Appeal No. 18-1374

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

v.

U.S. FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE, DANIEL JIRÓN, in his official capacity as Acting Under Secretary of Agriculture for Natural Resources & Environment, SCOTT ARMENTROUT, in his official capacity as Supervisor of the Grand Mesa, Uncompahgre & Gunnison National Forests, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, and KATHARINE MACGREGOR, in her official capacity as Deputy Assistant Secretary, Land & Minerals Management,
Defendants-Appellees,

and

MOUNTAIN COAL COMPANY, LLC,
Intervenor-Defendant-Appellee.

On Appeal from the United States District Court for the District of Colorado,
The Honorable Philip A. Brimmer, Civil Action No. 17-cv-03025-PAB

ORAL ARGUMENT IS REQUESTED

REPLY BRIEF OF APPELLANTS HIGH COUNTRY CONSERVATION ADVOCATES *ET AL.*

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GLOSSARY

APA	Administrative Procedure Act
Agencies	Forest Service and Bureau of Land Management
BLM	Bureau of Land Management
CO_2e	carbon dioxide equivalent in global warming potential
EIS	environmental impact statement
Exception EIS	Rulemaking for Colorado Roadless Area, Supplemental Final Environmental Impact Statement (Nov. 2016)
Leasing EIS	Federal Coal Lease Modifications COC-1362 & COC-67232, Supplemental Final Environmental Impact Statement (Aug. 2017).
MCC	Mountain Coal Company
MSHA	Mine Safety and Health Administration
NEPA	National Environmental Policy Act
OSM	Office of Surface Mining, Reclamation, and Enforcement
OSM ROD	Office of Surface Mining, Reclamation, and Enforcement, Record of Decision, Federal Coal Lease Modifications COC-1362 & COC-67232 (approved Mar. 12, 2019)

INTRODUCTION

In both the Rulemaking for Colorado Roadless Areas Supplemental Final Environmental Impact Statement ("Exception EIS") and the Federal Coal Lease Modifications Supplemental Final Environmental Impact Statement ("Leasing EIS"), Federal Defendants failed to consider reasonable alternatives proposed by the Conservation Groups that would mitigate the harm of mining publicly owned coal in roadless areas on public lands. The Pilot Knob alternative would protect the entire Pilot Knob roadless area from road building related to coal mining, but allow mining to continue in two other roadless areas where, unlike in the Pilot Knob region, there is 33 million tons more potentially recoverable coal and an active mining operation. The methane-flaring alternative would require the Forest Service and Bureau of Land Management ("BLM") (collectively "Agencies") to mitigate the climate and public health impacts of the largest industrial methane source in Colorado.

These alternatives easily satisfy the Tenth Circuit's "guideposts" for reasonable alternatives because they fall within the Agencies' statutory authority and meet the purpose and need of the projects. They also fail to satisfy either recognized exception: they are not too remote, speculative, impractical, or ineffective, and they are significantly distinguishable from the other alternatives the Agencies considered. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*,

565 F.3d 683, 708-09 (10th Cir. 2009) (setting forth the guideposts and exceptions). Federal Defendants' failure to consider these reasonable alternatives renders their EISs inadequate.

Federal Defendants' response fails to demonstrate that either of these alternatives are unreasonable. For the Pilot Knob alternative, rather than addressing the legal standards set forth in *Richardson* and other Tenth Circuit cases, the Forest Service offers an unsupported argument that it has virtually unfettered discretion to select the range of alternatives. That is not the law. The Forest Service also ignores its own explanation in the record for why it rejected the alternative—that it does not meet the agency's purpose of providing long-term access to recoverable coal resources—perhaps because that explanation is plainly false. But it is the *only* explanation this Court can consider. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) (holding that the court can affirm agency action only "on grounds articulated by the agency itself"). Moreover, the Forest Service's many post-hoc rationales do not provide a basis to reject the Pilot Knob alternative under the Tenth Circuit's standards.

For the methane-flaring alternative, the Agencies' primary response is to suggest that the Office of Surface Mining, Reclamation, and Enforcement ("OSM") or the Mine Safety and Health Administration ("MSHA") will consider a methane-flaring alternative in detail during their review or approval processes—a

claim that the Agencies now know is false. Moreover, this attempt to punt their legal obligations to another agency violates the National Environmental Policy Act ("NEPA"). The Agencies also argue that methane flaring is "impractical" because Mountain Coal Company ("MCC") may not make a profit on the flaring component of the project if it is implemented. However, this is not a rational basis to decline even to *consider* requiring a company with a parent corporation worth billions of dollars to mitigate the environmental impacts of such a large source of methane.

I. The Forest Service Violated NEPA in the Exception EIS by Failing to Consider the Pilot Knob Alternative, Which Protects an Intact Colorado Roadless Area that Is Not Subject to Active Coal Mining.

The Pilot Knob alternative easily satisfies the Tenth Circuit's standards for reasonableness. After the district court vacated the Forest Service's 2012 decision approving the North Fork Coal Mining Exception, the Elk Creek coal mine, located just south of the Pilot Knob roadless area, closed and started demolishing structures related to mining and reclaiming the site. *See* Answering Brief for the Federal Appellees 11 ("Fed. Br."); Opening Brief of Appellants High Country Conservation Advocates *et al.* 8 ("HCCA Br."). Given the lack of active or planned future mining operations in the Pilot Knob roadless area, the Conservation Groups proposed a reasonable alternative that would protect that entire roadless area from road construction for coal mining but still allow such activities in the

Sunset and Flatirons roadless areas, where the West Elk mine is active and has plans to expand. Aplts. App. 281-82.

The Forest Service should have considered this alternative in detail because it satisfies the Tenth Circuit's "guideposts" for reasonable alternatives and does not fall within either recognized exception. *See Richardson*, 565 F.3d at 708-09; *see also* 40 C.F.R. § 1502.14(a) (requiring agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives"); *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002) (holding agencies must "rigorously explore all reasonable alternatives . . . and give each alternative substantial treatment in the environmental impact statement"). The Forest Service offers no legal rationale for its failure to do so.

A. The Forest Service Ignores the Tenth Circuit's Standards for Evaluating Proposed Alternatives.

Although the Forest Service acknowledges the "rule of reason" and the general arbitrary and capricious standard of review, the agency largely ignores the relevant Tenth Circuit standards. Fed. Br. 22-23. The Forest Service does not address whether the Pilot Knob alternative is consistent with the agency's statutory authority, meets the purpose and need of the project, or is too remote, speculative,

or impractical.[1] The only standard the agency addresses directly is the "significantly distinguishable" exception, arguing that the Pilot Knob alternative is not significantly distinguishable from Alternative C. However, that rationale was not a basis for its decision and is incorrect. *See infra* pp. 13-17.

Instead of focusing on the Tenth Circuit standards, the Forest Service argues that it has virtually unfettered discretion to select a reasonable range of alternatives. Fed. Br. 23 (arguing the alternatives analysis is a "judgment call" and the "line-drawing" necessary is "vested in the agencies, not the courts" (quoting *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987)).[2] That is not this Court's test. *Richardson*, 565 F.3d at 708-712.

[1] Although the Forest Service makes no reference to the project's purpose and need, the agency seems to be arguing that the Pilot Knob alternative is unreasonable on that basis because it precludes future coal mining at what is now the closed Elk Creek mine. Fed. Br. 28-30. As discussed *infra* pp. 8-10, the Pilot Knob alternative fully satisfies the purpose and need of balancing roadless protection with coal mining by protecting one intact roadless area while allowing development in two others.

[2] Not only is *Coalition on Sensible Transportation* a more than 30-year-old D.C. Circuit case that does not even involve an alternatives claim, it also expressly recognizes the court's role in reviewing the reasonableness of an agency's NEPA decision making. *Prairie Band Pottawatomie Nation v. Federal Highway Administration*, 684 F.3d 1002 (10th Cir. 2012), is equally unhelpful to the Forest Service. *See* Fed. Br. 23. Although the Court recognized an agency's need to limit the number of alternatives considered, it also reaffirmed that the alternatives analysis is subject to the "reasonableness" standard, and that agencies need not consider alternatives where the environmental impact is not significantly distinguishable from that of considered alternatives. 684 F.3d at 1012.

The Forest Service argues that such unfettered line drawing is necessary to avoid consideration of a limitless number of possible alternatives. Fed. Br. 23; *see also* Brief of the Intervenor-Appellee 19 ("MCC Br."). However, the Tenth Circuit's guideposts and exceptions ensure agencies have to consider only a range of reasonable alternatives, not every possible variation that might be proposed. *Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1245 (D. Colo. 2012) (recognizing "the phrase 'all other reasonable alternatives' is not entirely open-ended" and that to define the "boundaries of the range of alternatives" agencies may define the purpose and need and reject alternatives that are impractical or not significantly distinguishable). The Pilot Knob alternative meets each of the relevant standards, and its inclusion would require the Forest Service to consider four reasonable alternatives, hardly an insurmountable task.

The Forest Service and MCC also argue that failure to consider the Pilot Knob alternative was reasonable given the "context" for the decision. Fed. Br. 26-27; MCC Br. 18. They point to the fact that the court in *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174 (D. Colo. 2014) ("*High Country I*"), did not disturb the range of alternatives the Forest Service analyzed in the 2012 Colorado Roadless Rule EIS. Fed. Br. 26. However, as the district court recognized in this case, Aplts. App. 230, the *High Country* court severed the North Fork Exception from the rest of the Colorado Roadless

Rule and vacated it as unlawful, creating a "clean slate." 67 F. Supp. 3d 1262, 1264-66, 1267 (D. Colo. 2014) ("*High Country II*"). Accordingly, the Tenth Circuit's standards for reasonableness govern the range of alternatives the Forest Service needed to consider in making its new decision, not the previous proceedings.

Because the Pilot Knob alternative is reasonable under the Tenth Circuit's standards, the Forest Service's failure to consider this alternative in detail renders its decision arbitrary and capricious.

B. The Forest Service's Post-Hoc Arguments Do Not Support Rejection of the Pilot Knob Alternative.

As the Forest Service concedes, the Exception EIS stated that the agency would not consider the Pilot Knob alternative in detail because it would remove the Pilot Knob roadless area from the North Fork Coal Mining Exception Area and would therefore defeat the purpose of providing "access to coal resources . . . over the long-term based on where recoverable coal resources might occur." Fed. Br. 11-12 (quoting Exception EIS); *see also id.* at 28. This is incorrect. Based on the Forest Service's own methodology, the Pilot Knob alternative allows access to 128 million tons of coal in the region where the West Elk mine is actively mining and seeking to expand its operations. *See* Aplts. App. 310.

In its response brief, the Forest Service focuses exclusively on lost future coal mining opportunities at the currently closed and reclaiming Elk Creek mine.

Fed. Br. 28-30. But there is no mention of the Elk Creek mine in the Forest Service's explanation in the Exception EIS for why it did not consider the Pilot Knob alternative in detail. *See* G.A. 121. This Court cannot consider this post-hoc explanation. *Utahns for Better Transp.*, 305 F.3d at 1164-65.

The Forest Service claims it made "factual findings" that support its decision to dismiss the Pilot Knob alternative. Fed. Br. 28-29. But it simply cherry-picks statements about the Elk Creek mine that appear in the administrative record; the record lacks any explanation that the mine is the *reason* the Forest Service rejected the Pilot Knob alternative. *Utahns for Better Transp.*, 305 F.3d at 1164-65 (rejecting appellees attempt to rely on statements in an EIS to justify its rejection of an alternative where the EIS did not identify those statements as a reason for eliminating the alternative). The Forest Service also cites to a statement in the *draft* Exception EIS that even if Oxbow Mining closed its operations at the Elk Creek mine, another company could operate in the area in the future. Fed. Br. 28 (citing G.A. 940); *see also* MCC Br. 21-22 n.7 (citing Int. App. 32). However, the Forest Service omitted this language from the final Exception EIS, and did not include it in its final rule or record of decision. G.A. 121; 81 Fed. Reg. 91,811 (Dec. 19, 2016). Therefore, the agency abandoned that rationale.

Even if the Court considers the Forest Service's arguments regarding the Elk Creek mine, however, they do not demonstrate that the Pilot Knob alternative is

unreasonable under the Tenth Circuit's standards. Although the Forest Service does not identify the relevant standard or even mention the purpose and need of the project, the agency appears to be arguing that the Pilot Knob alternative does not meet the purpose and need because it forecloses future mining opportunities at the Elk Creek mine. Fed. Br. 29; *see also* MCC Br. 19-22 (arguing expressly that the Pilot Knob alternative is inconsistent with the purpose and need). The Forest Service's failure to address the Exception EIS's purpose and need is telling given the extensive Tenth Circuit case law evaluating the range of alternatives in NEPA cases based on the project's purpose and need. *See, e.g.*, *Richardson*, 565 F.3d at 709, 712-713; *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1083-85 (10th Cir. 2014); *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1243-46 (10th Cir. 2011); *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175-76 (10th Cir. 1999).

Indeed, the Forest Service cannot reasonably claim that the Pilot Knob alternative is inconsistent with the purpose and need of its action, which is to "provide management direction for conserving . . . [Colorado 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." G.A. 103. In other words, the objective is to balance roadless area protection and coal mining in the North Fork Coal Mining Exception area. The Pilot Knob alternative does

exactly that by protecting the Pilot Knob roadless area in its entirety while allowing access to 128 million tons of recoverable coal in the Sunset and Flatirons roadless areas—nearly 75 percent of the recoverable coal available if all three areas were open to road construction. HCCA Br. 36-37.

The Forest Service and MCC seek to read additional language into the Exception EIS's purpose and need statement such that it would preclude the Forest Service from considering alternatives that would foreclose *any* opportunity for future coal mining in the North Fork Coal Mining Exception area, such as resuming operations at the Elk Creek mine. The statement's language is not so limiting. Moreover, as the district court recognized, this interpretation would also exclude consideration of Alternative C, which "would foreclose mining-related road construction in a larger area and one expected to contain more coal deposits than the Pilot Knob Roadless Area." Aplts. App. 238. As the Forest Service concedes, the Pilot Knob alternative provides access to 33 million tons more recoverable coal than Alternative C. Fed. Br. 31.

The Forest Service and MCC also attempt to argue that the Pilot Knob alternative is different from Alternative C because it precludes development of

proven, recoverable coal reserves.[3] This assertion is unsupported and incorrect. The Forest Service and MCC repeatedly state, without citation, that the presence of the closed Elk Creek mine means there is more certainty that there is "recoverable coal" in the Pilot Knob roadless area than in other areas within the Exception area boundaries. *See* Feds Br. 28-29; *see also id.* at 11;[4] MCC Br. 21 (referencing "proven federal coal reserves"). In fact, record evidence suggests that the mine's operator, Oxbow, believed it had mined most of the recoverable coal in the area. Aplts. App. 306 (newspaper article quoting Oxbow company president Mike Ludlow saying that Oxbow "had depleted most of the coal that we thought was economically recoverable from [the Elk Creek mine] area"). Oxbow ceased mining operations in 2012 after the coal seam under the mine caught on fire. Since then, it has destroyed several structures related to mining, begun reclaiming the site, and

[3] The Forest Service also states repeatedly that the Pilot Knob alternative would "foreclose future access to existing federal coal leases or private leases." Fed. Br. 18, 28. This explanation also is not in the record. Moreover, none of the alternatives, including the proposed Pilot Knob alternative, would affect *existing* federal leases because the Colorado Roadless Rule does not prohibit road construction on existing leases. *See* 36 C.F.R. § 294.48(a), (b) (grandfathering in existing permits and leases). With respect to private leases, it is unclear what the Forest Service is referencing. The pages of the Exception EIS that the agency cites make no mention of private leases. Fed. Br. 28 (citing G.A. 134-135). The Exception EIS mentions private leases adjacent to the Sunset Roadless area, but these leases would be unaffected by the Pilot Knob alternative. G.A. 130-131.

[4] The Forest Service cites only to one page of the Exception EIS (G.A. 128), which contains no support for this statement.

shown no interest in continuing operations. Aplts. App. 286-87, 301. Neither the Forest Service nor MCC point to any record evidence to suggest that future mining is likely at the site.

Furthermore, contrary to the Forest Service's and MCC's assertions, their "proven reserves" logic for rejecting the Pilot Knob alternative also would exclude consideration of Alternative C, which would have prohibited mining in wilderness capable lands in the Sunset roadless area where the *active* West Elk mine is *currently* planning to expand its operations. The proposed lease modifications challenged in this case are located directly south of West Elk's existing leases. G.A. 129 fig. 3-1. One of those lease modification areas overlaps with the wilderness capable lands that Alternative C would exclude from road construction for mining. *Id.*; G.A. 718 fig. 3-26. In fact, West Elk's exploration plan, approved with the lease modifications, includes drill sites and roads within those same wilderness capable lands. *Compare* G.A. 129 fig. 3-1 and G.A. 718 fig. 3-26, *with* G.A. 513 fig. 2-2.

MCC does not respond to the argument that the "proven reserves" argument would apply with even more force to Alternative C. The Forest Service acknowledges the "overlap" between the lease modifications and the areas excluded from mining under Alternative C, but attempts to discount it as "little" without any explanation or record support. Fed. Br. 29 n.6. In fact, although the

record does not indicate the specific acreage of the overlap, it appears to be about half of the area within lease modification COC-67232, which is around 920 acres. *See* G.A. 513 fig. 2-2; *see also* G.A. 69. Regardless, the size of the overlap does not mitigate the inconsistency in the Forest Service's position. Aplts. App. 273. The Forest Service cannot rationally claim that it based its decision not to consider the Pilot Knob alternative on the loss of future coal mining opportunities when the same logic would apply even more so to Alternative C.

C. The Forest Service's Argument that the Pilot Knob Alternative Is Not Significantly Distinguishable Based on the Agency's "Primary Metric" of Acreage and Amount of Coal Is Post-Hoc, Ignores the Tenth Circuit's Standards, and Is Incorrect.

The Forest Service's second post-hoc theory for rejecting the Pilot Knob alternative is inconsistent with its first. Rather than focus on foreclosed mining opportunities at the Elk Creek mine, the Forest Service's response brief argues that the Forest Service rejected the Pilot Knob alternative because it is not significantly distinguishable from Alternative C under the "primary metric" that the agency claims it used: acreage and amount of coal. Fed. Br. 30; *compare* MCC Br. 20-21 (arguing the Forest Service evaluated the alternatives based on "opportunities" for coal development, which are "not defined simply by raw acreage and tonnage, but by proximity to mines and known reserves"). This Court cannot uphold the North Fork Exception based on the Forest Service's "primary metric" explanation, which

is not found anywhere in the administrative record. *Utahns for Better Transp.*, 305 F.3d at 1164-65.

The Forest Service also offers no legal support for its contention that it may define a limiting "primary metric" to select its alternatives, let alone do so after-the-fact. Fed. Br. 30. Under Tenth Circuit law, the project's purpose and need defines the reasonable range of alternatives, not some post-hoc "primary metric." *See supra* p. 9.

The Pilot Knob alternative also is significantly distinguishable from Alternative C under the standards adopted in *Richardson* and other courts in the Tenth Circuit. For example, it protects a roadless area where the only coal mining "prospect" in the area is a closed mine with no plans to re-open. *See Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145, 1166-67 (D. Colo. 2018) (holding that BLM was required to consider a "significantly distinguishable" alternative to protect lands that had low oil and gas development potential). Additionally, the Pilot Knob alternative protects an *entire* roadless area from road construction related coal mining rather than just two smaller portions of roadless areas as considered in Alternative C. *See Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1249 (considering an alternative significantly distinguishable based on *how* it balanced development and resource protection). Neither the Forest Service nor MCC address this distinguishing aspect of the Pilot Knob alternative. The

alternative also protects the unique resources of the Pilot Knob roadless area, which include 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 in the Exception area. *See Richardson*, 565 F.3d at 711 (recognizing the area proposed for protection was distinct because of its "fragility and importance as habitat"); *see* HCCA Br. 7, 33.[5]

Moreover, the Pilot Knob alternative is significantly distinguishable from Alternative C even under the Forest Service's primary metric of acreage and amount of coal. The Forest Service concedes that, compared with Alternative C, the Pilot Knob alternative would provide access to coal mining on 2,100 *more* acres and allow development of 33 million *more* tons of coal. *See* Fed. Br. 30-31. Because of these differences, the Pilot Knob alternative would help to sharply

[5] Contrary to the Forest Service's repeated assertions, Fed. Br. 18, 31, 33, Conservation Groups fully explained why the Pilot Knob roadless area is ecologically distinct. *See, e.g.*, HCCA Br. 6-7, 33-35. MCC makes the specious argument that the Pilot Knob alternative is speculative because there is no record evidence showing that road construction related to coal mining would harm the Pilot Knob roadless area and the species that live there. MCC Br. 24. This argument is absent from the administrative record and the Forest Service's own brief and cannot be considered by the Court. *Utahns for Better Transp.*, 305 F.3d at 1164-65. It also is false. Indeed, one of the fundamental purposes of the Colorado Roadless Rule is to prevent habitat fragmentation and species impacts. *See, e.g.*, 77 Fed. Reg. 39,576, 39,577 (July 3, 2012) (recognizing "tree cutting, sale or removal, and road construction/reconstruction have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics").

define the issues at stake—including the environmental values that will be degraded depending on how much coal will be available for mining. Including the Pilot Knob alternative in the analysis would provide a clear basis for choice between roadless protection and coal mining for the agency and the public—the primary purpose of the alternatives analysis. 40 C.F.R. § 1502.14; *Richardson*, 565 F.3d at 708 ("Without substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded.").[6]

The Forest Service also incorrectly argues that Conservation Groups are proposing an "ecologically distinct" test for selecting alternatives. Fed. Br. 32. Unlike the Forest Service, Conservation Groups carefully applied the Tenth Circuit's standards to support their argument that the Pilot Knob alternative is reasonable. *See* HCCA Br. 31-36.

The Forest Service also claims that ecological distinctiveness of the Pilot Knob area is not relevant to preparing an analysis that discloses the greenhouse gas emissions resulting from the combustion of North Fork Valley Coal. Fed. Br. 32.

[6] MCC suggests that Conservation Groups proposed the Pilot Knob alternative only as a "fallback position" and an "afterthought on remand." MCC Br. 26. In fact, Conservation Groups made a logical decision to propose, in their scoping comments, an alternative that would preserve the whole Pilot Knob roadless area in response to information that the area's only active coal mine had stopped operations. Aplts. App. 281-82.

While important and significant, the climate impacts of the Exception area decision are not the only ones the Forest Service considered. *See, e.g.*, G.A. 161-69, 171-80 (considering impacts to species in supplemental Biological Evaluation); G.A. 188-223 (considering new information and changed circumstances in supplemental economic analysis). Nor could the agency's analysis have been so limited. The district court in *High Country II* vacated the North Fork Exception. 67 F. Supp. 3d at 1267. Therefore, the Forest Service was required under NEPA to consider all environmental impacts of reinstating that decision. 42 U.S.C. § 4332(C)(iii), (2)(E); 40 C.F.R. § 1502.14; HCCA Br. 28-29.[7]

In sum, the Forest Service ignored the relevant legal standards, which demonstrate that the Pilot Knob is a reasonable alternative that the agency should have considered. This Court should set aside the North Fork Exception due to the agency's failure to consider this reasonable alternative.

[7] MCC argues that the Forest Service's failure to consider the Pilot Knob alternative does not prejudice the Conservation Groups because the Forest Service can consider the site-specific impacts of mining at a later stage. MCC Br. 27-28. This argument fails because the Forest Service's decision of whether to reinstate the North Fork Exception is the *only* stage at which the agency could have considered the alternative of closing the Pilot Knob roadless area—precluding mining impacts altogether.

II. The Agencies Violated NEPA in The Leasing EIS by Failing to Consider a Reasonable Alternative to Mitigate the Climate Impacts of Leasing Coal.

After reinstating the North Fork Exception, the Agencies approved MCC's two lease modifications requests in the Exception area. G.A. 8, 80. At the leasing stage, the Agencies violated NEPA by refusing to consider in detail a mandatory methane-flaring alternative, which offers a reasonable trade-off between MCC's desire to lease publicly owned coal and the public's interest in reducing the harm from the lease's greenhouse gas emissions. The Agencies do not dispute that the West Elk mine is the largest industrial source of methane in Colorado, that flaring is highly effective at reducing the climate impacts of methane emissions, and that none of the considered action alternatives would in any way reduce the significant climate impacts of the mine. Fed. Br. 34–36.[8] Although the Agencies acknowledge that the purpose of the alternatives requirement "is to sharply define the issues and

[8] The Agencies and MCC argue incorrectly that even if the Agencies failed to consider the methane-flaring alternative, they satisfied NEPA's purpose by identifying the 11.91 million tons of carbon dioxide equivalent in global warming potential ("CO_{2e}") that will be emitted under the selected alternative, and recognizing that flaring could reduce the global warming potential by around 87 percent. Fed. Br. 35-36; MCC Br. 28-29. However, an adequate NEPA analysis would have to include additional evaluation of the environmental impacts of flaring. For example, as the Environmental Protection Agency pointed out in comments to the Agencies, methane flaring would also have significant benefits to public health by reducing hazardous air pollutant and volatile organic compound emissions. Aplts. App. 466.

provide a clear basis for choice among options by the decision maker and the public," Fed. Br. 24 (*citing* 40 C.F.R. § 1502.14), by refusing to analyze a flaring alternative in detail the Agencies deprived the public and decision makers of just such a choice.

The mandatory flaring alternative meets this Court's two guideposts for determining when an alternative is reasonable—it is within the Agencies' statutory mandates and fulfills the project's purpose and need of "facilitating recovery of federal coal resources in an environmentally sound matter." G.A. 70; *see also* HCCA Br. 42-43. Additionally, it does not meet either exception—it is not "too remote, speculative, or impractical or ineffective" and is "significantly distinguishable" from considered alternatives. *Richardson*, 656 F.3d at 708-09; *see also* HCCA Br. 42-45. Therefore, the Agencies' failure to consider this a mandatory flaring alternative violates the Agencies' obligation to "[r]igorously explore and objectively evaluate *all* reasonable alternatives" 40 C.F.R. § 1502.14(a) (emphasis added), and to do so at "*the earliest possible time*." *Richardson*, 565 F.3d at 707 (quoting 40 C.F.R. § 1501.2) (emphasis added).

In response, the Agencies point to a variety of inconsistent statements found in the Leasing FEIS and the Forest Service's and BLM's records of decision approving the lease modifications—none of which provide a reasoned basis for rejecting the methane-flaring alternative under Tenth Circuit standards. *See* Fed.

Br. 13-16. In their brief, the Agencies coalesce around two primary arguments. First, as before the district court, the Agencies repeatedly suggest that some other agency will analyze a flaring alternative in the future in connection with a mine plan (which OSM approves) or a ventilation plan (which MSHA approves). Fed. Br. 37; ECF No. 51 (Apr. 19, 2018) (Fed. Dist. Ct. Br. 34). This attempt to punt their legal obligations to another agency violates NEPA. Moreover, the Agencies fail to notify the Court that the Conservation Groups' concerns about "punting to a void" have now been realized because neither OSM nor MSHA analyzed a methane-flaring alternative.

The Agencies' brief, for the first time in court, also adds a second argument: that BLM declined to consider a methane-flaring alternative because it was "economically infeasible" and therefore "impractical." Fed. Br. 15-16, 34-35. The Forest Service made no such argument in its Leasing EIS or record of decision. Moreover, BLM cannot rationally claim that it is "impractical" for MCC—whose parent company Arch Coal is worth billions—to implement *any* reasonable mitigation measure to reduce the climate and public health impacts of their coal mining operations on public lands simply because the company might not make money or break even on the mitigation component (while nonetheless profiting on the project as a whole). G.A. 800.

A. By Passing the Buck to OSM and MSHA, the Agencies Effectively Avoided Any NEPA Consideration of a Mandatory Flaring Alternative and Violated NEPA's Clear Mandate to Consider All Reasonable Alternatives as Soon as It Can Be Done.

First, the Agencies attempt to avoid their NEPA obligations by repeatedly pointing to subsequent opportunities for review by OSM and MSHA. Fed. Br. 13-14, 37, 40, 42, 46; MCC Br. 30. Although the Agencies claim this is not "pass[ing] the buck," Fed. Br. 38, that is precisely what it is. The Agencies admit that this is the last NEPA review for the Forest Service and BLM in the mine permitting process and that all subsequent reviews "are within the regulatory purview of other state and federal agencies (not the Forest Service and BLM)." *Id.* at 37. Yet they fail to address the Conservation Groups' argument that agencies cannot abdicate their NEPA obligations to other agencies. *See* HCCA Br. 46 (citing *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1123, 1128 (D.C. Cir. 1971)); Fed. Br. 45 n.10. Nor do the Agencies cite any precedent—from any jurisdiction—where a court endorsed an agency's decision to defer NEPA analysis not just to an unspecified process *potentially* conducted by a different agency, Fed. Br. 44-46, but to a void where that analysis would likely never occur. HCCA Br. 46.

That is exactly what happened here. The Agencies repeatedly have passed the buck in a way that resulted in *no* detailed consideration of methane flaring at any stage of the process. During the North Fork Exception NEPA review, the

Forest Service stated that "methane flaring *is best considered at the leasing stage*." G.A. 387 (emphasis added).[9] At the leasing stage, the Agencies punted to OSM's mine plan review and MSHA's sign off on MCC's ventilation plan. G.A. 529-30. As the Conservation Groups warned in their Opening Brief, the Agencies were "punting into a potential void." HCCA Br. 47. Neither the Agencies nor MCC respond to this argument, but as they are no doubt aware, the Conservation Groups were correct.

On March 12, 2019, two days *before* the Agencies filed their brief in this matter, OSM issued its record of decision authorizing the mine plan for West Elk's lease modifications without preparing an environmental assessment ("EA") or EIS or accepting public comments under NEPA, and without considering in detail a mandatory flaring alternative. OSM, Record of Decision, Federal Coal Lease Modifications COC-1362 & COC-67232 (approved Mar. 12, 2019), *available at* https://www.wrcc.osmre.gov/initiatives/westElkMine/documentLibrary.shtm (last visited Apr. 18, 2019) ("OSM ROD"); *see also* 84 Fed. Reg. 9,554 (Mar. 15, 2019)

[9] The Agencies now insist that their refusal to study this alternative in detail at the leasing stage is somehow *consistent with* the Forest Service's statements during the Exception rulemaking phase, because "consider[] at the leasing stage" meant 'discuss but not consider in detail.' Not only is this an obviously tortured interpretation, but if methane flaring is "best considered" at the leasing stage, and that simply means 'best discussed,' then there would be no reason to point to future reviews by other agencies as available avenues for the required analysis.

(announcing the availability of the record of decision and that OSM determined the Leasing EIS "adequately assesses and discloses the environmental impacts for the mining plan modification" so no additional NEPA analysis was deemed necessary).[10] OSM also indicated that the "ventilation plan" presented to MSHA and the State, "does not include information on . . . methane flaring." OSM ROD 22. Thus, OSM and MSHA—the two agencies that BLM and the Forest Service punt to in the lease modification process—have both failed to consider a mandatory flaring alternative. *Accord* HCCA Br. 47-48.[11] No further NEPA analysis is required prior to mining. G.A. 5-6.

Contrary to their assertion, the Agencies' defer-until-later approach taken here is not supported by *WildEarth Guardians v. U.S. Forest Service*, 828 F. Supp. 2d 1223 (D. Colo. 2011). Fed. Br. 40-41. There, the district court declined to set

[10] This Court may take judicial notice of these documents. *See* 44 U.S.C. § 1507 (recognizing the contents of the Federal Register shall be judicially noticed); *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1212-13 (10th Cir. 2012) ("The contents of an administrative agency's publicly available files, after all, traditionally qualify for judicial notice."). These records also qualify for an exception to record review under the Administrative Procedure Act ("APA") because they came into existence after the agency's decision and demonstrate that it was flawed. *See Am. Min. Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985).

[11] *But see* MCC Br. 50-51 (touting that BLM and OSM are reviewing updated information submitted by MCC in November 2018 as part of OSM's mine plan review and "will in all likelihood . . . have *addressed* the Conservation Groups' specific contentions" (emphasis in original)).

aside the Forest Service's refusal to consider a methane-flaring alternative because the Forest Service consulted with MSHA on the feasibility of methane flaring, and MSHA concluded that, at that time, there were still "too many questions remaining unanswered" regarding miner safety for MSHA to approve flaring at the mine. *Id.* at 1237. Here, the Agencies point to no evidence that MSHA expressed any concerns about flaring safely on the lease modifications at issue. Indeed, more than a decade later, this Court faces a very different record. The State of Colorado concluded in 2016, "[a] properly engineered, manufactured, and operated flare with redundant safety systems can fully address [safety] concerns" at working mines. Aplts. App. 421; HCCA Br. 18. Indeed, flares are used safely at active coal mines in other countries. HCCA Br. 18-19. And MCC's own report on potential mitigation measures concludes that it may be "feasible to design and implement a safe flaring system." G.A. 804. The Agencies point to no contrary evidence.

Although the Agencies and MCC raise the specter of potentially conflicting legal requirements if MSHA refused to approve flaring, this is a red herring. Fed. Br. 44; MCC Br. 33. Nothing prevents the Agencies from imposing flaring *only if* MSHA approved it as safe. The Agencies and MCC point to the fact that MSHA has never approved a flaring proposal. Fed. Br. 38; MCC Br. 30. As the Agencies acknowledge, however, that is because "MSHA has not been presented with such a proposal," and not because flaring is infeasible. Fed. Br. 38; *see* HCCA Br. 47-48

(noting that MSHA will address flaring only if MCC presents a flaring proposal to the agency). Because none of the agencies with authority to impose flaring as a condition of mining did so, and because MCC did not voluntarily include a flaring proposal in its ventilation plan, OSM ROD 22, MSHA also is not considering flaring at the West Elk mine.

Moreover, the Agencies did not reject the methane-flaring alternative as "technically infeasible" or "impractical" during the administrative process. *See Utahns for Better Transp.*, 305 F.3d at 1165 ("We can only affirm agency action, if at all, on grounds articulated by the agency itself."). In the Leasing EIS, the Agencies state that, "[w]e do not speculate whether [flaring] is infeasible or uneconomical, leasing is just not the appropriate time to address potential permitting actions that related to in-mine safety for which no mine plan or ventilation plan has been prepared." G.A. 840.

The Agencies and MCC repeatedly make vague and conclusory statements about the need for "engineering designs," available at later stages of the process. *See* Fed. Br. 14, 19, 34, 37, 42 (citing only to G.A. 525, which contains one

sentence addressing this issue).[12] But neither the record nor the briefs specify what information is lacking or explain why the Agencies could not consider the basic contours of a methane-flaring alternative at the leasing stage and leave development of the specific engineering details for the mine plan and ventilation plan stage. While the Agencies ask for deference on this "technical issue," this Court will not defer to an agency where it fails to "provide any reasoning or analysis for its conclusion." *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1238 (10th Cir. 2017). Indeed, courts "cannot defer to a void." *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010).[13]

In fact, the record shows that the basic contours of the alternative were well within the Agencies' ability to evaluate when they reviewed MCC's proposed lease

[12] Notably, the Leasing EIS states that "[t]hese engineering designs would become part of the subsequent State or OSM[] mine permitting process and MSHA ventilation plan process." G.A. 525; *see also* MCC Br. 31-32. Yet OSM, like BLM and the Forest Service, claimed it did not have the necessary "engineering information," or the requisite MSHA approval necessary to even consider whether to condition its approval on mandatory flaring. OSM ROD 22. Thus, according to the federal agencies, the necessary engineering data is not available at *any* point prior to mining.

[13] The Agencies' self-serving attempt to distinguish this Court's ruling in *Richardson* also fails. Fed. Br. 44 ("The fact that neither the Forest Service nor BLM had conducted an 'internal analysis' of a methane flaring alternative shows that it was not possible for the agencies to study such an alternative."). To the contrary, the fact that the Agencies have not analyzed a methane-flaring alternative is evidence only that they have not done so—not that such an analysis could not be prepared.

modifications. Under the alternative, MCC would lease publicly owned coal; and, as part of that lease agreement, the company would be required to flare emissions from the mine's methane drainage wells as a condition of being granted access to public lands and minerals. The Agencies estimated the number of methane drainage wells entailed in the proposed mining, predicted the amount of methane that would be released, and noted how effective flaring could be at reducing climate harms from those emissions. Fed. Br. 35.

Both the Conservation Groups and MCC provided the Agencies with expert technical and economic analysis of a methane-flaring alternative using information available at the leasing stage. G.A. 789-809; Aplts. App. 470-98. The Forest Service stated in its record of decision that it had reviewed the Conservation Groups' report and "found it to be a reasonable way to assess flaring as a mitigation method." G.A. 35.[14] Yet the Agencies offer no rational explanation for why they too cannot consider—based on the extensive record evidence—a methane-flaring alternative at the leasing stage.

In addition to passing the buck to OSM and MSHA (and again directly contradictory to its Exception EIS statement that flaring is best evaluated at the

[14] Although MCC criticizes the district court for even considering the existence of the report, MCC Br. 37 n.9, the court correctly explained that the Forest Service reviewed and responded to the report in its record of decision for the lease modification and therefore it is properly part of the record. Aplts. App. 243 n.10.

leasing stage), the Forest Service also claims that *BLM* should consider the technical feasibility and cost-effectiveness of flaring as part of a non-NEPA, non-public review of information that MCC would provide to BLM within one year *after* BLM issued the lease. G.A. 35. However, any post-EIS analysis—conducted without any input from the public—cannot cure deficiencies in an EIS. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1169 (9th Cir. 2003). Indeed, MCC's post-leasing update to BLM has occurred and the public was not provided an opportunity to comment, frustrating NEPA's goal of allowing the public to "play a role in . . . the decisionmaking process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).[15]

Additionally, the Agencies and MCC note that methane emissions at the mine have declined somewhat in recent years. Fed. Br. 39; MCC Br. 32. Nonetheless, the Agencies were capable of estimating future methane emissions down to the single ton, Fed. Br. 35, acknowledge that flaring would be highly effective at mitigating the harm from these emissions, *id.*, and do not dispute that the West Elk mine is still the state's largest single industrial source of methane pollution, *see* Aplts. App. 454. Thus, the Agencies have provided no rational

[15] The Forest Service also argues that focusing on methane flaring might somehow preclude consideration of other mitigation measures. G.A. 35. But the possibility of precluding other mitigation measures does not excuse the failure to consider in detail *any* climate mitigation measures whatsoever.

explanation for their failure to consider a methane-flaring alternative to mitigate the tremendous climate and public health impacts of the West Elk mine.

B. The Agencies' Economic Infeasibility Arguments Do Not Provide a Reasonable Basis for Refusing to Consider the Methane-Flaring Alternative.

Second, the Agencies fail to square their assertion that they rejected methane flaring as "economically infeasible" and therefore "impractical at the lease-modification stage," Fed. Br. 15, 34; MCC Br. 29, with the Agencies' contrary record statements and its arguments in the district court. The record simply does not support the conclusory assertions in the Agencies' brief. In district court, the Agencies did not argue that methane flaring was "impractical." ECF No. 51 (Fed. D. Ct. Br. 32-36); *see WildEarth Guardians*, 870 F.3d at 1239 (holding BLM waived argument "by failing to argue it before the district court").

In fact, the record indicates that the Agencies were expressly making no determination as to whether cost or safety concerns made methane flaring impractical. In the Leasing EIS, the Agencies state that, "[w]e do not speculate whether [flaring] is infeasible or uneconomical." G.A. 840. Similarly, the Forest Service evaluated Conservation Groups' methane flaring study at West Elk in its 2017 record of decision for the lease modifications, but made no determination as to whether flaring could be accomplished economically. G.A. 35. These statements, and the omission of any argument before the district court that the

methane-flaring alternative fell within the "impractical" exception, significantly undercut the Agencies' attempt to re-characterize the record to fit under this Court's controlling *Richardson* framework for consideration of NEPA alternatives.

The Agencies also seek support from certain statements in BLM's record of decision approving the lease modifications, which mentions the economics of flaring and points to MCC's 2009 analysis. Fed. Br. 15 (citing G.A. 77-80); MCC Br. 30. However, that report defined "economically feasible" to mean that MCC had to avoid losing money on any mitigation measure and achieve an internal rate of return that at least equals MCC's capital costs for the mitigation. G.A. 799-800. Thus, under MCC's definition, the mine expansion could still be hugely profitable, but if the mitigation measure reduced MCC's profit by even $1, it would be deemed "economically infeasible." In the same discussion, the report recognizes that MCC's parent company, Arch Coal, "is a broadly diversified, multi-billion dollar corporation with substantial assets, a proven market track record, and established, long term revenue streams." *Id.* at 800. The Agencies offer no explanation in the record or in their briefs for how an important mitigation measure—even if MCC is unable to recoup some of the costs—could be considered "impractical" under these circumstances. Indeed, the Agencies' failure to *consider* a reasonable alternative that would require a company worth billions to

simply mitigate the climate impacts of mining publicly owned coal in a roadless area renders the decision arbitrary and capricious.

III. The Appropriate Remedy Is to Vacate the North Fork Exception and the Lease Modifications.

No party disputes that vacatur is the presumptive remedy if this Court finds a NEPA violation. *See* 5 U.S.C. § 706(2)(A) (stating that courts "shall . . . set aside" unlawful agency action); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187-88 (10th Cir. 1999) (holding, as used in § 706, "'[s]hall' means shall"). As the district court held in *High Country II*, agencies must approach their decision making with a "clean slate" to achieve "NEPA's goals of deliberative non-arbitrary decision-making." 67 F. Supp. 3d at 1264-66.

This is particularly true with respect to an alternatives analysis where the point is to ensure that agencies *compare* a range of reasonable alternatives prior to making a decision. *See* 40 C.F.R. § 1502.14(b) (requiring agencies to [d]evote substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparative merits"). To ensure that the Agencies are achieving NEPA's purpose of comparing the relative benefits and drawbacks of the alternatives—rather than just engaging in a paperwork exercise leading to predetermined outcomes—this Court must vacate the illegal approvals of the North Fork Exception and the lease modifications. *See Diné Citizens Against Ruining Our Env't v. OSM*, No. 12-CV-01275-JLK, 2015 WL 1593995, at *3 (D. Colo.

Apr. 6, 2015) (holding that absent vacatur while OSM corrected its NEPA violations "OSM's compliance with NEPA could become a mere bureaucratic formality").

The Agencies address remedy only in a footnote, arguing that the Court should remand to the district court to determine the appropriate remedy. Fed. Br. 47 n.12 (citing *WildEarth Guardians*, 870 F.3d at 1239-40); *see also* MCC Br. 51. In *WildEarth Guardians*, however, the Court declined to vacate primarily because the parties had not addressed specific remedy issues on appeal, and because a tailored remedy might be needed where mining was already occurring on three of the challenged leases. 870 F.3d at 1240. This Court should not allow the Agencies to manufacture a basis for avoiding vacatur by failing to respond to the remedy issues that Conservation Groups fully addressed in their Opening Brief. Furthermore, MCC has briefed the relevant remedy issues. Additionally, to the Conservation Groups' knowledge, although exploration within the lease modifications area is complete, mining has not commenced. *See* MCC Br. 50-51.

With respect to the Exception EIS, MCC argues that this Court should limit any remedy to the Pilot Knob area under the Colorado Roadless Rule's severability clause. MCC Br. 40-43. The severability clause has no applicability here. The Rule provides that if a Court holds any provision of the Rule is invalid, the remainder of the Rule will remain in place. 36 C.F.R. § 294.48(f). However, the challenged

North Fork Exception *is* a provision of the Rule that the Forest Service adopted through a distinct rulemaking process and final record of decision. *Id.* § 294.43(c)(1)(ix); 81 Fed. Reg. at 91,811. If this Court finds that the Forest Service violated NEPA in adopting the North Fork Exception, it must set aside that provision under the APA. MCC is incorrect that Conservation Groups are challenging only the "application" of the Exception to the Pilot Knob roadless area. MCC Br. 41. In fact, Conservation Groups are challenging the adoption of the Exception in its entirety due to a failure to consider a range of reasonable alternatives, including the Pilot Knob alternative. *See* ECF No. 39 (Mar. 23, 2018) (First Amended Complaint for Declaratory and Injunctive Relief and Petition for Review of Agency Action 27, 31). Accordingly, the severability clause provides no basis to limit the remedy to the Pilot Knob roadless area.

MCC's approach assumes that on remand the Forest Service would simply examine whether to include the Pilot Knob roadless area in the North Fork Exception area, but would not reconsider any other options before the agency. However, as the agency argues repeatedly, the "primary question" before it was to consider whether to reinstate the North Fork Exception and, if so, on how many acres. Fed. Br. 17, 23. If Conservation Groups prevail, the Forest Service must reconsider *that* decision based on a range of reasonable alternatives.

Nor should this Court limit the remedy based on principles of equity. As MCC acknowledges, this Court has not adopted a specific test for determining when defendants have overcome the presumption that vacatur is the appropriate remedy. MCC Br. 46. However, other courts often base this analysis on whether vacatur would defeat the purpose of the statute at issue. *See Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (refusing to vacate rule because doing so could lead to the "very danger the Clean Air Act aims to prevent" by worsening air pollution); *see also* HCCA Br. 54-55 (citing other cases). Here, the opposite is true: vacatur would promote NEPA's purpose of thoughtful decision-making based on consideration of a range of reasonable alternatives. *Richardson*, 565 F.3d at 708 ("Without substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded."); *see also High Country II*, 67 F. Supp. 3d at 1264-66.

Although MCC claims that vacatur would lead the company to bypass coal in the lease modifications, it offers no evidence to support this claim. MCC Br. 49. Accordingly, MCC has not overcome its burden to show that vacatur is not the appropriate remedy here. *See, e.g.*, *Pub. Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 3 (D.D.C. 2016) (expressing reluctance to consider economic harm as a reason for deviating from the normal remedy of

vacatur for a NEPA violation, particularly absent a "strong showing" of such harm); *Diné Citizens Against Ruining Our Env't*, 2015 WL 1593995, at *3 (noting that any economic harm related to vacatur of a coal mining permit lies with defendants and not plaintiffs and rejecting defendants' "conclusory statements" of economic harm as insufficient to overcome vacatur presumption).

Finally, MCC argues that even if the Court finds that the lease modifications are illegal, it should allow them to remain in place while the agency completes the required NEPA analysis. MCC Br. 50. MCC has again failed to offer any evidence to overcome the presumption that vacatur is the appropriate remedy. Indeed, absent vacatur, the West Elk mine will be permitted to vent methane directly into the atmosphere despite the Agencies' failure to consider reasonable mitigation options. Whereas with vacatur, mining will be delayed only for a short time, as long as the Agencies take the steps required under NEPA.

MCC argues that remand without vacatur is appropriate because coal exploration activities following approval of the lease modifications have revealed additional information on geologic and coal resources and likely methane generation rates. MCC Br. 50-51. While it is unclear how this relates to whether to vacate, it is notable that the specific information the Agencies had claimed was lacking in order to consider a methane-flaring alternative at the leasing stage is now fully available if the Court orders vacatur. Moreover, contrary to MCC's

claim that the federal government "will in all likelihood have . . . *addressed* the Conservation Groups' specific contentions," MCC Br. 51 (emphasis in original), neither OSM nor MSHA considered a methane-flaring alternative in detail. *See supra* pp. 22-23. Accordingly, Conservation Groups concerns *have not* been addressed.

In sum, MCC has not provided the necessary compelling reason for this Court to deviate from the presumptive remedy of vacating the illegal North Fork Exception and lease modifications.

CONCLUSION

The Pilot Knob alternative and the methane-flaring alternative are both reasonable alternatives under the Tenth Circuit's standards, and the Agencies' failure to consider them violates NEPA. To remedy these violations, this Court should vacate the North Fork Exception and the lease modifications.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of 10,000 words granted by this Court on April 16, 2019, for Appellants to file an oversized reply brief exceeding Fed. R. App. P. 32(a)(7)(B)'s limitation by 3,500 words; this brief contains 8,780 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14 point font size and Times New Roman.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2019, I electronically filed the foregoing **REPLY BRIEF OF APPELLANTS HIGH COUNTRY CONSERVATION ADVOCATES *ET AL.*** using the court's CM/ECF system, which will send notification of such filing to the following:

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