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 OPPOSITION TO PLAINTIFFS' MOTION FOR AN INJUNCTION PENDING APPEAL

Pursuant to this Court's Minute Order of October 6, 2020, Dkt. 104, Intervenor-Defendant Mountain Coal Company, LLC ("Mountain Coal") provides this Opposition to Plaintiffs' Motion for an Injunction Pending Appeal.[1] Dkt. 103. As the Court noted in its Order denying Plaintiffs' Emergency Motion to Enforce the Mandate, Dkt. 102 ("Order"), Plaintiffs make no claim that the Court failed to implement any aspect of the Tenth Circuit's mandate. Nor

[1] As noted in the Federal Defendants' Opposition, the Tenth Circuit issued a briefing schedule and temporary injunction for the Plaintiffs' motion for injunction pending appeal. Dkt. 107. This does not moot the Plaintiffs' motion in this Court, because the temporary relief provided by the Tenth Circuit is intended only to preserve the status quo pending briefing and deliberations on the motions, not afford Plaintiffs an injunction through the duration of their appeal. Mountain Coal further notes that on October 7, 2020, the Federal Defendants' filed an unopposed motion to extend the briefing schedule through October 20, 2020. Shortly after the filing of Federal Defendants' Opposition, the Tenth Circuit granted the request.

have they identified any action by Mountain Coal to interfere with or defeat the mandate, which was entered by joint unopposed motion on June 15, 2020. Rather than enforcing the *mandate*, Plaintiffs are seeking to invoke the Court's jurisdiction to enforce Plaintiffs' interpretation of the requirements of the *Colorado Roadless Rule* against Mountain Coal—a private party—following entry of the mandate, a regulatory enforcement claim not before the Court in this Administrative Procedure Act ("APA") action. Plaintiffs have also failed to satisfy the other requirements for injunctive relief. Consequently, Plaintiffs' Motion should be denied.

STANDARD OF REVIEW

Plaintiffs' motion is reviewed under the traditional four factor test for a preliminary injunction. 10th Cir. Rule 8.1. This requires the Plaintiffs to show "(1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013).

ARGUMENT

I. Plaintiffs are Unlikely to Succeed on the Merits

The Court made three determinations in the Order: (1) that it had fully implemented the Tenth Circuit's mandate, (2) that consideration of issues outside the mandate and not barred by the mandate is discretionary with the Court, and (3) that it would not exercise any discretion it possessed to address the new post-judgment claims and theories Plaintiffs raise. Because the consideration of matters beyond the mandate is discretionary, *Entek GRB LLC v. Stull Ranches LLC*, 113 F. Supp. 3d 1113, 1116 (D. Colo. 2015), *aff'd*, 840 F.3d 1239 (10th Cir. 2016), Plaintiffs must show that the Court abused its discretion in declining to reach the merits of their

argument. Plaintiffs do not dispute the first two determinations, and they make no effort to evaluate the Court's third determination under an abuse-of-discretion standard. Plaintiffs do not contend that either the mandate or any other law requires the Court to assess what conduct is allowed on the Lease Modifications under the Colorado Roadless Rule ("CRR") post-vacatur of the North Fork Exception. They simply argue that their view of the CRR is correct, and that the Court "should" enforce the CRR's requirements against Mountain Coal. Dkt. 103 at 3. Although they criticize the Court for "punting" on the issue, they offer nothing that prohibits the Court from punting. The Plaintiffs have therefore failed to show a likelihood of success under the applicable standard.

Moreover, their argument concedes that the Court may not even possess subject matter jurisdiction to provide the relief they request. They acknowledge that if the Court does not act, Mountain Coal's actions are "essentially unreviewable," because there is not "likely to be any additional federal decisionmaking." Dkt. 103 at 3. This reflects the fact that neither the statutes under which the CRR was promulgated[2] nor the CRR contain a citizen suit provision, hence judicial review is only obtainable as against federal agencies under the APA following final agency action. They have no right to enforce the CRR as a private attorney general against private parties. To the extent they are concerned with this statutory scheme, their quarrel is with Congress. They cannot dress up a citizen enforcement action against a private party as "enforcing the mandate" so as to evade this jurisdictional limitation.

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[2] 16 U.S.C. §§ 472, 529, 551, 1608, 1613; 23 U.S.C. §§ 201, 205. *See* 36 C.F.R. 294, Subpart D.

The only other error they identify is the Court's alleged erroneous "focus" on vacatur of the Lease Modifications, which Plaintiffs assert they are not seeking. In fact, Plaintiffs are all over the map on this issue. In parts of their filings they contended that they "seek no additional relief beyond vacatur of the North Fork Exception," Dkt. 89 at 2, but in their proposed order they affirmatively asked the Court to order the Forest Service to "withdraw *any consent* authorizing Mountain Coal to engage in surface disturbing activities within the North Fork Exception unless and until the Forest Service adopts a lawful exemption to the Colorado Roadless Rule," Dkt. 77-4 at 2 (emphasis added), and they further contended throughout the litigation and in their motion that vacatur of the North Fork Exception negated the consent on which the Lease Modifications were premised. *See, e.g.*, Dkt. 89 at 3 ("Based on this exception, the Bureau of Land Management (BLM) issued the lease modifications, and the Forest Service consented to them, giving MCC limited authorization to construct roads. . . . The Tenth Circuit's decision to vacate the North Fork Exception removes this authorization." (record citations omitted)). Critically, because Mountain Coal contends that it has a right to build roads by virtue of the Lease Modifications and the statutory rights exception at 36 C.F.R. § 294.43(c)(1)(i), if Mountain Coal is correct the only way to effectuate a withdrawal of consent for surface disturbance is to vacate the Lease Modifications. The Court cannot be faulted for interpreting vacatur of the Lease Modifications as Plaintiffs' actual request, notwithstanding their selective protestations to the contrary.

Regardless, Plaintiffs' narrowing of their claimed relief is not helpful to their motion. The validity of the Lease Modifications was at least raised to the Tenth Circuit on appeal; the validity of the Forest Service's consents were affirmed by the Court and never appealed. Whether the relief sought is vacatur of the Lease Modifications, an order to withdraw the Forest Service consents,

and/or an injunction against Mountain Coal, all requests require the Court to go beyond the requirements of the mandate and affirmatively interpret and enforce provisions of the CRR as applied to facts that were never raised in the litigation prior to post-mandate motion practice. It cannot be an abuse of discretion to decline that request.

II. Pending Harm to Plaintiffs is Minimal and Not Traceable to this Action

Plaintiffs concede that the only presently pending harm is *one* acre of additional surface disturbance that would result from Mountain Coal's construction of two additional borehole pads for coal panel LWSS2. Dkt. 103 at 4; *see also* Norris September 2020 Decl. ¶ 4 (Dkt. 97-1). The drilling of methane ventilation boreholes ("MVB") does not result in any incremental surface disturbance. Norris September 2020 Decl. ¶ 5. Additional surface disturbance beyond that one acre cannot occur unless and until the Forest Service confirms that Mountain Coal is entitled to construct new roads pursuant to the statutory rights exception to the CRR at 36 C.F.R. § 294.43(c)(1)(i), which is a necessary predicate for the Colorado Division of Mining Reclamation and Safety ("CDRMS") to allow work for other coal panels to occur. *See* Dkt. 94-1 (Modified CDRMS Cessation Order); Dkt. 96-1 at 4 (Forest Service letter confirming that Mountain Coal cannot undertake further road construction "unless other exceptions [to the CRR] apply"). The fact that there remains additional required administrative processes before Mountain Coal can construct more roads forecloses any finding of irreparable harm from that prospective work. *Town of Superior v. United States Fish & Wildlife Service*, 2012 U.S. Dist. LEXIS 182649 at *7-8 (D. Colo. 2012).

Importantly, any harm flowing to Plaintiffs from additional borehole pad construction and drilling is not traceable to the APA suit filed by Plaintiffs in 2017. Plaintiffs' claim that drill

pad construction should be enjoined hinges upon their interpretation of the tree-cutting restrictions at 36 C.F.R. § 294.42(c), which is not a subject of the Complaint and has been definitively rejected by the Forest Service. *See* Dkt. 96-1 at 4. And they provide no authority whatsoever for the claim that the CRR prohibits MVB drilling on already-constructed borehole pads.

Further mitigating any harm to Plaintiffs is the character of the area in which the work will occur. In the photos Plaintiffs inserted into their motion, taken in mid-June 2020, the Court will note that many of the trees have no leaves. Those trees are dead. Declaration of Kathleen Welt ("Welt Decl.") ¶ 3. The aspen stands in this area are over-mature, with many dead and dying trees, and have been in that condition for more than a decade. *Id.* Remaining vegetation is Gambel oak, which is nearly impassable and which has little to no ecological or recreational value. *Id.* ¶ 4. These remaining living aspen are not naturally regenerating and are gradually being replaced by Gambel oak. *Id.* ¶ 3. Plaintiffs provide no evidence that they actually recreate in and through Gambel oak. The tree-removal and re-vegetation associated with the construction will accelerate regeneration of the forest, and leave the forest and wildlife in a healthier state, sooner than if the work did not occur. *Id.* ¶ 5.

Moreover, Plaintiffs assert they are seeking to keep the area "pristine," so as to afford them "solitude and quiet recreation." Dkt. 103 at 6. But they are not disputing the validity of the Lease Modifications or mining activities occurring on LWSS1 just a few hundred feet away from the two additional drill pads to be constructed. In other words, they must share the area with the Mine. Under their own standard, the area has already been irreparably harmed from past conduct

not at issue in their motion. These conditions undermine the claims of irreparable harm from the planned construction.

III. The Balance of Harms Weighs Against Plaintiffs

Balanced against the minimal harm to Plaintiffs is severe harm to Mountain Coal and the Federal Defendants. As to Mountain Coal, the employment of hundreds of employees is at stake, as well as Mountain Coal's ability to fulfill its contracts with customers. Norris Decl. ¶ 8 (Dkt. 84-1). Plaintiffs strangely claim that there is "no evidence" to support these harms, when in fact they are set forth in the sworn declaration of the General Manager of the Mine. In making this charge, Plaintiffs appear to be arguing that the harm is insufficiently imminent and precise, or that Mountain Coal can readily mine other coal, but this reflects their fundamental misunderstanding of underground mining. Mining at West Elk occurs thousands of feet underground, and requires many months of advance construction and development. Mountain Coal cannot simply teleport through solid rock to access other coal. Although the amount of additional surface disturbance is minimal, that work is critical to continued mining based on Mountain Coal's current MSHA ventilation requirements. The ultimate degree of harm will depend on the duration and timing of the injunction, as well as market conditions through the winter. But the fact that the number of layoffs and degree of contract disruption cannot be predicted to the person and the penny does not make them less real.

The Federal Defendants will also be materially harmed by Plaintiffs' requested relief. Disruption of mining will harm the federal government's interest in the taxes and royalties associated with coal mining. Should the remaining coal in the Lease Modifications be bypassed, that will further harm the federal government's interest in the efficient development of federal

mineral resources. Equally important, Plaintiffs seek to usurp the authority of the Forest Service to interpret and enforce its own regulations, in a context where Congress has not enacted a citizen suit provision.

IV. The Public Interest Warrants Denial of the Motion

The foregoing discussion of Plaintiffs' attempt to create a new extra-statutory citizen enforcement mechanism and the respective harms indicate that denial of the motion is in the public interest. In addition, it is worth briefly revisiting the Tenth Circuit's rationale for vacating the North Fork Exception. As the Court noted, the Tenth Circuit determined that the Forest Service erred in failing to consider the "Pilot Knob" alternative, which would have carved out Pilot Knob from the North Fork Exception. The Tenth Circuit agreed that Pilot Knob was a reasonable alternative because protecting it would enhance certain environmental values while "providing for long-term coal-exploration and mining opportunities" elsewhere in the North Fork Valley (including the Sunset Roadless Area). *High Country Conservation Advocates v. United States Forest Service*, 951 F.3d 1217, 1224 (10th Cir. 2020). Having identified the error, the Tenth Circuit concluded it had no choice but to vacate the entire North Fork Exception, and it ordered this Court to enter a vacatur order (and nothing else). *Id.* at 1229. After the Court implemented the Tenth Circuit's instructions to the letter, Plaintiffs now urge the Court that it is in the public interest to impair if not vacate an existing federal coal lease and mining operation in the Sunset Roadless Area, miles away from Pilot Knob, based on provisions of the CRR and facts that were never at issue or in the record of the litigation. The requested relief cannot be in the public interest.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied.

DATED this 8th day of October, 2020.

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s/ Michael Drysdale

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2020, I caused the foregoing document, **MOUNTAIN COAL COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL,** to be electronically filed with the Clerk of the Court using the CM/ECF system on counsel of record.

s/ Michael Drysdale