IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

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

Federal Defendants,

and

MOUNTAIN COAL COMPANY, LLC,

Defendant-Intervenor.

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' OPENING BRIEF ON THE MERITS

Plaintiffs in this National Environmental Policy Act ("NEPA") case seek to prevent coal mining operations on National Forest System ("NFS") lands located in the resource-rich North Fork Valley of western Colorado. They challenge certain 2016 and 2017 decisions of the Department of Agriculture ("USDA"), the Bureau of Land Management ("BLM"), and the Forest Service ("Service"), which allowed road building on less than 20,000 acres within Colorado's 4.2 million acres of roadless NFS lands and which authorized coal leasing and exploration on two tracts totaling 1,720 acres. Those tracts, containing an estimated 10 million tons of low-sulfur coal, adjoin the existing West Elk Mine, which is located in the Grand Mesa, Uncompahgre, and Gunnison National Forests (collectively, "the Forest").

The supplemental final environmental impact statements (SFEISs) which supported these decisions were undertaken for the limited purpose of curing specific deficiencies in the agencies' prior NEPA analyses for the same project. The earlier project had been set aside by this Court in 2014, *High Country Conservation Advocates v. United States Forest Service* ("*HCCA 1*"), 52 F. Supp. 3d 1174 (D. Colo. June 27, 2014), and since then the agencies have expended considerable effort and resources in addressing the Court's specific findings of error. Despite the appropriately narrow focus of the SFEISs, however, Plaintiffs essentially seek to reopen the prior litigation, advancing five meritless claims, three of which challenge matters that either could have been raised in the prior litigation but were not, or that were never brought to the agencies' attention at the proper time in the NEPA proceedings. In addition to lacking merit, these three claims are either waived as a matter of law or barred by the doctrine of res judicata.

In the prior action, the Court directed its remedy ruling at four actions. It vacated three in their entirety: specifically, BLM's 2012 decision approving lease modifications for the two tracts; the Service's 2012 consent thereto; and BLM's 2013 decision approving a coal

exploration plan. *See High Country Conservation Advocates et al. v. United States Forest Service* ("*HCCA 2*"), 67 F. Supp. 3d 1262 (D. Colo. Sept. 11, 2014). In addition, the Court vacated in part the USDA's Colorado Roadless Rule ("CRR"), 36 C.F.R. § 294.43(c)(1)(ix), in particular, the portion referred to as the "North Fork Coal Mining Area Exception" or simply the Exception. *HCCA 2*, 67 F. Supp. 3d at 1262.

Notably the CRR and the Exception were the result of a seven-year public process aimed at conserving roadless characteristics in the Forest to the degree possible, while addressing variously-motivated concerns of the State of Colorado, members of the public, business interests, and Federal agencies. Among those concerns was the desire not to foreclose what are believed to be valuable mining opportunities in the North Fork Valley. *See Roadless Area Conservation; National Forest System Lands in Colorado*, 81 Fed. Reg. 91,811, 91,816 (December 19, 2016); CRR2-000371 to -000373. Plaintiffs actively participated in this formal rulemaking effort and the agency embraced a number of their concerns, including most significantly their championing of important elk habitat in the Currant Creek drainage, which to this day remains protected from road-building. Plaintiffs offered this conservation objective (not the newly-minted objectives in their opening brief) in 2011, as the centerpiece of their comments during the formal comment period for the draft EIS for the CRR. This was the "time appropriate" for such input "under [the agency's] practice." *United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 38 (1952).

Despite this success, Plaintiffs seeks once again to upend the agency's thoughtful compromise between conservation and development. In December 2017, they brought suit and moved to temporarily enjoin exploration activities, ECF No. 8, but the Court denied the motion. ECF No. 26. Intervenor Mountain Coal Company, LLC ("MCC") then commenced the first of two exploration phases, involving construction of roads and well pads on eight acres. Because a

second-phase of exploration is expected in June, 2018, the parties agreed to, and the Court approved, expedited merits briefing, in hopes of avoiding additional injunctive proceedings.

In sum, the erroneous narrative reflected in Plaintiffs' brief ignores the fact that the new SFEISs are, by design, aimed at correcting the specific deficiencies identified in *HCCA 1*. *See, e.g.*, CRR2-0000009 (describing the Exception SFEIS as a "limited-scope document"); FSLeasingII-0000114 (describing the Leasing SFEIS's purpose). This targeted approach is appropriate in a supplemental EIS. The agencies are not required to begin the NEPA process anew, or consider matters neither raised at an appropriate time nor disputed in *HCCA 1*.

FACTUAL AND PROCEDURAL BACKGROUND

MCC is the operator of the West Elk Mine. Soon after entry of the remedy Order, MCC re-applied for the same two lease modifications at issue in *HCCA 1*, with minor boundary adjustments, to allow expansion of mining into these contiguous areas. FSLeasingII-0027395-0027399, 0027408-0027409. Thereafter, MCC resubmitted its exploration plan. FSLeasingII-0018760-0018761. MCC's objective is to develop the compliant and super-compliant coal reserves (i.e., high-quality coal characterized by low sulfur dioxide emissions, high BTU, low-ash, and low-moisture content) and ensure that these resources are not bypassed. BLM shares this concern, as it routinely endeavors to avoid bypass.[1] Although the tracts at issue in this case lie within NFS lands, BLM administers the mineral estate under the MLA.

In response to the applications, the Service, in cooperation with BLM and other agencies, prepared the August 2017 Leasing SFEIS to support possible re-issuance of the lease modifications. In accord with 40 CFR § 1502.21, the Leasing SFEIS tiered to and incorporated

[1] *See* 43 C.F.R. § 3480.0-5(a)(21) ("Maximum Economic Recovery"); 43 C.F.R. § 3432.2 (allowing modification of proposed lease boundaries to avoid bypass); 43 C.F.R. § 3400.0-5(d) (definition of bypass coal); *see also* FSLeasingII-0000135 (discussing avoidance of bypass).

the Exception SFEIS discussed below. *See* FSLeasingII-0000147. The Leasing SFEIS (FSLeasingII-0000108-0001151) addressed the deficiencies identified in *HCCA 1*, and provided a thorough qualitative analysis of the climate impacts associated with greenhouse gas ("GHG") emissions, within the context of the lease modifications, and it quantified GHG emissions.[2] In addition, the SFEIS considered impacts of the exploration plan on recreation, a deficiency also noted in *HCCA 1*. *See* FSLeasingII-0000365-00000366. On December 11, 2017, the Service, as the surface managing agency, issued a record of decision ("ROD"), FSLeasingII-0000045-0000107, consenting to lease issuance, should BLM approve same. FSLeasingII-0000052-0000053 (discussing consent). On December 15, 2017, BLM approved the lease modifications in its own ROD, which also approved an "on-lease exploration plan." BLM000001.[3]

As noted, the Court's remedy order had not only set aside the leasing and consent decision, and approval of the exploration plan, it had also vacated in part the Exception to the CRR. *See* 36 C.F.R. § 294.43(c)(1)(ix). Accordingly, as the Forest Service and BLM were engaged in NEPA analysis for the leasing and consent decisions and approval of the exploration plan, the USDA set out to perform the NEPA analysis necessary to support reinstatement of the vacated Exception. This effort led to issuance of the Exception SFEIS. CRR2-0000001-0000356. USDA published the reinstated programmatic rule in the Federal Register in December 2016 and it became effective April 17, 2017. *See* 36 C.F.R. § 294.43; 81 Fed. Reg. at 91,811. The Exception SFEIS included a thorough discussion of the impacts of GHG emissions

[2] *See* FSLeasingII-0000227 to -0000228, 0000232, FSLeasingII-0000236 to -0000241, FSLeasingII0000251 to -0000259, FSLeasingII 0000280, FSLeasingII-0000294 to -0000296, FSLeasingII-0000297-0000300, FSLeasingII- 0000303, FSLeasingII-0000311 to -0000312, FSLeasingII-0000322 to -0000326, FSLeasingII-0000362 to -0000372, FSLeasingII-0000390, FSLeasingII-0000415 to -0000416.

[3] Specifically, BLM approved modifications to lease numbers COC-1362 (held by MCC) and COC-67232 (held by Ark Land LLC) (collectively "lessees").

from mine operation, transportation, and eventual coal combustion. *See* CRR2-0000041-0000062, CRR2-0000088-0000089, CRR2-0000098-0000131, CRR-0000233-0000267.

Plaintiffs filed this action on December 15, 2017, ECF No. 1, and amended their complaint on March 23, 2018. ECF No. 39. The amended complaint challenges three decisions: USDA's reinstatement of the Exception to the programmatic CRR; BLM's decision approving the lease modifications and exploration plan; and the Service's decision consenting to lease modification. With respect to remedy, the amended complaint requested two forms of injunctive relief, both of which are inappropriately directed at *completed* action. In one, Plaintiffs ask the Court to order the agencies not to "approve, consent to, or otherwise take action [on the lease modifications] unless and until [the agencies] comply with NEPA" and its implementing regulations. *Id*. at 38 ¶ 7. In the other, Plaintiffs seek an order that the agencies not "approve, consent to, or otherwise take action pursuant to any exploration plan" until NEPA is satisfied. *Id*. ¶ 8. Because these decisions have already occurred, such an order would be ineffective.[4]

LEGAL BACKGROUND

1. National Environmental Policy Act

NEPA is a procedural statute that does not impose substantive results. Instead it ensures that federal agencies consider environmental consequences of major federal actions significantly affecting the environment. 42 U.S.C. §§ 4321, 4332; 40 C.F.R. § 1501.1. This consideration

[4] Federal Defendants also note that Plaintiffs now improperly seek to amend their complaint, through merits briefing, by requesting vacatur as a remedy, and not the injunctive relief prayed for. Br. 45. Given this contradiction, Federal Defendants respectfully request an opportunity to brief remedy, should the Court find error in order to clarify that remand *without vacatur* is a permissible remedy in the event of a legal violation. *See* 5 U.S.C. § 702 (providing that nothing in the APA "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground"); *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't*, 104 F. Supp. 3d 1208, 1232 (D. Colo. 2015) (remanding, without vacatur, two decisions approving mining plan modifications due to NEPA violations), *appeal dismissed*, 652 F. App'x 717 (10th Cir. 2016).

serves NEPA's dual purpose of informing agency decision makers of the environmental effects of proposed actions and ensuring that relevant information is made available to the public so that it "may also play a role in both the decision-making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA's intent is to focus the attention of agencies and the public on a proposed action so its consequences may be studied before implementation. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

To assist in meeting these goals, NEPA requires preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332 (2)(C); 40 C.F.R. § 1502.3. The EIS must examine, among other things, the direct effects, indirect effects, and cumulative impacts of a proposed decision. 40 C.F.R. § 1502.16; *see also* § 1508.7 (defining cumulative impacts), § 1508.8 (defining effects). In addition, it must consider "alternatives to the proposed action." 42 U.S.C. § 4332 (2)(C)(iii). NEPA regulations refine this requirement by directing agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14; *see also New Mexico ex re. Richardson, v. U.S. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009) (same). An agency need not examine alternatives that do not accomplish the purpose or objective of a proposed action, as such alternatives are "not reasonable." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1244 (10th Cir. 2011).

Judicial review of agency NEPA compliance is deferential. *Marsh*, 490 U.S. at 377. The "role of the courts is simply 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." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97-98 (1983). A court may not

substitute its own judgment for that of the agency. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 555 (1978).

2. Mineral Leasing Act of 1920

BLM regulates and manages coal leases on federal lands under the Mineral Leasing Act, 30 U.S.C. §§ 181-196. The Act provides for development of oil and gas resources as well as solid minerals, including coal. *See* 30 U.S.C. §§ 181 (generally), 201 (coal), 226 (oil and gas). As the Tenth Circuit explained, the Act, as amended, states a policy of making "public lands . . . available for mineral leasing in an effort to reduce our energy dependence on foreign sources and to protect our national security." *Park Cty. Res. Council, Inc. v. U.S. Dep't of Agric*., 817 F.2d 609, 620 (10th Cir. 1987), *overruled on other grounds by Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) (*en banc*).

Before leasing mineral resources beneath NFS lands, BLM must obtain consent from the Service, which manages the surface estate. *See* 30 U.S.C. §§ 201(a)(3)(iii), 207(a); 43 C.F.R. § 3425.3(b). In providing that consent, the Service retains the authority to impose conditions to protect forest resources. *Id*. As relevant to this dispute, these same consent procedures apply in the case of lease modifications. 43 C.F.R. § 3432.3(d).

STANDARD OF REVIEW

Under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, the Court must decide whether the agency's actions challenged by Plaintiffs were arbitrary and capricious. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004); *Richardson*, 565 F.3d at 704–05. A plaintiff proceeding under this standard has the burden of proof. *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *Wyoming*, 661 F.3d at 1227.

In conducting its review, the Court "must determine whether the [agency]: (1) acted within the scope of [its] authority, (2) complied with prescribed procedures, and (3) took action that was neither arbitrary and capricious, nor an abuse of discretion." *Wyoming*, 661 F.3d at 1227 (citation omitted).

> Agency 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, offered an explanation for its decision that runs counter to the evidence before the agency, or if the agency action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. (internal quotation marks and citations omitted).

Because this Court is reviewing a decision within the agencies' technical and scientific expertise, the Court's deference to the agencies' decisions is "especially strong." *Wyoming*, 661 F.3d at 1246 (citations omitted); *accord Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 740 (10th Cir. 2006). The Court's role is to ensure that the agencies reached a rational conclusion, and "not to substitute [its] judgment for that of the agency." *Colo. Wild v. U.S. Forest Serv*., 435 F.3d 1204, 1213 (10th Cir. 2006) (citation omitted).

ARGUMENT

Plaintiffs' brief advances five NEPA arguments, the first three directed at the Exception SFEIS (for the Colorado Roadless Rule) and the final two directed at the Leasing SFEIS, in which BLM was a cooperating agency. These are:

i. that the analysis in the 2016 Exception SFEIS (CRR2-0000001-0000356), failed to consider a reasonable range of alternatives, including protection of the Pilot Knob area, one of three roadless areas excepted from the roadless rule;

ii. that the Exception SFEIS failed to adequately consider baseline environmental conditions within the Exception Area;

iii. that the Exception SFEIS inadequately examined the economic effects of expanded mining operations on energy consumption;

iv. that the Leasing SFEIS, completed in 2017 and supporting decisions of BLM and the Service – respectively approving and consenting to the lease modifications (FSLeasingII-0000108-0001151) – failed to adequately consider the climate impacts of that decision; and

v. that the Leasing SFEIS failed to consider an alternative that would require the mine operator to flare vented methane.

Federal Defendants respond to these arguments in the order presented.

I. The Exception SFEIS considered a Reasonable Range of Alternatives.

NEPA requires agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives," 40 C.F.R. § 1502.14, but as the Tenth Circuit has noted, the range of reasonable alternatives "is not infinite." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1166 (10th Cir. 2002). "Common sense" teaches that an alternatives analysis "cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man." *Vt. Yankee,* 435 U.S. at 551. Once an agency "establishes the objective of the proposed action – which it has considerable discretion to define – the agency need not provide a detailed study of alternatives that do not accomplish that purpose or objective, as those alternatives are not 'reasonable.'" *Wyoming*, 661 F.3d at 1244 (citations omitted).

A. Alternatives Considered.

The "purpose and need" statement explains that the agency prepared the 2016 Exception SFEIS to address deficiencies identified in *HCCA 1*, and that the SFEIS, "in conjunction with the 2012 FEIS," discloses the environmental consequences of reinstating the Exception. CRR2-0000009. The Exception SFEIS identified its objective in two passages. First, it explained that the "overarching purpose and need" are "the same as" those stated in the 2012 "purpose and need" statement for the CRR, CRR2-0000011, which in turn had identified the following four forest-management objectives:

(i) providing for the conservation and management of roadless characteristics;

(ii) regulating timber cutting in roadless areas;

(iii) accommodating Colorado's concerns with a variety of stated resources and uses, including, as relevant in this action, "facilitating exploration and development of coal resources in the North Fork coal mining area;" and

(iv) ensuring that roadless areas are accurately mapped.

CRR-0154037-0154038. Second, and more specifically, the Exception SFEIS explained that the "purpose and need" for reinstatement is "to provide management direction for conserving about 4.2 million acres of [roadless areas] while addressing the State's interest in not foreclosing opportunities for exploration and development of coal resources in the North Fork Coal Mining Area." CRR2-0000011. Based on these objectives, the agency examined three alternatives:

(i) Alternative A (the required "No Action" alternative), which would continue current management under the CRR without the North Fork exception;

(ii) Alternative B (designated the "preferred alternative"), which would reinstate the North Fork exception, allowing temporary road construction for coal mining related activities on about *19,700 acres* of forest lands otherwise subject to the CRR; and

(iii) Alternative C (exclusion of "wilderness capable" lands) which would also reinstate the Exception, but would exclude from it forest lands identified as "wilderness capable" during the 2007 Forest Plan revision process.[5]

All three alternatives included a boundary correction for the roadless areas, based on new information obtained since promulgation of the 2012 rule. CRR2-000003.

The Exception SFEIS also considered a number of additional alternatives, but they were eliminated from detailed study as impractical or not meeting the proposed action's purpose and need. *See* 40 C.F.R. § 1502.14(a) (requiring that an EIS briefly explain why a suggested

[5] *See* 36 C.F.R. § 219 (authorizing and requiring resource use planning); CRR2-0000019 (discussing the forest plan revision process).

alternative was considered but eliminated from detailed study). One such alternative – suggested in 2016 by Plaintiffs during the corrective NEPA analysis performed on remand in the wake of *HCCA 1* – was conserving the Pilot Knob area by excluding it from the Exception to the CRR.

In declining to pursue this alternative, the agency explained that it must consider "the future long-term opportunities for coal exploration and development, not just the current situation or short-term needs for the exception." CRR2-0000291. As further explained below, Plaintiffs' suggestion would have foreclosed long-term opportunities and would upset a careful compromise between conservationists and advocates for industry (including individuals and communities that are affected by mining).

B. Plaintiffs' Pilot Knob Alternative is Not Reasonable and was Untimely.

The roadless exception challenged in this case applies in three distinct geographic areas: the Sunset, the Flatirons, and the Pilot Knob areas. Each is depicted in white overlay on the cover of the Exception SFEIS, CRR2-0000001, and in more detail in various maps therein. *See, e.g.*, CRR2-0000021, CRR2-0000025.

Plaintiffs' opening argument focuses on the Pilot Knob area, a matter of no apparent concern to them in the original rulemaking. After vigorously contending in the first round of litigation that the Sunset roadless area should be protected at any cost, Plaintiffs now argue that the Service failed to consider in detail a new alternative – one that would protect Pilot Knob from road building. Pls.' Opening Br. on Merits 10, ECF No. 40 ("Br."). Ironically, this new proposal would actually allow road building in the Sunset area. The argument fails because Plaintiffs did not raise the alternative for the Service's consideration during the administrative proceedings at issue in *HCCA 1*, or in the corresponding litigation, and because the alternative is impractical and inconsistent with the Exception SEIS's purpose and need statement.

1. Plaintiffs' Pilot Knob Claim is Barred by the Doctrine of Res Judicata.

Plaintiffs' argument fails, first and foremost, because the doctrine of res judicata or claim preclusion bars Plaintiffs from challenging aspects of earlier agency decisions not raised in *HCCA 1*. The doctrine prevents a party from litigating a legal claim "that was or could have been the subject of a previously issued final judgment.'" *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017) (quoting *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005)). "The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not have another chance to do so." *Stone v. Dep't of Aviation*, 453 F.3d 1271, 1275 (10th Cir. 2006) (citation omitted).

The rule of claim preclusion requires the existence of three elements: "(1) a [final] judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *King v. Union Oil Co. of Cal.*, 117 F.3d 443, 445 (10th Cir. 1997). Element (1) is satisfied because a final judgment was entered in *HCCA 1*. *See HCCA 1*, No. 13-cv-01723-JLK, ECF No. 102. Element (2) is satisfied as to Plaintiffs High Country Citizen's Alliance, WildEarth Guardians, and Sierra Club, who were all plaintiffs in *HCCA 1*.[6] And element (3) is satisfied because, in each case, Plaintiffs' challenge is or was directed at inadequacies *in the 2012 FEIS* for the CRR, not on any inadequacy in the *Exception SFEIS*, which as noted was a "limited-scope" document. The 2012 FEIS was supplemented only because of errors unrelated to the 2012 alternatives analysis. Importantly, none of Plaintiffs'

[6] Although there are two additional plaintiff organizations in this action that were not plaintiffs in *HCCA 1* but that did, in fact, participate in the original NEPA proceedings challenged in *HCCA 1* (specifically, the Center for Biological Diversity and Wilderness Workshop), these entities never called to the agency's attention any concerns regarding the USDA's alternatives analysis and thus their claims are waived, as discussed in the subsection which follows.

claims in *HCCA 1* challenged the Exception SFEIS's alternatives analysis. Simple fairness dictates that the agency's effort to cure the four errors found in *HCCA 1* should not open the door to new claims on settled matters that could have been raised in the earlier litigation but were not.

2. The Pilot Knob Claim is Barred by the Doctrine of Waiver.

Plaintiffs' arguments are also barred by the doctrine of waiver, because none of the five Plaintiffs in this action called the issue of Pilot Knob to the agencies' attention during the administrative proceedings at issue in *HCCA 1*. The Supreme Court has made clear that a plaintiff must "structure [its] participation" in administrative proceedings in a manner that "alerts the agency to [its] position and contentions, in order to allow the agency to give the issue meaningful consideration." *Pub. Citizen*, 541 U.S. at 764 (internal quotation marks and citations omitted); *see also Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 (10th Cir. 2007) (claims "not properly raised before an agency are waived, unless the problems underlying the claim are obvious") (citing *Pub. Citizen*, 541 U.S. at 764-65).[7] Here, the record demonstrates that plaintiffs in *HCCA 1* only disputed the agency's analysis on grounds *unrelated to* Pilot Knob and, in fact, proposed management alternatives during the corresponding administrative proceedings that were inconsistent with their current desire to protect Pilot Knob.

A brief review of Plaintiffs' participation in agency proceedings is instructive in this regard. In February 2008, during the NEPA "scoping" effort on the original EIS for the CRR, a coalition of conservationists – including High Country Citizens' Alliance (predecessor to High

[7] Notably, the D.C. Circuit found waiver in rejecting an analogous challenge in a case with many striking procedural similarities to this one. *See W. Virginia v. E.P.A.*, 362 F.3d 861, 872 (D.C. Cir. 2004). In a rulemaking challenge, the court remanded the matter to the agency for corrective action. Following corrective action, plaintiffs filed a new action asserting new claims. The court rejected the claims as "forfeit[ed]" because they were not "raised in the initial litigation or the original rulemaking." *Id*. at 872; *cf. United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) (a party "cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal because the remand did not affect it").

Country Conservation Advocates), Wilderness Workshop (plaintiff in this action), and the Center for Biological Diversity ("CBD") (also a plaintiff in this action) – submitted a comment letter to the USDA, wherein they opposed all road construction and recommended certain mitigation measures if roads must be allowed. CRR-0018421. The letter made no mention of Pilot Knob.

In October 2008, the same coalition submitted a comment letter on the draft EIS for the CRR. CRR-0107815. The letter opposed all road construction and urged that, if roads must be allowed, they be permitted only on lands adjacent to existing mines. *Id*. At the time of the letter, however, the Oxbow Mine was still operating in the Pilot Knob area. CRR2-000036. This tacit endorsement of road building in the Pilot Knob area stands at odds with Plaintiffs' current position. The letter also pressed for protection of the Currant Creek roadless area and its valuable elk habitat, noting that building roads only on lands "adjacent to existing mines" would effectuate the desired protection, since Currant Creek is not located near any existing mine. CRR-0107831. The USDA embraced Plaintiffs' suggestion, modifying the draft EIS to conserve Currant Creek by excluding it from the Exception Area. This particular adjustment reduced the total acreage of the Exception Area from 29,000 acres, where it had then most recently stood in the balancing process, to 19,100. *Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado*, 77 Fed Reg. 39,602, 39,589-90 (July 3, 2012).[8]

In 2011, the coalition – now joined by Plaintiff WildEarth Guardians – submitted a comment letter on the revised draft EIS. CRR-0135023. Once again, the coalition opposed all road construction, but they applauded the revised draft's protection of the Currant Creek roadless area. CRR-0135038, CRR-0135044, CRR-0135057 (emphasizing that "Currant Creek must

[8] By way of comparison, the State of Colorado's original petition for rulemaking had proposed that the Exception area consist of about 55,000 acres. CRR2-0000018. Through the process of compromise over a seven-year period, this excepted acreage was reduced by more than 65%.

remain off-limits to road construction for coal mining"). Despite this success, High Country Citizens' Alliance, WildEarth Guardians, and the Sierra Club filed suit two years later in *HCCA 1*, but none of the eleven counts challenged the alternatives analysis for the CRR exception.

Plaintiffs cannot dispute that the Pilot Knob alternative was never suggested to the USDA, nor can they dispute that they failed to raise the claim in *HCCA 1*. Plaintiffs' shifting positions over the years amount to the sort of "unjustified obstructionism" the Supreme Court rejected in *Vt. Yankee*, 435 U.S. at 553, and should be rejected here as well. If Plaintiffs sincerely felt that the absence of their newly-minted alternative (which effectively asks the agency to alter the results of the seven-year balancing effort and to do so at the request of a single coalition of stakeholders) was unlawful, they should have timely raised the matter in 2012.

3. The Pilot Knob Alternative is Impractical and Ineffective.

Even if this Court concludes that Plaintiffs' arguments are not waived or barred by claim preclusion, it should nonetheless reject the Pilot Knob alternative as a basis for error because it is impractical and ineffective and, therefore, not reasonable. *Wyoming*, 661 F.3d at 1244. Plaintiffs' purpose in proposing the alternative was to protect desired roadless characteristics in the Pilot Knob area. But the suggestion ignores the fact that there are oil and gas leases in that area, where road building is also allowed under separate a provision of the CRR that was not vacated by the remedy order in *HCCA 2*. CRR-0153377-0153379, 36 C.F.R. §§ 294.43(c)(viii), 294.46(d). Prohibiting road building for coal development in an area where road building is already allowed for oil and gas development would accomplish little from an ecologic standpoint and would foreclose a valuable coal mining opportunity in contravention of both elements of the agency's stated "purpose and need," discussed *supra* at 11-12.

It also bears mention that one of Plaintiffs' stated reasons for advocating for the exclusion of Currant Creek from the Exception was that the only operating coal mine in the Pilot Knob area, the Elk Creek Mine, had idled production operations. CRR2-0102908. However, the record indicates that Oxbow Mining, LLC continued to show interest in mining the area as recently as the scoping period for the draft SFEIS, CRR200046077-0046078, and even though Oxbow Mining later closed its operations in Pilot Knob, another company could, under existing regulatory authorities, obtain approval to operate in the area. By declining to foreclose this opportunity, the agency's course comports with its stated purpose and need – a parameter it has considerable discretion in defining. *Wyoming*, 661 F.3d at 1244 (citations omitted).

Plaintiffs insist that barring development in Pilot Knob meets the agency's "purpose and need" because it does not foreclose mining opportunities in the other two roadless areas, that is, Sunset and Flatirons. But this ignores the fact that the three specific areas designated for the Exception were all selected precisely because they contain coal resources worth protecting. The USDA considered a reasonable range of alternatives by studying a "no action" alternative (allowing road building on zero acres and access to zero tons of coal); the proposed alternative (allowing road building on about 19,000 acres and access to as much as 172 million tons of coal); and a middle-ground alternative that would reduce the acreage in all three areas by setting aside certain wilderness-capable portions of each (thus allowing road building on about 12,600 acres and access to about 92 million tons of coal).

Plaintiffs' suggestion has similarities to the latter alternative, insofar as it increases the acreage protected from road building, though at the cost of a reduction in recoverable coal (relative to the proposed action), but it is less environmentally protective than the middle-ground alternative because it would allow access to a greater volume of coal. In any event, the

suggestion completely eliminates a distinct geographic landscape where an existing mine, with established infrastructure is located, CRR2-0000036, and where road building for existing oil and gas leases is permissible under the CRR. 36 C.F.R. §§ 294.43(c)(viii), 294.46(d).

In declining to carry the suggested alternative forward for detailed study in the Exception SFEIS, the USDA reminded the public that one of its objectives was to preserve the option of future coal exploration in the three designated areas. Plaintiffs' suggested alternative is thus ineffective and inconsistent with the purpose and need.

II. The Exception SFEIS Adequately Considered Baseline Environmental Conditions.

Plaintiffs next contend that the agency failed to provide data on baseline values and resources within the Exception Area and failed to analyze impacts to those resources from road construction. Plaintiffs' argument is untenable for a number of reasons.

A. Plaintiffs' Baseline Claim is Barred by the Doctrines of Res Judicata and Waiver.

Plaintiffs' "baseline" claim is similarly barred by the doctrine of claim preclusion, because Plaintiffs could have challenged the adequacy of the 2012 Exception FEIS's baseline information in *HCAA I*, but failed to do so.[9] Plaintiffs, moreover, cannot elude claim preclusion by directing their baseline arguments at the Exception SFEIS, because baseline information was not among the deficiencies the *HCCA 1* Court instructed the USDA to address on remand.

Plaintiffs contend that the Exception SFEIS, prepared to address deficiencies identified in *HCCA 1*, failed to provide baseline data about resources within the Exception Area that could be impacted by the construction of roads and pads. *Id.* at 16-19. But the Court in *HCCA 1* made no

[9] As with their Pilot Knob claim, Argument I, *supra*, Plaintiffs CBD and Wilderness Workshop– were not parties to *HCCA 1*. But their baseline arguments are nonetheless barred by waiver, as explained below.

findings relating to the discussion of baseline information or impacts pertaining to the Exception Area in the 2012 FEIS, and for good reason. Plaintiffs dedicated much of their arguments in *HCCA 1* to perceived inadequacies in the impacts analysis of resources on lands adjacent to the Lease Modifications area, while distinguishing what they believed to be the agency's more robust discussion of resources within the Lease Modifications area, which is predominantly located within the Exception Area.[10] *See HCCA 1*, No. 13-cv-01723-JLK, ECF No. 62 at 21-34. Plaintiffs had ample opportunity in *HCCA 1* to raise their present challenges to the analysis of resources *within* the Exception Area and how impacts to those areas might vary by the alternatives considered by the Service, but failed to do so. Plaintiffs are thus barred from raising any such claim at this belated stage.

Plaintiffs' claims are also barred because they failed to raise their concerns relating to baseline information during the administrative process for the 2012 Exception FEIS, despite otherwise availing themselves of the public comment process. *See Pub. Citizen*, 541 U.S. at 764. The record supports Federal Defendants' contention that none of the comments provided by Plaintiffs during the NEPA process for the 2012 Exception FEIS, alerted the agency that the baseline values and impacts analyses for resources (particularly with respect to big game habitat and wetlands) within the Exception Area was inadequate. *See* CRR-0107815-0107847; *see also* CRR-0018421-0018454; CRR-0110152-0110154; CRR-0006726-0006755; CRR-0132383; CRR-0133815-0133861; CRR-0135024-0135066. Because Plaintiffs failed to avail themselves of the administrative process for raising these issues, the Court should deem the argument waived. *See Pub. Citizen*, 541 U.S. at 764.

[10] Plaintiffs also failed to challenge, in *HCCA 1*, the agency's analysis of resources within the Lease Modification areas themselves.

B. USDA Provided Adequate Data on Baseline Values Within the Exception Area And Adequately Analyzed Impacts to Those Values

Even if the Court were to conclude that claim preclusion or waiver are inapplicable, Plaintiffs' claim nevertheless fails because the agency adequately described resources within the Exception Area and provided a reasonable impacts analysis of those values. In fact, Plaintiffs conceded in *HCCA 1* that the FEIS identified values within the Lease Modifications area, which is predominantly located within the Exception Area, and analyzed impacts to those values. *See HCCA 1*, No. 13-cv-01723-JLK, ECF No. 62 at 25-26 (noting that the Exception FEIS "identified values at stake within the Lease Modifications area"); *id.* at 30 (conceding that the Exception FEIS developed and disclosed impacts of the Mine Plan on resources within the Lease Modifications area). Plaintiffs also acknowledged that "the FEIS . . . identified the values at stake that are likely to be impacted by drill pads and roads within the Lease Modifications area[.]" *Id.* at 25-26. Indeed Plaintiffs never complained, until now, that there were resources within the Exception Area that the agency failed to identify or analyze.

The record does not support Plaintiffs' contention that USDA failed to adequately describe baseline values within the Exception Area, particularly with respect to big game habitat and wetlands. The Exception FEIS acknowledged that "[r]oadless areas provide important habitats for big game throughout the year," and provided a well-reasoned discussion on winter and summer habitats for ungulates, such as elk, throughout the roadless areas. *See* CRR-0162142 (also discussing secluded habitats throughout roadless areas to "sustain populations of mountain lions," whose ranges overlap with their ungulate prey, and the importance of forage resources within these areas to sustain black bear populations). The Specialist's Report for the 2012 Exception FEIS on Terrestrial Wildlife Species and Habitat also provided significant detail on big game habitat throughout roadless areas. *See* CRR-0077369-0077370. Likewise for

wetlands, the agency adequately described the types that are found throughout the roadless areas. *See* CRR-0162043 (discussing forested, scrub-shrub, emergent, and aquatic-bed wetlands); *see also* CRR00034880 (Specialist's Report for Water Resources); CRR-0153465 (threatened and endangered plants and wetlands); CRR-0153478 (wetlands as special aquatic habitats).

Plaintiffs also attempt to gloss over the agency's well-reasoned discussion of impacts to those particular resources, as being merely "general," but the record demonstrates otherwise.[11] With respect to big game habitat specifically, although conceding that the Exception FEIS discussed impacts to that resource, Plaintiffs complain that the agency failed to distinguish habitats within and among Exception Areas. *See* Br. 18. But Plaintiffs have failed to acknowledge that the agency did note differences in habitat across roadless areas. *See* CRR-0153489 (discussing roadless areas that join wilderness areas, and noting different vegetation cover types, habitat structural changes, mature and old forest conditions, and developed and undeveloped landscapes across roadless areas). And they have failed to explain or demonstrate with any supporting authority how any differences in habitat across the Pilot Knob, Sunset, and Flatirons roadless areas, whether major or minor, would somehow increase impacts to this resource so as to alter the agency's analysis in any meaningful way. As for wetlands, Plaintiffs suggest that the agency failed to conduct a reasoned discussion of impacts because the agency stated that the exact location and number of wetlands is unknown in order to quantify impacts. *See* Br. 19; *see also* CRR-0153408. But Plaintiffs misconstrue the statement. The agency only sought to explain that because the specific sites for potential project activities were not yet

[11] *See, e.g.*, CRR-0153501 (discussing specific impacts to big game habitat); CRR-0153503 (discussing direct and indirect impacts of road construction and road use on habitat and availability); CRR-0153504 (discussing impact of roads on the fragmentation of habitats and connectivity); CRR-0034888 (discussing impact of alternatives on wetlands); CRR-0153412 (cumulative effects on wetlands).

known, it could not yet be determined what particular wetlands might be impacted or the nature of the impacts.[12] *Id*. NEPA requires agencies to analyze reasonably foreseeable impacts of their decision, and the agency did that here. *See Wyoming*, 661 F.3d at 1251.

C. NEPA Does Not Require Site-Specific Impacts Analysis of Resources Within the Exception Area at This Stage.

Even if the Exception SFEIS's analysis of resources within the Exception Area could be construed as "general" as Plaintiffs assert, it was reasonable considering the limited purpose for which the Exception SFEIS was prepared. Plaintiffs however, now seek to change the scope of the Exception SFEIS insofar as they contend it should have addressed more site-specific analysis of resources within the Exception Area.[13] *See* Br. 15-16. When an agency prepares a programmatic EIS, it "must provide sufficient detail to foster informed decision-making," but "site-specific impacts need not be fully evaluated until a critical decision has been made to act on site development." *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 (9th Cir. 2003) (internal citation omitted), *opinion clarified*, 366 F.3d 731 (9th Cir. 2004). Here, the resource analysis in the 2012 Exception FEIS, and by extension the Exception SFEIS, are adequate considering the purpose of those documents and the actions they supported. The rule and supporting NEPA analyses, including the 2012 FEIS and the Exception SFEIS, do not themselves authorize any particular development project; they instead provide *management direction* for future site-specific actions for conserving roadless area characteristics while not foreclosing opportunities for the development of coal resources in the Exception Area. *See*

[12] The Exception FEIS nevertheless articulated that any alternative considered "would result in some impacts to wetlands," and that "alternatives with fewer restrictions on alternatives would have more potential for wetlands impacts than an alternative that it more restrictive." *Id.*

[13] Plaintiffs also did not object to the depth of agency's analysis of resources within the Exception Area during the rule-making process ultimately challenged in *HCCA 1*.

CRR-0153294; *see also* CRR2-0159787. And as Federal Defendants have explained, the Exception SFEIS is limited to correcting the deficiencies in the NEPA analysis for the CRR, as identified by the Court in *HCCA 1*. *See* CRR2-0000003, CRR2-000009. All the rule does is establish a regulatory framework for the exploration of coal resources within Exception Area, and nothing more. Plaintiffs' argument that the agency should have conducted a site-specific impacts analysis of resources within the Exception Area is thus untenable.

III. The Exception SFEIS Adequately Considered Economic Effects of Expanded Mining Operations on Energy Consumption.

Plaintiffs next argue that the USDA failed to take into account the fact that "adding 172 million tons of coal to the market *will* lead to cheaper electricity prices, which *will* lead to more power consumption and thus to more climate pollution and climate-induced costs." Br. 20 (emphasis added). In time, these conclusions may or may not prove true (despite Plaintiffs' certainty), but in 2016 they were unquestionably speculative and thus not useful to decision makers or the public. NEPA only requires consideration of the reasonably foreseeable consequences of a decision. *Wyoming*, 661 F.3d at 1251. Because USDA's thorough analysis fully complied with NEPA, the court should defer to USDA's conclusion and reject Plaintiffs' claim. *Balt. Gas & Elec. Co.*, 462 U.S. at 103.

Plaintiffs' argument recounts that Dr. Powers, an economist, submitted comments on the draft SFEIS in which he faulted the agency for using an economic forecasting model known as the "Integrated Planning Model," version 5.15, *see* CRR2-0000010, because it "does not account for the increased demand for electricity due to its falling price." Br. 22. It is true the model assumed a steady demand for electricity. However, the Exception SFEIS made this assumption known to the public and acknowledged that numerous factors can affect demand.

Plaintiffs insist the agency must embrace Plaintiffs' sense of certainty in predicting economic impacts, but turn a blind eye to a host of uncertainties surrounding coal development in the Exception Area. For example, in the Exception SFEIS's "Scope of Analysis" section, in Chapter 1 ("Purpose and Need"), the agency identified this list of "unknown" items:

- coal trends and future coal markets;
- if and how exploration activities might occur;
- when and if applications to lease might be made;
- how much coal might be developed from this area;
- when the coal might be developed;
- the specific quality of that coal;
- the specific methane content of that coal;
- the specific location of surface uses, such as of methane drainage wells and associated temporary roads needed to ensure safe working conditions in underground mines based on specific mine plans;
- the specific end users of the coal;
- where and how the coal could reach its destination; and
- where and what type of facilities could combust the coal.

CRR2-0000016.

Notably, the agency assumed for purposes of analysis that the entire 172 million tons of coal estimated to be present would be mined and combusted from 2016 to 2054. CRR2-0000108. This alone does not mean that electricity demand and therefore climate pollution "will" increase; many other variables can influence electricity demand, as the agency explained.

> Change in consumption of fuels by power generating facilities in response to changes in fuel prices varies by supply region (e.g., natural gas-coal elasticity ranges from 0.05 to 0.38; -0.14 to -0.22 for coal's own price elasticity), as expected given differing market, technology, policy, and demand conditions across regions (see Appendix C). However, consumption of coal is generally, relatively unresponsive to prices (inelastic).

CRR2-0000117; *see also* CRR2-0000250 (Appendix C to the SFEIS) (discussing elasticity of demand, regional variations in power plant fuel sources, and variations in power plant equipment

and operating conditions). Uncertainty affecting future demand also exists in regard to whether other fuel sources could substitute for coal produced from the Exception Area.

> The possible substitutes for [exception area] coal at coal-fired power plants depend on a number of factors. At one extreme, only coal that has the same characteristics as the North Fork Coal Mining Area coal might be considered possible substitutes. However, other factors such as coal plant location, boiler design, coal handling and grinding equipment, air permit requirements, and environmental controls, all play an important role in determining the types of coal that might be substitutes for [this] coal. Finally, other fuels may substitute for the consumption of North Fork Coal Mining Area coal for the production of electric power. These fuels include biomass, hydro, natural gas, nuclear, solar, or wind.

CRR2-0000117. The agency further explained, despite Plaintiffs' certainty as to increased demand for electricity, that this is only a theoretical possibility, subject to numerous variables.

> There is no clear evidence to support the suggestion that making available a pre-determined quantity of coal would lower coal prices enough to cause an increase in electric demand in a decision of this magnitude. While it is true that under the law of demand "a decrease in the own price of a normal good will cause quantity demanded to increase;" the responsiveness of how quantity demanded changes relative to a change in price is more nuanced (own-price elasticity) and depends upon numerous factors such as the availability of substitutes, length of adjustment period and the budget share spent on the good. In the case of electric power generation, the consumption of coal is generally, relatively unresponsive to prices (inelastic).

CRR2-0000342. In its response to comments on the Exception SDEIS, the agency added that "[e]lectricity generation is typically price inelastic because many power plants are designed to operate with a particular fuel type and must operate within certain ranges because of reliability and environmental restrictions (compliance)." CRR2-0000250. These are rational explanations for not assuming increased demand and are consistent with the guiding NEPA principle that agencies need only consider the reasonably foreseeable consequences of their actions.

In sum, Plaintiffs do not argue that the agency was arbitrary for failing to consider the question of electricity demand, nor could they. The record reflects that the agency examined the

issue in considerable detail, acknowledged the possibility of price variation, dependent of course on a number of factors difficult to predict, and ultimately disagreed with Dr. Power's conclusions. When an agency "is making predictions, within its area of special expertise . . . as opposed to simple findings of fact, a reviewing court must generally be at its most deferential. *Balt. Gas & Elec. Co.*, 462 U.S. at 103. The Court should defer to the agency's conclusions.

IV. The Leasing SFEIS Adequately Considered Climate Impacts.

Plaintiffs contend the Leasing SFEIS is inadequate because it provides only a "general discussion" of GHG emissions and fails to provide a "rational basis" for declining to apply the social cost of carbon ("SCC") protocol, Br. 24-30, an analytical tool which monetizes the costs to society of GHG emissions at a global level. As the Court noted in *HCCA 1*, the protocol was "designed to assist agencies in cost-benefit analyses associated with rulemakings, but the EPA has expressed support for its use in other contexts." *HCCA 1*, 52 F. Supp. 3d at 1190; *cf. Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1375 (D.C. Cir. 2017) (explaining the protocol "attempts to value in dollars the long-term harm done by each ton of carbon emitted").

The agency utilized and applied the protocol in the Exception SFEIS. CRR2-0000100-0000109, CRR2-0000112-0000123, CRR2-0000235-0000268. And the other defendant agencies considered these aspects of the USDA's analysis later on, in the context of preparing the Leasing SFEIS (which tiered to the Exception SEIS, *see* FSLeasingII-0000147) and both RODs (Service and BLM). FSLeasingII-0000257-0000258, FSLeasingII-0001111-0001114, FSLeasingII-0000059-0000061, FSLeasingII-0000076, BLM000010-000011. However, the Leasing SFEIS did not actually apply the protocol in its analysis. Consistent with recent holdings of the

Districts of New Mexico and Montana, and of the D.C. Circuit, [14] the Service's ROD explained why this analysis is not required. FSLeasingII-0000059-0000061; *see also* FSLeasingII-0000257-0000258, FSLeasingII-0001111-0001114 (explaining same).

Plaintiffs' first objection – that the SFEIS provides only a "general discussion" of GHG emissions – is belied by the record. The Leasing SFEIS, in Chapter 3, extensively discussed the environmental consequences and resource impacts caused by the effects of climate change, and it provided a thorough qualitative analysis of the climate impacts associated with GHG emissions, within the context of the lease modifications.

Climate change impacts were specifically discussed for the following resources:

- Air Quality, Greenhouse Gases and Climate Change, FSLeasingII-0000232-235, 0000240-241, 0000251-0000259;
- Soils, FSLeasingII-0000280;
- Watershed, FSLeasingII-0000294-0000296;
- Vegetation (including carbon sequestration), FSLeasingII-0000299-0000300, 0000303, 0000311-0000312;
- Wildlife and Sensitive Plants, FSLeasingII-0000322 (Lynx), FSLeasingII-0000326 (Sensitive Species), FSLeasingII-0000347 (Sensitive Plants), FSLeasingII-0000347 (Management Indicator Species), FSLeasingII-0000357 (Migratory Birds);
- Range Resources FSLeasingII-0000362;
- Recreation, FSLeasingII-0000367;
- Transportation System, FSLeasingII-0000372;
- Roadless FSLeasingII-0000390; and
- Socioeconomics impacts, FSLeasingII-0000415-0000416.

[14] *See EarthReports, Inc. v. Fed. Energy Regulatory Comm'n*, 828 F.3d 949, 956 (D.C. Cir. 2016) (rejecting claim that FERC erred in concluding the protocol need not be applied and would not be informative, because of a "lack of consensus on the appropriate discount rate lead[ing] to 'significant variation in output[,]' [the fact that] the tool 'does not measure the actual incremental impacts of a project on the environment[,]' and [the fact that] 'there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes'").

In addition, for the purpose of addressing public concerns about climate change, the Exception SFEIS projected the gross GHG emissions of mining and combusting the high-end estimate of 172 million tons of coal and indicated this could result in emissions of approximately 443 million metric tons of carbon dioxide ("CO_2") equivalent, occurring between 2016 and 2054, the projected timeframe over which coal resources could be produced. More specifically, the Exception SFEIS estimated gross annual GHG emissions of approximately 13.5 million metric tons of CO_2 equivalent at the projected "low production" level, and 39.9 million metric tons of CO_2 equivalent at the projected "high production" level based on established air quality permits. *See* 81 Fed. Reg. 91,811, 91,814 (explaining that this conservative estimate likely overestimated potential GHG emissions); *see also* CRR2-0000370. Based on these figures, the SFEIS estimated a net increase in carbon emissions from energy production, transportation, and combustion of about 17 million metric tons of CO_2 equivalent from 2016 to 2054. It also projected a net increase in annual coal mining-related methane gas emissions of 16.7 million metric tons of CO_2 equivalent from 2016 to 2054. *Id.* The Forest Supervisor, who signed the ROD for the Service's leasing consent decision, FSLeasingII-0000045, specifically relied on this analysis. FSleasingII-0000047 to -0000048, FSleasingII-0000059 to -0000061, FSleasingII-0000074 to -000075, FSleasingII-0000076 to -0000077.

Climate change was also discussed in response to comments, FSLeasingII-0001110-0001113, which demonstrate that the agencies recognized and addressed the deficiencies identified in *HCCA 1*. Notably, the Court did not order the agency to apply the protocol or to otherwise monetize the impacts of GHG emissions. Rather the Court found that, even though NEPA does not require a cost-benefit analysis, the agencies were arbitrary in "quantify[ing] the benefits of the lease modifications and then explain[ing] that a similar analysis of the costs was

impossible when such an analysis was in fact possible and was included in an earlier draft EIS." 52 F. Supp. 3d at 1182 (emphasis added). The Court criticized the agencies for preparing "half of a cost-benefit analysis" and then incorrectly claiming it was "impossible to quantify the costs," while relying on the "anticipated benefits to approve the project." *Id*. (quoting *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446–48 (4th Cir. 1996)).

Accordingly, the Service explained there are "different approaches that an agency can take to examine climate impacts associated with greenhouse gas emissions." FSLeasingII-0001112. The agency noted that it had

> examined the possible use of social cost of carbon/greenhouse gas estimates and determined to use a different approach for the SDEIS and revised SFEIS that quantified greenhouse gas emissions as the common metric used to compare across alternatives and then qualitatively discussed potential cumulative climate impacts at the local/state/region, and global scale.

Id. The agency provided detailed reasons why climate change and potential climate impacts are not well understood, relying on research that indicated that, for most people, difficult environmental issues such as climate change are more readily understood when the issue is at a scale relatable to their everyday life. FSLeasingII-0001112-0001113. In particular, the Forest Service presented the data and information in a manner that follows guidelines for effective climate change communication developed by the National Academy of Sciences:

> There is no standard methodology to determine how a project's incremental contribution to GHG would result in physical effects on the environment, either local or globally. The approach taken for this SEIS provides quantitative GHG emissions as a common metric across alternatives and qualitatively discusses climate impacts, thus effectively informing the decision-maker and the public of potential climate impacts at global, region/state, and local scale.

FSLeasingII-0001113.

This analysis meets NEPA's "hard look" requirement, as other Courts have held. In *WildEarth Guardians v. Jewell*, the court sustained a climate change analysis that used the predicted volume of GHG emissions as a proxy for assessing a mining plan's potential climate change effects. No. 1:16-CV-00605-RJ, 2017 WL 3442922 (D.N.M. Feb. 16, 2017) (citations omitted). The court noted that CEQ's regulations discourage the use of cost-benefit analyses in situations involving important qualitative considerations, 40 C.F.R. § 1502.23, and held that Respondent's choice of methodology for assessing impacts relating to GHG emissions had a rational basis and is not arbitrary or capricious. *Id*. at 12 (citing *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004)); *Utahns for Better Transp.*, 305 F.3d at 1171. More recently, the District of Montana rejected claims of error as to two BLM decisions approving resource management plans, in Wyoming and Montana, in which the agency declined to apply the protocol. The court held that BLM's decision not to "measure the cumulative impacts of its fossil fuel management by [using the protocol] does not present a 'clear error of judgment.'" *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 WL 1475470, at *1 (D. Mont. Mar. 26, 2018).

Although Plaintiffs cite cases holding otherwise, the decisions cited above represent the greater weight of authority. More importantly, Plaintiffs provide no binding authority for the proposition that an agency's NEPA analysis must monetize all impacts or none at all. Some categories of impacts are more naturally quantified than others and, naturally, a proposed project's socio-economic impacts – which include impacts to the employment market, tax revenue, and royalties – are more readily understood when discussed in economic terms. By contrast, impacts to natural resources are more traditionally discussed in qualitative terms, consistent with the governing CEQ regulations. 40 C.F.R. § 1502.23. Far from "turning a blind

eye to the climate harms side of the ledger," Br. 28, the agencies' analyses simply used the metrics and methodologies that were best suited to the tasks at hand, and its choice of methodology in this regard is entitled to deference. *See Committee to Preserve Boomer Lake Park v. Department of Transp*., 4 F.3d 1543, 1553 (10th Cir. 1993) (it is not the court's role to "decide the propriety of competing methodologies").

The SCC protocol takes into account wide-ranging factors and feedbacks occurring all around the world over a several hundred-year time-span. As a result, even if absolute parity were required whenever an agency opts to monetize certain impacts in a NEPA document, Plaintiffs' arguments would still fail because the economic analysis Plaintiffs take issue with did not take into consideration (and is not required to include) the total economic benefits of coal production, considered at a global level, whereas the SCC protocol does in fact seek to identify total monetary cost, on a global scale, of carbon emissions.

In order to allow for meaningful comparison of project benefits to costs, as determined by the SCC protocol, a cost-benefit analysis would necessarily require a similarly comprehensive look at the broader benefits of coal production, viewed at a global level, as the Service explained in its ROD. FSLeasingII-0000060. For example, it would have to take into account the benefits of burning coal to produce electricity, such as providing affordable, reliable electricity and the resultant benefits of having electricity in general, for comfort, work efficiencies, and promoting human health through medical advancements. *Id*. Put another way, applying the protocol here would have produced misleading results by inflating the social cost estimate while not providing comparable estimates of social benefits, a course inconsistent with NEPA's goal of informed decision making. The agencies' choice not to apply the protocol under these circumstances is entirely rational. *Balt. Gas & Elec. Co.*, 462 U.S. at 103.

Finally, Plaintiffs argue that the Service's reliance on the Exception SFEIS's cost analysis constitutes error because the Exception SFEIS incorrectly assumed that EPA's Clean Power Plan for coal-fired power plants would be in effect. Br. 36. The Court should reject the argument as mere flyspecking. While this possible circumstance might affect the ultimate monetized cost of emissions if the entire 172 million tons of estimated coal reserves in the Exception area were combusted, such monetization, as just discussed, is not particularly meaningful or instructive to decision makers and the public at the project level. Further, the discrepancy Plaintiffs point out is significantly diluted by the uncertainty that the entire 172 million tons will be removed and combusted over the estimated 35-year operational window. For example, the Leasing SFEIS, in Table 3-1, assumes an annual production rate of 6.5 million tons of coal per year at the West Elk Mine and indicates that the figure could be higher or lower. FSLeasingII-0000221. In the end, the agency has made clear, in its analysis, that it is engaging in a predictive exercise in the face of uncertainty about coal trends and future coal markets. The Court should therefore reject this claim of error.

V. The Leasing SFEIS Adequately Considered Methane Flaring

Plaintiffs' complaint that the agencies failed to consider methane flaring as a reasonable alternative for mitigating climate impacts is also unsound. They erroneously contend that BLM impermissibly delayed consideration of methane flaring despite methane's potency as a greenhouse gas and purported evidence that flaring presents a safe alternative. *See* Br. 39-42. These contentions are unsupported in fact and law and should be rejected.

A. Plaintiffs Claim is Barred Under the Rule of Claim Preclusion

As with Plaintiffs' other claims raised in this litigation, Plaintiffs High Country Citizens' Alliance, WildEarth Guardians, and Sierra Club's claim on methane flaring is barred by the rule

of claim preclusion. Plaintiffs failed to raise any challenge in *HCCA 1* that the agencies failed to consider methane flaring as a reasonable alternative, although they could have done so. During the comment period on the Leasing DEIS at issue in *HCCA 1*, Plaintiffs[15] asserted that the agencies failed to consider methane flaring as a reasonable alternative. *See* FSLeasing-0036443-48; *see also* FSLeasing-0131276-0131283 (commenting on the propriety of methane flaring as a reasonable alternative, during remand of the Service's 2011 NEPA analysis). Plaintiffs however, never raised this issue in *HCCA 1*, arguing instead that BLM failed to consider impacts of methane venting or a reasonable range of alternatives to the Exploration Plan. *See HCCA 1*, No. 13-cv-01723-JLK, ECF No. 10 at 34 (fifth cause of action), 37 (ninth cause of action); *see id.* ECF No. 62 at 81-82. Plaintiffs thus abandoned any claim they might have had on methane flaring during *HCCA 1*, and should not be permitted to revive it.[16]

B. The 2017 Leasing SFEIS Reasonably Considered Flaring as One of Several Methane Mitigation Measures.

Insofar as Plaintiffs contend that the 2017 Leasing SFEIS failed to consider methane flaring as a reasonable mitigation tool, Plaintiffs are wrong. The 2012 FEIS and 2017 Leasing SFEIS reasonably considered a number of methane mitigation measures, including flaring. *See* FSLeasing-0045676-0045677, 0045705-0045708; *see also* FSLeasingII-0000182-0000183 (discussing ventilation air methane ("VAM")); FSLeasingII-00000184 (carbon credits or off-set mitigations for methane); FSLeasingII-0000184-0000186 (staged mitigation process which includes USDA's consent to lease with lease stipulations allowing for methane mitigation to

[15] Plaintiff Wilderness Workshop, although not a party in *HCCA 1*, also provided comments on methane flaring as a reasonable alternative during the public comment phase for the 2011 Leasing Modification. *See* FSLeasing-0036419.

[16] Plaintiff CBD has also waived this claim, since it did not inform the agencies during the public comment process of its position on methane flaring as a reasonable mitigation measure. *See Pub. Citizen*, 541 U.S. at 764.

occur); FSLeasingII-0000186-0000188 (methane capture); FSLeasingII-0000188-0000189 (flaring). And regarding flaring in particular, the agencies acknowledged its benefits as a mitigation tool. *See id*. (noting the potential for flaring to "convert [methane] to carbon dioxide and . . . potentially reduce the total global warming potential of the gas by approx. 87%."). The SFEIS nevertheless articulated limitations on the use of flaring as the only reasonable mitigation option. *Id.*; *see also* FSLeasingII-0000079 (addressing flaring as an alternative).

Plaintiffs complain that the SFEIS has impermissibly punted any consideration of methane flaring as a reasonable alternative from the rulemaking stage to the project development phase. *See* Br. 41-42. The agencies however, reasonably articulated the propriety of considering methane mitigation measures, including flaring, in a staged decision-making process for the best outcomes. For example, the SFEIS explained that requiring a specific mitigation measure at the leasing stage would not be prudent due to underground mine safety issues that would only become known at the mining stage. *See* FSLeasingII-000109 (noting safety issues posed by methane flaring). It is at this stage that mining companies, including MCC, would prepare mining and ventilation plans for review by the Mine Safety and Health Administration, which as the permitting agency determines whether mine safety standards have been or will be met. [17] Neither the BLM nor the Service is involved in this aspect of the decision-making process.

[17] Plaintiffs argue that new information shows that emerging technologies from around the globe have made flaring technologies safe. *See* Br. 44. The Leasing SFEIS articulated however, that the information provided did not show that these technologies have been "applied in the active workings (area where actual mining is occurring) of an underground coal mine in the U.S." FSLeasingII-0001099-1100. Moreover, MSHA has not determined that the technologies identified by Plaintiffs have been or can be safely applied in the United States. Furthermore, as the SFEIS explained "MSHA has not approved or disapproved any flaring proposals because it has never been presented with an application" to use this method. FSLeasingII-0000189. Insofar as Plaintiffs assert that methane flaring technologies have been safely applied in the United States, particularly at the now-closed Elk Creek mine, the SFEIS explained there were unique circumstances at play. *See* FSLeasingII-0000185 (explaining that the economic feasibility of that endeavor was the unique geologic feature of the mine that resulted in extremely high

Next, to the extent that Plaintiffs suggest that the agencies have violated NEPA because they do not require MCC to consider or implement flaring as a mitigation measure, this is false. As the Leasing SFEIS has explained, the lease modifications have stipulations addressing methane flaring, capture or use, and require methane capture or flaring only if it is economically feasible to do so. *See* FSLeasingII-0000103-104. The terms and conditions of the lease modifications also require MCC to provide BLM with a report on the economic feasibility of capturing and flaring methane for use or abatement, within one year of leasing. *See* FSLeasingII-0000106. BLM also requires periodic updates of the report "to evaluate changing technical and economic parameters that can either enable or create barriers to the implementation or adoption" of methane flaring as a control measure,[18] which MCC has provided.[19] *See* FSLeasingII-0000108. Moreover, BLM's ROD identifies economic trigger values (to determine economic feasibility) at which point MCC would be required to implement methane capture or flaring measures. *See* BLM000015. No triggering event has taken place based on the last report provided by MCC, and thus BLM has not required MCC to apply any such measures.[20] BLM-000015.

---

concentrations of methane and the "brokering of a premium energy contract (i.e. guaranteed revenues in excess of current electricity market value)" with a number of energy companies). Plaintiffs have failed to offer any record support demonstrating that the West Elk mine is as uniquely positioned such that it would be economically feasible for MCC to implement flaring as a mitigation measure.

[18] *See id.* (noting that "periodic evaluations, capture the current state of technology developments applicable to the mine's operational parameters, fluctuations in energy prices that affect the short and long term economic feasibility of adoption, and the status of carbon offset markets[.]"

[19] In 2009 MCC submitted the "West Elk Mine E Seam Gas Economic Evaluation Report" to address coal mine methane management options, in response to BLM's March 25, 2009 request. *See* FSLeasingII-0000447-665. MCC's most recent report was submitted in 2012. BLM-000016.

[20] Plaintiffs assert that the Raven Ridge Report they submitted to USDA during the objection period demonstrates the economic feasibility of methane flaring at West Elk. *See* Br. 40. It

Because the record belies Plaintiffs' contention that the 2017 Leasing SFEIS failed to reasonably consider methane flaring as a reasonable measure to mitigate climate impacts, the Court should deny Plaintiffs' petition for review.

CONCLUSION

For the foregoing reasons, Federal Defendants ask the Court to deny Plaintiffs' petition for review of agency action and enter judgment in favor of all Defendants. Should the Court conclude that a NEPA violation has occurred, Federal Defendants respectfully request that they be afforded an opportunity to brief the question of remedy and the appropriateness of remand without vacatur.

Respectfully submitted this 19th day of April, 2018.

JEFFREY H. WOOD
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Div.

/s/ John S. Most
JOHN S. MOST, Trial Attorney
Natural Resources Section
Virginia Bar No. 27176
P.O. Box 7611
Washington, D.C. 20044
202-616-3353 || 202-305-0506 (fax)
john.most@usdoj.gov

should be noted however, that the report was untimely prepared and submitted to the agency for consideration – after the NEPA process was concluded and the Leasing SFEIS published. USDA nevertheless acknowledged in its ROD that the report stated a "reasonable way to assess flaring as a mitigation method," but the agency also reasonably articulated why the information in the report did not change its policy and regulatory framework for the decision to be made by the agency. *See* BLM-000086 (stating that "the report would be most appropriately reviewed by BLM along with their review of economic feasibility to be submitted by MCC for methane mitigation measures…as required by stipulation[,]" and that the information was "not relevant to this stage of the process."). The agency also made clear that its decision "does not preclude the inclusion of any methane mitigation measure including flaring, but does provide sideboards for how these activities may occur on NFS lands in the form of stipulations which address placement and requirements related to a fire plan." *Id.*

/s/ Michelle-Ann C. Williams
MICHELLE-ANN C. WILLIAMS,
Trial Attorney
Natural Resources Section
P.O. Box 7611, Washington, D.C. 20044
202-305-0420 || 202-305-0506 (fax)
michelle-ann.williams@usdoj.gov

Counsel for Federal Defendants

Of Counsel

Lois Witte
Office of General Counsel,
Mountain Region
U.S. Department of Agriculture
Golden, Colorado

Kristen Guerriero
Office of the Solicitor,
Rocky Mountain Region,
U.S. Department of the Interior
Denver, Colorado

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2018, a copy of the foregoing notice was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ *John S. Most*
JOHN S. MOST