

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

Civil Action No. 08-cv-02167-JLK

WILDEARTH GUARDIANS, a not-for-profit corporation,

Plaintiff,

v.

UNITED STATES FOREST SERVICE, a federal agency within the U.S. Department of
Agriculture,
RICK CABLES, in his official capacity as Regional Forester of the U.S. Forest Service's Rocky
Mountain Region,
CHARLES S. RICHMOND, in his official capacity as Supervisor of the Grand Mesa,
Uncompahgre, Gunnison National Forest,
UNITED STATES DEPARTMENT OF THE INTERIOR, a federal agency, and
C. STEPHEN ALLRED, in his official capacity as Assistant Secretary, Land and Minerals
Management, U.S. Department of the Interior,

Defendants.

**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND PETITION FOR REVIEW OF AGENCY ACTION**

INTRODUCTION

1. The West Elk coal mine near Paonia, Colorado, is an underground mine which removes federal coal from beneath lands managed by the U.S. Forest Service. Though the coal is underground, the Forest Service and Department of the Interior (DOI) recently approved an expansion of the mine that will have significant and damaging impacts above ground. For the expansion, the Mountain Coal Company has received the agencies' approval to construct and operate up to 168 methane drainage wells on 146 well pads and construct nearly 23 miles of new road on the Grand Mesa, Uncompahgre and Gunnison National Forest. These wells are holes drilled from above that permit methane to migrate up to the atmosphere, where it is released untreated. These methane drainage wells are necessary, Mountain Coal states, to remove potentially hazardous levels of methane – natural gas – from the mine.

2. Methane is hazardous when it is released into the atmosphere. Methane is a greenhouse gas with more than 20 times the heat trapping power of carbon dioxide. It is estimated that the West Elk mine expansion could release 7,000,000 cubic feet of methane into the atmosphere every day. The methane emitted will have the heat-trapping equivalent of about one million metric tons of CO₂ released into the atmosphere annually, making the mine one of the state's largest single contributors to global warming. The federal agencies are approving this huge release of methane just as scientists have begun to understand the damaging impacts of global warming on Colorado's environment and economy, and at a time when the Governor of Colorado has proposed drastically reducing the level of greenhouse gases released into the atmosphere in the State over the coming decades.

3. The emission of methane is also a waste of a valuable commodity. The volume of gas estimated to be vented directly into the atmosphere is enough to heat up to 39,500 homes – a city the size of Boulder, or twice the size of Grand Junction – for the life of the venting, or up to 12 years. The value of the methane released annually is estimated at approximately \$21.26 million annually and more than \$250 million over the life of the project.

4. Despite the damaging global warming impacts from the methane to be released, and the wanton waste of a much sought-after non-renewable natural resource, the Forest Service and Interior Department approved this mine expansion without analyzing the potential for capturing and using the methane. Nor did these agencies analyze the alternative of flaring – *i.e.*, burning – the methane to drastically reduce the project’s global warming impacts. The agencies failed to examine these alternatives despite the fact that methane is routinely captured at working coal mines in the United States and around the world, and despite the fact that methane is flared at working mines in Europe and Australia. The federal agencies’ failure to even consider these reasonable alternatives, and failure to account for the impacts of methane venting on climate change all violate the National Environmental Policy Act (NEPA). This Court must, therefore, set aside the agencies’ approval of the mine expansion.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), and 5 U.S.C. §§ 701-706 (judicial review provisions of the Administrative Procedure Act). The Court may order relief pursuant to 28 U.S.C. § 2201 (declaratory judgments).

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the events or omissions giving rise to the claims occurred within this judicial district; the Forest Service has

offices in this district; the public lands and resources in question are located in this district; and environmental impacts resulting from this project will impact this district.

PARTIES

7. Plaintiff WILDEARTH GUARDIANS is a Santa Fe, New Mexico-based nonprofit organization with offices in Denver and members throughout the American West. WildEarth Guardians is dedicated to protecting and restoring the wildlife, wild places, and wild rivers of the American West, and to safeguarding the Earth's climate. WildEarth Guardians has members throughout the American West, including Colorado, that utilize the region that will be affected by the West Elk methane venting. WildEarth Guardians and its members work to reduce harmful air pollution to safeguard public health, welfare, and the environment. WildEarth Guardians and its members have an interest in ensuring that the West Elk methane venting proceeds responsibly, in a manner that both safeguards public health, welfare, and the environment and promotes economic development. On September 15, 2008, Rocky Mountain Clean Air Action officially merged with WildEarth Guardians. Rocky Mountain Clean Air Action submitted comments on the West Elk methane venting, filed an administrative appeal of the project, and has otherwise been involved in the planning of the West Elk methane venting. The above-described interests of WildEarth Guardians and its members have been and are being adversely affected and irreparably injured by Defendants' decision to authorize the West Elk mine expansion and methane venting in violation of NEPA and the Administrative Procedure Act (APA).

8. Members and staff of WildEarth Guardians use and enjoy the federal public lands impacted by the West Elk Mine expansion and venting for a variety of purposes, including

scientific study, wildlife viewing, photography, recreation, and aesthetic appreciation. Members and staff of WildEarth Guardians visit and recreate on Forest Service lands that may be impacted by the expansion of the West Elk Mine. In addition, members and staff of WildEarth Guardians have actively supported the protection of Forest Service lands at issue in this case, and have advocated in support of restrictions on ecologically and destructive activities associated with methane venting. The Forest Service's approval of the West Elk methane venting project without performing required NEPA analysis and providing a reasonable range of alternatives harms members and staff of WildEarth Guardians by denying them the right to informed decision-making and full disclosure under NEPA, as well as the right to meaningfully participate in the decision-making process. Therefore, Plaintiff's identified interests will be further irreparably damaged by the Forest Service's failure to comply with NEPA and the APA.

9. Defendant UNITED STATES FOREST SERVICE is a federal agency under the United States Department of Agriculture. The Forest Service is responsible for managing the National Forest System, of which the Grand Mesa, Uncompahgre, Gunnison (GMUG) National Forest is a part.

10. Defendant RICK CABLES is the Regional Forester for the Rocky Mountain Region, a position he held when the agency made its decision to approve the methane venting and to deny the Plaintiff's appeal. The Regional Forester is responsible for ensuring compliance with federal law as it relates to actions of the Forest Service within Region 2 of the Forest Service, of which the GMUG National Forest is a part. As such he is responsible for ensuring that NFS lands are managed in compliance with the law and sound administrative practices. Staff of the Forest Service's Rocky Mountain Region upheld the West Elk methane venting

Record of Decision (ROD) after an appeal by Plaintiff and others. Mr. Cables is sued in his official capacity.

11. Defendant CHARLES S. RICHMOND is the Supervisor of the GMUG National Forest. Mr. Richmond signed the ROD approving the West Elk Mine expansion and methane drilling on March 7, 2008, and was responsible for the preparation of the final environmental impact statement analyzing the project's impacts. Mr. Richmond is sued in his official capacity.

12. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR is the Department of the United States government charged by the Surface Mining Control and Reclamation Act with approving the expansion of operations to remove federally-owned coal on federal land.

13. At all relevant times concerning the actions complained of, Defendant C. STEPHEN ALLRED was Assistant Secretary, Land and Mineral Management for tDOI. On July 31, 2008, Assistant Secretary Allred, on behalf of the Department of the Interior, signed the mining plan approval document approving the first phase of the West Elk Mine expansion. On January 15, 2009, Assistant Secretary Allred, on behalf of DOI, signed the mining plan approval document approving the second and final phase of the West Elk Mine expansion. Mr. Allred is sued in his official capacity.

LEGAL BACKGROUND

A. The Administrative Procedure Act

14. Because NEPA does not include a citizens suit provision, this case is brought pursuant to the APA.

15. The APA allows persons and organizations to appeal final agency actions to the federal courts. 5 U.S.C. §§ 702, 704. The APA declares that a court shall hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

B. The National Environmental Policy Act

16. Congress enacted NEPA to, among other things, “encourage productive and enjoyable harmony between man and his environment” and to promote government efforts “that will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321.

17. To fulfill this goal, NEPA requires federal agencies to prepare an environmental impact statement (EIS) for all “major Federal actions significantly affecting the environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The agency should describe “any adverse environmental effects which cannot be avoided should the proposal be implemented.” 42 U.S.C. § 4332(C)(ii). Overall, an EIS must “provide [a] full and fair discussion of significant impacts” associated with a federal decision and “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

18. NEPA requires federal agencies, including BLM, to include within an EIS “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis is

the “heart” of a NEPA document, and the statute’s implementing regulations emphasize an agency’s duty to “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.16.

19. NEPA also requires that agencies mitigate the adverse environmental impacts of their actions. 40 C.F.R. §§ 1502.14(f), 1502.16(h).

C. The Mineral Leasing Act.

20. Under the Mineral Leasing Act, coal leases of Forest Service land “may be issued only upon consent of the” the Forest Service and “only ... upon such conditions as [the Forest Service] may prescribe with respect to the use and protection of the nonmineral interests in those lands.” 30 U.S.C. § 201(a)(3)(A)(iii).

D. The Surface Mining Control and Reclamation Act.

21. The Surface Mining Control and Reclamation Act (SMCRA) regulates surface coal mining, which includes the surface impacts of underground coal mining. 30 U.S.C. § 1266. Under the law, the federal government sets minimum standards for reclamation and surface mining activities. The Office of Surface Mining (OSM) within DOI is charged with implementing SMCRA for the federal government.

22. SMCRA also authorized the Secretary of the Interior to delegate administration and enforcement of the law to states that have a federally approved surface mining program. 30 U.S.C. § 1273(c). In 1979, the Colorado legislature adopted the Colorado Surface Coal Mining Reclamation Act (“Coal Act”), making the Mined Land Reclamation Board (MLRB) the delegated state authority that has primary authority for enforcement of SMCRA’s provisions in this state. Colo. Rev. Stat. § 34-33-101 et seq.

23. SMCRA's implementing regulations provide that "[n]o person shall conduct surface coal mining ... operations on lands containing leased Federal coal until the Secretary [of the Interior] has approved the mining plan." 30 C.F.R. § 746.11(a). "OSM shall prepare and submit to the Secretary a decision document recommending approval, disapproval, or conditional approval of the mining plan to the Secretary. The recommendation shall be based, at a minimum, upon [inter alia]: (a) The permit application package, including the resource recovery and protection plan; (b) Information prepared in compliance with the National Environmental Policy Act of 1969, ... [and] (f) The findings and recommendations of the regulatory authority with respect to the permit application and the State program." 30 C.F.R. § 746.13.

24. Under SMCRA, the Forest Service has the authority to "protect[] ... non-mineral resources" of its land proposed to be impacted by underground mining of federal coal resources. 30 C.F.R. § 740.4(e)(2).

STATEMENT OF FACTS

I. THE WEST ELK COAL MINE'S "E SEAM" EXPANSION AND METHANE VENTING

25. In 1981, DOI approved the startup of the West Elk coal mine in Delta and Gunnison Counties, in Colorado. The West Elk mine is operated by the Mountain Coal Company (MCC), a subsidiary of the St. Louis, Missouri-based, Arch Coal Company. The West Elk coal mine largely underlies lands managed by the U.S. Forest Service as the GMUG National Forest.

26. Since about 2002, operations at the West Elk Mine have extracted coal from a geologic formation known as the "B seam." Prior to 2007, the West Elk Mine incorporated new leased federal coal reserves to their State-approved mine permit, and proposed to state and

federal regulators that operations move into unmined reserves in the “E seam” in the next few years.

27. The E seam, like the B seam, contains significant amounts of methane. Methane is released within the underground mine when coal is removed from the seam. Because it is highly combustible, methane can pose a safety hazard within the mine. To protect its workers, MCC proposed to address methane in the E seam as it has at the B seam; that is, to vent methane directly into the atmosphere. MCC generally accomplished the venting by building roads on top of the area to be mined, bulldozing a well pad, and drilling into the coal seam from Forest Service land. Methane would be released into the atmosphere untreated.

28. To facilitate its expansion into the E seam, MCC proposed to the Forest Service that the mine be permitted to construct and operate 168 methane drainage wells on 146 well pads and construct nearly 23 miles of new road. Because the construction of these facilities could have a significant effect on the human environment, the Forest Service began preparing an environmental impact statement (EIS) pursuant to NEPA on the E seam expansion project in 2006. 71 Fed. Reg. 54,608 (Sept. 18, 2006).

II. METHANE AND CLIMATE CHANGE

29. According to the U.S. Environmental Protection Agency (EPA), the West Elk coal mine is currently the fourth largest emitter of methane from an underground coal mine in the United States.

30. Methane emissions from coal mining have impacts on global warming. When released uncombusted directly into the air, methane is a potent greenhouse gas that traps heat in the atmosphere 21 times more effectively than carbon dioxide (CO₂). The U.S. Department of Energy estimates that coal mining activities account for 10% of all United States methane emissions.

31. Global warming, or climate change, is widely recognized to pose “serious and well recognized” impacts to the human environment. Massachusetts v. EPA, --- U.S. ---, 127 S. Ct. 1438, 1455 (2007).

32. The impacts of climate change to Colorado are and will be significant. In his Climate Action Plan issued in November 2007, Colorado Governor Bill Ritter, Jr., summarized:

Global warming is our generation’s greatest environmental challenge. The scientific evidence that human activities are the principal cause of a warming planet is clear, and we will see the effects here in Colorado. But the seeds of change are also here in Colorado, in our scientific and business communities, and in each of us individually. This Colorado Climate Action Plan is a call to action. It sets out measures that we in our state can adopt to reduce emissions of greenhouse gases by 20 percent by 2020, and makes a shared commitment with other states and nations to even deeper emissions cuts by 2050.

Why is this important? For Colorado, global warming will mean warmer summers and less winter snowpack. The ski season will be weeks shorter. Forest fires will be more common and more intense. Water quality could decline, and the demand for both agricultural and municipal water will increase even as water supplies dwindle.

Colorado Climate Action Plan at 1 (November 2007).

33. The Colorado Climate Action Plan states that “the direct risks to the state [posed by climate change] are very serious.” Colorado Climate Action Plan at 7 (November 2007). These “direct risks” are numerous, including current observations of shorter and warmer winters, with thinner snowpack and earlier spring runoff, with less precipitation overall, and more of that precipitation falling as rain, not snow. Id. Droughts are longer, and there are more wildfires “burning twice as many acres each year than before 1980.” Beetle infestations are now “[w]idespread” and there is also a “[r]apid spread of West Nile virus.” Id.

34. In addition to these observed impacts, the Colorado Climate Action Plan states that “[i]n the coming decades, scientists project that Colorado and neighboring western states will see:” three-to-four degree temperature increases by 2030, with more frequent and longer-lasting summer heat extremes; “Midwinter thawing and much earlier melting of snowpack” with resultant “flooding,” “ski season[s]” shortened by “three to six weeks,” and “added stress on reservoirs”; “Much lower flows in rivers in the summer months and a greater vulnerability to drought with consequent impacts to the ability of “[a]lready over-used river systems” to satisfy “existing water rights and future growth,” degradation of water quality, and a potential “decline” in “[h]ydropower production”; slower recharge in groundwater aquifers, with an overall decline of 20% projected for the Ogallala aquifer if temperatures increase by more than 5 degrees Fahrenheit; “Insect attacks in forests” caused by warmer winter temperatures that will “reduce winterkill of beetles,” warmer summer temperatures that will “allow faster insect lifecycles,” and forests rendered vulnerable by “summer droughts”; “Less snow cover and more winter rain on farm lands” whereby the “[p]elting rain on bare ground will increase soil erosion”; “More weeds” and other impacts. Id.

35. Other reports indicate that climate change is already having a disproportionate impact on the American West and Colorado, raising temperatures here faster than the rest of the world. The Rocky Mountain Climate Organization and the Natural Resources Defense Council released a report in March 2008 indicating that temperatures in the American West were rising 70% faster than the world-wide average. The report noted:

Already, decreases in snowpack, less snowfall, earlier snow melt, more winter rain events, increased peak winter flows, and reduced summer flows have been documented. Scientists have recently attributed more than half of these changes in the West between 1950 and 1999 to the effects of heat-trapping pollutants.

See “Hotter and Drier: The West’s Changed Climate” at v (March 2008).

36. Responding to these findings, Colorado Governor Bill Ritter, Jr., recently issued Executive Orders calling for, among other things, a 20% reduction in greenhouse gases below 2005 levels by 2020 and an 80% reduction below 2005 levels by 2050. According to Governor Ritter, “Many sectors of Colorado’s economy, including agriculture, recreation, skiing, and tourism, could experience significant changes and impacts if emissions are not reduced.” Executive Order D 004 08, “Reducing Greenhouse Gas Emissions in Colorado” (April 22, 008).

37. The impacts of global warming are very likely to impact the resources of the GMUG National Forest.

III. MITIGATING METHANE’S IMPACTS.

38. EPA has long recognized the damage that methane released from coal mines can cause, and has worked to encourage coal mines to address methane’s impact. In 1994 the EPA established the Coalbed Methane Outreach Program (CMOP), whose mission is to promote the profitable recovery and use of coal mine methane and to address barriers to using coal mine methane instead of emitting it into the atmosphere. EPA states that the capture or combustion of

methane mitigates climate change, improves mine safety and productivity, and can generate revenue and cost savings.

39. Methane's impact on global warming can be mitigated. Burning methane reduces the heat-trapping potential of methane by breaking the chemical down into components that have 90% less heat trapping capability.

40. Coal mines around the world use a variety of methods to mitigate the damaging effects of methane. For example, coal mines in Europe and Australia combust methane on site using contained "flares" that safely burn methane to reduce the global warming impacts that would otherwise occur from simply venting methane. In addition, coal mines in the U.S. and numerous other countries capture vented methane for energy generation on-site, or for transport via pipeline to other locations where methane can be burned to generate electricity or heat homes.

IV. THE FOREST SERVICE'S REVIEW AND APPROVAL OF THE WEST ELK "E SEAM" EXPANSION AND METHANE VENTING.

41. On March 23, 2007, the Forest Service released a Draft EIS purporting to analyze the environmental effects of the West Elk Mine's E seam expansion, and solicited comments on the draft. The Draft EIS did not disclose the impact of methane venting on global climate change. The Forest Service also failed to analyze alternatives or mitigation measures that would reduce the impact of methane venting through either flaring or capturing the gas.

42. On May 7, 2007, Rocky Mountain Clean Air Action, among others, submitted comments on the Draft EIS stating that the document's failure to disclose the direct, indirect, and cumulative impacts of methane venting and to consider reasonable alternatives or mitigation measures to reduce the impact of such venting violated NEPA.

43. EPA also submitted comments on the Draft EIS. EPA urged the Forest Service to consider alternatives to methane venting, including capture and use or flaring, and criticized the Forest Service for failing to disclose the impacts of the project on global climate change.

44. In August 2007, the Forest Service issued a Final EIS for the West Elk methane venting. The Final EIS suffered from the same flaws as the Draft EIS. Specifically, the Final EIS did not consider any alternatives to methane venting, such as capture and use or, as a last resort, flaring. Further, the Final EIS failed to analyze the global warming impacts of the West Elk methane venting.

45. The Final EIS admitted that the 168 methane drainage wells proposed by MCC for construction on National Forest System lands would vent methane into the air for up to 12 years. It estimated that the E seam expansion could release 7,000,000 cubic feet of methane into the atmosphere every day. According to the Forest Service, the methane emitted will have the heat-trapping equivalent of approximately one million metric tons of CO₂ released into the atmosphere annually, approximately 1.3% of the total in Colorado from all fossil fuel combustion. The Forest Service estimated that the amount of methane vented would be enough to heat up to 39,500 homes – a city the size of Boulder, or twice the size of Grand Junction – for up to 12 years. The methane emissions will make the mine one of the largest single contributors to global warming in Colorado.

46. Based on current natural gas prices, the undiscounted value of the vented methane would be approximately \$21.26 million annually and more than \$250 million over the life of the venting.

47. On November 8, 2007, GMUG National Forest Supervisor Charles Richmond signed a Record of Decision (ROD) giving the Forest Service's consent to the West Elk E seam expansion.

48. On December 31, 2007, Rocky Mountain Clean Air Action and other groups filed an administrative appeal of the Forest Service's ROD pursuant to 36 C.F.R. § 215. The appeal challenged, inter alia, the failure of the Forest Service to consider alternatives to methane venting, such as capture and use or, as a last resort, flaring, and challenged the failure of the Forest Service to analyze the global warming impacts of the methane venting.

49. On February 13, 2008, the Rocky Mountain Region of the U.S. Forest Service issued a decision on the administrative appeal. That decision concluded that "the record contained conflicting information ... regarding the viability of methane flaring" as an alternative to methane venting and remanded the decision to the GMUG National Forest for reconsideration. The appeal decision did not respond to any other issue raised in the appeal.

50. The Forest Service responded by meeting with a local office of the Mine Safety and Health Administration (MSHA) and soliciting a single letter from that office.

51. On March 14, 2008, the GMUG National Forest Supervisor Charles Richmond issued a revised ROD, again giving the Forest Service's consent to the E seam expansion.

52. On April 28, 2008, Rocky Mountain Clean Air Action and others filed an administrative appeal of the March 14, 2008 ROD pursuant to 36 C.F.R. § 215. The groups challenged, inter alia, the Forest Service's failure to adequately analyze the cumulative impacts of the West Elk methane venting on global warming, and its failure to analyze a range of

reasonable alternatives that would reduce the project's greenhouse gas emissions by flaring or capturing methane.

53. On June 2, 2008, the Forest Service's Rocky Mountain Region rejected the administrative appeal. The appeal decision did not address any of the appeal points raised by Rocky Mountain Clean Air Action in its April 28, 2008 appeal. Instead, the Forest Service provided only one reason for rejecting the appeal: that "None of the issues brought forth by the appellants were directed at the decision to authorize changes in certain lease stipulations and to authorize the construction, reconstruction and use of certain Forest Service roads and trails necessary for the installation of the proposed methane drainage wells."

54. The June 2, 2008 appeal decision constituted the final determination of the U.S. Department of Agriculture on the E seam mine expansion and methane venting.

V. REVIEW AND APPROVAL OF THE WEST ELK "E SEAM" EXPANSION AND METHANE VENTING BY THE DEPARTMENT OF THE INTERIOR.

55. On June 6, 2008, the Forest Service notified OSM and the Colorado Division of Reclamation Mining and Safety (DRMS) of its decision consenting to the West Elk mine expansion and methane venting. DRMS issued a proposed decision permitting the first phase of the expansion on June 9. The first phase related to the installation of 16 methane drainage well and construction of approximately 1.5 miles of road on Forest Service land. Plaintiff appealed that decision on June 23. The Colorado Mined Land Reclamation Board (MLRB) rejected the appeal on July 9, 2008.

56. Following MLRB's decision, OSM prepared a packet pursuant to 30 C.F.R. § 746.13, which it sent to DOI's Assistant Secretary for Land and Minerals on July 23, 2008. The packet recommended that DOI approve the first phase of the West Elk mine expansion and

methane venting. For purposes of NEPA compliance, OSM relied upon the Final EIS completed by the Forest Service.

57. DOI Assistant Secretary Stephen Allred approved the mining plan modification on July 31, 2008. Mr. Allred's approval constituted DOI's final determination on the first phase of E seam mine expansion and methane venting.

58. DRMS issued a proposed decision permitting the second and final phase of the expansion on August 18, 2008. The second and final phase relates to the installation of 152 methane drainage well and construction of approximately 10 miles of road on Forest Service land. On October 9, 2008, the Forest Service notified Colorado DRMS of its concurrence to the second and final phase of the West Elk mine expansion and methane venting. The Forest Service's concurrence was based on the Final EIS and ROD. MLRB approved the second and final phase of the expansion on November 14, 2008.

59. Following MLRB's November 14 decision approving the second and final phase of the expansion, OSM prepared a packet pursuant to 30 C.F.R. § 746.13, which it sent to DOI's Assistant Secretary for Land and Minerals on or about December 10, 2008. The packet recommended that DOI approve the second and final phase of the West Elk mine expansion and methane venting.

60. For purposes of NEPA compliance, OSM relied upon the Forest Service's Final EIS.

61. DOI Assistant Secretary Stephen Allred approved the mining plan modification on January 15, 2009. Mr. Allred's approval constituted DOI's final determination on the second and final phase of E seam mine expansion and methane venting.

FIRST CAUSE OF ACTION

(NEPA: Failure to analyze a range of reasonable alternatives to methane venting)

62. The allegations in paragraphs 1-61 are incorporated herein by reference.

63. NEPA requires federal agencies, including BLM, to include within an EIS “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis is the “heart” of a NEPA document, and the statute’s implementing regulations emphasize an agency’s duty to “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.16.

64. Defendants rely upon a Final EIS that failed to consider or analyze alternatives to venting methane, including capture and use, and flaring of methane, in the Final EIS for the West Elk methane venting.

65. Defendants’ failure to consider these reasonable alternatives violates NEPA and its implementing regulations, and so is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

SECOND CAUSE OF ACTION

(NEPA: Failure to analyze measures to mitigate impacts of methane venting)

66. The allegations in paragraphs 1-61 are incorporated herein by reference.

67. Implicit in NEPA’s demand that an agency prepare a detailed statement on “any adverse environmental effects which cannot be avoided should the proposal be implemented,” is an understanding that an EIS will discuss the extent to which adverse effects can be avoided. 42 U.S.C. § 4332(C)(ii). NEPA’s implementing regulations require that the agency analyze possible mitigation measures in defining the scope of the EIS, 40 C.F.R. § 1508.25(b), in

discussing alternatives to the proposed action, 40 C.F.R. § 1502.14(f), and consequences of that action, 40 C.F.R. § 1502.16(h), and in explaining its ultimate decision, 40 C.F.R. § 1505.2(c).

68. Defendants rely upon a Final EIS that failed to consider measures that could mitigate the impacts of venting methane, including capture and use, and flaring of methane, in the Final EIS for the West Elk methane venting.

69. Defendants' failure to consider measures that could mitigate the impacts of venting methane violates NEPA and its implementing regulations, and so is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

THIRD CAUSE OF ACTION

(NEPA: Failure to analyze impacts of methane venting)

70. The allegations in paragraphs 1-61 are incorporated herein by reference.

71. NEPA and its implementing regulations require that an EIS identify direct, indirect, and cumulative impacts for each reasonable alternative. 40 C.F.R. § 1502.15. See also 40 C.F.R. § 1508.8 (effects include ecological, aesthetic, historical, cultural, economic, social or health impacts, whether direct, indirect or cumulative); 40 C.F.R. § 1508.25(c) (EIS shall consider three types of impacts, including direct, indirect, and cumulative effects); 40 C.F.R. § 1508.25(a)(2) (EISs must analyze the effects of actions "which when viewed with other proposed actions have cumulatively significant impacts").

72. Defendants rely upon a Final EIS and decision that failed to analyze the cumulative global warming impacts of the West Elk methane venting in violation of NEPA. Defendants failed to address detailed scientific information provided by Plaintiff demonstrating

that the West Elk methane venting would release greenhouse gases and contribute to global warming.

73. Defendants' failure to address detailed scientific information provided by Plaintiff demonstrating that the West Elk methane venting would release greenhouse gases and contribute to global warming violates NEPA and its implementing regulations, and so is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in favor of Plaintiff and against the Defendants and provide the following relief:

1. Declare that Defendants' approval of the West Elk mine expansion and methane venting violated, and continues to violate, NEPA by issuing and relying upon an EIS that fails to properly and fully analyze a range of reasonable alternatives, fails to consider mitigation measures, and fails to disclose impacts of methane venting as set forth above;
2. Issue an injunction setting aside the Defendants' decisions approving or consenting to the West Elk mine expansion and methane venting;
3. Issue an injunction ordering the Defendants to not approve or consent to any expansion of the West Elk Mine and methane venting unless and until the Defendants comply with NEPA and its implementing regulations as set forth above;
4. Award Plaintiff costs and reasonable attorneys' fees as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and any other statute;
5. Retain jurisdiction of this action to ensure compliance with its decree; and

6. Provide such other declaratory and injunctive relief as the court deems just and proper.

Respectfully submitted February 20, 2009

s/ Edward B. Zukoski

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