waters in the Project Area.

In its NEPA Adequacy Review Form, OSM disclosed in passing that land subsidence resulting from expansion of the West Elk Mine under the challenged Mining Plan may alter both above- and below-ground hydrology, including by dewatering perennial streams and natural springs. NEPA Adequacy Review Form (Ex. 3) at 6–7. These impacts to perennial water resources may also impact native or other fish species. Once OSM identified that perennial waters were present within the Mine expansion area, and that the SFEIS had misidentified these waters as ephemeral waters not requiring analysis, OSM was required to analyze mining impacts to perennial waters and to consider fish impacts as part of an analysis of mining's impacts to perennial streams. Thus, OSM's failure to consider mining's impacts to newly-identified perennial springs in the expansion area was arbitrary and in violation of NEPA's mandate to consider all direct, indirect, and cumulative effects of a proposed action. 40 C.F.R § 1508.25(c); *see also* 40 C.F.R. § 1508.8 (defining "indirect effects" to include effects on "water" and "natural resources").

The West Elk expansion area sits at the headwaters of the North Fork of the Gunnison River. Leasing SFEIS (Ex. 4) at 130. Largely feeding into Minnesota Creek, which flows into the

North Fork near the Town of Paonia, the drainage area for the Mine expansion is generally located in an area of "little surface water," Leasing SFEIS (Ex. 6) at 750, magnifying the ecological importance of the limited water resources that exist in the expansion area.

With respect to the presence of perennial waters in the expansion area, OSM's conclusions differ from those in the SFEIS. The Leasing SFEIS concluded that "[t]here are no known perennial springs for the lease modification areas," and concluded that impacts to non-perennial springs would be negligible, as "no loss of water is anticipated." Leasing SFEIS (Ex. 4) at 130, 158–59. But a 2016 Annual Hydrology Report that OSM reviewed as part of its NEPA Adequacy Review Form contained new information identifying perennial streams and springs in the Mine expansion area. NEPA Adequacy Review Form (Ex. 3) at 6. OSM disclosed that, based on the new hydrologic information, "it is likely that there *are* perennial springs" associated with South Prong Creek and Horse Creek within the Mine expansion area. *Id*. (emphasis added). Similarly, the new hydrologic information indicated that South Prong and Horse Creeks are perennial and intermittent streams, not ephemeral streams as identified in the SFEIS. *Id*.

OSM's summary findings relating to mining's impacts on water resources also differ from those in the SFEIS. While the Leasing SFEIS concluded that "no discernible loss of water [from springs] is anticipated" from the Mine expansion, Leasing SFEIS (Ex. 4) at 163, OSM found otherwise, explaining that "[p]otentially some of the springs and seeps in the lease modification area could see a reduction or loss of flow due to the proposed longwall mining. . . ." NEPA Adequacy Review Form (Ex. 3) at 7. OSM also noted that "elevated values" for sediment affecting groundwater quality were "possibly related to mining operations." *Id*. at 6. So not only are there perennial springs and streams in the Mine expansion area that were not previously

identified in the Leasing SFEIS, OSM has suggested that these previously-unrecognized resources may be negatively impacted by mining activities and related subsidence. Although OSM disclosed the presence of perennial springs and streams in the Mine expansion area, the agency failed to take the essential next step of analyzing the *impacts* of mining on these water resources.

To comply with NEPA's hard look requirement, OSM must not only disclose that perennial waters are present in the project area, the agency must also analyze whether and how coal mining will affect this newly-identified natural resource. *See* 40 C.F.R § 1500.1(b); *Robertson*, 490 U.S. at 350. To the extent OSM is trying to avoid this analysis on the basis of harmless error by characterizing the new information as "minor edits and clarifications" to be made to the Leasing SFEIS, NEPA Adequacy Review Form (Ex. 3) at 6, OSM's effort fails. First, both NEPA and applicable case law make clear that OSM's failure to follow NEPA's mandatory procedures is not harmless error. The NEPA regulations contain their own version of the "harmless error" rule, limiting it to "trivial violations of these regulations." 40 C.F.R. § 1500.3. NEPA violations excused under this regulation have not involved failure to follow NEPA's procedural requirements, but rather truly "trivial" matters. *See*, *e.g.*, *Ass'ns Working for Aurora's Residential Env't v. Colo. Dep't of Transp.*, 153 F.3d 1122, 1129 (10th Cir. 1998) (excusing NEPA contractor's late filing of disclosure statement). Because informed decisionmaking through analysis of project impacts is one of the "twin aims" at the very heart of NEPA, *Baltimore Gas & Elec. Co*., 462 U.S. at 97, a failure to analyze the impacts of mining on perennial waters cannot constitute a trivial mistake for which OSM should be excused.

Second, OSM has not provided an explanation regarding why the presence of perennial waters in the expansion area that could "see a reduction or loss of flow" due to coal mining is merely a "minor edit" rather than a new circumstance requiring environmental analysis. NEPA Adequacy Review Form (Ex. 3) at 6-7.[12] In a similar situation, the Tenth Circuit rejected a federal agency's determination that potential groundwater contamination from oil and gas wastewater injection was "not a realistic concern" and that any impacts would be "minimal" where the agency failed to adequately support this conclusion. *Richardson*, 565 F.3d at 713. The Court explained that it did not "sit in judgment of the *correctness*" of the evidence indicating a risk of contamination, but concluded that the agency failed to take a hard look at the issue because it did not examine the relevant data and support its conclusion that the risk was minimal. *Id*. at 715. *See also Nat'l Audubon Soc'y v. Dep't of the Navy,* 422 F.3d 174 (4th Cir. 2005) (held agency failed to take a hard look where its "conclusion that impacts on [migratory birds] would be 'minor'" was "difficult to reconcile with [the agency's] failure to conduct more detailed analysis on both the relevant species and the unique properties of the habitat" affected by the agency action). Therefore, OSM's disclosure of perennial waters in the expansion area is not sufficient to comply with NEPA. Now that OSM has identified a resource that may be affected

[12] OSM's failure to analyze potential impacts on perennial springs may also have implications for native fish species. Based on its assumption that there were no perennial springs or streams at the mine expansion area, the Forest Service did not assess impacts to fish in the Leasing SFEIS (Ex. 4) at 218, 219 ("As there are only intermittent streams in the analysis area there are no [Management Indicator Species] fish with suitable habitat present and therefore will not be discussed."). But because OSM has found that the Forest Service was mistaken in its characterization of water sources in the expansion area, OSM cannot rely on the Leasing SFEIS to meet its obligation to take a hard look at mining's impacts to fish because the SFEIS did *not* perform this analysis.

by the Mining Plan, and that was not analyzed in the SFEIS, the agency must analyze mining's impacts to that resource.

Moreover, where a federal agency adopts an EA or EIS under NEPA, the agency is required to provide "appropriate supporting documentation [] that [the adopted EA or EIS] adequately assesses the environmental effects of the proposed action and reasonable alternatives." 43 C.F.R. § 46.120(c). Such supporting documentation "must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects." *Id*. OSM's cursory conclusion – that the presence of newly-identified perennial springs and streams that may be dewatered by mining activities constitutes only a "minor edit" – lacks support in the record. NEPA Adequacy Review Form (Ex. 3) at 6–7. OSM violated NEPA by failing to take a hard look at the impacts to perennial waters and to adequately document its conclusions regarding such impacts.

II. CONSERVATION GROUPS ARE LIKELY TO SUFFER IRREPARABLE HARM IF AN INJUNCTION IS NOT GRANTED.

A movant satisfies the irreparable harm requirement where there is a "significant risk" of irreparable injury. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (movant must show irreparable harm is "likely"). The Supreme Court has held that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *Catron Cnty. Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1440 (10th Cir. 1996) ("An environmental injury usually is of an enduring or permanent nature, seldom

remedied by money damages and generally considered irreparable."). Environmental harm "is irreparable in the sense that it cannot adequately be remedied by nonequitable forms of relief." *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002), *overruled on other grounds by Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016).

Conservation Groups will suffer at least two types of irreparable harm if the Court does not preliminarily enjoin activities associated with Mining Plan implementation. First, Conservation Groups will suffer environmental harm from construction of new roads and methane drainage well pads, and mining coal through the forests of the Sunset Roadless Area during the pendency of this litigation. No monetary remedy can repair the trees, the area's wild nature, or lands collapsed by mining-induced subsidence. Second, if these activities occur in the absence of the environmental review required by NEPA, the statute's purpose of requiring agencies to "look before they leap" will be undermined, unleashing a "bureaucratic steam roller" that makes it less likely that Conservation Groups will obtain any meaningful on-the-ground relief if they prevail on the merits. Thus, preliminary relief is necessary.

A. Construction and Mining Activities Under the Mining Plan Will Irreparably Harm Conservation Groups' Use and Enjoyment of the Sunset Roadless Area.

Here, Conservation Groups will be harmed by construction of new roads and methane drainage wells, and the mining of 17.6 million tons of coal at the West Elk Mine carried out pursuant to the Mining Plan. Counsel for Arch has indicated that six well-pads for methane drainage wells and nearly a mile of new roads (4,600 feet) are planned for construction this year, beginning as soon as the week of July 1. Declaration of Daniel Timmons (Timmons Dec.) (Ex. 19) at ¶ 6. During the course of litigation, up to 8.4 miles of new roads and 43 methane drainage

wells could be constructed under the Mining Plan, largely within the Sunset Roadless Area. OSM ROD (Ex. 2) at 21.

This harm is imminent. On June 25, staff from the Paonia Ranger District informed counsel for Conservation Groups that Arch is currently onsite undertaking post-winter reconstruction activities on existing roads, and that they expect Arch to begin road-building activities "within a couple weeks." Timmons Dec. (Ex. 19) at ¶ 2. On June 28, counsel for Arch confirmed that Arch expects to begin road-building, well-pad clearing, and well drilling activities under the Mining Plan as early as this week. *Id*. at ¶ 4. Moreover, Arch's counsel stated that some coal mining may already be occurring under the Mining Plan in limited areas where the mine expansion area could be reached from existing underground workings without requiring additional surface disturbance. *Id*. In discussions with Conservation Groups' counsel, Arch has rejected requests to defer implementation of activities under the Mining Plan. *Id.* The damage this project will cause to designated roadless areas would be swift, long-lasting, and irreparable.

Courts have found irreparable harm from road construction in forests, and irreparable harm to public lands from mineral extraction—the very harms threatened by implementation of the Mining Plan challenged here. *See*, *e.g.*, *Colorado Wild, Inc. v. U.S. Forest Service* (*Colo. Wild II*), 523 F. Supp. 2d 1213, 1220-21 & n.4 (D. Colo. 2007) (holding that construction of even one 250-foot long access road through forest lands would cause irreparable harm to the environment.).

Arch's planned construction activities will be highly disruptive to the Sunset Roadless Area and the forest and habitat it supports. If a preliminary injunction is not issued, Arch will blade, fill, and level miles of new roads over the course of this litigation, including the

installation of culverts for any stream crossings. OSM ROD (Ex. 2) at 22; Leasing SFEIS (Ex. 4) at 160. Dozens of "[d]rill sites will be leveled by grading," meaning that terrain will be leveled, and the existing contour will be altered, as hillsides may be gouged out. Leasing SFEIS (Ex. 4) at 45. OSM adopted the Forest Service's acknowledgment that these roads and well pads "will result in complete loss of existing vegetation community within the footprint of same," an impact that will last for years. *Id*. at 175. Activities associated with the methane drainage well pads include: constructing large slurry pits, drilling the well, and topsoil removal and stockpiling. *Id.* at 41–47. Construction will cause traffic noise from drilling rig transport, fuel trucks, water trucks, a pipe truck, flatbed trailer, air compressors and/or boosters, a supply trailer, and four-wheel-drive pick-up trucks. *Id.* at 45.

These ground-disturbing activities will have immediate and long-term impacts on the Forest and its wildlife. Construction in areas of mature aspen stands will ultimately result in a loss of about 40 acres of aspen and 29 acres of oak. *Id*. These trees will take decades to grow back, and the Leasing SFEIS admits that this disturbance will be "long-term." *Id*. at 176. The fact that the forest ecosystem eventually may regrow after reclamation does not eliminate the likelihood of irreparable harm. *See San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Serv.*, 657 F. Supp. 2d 1233, 1240 (D. Colo. 2009).

Road and well pad construction will have long-term impacts on wildlife. OSM acknowledges that the construction of "roads and well pads" "will result in a complete loss of habitat within the footprint [of these wells and pads] … for the life of the project." Leasing SFEIS (Ex. 4) at 190, 198; *Id*. (Ex. 6) at 1003 (noting that the wildlife analysis sections of the supplemental draft EIS "recognized that roads and well pads would result in complete loss of

habitat within the footprint for many of the species analyzed"). OSM also recognize this habitat loss as a "long-term change" to the forest ecosystem. Leasing SFEIS (Ex. 6) at 1003. Construction will destroy habitat for birds, including northern goshawk and purple martin, both of whom use mature aspen forests that will be bulldozed for pads and roads. Leasing SFEIS (Ex. 4) at 202-03, 213-14. It will also change suitable habitat for the threatened lynx into unsuitable habitat. *Id.* at 190 (recognizing that "[l]ong-term direct effects" would result from "changes in vegetation, which provides denning and foraging habitat").

Courts have recognized the destruction of wildlife habitat and other environmental values constitutes irreparable harm. *See, e.g., Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 323 (D.C. Cir. 1987) (upholding district court's grant of preliminary injunction, which "stressed that any mining or leasing could cause irreparable injury by permanently destroying wildlife habitat, air and water quality, natural beauty, and other environmental and aesthetic values"). By adopting the Leasing SFEIS without conducting any additional NEPA analysis, OSM admits that these impacts to wildlife habitat will be "irretrievable," and that the destroyed areas would not recover to their pre-disturbance character for "several decades." Leasing SFEIS (Ex. 4) at 289.

Road and well pad construction will also harm Conservation Groups' members who seek out a remote, natural recreation experience. The Tenth Circuit has recognized that irreparable injury can result when a proposed action harms recreational users by "disrupt[ing] the natural setting and feeling" of the affected area. *Davis*, 302 F.3d at 1115-16 (quotation omitted). Construction, vegetation eradication, habitat destruction, and landscape and scenery alteration caused by implementing the Mining Plan will occur within what the Forest Service has identified for over 30 years as a roadless area—that is, an undisturbed area free of roads, free of

development, and largely natural in appearance. Leasing SFEIS (Ex. 4) at 244. While exploration activities over the past year have impacted the pristine nature of the Sunset Roadless Area, the construction and mining activities authorized under the Mining Plan would permanently alter this relatively-untouched landscape. The Leasing SFEIS acknowledges that road and pad construction "could diminish natural-appearing landscapes," an impact that could persist for up to a quarter-century. *Id.* at 253; *see also id.* at 254 (roads and pads "could diminish the recreational opportunities for some users"). Road and well pad construction for coal mining would degrade the existing "semi-primitive recreational experience … across the entire 1,700 acre lease modification area until roads are rehabilitated." *Id.* at 256.

The record clearly shows that road and well pad construction will result in irreparable harm to lands, wildlife, and the recreational experience.[13] Conservation Groups' members attest to how this irreparable harm impacts their recreational interests in the Project area including diminished enjoyment of the naturalness and undeveloped character of the area; diminished enjoyment of hiking, camping, and other recreational endeavors; and diminished enjoyment of the views of the area, both within and outside of the Sunset Roadless Area. Nichols Dec. (Ex. 20)

[13] *See also San Luis Valley*, 657 F. Supp. 2d at 1240 (finding irreparable harm from drilling two exploratory oil and gas wells disturbing 14 acres of public land because such development would threaten, *inter alia*, wildlife habitat and a "large expanse of undeveloped land with a significant 'sense of place' and quiet," and because plaintiffs "have interests in the water, wildlife, air, solitude and quiet, and natural beauty [the area] provides"); *Anglers of the Au Sable v. U.S. Forest Serv.*, 402 F. Supp. 2d 826, 829-30, 834, 837-38 (E.D. Mich. 2005) (enjoining site preparation involving "clearing of a 3.5-acre well site, logging and clearing of the land, and widening the road . . . about 200 feet from [a] semi-primitive, non-motorized area" because the activities would disturb the peace and quiet of the tract; harm old-growth forests; cause wildlife disturbance; damage "the cleared area and surrounding forest," "disrupt[] natural regeneration systems," and impact recreation); *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006) (finding irreparable harm warranting injunction where inundating lands for a proposed mine "will adversely affect the environment by destroying trees and other vegetation").

at ¶¶ 15–17, 22–30; Melton Dec. (Ex. 21) at ¶¶ 17–20, 25, 27, 31–32, 34–36; Reed Dec. (Ex. 22) at ¶¶ 9-10, 13; Hart Dec. (Ex. 23) at ¶¶ 8–11, 13–14, 17–18, 20–22. As the Tenth Circuit has recognized, these harms cannot be rectified with money. *Davis*, 302 F.3d at 1115-16 (finding irreparable injury when the proposed action would "disrupt the natural setting and feeling" of the affected area); *see also San Luis Valley*, 657 F. Supp. at 1240. Neither can these harms be prevented absent an injunction preserving the status quo and the Sunset Roadless Area. *See, e.g., Neighbors of Cuddy Mtn. v. U.S. Forest Serv.*, 137 F.3d 1372, 1382 (9th Cir. 1998).

In addition to the harms associated with road-building and well construction, coal mining under the Mining Plan will irreparably harm Conservation Groups and their members. The removal of coal from the underground mine will have significant impacts on the land surface enjoyed by members of the Conservation Groups. Nichols Dec. (Ex. 20) at ¶¶ 15–14, 22–30; Melton Dec. (Ex. 22) at ¶¶ 17–20, 25, 27, 31–32, 34–36; Reed Dec. (Ex. 22) at ¶¶ 9-10, 13; Hart Dec. (Ex. 23) at ¶¶ 8–11, 13–14, 17–18, 20–22. Due to coal mining on the expansion area, over 1,000 acres of land, largely within the Sunset Roadless Area, are expected to subside or collapse up to 8 feet, permanently lowering the land surface and potentially causing large cracks up to 50 feet deep, slope failures, landslides, and rock-falls. Leasing SFEIS (Ex. 4) at 86–88, 132. This subsidence may also lead to the permanent dewatering of natural springs and the rerouting and dewatering of headwater streams in the area. NEPA Adequacy Review Form (Ex. 3) at 6–7. This could further eliminate habitat utilized by native or other fish species, a potential impact that OSM has never assessed. North Fork Watershed Plan Update (Ex. 15) at 3-7.

Mining 17.6 millions tons of coal from the West Elk Mine will also release significant amounts of greenhouse gases, including direct methane emissions with the equivalent global

warming potential of nearly 3 million tons of carbon dioxide. Leasing SFEIS (Ex. 4) at 111. The combustion of the coal extracted under the Mining Plan will contribute some 45 million tons of carbon dioxide to the atmosphere. *Id*. at 66 tbl. 2-6 (calculated by subtracting combustion emissions of No Action Alternative from combustion emissions from selected Alternative 3). Once these greenhouse gases are emitted, they will remain in the atmosphere for decades, exacerbating the climate crisis that is projected to increase temperatures, contribute to more serious wildfires, alter hydrology, and exacerbate extreme floods and droughts, in Colorado and beyond. *Id*. at 125–27. Such long-term impacts constitute irreparable harm that will impair the Conservation Groups' members enjoyment of the recreational and aesthetic values of the Sunset Roadless Area and other public lands throughout Colorado. *See State v. Bureau of Land Mgmt*., 286 F. Supp. 3d 1054, 1058 (N.D. Cal. 2018) (finding irreparable harm from "exacerbated climate impacts," *inter alia*, from suspension of federal methane waste regulation).

The record establishes that road and well pad construction and coal mining under the Mining Plan will undoubtedly result in irreparable harm to lands, wildlife, climate, and the recreational experience, and further threaten to permanently dewater natural springs that may harbor native fish. These irreparable harms weigh in favor of this Court granting the requested preliminary injunction.

B. Implementation of the Mining Plan Absent NEPA Compliance Threatens Irreparable Harm.

Conservation Groups also face irreparable harm if the Mining Plan is implemented absent compliance with NEPA. NEPA is a procedural statute that requires agencies to undertake a comprehensive analysis of environmental impacts *before* taking action that may impact the environment. By requiring federal agencies to consider the impacts of their actions prior to

taking them, *see* 42 U.S.C. §§ 4321, 4332, that is, to look before they leap, NEPA procedures "ensure[] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349; *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989) (requiring NEPA compliance beforehand, so agency does not "act on incomplete information, only to regret its decision after it is too late to correct"). Agencies must therefore comply with NEPA at the earliest possible time, "before an irretrievable commitment of resources is made." *Richardson*, 565 F.3d at 718 (quotation omitted); *see id.* at 703 ("NEPA requires federal agencies to pause before committing resources to a project.").

As a result, courts find irreparable harm can result from agency actions going forward where courts have before them credible claims of NEPA violations. Agency action prior to NEPA compliance unleashes "a bureaucratic steam roller," making it difficult to alter the outcome of analyses retroactively. *Colo. Wild II*, 523 F. Supp. 2d at 1221 (quoting *Davis*, 302 F.3d at 1115 & n. 7.); *see also San Luis Valley*, 657 F. Supp. 2d at 1241-42 ("[t]he Conservation Groups' procedural interest in a proper NEPA analysis is likely to be irreparably harmed if [the exploratory drilling] were permitted to go forward with the very actions that threaten the harm NEPA is intended to prevent, including uninformed decisionmaking."); *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (holding the "difficulty of stopping a bureaucratic steam roller, once started," to be a "perfectly proper factor" to consider in evaluating preliminary injunction request because NEPA designed to prevent "real environmental harm" that could occur through "inadequate foresight and deliberation"). Unless NEPA compliance occurs before implementation, the public "will have been deprived of the opportunity to participate in [the]

NEPA process at a time when such participation … is calculated to matter." *Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1189 (N.D. Cal. 2009).

If Conservation Groups ultimately prevail on the merits, NEPA compliance *after* bulldozing for road and drill pad construction, installation of methane drainage wells, and mining activities have begun will make an unbiased environmental analysis of the decisions leading to the Mining Plan virtually impossible due to the bureaucratic momentum for a project already underway. Conservation Groups' members attest to the irreparable harm that they and their organizations will suffer from implementation of the Mining Plan absent the thorough environmental analysis required by NEPA. *See, e.g.*, Nichols Dec. (Ex. 20) at ¶¶ 15-17, 22-32; Melton Dec. (Ex. 21) at ¶¶ 2–3, 17–20, 25, 27, 31–32, 34–36; Reed Dec. (Ex. 22) at ¶¶ 9-10, 13; Hart Dec. (Ex. 23) at ¶¶ 3, 8–11, 13–14, 17–18, 20–22. Conservation Groups thus face irreparable harm from the inability to participate effectively in agency environmental evaluations—as well as irreparable environmental harm—if this Court allows Arch to implement the Mining Plan while litigation of the merits of Conservation Groups' allegations of NEPA violations proceeds.

III. THE BALANCE OF HARMS WEIGHS IN FAVOR OF GRANTING AN INJUNCTION.

Permanent harm to the environment and Conservation Groups' legal rights from OSM's Mining Plan approval outweigh temporary, conditional, and purely economic harm to Arch if implementation of the Mining Plan is provisionally suspended. As the Tenth Circuit has consistently recognized, "financial concerns alone generally do not outweigh environmental harm." *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1087 (10th Cir. 2004). *See also Amoco Prod. Co*., 480 U.S. at 545 (finding where environmental harm "is sufficiently likely . . .

the balance of the harms will usually favor the issuance of an injunction to protect the environment); *Colo. Wild II*, 523 F. Supp. 2d at 1222 (finding "economic harm . . . is not irreparable and does not outweigh the serious risk that irreparable environmental harm will result" if the project were allowed to proceed.). This case is no exception.[14]

Here, the speculative nature of Arch Coal's financial harm demonstrates that the balance of harms tips decidedly in Conservation Groups' favor. It is unlikely a brief stay of activities under the Mining Plan would cause economic harm to Arch Coal's ongoing or planned mining because the Mining Plan will not lead to increased coal production at West Elk, but will merely extend the life of the mine. Leasing SFEIS (Ex. 4) at 111. And even without the reserves to be accessed under the Mining Plan, Arch can keep mining coal at the West Elk Mine based on its current reserves for at least six more years, or until about 2025. *Id*. at 20. Arch Coal thus also has many years to find other coal reserves to mine. Further, the methane drainage wells to be constructed in 2019 are not immediately necessary for continued mining. According to counsel for Arch, mining is not expected to reach areas underlying these methane drainage wells until sometime in 2020. Timmons Dec. (Ex. 19) ¶ 4. Delaying Arch's planned road-building and methane drainage wells under the Mining Plan by a few months to permit orderly briefing of this case is thus unlikely to impact Arch's bottom line. Even if it did, any harm Arch Coal may suffer would likely be purely financial, and "financial concerns alone generally do not outweigh environmental harm." *Mineta*, 373 F.3d at 1087.

[14] This is not a case where Arch Coal has already started substantial mining activities under the Mining Plan. An injunction will simply preserve the status quo on the ground. The fact that Conservation Groups do not seek to halt a project already begun means there are no "equities in favor of completion of a partially-completed project." *Davis*, 302 F.3d at 1116.

Because Conservation Groups face irreparable environmental harm from imminent road and well pad construction, and future irreparable harm from coal mining activities that may begin in the Sunset Roadless Area prior to resolution of this litigation, and Federal Defendants and Arch Coal face only, at most, some speculative and reparable monetary harm, the balance of harms tips sharply in Conservation Groups' favor. A preliminary injunction would simply preserve the parties' relative positions while the parties and this Court have more time to address this case.

IV. THE PUBLIC INTEREST FAVORS GRANTING A PRELIMINARY INJUNCTION.

The public interest is strongly served through protection of public lands and the environment, as well as by ensuring OSM's compliance with federal law. The Tenth Circuit has held that "there is an overriding public interest in preservation of the undeveloped character of the area recognized by [NEPA]." *Wyo. Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1250 (10th Cir. 1973) *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) (en banc); *Colo. Wild v. U.S. Forest Serv.* (*Colo. Wild I*), 299 F. Supp. 2d 1184, 1190-91 (D. Colo. 2004) ("There is an overriding public interest in the preservation of biological integrity and the undeveloped character of the Project area that outweighs public or private economic loss in this case."). Other courts have similarly found a public interest in "preserving nature." *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) ("We recognize the well-established public interest in preserving

nature and avoiding irreparable environmental injury.") (quotation omitted).[15] A preliminary injunction in this case would serve the public interest by preserving the forests, habitat, scenery, and the recreation and environmental values of the lands owned by all Americans pending a ruling on the merits of this case.

The public interest is also strongly served by limiting greenhouse gas emissions to avoid the worst consequences of climate change. *See e.g., W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) (in public interest analysis, the "district court properly took into account the federal government's stated goal of increasing the supply of renewable energy and addressing the threat posed by climate change"); *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1115 (E.D. Cal. 2013) (holding that injunction that would have negatively impacted the Forest Service's ability to address "the intertwined threats posed by climate change, drought and bark beetles" would have been "contrary to the public interest"). Climate change threatens to cause widespread temperature increases, exacerbation of extreme weather events such as floods and droughts, alteration of natural streamflow patterns and disruption of public water supplies, increased wildfire risk, ocean acidification, disruption of food production, and other impacts. Leasing SFEIS (Ex. 4) at 124–27. With the causal link between greenhouse gas emissions, including methane and carbon dioxide, scientifically well-established, *id*. at 98-99, 103-05, limiting greenhouse gas emissions as needed to preserve a stable climate is undoubtedly in the public interest.

[15] In *Alliance for the Wild Rockies*, the Ninth Circuit concluded that the public interest in "preserving nature" outweighed the public interest in creating temporary jobs for the challenged project. 632 F.3d at 1138-39.

The public also has an interest in ensuring that federal agencies comply with laws designed to protect the environment, public lands, and public participation. As one court in this district has held, "[t]he public has an undeniable interest in the [federal agency's] compliance with NEPA's environmental review requirements and in the informed decision-making that NEPA is designed to promote." *Colo. Wild II*, 523 F. Supp. 2d at 1223. The Tenth Circuit has agreed. *Davis*, 302 F.3d at 1116 (holding that the public interest in completing a highway project must yield to the obligation to construct the project in compliance with environmental laws); *see also Nat'l Ski Areas Ass'n, Inc. v. U.S. Forest Serv.*, 910 F. Supp. 2d 1269, 1290 (D. Colo. 2012) ("there is public interest in ensuring that federal agencies adhere to" federal laws, including those that guarantee public involvement).

Defendants may argue that development of the nation's mineral resources is also in the public interest. But any interest in development of coal under the Mining Plan must be weighed against the public interest in vibrant public lands, informed decisionmaking, and a stable climate. Courts have recognized that our need for energy does not trump environmental considerations. In a case involving natural gas development in neighboring Wyoming, a court held:

> The Court is cognizant of the importance of mineral development to the economy of the State of Wyoming. Nevertheless, mineral resources should be developed responsibly, keeping in mind those other values that are so important to the people of Wyoming, such as preservation of Wyoming's unique natural heritage and lifestyle. The purpose of NEPA ... is to require agencies ... to take notice of these values as an integral part of the decisionmaking process.

Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1260 (D. Wyo. 2005). Here, the public interest in lawful decisionmaking, the natural heritage of the forests and wildlife within the Sunset Roadless Area, and an intact climate system weigh heavily in favor of an injunction.

V. THE COURT SHOULD IMPOSE NO BOND OR A NOMINAL ONE.

Finally, if this Court enters a preliminary injunction, Conservation Groups respectfully request that the Court waive the bond requirement or, alternatively, impose no bond or a nominal bond under the public interest exception to Rule 65(c).

Although Rule 65(c) requires a security to be posted in conjunction with a preliminary injunction, "the trial judge has wide discretion in the matter of requiring security" and under some circumstances, "no bond is necessary." *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964). The Tenth Circuit and its district courts routinely hold that a substantial bond is not required from litigants who, like Conservation Groups here, seek to enforce environmental laws to protect the public interest. This specifically includes enforcement of NEPA: "[W]here a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered." *Davis*, 302 F.3d at 1126 (requiring only nominal bond).[16] *See also Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012) ("It is well established that in public interest environmental cases the plaintiff need not post bonds because of the potential chilling effect on litigation to protect the environment and the public interest. Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond.") (citing *California ex rel. Van de Kamp v. Tahoe Regional Planning Agency,* 766 F.2d 1319 (9th Cir.1985) (no bond required)).

[16] *See Kansas v. Adams*, 705 F.2d 1267, 1269 (10th Cir. 1983) ("only nominal bonds … are imposed in NEPA cases"); *San Luis Valley Ecosystem Council*, 657 F. Supp. 2d at 1248 (declining to impose bond because "the imposition of substantial security would impede Plaintiff's access to judicial review"); *Colo. Wild II*, 523 F. Supp. 2d at 1231 (no substantial bond required where its "[i]mposition … would preclude [p]laintiffs' request for review of [an agency's] … decision and frustrate the policies underlying NEPA and the APA").

Here, Conservation Groups are five not-for-profit organizations seeking to protect the environment and vindicate the public interest. They do so by enforcing NEPA through the Administrative Procedure Act's judicial review provisions, as intended by Congress. They have no pecuniary interest in the case's outcome.[17] A bond order that exposes the Conservation Groups to substantial financial liability would effectively preclude their ability to enforce NEPA.[18] None of the Conservation Groups can afford to post a substantial bond in every case where they seek temporary injunctive relief.[19] If bringing a citizen suit to enforce environmental laws exposes these non-profit organizations to substantial liability, they could be forced to curtail their efforts to enforce environmental laws, which would be contrary to the public interest and congressional intent in enacting these statutes.[20]

CONCLUSION

Because they satisfy the test for a preliminary injunction, Conservation Groups respectfully request an order enjoining any further implementation of the West Elk Mining Plan. This preliminary relief will maintain the status quo until this Court rules on the merits of the case.

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[17] Declaration of John Horning (Horning Dec.) (Ex. 25) at ¶¶ 8-9; Declaration of Patrick Gallagher (Gallagher Dec.) (Ex. 26) at ¶ 7; Declaration of Kieran Suckling (Suckling Dec.) (Ex. 27) at ¶ 7; Declaration of Brett Henderson (Henderson Dec.) (Ex. 28) at ¶ 6.

[18] Horning Dec. (Ex. 25) at ¶¶ 10-11; Gallagher Dec. (Ex. 26) at ¶¶ 9-10; Suckling Dec. (Ex. 27) at ¶¶ 5, 9, 10; Henderson Dec. (Ex. 28) at ¶¶ 7-9; Declaration of Will Roush (Roush Dec.) (Ex. 29) at ¶¶ 4-6.

[19] Horning Dec. (Ex. 25) at ¶ 11; Gallagher Dec. (Ex. 26) at ¶¶ 9-10; Suckling Dec. (Ex. 27) at ¶¶ 5, 9, 10; Henderson Dec. (Ex. 28) at ¶¶ 7-9; Declaration of Will Roush (Roush Dec.) (Ex. 29) at ¶¶ 4-6.

[20] Horning Dec. (Ex. 25) at ¶¶ 10-11; Gallagher Dec. (Ex. 26) at ¶¶ 10-11; Suckling Dec. (Ex. 27) at ¶¶ 5, 10, 11; Henderson Dec. (Ex. 28) at ¶¶ 7-9; Roush Dec. (Ex. 29) at ¶¶ 4-6.

Respectfully submitted on this 2nd day of July 2019,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION was served on all counsel of record through the Court's ECF system on this 2nd day of July 2019.

/s/ Daniel Timmons