

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 17-cv-3025-PAB
HIGH COUNTRY CONSERVATION ADVOCATES, *et al.*
Plaintiffs,

v.

UNITED STATES FOREST SERVICE, *et al.*
Federal Defendants,

and

MOUNTAIN COAL COMPANY, LLC,
Intervenor-Defendant.

**MOUNTAIN COAL COMPANY’S RESPONSE TO PLAINTIFFS’ MOTION TO
EXPEDITE CONSIDERATION OF EMERGENCY MOTION TO ENFORCE REMEDY**

As Plaintiffs reported in their Motion to Expedite, Dkt. #94, Intervenor-Defendant Mountain Coal Company, LLC (“Mountain Coal”) takes no position on their request that the Court expedite consideration of their Motion to Enforce Remedy. Dkt. #77. However, Mountain Coal recognizes that the Court has many matters on its docket, and so provides a brief update on the status of permitting and construction plans in the Sunset Roadless Area to assist the Court in evaluating the urgency of Plaintiffs’ motion in relation to the Court’s other obligations. Mountain Coal will not engage with Plaintiffs’ repeated characterizations of Mountain Coal’s actions as “illegal,” since that is plainly contested and the subject of the original motion.

The remaining work for longwall coal panel SS2 is anticipated to involve approximately one acre of additional disturbance. September 2020 Norris Declaration ¶ 4. Work related to SS2

is not expected to begin until at least October 2, 2020, owing to the need to mobilize equipment and address other project scheduling. *Id.* ¶ 5. However, construction becomes subject to significantly increased weather risks starting around the end of October. *Id.* ¶ 3.

In addition to work related to panel SS2, during the July 23, 2020 hearing, the MLRB affirmed a permit modification that will reduce surface disturbance for panels SS3 and SS4 to 7.6 total acres. *Id.* ¶ 3. Such work will require further modification of the Cessation Order following either a determination from the Court or the USFS on the applicability of the statutory rights exception for roadbuilding at 36 C.F.R. § 294.43(c)(1)(i). As discussed in Mountain Coal's response to Plaintiffs' motion, the Court has fulfilled its obligation under the mandate to effectuate the remedy, and whether the Court reaches the merits of Plaintiffs' motion and the applicability of 36 C.F.R. § 294.43(c)(1)(i) is a matter of its discretion.

DATED this 22nd day of September, 2020. DORSEY & WHITNEY LLP

s/ Michael Drysdale

Michael Drysdale
DORSEY & WHITNEY LLP
50 South Sixth Street, Ste. 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-5652
Facsimile: (612) 340-8800
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Attorneys for Mountain Coal Company LLC

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2020, I caused the foregoing document, **MOUNTAIN COAL COMPANY’S RESPONSE TO PLAINTIFFS’ MOTION TO EXPEDITE CONSIDERATION OF EMERGENCY MOTION TO ENFORCE REMEDY,** to be electronically filed with the Clerk of the Court using the CM/ECF system on counsel of record.

/s/ Vanessa Thompson _____

EXHIBIT 1

(BLM/USFS Letter to MCC dated Aug. 25, 2020)



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
Colorado State Office
2850 Youngfield Street
Lakewood, Colorado 80215-7210

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

Michael Drysdale
Attorney for Mountain Coal Company, LLC
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498

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

Dear Mr. Drysdale:

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

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

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

Section 2 of the modified coal leases, as authorized under the Mineral Leasing Act of 1920 (30 U.S.C. § 181 *et seq.*) granted the Lessee the exclusive right and privilege to drill for, mine, extract, remove or otherwise process and dispose of the coal deposits in, upon, or under the lands in the Leases; and construct such works, buildings, plants, structures, equipment and appliances and the right to use such on-lease rights-of-way which may be necessary and convenient in the exercise of the rights and privileges granted.

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

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

Sincerely,

DOUGLAS SIPLE Digitally signed by DOUGLAS SIPLE
Date: 2020.08.25 12:02:12 -06'00'

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

1 Attachment:

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



United States
Department of
Agriculture

Forest
Service

Rocky Mountain Region

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

File Code: 2820
Date: August 19, 2020

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

Dear

Thank you for your letter of July 30, 2020, in which you requested USDA - Forest Service input regarding the effect of Forest Service special stipulations on federal coal leases COC-1362 and COC-67232. Your letter relays a request from the federal lessees, Mountain Coal Company (MCC) and ArkLand LLC, seeking confirmation of certain rights of access and to construct certain facilities on the surface of its leases. The surface lands are National Forest System lands that lie in whole or in part within the Sunset Colorado Roadless Area (CRA) of the Gunnison National Forest. MCC seeks confirmation of its rights in light of the vacatur of the North Fork Coal Mining Area Exception (North Fork Exception) to the Colorado Roadless Rule (CRR), by the U.S. District Court for the District of Colorado on June 15, 2020¹ pursuant to the mandate issue by the Court of Appeals, and the Cessation Order (CO) issued by the Colorado Division of Mining, Reclamation and Safety (CDRMS) on July 30, 2020, CO 2020-001. MCC holds the coal mining permit issued by the CDRMS.

MCC has requested confirmation of its rights to conduct certain surface activities related to mining longwall panel LW-SS2 under the lease. CDRMS permitted these activities in Permit Revision PR-15 (2018) and Minor Revision MR-441 (2019) to MCC's surface coal mining permit issued pursuant to the Colorado Surface Coal Mining Reclamation Act. MCC's surface operations involve lands in federal coal leases COC-1362 and COC-67232; specifically, these operations would be on lands added to the parent leases through lease modifications made in December 2017. Surface operations approved in PR-15 and MR-441 involve lands within non-upper tier acreage of the Sunset CRA. MCC has been required to provide CDRMS with "detailed information regarding its assertion that it maintains the legal right of entry to the Sunset Roadless area and why it is not in direct conflict with the District Court Order vacating the North Fork Exception to the [CRR]." In addition to providing lease stipulations as a condition of consenting to coal leasing on National Forest System lands under the Mineral Leasing Act (MLA), the Forest Service administers the CRR.

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



Doug Siple

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Lease No. COC-1362

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

The permittee/lessee must comply with all rules and regulations of the Secretary of Agriculture set forth at Title 36, Chapter II, of the Code of Federal Regulations governing the use and Management of the National Forest System when not inconsistent with the rights granted by the Secretary of the Interior in the permit.² The Secretary of Agriculture's rules and regulations must be complied with for (1) all use and occupancy for the National Forest System prior to approval of an exploration plan by the Secretary of the Interior, (2) uses of all existing improvements, such as forest development roads, within and outside the area permitted by the Secretary of the Interior, and (3) use and occupancy of the National Forest System not authorized by an exploration plan approved by the Secretary of the Interior.

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

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

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

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

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On the following lands within the Sunset CRA, surface operations incident to underground coal mining are subject to regulations in 36 CFR 294, subpart D:

- All roads that may be constructed must be temporary
- All temporary road construction must be consistent with applicable land management plan direction
- Road construction may only occur if motorized access has been deemed infeasible by the responsible official; unless a temporary road is needed to protect public health and safety in cases of an imminent threat of flood, fire or other catastrophic events that, without intervention, would cause the loss of life or property
- Temporary road construction must be completed in a manner that reduces effects on surface resources and prevents unnecessary or unreasonable surface disturbance
- All temporary roads must be decommissioned, and affected landscapes restored when it is determined that the road is no longer needed for the established purpose
- All temporary roads must prohibit public motorized vehicles (including off-highway vehicles) except

I. Where specifically used for the purpose for which the road was established; or

II. Motor vehicle use that is specifically authorized under Federal law or regulation.

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

Lease No. COC-67232

The BLM originally issued lease COC-67232 in March 2007 with the same lease notice as was on COC-1362 for National Forest System lands. The lease was also issued with a special lease notice applicable to the West Elk Inventoried Roadless Area (IRA), which provided notice that certain described leases lands were within the IRA and "may be subject to restriction on road-building pursuant to rules and regulations of the Secretary of the Agriculture applicable at the time any roads may be proposed on the lease." As with lease COC-1362, in December 2017, lease COC-67232 was modified to add about 920 acres, including approximately 915 acres within non-upper tier acreage of the Sunset CRA. The 2017 modification added the same roadless rule stipulation as was added to COC-1362 in 2017.⁴ As with COC-1362, they are not applicable to lands within the area of the lease modification that are not within the Sunset CRA.

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

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

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

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

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

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

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

Sincerely,

 acting for E. Lynn Burkett

JASON ROBERTSON
Digitally signed by JASON ROBERTSON
Date: 2020.08.19 12:23:41 -0600

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

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

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CO STATE OFFICE
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