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/Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Federal Defendants/Respondents, and

MOUNTAIN COAL COMPANY, LLC,

Respondent/Defendant-Intervenor.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

Conservation Groups' request that this Court issue an injunction pending appeal to prevent further destruction of the Sunset Roadless Area in violation of the Tenth Circuit's mandate to vacate the North Fork Exception—the only basis for allowing road construction and tree cutting necessary for coal mining in the roadless area. Conservation Groups satisfy the four showings necessary for an injunction.

I. Conservation Groups' Are Likely to Succeed on the Merits Because Mountain Coal's Bulldozing Violates the Tenth Circuit's Vacatur Order.

As Mountain Coal previously conceded, the Tenth Circuit's decision ordering vacatur of the North Fork Exception precludes mining in the Sunset Roadless Area. *See* Pls.' Mot. for Injunction Pending Appeal 3, ECF No. 103. Rather than address this critical issue, both Federal

Defendants and Mountain Coal support this Court's decision to abstain from resolving the impact of the vacatur order. Opp. by Federal Resps. to Pets.' Mot. for Injunction Pending Appeal ("Feds Opp.") 3; Mountain Coal Co.'s Opp. to Pls.' Mot. for Injunction Pending Appeal ("MCC Opp.") 3. However, the judicial branch has an interest "in seeing that an unambiguous mandate is not blatantly disregarded by parties to a court proceeding." *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984)). This is an interest that this Court is "empowered to protect" on remand. *Id.* Indeed, the exercise of this authority is "particularly appropriate in a case such as this where an administrative agency plainly neglects the terms of a mandate, and the case then returns to the court . . . on a motion to enforce the original mandate." *Id.*; *see also Sierra Club v. McCarthy*, 61 F. Supp. 3d 35, 39 (D.D.C. 2014); *Oceana, Inc. v. Ross*, No. 2:17-cv-05146-RGK-JEM, 2020 WL 5239197, at *3 (C.D. Cal. Jan. 8, 2020).

Mountain Coal claims that the question of whether its bulldozing is illegal is "beyond the mandate." MCC Opp. 2; *see also* Feds Opp. 3.[1] But this argument ignores that Mountain Coal conceded before the Tenth Circuit exactly what the impacts of vacating the North Fork Exception would be—to "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." Br. of Intervenor-Appellee, App. Ct. ECF No. 25 at 49 (attached as Ex. 1 to Pls.

[1] Federal Defendants cite to *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29 (D.C. Cir. 2005), in support. Feds Opp. 3. But in *Heartland* the agency had taken action on remand, and the court held that "whether or not the agency's [post-remand] rejection of the alternatives was arbitrary is a determination that must be made in [a] separate APA action challenging [the agency's] post-remand decisions." *Id.* at 30. That is not the case here. The Forest Service has not issued a new decision considering the Pilot Knob alternative. Until it does, the North Fork Exception has been vacated by the Tenth Circuit, and it is up to the courts to enforce that remedy.

Emergency Mot. to Enforce Remedy, ECF No. 77-1). For that reason, Mountain Coal spent ten pages of its appellate brief requesting the Court remand without vacatur outside of the Pilot Knob roadless area. *Id.* at 39-49. The Court considered and rejected those arguments and instead vacated the Exception in its entirety. *High Country Conservation Advocs. v. U.S. Forest Serv.*, 951 F.3d 1217, 1229 (10th Cir. 2020). This Court has no discretion to disregard the Tenth Circuit's mandate and instead implement the very remedy of remand without vacatur that the Tenth Circuit rejected. *Estate of Cummings by & through Montoya v. Cmty. Health Sys., Inc.*, 881 F.3d 793, 801 (10th Cir. 2018) ("A lower court is 'bound to carry the mandate of the upper court into execution and [cannot] consider the questions which the mandate laid at rest.'" (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939) (alteration in original)); *see also* Order 6-7, ECF No. 99 (citing *Estate of Cummings*, 881 F.3d at 801).

This Court mistakenly frames Conservation Groups' argument as an "entirely new claim" alleging that "Mountain Coal's surface-disturbing activities in the Sunset Roadless Area violate the Roadless Rule." Order 9-10, ECF No. 99; *see also* MCC Opp. 2. This is not a new claim—it is the premise underlying the entire case. The *only* reason the Forest Service adopted the North Fork Exception was to allow road construction for mining purposes that the Colorado Roadless Rule otherwise prohibited. Mountain Coal was well aware of this necessary predicate to mining and is currently the only entity poised to take advantage of the Exception.

That the North Fork Exception is necessary to authorize mining in any roadless areas is apparent from the Tenth Circuit's consideration of Conservation Groups' Pilot Knob alternative claim under the National Environmental Policy Act (NEPA). The Tenth Circuit acknowledges repeatedly that the various alternatives the Forest Service considered were a tradeoff between

"provid[ing] access" to coal that would otherwise be "foreclose[d]" under the Colorado Roadless Rule and conserving roadless areas. *High Country Conservation Advocs.*, 951 F.3d at 1224-26. Indeed, as the Tenth Circuit recognized, the Forest Service rejected the Pilot Knob alternative because excluding the Pilot Knob region from the North Fork Exception would have precluded coal mining in that area, just like it would in any other roadless areas not covered by the Exception. *Id.* at 1224; *see also id.* (recognizing that every alternative other than the adoption of the full North Fork Exception would have "foreclose[d] long-term coal mining opportunities"); *id.* at 1224-26 (recognizing that the alternative that would have excluded certain "wilderness capable" lands from the North Fork Exception would "prohibit coal mining in part of the Sunset Roadless Area").

Mountain Coal is wrong that the only way to effectuate the relief that Conservation Groups seek is to vacate the lease modifications. MCC Opp. 4. The right to construct roads under those lease modifications is entirely dependent on the North Fork Exception. Accordingly, Mountain Coal cannot construct roads and the Forest Service cannot allow such construction to occur unless the Forest Service adopts a valid North Fork Exception on remand. Mountain Coal repeatedly inquired with the Forest Service about the timeline for reinstating the North Fork Exception, but apparently determined that it would not occur quickly enough and instead bulldozed nearly a mile of road in the Sunset Roadless Area. *See* Decl. of Weston Norris ¶ 4, ECF No. 84-1. Because the Tenth Circuit vacated the North Fork Exception, Mountain Coal had no right to engage in such prohibited activity, as Mountain Coal previously recognized.

II. Conservation Groups Will Suffer Irreparable Harm Absent an Injunction

Federal Defendants do not address the harm to the Sunset Roadless Area that will occur absent an injunction. Mountain Coal attempts to downplay the destruction by relying on the fact that it already bulldozed the illegal road and two drilling pads and is now simply seeking to bootstrap in two more drilling pads adjacent to the road. MCC Opp. 5. But this drilling pad construction is by no means insignificant, as demonstrated by photos taken of the two already constructed pads. *See* Pls.' Mot. for Injunction Pending Appeal 5-6, ECF No. 103; *see also* Decl. of Matt Reed ¶¶ 9-10, ECF No. 89-5; Decl. of Brett A. Henderson ¶¶ 14-17, ECF No. 89-4. Such harm to the environment cannot be remedied absent an injunction—once the trees are cut down they cannot be put back up. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

III. The Balance of Harms Favors Protecting the Roadless Area

In contrast with the certain irreparable harm to the Sunset Roadless Area, Mountain Coal's entire allegation of harm is as follows:

> Mountain Coal presently employs 316 people. In the event that Mountain Coal is not able to complete methane ventilation borehole construction for longwall panel SS-2 this construction season, it will face a shutdown of operations of at least several months, which will result in layoffs of a large portion of its workforce. The specific number of layoffs cannot be predicted at this time.

Decl. of Weston Norris ¶ 8, ECF No. 84-1. Although Mountain Coal asserts that it "cannot simply teleport through solid rock to access other coal," it offers no explanation for why it cannot continue mining on the parent leases or private land (outside the roadless area) or on longwall panel SS1 (inside the roadless area) during the duration of any appeal. MCC Opp. 7. Likewise, Mountain Coal's attorney argues in its opposition that the degree of harm will depend on market conditions, but Mountain Coal provides no evidence regarding current or projected

market conditions. *Id.* Accordingly, Mountain Coal's vague allegations of harm are insufficient to overcome the certain and irreparable harm to the Sunset Roadless Area.

IV. An Injunction is in the Public Interest

With respect to the public interest, Mountain Coal attempts to rehash the remedy briefing that occurred before the Tenth Circuit. MCC Opp. 8. The Tenth Circuit considered and rejected Mountain Coal's request for a lesser remedy that would not affect its mining operations in the Sunset Roadless Area. *High Country Conservation Advocs.*, 951 F.3d at 1229. It is not in the public interest to allow Mountain Coal to disregard an appellate order.

CONCLUSION

For these reasons, Conservation Groups request the Court grant an injunction to prevent further destruction of the Sunset Roadless Area pending appeal.

Respectfully submitted October 14, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2020, I filed the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO STAY PENDING APPEAL** with the Court's electronic filing system, thereby generating service upon the following parties of record:

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