No. 18-1374

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HIGH COUNTRY CONSERVATION ADVOCATES, *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees

and

MOUNTAIN COAL COMPANY, LLC,

Intervenor-Appellee.

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

BRIEF OF THE INTERVENOR-APPELLEE

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Mountain Coal Company, LLC is 100% owned by Arch Western Bituminous Group, LLC, which is 100% owned by Arch Western Resources, LLC. Arch Western Resources, LLC is 99.5% owned by Arch Western Acquisition Corporation and .5% owned by Arch Western Acquisition, LLC, which is 100% owned by Arch Western Acquisition Corporation. Arch Western Acquisition Corporation is 100% owned by Arch Coal, Inc.

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STATEMENT OF RELATED APPEALS

There are no prior related appeals.

GLOSSARY

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

APA – Administrative Procedures Act

BLM – Bureau of Land Management

CG – Appellant Conservation Groups

CO_2e – Carbon Dioxide Equivalent

CRA – Colorado Roadless Area

CRR – Colorado Roadless Rule

GHG – Greenhouse Gas

GMUG – Grand Mesa, Uncompahgre, and Gunnison National Forests

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

MDW – Methane Drainage Well

Mountain Coal/MCC – Mountain Coal Company, LLC

MSHA – Mine Safety and Health Administration

NEPA – National Environmental Policy Act

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

OSMRE – Office of Surface Mining, Reclamation, and Enforcement

RACR – Roadless Area Conservation Rule

ROD – Record of Decision

SFEIS – Supplemental Final Environmental Impact Statement

STATEMENT OF THE ISSUES

1. Whether, as part of the re-promulgation of the North Fork Coal Mining Area Exception to the Colorado Roadless Rule, the United States Forest Service reasonably declined to consider in detail a proposed alternative that would have categorically prohibited temporary roadbuilding for coal exploration and mining in the Pilot Knob Colorado Roadless Area.

2. Whether the United States Forest Service and Bureau of Land Management, in evaluating proposed coal lease modifications, satisfied NEPA in disclosing the environmental consequences of a proposed alternative that would require flaring of methane as mitigation, but deferred analysis of the safety and economic feasibility of flaring until more site-specific data was available.

3. Whether vacatur of the entire North Fork Coal Mining Area Exception rulemaking is the appropriate remedy if the Court concludes that the United States Forest Service erred in its environmental review of the proposed Pilot Knob Alternative.

4. Whether vacatur of the Lease Modifications is the appropriate remedy if the Court concludes that the United States Forest Service and Bureau of Land Management should have conducted more analysis of the flaring-as-mitigation alternative as part of NEPA review of proposed coal lease modifications.

STATEMENT OF THE CASE

Intervenor-Appellee Mountain Coal Company LLC ("Mountain Coal") understands that Federal Defendants United States Forest Service ("Forest Service") and Bureau of Land Management ("BLM") (collectively "Agencies") will provide a detailed factual and legal background. To minimize duplication, Mountain Coal will defer to the Federal Defendants' discussion of the general regulatory framework applicable to leasing and mining federal coal, and instead focus on background facts and procedural history relevant to the current appeal.

A. The West Elk Mine.

The West Elk Mine ("West Elk") is an underground coal mine in operation since 1981, owned by Mountain Coal. Government Appendix ("GA") 545. West Elk mines high energy, low ash, low sulfur, compliant and super-compliant coal. GA 476 (explaining coal characteristics). These coal resources include both privately owned coal and federal coal leased by the BLM, as the manager of the federal mineral estate, under the Mineral Leasing Act. 30 U.S.C. § 181 *et seq*. GA 67, 131.

Portions of the mine are located in the Grand Mesa, Uncompahgre, and Gunnison National Forests ("GMUG"), in the "North Fork Valley" of the Gunnison River. GA 477. The surface within the GMUG is managed by the Forest Service, and the sub-surface federal coal is managed by the BLM. *Id*. The

North Fork Valley is also the location of several other underground coal mines, which have historically been important contributors to the regional economy. GA 129 (map of federal coal leases in the North Fork Exception area).

West Elk mines coal through the longwall mining method, in which continuous mining equipment extract coal from a coal seam. GA 68. After the equipment removes the coal, the roof is then allowed to collapse in a controlled manner behind the mining area. *Id.* This process releases methane gas that had been locked in the native rock. *Id.*; GA 791-92.

Methane is highly dangerous in a confined underground mining environment. *Id.* For this reason the federal Mine Health and Safety Administration ("MSHA") imposes strict ventilation requirements. GA 491. Methane is kept at safe levels through two primary mechanisms: (1) ventilation fans that maintain air flow and appropriate oxygen and methane levels throughout the mine; and (2) methane drainage wells ("MDWs") vertically drilled from the surface. GA 68, 491. MDWs allow excess methane levels to vent to the surface (and away from the mine workers). *Id.* Venting through MDWs is an essential element of West Elk's MSHA-approved mine ventilation plan. *Id.*

Coal resources are typically described in terms of "seams," reflecting distinct strata of coal. West Elk is presently mining the "E Seam" of coal in

federal coal leases COC-1362 and COC-67232 ("Leases"),[1] and in fee coal reserves adjacent to the Leases. GA 79, 581. Mining at West Elk generally progresses from northeast to southwest through a "panel" of coal. GA 794. When mining a panel is complete, the mining equipment is transferred to the next panel. In this fashion, mining has been progressing north-to-south.

In the 1990s, West Elk determined that there were likely recoverable federal and fee coal reserves to the south of the Leases, between the Leases and the West Elk Wilderness Area. However, if West Elk exhausts the reserves in the Leases and moves mining operations to the north, any federal and fee coal south of the Leases will in all likelihood be isolated and no longer economically recoverable. In industry and regulatory parlance, the coal would be "bypassed." GA 67, 473. Consequently, Mountain Coal has advocated that exploration and mining of this coal be allowed and it provisionally applied for the Lease Modifications in January 2009. GA 473. However, access to the coal was faced with regulatory obstacles erected in 2001.

[1] Lease COC-1362 is held by Mountain Coal, and Lease COC-67232 is held by Arch Coal affiliate Ark Land Company, LLC.

B. Procedural and Legal History.

1. Roadless Disputes

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

Among the criticisms of the RACR was that the Rule was developed with too little consultation with the States, contained numerous mapping errors, and was overly restrictive of important activities such as timber management and mining. *Id.* at 1226. The coal mining operations in the North Fork Valley were materially affected by the RACR. Significant coal resources adjacent to West Elk and other mines in the North Fork Valley lie under the RACR-designated Roadless Areas, which were subject to the prohibition on roadbuilding. Like West Elk, other coal mines in the North Fork Valley are also required to vent methane for safety purposes. GA 491. Because of the rugged terrain and general depth of the coal strata in the GMUG, MDWs generally cannot be drilled and operated without

temporary roads constructed to access the drill sites. *Id.* As a result, the RACR effectively prohibited coal exploration and mining in all areas underlying roadless areas in the North Fork Valley.

Consequently, in parallel to the ongoing RACR litigation, the Forest Service's 2005 State Petitions Rule amended 36 CFR Part 294 to authorize state-specific supplemental rulemaking actions to revise and update the RACR as applied to those States. 70 Fed. Reg. 25,654. One of these initiatives was the Colorado Roadless Rule ("CRR"). The CRR was a collaborative effort between the State of Colorado, the Forest Service, and a wide array of private and public stakeholders in the uses of the National Forest System in Colorado. Collectively, they sought to better customize the RACR for the specific needs of Colorado. The CRR was promulgated at 36 C.F.R. Part 294 on July 12, 2012. 77 Fed. Reg. 39,575.

Included among the Colorado-specific changes in the CRR was a substantial strengthening of environmental protections. The CRR extended roadless protections to over 400,000 acres not protected in the RACR, and tightened restrictions on another 1.2 million acres. *See* 77 Fed. Reg. 39577-578. The CRR also removed acres determined to be substantially altered and created exceptions for a variety of specific activities in selected areas. *Id.* The CRR resulted in revised roadless designations known as Colorado Roadless Areas ("CRAs"). And

one of the regulatory exceptions was the North Fork Coal Mining Area Exception, focused on the North Fork Valley. 36 C.F.R. § 294.43(c)(1)(ix) ("North Fork Exception").

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

In 2013, a subset of the Appellant Conservation Groups ("Conservation Groups")[2] then challenged the CRR, the Lease Modifications, and the Exploration Plan in a single action in the District Court for the District of Colorado. *Id.* at 1185. As to the CRR, the Conservation Groups focused exclusively on the North Fork Exception. *Id.* at 1194-95. The Conservation Groups raised a wide variety of claims, but did not propose or litigate the Pilot Knob Alternative. *Id.* As to the

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

Lease Modifications, the Conservation Groups did not challenge the BLM's decision not to require methane flaring as a mitigation measure. *Id.* at 1187.

The district court identified Administrative Procedure Act ("APA") violations for each of the North Fork Exception, the Lease Modifications, and the Exploration Plan. *Id.* at 1189-1193, 1195-1201. None of the issues that the *HCCA* Court found deficient are at issue in this appeal. Importantly, in a subsequent decision the *HCCA* Court severed the North Fork Exception from the remainder of the CRR. *High Country Conservation Advocates v. U.S. Forest Service*, 67 F. Supp. 3d 1262, 1266 (D. Colo. 2014) ("*HCCA II*"). As a result, all elements of the CRR other than the North Fork Exception have been in effect since promulgation in 2012.

2. Methane Emission Disputes

Independently of the GMUG-specific roadless issues, coal mining in the United States has also become increasingly controversial as a result of greenhouse gas ("GHG") emissions from the mining and combustion of coal. Methane is a GHG. Consequently, methane emissions from MDWs and ventilation air from North Fork Valley coal mines have been an additional area of dispute.

In 2008, West Elk sought to construct additional MDWs on the Leases as part of mining the E Seam. WildEarth Guardians urged the Forest Service to require methane flaring or other management. As in this appeal, WildEarth

Guardians contended that methane is a valuable commodity as natural gas or by virtue of carbon offsets generated through flaring or other management. WildEarth Guardians further contended that methane has been safely flared at mines outside the United States and at inactive coal mines. The Forest Service rejected these arguments on the grounds that MSHA approval would be required and was unlikely. The Forest Service therefore consented to the request to construct additional MDWs. WildEarth Guardians challenged the decision in the District Court for the District of Colorado under NEPA and the APA. The district court affirmed the Forest Service's decision. *WildEarth Guardians v. U.S. Forest Serv.*, 828 F.Supp.2d 1223, 1237-38 (D. Colo. 2011)("*West Elk*")(describing the flaring dispute and reasons for affirmance).[3]

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

Sent back the drawing board by the *HCCA* decisions, the Agencies set about addressing the identified deficiencies. The Agencies prepared an extensive analysis of the climate change issues that the *HCCA* Court identified in the North Fork Exception, and corrected the errors in the Exploration Plan. The North Fork Exception was re-promulgated following a Supplemental Final Environmental

[3] WildEarth Guardians is such a frequent litigant in this Circuit and subject matter that abbreviations employing their name are more confusing than helpful. Mountain Coal therefore identifies decisions with other shorthand labels.

Impact Statement ("North Fork Exception SFEIS"), GA 93-237 (SFEIS w/o appendices), and the Lease Modifications and Exploration Plan were re-issued following the preparation of an additional Supplemental Final Environmental Impact Statement ("Leasing SFEIS"). GA 1-63 (Forest Service Record of Decision "ROD"); 64-92 (BLM ROD).

(a) The North Fork Exception.

Gaining additional allies, the Conservation Groups filed very extensive comments on the North Fork Exception.[4] *See* Intervenor Appendix[5] ("Int. App." 1-23 (excerpts)). The Conservation Groups strongly advocated the No Action Alternative. Int. App. 2-11. As a fallback, they advocated Alternative C, which would have continued the prohibition on roadbuilding to "wilderness capable" sections of CRAs. Int. App. 12-14. As relevant to this appeal, the Conservation Groups also proposed several new alternatives for the North Fork Exception that had not been proposed in the original CRR proceeding. One of these they labeled the "Protect Pilot Knob Alternative" ("Pilot Knob Alternative"), under which they proposed to carve out the Pilot Knob CRA from the North Fork Exception. Int.

[4] The Conservation Groups' January 15, 2016 comments on the draft SEIS for the North Fork Exception alone totaled over 130 single-spaced pages, excluding hundreds of pages of exhibits. Int. App. 1, 23.

[5] Mountain Coal has attempted to rely on the Conservation Groups' and Federal Defendants' Appendices as much as possible, but there are a handful of relevant materials not captured in the respective excerpts.

App. 14-19. The Conservation Groups asserted that the Pilot Knob CRA was "ecologically distinct," as related to habitat for several bird and mammal species. Int. App. 14. The Pilot Knob Alternative was less attractive to the Conservation Groups than either the No Action Alternative or Alternative C (they did not propose the Pilot Knob Alternative until page 91 of their comments), Int. App. 14, but advocated the Pilot Knob Alternative as a means to further chip away at the North Fork Exception.

The Forest Service declined to consider the Pilot Knob Alternative in detail during rulemaking. GA 121. It reasoned that the Pilot Knob Alternative would categorically prohibit coal exploration and mining opportunities, which was in conflict with the purpose of the rulemaking of preserving long-term opportunities where coal resources might occur. *Id.* In addition, the Forest Service observed that the North Fork Exception did not itself authorize any roadbuilding or confer any rights to build roads, and performing an entirely new rulemaking for the Pilot Knob CRA would be highly inefficient for both the government and industry. Int. App. 26. Consequently, the Forest Service concluded that the wildlife values articulated by the Conservation Groups could be adequately and more effectively analyzed and protected as appropriate in the context of future site-specific proposals. Int. App. 27-29.

(b) The Lease Modifications.

The Conservation Groups also filed extensive comments on the Lease Modifications. CG App. 447. They principally alleged that the Agencies failed to adequately address the deficiencies identified in *HCCA*, but they also raised new issues. As relevant to this appeal, they revived the argument from *West Elk* that if the Agencies issued the Lease Modifications, the Forest Service and/or BLM should require that Mountain Coal flare the methane to mitigate climate impacts. CG App. 447.

The Agencies fully disclosed the climate mitigation potential of methane flaring in the Leasing SFEIS. GA 529. However, the Agencies declined to require flaring as a condition of the lease modifications. The Agencies observed that there were critical safety and economic feasibility issues associated with methane flaring that could not be effectively analyzed until coal exploration had occurred and more detailed mine and ventilation planning had developed through permit and mine plan applications. GA 529-530. As a stipulation to the Lease Modifications, the Forest Service required that Mountain Coal update a 2009 Resource Recovery and Protection Plan Report ("R2P2") by December 2018, which would allow further consideration of the safety and economics of flaring. GA 14, 35, 62.

4. Litigation in the District Court

After the Lease Modifications were issued, the Conservation Groups immediately challenged the re-promulgated North Fork Exception, the Lease Modifications, and the Exploration Plan. Dkt. #1, CG App. 004. They sought a temporary restraining order to prevent exploration, Dkt. #8, CG App. 005, which was denied. Dkt. #26, CG App. 007. They then scheduled, but later withdrew, a request for preliminary injunctive relief. *Id.*; Dkt. #28, CG App. 007.

Briefing on the merits occurred in the Spring of 2018, and the district court affirmed the agency actions on August 10, 2018. Dkt. #62, CG App. 010. This appeal followed. The Conservation Groups did not seek a stay pending appeal. In this appeal, the Conservation Groups seek further review of only two elements of the Agency actions: (1) evaluation of the Pilot Knob Alternative in the North Fork Exception SFEIS, and (2) the Agencies' decision to defer consideration of the safety and economic feasibility dimensions of methane flaring as mitigation until the mine planning and permitting stage.

SUMMARY OF THE ARGUMENT

The Forest Service reasonably declined to analyze the Pilot Knob Alternative in detail, for several reasons. First, the Pilot Knob Alternative is contrary to the purposes of the CRR, in that it would unreasonably constrict opportunities for the Agencies to consider requests for coal exploration and mining

in the North Fork Valley. Second, the Pilot Knob Alternative would not be practical or effective, since there is no record evidence that the cited wildlife would be materially harmed by coal-related roadbuilding or underground mining. Third, the Pilot Knob Alternative is not significantly distinguishable from Alternative C in terms of the stated objective of protecting environmental values. Finally, the record is clear that the Agencies can equally or more effectively assess potential impacts in the context of site-specific proposals, and therefore it was reasonable and non-prejudicial for the Forest Service to decline to examine the Pilot Knob Alternative in detail at the rulemaking stage.

In evaluating the proposed Lease Modifications, the Agencies adequately considered the environmental effects of requiring flaring of methane. Remaining factors regarding flaring were focused on the non-environmental issues of safety and economic feasibility, neither of which could be appropriately evaluated and decided at the leasing stage. Both issues require the development of substantial additional site-specific geologic, emissions, and engineering data and planning that could not reasonably be prepared without exploration results. The Agencies thus satisfied NEPA, and any error did not prejudice the Conservation Groups.

Should the Court conclude that the Agencies violated the APA in either the North Fork Exception Rulemaking or Lease Modifications process, the appropriate remedy is to remand the relevant issues without vacatur of the larger underlying

decisions. The Pilot Knob Alternative is clearly severable by regulation and geography, and therefore there is no reason for any remedy to affect the remainder of the North Fork Exception. Similarly, because flaring was proposed as an additional condition to the Lease Modifications, the appropriate remedy is to remand for additional study of flaring, rather than vacate the Lease Modifications as a whole. Moreover, the Record is now outdated because the updated flaring analysis required by the Agencies has been performed, and the district court and Agencies should have the benefit of that information on remand.

ARGUMENT

A. Standard of Review.

The Court reviews the District Court's decision under the APA and under NEPA de novo. *See Cure Land, LLC v. U.S. Dept. of Agriculture*, 833 F.3d 1223, 1230 (10th Cir. 2016). But the review is "highly deferential to the agency." *Id.* Appellants bear the burden of proving that the Agencies' decisions were "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* "The duty of a court reviewing agency action under the arbitrary or capricious standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Id.*

"Deficiencies in an EIS that are mere 'flyspecks' and do not defeat NEPA's goals of informed decisionmaking and informed public comment will not lead to reversal." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009)("*Richardson*"). Moreover, even if an error rises to an actual violation of the APA, reversal of the agency decision is not required unless the appellant demonstrates prejudice resulting from the error. *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1183 (10th Cir. 2013)("*Nat'l Park Serv.*").

The Conservation Groups' appeal is principally focused on claims that the Agencies improperly declined to conduct detailed review of two proposed alternatives. "[T]here are no hard and fast rules to guide the alternatives analysis." *Colo. Envt'l Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999)("*Dombeck*"). The relevant question is whether the Agencies' alternatives analysis satisfies the rule of reason and practicality. *Id.*; *BioDiversity Conservation All. v. Bureau of Land Management*, 608 F.3d 709, 714 (10th Cir. 2010). "To be a reasonable alternative, [the alternative] must be non-speculative, and bound by some notion of feasibility." *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1172 (10th Cir. 2002) (citations omitted). Accordingly, federal agencies need not consider an alternative they have "in good faith rejected as too remote, speculative, or impractical or ineffective." *Nat'l Park Serv.*, 703 F.3d at 1183. Agencies are entitled to deference as to which alternatives to consider and the extent to which to

consider them. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 310 (D.C. Cir. 2013). And they need only "briefly discuss the reasons" for eliminating an alternative from detailed consideration. 40 C.F.R. § 1502.14.

B. The Agencies Reasonably Declined to Evaluate the Pilot Knob Alternative in Detail at the Rulemaking Stage.

1. The North Fork Exception is itself a "Reasonable Middle Ground."

As a threshold matter, the Conservation Groups apply the principles articulated in *Richardson* to their Pilot Knob proposal as though the decision established a formula, but *Richardson's* framework should be understood within *Dombeck's* caution that each case is to be decided on its own facts and under the general rule of reason applicable to NEPA/APA review. The Conservation Groups portray the Pilot Knob Alternative as a *Richardson*-style "reasonable middle ground" between the guideposts of the 19,700 acres/172 million tons of coal proposed in the North Fork Exception, and 12,600 acres/95 million tons evaluated under Alternative C. CG Brf. at 31-36. But this framing ignores that the North Fork Exception is itself a reasonable middle ground, developed after careful balancing of the Forest Service's Multiple Use Sustained Yield mandate in the CRR. In the CRR, interests such as the Conservation Groups obtained substantially strengthened environmental protections throughout the 4.2 million acres of CRAs in Colorado. In exchange, the RACR's categorical prohibition on

roadbuilding was relaxed for specified activities in selected areas, including roadbuilding for coal exploration and mining in the North Fork Valley.

The Colorado District Court in *HCCA* described this balancing of interests as follows:

> Before delving into the details of the CRR, I note that the rule appears to be the product of exactly the kind of collaborative, compromise-oriented policymaking that we want in America. Broadly speaking, the CRR balances important conservation interests with the also important economic need to develop natural resources in Colorado. Not everyone got what they wanted out of the rule, but perhaps that is a sign that the political process worked as intended.

HCCA, 52 F.Supp.2d 3d at 1195. One must not lose sight of this broader context. Because the district court in *HCCA* concluded that provisions of CRR are severable, it allowed the rest of the CRR to go into effect while vacating the North Fork Exception. *HCCA II*, 67 F.Supp. 3d at 1266. Having already obtained the very significant state-wide organizational mission benefits of the CRR, the Conservation Groups' continued advocacy and litigation is an effort to move the goalposts further in their favor.

In that context, the Forest Service would have been reasonably justified under NEPA in analyzing only the Proposed Action and No Action Alternatives in the North Fork Exception rulemaking, because the North Fork Exception itself reflects the type of "reasonable middle ground" contemplated in *Richardson*.

Nevertheless, the Forest Service went further, electing to analyze Alternative C, which would have preserved the roadbuilding prohibition on 7,100 acres and foreclosed access to nearly half the estimated coal in the North Fork Valley. Alternative C is fully in keeping with the Conservation Groups' organizational objectives, and the Conservation Groups certainly do not fault the Forest Service for analyzing Alternative C in detail. Indeed, throughout the CRR, North Fork Exception, and Lease Modification proceedings, the Conservation Groups strongly urged the preservation of roadless protections on wilderness-capable lands. *See, e.g.*, Int. App. 12-14. In contending that the Forest Service should *also* have analyzed the Pilot Knob Alternative in detail, the Conservation Groups are thus advocating a third-degree of middle-groundism. Nothing in *Richardson* suggests that federal agencies must continue slicing the alternatives ever finer to the limit of commenters' ability to identify distinctions. *See Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1083 (10th Cir. 2014) ("The range of reasonable alternatives is not infinite" (quotations omitted)).

2. The Pilot Knob Alternative Would Not Meet the Purpose and Need of the Proposed Rulemaking.

In addition to carrying forward the overarching Purpose and Need for the CRR, the stated (and unchallenged) specific Purpose and Need of the North Fork Exception rulemaking is as follows:

> [T]o provide management direction for conserving about 4.2 million acres of CRAs while addressing the State's interest in *not foreclosing opportunities* for exploration and development of coal resources in the North Fork Coal Mining Area.

GA 103 (emphasis added). The emphasized phrase is critical to understanding how the North Fork Exception inter-relates with the broader CRR and the regulations governing coal mining in general. Contrary to the characterization of the Conservation Groups, the North Fork Exception does not authorize coal exploration or coal mining. Exploration and mining cannot occur without further site-specific authorizations by the Forest Service, BLM, and in the case of mining, by the State of Colorado and the federal Office of Surface Mining, Reclamation, and Enforcement ("OSMRE"). GA 479-80. The North Fork Exception simply removes a *categorical prohibition* on these various agencies even considering proposals for site-specific authorizations.

The Pilot Knob Alternative is contrary to the Purpose and Need in that it would foreclose such opportunities for further consideration of site-specific proposals in the Pilot Knob CRA. The Pilot Knob Alternative is also importantly more limiting than Alternative C. Alternative C would have foreclosed opportunities in "wilderness-capable" zones of the North Fork Valley CRAs, but would have retained other opportunities in the immediate vicinity of each existing mine and corresponding coal leases in the North Fork Valley. In contrast, the Pilot

Knob Alternative would have foreclosed *all* opportunities in the Pilot Knob CRA, including the location of the Elk Creek Mine and proven federal coal reserves. "Opportunities" are not defined simply by raw acreage and tonnage, but by proximity to mines and known reserves.[6] It is substantially more economical and logical to expand or resume mining operations in areas that can take advantage of established mine reserves. Consequently, the Pilot Knob Alternative would foreclose the number and geographic distribution of opportunities for future mining in a way that Alternative C would not.

The Conservation Groups' chief arguments in response are that the Elk Creek Mine is not currently operating and any stated intent to protect Elk Creek is a *post hoc* rationalization. Conservation Groups' ("CG") Brf. at 8, 37-38. These arguments misperceive the Purpose and Need, mischaracterize the record, and undercut the Conservation Groups' argument that the Pilot Knob Alternative serves any environmental objective. The Forest Service was clear that the rulemaking was not focused on the current state of specific operators or mines, but was intended to provide long-term opportunities.[7] Thus, should coal market

[6] Because of the RACR, no coal exploration has occurred in North Fork Valley CRAs between early 2001 and the late 2017 approval of the Exploration Plan.

[7] As the Forest Service explained in response to a scoping letter from the owner of Elk Creek mine: "During the public scoping period, Oxbow LLC provided comments maintaining their interest in coal mining opportunities within the Pilot Knob CRA. However, the proposed reinstatement of the North Fork Coal Mining

conditions become more favorable, Elk Creek and its surrounding leases and coal could potentially be reopened/reaccessed by the same or another operator without having to undergo another lengthy and inefficient federal rulemaking process. Int. App. 26-28. The Agencies would still retain their full authority to decline a specific proposal on environmental or other grounds, but they would at least have the authority to *consider* such a request. And, if market conditions do not improve, then Elk Creek and the surrounding leases would remain inactive and no roadbuilding would occur. The Pilot Knob Alternative thus burdens potential future operations in the vicinity of Elk Creek and those leases to no corresponding benefit, and is contrary to the Purpose and Need in a manner that Alternative C is not.

3. There is No Record Evidence Supporting the Claim that the Pilot Knob Alternative would be Practical or Effective at Achieving its Stated Goals.

The Conservation Groups advocate the Pilot Knob Alternative, as distinctive from Alternative C, on the basis of environmental values that are allegedly unique

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Area exception is not for the benefit of any specific mining company. The state specific concern is the stability of local economies in the North Fork Valley recognizing the contribution coal mining provides to those communities. Coal mining opportunities in this area is a means of providing community stability. Even if an existing coal company in the area is no longer interested or able to mine, another company could take advantage of the opportunity." Int. App. 32.

among the CRAs in the North Fork Valley, especially in providing winter range for certain species. They argue:

> In fact, of the three roadless areas, the Pilot Knob Roadless Area contains the only winter range for deer and bald eagles, the only severe winter range for elk, and the only historic and potential future habitat for the imperiled Gunnison sage-grouse.

CG Brf. at 7. The flaw in this argument is that there is no record evidence that the temporary road-building that would cease to be prohibited under the North Fork Exception would have any significant negative effect on these species. Roadbuilding very rarely occurs in the winter in the GMUG, and there is no suggestion that any of the identified species would be materially harmed by either the roads or coal mining. For bald eagles and the Gunnison sage grouse, the Forest Service expressly concluded that the CRR would "not likely cause a loss of viability in the Planning Area." GA 159. Deer and elk were not even identified as species of concern. GA 157-169.

Indeed, the road and drill pad construction at the West Elk Mine is *beneficial* in the long term for elk and deer, creating forest gaps and promoting new growth of forage. GA 691. The Forest Service further stressed its ability to provide adequate protection in the context of site-specific proposals, Int. App. 27, and the Lease Modifications SFEIS included extensive consideration of potential effects on

these species as related to West Elk activities. *See, e.g.*, GA 487, 496-498, 532, 538-539, 654–669, 671-674, 688-689, 719.

Consequently, the Forest Service had no basis to conclude that Pilot Knob warranted special exemption from the proposed rule, let alone that it provided any significantly different benefits from Alternative C. In terms of the *Richardson* test, the Conservation Groups made no showing that the Pilot Knob Alternative would be practical, effective, or anything other than speculative in achieving its purported objectives. They have not carried their burden.

To be clear, the Forest Service did not rule out considering such evidence in the future, should the Conservation Groups ever provide anything, in the context of a site-specific proposal. Indeed, the Forest Service reasonably concluded that site-specific proposals provided a *superior* opportunity to evaluate any evidence of impacts. Int. App. 27. But at a minimum, the Forest Service cannot have erred in declining to consider in detail at the rulemaking stage an alternative expressly advocated for wildlife protection, when the advocates failed to provide any evidence that the alternative would actually protect wildlife.

4. The Pilot Knob Alternative is Not Significantly Distinguishable from Alternative C in Terms of Environmental Protection.

The Conservation Groups are avowedly focused on limiting coal exploration and mining and minimizing road construction in CRAs. *See, e.g.*, Int. App. 4-11. They principally advocated the No Action Alternative. *Id.* Next best, they

asserted that "The Forest Service Must Evaluate Alternatives that Foreclose Exploration and Mining on Some of the North Coal Mining Area," and best of these was Alternative C. Int. App. 14. They stressed their paramount interest in protection of wilderness-capable lands, and "appreciated" that the Forest Service studied Alternative C in detail. Int. App. 12-14, 20. Alternative C was clearly the closest of the alternatives to their preferred No Action Alternative.

In also advocating the Pilot Knob Alternative, the Conservation Groups did identify differences between the Pilot Knob Alternative and Alternative C, but these differences were more of the type that would result from any comparison between sections of a National Forest. National Forests are complex, multi-dimensional environments with hundreds if not thousands of environmental variables, and it is always possible to identify particular species, habitats, or conditions that are more prevalent or different from one section of Forest to the next. While the Conservation Groups thus succeeded (as was inevitable) in finding a handful of distinguishing characteristics between Pilot Knob and other CRAs in the GMUG, they did not provide any basis to conclude that the differences were collectively *significant* in comparison to Alternative C.

Moreover, this Court has been solicitous of requests by environmental interests to analyze alternatives that are *more* environmentally protective than those analyzed by federal agencies, yet still within the agency's statutory mandate.

See, e.g., *Richardson*, 565 F.3d at 709. The Conservation Groups' advocacy of the Pilot Knob Alternative is the inverse of that scenario, being less protective than either of their preferred alternatives, which were both analyzed in detail. As such, the Pilot Knob Alternative was on its face a fallback position, clearly inferior to the proposers' preferred outcome. This is further confirmed by the fact that the Conservation Groups did not propose the Pilot Knob Alternative in conjunction with the original North Fork Exception litigation, but developed it as an afterthought on remand. As a result, the Forest Service did not err in declining to analyze the Pilot Knob Alternative in detail, in addition to Alternative C. *See Richardson*, 565 F.3d at 708-711.

5. The Conservation Groups Cannot Show Prejudice from Deferral of Detailed Consideration of Wildlife Impacts in Pilot Knob to Site-Specific Proposals

Even if the Conservation Groups persuade the Court that the Pilot Knob Alternative would have advanced the Purpose and Need for the rulemaking, was significantly distinguishable from the other Alternatives, and there was record evidence to support a conclusion that the asserted wildlife values could be harmed by the North Fork Exception, the Conservation Groups must further show that they were prejudiced by the Forest Service's decision. *Nat'l Park Serv.*, 703 F.3d at 1183. But the Conservation Groups do not and cannot make this showing, because it is indisputable that the Agencies can perform an adequate NEPA analysis of

potential impacts to wildlife at the coal leasing and exploration stage, before any roadbuilding or mining is authorized.

We know with certainty that the Agencies are *capable* of an adequate NEPA analysis of wildlife values and impacts at the leasing stage for a site-specific proposal in the North Fork Valley, because they *prepared one* for the Lease Modifications. The Conservation Groups do not allege any wildlife-related error in the Leasing SFEIS. Nor is there any argument or evidence that the successful analysis done for the Lease Modifications in the Sunset CRA would not be fully replicable for any proposal in the Pilot Knob CRA. A single appellate record thus includes a rare NEPA proof-of-concept—at the rulemaking stage, the Agencies said they could effectively satisfy NEPA at the leasing stage, and then did it.

The Agencies reasonably concluded that a *better* NEPA analysis could be performed at the leasing stage, because the Agencies would have more information available and could conduct a more focused analysis on the affected lands and wildlife. Int. App. 27-28. But the Court need not decide that proposition, because there is no claim that the Agencies would be in a *worse* position, and incontrovertible evidence shows that a *sufficient* NEPA analysis can be performed at the time of leasing. Critically, the North Fork Exception does not confer any legal rights on operators, and therefore does not constitute the irretrievable commitment of resources that would mandate detailed analysis at the rulemaking

stage rather the leasing stage when more information is available. *Richardson,* 565 F.3d at 717. Consequently, the Conservation Groups have not carried their burden to show prejudice from the Forest Service's decision not to evaluate the Pilot Knob Alternative in detail during the North Fork Exception rulemaking.

C. The Agencies Adequately Disclosed and Considered the Environmental Effects of Methane Flaring, and Their Determination to Conduct Further Economic and Safety Analysis at the Mine Planning Stage was Not Arbitrary and Capricious.

The feasibility of methane flaring at West Elk has been a point of controversy since 2009. As in the prior *West Elk* litigation, the Conservation Groups have ignored key issues, offered inapposite evidence, and fail to acknowledge that the *environmental* impacts of flaring are not in controversy.

1. The Agencies Satisfied NEPA in Disclosing the Environmental Impacts of Methane Flaring.

The purpose of NEPA is not to mandate any particular decision, no matter how potentially environmentally beneficial, but rather to insure that federal agencies understand the environmental consequences of their decisions before they make them. *Dombeck,* 185 F.3d at 1171-72. The Conservation Groups advocated that methane released from West Elk's MDWs should be flared for a simple and straightforward reason—burning methane transforms the methane into water and carbon dioxide, which in turn reduces the carbon dioxide equivalent ("CO_2e") of the emissions by up to 87%. The Leasing SFEIS disclosed this effect of flaring,

and neither Agency suggested that more analysis was required for decisionmakers to understand the CO_2e reduction potential of flaring. *See* GA 529 (explaining that flaring has the potential to reduce the global warming potential of methane by 87%). The Conservation Groups do not fault the disclosure and discussion of the environmental effects of methane flaring. *See also* CG Brf. at 9, 17-18 (citing the Leasing SFEIS and explaining the potential environmental benefits).

In addition to disclosing the environmental effects of flaring, the Agencies included lease stipulations that expressly permit flaring if and when it becomes economically feasible and safe. GA 58 (lease stipulations). The Forest Service reiterated that these stipulations leave the door open for methane flaring in the future. GA 14 ("these stipulations are permissive of methane capture, use or flaring and do not preclude their inclusion in a subsequent mine plan"); 35 ("My decision does not preclude the inclusion of any methane mitigation measure including flaring"). For these reasons, the Agencies satisfied NEPA's mandate – at the rulemaking stage, at the leasing stage, and in any future decisions that will be informed by the North Fork Exception and Leasing SFEIS's.

2. The Agencies Properly Deferred Economic Feasibility and Safety Determinations.

Environmental effects are not the only variables that determine the feasibility and advisability of flaring. Two primary additional factors are safety and economic cost-effectiveness. Based on these factors, the Agencies properly

declined to analyze an alternative at the rulemaking and leasing stages that would have required Mountain Coal to flare methane. The Agencies explained that a detailed analysis of methane flaring was not practical at those junctures because the analysis would require detailed engineering information that would not become known until later in the process.

Specifically, the economics of flaring could not be fully understood until coal exploration had occurred, and any methane-flaring requirement would ultimately have to be approved by MSHA. MSHA approval had never been given for flaring at an active coal mine and could not be assumed. GA 35, 77-79, 525 (explaining that methane mitigation measures were not properly considered until exploration provided information relating to engineering designs for mining, safety, and technological possibility); 529-30 (explaining that a flaring proposal would need to be approved by MSHA and that MSHA has not yet approved flaring at an active coal mine).

Moreover, in 2009 Mountain Coal prepared a detailed analysis of the economics of flaring methane from the northern E Seam, with the benefit of exploration data and recent methane generation volumes. GA 79, 789-809. That analysis showed that flaring was not cost effective. *Id.* As a result, the Agencies required Mountain Coal to update the economic feasibility analysis after obtaining exploration data, no later than one year after the Lease Modifications were

approved. GA 62, 508 (stipulation providing that flaring is not required if it is not economically feasible, which requires MCC to "provide to BLM an updated report on the economic feasibility of capturing or flaring the mine's mine methane for beneficial use or abatement" and that such report must be provided to BLM "no later than 1 year after the modification is approved.").

The Agencies' stance regarding the consideration of methane-mitigation measures has been consistent throughout this process—that they cannot be fully evaluated until all site-specific information is available. *See* GA 126, 525. Accordingly, in the Leasing SFEIS and their respective RODs, the Agencies explained that they currently lacked the site-specific exploration and resultant engineering designs necessary to adequately determine the feasibility of methane flaring. GA 35; 525. Indeed, part of what the Agencies approved, was "an exploration plan proposal . . . that would allow MCC to ascertain the qualitative properties of the coal in the lease mod areas and formulate a mining strategy necessary to safely mine this coal." GA 581; 476-77 (describing the Exploration Plan). Consistent with the need for exploration, the Agencies explained that:

> *Consideration of all these potential methane mitigation measures relies on site-specific exploration data yet to be authorized based on this analysis, data collected and resultant engineering designs for: 1) mining, 2) safety and finally 3) mitigation technology possibilities.* These engineering designs would become part of the subsequent State or OSMRE mine permitting processes and MSHA ventilation plan process. Followed by other agencies

> issuing permits to mine. While opponents to this project would say we "can't kick the can down the road" because of global climate change concerns, the staged process under several authorizing agencies, with defined roles and permitting stages, does not lend itself well to prescribing specific mitigation measures for activities that have not been proposed yet. . . . It is highly unlikely that one of these technologies would be applied until such time as mine-specific operational parameters are known for the lease modifications such as could occur after lease modifications are issued; therefore, lease stipulations about MCC analyzing this situation may prove useful in the determination of these measures.

GA 525 (emphasis added). The Agencies also explained that, while certain data can be estimated, the feasibility of methane flaring depends on current methane volumes (which fluctuate and have decreased 73% since 2010), *see* GA 524, and that "[a]t the leasing and pre-exploration stage, without coal seam information, without a mining plan addressing safety, and without detailed engineering based on information that has yet to be collected, it is speculative to assume that [flaring] is appropriate for the lease modifications' likely post-mining scenario." Int. App. 37-38 ("there are many details about mining yet undetermined which could include or preclude feasibility of available options"); 40-41.

The reason that site-specific information is necessary to determine the feasibility of flaring is due in large part to the fact that coal mine methane is, first and foremost, a miner-safety issue, governed by MSHA. *See* GA 523 ("In underground coal mining, methane is released in the mine during extraction.

MSHA regulations require methane to be diluted in the ventilation air and then vented to the atmosphere . . . for the safety of the mine workers."). As the Agencies explained, MSHA has the final word on these issues. *See* GA 530 (flaring would have to be approved by MSHA). Accordingly, if the Agencies were to require flaring, they could be left with a situation where MSHA would not approve flaring for safety concerns—prohibiting Mountain Coal from recovering the coal and violating the purpose of the agency action.

In *Utahns for Better Transportation v. U.S. Department of Transportation*, this Court held that an alternative that would have required the cooperation of local and regional governmental entities to make the alternative a reality was not a reasonable alternative that needed to be considered. 305 F.3d at 1172. Relying on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 551 (1978), the Court explained that:

> NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies—making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame or the needs to which the underlying proposal is addressed.

Utahns for Better Transp., 305 F.3d at 1172 (quoting *Vermont Yankee*, 425 U.S. at 551). Like in *Utahns*, because the feasibility of flaring is dependent on MSHA, as

well as significant information that cannot be obtained until further exploration has taken place, the Agencies properly refused to further consider an alternative that would have required flaring beyond the baseline disclosure of flaring's CO2e mitigation potential.

Instead of acknowledging MSHA's critical veto authority, the Conservation Groups assert that there was "ample record evidence" available to assess the feasibility of methane flaring at the West Elk Mine at the rulemaking and leasing stages. CG Brf. at 44. But the evidence that the Conservation Groups point to is largely based on assumptions from historical methane emissions that have been fluctuating, and that the Agencies explained are not tied to the amount of coal mined.[8] *See* GA 577 ("there is no clear relationship that would make it possible to accurately predict the amount of methane that will be released to the atmosphere during future mining operations."). The Agencies further explained that using these estimates for determining the feasibility of flaring is not proper: "[m]ethane volumes, which are not tied to production rates, vented at West Elk in 2016 represent a 73% decrease over 2010 levels and would require detailed engineering

[8] The Conservation Groups point to the following types of data: West Elk's prior reporting of methane emissions, predictions as to the location and amount of coal, total acreage to be impacted, and the configuration of existing mining areas. CG Brf. at 44. These do not go to the detailed engineering characteristics specific to the coal and area that will be mined under the lease modifications.

(not simply an economic review based on 6 year old data) based on the conditions specific to West Elk." Int. App. 37.

The Conservation Groups offer three other justifications for why it would be feasible for Mountain Coal to flare methane at the West Elk Mine: (1) an expert report that they submitted after publication of the Leasing SFEIS, during the Forest Service objection process; (2) the observation that methane flaring is "implemented around the world"; and (3) that methane flaring is employed at the nearby *inactive* Elk Creek mine. CG Brf. at 18-19. None of these justifications render the Agencies' decision to refuse to consider in detail an alternative requiring methane flaring arbitrary or capricious.

First, the Conservation Groups rely on an October 20, 2017 study conducted by Raven Ridge Resources ("Raven Report"), CG App. 470. The Raven Report was submitted during the Forest Service objection process, *after* the Leasing SFEIS was published, and more than 18 months after scoping. As a threshold matter, the Conservation Groups waived any argument premised on the Raven Report that the Agencies violated NEPA. "Persons challenging an agency's compliance with NEPA must structure their participation so that it alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004). Submitting the Raven Report *after* the Leasing SFEIS was issued

did not give the Forest Service an opportunity to meaningfully consider it. The Conservation Groups gave no justification as to why they submitted the Raven Report after the Leasing SFEIS was published or why they could not have submitted it earlier.

The late submission of the Raven Report was inexcusable and prejudicial to the Agencies and Mountain Coal. Not only had the opportunity been lost to address the Raven Report in the draft or final EISs, but the prejudice was magnified by the short turnaround provided in the Forest Service objection process. The Forest Service must make a determination on an objection to its decision within 60 days of the objection date and there is no role for participation of a coordinating agency such as BLM or for a project applicant like Mountain Coal. *See* 36 C.F.R. § 218.11. This timeframe is ill suited to an effective evaluation of a highly technical issue like a methane flaring system at a specific mine, with significant safety implications. Indeed, in light of the short regulatory window, the Forest Service regulations do not even require a point-by-point response to objections, *see id.*, and the Forest Service cannot be faulted for the brevity of their discussion of the issue in the Leasing ROD.

Had the Raven Report been timely submitted, the Agencies would have had an opportunity to give it a proper review and Mountain Coal would have been able to properly evaluate it. As such, the Agencies could not have considered it in their

NEPA analysis, were not required to, and arguments based on the Raven Report are waived. *See Dep't of Transp.*, 541 U.S. at 765; *Vill. of Logan v. U.S. Dept. of Interior*, 577 Fed. Appx. 760, 770-71 (10th Cir. 2014) (unpublished) (agencies could not be faulted for not considering study released after NEPA document was published).[9]

[9] Citing *Dine Citizens Against Ruining Our Env't v. Klein*, 676 F.Supp.2d 1198, 1210 (D. Colo. 2009) and *Native Ecosystems Council & All. for the Wild Rockies v. Forest Serv.*, 866 F.Supp. 2d 1209, 1223 (D. Idaho 2012), the District Court concluded that the Conservation Groups did not waive arguments based on the Raven Report because the Forest Service considered the report in its Record of Decision. D. Ct. Op. at 26, n.10. These cases do not foreclose Mountain Coal's position. Instead, they confirm that untimely arguments can be waived. *See Dine Citizen*, 676 F.Supp.2d at 1209-10; *Native Ecosystems*, 866 F.Supp.2d at 1222. They further explain that failure to exhaust administrative remedies is a prudential rather than a jurisdictional doctrine, and is thus subject to case-specific exceptions that were present in those cases. *Dine Citizens*, 676 F.Supp.2d at 1210-11 (refusing to bar plaintiffs' untimely arguments because they were based on the agency's failure to provide timely notice, making a timely challenge impossible); *Native Ecosystems*, 866 F.Supp.2d at 1223 (finding that plaintiffs had done enough to put agency on notice of issues). But the issue with the Raven Report is not so much exhaustion between the administrative appeal process and judicial review as it is the failure to timely make arguments and present evidence during the NEPA process, as was at issue in *Department of Transportation*. The District Court did not engage on the issue of whether the Conservation Groups had any excuse for failing to submit the Raven Report until the Forest Service objection process (they did not), or whether the late submission was prejudicial to the Agencies or Mountain Coal (it was). The District Court's failure to properly evaluate whether arguments based on the Raven Report were waived is harmless given its affirmance of the Forest Service's decision on the merits. But waiver is an additional reason why the Lease Modifications should be upheld.

Ironically, while the Raven Report advocates that methane flaring could theoretically be safe and profitable at West Elk, it also validates the Agencies' determination that the feasibility of methane flaring cannot be ultimately resolved until specific engineering data is known. The report cautions that "all cost assumptions should be refined once a final engineering design is developed." CG App. 492. Thus, the report does not support the Conservation Groups' position.

Next, the Conservation Groups contend that flaring is feasible because it has been employed at active mines *outside of the United States* and at the nearby *inactive* Elk Creek Mine. CG Brf. at 18-19; 43. The Agencies addressed these facts, which the Conservation Groups completely ignore. In the Leasing SFEIS, the Agencies explained that while flaring has been employed at active mines outside of the United States, those mines "are not subject to the same safety regulations/standards to those of the U.S." Int. App. 36. The Agencies also distinguished the inactive Elk Creek Mine on the basis that "[t]he former Elk Creek Mine has different geology and the system was to be located on private lands near the highway and existing infrastructure." *Id.*; GA 526 (noting the "critical differences between the [Elk Creek] and West Elk mines that affect the feasibility of a similar project at West Elk" including that the Elk Creek mine "has unique geological fractures that result in an extremely high concentration of methane unlike West Elk's"). Indeed, this same type of off-site evidence was considered

and rejected in the first West Elk litigation regarding methane flaring. As the district court there observed, "simply because there is some evidence supporting another perspective does not make the alterative more feasible for [the West Elk] mine." *West Elk*, 828 F.Supp.2d at 1237.

Accordingly, it was not arbitrary and capricious for the Agencies to decline to consider in detail at the leasing stage the safety and economics of an alternative that required Mountain Coal to flare methane as mitigation.

D. The Conservation Groups' Requested Remedies are Overbroad and Unwarranted.

As discussed above, the Agencies did not err in their NEPA analyses and, even if they did, any such error was not prejudicial. But, if the Conservation Groups nevertheless persuade the Court that the Agencies committed prejudicial error in either promulgating the North Fork Exception or the Lease Modifications, the appropriate remedy is a remand without vacatur. Vacating either the North Fork Exception or the Lease Modifications would be wildly overbroad and unnecessary given the specific errors alleged. The plain language of the CRR, Tenth Circuit case law, the law of this case, and the equities require that the remainder of the North Fork Exception and the Lease Modifications remain effective during any remand.

1. Any Remedy Related to the Pilot Knob CRA Must be Confined to the Pilot Knob CRA.

The CRR contains a severability clause that prohibits vacatur of any regulation or application of its provisions not expressly determined to be invalid. The Court has held that "[t]he existence of a severability clause raises a *presumption* that the legislating body would have enacted the remaining portions of a statute even without the invalidated sections." *Harvey E. Yates Co. v. Powell*, 98 F.3d 1222, 1240 (10th Cir. 1996). It has also decided there is "no reason why a similar inquiry should not also govern the severability of a regulation." *Id.*

The severability clause in the CRR states:

> If any provision in this subpart *or its application* to any person or to certain circumstances is held to be invalid, the remainder of the regulations in this subpart *and their application* remain in force.

36 C.F.R. § 294.48(f) (emphasis added). The plain meaning of this broadly worded clause makes clear the regulatory intent that courts set aside only those provisions specifically found to be invalid and to allow all other provisions in the CRR to remain in effect. In fact, the clause goes even further and requires courts to conduct an even finer inquiry and construct an even finer remedy. If a court finds invalid only a particular application of an otherwise valid regulation, then 36 C.F.R. § 294.48(f) requires that a court side aside only the invalid application and to allow all other applications of the regulation to "remain in force."

The Conservation Groups do not complain about the entire North Fork Exception regulation codified at 36 C.F.R. § 294.43(c)(1)(ix), but only the *application* of that regulation to the Pilot Knob CRA. The North Forth Exception regulation states:

> A temporary road is needed for coal exploration and/or coal-related surface activities for certain lands with Colorado Roadless Areas within the North Fork Coal Mining Area of the Grand Mesa, Uncompahgre, and Gunnison National Forests as defined by the North Fork Coal Mining Area displayed on the final Colorado Roadless Areas map.

36 C.F.R. § 294.43(c)(1)(ix) (emphasis added). Neither the Pilot Knob CRA nor any other roadless area is specifically mentioned in the North Fork Exception regulation. Instead, the regulation states that the temporary coal road exception applies to "certain lands … within the North Fork Coal Mining Area of the Grand Mesa, Uncompahgre, and Gunnison National Forests." *Id.* Those "certain lands" are identified in another regulation: 36 C.F.R. § 294.49. Section 294.49 includes Pilot Knob along with 75 other CRAs within the GMUG. *Id.* at § 294.49, lines 29-104. The Pilot Knob CRA is listed on line 84 of regulation Section 294.49, which contains 363 lines identifying 363 Colorado roadless areas in all. *Id.* Overlaying the final Colorado Roadless Areas Map identifies three distinct CRAs—Flatirons, Pilot Knob, and Sunset—as subject to the North Fork Exception. There are clearly

defined geographic and regulatory boundaries between the Pilot Knob CRA and the other two.

The Conservation Groups do not allege that the Forest Service erred in failing to consider alternatives that would exclude any of the other two CRAs identified in regulation Section 294.49 from the North Fork Exception. They claim only that the Forest Service erred in failing to consider an alternative that would exclude the Pilot Knob CRA—and only the Pilot Knob area CRA—from the "certain lands" falling within the North Fork Exception codified in regulation Section 294.43(c)(1)(ix).

If things had gone the way the Conservation Groups had wanted, and the Forest Service had considered the Pilot Knob Alternative and decided to exclude it from the North Fork Exception, then 36 C.F.R. § 294.43(c)(1)(ix) would be written almost exactly as it is written today. Section 294.49 would still contain 363 out of 363 lines, because Pilot Knob would still be listed as a roadless area. The only change to the Rule would be that Section 294.43(c)(1)(ix) would not be applied to the Pilot Knob CRA. The change could be achieved with three simple words: "except Pilot Knob." Section 294.43(c)(1)(ix) would read:

> A temporary road is needed for coal exploration and/or coal-related surface activities for certain lands with Colorado Roadless Areas within the North Fork Coal Mining Area of the Grand Mesa, Uncompahgre, and Gunnison National Forests, *except Pilot Knob*, as defined

> by the Northern Fork Coal Mining Area displayed on the final Colorado Roadless Areas map.

The remainder of the regulations and their applications would not have changed. Despite this, the Conservation Groups ask the Court to vacate all of 36 C.F.R. § 294.43(c)(1)(ix), and sweep the Flatirons and Sunset CRAs into further regulatory proceedings that should not involve them in any way.

The CRR's severability clause does not allow for such overbroad relief. Instead, if the Court were to determine the application of the North Fork Exception to the Pilot Knob CRA to be invalid because the Forest Service did not consider an alternative excluding it from this application, then the CRR requires the Court to fashion a remedy that allows "the remainder of the regulations in this subpart and their application [to] remain in force…" 36 C.F.R. § 294.48(f). The Court or the district court on remand can fashion such a narrowly tailored remedy by remanding consideration of the Pilot Knob Alternative to the Forest Service and, as necessary, enjoining roadbuilding in the Pilot Knob CRA pending such consideration, while permitting the rest of the Exception to remain in effect. And because it can, the CRR requires that it must.

Notably, a partial set aside would be appropriate even if the CRR did not contain a severability clause, because the application of the North Fork Exception to Pilot Knob is clearly and reasonably severable from the rest of the Exception. The Court has held that, even where a regulation does not contain a severability

clause, a reviewing court "may *partially* set aside a regulation *if* the invalid *portion* is *severable*." *Arizona Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009) (emphasis added). The test for determining severability is "if the severed parts operate entirely independently of one another, and the circumstances indicate the agency would have adopted the regulation even without the faulty provision." *Id.*

There is nothing in the record that may be construed to indicate that the remainder of the North Fork Exception depends on the inclusion of the Pilot Knob CRA. There is nothing in the record below to indicate if the Pilot Knob CRA was excluded, the remainder of the North Fork Exception could not or should not go into effect. The Conservation Groups themselves claim that the Pilot Knob Alternative is *intended* to "preserve the option of future coal exploration and development" and "open 75 percent of roadless forest in the North Fork Exception Area to road construction and permit access to 128 million tons of coal." CG Brf. at 36-37 (internal quotation marks omitted). Vacatur of the entire North Fork Exception is inconsistent with the Conservation Groups' own advocacy for the Pilot Knob Alternative during the rulemaking process and on the merits on appeal.

In addition, there is nothing in the record, nor in any of the Conservation Groups' pleadings, to suggest, even in passing, that the Forest Service adopted the North Fork Exception only because Pilot Knob was included and that it would not

have adopted the Exception if Pilot Knob had remained roadless. Pilot Knob therefore would be severable even if there were no severability clause in the Rule. *See Arizona Pub. Serv. Co.*, 562 F.3d at 1122 (setting aside only the fugitive dust limit part of EPA's federal implementation plan for a coal-fired power plant because "the functionality of the plan does not depend on enforcement of the fugitive dust limit"). Accordingly, if the Court decides the Forest Service erred by not considering the Pilot Knob alternative, then the Court should allow the North Fork Exception and all applications apart from the Pilot Knob application to go into effect. *See Harvey E. Yates Co.*, 98 F.3d at 1240.

Narrow relief is also required by the law of the case and basic equity. In *HCCA II*, the district court invoked the CRR's severability clause when it fashioned partial relief after finding that the Forest Service's initial promulgation of the North Fork Exception failed to comply with NEPA. *HCCA II*, 67 F. Supp. 3d at 1266. At that time, the appellants "[sought] severance of the North Fork Exception and vacation *of that provision only*." *Id.* (emphasis added). The district court concluded that: "the severability clause creates a presumption that the North Fork Exception is severable, that the CRR could operate independently of the exception, and that while there is mixed evidence regarding whether the agency would have wished the CRR to operate without the exception, nothing in the record indicates a strong preference that the CRR be totally abandoned without the

exception." *Id.* It accordingly ordered the severance and vacatur of only the North Fork Exception and not the entire Rule. *Id.*

Citing *HCCA II*, the Conservation Groups assert that "vacatur is the normal remedy for an agency action that fails to comply with NEPA." CG Brf. at 55. They attempt to cast the district court's remedies decision as the kind of sweeping vacatur the Conservation Groups request here, but this is misleading. At issue in *HCCA II* was the question of whether the whole CRR should be vacated, or merely the portion the court found to be in error. Because the only portion of the agency action which the court found to violate NEPA was the North Fork Exception, the district court vacated only the Exception and left the rest of the CRR intact.

Finally, the Conservation Groups spend six pages of their brief making the uncontroverted point that "courts retain equitable discretion to depart from vacatur to craft an alternative remedy for APA violations." CG Brf. at 54. They do not, however, spend a single sentence explaining why the equities do not favor a partial remedy in this case. As the district court noted in *HCCA II*, the APA "does not … deprive reviewing courts of traditional equitable powers when fashioning a remedy," and the Court "has a great deal of discretion in crafting a remedy." 67 F. Supp. 3d at 1263-64.

Noting that the Tenth Circuit had not determined whether this circuit applies the two-step test, other circuits have adopted for determining whether "equity

counsels against vacatur," the district court in *HCCA II* undertook its own consideration of the equities in the case at the time. *Id.* at 1263. The district court gave particular weight to the principle that "where several interrelated agency decisions all contained significant NEPA violations," as the district court had found that they did in that case, "a simple remand and temporary injunction" was unlikely "to remedy the agencies' errors." *Id.* at 1265. Comparing the three decisions at issue to a "Gordian knot that needs cutting than a simple tangle that the government can untie with a little extra time," it expressed concern that it was not clear "how, if the North Fork Exception to the CRR violated NEPA, any activity pursuant to the lease modification could avoid relying on the offending part of the CRR." *Id.* It speculated that the "agencies might, depending on how they calculate the effect of greenhouse gas emissions, decide to forgo granting the lease modifications altogether." *Id.* Or, it might not. *Id.*

The circumstances would be quite different if the Court concluded the Forest Service erred in failing to consider the Pilot Knob Alternative. The Agency's error would be solitary, discrete, and isolated. There are no pending site-specific proposals that touch upon the Pilot Knob CRA or depend on the inclusion of the Pilot Knob CRA in the North Fork Exception. The remainder of the North Fork Exception and its application to the other roadless areas within the North Fork Coal Mining Area of the GMUG could go into effect without any disturbance to the

Pilot Knob CRA. After considering the Pilot Knob Alternative, the Forest Service would face a simple choice: reaffirm the decision to include the Pilot Knob in the excepted area, or exclude it. Neither option would have any effect on any of the other activities occurring in the other CRAs included in the North Fork Exception. Accordingly, the equitable considerations would require only invalidation of the application of the North Fork Exception to Pilot Knob and not invalidation of the rule as a whole.

The result would be the same were the Court to adopt and apply the two-part test applied by other circuits. In *Applied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, the D.C. Circuit held that "[a]n inadequately supported rule … need not necessarily be vacated." 988 F.2d 146, 150 (D.C. Cir. 1993). Instead, the "decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequence of an interim change that may itself be changed." *Id.* at 150-51.

Here, were the Court to decide the Forest Service should have considered the Pilot Knob Alternative, the seriousness of the deficiency would be minimal and well defined. If there is any error, it is one of line-drawing and nothing more—i.e., how large of an area might be excluded from the North Fork Exception while still advancing the Rule's Purpose and Need.

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

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

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

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

Lease Modifications if the Court determines that the BLM should have further considered flaring. Rather, if any remedy other than remand without vacatur to the district court is ordered by the Court, the maximum that should be considered is an injunction prohibiting or limiting methane emissions from MDWs in the Lease Modifications until further study of flaring is complete. Although this would effectively prohibit mining beyond the point where MDWs would need to be operating to safely mine, it would not nullify the legal instrument of the Lease Modifications, prevent coal exploration, or preclude the limited amount of mining that can be conducted before new MDWs in the Lease Modifications would begin discharging. None of those other instruments or activities are implicated in any error related to the NEPA analysis of flaring, and there is no basis to prohibit them through vacatur of the Lease Modifications.

Equally important, remand without vacatur is the appropriate remedy because the Court is now working with outdated information. As required by stipulation in the Lease Modifications, in November 2018 Mountain Coal provided updated safety and economic data related to the feasibility of flaring in an updated Resource Recovery and Protection Plan to the BLM. This report drew upon geologic and coal resource information discovered during coal exploration following approval of the Lease Modifications, and provided the latest information on likely methane generation rates under the updated mine and ventilation plans

for the Lease Modification lands. BLM and OSMRE are considering the information as part of the Assistant Secretary for Lands and Minerals' review and decision on the proposed modified and updated mine plan. No longwall mining or methane emissions from Lease Modification MDWs will occur before that decision. And the decision is itself reviewable under the APA.

Of course, none of this material is in the Administrative Record, because it all post-dates issuance of the Lease Modifications. Consequently, only the district court on remand, or in the context of a petition for review of the mine plan decision, would be able to evaluate the federal government's determinations with the benefit of up to date information on the economic feasibility and safety of flaring.

Where the agency's error in a coal leasing decision was narrow and relevant information has developed post-decision, this Court has held that the appropriate remedy is to remand to the district court without vacatur. *WildEarth Guardians v. U.S. Bureau of Land Management,* 870 F.3d 1222, 1239-40 (10th Cir. 2017). The case for remand without vacatur is even stronger here, where the federal government will in all likelihood have superseded and *addressed* the Conservation Groups' specific contentions with more accurate, up-to-date information than was available during the leasing process, and prior to emissions of methane from MDWs. Vacatur would inflict significant collateral injury, to no corresponding

benefit. Consequently, remand without vacatur is the appropriate remedy if the Court finds that the BLM committed prejudicial error in its consideration of methane flaring during processing of the Lease Modifications.

CONCLUSION

For the reasons expressed herein, the Court should affirm the order of the district court and decisions of the Agencies. Should it find error, the Court should remand the relevant decisions to the district court without vacatur.

STATEMENT REGARDING ORAL ARGUMENT

Mountain Coal believes that oral argument would be beneficial in this case in that the decisions on review involve a lengthy and complex procedural history, important inter-agency jurisdictional issues, and a voluminous administrative record.

DATED this 14th day of March, 2019.

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ADDITIONAL CERTIFICATIONS

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

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

2. The hard copies of the **BRIEF OF INTERVENOR-APPELLEE** are exact copies of the ECF filing;

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2019, I electronically filed the foregoing **BRIEF OF INTERVENOR-APPELLEE** using the court's CM/ECF system, which will send notifications of such filing to the following:

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