Appeal No. 20-1358

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, CHAD STEWART, 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

APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants High Country Conservation Advocates, WildEarth Guardians, Center for Biological Diversity, Sierra Club, and Wilderness Workshop have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

INTRODUCTION

Pursuant to Fed. R. App. 8(a) and 10th Cir. R. 8.2, Appellants High County Conservation Advocates et al. (collectively "Conservation Groups") move for an emergency injunction pending appeal to enjoin Intervenor-Appellee Mountain Coal Company from imminently bulldozing additional drilling pads on an illegally constructed road and drilling methane ventilation boreholes in preparation for coal mining in the Sunset Roadless Area. Mountain Coal previously acknowledged to this Court that vacatur of the North Fork Exception to the Colorado Roadless Rule would foreclose road construction and related surface disturbance in the Sunset Roadless Area. Yet, after this Court ordered the district court to vacate that exception in its entirety, Mountain Coal took advantage of the nearly two-month period between this Court's mandate and the district court's execution of the vacatur order during a global pandemic to bulldoze nearly one mile of road and one acre of drill pads in the protected area in early June. Federal Appellee, the U.S. Forest Service, acquiesced to Mountain Coal's road construction because it occurred before the district court entered the vacatur order, and the agency now claims that any subsequent related construction and use of the roads for mining purposes is now permissible.

Although the State of Colorado issued a cessation order temporarily stopping construction based on the Tenth Circuit's decision, it partially lifted that

order on September 17. On September 22, Mountain Coal informed the district court that it would commence additional construction on or around October 2. An injunction is necessary to preserve the status quo and to prevent irreparable environmental harm while the Court considers the merits of this appeal. Because this harm is imminent, Conservation Groups respectfully request emergency relief within forty-eight hours or as soon thereafter as practicable. If the Court grants an injunction, Conservation Groups are amenable to expedited briefing of the appeal.

Conservation Groups conferred with both Appellees, and they oppose this Motion.

STANDARD OF REVIEW

Under Fed. R. App. P. 8(a) and 10th Cir. R. 8.1, appellants must address: (A) the basis for the district court's and the court of appeals' jurisdiction, (B) the likelihood of success on appeal; (C) the threat that appellants will be irreparably harmed if the injunction is not granted; (D) the absence of harm to appellees if the injunction is granted; and (E) any risk of harm to the public interest. This Court reviews the district court's decision for an abuse of discretion, reviewing factual findings for clear error and legal determinations *de novo*. Fish v. Kobach, 840 F.3d 710, 723 (10th Cir. 2016). If the district court committed "an error of law," it is "entitled to no deference and must be reversed." Bhd. of Maint. of Way Emps. Div. v. Union Pac. R.R. Co., 460 F.3d 1277, 1282 (10th Cir. 2006) (quotation omitted).

JURISDICTION

On December 15, 2017, Conservation Groups challenged Federal Defendants' approval of the North Fork Coal Mining Exception to the Colorado Roadless Rule and their approval, and consent to, coal lease modifications in the Sunset Roadless Area. The district court had jurisdiction based on 28 U.S.C. § 1331. On August 10, 2018, the district court ruled against Conservation Groups. On September 10, 2018, Conservation Groups appealed the district court ruling to this Court. On March 2, 2020, this Court reversed in part the district court's decision and held unlawful and vacated the North Fork Exception. High Country Conservation Advocs. v. U.S. Forest Serv., 951 F.3d 1217, 1229 (10th Cir. 2020). On June 12, after Mountain Coal bulldozed a road and two drill pads in the Sunset Roadless Area, Conservation Groups filed an emergency motion to enforce remedy with the district court. On October 2, the district court issued a final order denying Conservation Groups' emergency motion. Ex. 1, Order. Conservation Groups appeal that order.

This Court has jurisdiction under 28 U.S.C. § 1291. See S.E.C. v. Suter, 832 F.2d 988, 990 (7th Cir. 1987) (holding post-judgment proceedings in the district court are appealable when final). In accordance with Fed. R. App. P. 8(a), Conservation Groups also requested an injunction pending appeal from the district court on October 5. Waiting for the district court to rule on that motion would be

impracticable given the imminent harm to the environment and the fact that the district court just ruled against Conservation Groups on the merits, and likelihood of success on the merits is a necessary showing for an injunction pending appeal. See Fed. R. App. P. 8(a)(2); Populist Party v. Herschler, 746 F.2d 656, 657 n.1 (10th Cir. 1984) (holding it was not necessary to move for injunction in district court where the harm was imminent); Chem. Weapons Working Grp. v. Dep't of the Army, 101 F.3d 1360, 1362 (10th Cir. 1996) ("When the district court's order demonstrates commitment to a particular resolution, application for a stay from that same district court may be futile and hence impracticable."). This Court accordingly has jurisdiction to hear this appeal.

FACTUAL BACKGROUND

In a prior appeal to this Court, Conservation Groups prevailed in their challenge to the Forest Service's adoption of the North Fork Exception to the Colorado Roadless Rule. The Colorado Roadless Rule generally prohibits road construction and tree cutting within designated areas of National Forest lands in the state. 36 C.F.R. §§ 294.42(a), 294.43(a). The North Fork Exception allowed road construction for coal mining under certain conditions within the 19,000-acre North Fork Coal Mining Area. Id. § 294.43(c)(1)(ix). Before Federal Appellees could approve Mountain Coal's lease modifications authorizing road construction

for coal mining purposes in the Sunset Roadless Area, the Forest Service had to adopt the North Fork Exception.

On March 2, 2020, this Court held that the Forest Service violated the National Environmental Policy Act (NEPA) by adopting the North Fork Exception without considering a reasonable alternative that would have protected an additional roadless area from coal mining impacts. High Country Conservation Advocs., 951 F.3d at 1224-27. This Court vacated the district court judgment and remanded the case for entry of an order vacating the North Fork Exception. Id. at 1229. On April 24, 2020, the Tenth Circuit issued the mandate. Mandate of U.S. Ct. App., High Country Conservation Advocs., 951 F.3d 1217 (Appeal No. 18-1374) (Dist. Ct. ECF No. 74). Neither Federal Appellees nor Mountain Coal sought to stay the Tenth Circuit's mandate, nor did they seek certiorari in the Supreme Court.

During merits briefing on appeal, Mountain Coal urged this Court to remand without vacating the North Fork Exception because vacatur would prohibit road construction for mining purposes:

> 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.

Ex. 2, Br. of Intervenor-Appellee 49. This Court rejected this request and ordered vacatur of the entire North Fork Exception. High Country Conservation Advocs., 951 F.3d at 1228-29. The Court remanded to the district court to enter an order vacating the Exception. Id. at 1229.

The district court did not immediately enter the vacatur order. In late May, counsel for the Conservation Groups emailed counsel for the Forest Service to confirm that Mountain Coal would not be constructing roads in the Sunset Roadless Area given the Tenth Circuit's decision. Ex. 3, Decl. of Robin Cooley ¶ 2.[1] But Federal Appellees' attorneys refused to disclose any information about the construction activities. Id. ¶ 3.

On June 4, 2020, Conservation Groups contacted Mountain Coal and learned that—despite its representations to the Tenth Circuit and this Court's subsequent vacatur order—the company had constructed nearly one mile of road in the Sunset Roadless Area between June 2 and June 4 to prepare for mining of longwall panel SS2. See Ex. 4, Decl. of Weston Norris ¶ 6; see also Ex. 3, Cooley Decl. ¶ 5; Ex. 5, Decl. of Matt Reed ¶¶ 8-10 (on the ground photos); Ex. 6, Decl. of Brett A. Henderson ¶¶ 7-11 (satellite photos); Ex. 7, Decl. of Sally Jane Pargiter ¶ 6 (overflight photos). Between June 12 and 16, Mountain Coal constructed two

[1] All declarations attached to this Motion as Exhibits were filed with the district court and are still accurate and relevant.

drilling pads totaling one acre adjacent to the bulldozed road. Ex. 4, Norris Decl. ¶ 7; Ex. 5, Reed Decl. ¶¶ 9-10. These pads are used to drill wells to vent methane when mining occurs underground. Mountain Coal had plans to construct about twice as much road as it already bulldozed in the Sunset Roadless Area during the 2020 construction season (for longwall panels SS3 and SS4). Ex. 4, Norris Decl. ¶ 3.

In response to the illegal construction, the Conservation Groups took steps to attempt to enforce the Tenth Circuit's order. On June 11, Conservation Groups filed a Motion for Entry of the Tenth Circuit Mandate, and the district court executed the order vacating the North Fork Exception on June 15. On June 12, Conservation Groups moved the district court to enforce this Court's order and instruct Mountain Coal to cease construction activities.

On June 18, the Colorado Division of Reclamation, Mining and Safety (DRMS) issued a cessation order finding that, because of the Tenth Circuit's decision, Mountain Coal did not have legal right of entry for road construction in the Sunset Roadless Area. Ex. 8, Cessation Order. The cessation order prohibited Mountain Coal from further surface disturbance. Id. Conservation Groups then notified the district court that the cessation order had abated the emergency. But on September 17, in response to a letter from the Forest Service solicited by Mountain Coal that indicated the Forest Service's consent to certain activities within the

roadless area, DRMS partially modified the cessation order. Ex. 9, Modification Cessation Order. The modified order allows Mountain Coal to immediately utilize the illegally constructed road, cut trees for additional drill pad construction, and drill methane ventilation boreholes on illegally constructed drill pads. Id.

In response, Conservation Groups immediately moved the district court to expedite consideration of the emergency motion to enforce remedy. On September 22, Mountain Coal informed the district court that additional construction would commence on or around October 2. Ex. 10, Sept. 2020 Decl. of Weston Norris ¶ 5. On October 2, the district court denied Conservation Groups' emergency motion to enforce remedy. As a result, construction of drilling pads and methane boreholes is now imminent.[2]

ARGUMENT

Conservation Groups are entitled to an injunction because: (1) they are likely to succeed on the merits; (2) their members will suffer irreparable harm, (3) this

[2] Currently, Mountain Coal is only permitted to drill additional pads and methane ventilation boreholes for longwall panel SS2. However, Mountain Coal has notified DRMS that it will seek to modify the cessation order to authorize road and drill pad construction for panels SS3 and SS4 this construction season. See Ex. 10, Sept. 2020 Norris Decl. ¶ 6. If DRMS lifts the cessation order in its entirety, Mountain Coal will be free to bulldoze additional roads and drilling pads in the protected area, absent an order from this Court. Should that occur, Conservation Groups may need to seek additional emergency relief from this Court to prevent this substantial harm.

irreparable harm outweighs Mountain Coal's purely economic and self-inflicted harm, and (4) an injunction will not harm the public interest. See Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2002), abrogated on other grounds by Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276 (10th Cir. 2016). Conservation Groups satisfy this burden.[3]

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

A. Vacatur of the North Fork Exception Eliminated Mountain Coal's Right to Construct Roads in the Sunset Roadless Area.

Mountain Coal's authorization to construct roads in the Sunset Roadless Area was premised entirely on the North Fork Exception to the Colorado Roadless Rule, a rule that generally prohibits road construction in Colorado Roadless Areas unless a specific exception applies. 36 C.F.R. § 294.43(a). However, this Court ordered vacatur of the entire North Fork Exception and left all remaining provisions of the Colorado Roadless Rule in place: "Under our traditional equitable powers to fashion appropriate relief . . . the appropriate remedy is vacatur of the

[3] If the Court grants a preliminary injunction, Conservation Groups request that it waive the bond requirements or impose a nominal bond. Kansas v. Adams, 705 F.2d 1267, 1269 (10th Cir. 1983) ("[O]nly nominal bonds and nominal liabilities for wrongful injunctions are imposed in NEPA cases."); see also Davis, 302 F.3d at 1126 ("Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered."); Colo. Wild v. U.S. Forest Serv., 299 F. Supp. 2d 1184, 1191 & n.31 (D. Colo. 2004) (waiving bond).

entire North Fork Exception." High Country Conservation Advocs., 951 F.3d at 1229. This ruling invalidates the North Fork Exception—the only exception that would have authorized road construction in the Sunset Roadless Area—as of the date the Forest Service adopted it.

Black's Law Dictionary defines "vacate" as "[t]o nullify or cancel; make void; invalidate." Black's Law Dictionary (11th ed. 2019). Vacatur "wipe[s] the slate clean." Prometheus Radio Project v. Fed. Commc'ns Comm'n, 824 F.3d 33, 52 (3d Cir. 2016). "Vacatur of agency action is a . . . form of injunctive relief." Diné Citizens Against Ruining Our Env't v. Bernhardt ("Diné CARE"), 923 F.3d 831, 859 (10th Cir. 2019), reh'g denied (June 24, 2019) (quotation omitted). This remedy "may be quite disruptive," including invalidating authorizations premised on vacated decisions. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993); Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, No. 3:19-CV-00216 JWS, 2020 WL 2892221, at *10 (D. Alaska June 1, 2020) (vacatur of land exchange enjoined road construction and other authorizations).

"When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect and the agency must initiate another rulemaking proceeding if it would seek to confront the problem anew." Envtl. Def. v. Leavitt, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) (quotation omitted); see also Organized Vill.

of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 970 (9th Cir. 2015) (en banc) (same); Action on Smoking & Health v. C.A.B., 713 F.2d 795, 797 (D.C. Cir. 1983) (vacatur "had the effect of reinstating the rules previously in force"). Accordingly, vacatur of the North Fork Exception in this case reinstates the Colorado Roadless Rule's prohibitions on road construction and tree cutting.

Mountain Coal previously requested that the Court remand the North Fork Exception EIS without vacatur because "vacatur of the entire North Fork Exception would again freeze coal exploration in the entire North Fork . . . Exception Area and prevent Mountain Coal from further roadbuilding and mining in the Lease Modifications." Ex. 2, Br. of Intervenor-Appellee 49. This Court, exercising its "traditional equitable powers," squarely rejected Mountain Coal's request. High Country Conservation Advocs., 951 F.3d at 1229. The Court found that the legal flaw implicated the North Fork Exception "as a whole," requiring the Forest Service to reconsider its entire decision. Id. Despite its representations to this Court, Mountain Coal now claims that vacatur of the North Fork Exception has no impact on its ability to construct roads or clear adjacent drilling pads. In effect, Mountain Coal argues that vacatur has the exact same impact as remand without vacatur. But this would render meaningless the Tenth Circuit's careful consideration of the equities and order to vacate.

The district court failed to address the fact that this Court's vacatur order eliminates the only basis for road construction in the Sunset Roadless Area. Instead, the district court found that Conservation Groups could not pursue the "weighty" issue of whether Mountain Coal's construction violates the Colorado Roadless Rule in this case because their challenge is to the federal agencies' NEPA process. Ex. 1, Order 10.[4] But, as the district court concedes, federal courts have jurisdiction to interpret and enforce their own remedies. Id. at 6 (citing Anglers Conservation Network v. Ross, 387 F. Supp. 3d 87, 93 (D.D.C. 2019)). Absent such enforcement in this case, Mountain Coal will succeed in treating this Court's order to vacate the North Fork Exception as a nullity. Moreover, there is no question that Mountain Coal's road construction and tree cutting violate the Colorado Roadless Rule—it is precisely because of this fact that the Forest Service had to adopt the North Fork Exception *prior* to authorizing Mountain Coal's lease modifications. See e.g., Ex. 11, Record Excerpts, FSLeasingII-76–77, -168, -1103, -1127, -1130–31, BLM9.

[4] The district court's suggestion that Conservation Groups may pursue relief elsewhere rings hollow because there is no additional agency action to challenge here. Federal Appellees have acquiesced to Mountain Coal's illegal construction based on prior authorizations that were already challenged in this case.

B. Mountain Coal Cannot Ignore the Tenth Circuit's Clear Mandate Simply Because the District Court Had Not Yet Entered the Vacatur Order.

The Forest Service's primary defense to its inaction is that the road construction occurred after this Court entered the mandate but before the district court entered the vacatur order. Furthermore, according to the Forest Service, because Mountain Coal got in under the wire, it can now bootstrap in any associated tree clearing, drilling of methane ventilation boreholes, and use of the road. This logic is not only legally flawed, but its acceptance would encourage losing parties to take matters into their own hands when cases are remanded to the district court, as Mountain Coal did here.

The nullification worked by vacatur is not merely prospective. As the district court previously held, the point of vacatur in a case finding NEPA violations is to provide a "clean slate." High Country Conservation Advocs. v. USFS, 67 F. Supp. 3d 1262, 1265 (D. Colo. 2014). The appellate order must be given effect "as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule." Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993); see also United States v. Sec. Indus. Bank, 459 U.S. 70, 79 (1982) (the principle that "judicial decisions operate retrospectively, is familiar to every law student"); Nat'l Fuel Gas Supply Corp. v. FERC, 59 F.3d 1281, 1289 (D.C. Cir.

1995) ("[A]ll parties charged with applying [a judicial] decision, whether agency or court . . . must treat it as if it had always been the law.").

Indeed, once the appellate mandate issues, "the parties' obligations become fixed"—the "[mandate's] effectiveness is not delayed until . . . the trial court or agency . . . acts upon it." Fed. R. App. P. 41(c) advisory committee's note. Moreover, the district court had no choice but to "carry the mandate of the upper court into execution." Estate of Cummings by & through Montoya v. Cmty. Health Sys., Inc., 881 F.3d 793, 801 (10th Cir. 2018) (quotations omitted); see also Litchfield v. Dubuque & P.R. Co., 74 U.S. 270, 271 (1868) ("After the decision by this court, the court below had no power but to enter a judgment according to the mandate, and to carry that judgment into execution.").

Neither Mountain Coal nor the Forest Service can ignore the Tenth Circuit's invalidation of the North Fork Exception, particularly where the Court expressly rejected Mountain Coal's request for a lesser remedy. It would be incongruous for the Court to set aside the entire North Fork Exception, but still intend for Mountain Coal—the only entity with any plans to avail itself of the Exception at the time of its adoption and presently—to proceed as if the Exception were still in place.

C. The Tenth Circuit's Methane-Flaring Ruling Has No Bearing on the Remedy.

Before the district court, Mountain Coal attempted to sidestep the vacatur order by pointing to this Court's holding that Federal Appellees did not need to

consider a methane-flaring alternative under NEPA before issuing and consenting to the lease modifications. The district court similarly erred when it found that precluding road construction in the Sunset Roadless Area necessarily required vacatur of the lease modifications. Ex. 1, Order 7-9. This Court's narrow methane-flaring ruling has no bearing on the remedy.

This Court held that Federal Appellees were not required to consider a methane-flaring alternative before authorizing the lease modifications. High Country Conservation Advocs., 951 F.3d at 1227-28. Nothing in that ruling confirms Mountain Coal's road construction rights. The lease modifications explicitly premised a limited right to construct roads on the existence of the North Fork Exception. See e.g., Ex. 11, Record Excerpts, FSLeasingII-76–77, -168, -1103, -1127, -1130–31, BLM9. As the Forest Service explained, if "a court vacates [the North Fork Exception], then the proposed lease modifications would not be able to proceed." Ex. 11, Record Excerpts, FSLeasingII-1131. To preclude road construction in the Sunset Roadless Area, this Court therefore did not need to vacate the lease modifications—the lease modifications do not provide an unconditional right to build roads, as Mountain Coal previously acknowledged to this Court.

Moreover, contrary to the district court's conclusion, Mountain Coal's inability to construct roads as a result of this Court's decision does not render this

Court's holding on the methane-flaring claim dicta. Ex. 1, Order 8 n.4. Vacatur of the North Fork Exception prohibits current road construction. If the Forest Service adopts a valid exception, Mountain Coal could exercise its road construction rights under its approved lease modifications. See Cal. ex rel. Lockyer v. U.S. Dep't of Agric., 468 F. Supp. 2d 1140, 1146 (N.D. Cal. 2006), aff'd, 575 F.3d 999 (9th Cir. 2009 (prohibiting "road building . . . prohibited by the Roadless Rule," but not invalidating the leases). This Court's ruling on the methane-flaring claim therefore does not insulate Mountain Coal from the impacts of the vacatur order.

D. Mountain Coal is Judicially Estopped from Arguing Road Construction Does Not Violate the Tenth Circuit Order.

After acknowledging to this Court that vacatur of the North Fork Exception would preclude road building and "freeze" mining-related activities in an attempt to convince the court not to vacate the North Fork Exception, Mountain Coal proceeded to engage in that very prohibited act the week of June 1—without any notice to the Conservation Groups or the district court. The doctrine of judicial estoppel prevents "a party from playing fast and loose with the courts." Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980) (quotation omitted). A party may not "adopt[] a legal position in conflict with one earlier taken in the same or related litigation." Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982). The doctrine "protect[s] the integrity of the judicial process." New Hampshire v. Maine, 532 U.S. 742, 749 (2001). Here, judicial estoppel prevents

Mountain Coal from disregarding its prior representations and now claiming that it can engage in the very activity that it previously claimed would be illegal.

Moreover, even if this Court were to give Mountain Coal a free pass with respect to the already constructed road—which it should not—this Court should not allow Mountain Coal to bootstrap in additional drilling pad construction and other construction activities accessible only using the illegal road. Mountain Coal comes to the Court with "unclean hands." Deseret Apartments, Inc. v. United States, 250 F.2d 457, 458 (10th Cir. 1957). It is well-established that a court generally must not sanction unlawful and deceitful acts or otherwise turn a blind eye to them. See Pan-Am. Petroleum & Transp. Co. v. United States, 273 U.S. 456, 506 (1927) ("The general principles of equity . . . will not be applied to frustrate the purpose of [U.S.] laws or to thwart public policy."). This Court should not allow Mountain Coal to benefit from its illegal acts.

II. ABSENT AN INJUNCTION PENDING APPEAL, CONSERVATION GROUPS WILL SUFFER IRREPARABLE HARM.

A preliminary injunction is warranted because "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987), abrogated in part on other grounds by Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); Davis, 302 F.3d at 1116 (environmental harm "is irreparable in the sense that it cannot adequately be

remedied by nonequitable forms of relief"). Therefore, to show irreparable harm, Conservation Groups need only establish "significant risk" of environmental injury. Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1258 (10th Cir. 2003).

Mountain Coal plans to imminently bulldoze two additional drilling pads adjacent to the illegally constructed road in the Sunset Roadless Area. Ex. 10, Sept. 2020 Norris Decl. ⁋⁋ 4-5. These drilling pads will allow Mountain Coal to drill methane boreholes and to excavate large amounts of coal. The scraping of two additional drilling pads will cause substantial and irreparable harm to the environment. The following photographs, taken of the construction that occurred during the week of June 1, show the vast destruction caused by bulldozing drilling pads in the Sunset Roadless Area. Ex. 5, Reed Decl. ¶¶ 9-10.

The scars left behind by Mountain Coal's illegal activities will persist for decades if not longer. Ex. 6, Henderson Decl. ¶¶ 14-17. Indeed, bulldozing a protected roadless area is the epitome of irreparable harm. See, e.g., Idaho Sporting Cong. Inc. v. Alexander, 222 F.3d 562, 569 (9th Cir. 2000) (holding logging

constituted irreparable injury); Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1382 (9th Cir. 1998) (same). And it is well-established that such harm to the environment cannot be remedied absent an injunction. See Amoco Prod. Co., 480 U.S. at 545; Lockyer, 459 F. Supp. 2d at 914.

Further, scraping additional drilling pads in the Sunset Roadless Area will irreparably harm Conservation Groups' members, who rely on the remote, pristine wildlands for solitude and quiet recreation. Ex. 6, Henderson Decl. ¶¶ 12-17; Ex. 5, Reed Decl. ¶¶ 11-16. Interfering with people's enjoyment of wild landscapes "is considered 'irreparable' since land is viewed as a unique commodity for which monetary compensation is an inadequate substitute." Pelfresne v. Vill. of Williams Bay, 865 F.2d 877, 883 (7th Cir. 1989). Such areas will be enjoyed not only by Conservation Groups and their members but also "by many generations of the public," thereby warranting an injunction to protect these interests. Neighbors of Cuddy Mountain, 137 F.3d at 1382; see Ex. 6, Henderson Decl. ¶ 14.

Allowing Mountain Coal to proceed with its illegal activities also will pave the way for additional coal mining, which will irreparably harm the climate and air quality. Courts have recognized that environmental harm can have cascading effects; once wrongful activities are set in motion, they can be difficult to stop. See Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs, 826 F.3d 1030, 1039 (8th Cir. 2016) (finding irreparable harm because once construction has

begun, it will be difficult to stop the larger project); Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d 978, 995 (8th Cir. 2011) (finding irreparable harm where failure to consider important environmental factors in issuing permit could lead to several environmental harms, including increased threats to species). Here, the scraping of two additional drilling pads and drilling methane boreholes will allow Mountain Coal to mine additional coal from the Sunset Roadless Area, accessible only by the illegal road it constructed in early June. This additional coal mining will irreparably and substantially harm air quality and the climate, as a result of increased emissions of methane and ozone precursors, among other harmful pollutants. See, e.g., Ex. 11, Record Excerpts, BLM005440-BLM005447, FSLeasingII-0035532-FSLeasingII-0035533. Conservation Groups and their members will also suffer these harms. See id.

III. THE IRREPARABLE ENVIRONMENTAL INURY OUTWEIGHS ANY HARM TO MOUNTAIN COAL OR THE AGENCIES.

If environmental harm "is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod., 480 U.S. at 545. Because environmental injury—unlike economic injury—is by its nature irreparable, the environmental harm caused by Mountain Coal's illegal acts should outweigh any economic injury it might suffer. See id.; Colo. Wild Inc. v. U.S. Forest Serv., 523 F. Supp. 2d 1213, 1222 (D. Colo. 2007)

(finding economic harm is "not irreparable" and does not outweigh environmental harm).

Here, the balance of hardships favors enjoining Mountain Coal's unlawful bulldozing of additional drilling pads and related surface disturbance because this irreparable harm is certain to occur. Ex. 10, Sept. 2020 Norris Decl. ¶¶ 4-5; see Amoco, 480 U.S. at 545. In contrast, Mountain Coal has claimed that enjoining its illegal activities would force layoffs, but no evidence supports that assertion. Ex. 4, Norris Decl. ¶ 8. Nor has Mountain Coal addressed how it might avoid such impacts. In 2017, Mountain Coal indicated that previously approved mining on the parent leases would continue for another decade. Ex. 11, FSLeasingII-209. Mountain Coal also has access to mine longwall panel SS1 in the Sunset Roadless Area, which would be unaffected by the Groups' requested relief.[5]

Further, Mountain Coal obtained its lease modifications knowing that Conservation Groups were challenging the underlying North Fork Exception and proceeded with construction in the Sunset Roadless Area despite its prior recognition that vacatur of the North Fork Exception would preclude such

[5] Conservation Groups seek relief only for construction undertaken after the Tenth Circuit's order and mandate. This relief would not stop all mining in the lease modification area. Before the Tenth Circuit ruled, Mountain Coal completed road construction for longwall panel SS1 in this area. Ex. 12, Decl. of Chad Stewart ¶ 10. DRMS has not issued a stop-work order for this panel since the road construction is complete.

activities. Accordingly, any harm suffered is "self-inflicted." Davis, 302 F.3d at 1116. The balance of hardships therefore strongly favors an injunction.

IV. AN INJUNCTION PENDING APPEAL WOULD SERVE THE PUBLIC INTEREST

An injunction in this case will not "adversely affect" the public interest. Id. at 1111. There is a "strong public interest in preserving our [roadless] national forests in their natural state," Lockyer, 459 F. Supp. 2d at 914 (quotation omitted), and in preserving the "biological integrity and the undeveloped character" of them. Colo. Wild v. U.S. Forest Serv., 299 F. Supp. 2d 1184, 1190-91 (D. Colo. 2004). Given such interests, this Court has recognized that "[t]he clearcutting of the timber . . . obviously will have a significant effect on the environment for many years," justifying equitable relief. Wyo. Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1250 (10th Cir. 1973), overruled on other grounds by Vill. of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992) (en banc).

Here, despite the pandemic, thousands have opposed Mountain Coal's illegal activities, seeking to protect the Sunset Roadless Area from further irreparable harm. Ex. 6, Henderson Decl. ¶ 19. Enjoining Mountain Coal from bulldozing drilling pads and engaging in further surface disturbance will serve the public interest by protecting these remote wildlands.

CONCLUSION

For these reasons, Conservation Groups request that this Court grant their request for an injunction pending appeal.

Date: October 5, 2020

s/ Robin Cooley
Robin Cooley
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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;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Core Agent 2.8.6., Endpoint Advanced 10.8.8.1, Intercept X 2.0.17, as of October 5, 2020, and according to the program are free of viruses.

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CERTIFICATE OF COMPLIANCE WITH RULES 27 & 32(a)

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d) because this motion contains 5198 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

2. This motion complies with the typeface requirements of Fed. R. App. P. 27(d) and 32(a)(5) and the type style requirements of Fed. R. App. P. 27(d) and 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Word 2016 in 14 point font size and Times New Roman.

Date: October 5, 2020

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CERTIFICATE OF COMPLIANCE WITH 10TH CIR. R. 8.2

Pursuant to 10th Cir. R. 8.2, Conservation Groups certify:

(1) This Motion was filed within one business day of the district court's order denying Conservation Groups' Emergency Motion to Enforce Remedy.

(2) The district court entered its order denying Conservation Groups Emergency Motion to Enforce Remedy on October 2, 2020.

(3) The district court's order was effective immediately.

(4) The telephone number and email address for all counsel of record are as follows:

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/s/ Robin Cooley

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I electronically filed the foregoing **APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL** using the court's CM/ECF system, which will send notification of such filing to the following:

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