No. 18-1374

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HIGH COUNTRY CONSERVATION ADVOCATES, et al.,
Plaintiffs/Appellants,

v.

UNITED STATES FOREST SERVICE, et al.,
Defendants/Appellees,

and

MOUNTAIN COAL COMPANY, LLC,
Intervenor/Defendant/Appellee.

Appeal from the U.S. District Court for the District of Colorado
No. 17-cv-03025-PAB (Hon. Philip A. Brimmer)

ANSWERING BRIEF FOR THE FEDERAL APPELLEES

(Oral Argument Requested)

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STATEMENT OF RELATED CASES

There are no prior or related appeals under Tenth Circuit Rule 28.2(C)(1).

GLOSSARY

APA	Administrative Procedure Act
BLM	Bureau of Land Management
CO2e	carbon dioxide equivalent
CRA	Colorado Roadless Area
DRMS	Colorado Division of Reclamation, Mining and Safety
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
GHG	Greenhouse gas
MCC	Mountain Coal Company
MDW	Methane drainage well
MSHA	Mine Safety and Health Administration
NEPA	National Environmental Policy Act
NFCMA	North Fork Coal Mining Area
OSMRE	Office of Surface Mining, Reclamation, and Enforcement
ROD	Record of Decision
SFEIS	Supplemental Final Environmental Impact Statement

INTRODUCTION

Plaintiffs sued the U.S. Forest Service and the Bureau of Land Management (BLM), asserting numerous violations of the National Environmental Policy Act (NEPA) in connection with (i) the reinstatement of a regulatory exception to the so-called "Colorado Roadless Rule"; and (ii) the approval of lease modifications for a coal mine located in national forests in Colorado. Two of Plaintiffs' NEPA claims are at issue in this appeal.

First, responding to a partially adverse district court decision in a prior lawsuit, the Forest Service prepared a supplemental final environmental impact statement (SFEIS) to support the reinstatement of a regulatory exception to the Colorado Roadless Rule known as the "North Fork Coal Mining Area Exception." Hereafter, we refer to this SFEIS as the "Exception SFEIS." Plaintiffs contend that the Forest Service acted arbitrarily and capriciously by declining to carry forward for detailed analysis in the Exception SFEIS of an alternative called "Pilot Knob."

Second, also responding to the same district court decision, the Forest Service and BLM prepared a separate SFEIS to support approval of lease modifications sought by Mountain Coal Company (MCC) for the West Elk Mine, an underground coal mine located in national forests in Colorado. Hereafter, we refer to this SFEIS as the "Lease Modification SFEIS." Plaintiffs contend that the agencies acted arbitrarily and capriciously by declining to carry forward for detailed analysis in the

Lease Modification SFEIS of an alternative that would require MCC to "flare" (burn) methane gas on the lease modification tracts at the West Elk Mine.

The district court correctly ruled that the agencies did not act arbitrarily or capriciously in either respect. Accordingly, the judgment of the district court should be affirmed.

STATEMENT OF JURISDICTION

Plaintiffs asserted claims under NEPA, 42 U.S.C. §§ 4321 et seq., and the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). Appellants' Appendix (A.A.) 43-49. Accordingly, the district court had jurisdiction under 28 U.S.C. § 1331 (federal question).

On August 16, 2018, the district court entered final judgment in favor of the federal defendants on all claims. A.A. 259-60. On September 10, 2018, Plaintiffs filed a timely notice of appeal. A.A. 11 (Doc. 64); Fed. R. App. P. 4(a)(1)(B)(ii). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Forest Service reasonably declined to carry forward the Pilot Knob alternative for detailed analysis in the Exception SFEIS.

2. Whether the Forest Service and BLM reasonably declined to carry forward for detailed analysis in the Lease Modification SFEIS an alternative that would require MCC to flare methane gas on certain tracts at the West Elk Mine.

PERTINENT STATUTES AND REGULATIONS

Except for those contained in the addendum to this brief, all pertinent statutes and regulations are contained in the addendum to Plaintiffs' opening brief.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. National Environmental Policy Act

NEPA seeks to ensure that federal agencies consider the environmental impacts of proposed major federal actions. 42 U.S.C. § 4332(2)(C); *Winter v. NRDC, Inc.*, 555 U.S. 7, 15-16 (2008). The statute does not mandate any specific substantive results, "but simply prescribes the necessary process." *WildEarth Guardians v. U.S. Fish & Wildlife Service*, 784 F.3d 677, 690 (10th Cir. 2015) (internal quotation marks omitted). In the end, NEPA "merely prohibits uninformed—rather than unwise—agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

NEPA requires agencies to take a "hard look" at the environmental consequences of a proposed federal action. *Id.* at 350. When an agency determines that a particular action will have significant environmental impacts, it must prepare an environmental impact statement (EIS). 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.1. Agencies may prepare supplements to draft or final EISs "when the

agency determines that the purposes of [NEPA] will be furthered by doing so." *Id.* § 1502.9(c)(2).[1]

The content of an EIS is determined in part by the "underlying purpose and need to which the agency is responding." 40 C.F.R. § 1502.13. An agency must analyze a range of "reasonable" alternatives—along with a no-action alternative—that are consistent with the nature and scope of the proposed action. *Id.* § 1502.14(a), (d); *Citizens' Committee to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1030 (10th Cir. 2002). If an agency eliminates alternatives from detailed study in an EIS, it must "briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a); *WildEarth Guardians v. National Park Service*, 703 F.3d 1178, 1183 (10th Cir. 2013).

[1] The NEPA regulations cited in this brief were promulgated by the Council on Environmental Quality. This Court gives those regulations substantial deference. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 703 (10th Cir. 2009). *See also Department of Transportation v. Public Citizen*, 541 U.S. 752, 757 (2004) (explaining that Council on Environmental Quality was established by NEPA with authority to issue regulations interpreting the statute); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding that administrative implementation of a particular statutory provision "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority").

2. Mineral Leasing Act

BLM regulates and manages coal leases on federal land under the Mineral Leasing Act (MLA). 30 U.S.C. §§ 181 et seq.; 43 U.S.C. § 1731(b). The MLA authorizes BLM to offer for lease tracts of federal land which have been classified for coal leasing. 30 U.S.C. § 201(a)(1). In certain circumstances, BLM may approve "modifications of the original coal lease" to include additional contiguous or cornering lands. *Id.* § 203(a)(1). BLM "prescribe[s] terms and conditions . . . applicable to all of the acreage in such modified lease." *Id.* § 203(b). Before approving a lease modification, BLM prepares an environmental analysis (either an environmental assessment or an EIS) pursuant to NEPA. 43 C.F.R. § 3432.3(c).

Before approving a coal lease modification involving lands in the National Forest System, BLM must obtain "consent" from the Forest Service, which manages the surface estate of such lands. 30 U.S.C. § 201(a)(3)(A)(iii); 43 C.F.R. § 3432.3(d). In providing such consent, the Forest Service may attach "appropriate lease stipulations." *Id.* § 3432.3(d); Government's Supplemental Appendix (G.A.) 477.

3. North Fork Coal Mining Area Exception to the Colorado Roadless Rule

The Colorado Roadless Rule, 36 C.F.R. §§ 294.40-294.49, "provide[s], within the context of multiple use management, State-specific direction for the protection of roadless areas on National Forest System lands in Colorado." *Id.* § 294.40; *see*

also Wyoming v. U.S. Department of Agriculture, 661 F.3d 1209, 1221 (10th Cir. 2011) (discussing statutes under which Forest Service manages National Forest System lands).[2]

The Colorado Roadless Rule "protect[s] roadless values by restricting" certain activities—for example, tree cutting and road construction—within Colorado Roadless Areas (CRA). 36 C.F.R. § 294.40. The Colorado Roadless Rule applies to approximately 4.2 million acres of National Forest System lands in Colorado. 77 Fed. Reg. 39,576, 39,576 (July 3, 2012).

The Colorado Roadless Rule includes "narrowly focused exceptions." 36 C.F.R. § 294.40. Relevant here is the North Fork Coal Mining Area Exception (hereafter NFCMA Exception). *Id.* § 294.43(c)(1)(ix). That exception permits construction of temporary roads if "needed for coal exploration and/or coal-related surface activities for certain lands with [CRAs] within the North Fork Coal Mining Area of the Grand Mesa, Uncompahgre, and Gunnison National Forests." *Id.* This exception reflects a need "to accommodate State-specific situations and concerns in

[2] Except in Colorado (where the Colorado Roadless Rule is in effect) and Idaho (which has its own state-specific roadless rule), the Forest Service manages roadless areas in National Forest System lands under the 2001 Roadless Area Conservation Rule, 66 Fed. Reg. 3,244 (Jan. 12, 2001). A "key factor" in Colorado's decision to petition the Forest Service for a state-specific roadless rule was the uncertainty created by litigation challenging the 2001 rule. 77 Fed. Reg. 39,576, 39,577 (July 3, 2012). The 2001 rule was ultimately upheld by this Court in 2011. *Wyoming*, 661 F.3d 1209.

Colorado's roadless areas," namely, "facilitating the exploration and development of coal resources" in the NFCMA. 81 Fed. Reg. 91,811, 91,814 (Dec. 19, 2016).

B. Factual background

1. North Fork Coal Mining Area

The North Fork Coal Mining Area (NFCMA) is located in the Grand Mesa, Uncompaghre, and Gunnison National Forests (collectively, Forest) near Somerset in west-central Colorado. G.A. 115 (map). There are 76 CRAs in the Forest. 36 C.F.R. § 294.49 (table). The NFCMA is situated in three of the Forest's CRAs, which are known as Flatirons, Sunset, and Pilot Knob:

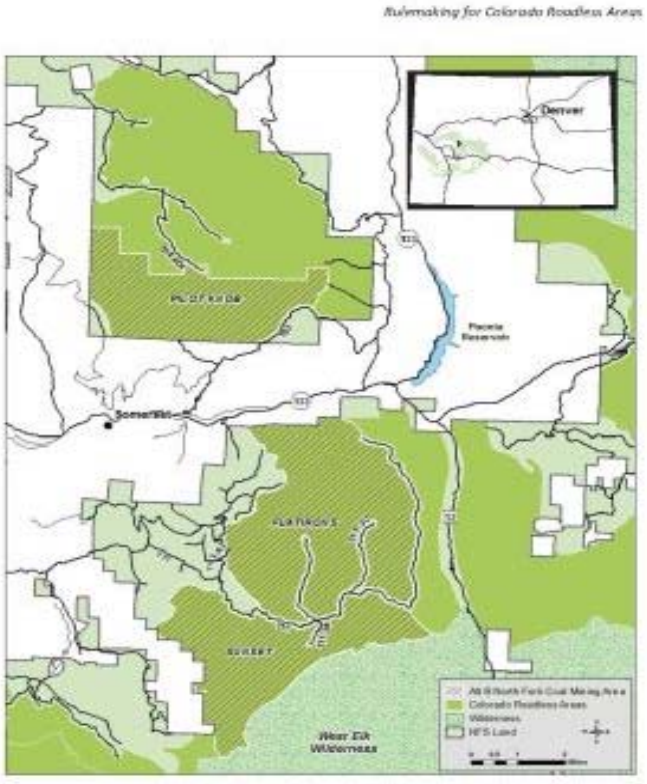

Figure 2-2. Map of Alternative B, the North Fork Coal Mining Area.

G.A. 115; 81 Fed. Reg. at 91,813. The NFCMA is approximately 19,700 acres, i.e., less than 0.5% of the 4.2 million acres of National Forest System lands located within all CRAs. *Id.* at 91,812-13. The NFCMA includes coal beneath lands in the North Fork Valley of the Gunnison River. G.A. 208. Coal mining has been one of the dominant land uses in that area, and underground mining has occurred there for the past 100 years. G.A. 545.

2. West Elk Mine and lease modification tracts

The West Elk Mine is an underground coal mine located in the Sunset CRA, which is part of the NFCMA. G.A. 510 (Figure 2-1). As of August 2017, it had been operating for 29 years and is currently the only operating coal mine in the North Fork Valley. G.A. 545.

In 2009, MCC submitted applications to BLM seeking to modify two existing federal coal leases at the West Elk Mine.[3] If approved, the lease modifications would add two tracts of land to MCC's existing leases. G.A. 472-73. The lease modification tracts, together approximately 1720 acres, are immediately adjacent to MCC's existing leases. G.A. 472-73, 510. Approximately 1701 of the 1720 acres in the lease modification tracts lie in the Forest's Sunset CRA; the remaining 19 acres are not within roadless areas. G.A. 474.

[3] MCC holds one of the existing federal leases (lease COC-1362); Ark Land LLC holds the other (lease COC-67232). G.A. 67. Because the distinction between the two corporate entities is irrelevant here, we refer to "MCC" for simplicity.

3. Prior lawsuit

In 2012, after preparing a final EIS (FEIS), the Forest Service promulgated the Colorado Roadless Rule, including the NFCMA Exception. 77 Fed. Reg. 39,576 (July 3, 2012); G.A. 9. Also in 2012, after preparing a separate FEIS, the Forest Service consented to, and BLM approved, the two lease modifications sought by MCC at the West Elk Mine. G.A. 473.

Three of Plaintiffs here (High Country Conservation Advocates, WildEarth Guardians, and Sierra Club) subsequently brought a lawsuit challenging the 2012 FEISs under NEPA. In 2014, the district court issued a decision partially adverse to the agencies, principally ruling that (i) the FEIS supporting the NFCMA Exception did not adequately disclose the greenhouse gas (GHG) emissions resulting from combustion of North Fork Valley coal; and (ii) the FEIS supporting approval of the West Elk Mine lease modifications inadequately disclosed the economic effects of methane emissions from the development of the lease modifications. *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174, 1189-93, 1195-98 (D. Colo. 2014) (*High Country I*).

In a subsequent decision, the district court severed the NFCMA Exception from the Colorado Roadless Rule, vacated that exception, and vacated the approval of the lease modifications for the West Elk Mine. *High Country Conservation*

Advocates v. U.S. Forest Service, 67 F. Supp. 3d 1262, 1264-66 (D. Colo. 2014) (*High Country II*).

4. Exception SFEIS and Record of Decision

After vacatur of the NFCMA Exception in *High Country II*, the Forest Service prepared a supplemental EIS to address NEPA deficiencies found in *High Country I* and to study reinstatement of the exception. G.A. 101-02. In November 2016, after extensive public involvement, the Forest Service released the Exception SFEIS. G.A. 93, 104. As relevant here, the Exception SFEIS carried three alternatives forward for detailed analysis. G.A. 110-223.

Under Alternative A—the no-action alternative—the Forest Service would not reinstate the NFCMA Exception, i.e., there would be zero acres of land in the NFCMA available for temporary road construction. G.A. 112-13.

Under Alternative B—the Forest Service's preferred alternative—the agency would reinstate the NFCMA Exception as originally written. G.A. 114-15; *see supra* p. 6. Under this alternative, the size of the NFCMA would be approximately 19,700 acres, and an estimated 172 million short tons (a short ton is 2000 pounds) of federal coal could be accessible. G.A. 114, 130 (Table 3-1), 134.

Under Alternative C, "wilderness capable" lands in the Sunset and Flatirons CRAs would be removed from the NFCMA. G.A. 116-17.[4] Under this alternative, the size of the NFCMA would be some 12,600 acres, and an estimated 95 million short tons of federal coal could be accessible. G.A. 116, 130 (Table 3-1), 134.

In the Exception SFEIS, the Forest Service also considered 12 additional alternatives but eliminated them from detailed study. G.A. 118-21. One of those alternatives—Plaintiffs' proposed Pilot Knob alternative—would remove the Pilot Knob CRA from the NFCMA. G.A. 121.

A coal mine in the Pilot Knob CRA called the Elk Creek Mine idled production in December 2015, at which point the mine's operator, Oxbow Mining, LLC, was focused on final reclamation. G.A. 128, 129 (Figure 3-1)]. The existing lease tracts still contain potentially recoverable coal. G.A. 128.

The Exception SFEIS briefly discussed why the Pilot Knob alternative was not carried forward for detailed study:

> This alternative would remove the Pilot Knob Roadless Area, about 5,000 acres (about 25%) of the project area, from the North Fork Coal Mining Area. This alternative was dismissed from detailed analysis because the Colorado Roadless Rule is considering access to coal resources within the North [Fork] Coal Mining Area over the long-term based on where recoverable coal resources might occur. The Rule preserves the option of future coal exploration and development by allowing temporary road construction for coal exploration and coal-related surface activities. One of the State-specific concerns is the

[4] "Wilderness capable" refers to the characteristics of particular lands regarding their naturalness and solitude. *E.g.*, G.A. 242, 246.

> stability of local economies in the North Fork Valley and recognition of the contribution that the coal industry provides to those communities. Preserving coal exploration and development opportunities in the area is a means of providing community stability.

G.A. 121.

In December 2016, the Forest Service issued a final rule and record of decision (ROD), selecting Alternative B and reinstating the NFCMA Exception as originally written. 81 Fed. Reg. at 91,811-12, 91,814.

5. Lease Modification SFEIS and Records of Decision

In January 2015, after vacatur of the lease modifications for the West Elk Mine in *High Country II*, MCC resubmitted applications for the lease modifications to BLM for approval. BLM also sent the applications to the Forest Service for its consent. G.A. 473.

a. Lease Modification SFEIS

To address NEPA deficiencies found in *High Country I*, the Forest Service and BLM prepared a supplemental EIS to determine whether to approve the resubmitted lease modification applications. G.A. 473. In August 2017, after extensive public involvement, the agencies released the Lease Modification SFEIS. G.A. 453-44, 485. This SFEIS considered in detail the environmental impacts of three alternatives, including the no-action alternative. G.A. 490-759.

The agencies' preferred alternative was Alternative 3. Under that alternative, the Forest Service would consent to, and BLM would approve, the lease

modifications. G.A. 491-510. In Alternative 3, the agencies made an assumption that MCC would need to construct approximately 48 methane drainage wells (MDWs) on the lease modification tracts. G.A. 560. MDWs are necessary to achieve compliance with a regulation of the Mine Safety and Health Administration (MSHA) that requires methane levels in underground coal mines to remain below a concentration of 1% in the active working areas of the mine for worker safety. G.A. 509, 555. MDWs are drilled from the surface into the strata overlying the coal, and use an exhaust blower to pull methane gas from the rock formation to the surface, where it is released to the air. G.A. 555.

The agencies considered eight alternative means of mitigating the methane gas that otherwise would be released to the air via the MDWs, but eliminated them from detailed study. G.A. 523-31. One such measure—proposed by Plaintiffs—would have required MCC to "flare" (i.e., burn) the methane. G.A. 529. The agencies found that flaring would convert methane into carbon dioxide, which "could potentially reduce the total global warming potential" by approximately 87%. G.A. 529. However, the agencies discussed multiple reasons why a methane flaring requirement was not carried forward as an alternative for detailed analysis. G.A. 525-27, 529-30.

Among other considerations, the agencies concluded that any potential methane-mitigation measure would have to rely on site-specific exploration data and

engineering designs. G.A. 525. But those are technical matters for the subsequent state or federal mine permitting process and MSHA ventilation plan process—"activities that have not been proposed yet." *Id.*

The agencies also explained that a 2009 lease addendum for the existing leases at the West Elk Mine authorizes MCC to "drill for, extract, remove, develop, produce and capture for use or sale any or all of the coal mine methane" if economically feasible. G.A. 526. As a result of the lease addendum, BLM requested that MCC prepare an economic evaluation report to supplement its existing "Resource Recovery and Protection Plan," or "R2P2," to address coal mine methane management options at the West Elk Mine. *Id.*; G.A. 788-809 (Appendix A). BLM requires MCC's R2P2 report to be updated periodically "to evaluate the changing technical and economic parameters that can either enable or create barriers to the implementation or adoption of a particular methane control strategy." G.A. 526. The agencies explained that periodic evaluations "capture the current state of technology developments applicable to the mine's operational parameters, fluctuations in energy prices that affect the short and long term economic feasibility of adoption, and the status of the carbon offset markets (credits and potential financial incentives provided to verifiable projects that reduce their GHG emissions)." *Id.*

b. Records of Decision

On December 11, 2017, the Forest Service issued a ROD selecting Alternative 3 and consenting to the lease modifications. G.A. 1, 21-22. The Service rejected "methane capture/destruction as a mitigation measure" in a lease stipulation for three reasons. G.A. 59. First, the agency found that the amounts of methane that would be released by the lease modification are "incremental when viewed in the context of the alternatives available"—i.e., Alternatives 1, 3, and 4 in the Lease Modification SFEIS. *Id.* Second, the agency found that the difference between the amount of methane released under the no-action alternative (Alternative 1, not granting the lease modifications) and the selected alternative (Alternative 3, granting the lease modifications) is at most 2.54 million tons CO2e, "an amount for which specific climate change effects are unable to be predicted." *Id.* Third, the agency found that the amount of methane released at the West Elk Mine has "decreased steadily since 2012 without the imposition of a methane mitigation measure as a lease stipulation." *Id.*

On December 15, 2017, BLM issued a ROD selecting Alternative 3 and approving the lease modifications, to which the Forest Service had consented. G.A. 64, 70-71. BLM rejected methane flaring as a lease stipulation because, on the existing leases at the West Elk Mine, methane flaring was economically infeasible as of December 2017, when the ROD issued. G.A. 77-80. BLM found that to make

methane flaring economically feasible on the existing leases at the West Elk Mine, a robust carbon credit market is necessary, but such a market "does not currently exist" (i.e., as of December 2017). G.A. 79. BLM found that the carbon credit market "has been significantly devalued" since 2010. *Id.*

BLM also established "trigger values that will prompt further review of methane use at the West Elk Mine," one of which is "a future increase in carbon credit price." *Id.* Accordingly, a lease stipulation requires MCC to provide BLM with an updated report on the economic feasibility of capturing or flaring methane at the West Elk Mine no later than one year after the lease modifications are approved. G.A. 62.

C. Proceedings below

Invoking the APA, 5 U.S.C. § 706(2)(A), Plaintiffs filed an amended complaint in the district court alleging that the Exception SFEIS and the Lease Modification SFEIS do not comply with NEPA in numerous respects. A.A. 12-51. Reviewing the extensive administrative record, the district court rejected all of Plaintiffs' claims and entered judgment for the agencies. A.A. 218-258. Two of the district court's rulings are at issue in this appeal.

First, the court declined to "second-guess" the Forest Service's determination to dismiss the Pilot Knob alternative from detailed study in the Exception SFEIS. The court concluded that the Pilot Knob alternative would "foreclose long-term

opportunities in a way inconsistent with" the agency's goal in reinstating the NFCMA Exception. A.A. 240.

Second, the district court concluded that the Forest Service and BLM satisfied their obligation to "briefly discuss" why the methane flaring mitigation requirement for the lease modification tracts at the West Elk Mine was not studied in detail in the Lease Modification SFEIS. A.A. 245. The court found that it was reasonable for the agencies to determine that detailed consideration of whether to require methane flaring at the West Elk Mine would be more appropriate at later stages of the mine permitting process because resolution of that question requires detailed engineering and other data that are available only at such stages. *Id.* The court agreed that it was unknown whether MSHA would approve such a system. A.A. 244.

SUMMARY OF ARGUMENT

1. The Forest Service reasonably declined to carry forward the Pilot Knob alternative for detailed analysis in the Exception SFEIS. Alternatives A, B, and C represent a reasonable range given the primary question that was pending before the Forest Service: whether to reinstate an NFCMA exception and, if so, on how many acres. Engaging in necessary line-drawing, the Forest Service reasonably decided to analyze alternatives that represent acreages at both the high end (Alternative B) and low end (Alternative A) of the theoretically possible range, as well as an alternative in between (Alternative C).

Plaintiffs fail to demonstrate that, in selecting that range of alternatives for detailed study, the agency "entirely failed to consider an important aspect of the problem," or made "a clear error of judgment." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). The agency reasonably analyzed Alternative C, but dismissed the Pilot Knob alternative, because unlike the Pilot Knob alternative, Alternative C does not foreclose future access to existing federal coal leases or private leases. And even putting aside any consideration of the Elk Creek Mine (as Plaintiffs urge), the Pilot Knob alternative is not significantly distinguishable from Alternative C when evaluated in terms of the primary metric used by the Forest Service to select its range of alternatives, namely, the size (acreage) of the NFCMA and the amount of coal that could be accessed under the respective alternatives.

While Plaintiffs contend that the Pilot Knob alternative *is* significantly distinguishable from Alternative C because Alternative C offers no protection to the ecologically distinct Pilot Knob area, Plaintiffs do not explain why. Moreover, Plaintiffs cite no authority for the proposition that the Forest Service was required to use an "ecologically distinct" test for selecting a reasonable range of alternatives here. Finally, Plaintiffs' "ecologically distinct" test threatens to be unworkable, and therefore fails NEPA's "rule of reason."

2. The Forest Service and BLM reasonably declined to carry forward for detailed analysis in the Lease Modification SFEIS an alternative that would require MCC to flare methane gas on the lease modification tracts at the West Elk Mine. In deciding whether to approve the lease modification requests, the agencies disclosed approximately how much methane was likely to be emitted from the 48 assumed MDWs, and by approximately how much the global warming potential of that methane could be reduced by flaring. This analysis by the agencies satisfies NEPA's goal of facilitating informed decision-making.

Plaintiffs, however, want the agencies to go further and analyze in detail whether MCC should be required to implement a flaring system on the lease modification tracts as a condition of the lease. Plaintiffs fail to demonstrate that, in dismissing that alternative, the agencies "entirely failed to consider an important aspect of the problem," or made "a clear error of judgment." *State Farm*, 463 U.S. at 43.

Among other things, the agencies found that, to consider *any* potential methane mitigation measure (such as flaring) for the lease modification tracts at the West Elk Mine, the agencies must have site-specific exploration data and engineering designs related to mining and worker safety. But such data and designs were unavailable to the agencies at this lease-modification stage, at which actual mining activity has not yet been proposed. The agencies found it "highly unlikely"

that any methane-mitigation technology "would be applied until such time as mine-specific operational parameters are known for the lease modifications such as could occur after lease modifications are issued." G.A. 525. Moreover, using information that *was* available at the time, the agencies reasonably declined to require methane flaring on the lease modification tracts as a lease stipulation.

The judgment of the district court should be affirmed.

STANDARD OF REVIEW

Federal courts "review an agency's compliance with NEPA pursuant to the APA." *Cure Land, LLC v. U.S. Department of Agriculture*, 833 F.3d 1223, 1230 (10th Cir. 2016). The APA provides that agency action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In the APA context, this Court's review is "de novo with respect to the district court's decision, but 'highly deferential to the agency.'" *Cure Land*, 833 F.3d at 1230 (quoting *Citizens' Committee to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008)). Arbitrary-or-capricious review is "narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43.

This Court presumes that an agency's decision is both substantively and procedurally valid, and "the burden of proof rests with the appellants who challenge

such action" to show otherwise. *Citizens' Committee*, 513 F.3d at 1176. Under the arbitrary-or-capricious standard, moreover, this Court

> will not disturb agency action unless the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

WildEarth Guardians v. U.S. EPA, 770 F.3d 919, 927 (10th Cir. 2014) (quoting *State Farm*, 463 U.S. at 43).

This Court "must uphold the agency's action if it has articulated a rational basis for the decision and has considered relevant factors." *Wolfe v. Barnhart*, 446 F.3d 1096, 1100 (10th Cir. 2006) (quoting *Slingluff v. Occupational Health and Safety Review Commission*, 425 F.3d 861, 866 (10th Cir. 2005)); *accord State Farm*, 463 U.S. at 43 (reviewing courts must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment" (internal quotation marks omitted)). Deference to an agency is especially strong where, as here, the challenged decision involves "technical or scientific matters within the agency's area of expertise." *Utah Environmental Congress v. Russell*, 518 F.3d 817, 824 (10th Cir. 2008). Indeed, a reviewing court's "job is not to second-guess the experts." *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1445 (10th Cir. 1992) (internal quotation marks omitted).

ARGUMENT

The Forest Service reasonably declined to carry forward the Pilot Knob alternative for detailed analysis in the Exception SFEIS. Likewise, the Forest Service and BLM reasonably declined to carry forward for detailed analysis in the Lease Modification SFEIS an alternative requiring MCC to flare methane as a mitigation measure on the lease modification tracts at the West Elk Mine. As the district court correctly held, Plaintiffs fail to carry their burden of showing that the challenged agency decision-making was arbitrary or capricious. *Citizens' Committee*, 513 F.3d at 1176.

I. The Forest Service reasonably declined to carry forward the Pilot Knob alternative for detailed analysis in the Exception SFEIS.

The "rule of reason" guides "both the choice of alternatives as well as the extent to which the [EIS] must discuss each alternative." *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1040 (10th Cir. 2001). Under the rule of reason, the range of alternatives analyzed in detail by the Forest Service in the Exception SFEIS is a reasonable range—i.e., Alternatives A, B, and C, but not the Pilot Knob alternative. Plaintiffs fail to demonstrate that, in selecting that range of alternatives for detailed study, the agency "entirely failed to consider an important aspect of the problem," or made "a clear error of judgment." *State Farm*, 463 U.S. at 43.

A. The Forest Service analyzed a reasonable range of alternatives (Alternatives A, B, and C).

Alternatives A, B, and C represent a reasonable range given the primary question that was pending before the Forest Service: whether to reinstate an NFCMA exception and, if so, on how many acres. 81 Fed. Reg. at 91,818. In theory, that exception acreage could be anywhere on a wide continuum between zero acres (i.e., not reinstating any NFCMA exception) and approximately 19,700 acres (i.e., the size of the NFCMA in the exception as originally written). *Id.* at 91,812.

Given that wide potential range, the Forest Service had to engage in line-drawing to select the acreages that it would discuss in detail in an SEIS. "The NEPA process involves an almost endless series of judgment calls," and—provided that the challenged agency action is not arbitrary or capricious—"[t]he line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts." *Coalition on Sensible Transportation, Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987); *accord Prairie Band Pottawatomie Nation v. Federal Highway Administration*, 684 F.3d 1002, 1012 (10th Cir. 2012) (explaining, in context of a highway project, that "[b]y necessity, an agency must select a certain number of routes for serious study and eliminate the rest without detailed analysis").

Here, the Forest Service reasonably decided to analyze alternatives that represent acreages at both the high and low ends of the theoretically possible range, as well as an alternative in between. Alternative A is at the low end (an NFCMA

exception of zero acres); Alternative B is at the high end (an NFCMA exception of approximately 19,700 acres/estimated 172 million short tons of coal); and Alternative C is in between (an NFCMA exception of approximately 12,600 acres/estimated 95 million short tons of coal). *See supra* pp. 10-11.

Moreover, the Forest Service gave careful attention to the range-of-alternatives issue and reasonably explained why the range of alternatives it had selected in the SFEIS was sufficient. 81 Fed. Reg. at 91,818. The agency recognized that "[o]ne of the purposes of a range of alternatives is to sharply define the issues and provide a clear basis for choice among options by the decision maker and the public." *Id.* (citing 40 C.F.R. § 1502.14). The agency then reasonably explained:

> From a roadless conservation standpoint, the primary decision is if and how much the North Fork Coal Mining Area exception should apply to roadless areas under the 2012 Colorado Roadless Rule. *The range of alternatives is adequate to define this issue and provides a clear basis for choice*; in this case, whether to apply the exception to 0 [Alternative A], 12,600 [Alternative C], or 19,700 acres [Alternative B].

Id. (emphasis added).

The cases cited by Plaintiffs (Br. 34-35) do not demonstrate that the Forest Service was required to include the Pilot Knob alternative in its range of alternatives. Rather, this Court's decision in *New Mexico*, 565 F.3d 683, supports a conclusion that the agency's range of alternatives was reasonable. *New Mexico* concluded that BLM should have analyzed an alternative that would close federal land known as "Otero Mesa" to development, explaining that the most protective alternative

analyzed by the agency, which would conserve only approximately 27% of the Mesa, was "a far cry from closure." *Id.* at 711; *see also id.* at 709. Here, consistent with *New Mexico*, the Forest Service analyzed the equivalent of a closure alternative (Alternative A), under which an exception would not be reinstated anywhere in the NFCMA (i.e., the NFCMA exception would be zero acres). G.A. 112-13.

Next, citing *Utahns for Better Transportation v. U.S. Department of Transportation*, 305 F.3d 1152, 1170 (10th Cir. 2002), Plaintiffs argue (Br. 34) that the Forest Service was required to include the Pilot Knob alternative in its range of alternatives because it is "in between the two action alternatives that the Forest Service has already accepted as reasonable," i.e., the Pilot Knob alternative is "in between" Alternatives B and C.

But *Utahns* does not address the concept of "in between" alternatives, nor does it establish a general rule that, to comply with NEPA, agencies are required to analyze alternatives that are "in between" their action alternatives. *Id.* at 1170 (concluding that delaying the Legacy Parkway and I-15 project until after all or part of public transit expansion is in place is "an alternative that could be reasonable"). Moreover, Plaintiffs overlook that—as shown above (p. 24)—the size of the

NFCMA under Alternative C is "in between" the size in Alternatives A and B, and the agency added Alternative C to its range of alternatives for that very reason.[5]

The Forest Service's range of alternatives was particularly reasonable given the context in which the range of alternatives was chosen, namely, the need to address the district court's ruling in *High Country I* that the 2012 FEIS did not adequately disclose the GHG emissions resulting from combustion of North Fork valley coal. *See supra* p. 9. In so ruling, *High Country I* did *not* disturb the range of alternatives that the Forest Service had analyzed in the 2012 FEIS, which consisted of four alternatives. G.A. 895-934. The agency's preferred alternative was known as Alternative 2. G.A. 903. Under that alternative, an exception would allow temporary road construction for activities associated with coal mining in an NFCMA of 19,100 acres. G.A. 903-13.

Accordingly, during the scoping process for the supplemental EIS, the Forest Service initially proposed to analyze only two alternatives. *See Wyoming*, 661 F.3d at 1237 (discussing scoping). The first alternative would reinstate the North Fork Exception as originally written on 19,100 acres (the proposed action). This alternative ultimately became Alternative B in the supplemental EIS after the size of the NFCMA exception was increased slightly to 19,700 acres to administratively

[5] Plaintiffs also cite (Br. 35) *Wilderness Workshop v. U.S. BLM*, 342 F. Supp. 3d 1145 (D. Colo. 2018). But that decision is not binding authority and, moreover, appears to have misread this Court's decision in *New Mexico*. *See id.* at 1166.

correct a boundary error. 80 Fed. Reg. 18,598, 18,598-99 (Apr. 7, 2015) (notice of intent to prepare SEIS); G.A. 114. The second alternative would not reinstate any exception for the NFCMA (the no-action alternative), which ultimately became Alternative A in the supplemental EIS. *Id.* The agency sought public comment on this two-alternative proposal. 80 Fed. Reg. at 18,598-99; G.A. 112.

Based on comments received, the agency decided to expand its initially proposed range of two alternatives to include a third alternative, which ultimately became Alternative C in the supplemental EIS. The agency reasonably explained that it was adding Alternative C to the range of alternatives for detailed study because it "provides *an intermediate size* for the [NFCMA] between the proposed action [Alternative B] and no action [Alternative A] alternatives." G.A. 392-93 (emphasis added).

B. The Forest Service's reasons for dismissing the Pilot Knob alternative from detailed analysis do not also compel dismissal of Alternative C.

Despite the Forest Service's reasoned approach to selecting its range of alternatives, Plaintiffs assert (Br. 37) that the agency was arbitrary and capricious in carrying forward Alternative C for detailed analysis because the agency's reasons for dismissing the Pilot Knob alternative also apply to Alternative C. The district court correctly rejected that argument. A.A. 239-40.

The agency dismissed the Pilot Knob alternative because it would curtail future opportunities for access to recoverable coal resources by removing approximately 5000 acres from the NFCMA. G.A. 121; *see supra* pp. 11-12. Alternative C also removes acreage from the NFCMA (approximately 7100 acres), but unlike the Pilot Knob alternative, Alternative C does not foreclose future access to existing federal coal leases or private leases. G.A. 129 (Figure 3-1), 134-35. It was therefore reasonable for the agency to analyze in detail Alternative C, but to dismiss the Pilot Knob alternative.

In the Exception SFEIS, the Forest Service found that a coal mine with existing leases in the Pilot Knob CRA called the Elk Creek Mine was active as recently as December 2015, at which point the mine's operator (Oxbow Mining, LLC) was focused on final reclamation. G.A. 128, 129 (Figure 3-1); *see also* G.A. 941-44 (Oxbow Mining letter to BLM dated May 18, 2015). The agency also found in the draft Exception SEIS that, if Oxbow Mining closed its operations in the Pilot Knob roadless area, "another company could operate in the area." G.A. 940.

The record thus demonstrates that the Elk Creek Mine was recently active, meaning that there is recoverable coal in the Pilot Knob roadless area. This fact (which Plaintiffs do not contest) is significant, moreover, given the agency's further finding (in its ROD and final rule reinstating the North Fork Exception) that 80% of the NFCMA has not been explored, and little is known about where recoverable coal

is actually situated in the NFCMA. 81 Fed. Reg. at 91,818. The ability of Oxbow Mining or another company to mine coal in the area of the Elk Creek Mine would be foreclosed by the Pilot Knob alternative, which "clos[es] the entire Pilot Knob Roadless Area to coal mining." Br. 33. But that option would not be foreclosed by Alternative C, which would remove lands from a different part of the NFCMA—i.e., certain lands in the Sunset and Flatirons CRAs, not Pilot Knob. G.A. 116-17; *see supra* p. 11.

Plaintiffs incorrectly contend (Br. 37) that the district court "cobbled together its own post-hoc explanation" by citing the Elk Creek Mine. That contention misconstrues the district court's decision. Rather, as just shown, the Forest Service itself made factual findings bearing on the Elk Creek Mine that support its decision to dismiss the Pilot Knob alternative from detailed analysis. The district court correctly declined to "second-guess" the agency's decision on this particular issue. A.A. 240.[6]

[6] Plaintiffs argue (Br. 39) that what they erroneously call "the district court's rationale" would exclude consideration of Alternative C. That argument lacks merit. The Forest Service did not find that there is a mine comparable to the Elk Creek Mine in the area that would be removed from the NFCMA under Alternative C, and Plaintiffs cite no such record evidence. Rather, Plaintiffs cite only the lease modification tracts sought by MCC at the West Elk Mine, not evidence of an active or recently idled coal mining operation. Moreover, a map cited by Plaintiffs (Br. 39) shows that there is little overlap between any proposed lease modifications and the wilderness capable lands that would be removed under Alternative C. A.A. 273.

While the Forest Service's analysis concerning the Elk Creek Mine arguably may be of "less than ideal clarity," the agency's "path may reasonably be discerned" from the record. Accordingly, the agency's decision to dismiss the Pilot Knob alternative from detailed study should be upheld on arbitrary-or-capricious review under the APA—as the district court correctly did here. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

C. The Pilot Knob alternative is not significantly distinguishable from Alternative C.

Under NEPA, an agency need not analyze in detail alternatives that are not "significantly distinguishable" from other alternatives already analyzed. *New Mexico*, 565 F.3d at 708-09; *accord*, *e.g.*, *Prairie Band*, 684 F.3d at 1011. That principle applies here because—even putting aside any consideration of the Elk Creek Mine, as Plaintiffs urge (Br. 38)—the Pilot Knob alternative is not significantly distinguishable from Alternative C when evaluated in terms of the primary metric used by the Forest Service to select its range of alternatives.

That metric is the size (acreage) of the NFCMA and the amount of coal that could be accessed under the respective alternatives. *See supra* pp. 23-24. The comparative difference in the size of the NFCMA is only about 2100 acres: approximately 14,700 acres under the Pilot Knob alternative versus approximately 12,600 acres under Alternative C. G.A. 116, 121, 130 (Table 3-1), 134. Particularly

when viewed in the context of an NFCMA that could potentially comprise nearly *20,000 acres*, a 2100-acre difference is not significant.

The comparative difference in the amount of coal that could be accessed is about 33 million short tons: approximately 128 million short tons under the Pilot Knob alternative versus approximately 95 million short tons under Alternative C. G.A. 116, 130 (Table 3-1), 134; Br. 33. While a difference of 33 million short tons may seem significant in the abstract, it is not significant when viewed in the context of an NFCMA that could potentially contain an estimated *172 million short tons* of recoverable coal. G.A. 130 (Table 3-1), 134. It is also not significant given that there is no difference in the properties of the coal that could be accessed under either alternative. Rather, all coal in the NFCMA is bituminous, with consequently low ash, mercury, and sulfur content; and because of its low sulfur content, the coal is considered "compliant" or "super-compliant" for purposes of the Clean Air Act. G.A. 128.[7]

Plaintiffs argue (Br. 35) that the Pilot Knob alternative *is* significantly distinguishable from Alternative C because Alternative C "offers no protection to the ecologically distinct Pilot Knob area." But Plaintiffs do not explain why, and they cite no authority for the proposition that, the Forest Service was required to use

[7] "Compliant" coal emits less than 1.2 pounds of sulfur dioxide per million British thermal units (BTUs) when burned. "Super-compliant" coal emits less than 1 pound of sulfur dioxide per million BTUs when burned. *Id.*

an "ecologically distinct" test for selecting a reasonable range of alternatives here—rather than the metrics just discussed (i.e., comparative size of the NFCMA and amount coal that could be recovered). Indeed, the ecological distinctiveness of an area is not relevant to preparing an analysis that discloses the GHG emissions resulting from combustion of North Fork Valley coal—i.e., to address the NEPA deficiency found in *High Country I* respecting the 2012 Exception FEIS. *See supra* p. 9. Rather, the Forest Service's chosen metrics (i.e., comparative size of the NFCMA and amount of coal that could be recovered) reasonably frame that inquiry, particularly given that the coal has the same properties wherever found in the NFCMA (i.e., it is "compliant" or "super-compliant" coal).

Moreover, Plaintiffs' "ecologically distinct" test threatens to be unworkable, and therefore fails NEPA's "rule of reason." *Custer County*, 256 F.3d at 1040 (the rule of reason "guides both the choice of alternatives as well as the extent to which the [EIS] must discuss each alternative"). As this case illustrates, a large project area like the NFCMA may contain any number of sub-areas that could be characterized as "ecologically distinct" in some sense, such that the land management agency would be compelled to analyze in detail alternatives protecting each of the numerous sub-areas under an "ecologically distinct" test.

For example, in a declaration filed with the district court, Plaintiffs contended that the Sunset CRA contains a "unique" aspen forest in and near the upper reaches

of Lick Creek. A.A. 114 (¶ 19) (Melton Decl.). Accepting arguendo that characterization, then presumably the Forest Service would be required (under an "ecologically distinct" test) to analyze an alternative that would protect this "unique" aspen forest in the Sunset CRA—in addition to analyzing the Pilot Knob alternative. And in similar fashion, the list of alternatives that the land management agency would be compelled to analyze in an EIS could be lengthened practically *ad infinitum*, limited only by a NEPA commenter's ability to identify "ecologically distinct" areas within a large-scale landscape.

Finally, even accepting arguendo Plaintiffs' "ecologically distinct" test, the Pilot Knob alternative is not significantly distinguishable from Alternative C. Alternative C likewise protects lands that can be regarded as "ecologically distinct"; that is, it protects 7100 acres of wilderness capable lands in the Sunset and Flatirons CRAs, which have characteristics for naturalness and solitude. Those lands are protected by Alternative C because they are removed from the NFCMA under that alternative. *See supra* p. 11 & note 4.

Plaintiffs resist this conclusion by noting (Br. 35) that Pilot Knob is located northwest of the Sunset and Flatirons CRAs and is separated from them by a highway. *See supra* p. 7 (map). But Plaintiffs offer no explanation or authority for their contention that this geographic circumstance renders the Pilot Knob alternative significantly different from Alternative C for purposes of NEPA.

In sum, the Forest Service reasonably declined to carry forward the Pilot Knob alternative for detailed analysis in the Exception SFEIS.

II. The Forest Service and BLM reasonably declined to carry forward for detailed analysis in the Lease Modification SFEIS an alternative requiring MCC to flare methane on the lease modification tracts at the West Elk Mine.

NEPA does not require an agency "to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective." *Custer County*, 256 F.3d at 1039 (internal quotation marks omitted); *accord*, *e.g.*, *WildEarth Guardians*, 703 F.3d at 1183. Moreover, agencies are "not required to analyze infeasible alternatives so long as they articulate the reasons supporting their decisions." *Id.* at 1186.

Under these principles, the Forest Service and BLM reasonably declined to analyze in detail in the Lease Modification SFEIS an alternative that would require MCC to flare methane as a mitigation measure on the lease modification tracts at the West Elk Mine. The agencies reasonably dismissed that alternative because the lack of site-specific exploration data, necessary engineering designs, and uncertainty as to whether MSHA would approve a flaring system at the West Elk Mine made that alternative impractical at the lease-modification stage. Moreover, based on the data that *was* available to the agencies at that stage, they did consider requiring MCC to flare methane on the lease modification tracts as a lease stipulation; however, they reasonably declined to do so for a number of reasons, including the economic

infeasibility of flaring methane at the West Elk Mine as of late 2017. Plaintiffs fail to demonstrate that the agencies "entirely failed to consider an important aspect of the problem," or made "a clear error of judgment." *State Farm*, 463 U.S. at 43.

A. The agencies projected the amount of methane likely to be emitted from MDWs on the lease modification tracts at the West Elk Mine and disclosed the approximate reduction in global warming potential if the methane were flared.

As shown above (p. 13), in the Lease Modification SFEIS, the agencies made an assumption that MCC would need to construct approximately 48 MDWs on the requested lease modification tracts at the West Elk Mine. Those MDWs are necessary to ensure compliance with MSHA's regulatory requirement that methane levels in coal mines remain below a concentration of 1% in the active working areas of the mine to assure miner safety.

The agencies projected that the 48 MDWs and other mining sources at the West Elk Mine would emit 26,049 tons of methane per year over approximately 1.6 years within the 10.9-year remaining life of the mine. Alternative 3, the selected alternative, identified 11.91 million tons of CO2e from methane for this period. G.A. 562 (Table 3-1), 573 (Table 3-7), 581. The agencies then found that flaring (i.e., burning) the methane, rather than releasing it to the air via the MDWs, would convert the methane to carbon dioxide, which "could potentially reduce the total global warming potential" by approximately 87% (on a CO2e basis). G.A. 529.

This analysis satisfies NEPA's goal to "facilitate[] informed decisionmaking." *New Mexico*, 565 F.3d at 703. In deciding whether to approve the lease modification requests from MCC, the agencies understood approximately how much methane was likely to be emitted from the MDWs and by approximately how much the global warming potential of that methane could be reduced by flaring. Plaintiffs, however, want the agencies to go further (Br. 40, 43-44) and analyze in detail whether MCC should be required to implement a flaring system as a condition of the lease. Consistent with NEPA, the agencies reasonably declined to do so.

B. The agencies reasonably declined to analyze in detail a methane-flaring alternative because necessary site-specific exploration data, engineering designs, and MSHA approval were then unavailable.

Plaintiffs contend (Br. 45) that the agencies' "primary rationale for rejecting detailed consideration of the methane-flaring alternative is that they prefer to pass the buck" to MSHA and federal Office of Surface Mining, Reclamation, and Enforcement (OSMRE). *See also* Br. 41 (arguing that the agencies attempted to avoid consideration of this alternative "by passing the buck to other agencies"). That contention is contradicted by the record.

The Forest Service and BLM complied with their obligation to "briefly discuss[]" their reasons for eliminating this alternative from detailed study. 40 C.F.R. § 1502.14(a); *WildEarth Guardians*, 703 F.3d at 1183. The agencies found that, to consider implementation of *any* potential methane mitigation measure

(such as flaring) for the lease modification tracts at the West Elk Mine, they must have site-specific exploration data and engineering designs related to mining, worker safety, and possible mitigation technology. G.A. 525. But such site-specific data and designs were unavailable to the agencies at this stage, as actual mining activity has "not yet been proposed." *Id.*

The agencies found that the necessary site-specific exploration data and engineering designs are for subsequent stages of the mine-permitting process for the lease modification tracts at the West Elk Mine. *Id.* Those stages of the process, however, are within the regulatory purview of other state and federal agencies (not the Forest Service and BLM). *Id.* Specifically, the mine-permitting process for the West Elk Mine is regulated by the Colorado Division of Reclamation, Mining and Safety (DRMS), with oversight from OSMRE; the mine-ventilation safety process is regulated by MSHA. *Id.*; G.A. 480. The agencies found it "*highly unlikely*" that any methane-mitigation technology would be implemented "*until such time as mine-specific operational parameters are known for the lease modifications*" at the West Elk Mine. G.A. 525 (emphasis added).[8]

[8] Oversimplifying somewhat, to conduct mining operations on federal coal lands in Colorado, a federal coal lessee must follow a two-stage regulatory process. At the first stage, Colorado DRMS is responsible for issuing mining permits, which include proposed plans for mining and reclamation, pursuant to a state-federal cooperative agreement executed under the Surface Mining Control and Reclamation Act. 30 U.S.C. §§ 1253, 1273; 30 C.F.R. §§ 906.10, 906.30. At the second stage, based on a recommendation from OSMRE, the Secretary of the Interior exercises one of

Next, the agencies found that there are currently no flaring operations or proposed test operations at any active coal mines in the United States, i.e., at a mine where active coal mining is occurring, as distinguished from sealed portions of the mine. G.A. 529. The use of a flaring system must be approved by MSHA, "which has the regulatory authority to approve proposed flaring systems intended for use at coal mines in the U.S." G.A. 530. The agencies noted that, to date, MSHA has not approved or disapproved any flaring proposal because MSHA has not been presented with such a proposal. *Id.* The agencies also observed that "[a]ny flaring option considered for potential mitigation on NFS [National Forest System] lands would need to be considered related to ignition and fires on NFS lands," consistent with a lease stipulation that states: "If flaring or other combustion is prescribed as part of any future mitigation measure, lessee will be required to submit a fire prevention and protection plan subject to responsible Forest Service official for approval." G.A. 529.

The record therefore demonstrates that, contrary to Plaintiffs' contention, the agencies did *not* "prefer to pass the buck" (Br. 45) to MSHA and OSMRE. Moreover, as shown above (pp. 15-16), the agencies did consider the information that *was* available at this stage, including that the amount of methane released at the

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three options with respect to a proposed mining plan or mining plan modification: approval, disapproval, or approval subject to condition. 30 U.S.C. § 1273(c); 30 C.F.R. §§ 746.11(a), 746.13.

West Elk Mine has decreased steadily since 2012 without the imposition of a methane mitigation measure as a lease stipulation. Based on this information, the agencies reasonably declined to require methane flaring as a mitigation measure for the lease modification tracts in the lease stipulations, including that the amount of methane released at the West Elk Mine has decreased steadily since 2012 without the imposition of a methane mitigation measure as a lease stipulation.

The agencies also reasonably rejected an argument akin to that of Plaintiffs in the Lease Modification SFEIS. The agencies observed that "opponents [of] this project would say we [i.e., the Forest Service and BLM] 'can't kick the can down the road' because of global climate change concerns." G.A. 525. The agencies reasonably responded that "the staged process under several authorizing agencies, with defined roles and permitting stages, *does not lend itself well to prescribing specific mitigation measures for activities that have not been proposed yet.*" *Id.* (emphasis added). And in response to comments on the draft SEIS, they stressed that the "requirement of a specific methane mitigation …is not appropriate at the leasing stage as there are many mining details unknown at this stage." G.A. 839.

Likewise, in its December 2017 ROD consenting to the lease modifications for the West Elk Mine, the Forest Service noted that "coal mining is a multi-staged process with multiple federal and state agencies involved." G.A. 4. Because it had "become evident throughout the history of this leasing consent decision" that the

public "does not understand this complicated process," the Forest Service provided a flow chart depicting the process in "layman's terms." *Id.*; G.A. 5-6 (chart). That chart illustrates that consideration of mine-ventilation plans and methane-mitigation plans occur much later in the regulatory process, under the auspices of Colorado DRMS and MSHA, only *after* the holder of a federal coal lease has conducted exploration and determined that coal is present in mineable quantities. G.A. 6. The flow chart also makes clear that that stage of the regulatory process had not yet been reached here. G.A. 5; *see also* G.A. 810-13 (Appendix C: "Roles and Responsibilities of Regulatory Agencies in the Federal Coal Program in Colorado").

Moreover, in response to comments on the draft Lease Modification SEIS, the agencies stressed the importance of MSHA review and approval of any methane flaring proposal, which would occur in the context of a mine-ventilation plan "tied to an actual mine plan":

> Why is this important? Above-ground (even enclosed) flares rely on air in the mine where fluctuations in methane may pull the flame underground depending upon the particular system used, which might affect miner safety. Coal is also flammable. This is why flares are used in closed or sealed-off portions of coal mines where there are no workers.

G.A. 839.

The agencies' approach here is supported by *WildEarth Guardians v. U.S. Forest Service*, 828 F. Supp. 2d 1223 (D. Colo. 2011), which involved an earlier lease modification sought by MCC at the West Elk Mine. In that case, the district

court concluded that the Forest Service's decision not to analyze a methane flaring alternative in the EIS prepared for that lease modification was not arbitrary or capricious. *Id.* at 1238. The court ruled that, after consulting in 2008 with MSHA, "the agency with final authority over mine safety issues," the Forest Service reasonably determined that methane-flaring was infeasible because MSHA would not approve flaring without significant preliminary testing to assure safety. *Id.* at 1237. As the agencies found here, nothing has changed in this regard.

Plaintiffs nonetheless argue (Br. 43-44) that methane flaring technology can be used safely at working coal mines under certain circumstances, and that the agencies had "ample data" to evaluate a methane flaring alternative. But regarding safety, the agencies concluded that MSHA—which has authority to regulate the use of flaring systems at coal mines—is the proper agency for assessing the safety of any given flaring system at later stages of the regulatory process, *not* the Forest Service and BLM at this stage. And that conclusion is supported by *WildEarth Guardians*, which involved the same issue at the West Elk Mine respecting an earlier lease modification.

Regarding data to evaluate a methane flaring alternative, Plaintiffs cite (Br. 44) the agencies' possession of data about such matters as the configuration of the coal mine panels on MCC's existing leases at the West Elk Mine and the volume of methane emissions from MDWs located on those leases. But Plaintiffs do not

explain how such data can substitute for the unavailable site-specific exploration data (i.e., exploration data specific to the lease modification tracts, not the existing leases) and engineering designs that the agencies reasonably determined would be necessary to consider any methane-mitigation alternative. G.A. 525. As the Forest Service reiterated in its 2017 ROD consenting to the lease modifications at the West Elk Mine, "[s]pecific mitigation measures which condition mine operations to reduce the emissions of [GHGs] are better made by federal and state agencies which will have the benefit of more specific information, mine plans, and mining operations." G.A. 12.

This is an issue on which deference to the agencies is especially warranted because the challenged decision involves "technical or scientific matters within the agency's area of expertise." *Utah Environmental Congress*, 518 F.3d at 824. This Court should decline Plaintiffs' invitation "to second-guess" the agencies' judgment on the technical issue of what data is necessary to determine whether MCC should be required to flare methane on the lease modification tracts at the West Elk Mine. *All Indian Pueblo Council*, 975 F.2d at 1445.

C. The agencies did not engage in a "shell game."

Plaintiffs observe (Br. 42) that, in a response to a comment on the draft Exception SEIS for the rulemaking that culminated in reinstatement of the North Fork Exception, the agencies stated that "methane flaring is best considered at the

leasing stage." G.A. 387.[9] Plaintiffs then argue (Br. 47) that, by not considering a methane flaring alternative in an SEIS at the lease-modification stage for the West Elk Mine, "the [a]gencies' shell game has become apparent." *See also id.* (arguing that agencies "again punted consideration of the flaring alternative"). Those contentions lack merit.

First, Plaintiffs simply misconstrue the cited agency response: "methane flaring is best considered at the leasing stage." Plaintiffs believe that "consider at the leasing stage" means "analyze in detail at the leasing stage," but those are two entirely different actions. As shown above (pp. 36-38), the agencies did *consider* a methane-flaring alternative at the leasing stage for the lease modifications at the West Elk Mine, but reasonably dismissed it from detailed analysis. In short, the factual premise of Plaintiffs' "shell game" argument is wrong.

Second, Plaintiffs omit the next paragraph of the cited agency response, which explained:

> In addition, making flaring a regulatory requirement for coal-mining operations in the North Fork Coal Mining Area could be problematic because [MSHA] could ultimately decide not to allow flaring if it determined that it jeopardizes the safety of the miners. …. *This could result in the coal mining company being required to flare by two agencies [i.e., the Forest Service and BLM] but not allowed to flare by another agency charged with miner safety [i.e., MSHA].*

[9] While Plaintiffs contend (Br. 42) that the cited response was that of "the agencies," i.e., the Forest Service and BLM, in fact it was the Forest Service's alone. G.A. 378 ("Forest Service Response to Comments"). In any event, we assume arguendo that the cited response is attributable to both agencies.

G.A. 387 (emphasis added). This response further highlights the impractical nature of implementing a methane flaring requirement on the lease modification tracts at the leasing stage—i.e., potentially placing the lessee under contradictory legal obligations. That is a valid ground for dismissing an alternative from detailed analysis. *Custer County*, 256 F.3d at 1039; *WildEarth Guardians*, 703 F.3d at 1183.

Moreover, the decisions cited by Plaintiffs (Br. 46-48) do not advance their case. Rather, the only cited decision of this Court supports the agencies' dismissal of a methane flaring alternative from detailed study, and the rest of the cited cases are inapposite.

In *New Mexico*, 565 F.3d 683, *cited in* Br. 48, this Court concluded that BLM was required to prepare a supplemental EIS at the planning stage analyzing the fragmentation impacts of the agency's selected alternative because the record revealed that BLM had already conducted an internal analysis of the fragmentation issue, which convinced the Court that "such analysis was possible" at the planning stage. *Id.* at 708. If anything, *New Mexico* supports the agencies' approach here. The fact that neither the Forest Service nor BLM had conducted an "internal analysis" of a methane flaring alternative shows that it was not possible for the agencies to study such an alternative in detail in an SEIS at the lease-modification stage. Rather, the only arguable internal agency analysis, based on information

available at the time, showed that methane flaring was not an appropriate lease stipulation for the lease modification tracts. *See supra* pp. 15-16.

Plaintiffs also cite two D.C. Circuit cases (Br. 46-47), but neither addressed the circumstances under which an agency may decline to analyze a mitigation alternative in an EIS where the necessary data is not available until later stages of a complex regulatory process within the purview of other agencies.[10] Plaintiffs cite a third D.C. Circuit case for the proposition that "MSHA cannot unilaterally impose flaring as a condition of mining," but that is not a relevant issue here. *See Ziegler Coal Co. v. Kleppe*, 536 F.2d 398, 406-07 (D.C. Cir. 1976) (concluding that, under Federal Coal Mine Health and Safety Act, a mine operator may opt to refuse the mine-ventilation plan required by the Mine Enforcement Safety Administration; but in that event, the agency may seek civil and criminal penalties against the mine operator), *cited in* Br. 48.

Plaintiffs also cite a Ninth Circuit case (Br. 49) that supports the agencies' approach here. In *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006), the court agreed with BLM's "cogent[]" view that site-specific

[10] *Idaho v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994), *cited in* Br. 46 (concluding that agency "cannot delegate its NEPA responsibilities" by authorizing an action without preparing an EIS and then merely requiring proponent to consult with other federal agencies about the environmental impacts); *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1122 (D.C. Cir. 1971), *cited in* Br. 46-47 (concluding that agency's procedural rules provided for "abdication of NEPA authority to the standards of other agencies").

analysis of the environmental impacts of drilling for oil and gas is not possible until it is known where the drilling is likely to take place, and that can be known "only after leasing *and exploration*." *Id.* at 973 (emphasis added). Accordingly, *Northern Alaska* supports the agencies' view that in a multi-staged regulatory process, site-specific exploration data is vital to a detailed analysis of methane flaring on the lease modification tracts at the West Elk Mine. However, that site-specific exploration data was unknown and unavailable to the agencies because MCC had not yet conducted exploration on those tracts. G.A. 525.

Although Plaintiffs argue (Br. 50) that *Northern Alaska* is distinguishable because the agencies here "have a site-specific proposal (the lease modifications) and detailed information is available," Plaintiffs overlook that necessary site-specific *exploration data* for the lease modification tracts was unknown and unavailable to the Forest Service and BLM, but would be available at later stages of the mine-permitting process before other agencies. Plaintiffs also seek to distinguish *Northern Alaska* on the ground (*id.*) that BLM "retained control over whether to consider the issue at a later stage." But that circumstance simply reflects that the regulatory process applicable to the management of federal oil and gas reserves on BLM-

administered land in Alaska is different from the regulatory process applicable to the management of federal coal reserves on National Forest System land in Colorado.[11]

* * * * *

In sum, Plaintiffs fail to demonstrate that, respecting the challenged Forest Service and BLM decision-making, the agencies "entirely failed to consider an important aspect of the problem," or made "a clear error of judgment." *State Farm*, 463 U.S. at 43. Because the Forest Service and BLM "articulated a rational basis" for their decisions, and "considered relevant factors," this Court "must uphold the agency's action." *Wolfe*, 446 F.3d at 1100.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.[12]

STATEMENT CONCERNING ORAL ARGUMENT

The federal appellees request oral argument because it will assist the Court in deciding this appeal.

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[11] Plaintiffs cite (Br. 48) an additional Ninth Circuit case, but it is inapposite. *See Kern v. U.S. BLM*, 284 F.3d 1062, 1074 (9th Cir. 2002) (concluding that revised environmental assessment for a proposed timber sale was inadequate because it tiered to a deficient EIS and failed to address cumulative impacts).

[12] If this Court finds a NEPA violation, it should reverse and remand to the district court for consideration of appropriate relief in the first instance based on the nature of the violation found, and the facts and equities prevailing on remand. *WildEarth Guardians v. U.S. BLM*, 870 F.3d 1222, 1239-40 (10th Cir. 2017).

Respectfully submitted,

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March 14, 2019
90-1-4-15267

CERTIFICATES OF COMPLIANCE AND DIGITAL SUBMISSION

I hereby certify that the foregoing document complies with the type-volume and typeface requirements of Fed. R. App. P. 32(a)(5) and (7) because it contains 11,055 words in 14-point type (Times New Roman).

I further hereby certify that with respect to the foregoing document:

(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, Windows Defender: Antivirus Definition 1.289.1157.0 (last updated March 14, 2019), and according to the program are free of viruses.

/s/ John E. Arbab
John E. Arbab

Counsel for the Federal Appellees

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. All counsel in this appeal are registered CM/ECF users who will be served by the appellate CM/ECF system.

/s/ John E. Arbab
John E. Arbab

Counsel for the Federal Appellees

Addendum

Index to Addendum

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 25. Surface Mining Control and Reclamation (Refs & Annos)
Subchapter V. Control of the Environmental Impacts of Surface Coal Mining (Refs & Annos)

30 U.S.C.A. § 1253

§ 1253. State programs

Currentness

(a) Regulation of surface coal mining and reclamation operations; submittal to Secretary; time limit; demonstration of effectiveness

Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 1271 and 1273 of this title and subchapter IV of this chapter, shall submit to the Secretary, by the end of the eighteenth-month period beginning on August 3, 1977, a State program which demonstrates that such State has the capability of carrying out the provisions of this chapter and meeting its purposes through--

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter;

(2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which sanctions shall meet the minimum requirements of this chapter, including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;

(3) a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this chapter;

(4) a State law which provides for the effective implementations, [1] maintenance, and enforcement of a permit system, meeting the requirements of this subchapter for the regulations [1] of surface coal mining and reclamation operations for coal on lands within the State;

(5) establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 1272 of this title provided that the designation of Federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; and [1]

Add. 1

(6) establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations; and

(7) rules and regulations consistent with regulations issued by the Secretary pursuant to this chapter.

(b) Approval of program

The Secretary shall not approve any State program submitted under this section until he has--

(1) solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed State program;

(2) obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of a State program which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended, and the Clean Air Act, as amended;

(3) held at least one public hearing on the State program within the State; and

(4) found that the State has the legal authority and qualified personnel necessary for the enforcement of the environmental protection standards.

The Secretary shall approve or disapprove a State program, in whole or in part, within six full calendar months after the date such State program was submitted to him.

(c) Notice of disapproval

If the Secretary disapproves any proposed State program in whole or in part, he shall notify the State in writing of his decision and set forth in detail the reasons therefor. The State shall have sixty days in which to resubmit a revised State program or portion thereof. The Secretary shall approve or disapprove the resubmitted State program or portion thereof within sixty days from the date of resubmission.

(d) Inability of State to take action

For the purposes of this section and section 1254 of this title, the inability of a State to take any action the purpose of which is to prepare, submit or enforce a State program, or any portion thereof, because the action is enjoined by the issuance of an injunction by any court of competent jurisdiction shall not result in a loss of eligibility for financial assistance under subchapters IV and VII of this chapter or in the imposition of a Federal program. Regulation of the surface coal mining and reclamation operations covered or to be covered by the State program subject to the injunction shall be conducted by the State pursuant to section 1252 of this title, until such time as the injunction terminates or for one year, whichever is shorter, at which time the requirements of this section and section 1254 of this title shall again be fully applicable.

Add. 2

CREDIT(S)

(Pub.L. 95-87, Title V, § 503, Aug. 3, 1977, 91 Stat. 470.)

Footnotes

1 So in original.

30 U.S.C.A. § 1253, 30 USCA § 1253

Current through P.L. 116-5. Title 26 current through 116-7.

Add. 3

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 25. Surface Mining Control and Reclamation (Refs & Annos)
Subchapter V. Control of the Environmental Impacts of Surface Coal Mining (Refs & Annos)

30 U.S.C.A. § 1273

§ 1273. Federal lands

Currentness

(a) Promulgation and implementation of Federal lands program

No later than one year after August 3, 1977, the Secretary shall promulgate and implement a Federal lands program which shall be applicable to all surface coal mining and reclamation operations taking place pursuant to any Federal law on any Federal lands: *Provided*, That except as provided in section 1300 of this title the provisions of this chapter shall not be applicable to Indian lands. The Federal lands program shall, at a minimum, incorporate all of the requirements of this chapter and shall take into consideration the diverse physical, climatological, and other unique characteristics of the Federal lands in question. Where Federal lands in a State with an approved State program are involved, the Federal lands program shall, at a minimum, include the requirements of the approved State program: *Provided*, That the Secretary shall retain his duties under sections 201(a), (2)(B) [1] and 201(a)(3) of this title, and shall continue to be responsible for designation of Federal lands as unsuitable for mining in accordance with section 1272(b) of this title.

(b) Incorporation of requirements into any lease, permit, or contract issued by Secretary which may involve surface coal mining and reclamation operations

The requirements of this chapter and the Federal lands program or an approved State program for State regulation of surface coal mining on Federal lands under subsection (c), whichever is applicable, shall be incorporated by reference or otherwise in any Federal mineral lease, permit, or contract issued by the Secretary which may involve surface coal mining and reclamation operations. Incorporation of such requirements shall not, however, limit in any way the authority of the Secretary to subsequently issue new regulations, revise the Federal lands program to deal with changing conditions or changed technology, and to require any surface mining and reclamation operations to conform with the requirements of this chapter and the regulations issued pursuant to this chapter.

(c) State cooperative agreements

Any State with an approved State program may elect to enter into a cooperative agreement with the Secretary to provide for State regulation of surface coal mining and reclamation operations on Federal lands within the State, provided the Secretary determines in writing that such State has the necessary personnel and funding to fully implement such a cooperative agreement in accordance with the provision of this chapter. States with cooperative agreements existing on August 3, 1977, may elect to continue regulation on Federal lands within the State, prior to approval by the Secretary of their State program, or imposition of a Federal program, provided that such existing cooperative agreement is modified to fully comply with the initial regulatory procedures set forth in section 1252 of this title. Nothing in this subsection shall be construed as authorizing the Secretary to delegate to the States his duty to approve mining plans on Federal lands, to designate certain Federal lands as unsuitable for surface coal mining pursuant to section 1272 of this title, or to regulate other activities taking place on Federal lands.

Add. 4

(d) Development of program to assure no unreasonable denial to any class of coal purchasers

The Secretary shall develop a program to assure that with respect to the granting of permits, leases, or contracts for coal owned by the United States, that no class of purchasers of the mined coal shall be unreasonably denied purchase thereof.

CREDIT(S)

(Pub.L. 95-87, Title V, § 523, Aug. 3, 1977, 91 Stat. 510.)

Footnotes

1 So in original. Probably should be "201(a)(2)(B)".

30 U.S.C.A. § 1273, 30 USCA § 1273

Current through P.L. 116-5. Title 26 current through 116-7.

End of Document

Add. 5

Code of Federal Regulations
Title 30. Mineral Resources
Chapter VII. Office of Surface Mining Reclamation and Enforcement, Department of the Interior
Subchapter D. Federal Lands Program
Part 746. Review and Approval of Mining Plans (Refs & Annos)

30 C.F.R. § 746.11

§ 746.11 General requirements.

Currentness

(a) No person shall conduct surface coal mining and reclamation operations on lands containing leased Federal coal until the Secretary has approved the mining plan.

(b) Surface coal mining and reclamation operations on lands containing leased Federal coal shall be conducted in accordance with a permit issued in accordance with this subchapter, any lease terms and conditions, and the approved mining plan.

AUTHORITY: 30 U.S.C. 1201 et seq. and 30 U.S.C. 181 et seq.

Notes of Decisions (2)

Current through March 7, 2019; 84 FR 8277.

End of Document

Add. 6

Code of Federal Regulations
Title 30. Mineral Resources
Chapter VII. Office of Surface Mining Reclamation and Enforcement, Department of the Interior
Subchapter D. Federal Lands Program
Part 746. Review and Approval of Mining Plans (Refs & Annos)

30 C.F.R. § 746.13

§ 746.13 Decision document and recommendation on mining plan.

Currentness

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:

(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, 42 U.S.C. 4321, et seq.;

(c) Documentation assuring compliance with the applicable requirements of other Federal laws, regulations and executive orders other than the Act;

(d) Comments and recommendations or concurrence of other Federal agencies, as applicable, and the public;

(e) The findings and recommendations of the Bureau of Land Management with respect to the resource recovery and protection plan and other requirements of the lease and the Mineral Leasing Act;

(f) The findings and recommendations of the regulatory authority with respect to the permit application and the State program; and

(g) The findings and recommendations of OSM with respect to the additional requirements of this subchapter.

AUTHORITY: 30 U.S.C. 1201 et seq. and 30 U.S.C. 181 et seq.

Notes of Decisions (2)

Current through March 7, 2019; 84 FR 8277.

End of Document

Add. 7

Code of Federal Regulations
Title 30. Mineral Resources
Chapter VII. Office of Surface Mining Reclamation and Enforcement, Department of the Interior
Subchapter T. Programs for the Conduct of Surface Mining Operations Within Each State
Part 906. Colorado (Refs & Annos)

30 C.F.R. § 906.10

§ 906.10 State regulatory program approval.

Currentness

The Colorado State program as submitted on February 29, 1980, and amended and clarified on June 11, 1980, was conditionally approved, effective December 15, 1980. Beginning on that date, the Colorado Department of Natural Resources was deemed the regulatory authority in Colorado for surface coal mining and reclamation operations and for coal exploration operations on non-Federal and non-Indian lands. Copies of the approved program are available for review at:

(a) Colorado Department of Natural Resources, Division of Minerals and Geology, Centennial Building, room 215, 1313 Sherman Street, Denver, CO 80203.

(b) Office of Surface Mining Reclamation and Enforcement, Western Regional Coordinating Center, Technical Library, 1999 Broadway, Suite 3320, Denver, Colorado 80202–5733.

Credits
[47 FR 56350, Dec. 16, 1982; 59 FR 17932, April 15, 1994; 60 FR 54593, Oct. 25, 1995]

AUTHORITY: 30 U.S.C. 1201 et seq.

Current through March 7, 2019; 84 FR 8277.

End of Document

Add. 8

Code of Federal Regulations
Title 30. Mineral Resources
Chapter VII. Office of Surface Mining Reclamation and Enforcement, Department of the Interior
Subchapter T. Programs for the Conduct of Surface Mining Operations Within Each State
Part 906. Colorado (Refs & Annos)

30 C.F.R. § 906.30

§ 906.30 State–Federal cooperative agreement.

Currentness

The Governor of the State of Colorado, acting through the Mined Land Reclamation Division (MLRD), and the Secretary of the Department of the Interior, acting through the Assistant Secretary for Energy and Minerals, and the Office of Surface Mining (OSM), enter into a Cooperative Agreement (Agreement) to read as follows.

Article I: Introduction and Purpose

1. This Agreement is authorized by section 523(c) of the Surface Mining Control and Reclamation Act (Act), 30 U.S.C. 1273(c), which allows a State with a permanent regulatory program approved by the Secretary under 30 U.S.C. 1253, to elect to enter into an Agreement for the regulation and control of surface coal mining operations on Federal lands.

This Agreement provides for State regulation, consistent with the Act, the Federal lands program (30 CFR part 745) and the Colorado State Program (Program) for surface coal mining and reclamation operations, on Federal lands.

2. The purpose of this Agreement is to (a) foster Federal–State cooperation in the regulation of surface coal mining; (b) eliminate intergovernmental overlap and duplication; and (c) provide uniform and effective application of the Program on all non-Indian lands in Colorado, in accordance with the Act and the Program.

Article II: Effective Date

3. After being signed by the Secretary and the Governor, the Agreement shall be effective upon publication in the Federal Register as a final rule.

This Agreement shall remain in effect until terminated as provided in Article XI.

Article III: Scope

4. Under this Agreement, the laws, regulations, terms, and conditions of the Program conditionally approved effective December 15, 1980, 30 CFR part 906, or as hereinafter amended in accordance with 30 CFR 732.17, for the administration of the Act, are applicable to Federal lands within the State except as otherwise stated in this Agreement, the Act, 30 CFR 745.13, or other applicable laws.

Orders and decisions issued by MLRD in accordance with the State Program that are appealable, shall be appealed to the State reviewing authority. Orders and decisions issued by the Department that are appealable, shall be appealed to the Department of the Interior's Office of Hearings and Appeals.

Add. 9

Article IV: Requirements for Agreement

5. The Governor and the Secretary affirm that they will comply with all of the provisions of this Agreement and will continue to meet all the conditions and requirements specified in this Article.

A. Responsible Administrative Agency: The MLRD shall be responsible for administering this Agreement on behalf of the Governor on Federal lands throughout the State. The Assistant Secretary for Energy and Minerals, or designee, shall administer this Agreement on behalf of the Secretary in accordance with the regulations in 30 CFR Chapter VII.

B. Authority of State Agency: The MLRD has and shall continue to have the authority under State law to carry out this Agreement.

C. Funds: Upon application by the MLRD and subject to appropriations, the Department shall provide the State with the funds to defray the costs associated with carrying out responsibilities under this Agreement as provided in section 705(c) of the Act and 30 CFR 735.16. If sufficient funds have not been appropriated to OSM, OSM and MLRD shall promptly meet to decide on appropriate measures that will insure that mining operations are regulated in accordance with the Program. If agreement cannot be reached, then either party may terminate the Agreement.

Funds provided to the State shall be adjusted in accordance with Office of Management and Budget Circular A–102, Attachment E.

D. Reports and Records: The MLRD shall make annual reports to the Director of OSM (Director) containing information with respect to compliance with the terms of this Agreement, pursuant to 30 CFR 745.12(c). The MLRD and the Director shall exchange, upon request, except where prohibited by Federal law, information developed under this Agreement. The Director shall provide the MLRD with a copy of any final evaluation report prepared concerning State administration and enforcement of this Agreement.

E. Personnel: The MLRD shall have the necessary personnel to fully implement this Agreement in accordance with the provisions of the Act and the approved Program. If sufficient funds have not been appropriated, OSM and MLRD shall promptly meet to decide on appropriate measures that will insure that mining operations are regulated in accordance with the Program.

F. Equipment and Laboratories: The MLRD shall assure itself access to equipment, laboratories, and facilities with which all inspections, investigations, studies, tests, and analyses can be performed which are necessary to carry out the requirements of this Agreement.

G. Permit Application Fees: The amount of the fee accompanying an application for a permit shall be determined in accordance with section 34–33–110(1) Colorado Revised Statutes (CRS 1973), as amended. All permit fees shall be retained by the State and deposited with the State Treasurer in the General Fund. The Financial Status Report submitted pursuant to 30 CFR 735.26 shall include a report of the amount of fees collected during the prior State fiscal year.

Article V: Definitions

6. Terms and phrases used in this Agreement which are defined in the Act, 30 CFR parts 700, 701 and 740 and as defined in the Program shall be given the meaning set forth in said definitions. Where there is a conflict between the above referenced State and Federal definitions, the definitions used in the approved State Program will apply, except in the case of a term which defines the Secretary's continuing responsibilities under the Act and other laws.

Add. 10

Article VI: Policies and Procedures: Review of a Permit Application To Conduct Surface Coal Mining and Reclamation Operations or an Application for a Permit Revision or Permit Renewal

7. The MLRD and the Director shall require an operator on Federal lands to submit a permit application package or an application for a permit revision or renewal in an appropriate number of copies to the MLRD and OSM. Any documentation or information prepared by the operator for the sole purpose of complying with the 3–year requirement of section 7(c) of the Mineral Leasing Act (MLA) will be submitted directly to the Minerals Management Service (MMS). If such documentation is submitted as part of a permit application, a copy of the entire package will be forwarded to the MMS by OSM.

The permit application package or application for a permit revision or renewal shall be in the format required by the MLRD and include any supplemental information required by the Department. The permit application package or application for a permit revision or renewal shall satisfy the requirements of 30 CFR 741.12(b) and 30 CFR 741.13, and include the information required by, or necessary for, the MLRD and the Department to make a determination of compliance with:

(a) Section 34–33–101, et seq., CRS 1973, as amended;

(b) Regulations of the Colorado Mined Land Reclamation Board for Coal Mining;

(c) Applicable terms and conditions of the Federal coal lease;

(d) Applicable requirements of the MMS's 30 CFR part 211 regulations pertaining to the Mineral Leasing Act requirements unless previously submitted to the MMS; and

(e) Applicable requirements of the approved Program and other Federal laws including, but not limited to, those identified in 30 CFR Chapter VII, Subchapter D, and appendix A of this Agreement.

8. The MLRD shall assume primary responsibility pursuant to sections 510(a) and 523(c) of the Act for the analysis, review, and approval of the permit application or application for a permit revision or renewal according to the standards of the approved Program. The Director shall assist the MLRD in the analysis of the permit application or application for a permit revision or renewal and coordinate with the other appropriate Federal agencies as specified by the Secretary according to the procedures set forth in appendix B. The Department shall concurrently carry out its responsibilities which cannot be delegated to the State under the MLA, National Environmental Policy Act (NEPA), and other public laws (including, but not limited to, those in appendix A) according to the procedures set forth in appendix B so as, to the maximum extent possible, not to duplicate the responsibilities of the State as set forth in this Agreement and the Program. The Secretary shall consider the information submitted in the permit application package and, when appropriate, make the decisions required by the Act, MLA, NEPA and other public laws as described above.

9. As a matter of practice the Department will not independently initiate contacts with the applicant regarding permit application packages or applications for permit revisions or renewals. However, the Department reserves the right to act independently of the MLRD to carry out its statutory responsibilities under the Act, MLA, NEPA and other public laws provided, however, that the Department shall send copies of all relevant correspondence to the MLRD.

10. The MLRD shall maintain a file of all original correspondence with the applicant and any information received from the applicant which may have a bearing on decisions regarding the permit application or application for a permit revision or renewal.

Add. 11

11. OSM shall have access to MLRD files for mines on Federal lands. MLRD will provide OSM copies of information OSM deems necessary.

12. To the fullest extent allowed by State and Federal law, the Director and MLRD shall cooperate so that duplication will be eliminated in conducting the review and analysis of the permit application package or application for a permit revision or renewal.

Article VII: Inspections

13. The MLRD shall conduct inspections on Federal lands and prepare and file inspection reports in accordance with the Program.

14. The MLRD shall, subsequent to conducting any inspection, and on a timely basis, file with the Director a copy of each inspection report. Such report shall adequately describe (1) the general conditions of the lands under the permit; (2) the manner in which the operations are being conducted; and (3) whether the operator is complying with applicable performance and reclamation requirements.

15. The MLRD will be the point of contact and primary inspection authority in dealing with the operator concerning operations and compliance with the requirements covered by this Agreement, except as described hereinafter. Nothing in this Agreement shall prevent Federal inspections by authorized Federal or State agencies for purposes other than those covered by this Agreement. The Department may conduct any inspections necessary to comply with 30 CFR parts 842 and 743, as part 743 relates to obligations under laws other than the Act.

16. OSM shall ordinarily give the MLRD reasonable notice of its intent to conduct an inspection under 30 CFR 842.11 in order to provide State inspectors with an opportunity to join in the inspection. When OSM is responding to a citizen complaint of an imminent danger to the public health and safety or significant, imminent environmental harm to land, air or water resources, pursuant to 30 CFR 842.11(b)(1)(ii)(C), it will contact MLRD no less than 24 hours prior to the Federal inspection, if practicable, to facilitate a joint Federal/State inspection. All citizen complaints which do not involve an imminent danger shall be referred to MLRD for action. The Secretary reserves the right to conduct inspections without prior notice to MLRD to carry out his responsibilities under the Federal Act.

Article VIII: Enforcement

17. MLRD shall be the primary enforcement authority under the Act concerning compliance with the requirements of this Agreement and the Program. Enforcement authority given to the Secretary under other laws and orders including, but not limited to, those listed in appendix A is reserved to the Secretary.

18. During any joint inspection by OSM and MLRD, MLRD shall have primary responsibility for enforcement procedures, including issuance of orders of cessation, notices of violation, and assessment of penalties. The MLRD shall consult OSM prior to issuance of any decision to suspend or revoke a permit.

19. During any inspection made solely by OSM or any joint inspection where the MLRD and OSM fail to agree regarding the propriety of any particular enforcement action, OSM may take any enforcement action necessary to comply with 30 CFR parts 843 and 845. Such enforcement action shall be based on the performance standards included in the regulations of the approved Program, and shall be taken using the procedures and penalty system contained in 30 CFR parts 843 and 845.

20. The MLRD and the Department shall promptly notify each other of all violations of applicable laws, regulations, orders, or approved mining permits subject to this Agreement and of all actions taken with respect to such violations.

21. Personnel of the State and representatives of the Department shall be mutually available to serve as witnesses in enforcement actions taken by either party.

22. This Agreement does not limit the Department's authority to enforce violations of Federal law which establish standards and requirements which are authorized by laws other than the Act.

Article IX: Bonds

23. For all surface coal mining operations on Federal lands, the MLRD and the Secretary shall require each operator to submit a single performance bond payable to the State and to the United States, if required by Federal regulations, to cover the operator's responsibilities under the Act and the Program. Such performance bond shall be conditioned upon compliance with all requirements of the Act, the Program and any other requirements imposed by the Department under the MLA, as amended. If the Agreement is terminated, all bonds will revert to being payable only to the United States to the extent that Federal lands are involved. Submission of a performance bond does not satisfy the requirements for a Federal lease bond required by 30 CFR subpart 3473 or a lessee protection bond required in addition to a performance bond, in certain circumstances, by section 715 of the Act.

24. Prior to releasing the operator from an obligation under a performance bond required by the Program, the MLRD shall obtain the concurrence of OSM, the MLRD shall also advise OSM of annual adjustments to the performance bond, pursuant to the Program. Departmental concurrence shall include coordination with other Federal agencies having authority over the lands involved.

25. The operator's performance bond shall be subject to forfeiture with the consent of OSM, in accordance with the procedures and requirements of the Program.

Article X: Designating Land Areas Unsuitable for All or Certain Types of Surface Coal Mining Operations

26. The MLRD and the Director shall cooperate with each other in the review and processing of petitions to designate lands as unsuitable for surface coal mining operations. When either agency receives a petition that could impact adjacent Federal and non-Federal lands, respectively, the agency receiving the petition shall (1) notify the other of receipt and of the anticipated schedule for reaching a decision; and (2) request and fully consider data, information and views of the other.

The authority to designate State and private lands as unsuitable for mining is reserved to the State. The authority to designate Federal lands as unsuitable for mining is reserved to the Secretary or his designated representative.

Article XI: Termination of Cooperative Agreement

27. This Agreement may be terminated by the Governor or the Secretary under the provisions of 30 CFR 745.15.

Article XII: Reinstatement of Cooperative Agreement

28. If this Agreement has been terminated in whole or in part it may be reinstated under the provisions of 30 CFR 745.16.

Article XIII: Amendment of Cooperative Agreement

29. This Agreement may be amended by mutual agreement of the Governor and the Secretary in accordance with 30 CFR 745.14.

Add. 13

Article XIV: Changes in State or Federal Standards

30. The Department or the State may from time to time promulgate new or revised performance or reclamation requirements or enforcement and administration procedures. Each party shall, if it determines it to be necessary to keep this Agreement in force, change or revise its regulations and request necessary legislative action. Such changes shall be made under the procedures of 30 CFR part 732 for changes to the State Program and under the procedures of section 501 of the Act for changes to the Federal lands program.

31. The MLRD and the Department shall provide each other with copies of any changes to their respective laws, rules, regulations and standards pertaining to the enforcement and administration of this Agreement.

Article XV: Changes in Personnel and Organization

32. Each party to this Agreement shall notify the other, when necessary, of any changes in personnel, organization and funding or other changes that will affect the implementation of this Agreement to ensure coordination of responsibilities and facilitate cooperation.

Article XVI: Reservation of Rights

33. In accordance with 30 CFR 745.13, this Agreement shall not be construed as waiving or preventing the assertion of any rights that have not been expressly addressed in this Agreement that the State or the Secretary may have under other laws or regulations, including but not limited to those listed in appendix A.

Dated: September 27, 1982.

Richard D. Lamm,

Governor of Colorado.

Dated: September 20, 1982.

Donald Paul Hodel,

Acting Secretary of the Interior.

Appendix A

1. The Federal Land Policy and Management Act, 43 U.S.C. 1701 et seq., and implementing regulations.

2. The Mineral Leasing Act of 1920, 30 U.S.C. 181 et seq., and implementing regulations including 30 CFR part 211.

3. The National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., and implementing regulations including 40 CFR part 1500.

4. The Endangered Species Act, 16 U.S.C. 1531 et seq., and implementing regulations including 50 CFR part 402.

5. The National Historic Preservation Act of 1966, 16 U.S.C. 470 et seq., and implementing regulations, including 36 CFR part 800.

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6. The Clean Air Act, 42 U.S.C. 7401 et seq., and implementing regulations.

7. The Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., and implementing regulations.

8. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 et seq., and implementing regulations.

9. The Reservoir Salvage Act of 1960, amended by the Preservation of Historical and Archaeological Data Act of 1974, 16 U.S.C. 469 et seq.

10. Executive Order 1593 (May 13, 1971), Cultural Resource Inventories on Federal Lands.

11. Executive Order 11988 (May 24, 1977), for flood plain protection. Executive Order 11990 (May 24, 1977), for wetlands protection.

12. The Mineral Leasing Act for Acquired Lands, 30 U.S.C. 351 et seq., and implementing regulations.

13. The Stock Raising Homestead Act of 1916, 43 U.S.C. 291 et seq.

14. The Constitution of the United States.

15. The Constitution of the State and State Law.

Appendix B—Procedure for Cooperative Review of Permit Application Packages and Applications for Permit Revisions or Renewals for Federal Coal Mines in Colorado

I: Point of Contact and Coordination for the Review of Permit Applications and Applications for Permit Revisions or Renewals

A. The Colorado Mined Land Reclamation Division (MLRD) will:

1. Be the point of contact and coordinate communications with the applicant on issues concerned with the development, review and approval of the permit application package or application for permit revision or renewal.

2. Communicate with the applicant on issues of concern to the Office of Surface Mining (OSM) and promptly advise OSM of such issues and communications.

3. Provide OSM with a monthly report on the status of each permit application, or application for permit revision or renewal.

B. OSM will:

1. Be responsible for coordinating the review of the permit application package with all Federal agencies which have responsibilities related to approval of the package.

2. Be responsible for ensuring that any information OSM receives which has a bearing on decisions regarding the permit application package or application for a permit revision or renewal is sent promptly to MLRD.

C. Minerals Management Service (MMS) will:

1. Receive any documentation and information required by the 30 CFR part 211 regulations.

2. Be the point of contact with the applicant on issues concerned exclusively with the 30 CFR part 211 regulations.

3. Provide MLRD and OSM with copies of pertinent correspondence.

II: Receipt and Distribution of the Permit Application Package and Applications for Permit Revision or Renewal

A. MLRD will:

1. Receive from the applicant the appropriate number of copies of the permit application package, application for a permit revision or renewal, or the review correspondence from the applicant.

2. Identify an application manager responsible for coordinating the review and notify OSM.

3. Upon receipt of an application, MLRD will meet with OSM to discuss the application and agree upon a work plan and schedule.

B. OSM will:

1. Receive from the applicant the appropriate number of copies of the permit application package, application for a permit revision or renewal, or the review correspondence from the applicant.

2. Distribute copies of the permit application package and the identity of the MLRD application manager to other Federal agencies as required.

C. OSM, MMS and the Federal land management agency (FLMA) will: Each identify an application manager upon receipt of the application package. OSM will notify MLRD and all Federal agencies of the identity of the application managers.

III: Determination of Completeness

A. MLRD will:

1. Determine the completeness of a permit application package or application for a permit revision or renewal in accordance with section 34–33–118(1) CRS 1973, as amended and as defined in rule 1.04(30) of the Regulations of the Colorado Mined Land Reclamation Board for Coal Mining promulgated pursuant to the Colorado Surface Coal Mining Reclamation Act.

2. Issue public notice of a complete application in accordance with the procedures of section 34–33–118(2) CRS 1973, as amended.

IV: Determination of Preliminary Findings of Substantive Adequacy

A. MLRD will:

1. Consult with MMS, FLMA, OSM, and other appropriate Federal agencies to review the filed application for preliminary findings of substantive adequacy (henceforth "preliminary findings") and to assess the need for additional data requirements in their respective areas of responsibility.

2. Arrange meetings and field examinations with the interested parties, as necessary, to determine the preliminary findings.

3. Advise the applicant of the preliminary findings upon the advice and consent of FLMA, MMS, OSM and other Federal agencies specified by the Secretary.

4. Transmit the letter(s) informing the applicant of the preliminary findings with copies to FLMA, MMS, OSM and other Federal agencies specified by the Secretary.

5. Furnish the Director with copies of correspondence with the applicant and all information received from the applicant as requested.

B. OSM will:

1. At the request of MLRD, assist as possible in the review of the permit application package or application for a permit revision or renewal. In any case where assistance has been agreed upon, furnish MLRD with preliminary findings within 45 calendar days of receipt of the request.

2. Work with other Federal agencies involved in the review to insure timely response and resolution of issues of particular concern regarding their statutory requirements.

3. Within 30 days from notification of completeness, initiate NEPA compliance procedures and procedures required by other laws which OSM has responsibility for and has not delegated to the State.

4. Participate, as arranged, in meetings and field examinations.

C. FLMA will:

1. Review the permit application package or application for permit revision or renewal for preliminary findings as to whether the applicant's proposed post-mining land use is consistent with FLMA's land use plan, and as to the adequacy of measures to protect Federal resources not covered by the rights granted by the Federal coal lease.

2. Furnish OSM with preliminary findings and with any specific requirements for additional data, within 45 calendar days of FLMA's receipt of the permit application package or application for a permit revision or renewal.

3. Participate, as arranged, in meetings and field examinations.

D. MMS will:

1. Review the permit application package or application for a permit revision or renewal in regard to MLA requirements addressed in such application.

2. Furnish OSM with preliminary findings and with any specific requirements for additional data within 45 calendar days of MMS's receipt of the permit application package or application for a permit revision or renewal.

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3. Participate, as arranged, in meetings and field examinations.

E. Other appropriate Federal agencies specified by the Secretary will:

1. Review the permit application package or application for a permit revision or renewal for preliminary findings in regard to their responsibilities under law.

2. Furnish OSM with preliminary findings within 45 calendar days of receipt of the application with specific requirements for additional data.

3. Participate, as arranged, in meetings and field examinations.

V: Findings of Technical Adequacy and NEPA Compliance

A. MLRD will:

1. Develop and coordinate the technical review of the permit application package or application for a permit revision or renewal. The review will include representatives of MLRD, MMS, FLMA, OSM and other appropriate Federal agencies specified by the Secretary.

2. Coordinate with OSM for the purpose of eliminating duplication, and provide to OSM a complete technical analysis pursuant to the approved Program that will serve as the technical base for any Environmental Analysis (EA) or Environmental Impact Statement (EIS) which may be necessary to determine NEPA compliance for each permit application package.

3. Coordinate, for the purpose of eliminating duplication, with MMS to conduct a technical analysis that will assist the MMS in making findings as may be necessary to determine compliance with the MLA.

4. Coordinate, for the purpose of eliminating duplication, with FLMA to conduct a technical analysis of issues regarding post-mining land use and the adequacy of measures to protect Federal resources not covered by the rights granted by the lease.

5. Coordinate, for the purposes of eliminating duplication, with other appropriate Federal agencies specified by the Secretary, to conduct a technical analysis of issues within their jurisdiction.

B. OSM will:

1. At the request of MLRD, assist as possible in the review of the application for technical adequacy in a timely manner as set forth by a schedule. Such schedule will be governed by the deadlines set forth in the Colorado Surface Coal Mining Reclamation Act and shall be developed by MLRD in cooperation with OSM.

2. Resolve conflicts and difficulties between other Federal agencies in a timely manner.

3. As soon as possible after receipt of the permit application package, determine the need for an EA or an EIS, pursuant to NEPA, with the assistance of FLMA, MMS, MLRD and other appropriate agencies, as arranged.

4. Publish notices of NEPA documents as required by Federal law and regulations.

5. Take the leadership role for the development of the EA and EIS including identification of areas where additional data is necessary.

6. Provide MLRD with the analysis and conclusions of the appropriate Federal agencies regarding those elements of the package which the Secretary cannot delegate to the State.

C. MMS will:

1. Review the permit application package or application for a permit revision or renewal for compliance with 30 CFR part 211.

2. Furnish MLRD, through OSM, findings on compliance in a timely manner as set forth by schedule. Such schedule will be governed by the statutory deadlines set forth in the Colorado Surface Coal Mining Reclamation Act and shall be developed by MLRD in cooperation with MMS.

3. Participate, as arranged, in meetings and field examinations.

D. FLMA will:

1. Determine whether the permit application or application for a permit revision or renewal provides for post-mining land use consistent with FLMA's land use plan and determine the adequacy of measures to protect Federal resources under FLMA's jurisdiction not covered by the rights granted by the Federal coal lease.

2. Furnish MLRD, through OSM, its determination on the technical adequacy in a timely manner as set forth by schedule. Such schedule will be governed by the statutory time limits set forth in the Colorado Surface Coal Mining Reclamation Act and shall be developed by MLRD in cooperation with FLMA.

3. Participate, as arranged, in meetings and field examinations.

E. Other appropriate Federal agencies specified by the Secretary will:

1. Review the permit application package or application for a permit revision or renewal in regard to their responsibilities under law.

2. Furnish MLRD, through OSM, findings on compliance with other applicable Federal laws and regulations in a timely manner as set forth by schedule. Such schedule will be governed by the statutory deadlines set forth in the Colorado Surface Coal Mining Reclamation Act and shall be developed in cooperation with MLRD.

3. Participate, as arranged, in meetings and field examinations.

VI: Preparation of the Decision Document and Transmittal

A. MLRD will:

1. Prepare a finding of compliance with the Program as approved by the Secretary and the regulations promulgated thereunder, which will consist of an analysis of critical issues raised during the course of the review and the resolution of those issues.

2. Assist OSM in the preparation of the decision document for the permit application package or application for a permit revision or renewal, unless the work plan and schedule agreed upon provides otherwise. MLRD will provide OSM with:

a. a brief but comprehensive discussion of the need for the proposal and alternatives to the proposal;

b. a finding of compliance prepared under A.1;

c. all other specific written findings required under section 34–33–114 CRS 1973, as amended.

3. Consider the comments of OSM, MMS, FLMA and other appropriate Federal agencies when assisting in the preparation of the decision document.

B. OSM will:

1. Prepare the approved NEPA compliance finding.

2. Prepare the decision document with the assistance of MLRD unless the work plan and schedule agreed upon provides otherwise. The decision document shall contain the following:

a. an analysis of the environmental impacts of the proposal and alternatives to the proposal prepared in compliance with NEPA, CEQ regulations and OSM's NEPA Compliance Handbook;

b. the determinations and recommendations of FLMA;

c. the memorandum of recommendation from the MMS to the Assistant Secretary for Energy and Minerals, with regard to MLA requirements;

d. the comments of other appropriate Federal agencies specified by the Secretary; and

e. the relevant information submitted by MLRD as specified by A.2. of this Article.

3. Transmit the decision document to the Secretary.

C. FLMA will: Provide written concurrence on the decision document to OSM with regard to post-mining land use and the adequacy of measures to protect Federal resources not covered by rights granted by the Federal coal lease.

D. MMS will: Provide written concurrence on the decision document to OSM with regard to MMS responsibilities.

E. Other agencies will: Provide written concurrence on the decision document to OSM with regard to their responsibilities.

VII: Decision and Permit Issuance

A. The Secretary will:

1. Evaluate the analysis and conclusions as necessary to determine whether he concurs in the decision document insofar as it relates to his statutorily required decisions.

2. Inform the MLRD immediately of this decision. The reason for not approving shall be specified and recommendations for remedy shall be specified.

B. MLRD will:

1. Issue the permit, permit revision, or permit renewal for surface coal mining and reclamation operations after making a finding of compliance with the approved Program in the manner set forth in this Cooperative Agreement.

2. Advise the operator in the permit of the necessity of obtaining Secretarial approval, for those statutory requirements which have not been delegated to the State, prior to directly affecting Federal lands, and if necessary, prohibit the operator from directly affecting Federal lands under the permit, revised permit, or permit renewal until after the Secretary's approval has been received.

3. Reserve the right to modify the permit, permit revision, or permit renewal, when appropriate, in order to resolve conflicts between the permit requirements and the requirements of other laws, rules and regulations administered by the Secretary, so that all requirements placed upon an operation are consistent and uniform.

VIII: Resolution of Conflict

A. Every effort will be made to resolve errors, omissions and conflicts on data and data analysis at the State and field level.

B. Areas of disagreement between the State and the Department shall be referred to the Governor and the Secretary for resolution.

Credits
[47 FR 44217, Oct. 6, 1982]

AUTHORITY: 30 U.S.C. 1201 et seq.

Current through March 7, 2019; 84 FR 8277.

End of Document

Add. 21

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.9

§ 1502.9 Draft, final, and supplemental statements.

Currentness

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

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(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Notes of Decisions (609)

Current through March 7, 2019; 84 FR 8277.

End of Document

80 FR 18598-02, 2015 WL 1522086(F.R.)
NOTICES
DEPARTMENT OF AGRICULTURE
Forest Service

Roadless Area Conservation; National Forest System Lands in Colorado

Tuesday, April 7, 2015

AGENCY: Forest Service, USDA.

***18598** ACTION: Notice of intent to prepare a supplemental environmental impact statement.

SUMMARY: The U.S. Department of Agriculture is initiating a supplemental environmental impact statement (SEIS) to propose reinstatement of the North Fork Coal Mining Area exception of the Colorado Roadless Rule. The exception would allow for temporary road construction for coal exploration and/or coal-related surface activities in a 19,100-acre area defined as the North Fork Coal Mining Area. The Forest Service will use the SEIS to address specific deficiencies identified by the District Court of Colorado in High Country Conservation Advocates v. ***18599** United States Forest Service (D. Colo. June 27, 2014).
DATES: Comments must be received in writing by May 22, 2015.

ADDRESSES: Comments may be submitted electronically at https://cara.ecosystem-management.org/Public/CommentInput?Project =46470. In addition written comments can be submitted via hard-copy mail to: Colorado Roadless Rule, 740 Simms Street, Golden, CO 80401.
All comments, including names and addresses, are placed in the record and are available for public inspection and copying.

FOR FURTHER INFORMATION CONTACT: Ken Tu at 303-275-5156. Individuals using telecommunication devices for the deaf (TDD) may call the Federal Information Relay Services at 1-800-877-8339 between 8 a.m. and 8 p.m. Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: On July 3, 2012 (77 FR 39576), the U.S. Department of Agriculture promulgated the Colorado Roadless Rule, a state-specific regulation for management of Colorado Roadless Areas. This Rule addressed State-specific concerns while conserving roadless area characteristics. One State-specific concern was to avoid foreclosing exploration and development of coal resources on the Grand Mesa, Uncompahgre, and Gunnison (GMUG) National Forests. The Colorado Roadless Rule addressed this by defining a 19,100-acre area as the North Fork Coal Mining Area, and developing an exception that allows temporary road construction for coal-related activities within that defined area.
In July 2013, High Country Conservation Advocates, WildEarth Guardians, and Sierra Club challenged the Forest Service's decision to consent to the Bureau of Land Management (BLM) modifying two existing coal leases, the BLM's companion decision to modify the leases, BLM's authorization of an exploration plan in the lease modification areas, and the North Fork Coal Mining Area exception of the Colorado Roadless Rule. In June 2014, the District Court of Colorado found the environmental documents supporting the four decisions to be in violation of the National Environmental Policy Act (NEPA) due to analysis deficiencies. In September 2014, the District Court of Colorado vacated the lease modifications, the exploration plan, and the North Fork Coal Mining Area exception of the Colorado Roadless Rule (36 CFR 294.43(c)(1)(ix)).

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This supplemental NEPA process will only address the Colorado Roadless Rule. The lease modifications and exploration plan authorization will be addressed in future environmental analyses, if needed.

Purpose and Need

The purpose and need for this supplemental EIS is to provide management direction for conserving roadless characteristics within the area while addressing the State interest in not foreclosing exploration and development of the coal resources in the North Fork Coal Mining Area.

Proposed Action

The proposed action for the Colorado Roadless Rule supplemental is to reinstate the North Fork Coal Mining Area exception as written in 36 CFR 294.43(c)(1)(ix). In addition, the Forest Service is proposing to administratively correct the North Fork Coal Mining Area boundary to remedy clerical errors.

Alternative to the Proposed Action

The other alternative being considered is the no-action alternative, which is the continuation of current management following the District Court ruling to vacate the North Fork Coal Mining Area exception. The Colorado Roadless Rule contains a severability clause (36 CFR 294.48(f)), which allows the rest of the Rule to remain in effect. Therefore, the District Court of Colorado's ruling only changed management of Colorado Roadless Areas in the North Fork Coal Mining Area. Currently, the North Fork Coal Mining Area is being managed the same as other non-upper tier Colorado Roadless Areas. Valid existing coal leases would operate according the terms of their leases.

Cooperating Agencies

The Colorado Department of Natural Resources and the BLM will participate as cooperating agencies in the preparation of the SEIS.

Responsible Official

The Responsible Official for the rulemaking and SEIS is the Secretary of Agriculture or his designee.

Decision To Be Made

The Responsible Official will determine whether to reinstate the North Fork Coal Mining Area exception, or continue to manage the area without the exception. In addition, the Forest Service will determine if corrections to the North Fork Coal Mining Area boundary should be made to adjust for clerical errors.

Scoping Process

The Forest Service is seeking public comments for 45 days from the publication date of this notice. Comments should be limited to issues related to the proposed action, which is limited only to reinstating the North Fork Coal Mining Area exception of the Colorado Roadless Rule. The Forest Service is not seeking comments on the other portions of the Colorado Roadless Rule, roadless area boundary modifications, or other roadless areas in Colorado.

Due to the extensive public participation process that occurred with the development of the Colorado Roadless Rule, no public meetings are planned for this 45 day scoping effort. However, public meetings may be held in Denver and Paonia, Colorado after the release of the Supplemental Draft Environmental Impact Statement (SDEIS) and proposed rule.

Estimated Timeline
The SDEIS and proposed rule is estimated to be released in early fall 2015. The Supplemental Final EIS is estimated spring 2016.

Brian Ferebee,

Deputy Regional Forester, Rocky Mountain Region.

[FR Doc. 2015-07886 Filed 4-6-15; 8:45 am]

BILLING CODE CODE 3410-11-P