IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-1920-RBJ

WILDEARTH GUARDIANS, *et al*.,

Petitioners,

v.

DAVID L. BERNHARDT, in his official capacity as U.S. Secretary of the Interior; *et al*.,

Federal Respondents.

CONSERVATION GROUPS' OPENING BRIEF ON THE MERITS

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GLOSSARY

BLM	Bureau of Land Management
CO_2e	Carbon Dioxide Equivalent
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
MLA	Mineral Leasing Act
MSHA	Mine Safety and Health Administration
NEPA	National Environmental Policy Act
OSM	Office of Surface Mining Reclamation and Enforcement
ROD	Record of Decision
SMCRA	Surface Mining Control and Reclamation Act
SFEIS	Supplemental Final Environmental Impact Statement

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Exhibit #	**Description**
Exhibit 1	Declaration of Jeremy Nichols (July 2019)
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INTRODUCTION

WildEarth Guardians, High Country Conservation Advocates, Center for Biological Diversity, Sierra Club, and Wilderness Workshop (collectively "Conservation Groups") challenge the U.S Office of Surface Mining Reclamation and Enforcement's and its officials' (OSM's)[1] decisions to approve an expansion of the underground West Elk Coal Mine in western Colorado. OSM's approval of Arch Coal's (Arch's) Mining Plan allows Arch to bulldoze up to 8.4 miles of new roads, construct up to 43 methane drainage wells, and mine 17.6 million tons of coal from within the Sunset Roadless Area on National Forest lands and on adjacent private lands. The coal mining and related construction activities will degrade the scenic beauty, wildlife habitat, and largely undeveloped nature of these cherished public lands. Burning the 17.6 million tons of coal and venting the mine's methane will release more than 57 million tons of greenhouse gases, exacerbating the climate crisis. U.S. Dep't of Agric., Supplemental Final Environmental Impact Statement, Federal Coal Lease Modifications COC-1362 & COC-67232 (including on-lease exploration plan) (Aug. 2017) (Leasing SFEIS) (AR 000320, 000322). Conservation Groups have long fought to prevent this environmental degradation. In 2014, this Court vacated three Forest Service and Bureau of Land Management (BLM) approvals related to the expansion of the mine based on violations of the National Environmental Policy Act (NEPA), and Conservation Groups' challenge to the subsequently revised environmental analyses prepared by those agencies (the Leasing SFEIS and a related review of a Colorado Roadless Rule Exception) is pending before the Tenth Circuit Court of Appeals.

[1] Federal Defendants are collectively referred to as OSM throughout this brief.

In approving the Mining Plan, OSM violated NEPA for three reasons. First, OSM failed to consider an alternative that would require Arch to greatly reduce the Mine's direct greenhouse gas emissions by flaring its methane pollution as a condition of mining publicly-owned coal beneath publicly-owned lands. The West Elk Mine has been for years Colorado's largest industrial source of methane pollution, but to date no federal regulator has ever considered in detail an alternative that would require the mine to mitigate the harm caused by this pollution. In approving the Mining Plan, OSM performed *no new* NEPA analysis whatsoever, but instead simply adopted by reference the existing Supplemental Environmental Impact Statement prepared by the U.S. Forest Service and BLM for the earlier lease modification. Leasing SFEIS (AR 000188–001231). *See infra* Tables 1 and 2 on p. 11–12.

NEPA requires federal agencies to consider "all reasonable alternatives" to their proposed actions. 40 C.F.R. § 1502.14. At the lease modification stage, BLM and the Forest Service deferred consideration of a methane flaring alternative, explaining that flaring was not considered in detail "because it, like all other methane mitigation measures, requires detailed engineering and economic considerations that would occur later in the process." Forest Service Record of Decision (ROD) (AR 003390). The Forest Service's decision to decline to consider a mandatory methane flaring alternative at the leasing stage assumed that OSM would have the opportunity to analyze methane mitigation alternatives, including flaring, at the subsequent mining plan stage when it had a mine plan or ventilation plan in hand. However, OSM nonetheless faied to analyze a methane flaring alternative. Instead, OSM erroneously asserted that BLM and the Forest Service concluded flaring was technically or economically infeasible. On the contrary, in the 2017 Leasing SFEIS, BLM and the Forest Service stated:

> We do not speculate whether [flaring] is infeasible or uneconomical, leasing is just not the appropriate time to address potential permitting actions that relate to in-mine safety for which no *mine plan* or ventilation plan has been prepared.

Leasing SFEIS (AR 001180) (emphasis added).

Approval of the Mining Plan represents the last step in federal agency reviews before mining can begin; it is the end of the road, the last chance for OSM or any other federal agency to consider a mandatory flaring alternative before mining takes place. OSM's approval of the Mining Plan without considering this reasonable alternative violated NEPA.

Second, OSM violated NEPA by failing to take a hard look at cumulative impacts to climate from expanding the West Elk mine in the context of other OSM and Department of Interior activities that collectively contribute to climate change. In adopting the Forest Service's Leasing SFEIS without further analysis, OSM relied on analysis of direct and indirect greenhouse gas emissions from the West Elk expansion in isolation that failed to address other past, present, and future emission-generating activities, including pending and recently approved federal coal mining proposals, as required by NEPA.

Third, OSM failed to take a hard look at direct impacts to water resources from mining activities, as required by NEPA. Although OSM identified previously-unknown perennial springs and streams within the mine expansion area, OSM downplayed this important new information and failed to meaningfully assess the risk that such critical water resources could be permanently dewatered by mining activities. Moreover, OSM completely ignored potential indirect impacts to wildlife and fish that could result if these springs lose flow or dry up.

For the reasons discussed below, Conservation Groups request that this court vacate OSM's approval of the West Elk Mining Plan.

LEGAL BACKGROUND

I. The Mineral Leasing Act and Surface Mining Reclamation and Control Act

Under the Mineral Leasing Act (MLA), the Secretary of the Interior has two primary responsibilities regarding the disposition of federally owned coal. First, the Secretary is authorized to lease federal coal resources, where appropriate. *See* 30 U.S.C. §§ 181 and 201. BLM, an agency within the Department of the Interior, is largely responsible for implementing the Secretary's coal leasing responsibilities.

The Secretary of the Interior's second responsibility is to authorize, where appropriate, the mining of federally-owned coal through approval of a mining plan.[2] The MLA sets forth the Secretary's authority to issue a mining plan, requiring that before any entity can take action on a leasehold that "might cause a significant disturbance of the environment," the operator must submit an operation and reclamation plan to the Secretary of the Interior for approval. 30 U.S.C. § 207(c). Referred to as a "mining plan" by the Surface Mining Control and Reclamation Act (SMCRA) and its implementing regulations, the Secretary "shall approve or disapprove the [mining] plan or require that it be modified." 30 U.S.C. § 1273(c); 30 C.F.R. § 746.14. By delegation, the Assistant Secretary of the Interior for Land and Minerals Management must approve the mining plan before any mining operations may commence on "lands containing leased Federal coal." 30 C.F.R. § 746.11(a).

Among other requirements, a mining plan must, at a minimum, assure compliance with applicable requirements of federal laws, regulations, and executive orders, and be based on

[2] In addition to receiving a Mining Plan authorization, underground mines such as West Elk must obtain a ventilation plan from the Mine Safety Heath Administration (MSHA) to ensure safe underground working conditions for miners. MSHA's ventilation plan review occurs alongside OSM's Mining Plan review. Leasing SFEIS (AR 000269).

information prepared in compliance with NEPA. *See* 30 C.F.R. § 746.13. A legally compliant mining plan is a prerequisite to an entity's ability to mine leased federal coal. 30 C.F.R. § 746.11(a). To this end, a mining plan is "binding on any person conducting mining under the approved mining plan." 30 C.F.R. § 746.17(b).

In addition to an approved mining plan, SMCRA requires that either the Secretary or a federally-delegated state surface mining agency approve a surface mining permit application and reclamation plan (SMCRA permit) before an entity can commence mining. *See* 30 U.S.C. § 1256(a). The SMCRA permit governs surface disturbances from underground coal mining operations. Congress authorized the Secretary to delegate administrative and enforcement of SMCRA to states that have a federally-approved surface mining program. 30 U.S.C. § 1273(c). Interior has delegated SMCRA administration and enforcement authority to the State of Colorado. 30 C.F.R. § 903.30.

However, Congress has expressly prohibited the Secretary of the Interior from delegating to states the duty to approve, disapprove, or modify mining plans for federally-owned coal. *See* 30 U.S.C. § 1273(c); 30 C.F.R. § 745.13(i). SMCRA also prohibits the Secretary from delegating to states authority to comply with NEPA and other federal laws and regulations (other than SMCRA) with regard to the regulation of federally-owned coal resources. 30 C.F.R. § 745.13(b).

Although the Secretary is charged with approving, disapproving, or modifying a mining plan, OSM is charged with "prepar[ing] and submit[ting] to the Secretary a decision document recommending approval, disapproval or conditional approval of the mining plan." 30 C.F.R. § 746.13. Thus, OSM plays a critical role in adequately informing the Secretary.

II. The National Environmental Policy Act

Congress enacted NEPA, 42 U.S.C. § 4321 *et seq*., to, among other things, "encourage productive and enjoyable harmony between man and his environment" and to promote government efforts "that will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. NEPA requires that federal agencies analyze and disclose to the public the environmental impacts of their actions and evaluate all reasonable alternatives that would lessen or avoid those impacts. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.14.[3] Agencies shall "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E).

To fulfill its mandates, NEPA requires federal agencies to prepare an environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The EIS must describe "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii). NEPA thus requires a "hard look at the environmental consequences" of a proposed action. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal quotation omitted). An EIS must "provide [a] full and fair discussion of significant environmental impacts" associated with a federal decision and "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. The alternatives analysis is the "heart" of the NEPA process. 40 C.F.R. § 1502.14.

[3] The Council on Environmental Quality promulgates NEPA regulations that apply to all federal agencies and are set out at 40 C.F.R. 1500.1 *et seq.*

The Department of the Interior's own NEPA regulations allow agencies such as OSM to adopt pre-existing NEPA analyses, but require the agency to determine "with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives." 43 C.F.R. § 46.120(c). Such supporting documentation "must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects." *Id*.

FACTUAL BACKGROUND

I. The Sunset Roadless Area

The Sunset Roadless Area is 5,800 acres of National Forest land that hugs the west flank of 12,700-foot Mount Gunnison and the West Elk Wilderness in northwestern Gunnison County, Colorado. Located in the upper North Fork Valley, an area of "beautiful scenery, abundant wildlife, and outstanding recreational opportunities," *High Country Conservation Advocates v. U.S. Forest Serv*. (*High Country I*), 52 F. Supp. 3d 1174, 1181 (D. Colo. 2014), the Sunset Roadless Area is characterized by wide swaths of aspen groves and mixed conifer forest; wildflowers, meadows, natural springs, headwater streams, and beaver ponds are also found here.[4] Undisturbed until coal exploration activities began in late 2018, these habitats support numerous different wildlife species, from elk, black bear, and the imperiled Canada lynx, to

[4] Declaration of Jeremy Nichols (Nichols Dec.) (Ex. 1) at ¶ 10–11, 13; Declaration of Allison Melton (Melton Dec.) (Ex. 2) at ¶¶ 15–16, 19, 21, 22–24, 33; Declaration of Matt Reed (Reed Dec.) (Ex. 3) at ¶¶ 5-10; Declaration of Peter Hart (Hart Dec.) (Ex. 4) at ¶ 7-9,11–13, 15

chorus frogs and snakes.[5] Visitors may delight in stunning views of Mount Gunnison, Mount Lamborn, and the Ragged Mountains while enjoying a quiet hike in the relatively intact forest.[6]

Operating the underground mine, however, requires substantial above-ground construction, and the Mining Plan challenged here authorizes substantial surface impacts within the Sunset Roadless Area. OSM ROD (AR 000035). Expanding the West Elk Mine into the Sunset Roadless Area will result in a spiderwebbed network of bulldozed roads, flattened and clear cut forest for drilling pads, and methane drainage wells that will vent methane, a powerful greenhouse gas, directly into the atmosphere. *Id.*[7]

With the Department of the Interior's recent approval of a Mining Plan modification for the West Elk Mine (Federal Coal Leases COC-162, COC-67232), Arch is now poised to expand its coal mining operations into the Sunset Roadless Area, building miles of roads and dozens of drainage well pads across this relatively-undisturbed landscape at significant environmental cost. *Id.* While exploration activities since issuance of the lease for the mine expansion area have partially degraded the natural character of some of the area, these existing impacts are a small fraction of what the Mining Plan authorizes. Implementing the Mining Plan will involve construction of about 8.4 miles of new roads, fragmenting important wildlife habitat, and entail the installation of 43 methane drainage wells, mostly within the Sunset Roadless Area, releasing

[5] Nichols Dec. (Ex. 1) at ¶ 11, 13; Melton Dec. (Ex. 2) at ¶¶ 21–22, 33; Reed Dec. (Ex. 3) at ¶ 6–7, 9; Hart Dec. (Ex. 4) at ¶ 15, 18. The area is treasured by hunters and hikers alike for its remoteness and beauty. Nichols Dec. (Ex. 1) at ¶¶ 10, 13–14, 16); Melton Dec. (Ex. 2) at ¶¶ 15, 16, 19, 24; Reed Dec. (Ex. 3) at ¶¶ 5, 14, 16, 18; Hart Dec. (Ex. 4) at ¶ 16.

[6] Nichols Dec. (Ex. 1) at ¶ 10, 14 (and attached photos); Melton Dec. (Ex. 2) at ¶¶ 13, 21, 24; Reed Dec. (Ex. 3) at ¶¶8–9; Hart Dec. (Ex. 4) at ¶ 14.

[7] The West Elk Mine, like other underground coal mines, must remove methane from active mining areas in order to protect the safety of coal miners. At West Elk, much of this methane is removed and vented directly into the atmosphere by methane drainage wells, which are typically drilled every 750 – 1,000 feet. Leasing SFEIS (AR 000294).

methane and other pollutants that degrade local and regional air quality and the global climate. *Id.* Mining will also cause substantial land subsidence over a large area, potentially dewatering perennial headwater springs that are critical resources in this semi-arid region. Leasing SFEIS (AR 000439); NEPA Adequacy Review Form (AR 000043–44).

II. Administrative Procedural History of the West Elk Mine Expansion

A. Leasing Approvals

For years, this forest has been threatened by a proposed expansion of the West Elk Mine, owned by the nation's second largest coal company, Arch Coal.[8] Since 2009, Arch has been seeking to expand the mine's underground operations beneath the Sunset Roadless Area. Leasing SFEIS (AR 000212). In 2012 and 2013, the Forest Service and BLM issued a suite of decisions approving an expansion that would have led to the construction of more than 6 miles of roads and nearly 50 drilling pads within a 1,700-acre area at the heart of the Sunset Roadless Area, similar to the mine expansion area approved under the Mining Plan challenged here. *High Country I*, 52 F.Supp. 3d at 1184. First, in 2012, the Forest Service adopted the Colorado Roadless Rule, which included a North Fork Coal Mining Area "exception" allowing temporary road construction for coal mining in the Sunset Roadless Area and other roadless lands. 77 Fed. Reg. 39,576, 39,576 (July 3, 2012) (Colorado Roadless Rule Exception). Second, the Forest Service officially consented to the Lease Modifications in 2012, paving the way for BLM to

[8] Reportedly, Arch has recently entered into a joint venture with the nation's largest coal company, Peabody Coal, that is planned to take ownership and control of the West Elk Mine; however, Conservation Groups understand that this joint venture has not been finalized or received necessary regulatory approval, so Arch's subsidiary Mountain Coal Company remains the sole owner and operator of the West Elk Mine. https://www.peabodyenergy.com/Home/Company-News-1038 (last visited Aug. 18, 2019).

approve lease modifications on December 27, 2012. *High Country I*, 52 F. Supp. 3d at 1184. Third, BLM approved a coal exploration plan in late June 2013, with the purpose of allowing about six miles of road and multiple drilling pads to be constructed within the Sunset Roadless Area. *Id*. at 1185.

In 2014, however, this court stopped this threatened destruction by vacating the federal agencies' decisions, which several of the current Petitioners challenged. *High Country Conservation Advocates v. U.S. Forest Serv.* (*High Country II*), 67 F. Supp. 3d 1262, 1266–67 (D. Colo. 2014). This court held that the Forest Service and BLM violated the National Environmental Policy Act (NEPA) in their environmental review by turning a blind eye to the project's huge climate costs while carefully accounting for the alleged economic benefits of the expansion, an approach that subverted the law's mandate that agencies take a "hard look" at environmental impacts. *High Country I,* 52 F. Supp. 3d. at 1195–97.

In 2015, the Forest Service announced its intent to consider re-imposing the coal mine exception to the Colorado Roadless Rule and to prepare supplemental environmental analyses discussing the impacts of that proposal. 80 Fed. Reg. 18,598 (Apr. 7, 2015). After conducting new, still-flawed NEPA analysis, the Forest Service and BLM made a series of decisions that set the stage for Arch to move forward with the lease expansion, as shown in the following Table 1.

Table 1. Timetable of Federal Actions for 2017 Lease Modifications Approval.

Date	Agency Decision	Citation
April 17, 2017	Effective date of Forest Service reinstatement of North Fork area coal mine exception to Colorado Roadless Rule (Colorado Roadless Rule Exception).	81 Fed. Reg. 91,811 (Dec. 19, 2016); 82 Fed. Reg. 9,973 (Feb. 9, 2017).
Sept. 7, 2017	Forest Service (with BLM as cooperator) issues Leasing SFEIS and draft Record of Decision to approve modification of two coal leases and coal exploration plan at West Elk.	AR 000188–001231.
Dec. 11, 2017	Forest Service consents to the modification of the two coal leases at West Elk.	AR 003356, 003375, 000301 (tbl. 3-1).
Dec. 15, 2017	Department of the Interior Deputy Assistant Secretary for Land and Minerals Management issues a Record of Decision approving the lease modifications and coal exploration plan for West Elk (Federal leases COC-1362 and COC-67232).	AR 000017, 000294.

On December 15, 2017, Conservation Groups brought a legal challenge to these new Forest Service and BLM actions, which opened the Sunset Roadless Area to limited road-building for West Elk's coal exploration activities. Judge Brimmer upheld the agency decisions. *High Country Conservation Advocates v. U.S. Forest Serv*. 333 F. Supp. 3d 1107 (D. Colo. 2018) (*High Country III*). The district court's decision is currently on appeal. *High Country Conservation Advocates v. U.S. Forest Serv.,* No. 18-1374 (10th Circuit appeal filed Sept. 11, 2018).

B. OSM's Approval of the Mining Plan

Following the 2017 issuance of the lease modifications, Arch submitted a Permit Application Package for the West Elk Mine expansion to the state permitting agency, the Colorado Division of Reclamation, Mining, and Safety. The state agency approved Permit Revision No. 15 on September 4, 2018, effective on November 15, 2018. OSM Mining Plan

Decision Document (AR 004354). OSM and its officials then made a series of decisions to approve the Mining Plan, as shown in the following Table 2.

Table 2. Timetable of Federal Actions for 2019 Mining Plan Approval.

Date	Agency Decision	Citation
Mar. 12, 2019	OSM Western Regional Director issues memorandum recommending approval of the Mining Plan and signs Record of Decision adopting Leasing SFEIS.	AR 000005.
Mar. 15, 2019	OSM issues Federal Register Notice announcing its intent to adopt the Leasing SFEIS for the Mining Plan modification.	84 Fed. Reg. 9554; AR 004354.
On or about Mar. 15, 2019	OSM completes NEPA Adequacy Review Form, which found the Mining Plan action to be "substantially similar" to the Leasing Modifications analyzed in the Leasing SFEIS and concluded that "the environmental analysis completed in the [Leasing Modifications] SFEIS is adequate."	AR 000038–44.
On or about Mar. 15, 2019	OSM Acting Director issues memorandum to Assistant Secretary Land and Minerals Management recommending approval of the Mining Plan.	AR 000004.
April 19, 2019	Assistant Secretary Land and Minerals Management signs the formal Mining Plan Approval.	AR 000001–3.

In approving the Mining Plan, OSM provided no new environmental analysis of the updated hydrologic information, or consideration of the cumulative climate impacts of recently-approved federal coal projects. Instead, the agency's NEPA Adequacy Review Form simply listed the NEPA adequacy criteria and concluded the criterion were met. NEPA Adequacy Review Form (AR 000041–44). Although OSM did not release draft documents for public review or hold a formal public comment period,[9] on June 1, 2018, Conservation Groups provided

[9] OSM's standard practice before formally recommending approval of a mining plan includes multiple public comment opportunities, including the release of a draft EA or draft EIS for public comment. *See, e.g.*, OSM Record of Decision, Rosebud Mine Area F Federal Mining Plan at 8, 26 (June 2019), *available at*: https://www.wrcc.osmre.gov/initiatives/westernEnergy/documents/WesternEnergy_Area_F_EIS_ROD.pdf (attached as Ex. 5); OSM, Notice of Public Review and Comment Period Extension for the Spring Creek Mine LBA1, Environmental Assessment (July 7, 2016), available at:

OSM with an unsolicited comment letter based upon their general understanding of potential impacts under the Mining Plan. Conservation Groups' Letter to OSM (AR 003316). However, Conservation Groups and the public at large were kept in the dark about OSM's review process, including the agency's identification of previously unknown perennial springs potentially impacted by mining activities.

STANDARD OF REVIEW

The Court's review of the merits of the NEPA claims is governed by the Administrative Procedure Act (APA). *Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006). Under the APA, courts must invalidate actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To survive scrutiny under this standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). An action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an

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https://www.wrcc.osmre.gov/initiatives/SpringcreekMineLBA1/documents/publicNotice0716.pdf. (attached as Ex. 6); OSM Public Notice – Centralia Mine (attached as Ex. 7), available at: https://www.wrcc.osmre.gov/initiatives/centraliaMine/documents/042619-Centralia_Mine_Public_Notice.pdf.

While OSM's Spring Creek, Rosebud, and Centralia coal mine documents are not included in OSM's Administrative Record, they are public records available on a federal government website of which this court may take judicial notice. *See* Fed. R. Evid. 201(b); *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 702 n.22 (10th Cir. 2009) (taking judicial notice of studies and minutes found on federal and State websites and observing, "It is not uncommon for courts to take judicial notice of factual information found on the world wide web") (quotations omitted).

important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* OSM violated NEPA by failing to meet this standard.

STANDING

Conservation Groups have standing to bring the claims pressed here. Article III standing requires "1) 'an injury in fact' that is 2) fairly traceable to the challenged action and 3) likely to be redressed by judicial intervention." *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1264-65 (10th Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Conservation Groups meet each part of this test, and this Court has twice concluded Conservation Groups had standing to challenge federal agency approvals related to this very mine expansion. *High Country I*, 52 F. Supp. 3d. at 1186–87 (citing *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1230–32 (10th Cir. 2017)); *High Country III*, 333 F. Supp. 3d at 1117).[10]

To establish injury-in-fact from inadequate NEPA analysis, "a litigant must show: (1) that in making its decision without following the NEPA's procedures, the agency created an increased risk of actual, threatened or imminent environmental harm; and (2) that this increased risk of environmental harm injures its concrete interest." *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1265 (10th Cir. 2002); *see also Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996). The attached declarations of Mr. Nichols, Mr. Reed, Ms. Melton, and Mr. Hart (Exs. 1–4) demonstrate that each plaintiff group has members who: use and enjoy the

[10] Additionally, Conservation Groups meet the requirements for organizational standing because their members have standing, the claims are germane to their organizational purposes, and participation by individual members is not required to secure the relief sought. *Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 452, 447 n.3 (10th Cir. 1996); *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

lands within the mine expansion area impacted by the Mining Plan; assert that their recreational, aesthetic, and health interests will be harmed by bulldozing for road and pad clearing, methane emissions from the mine, and mining-induced land subsidence or collapse; and have concrete plans to return to the area. Ex. 1, Nichols Dec. ¶¶ 3, 5–7, 10, 12-17, 24-31; Ex. 2, Melton Dec. ¶¶ 1-3, 15-22, 24-35; Ex. 3, Reed Dec. ¶¶ 1, 5-11, 13, 14, 16-18; Ex. 4, Hart Dec. ¶¶ 1, 8-10, 12–15, 17-18, 22.[11]

OSM's "*uninformed* decisionmaking" in violation of NEPA increases the risk of those harms. *Rio Hondo*, 102 F.3d at 452; *Sierra Club*, 287 F.3d at 1265 (holding a plaintiff "need only show that, in making its decision without following the NEPA . . . procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm."). Finally, a favorable ruling is likely to redress the harm to Conservation Groups' members. Conservation Groups seek to vacate OSM's decision that increases the risk of road building, tree cutting, coal, mining, and methane venting within the Sunset Roadless Area. Conservation Groups therefore satisfy each Article III standing requirement.

ARGUMENT

First, OSM violated NEPA by refusing to consider a reasonable alternative, put forward by Conservation Groups, that would require Arch to flare its methane emissions as a condition of mining publicly-owned coal. Conservation Groups June 2018 Letter to OSM (AR003324–25). Record evidence shows flaring is highly effective at reducing the climate impacts of methane emissions and that flaring could be accomplished safely and economically using existing

[11] The Declarations of Mr. Nichols, Ms. Melton, and Mr. Reed were previously submitted in support of Plaintiffs withdrawn motion for preliminary injunction. Mr. Hart's Declaration has been updated to reflect his latest plan to return to the Sunset Roadless Area.

technology. Raven Ridge Report (AR 003276).[12] OSM's refusal to consider a mandatory flaring alternative is the latest dodge in a line of federal agency decisions related to the mine expansion, each of which punted evaluation of a mandatory flaring alternative to a different federal agency. Now that the agencies have reached the end of federal approvals, OSM points the finger back to the Forest Service and BLM, erroneously claiming those agencies concluded flaring was infeasible. Here, at the final stage of federal agency approvals for new coal mining, OSM refused to analyze a methane flaring alternative, despite the availability of the mining and ventilation plans that the Forest Service and BLM previously maintained were needed to analyze such an alternative.

Second, OSM failed to take a hard look at the cumulative impacts to climate from OSM's approval of the West Elk Mine expansion, as NEPA requires. OSM evaluated only the greenhouse gas emissions from the West Elk expansion in isolation, but never considered the impacts of that pollution together with that of other past, present, and reasonably foreseeable future federal coal projects approved by OSM and the Department of Interior that will collectively contribute greenhouse gas pollution to the atmosphere and exacerbate the climate crisis. Accordingly, OSM failed to take the required hard look at the project's cumulative climate impacts.

Third, OSM failed to take a hard look at perennial springs and streams that may be dewatered by the expansion of mining at West Elk. Although the 2017 Leasing SFEIS included a

[12] As explained in Part I.B., Conservation Groups submitted a report, prepared by Raven Ridge Resources, Inc., to both the Forest Service and OSM. The Raven Ridge Report concludes that the West Elk Mine could feasibly flare the methane pollution from its methane drainage wells and could make a profit on the mitigation project in the very first year of operation. Raven Ridge Report (AR 003276).

finding that there were no perennial springs on the mine expansion site, OSM subsequently disclosed that the SFEIS was mistaken and identified such on-site springs. NEPA Adequacy Review Form (AR 000043–44). This disclosure specifically contradicts the underlying conclusion on which the prior analysis was based, *i.e.*, that mining would not impact perennial streams because none were present in the expansion area. Although OSM acknowledges that mining activities could potentially permanently dewater these important water resources, it failed to analyze any relevant factors to determine the severity of impacts, such as the likelihood, extent, or expected duration of dewatering, or the impact of dewatering on any wildlife that use or rely on these resources. *Id.* Instead of taking a hard look at the risk of such potential impacts to such springs – and the ecologies they support – OSM simply noted this new information as prompting a "minor edit and clarification" to the Leasing SFEIS without any additional NEPA review at the mining plan stage. *Id.*

I. OSM VIOLATED NEPA BY FAILING TO CONSIDER A MANDATORY FLARING ALTERNATIVE.

A. NEPA Requires Federal Agencies to Consider All Reasonable Alternatives.

NEPA requires agencies to "study, develop, and describe" reasonable alternatives to the agency's proposed action. 42 U.S.C. § 4332(2)(C)(iii), (2)(E). This alternatives analysis forms the "heart" of the NEPA process. 40 C.F.R. § 1502.14. To fulfill this mandate, federal agencies must "[r]igorously explore and objectively evaluate *all* reasonable alternatives." 40 C.F.R. § 1502.14(a) (emphasis added); *Richardson*, 565 F.3d at 708.

The Tenth Circuit uses two "guideposts" to evaluate whether a proposed alternative is reasonable: (1) whether the alternative "falls within the agency's statutory mandate," and (2) whether the alternative meets the purpose and need of the project. *Richardson*, 565 F.3d at

709. Additionally, the Tenth Circuit has recognized two exceptions under which an agency may decline to consider an otherwise reasonable alternative. First, an agency need not consider an alternative that it has in "good faith" found to be "too remote, speculative, or impractical or ineffective." *Id*. at 708 (quoting *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999)); *accord Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1172 (10th Cir. 2002). Second, an agency may refuse to consider an alternative that is not "significantly distinguishable from the alternatives already considered." *Richardson*, 565 F. 3d at 708–09 (citing *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004)). When an alternative meets the guideposts, and is not subject to the exceptions, an agency must consider it in detail as part of the NEPA process. *Id.* at 711.

B. Mandatory Methane Flaring Is a Reasonable Alternative.

The West Elk Mine is the largest industrial source of methane in Colorado. Conservation Groups Leasing EIS Comment Letter 13 tbl. 1 (July 24, 2017) (FSLeasingII-0038931) (based on EPA data). Flaring methane, as opposed to venting it directly into the atmosphere as OSM approved, would convert it to carbon dioxide and water, thus effectively reducing its global warming potency up to 87 percent. Leasing SFEIS (AR 000268). Flaring in this manner could entail using surface equipment to capture methane the Mine currently vents directly into the atmosphere via methane drainage wells; transporting the methane via pipe along existing roads and rights-of-way (which the Mine does in the winter with some of its methane to heat other parts of the Mine); and combusting the methane via a central, enclosed flare. Raven Ridge Report (AR 003286–87). Flaring technology is readily available – it is in use in other countries at active coal mines and at the inactive coal mine adjacent to West Elk – and in 2016 the State of Colorado concluded that a "properly engineered, manufactured, and operated flare with

redundant safety systems can fully address [safety] concerns." Colorado Energy Office, Methane Market Research Report (AR 003244–45).

OSM violated NEPA by refusing to consider a reasonable mine plan alternative that would require Arch Coal to flare the methane emitted from its drainage wells as a condition of mining publicly-owned coal from beneath publicly-owned lands. Although OSM asserted that methane flaring is "not technically or economically feasible," OSM ROD (AR 000035), that statement is arbitrary because the record does not support, and in fact contradicts, this conclusion. Conservation Groups submitted an expert report to the Forest Service, and later to OSM, prepared by Raven Ridge Resources, which assessed publicly-available data from the West Elk Mine and concluded that methane flaring at West Elk is both economically and technically feasible using technology now in use at the nearby inactive Elk Creek Coal Mine. Raven Ridge Report (AR 003276).[13] Based on West Elk's self-reported and publicly-available methane emissions data, Raven Ridge concluded that not only could the Mine safely flare methane using available technology, but the Mine could recoup 100 percent of its investment and make a profit within the first year of flaring operations. Raven Ridge Report (AR 003276). The Forest Service reviewed this report before issuing its decision to reinstate the Colorado Roadless Rule Exception and concluded that the report presented a "reasonable way to assess flaring as a mitigation method." Forest Service ROD (AR 003390). EPA has noted that mines in this part of Colorado are particularly well situated to evaluate methane flaring technology given the large amounts of methane released by mining in the area. EPA stated in comments on the Forest Service's Exception Draft EIS:

[13] OSM acknowledged receiving Conservation Groups' June 1, 2018 letter. OSM ROD (AR 000034–37).

> All coal mines in the North Fork Mining Area are well informed about methane capture systems, as they all deploy gas drainage systems to supplement their ventilation fans. In fact, representatives of West Elk Mine and Elk Creek Mines have given presentations describing their gas drainage and use activities at past EPA Coalbed methane Outreach Program (CMOP) events . . . .

EPA Exception Comment Letter (AR 004230). Thus, contrary to OSM's unsupported conclusion, record evidence shows that a methane flaring alternative is not "too remote, speculative, or impractical" to implement. *Richardson*, 565 F.3d at 708.

Conservation Groups' mandatory methane flaring alternative meets the standard for reasonable alternatives that require consideration under the Tenth Circuit's controlling framework. First, requiring flaring as a condition of mining is well within OSM's statutory mandate. *Id*. As OSM explained in its ROD, its review of mining plans includes making an assessment of proposed mining and "recommending approval, disapproval, or *approval with condition(s)*." OSM ROD (AR 000018) (citing 30 C.F.R. § 746) (emphasis added). Thus, although OSM decided to "recommend[] approval without conditions of the mining plan modification," *id.* at AR 000037, it certainly had the statutory authority to require flaring as a condition of approving Arch's Mining Plan.

Second, conditioning the mining of publicly-owned coal beneath publicly-owned lands on the permittee taking reasonable steps to mitigate the climate damage the mining imposes on the public is within the stated purpose and need of the project. *Richardson*, 565 F.3d at 708. OSM's ROD states that "the purpose of the Proposed Action is to evaluate the environmental effects of coal mining" and that the "need for this action is to provide [Arch] the opportunity to mine the Federal coal obtained" under the Leases. OSM ROD (AR 000019). Here, a mandatory flaring alternative meets these standards by allowing Arch to mine precisely the same amount of

coal as under the preferred alternative, while significantly reducing the direct climate harms the project will cause.

Additionally, neither of the Tenth Circuit's recognized exceptions excuse OSM from considering a mandatory flaring alternative. A mandatory methane flaring alternative is significantly distinguishable from the proposed action alternative. *Richardson*, 565 F.3d at 708–09. The West Elk Mine is the largest industrial source of methane in Colorado, (Conservation Groups Leasing EIS Comment Letter (FSLeasingII-0038931)), and flaring reduces the global warming influence of methane up to 87 percent (on a CO_2e basis). Leasing SFEIS (AR 000268). This proposal is thus readily distinguishable from both the no action alternative, considered by the Forest Service in the Leasing SFEIS, which would preclude mining altogether, and the preferred alternative, which does not require Arch to take any steps to mitigate the climate harm caused by its proposed mining. NEPA requires agencies to "provide legitimate consideration to alternatives that fall between the obvious extremes," *Dombeck*, 185 F.3dat 1175, and a mandatory flaring alternative does just that. "The existence of a viable but unexamined alternative renders an alternatives analysis, and the [NEPA review] which relies upon it, inadequate." *Diné Citizens Against Ruining our Env't v. Klein* (*Diné Citizens*), 747 F. Supp. 2d 1234, 1256 (D. Colo. 2010). Because the methane flaring alternative is within OSM's statutory mandate, meets the purpose and need for the project, is significantly distinguishable from the alternatives the SFEIS analyzed in detail, and is not too remote or speculative, OSM's refusal to consider this reasonable alternative was arbitrary. *Richardson*, 565 F.3d at 708–11.

C. OSM's Excuses for Not Considering a Mandatory Methane Flaring Alternative Lack Merit.

OSM's assertion that BLM and the Forest Service concluded methane flaring was infeasible is incorrect, contradicted by the record, and arbitrary. The records that the Forest Service and BLM developed for the leasing approvals do not conclude that flaring was either technically or economically infeasible. Leasing SFEIS (AR 000268–69); Forest Service ROD (AR 003390). Instead, the records show that each agency, at each step, considered flaring to be more appropriately considered at a later stage of the mine permitting process: at the Colorado Roadless Rule Exception stage, the Forest Service pointed to BLM's review at the leasing stage; at leasing, the Forest Service and BLM and pointed to OSM's review at the mining plan stage. Having reached the mining plan stage, OSM points back to BLM and the Forest Service and BLM. Now the shell game must end.

1. The Forest Service and BLM Did Not Conclude That Methane Flaring Was Either Technologically or Economically Impractical.

OSM's ROD asserts that the Leasing SFEIS "sufficiently addressed the alternative of methane flaring" and states that OSM "agree[s] with [the Forest Service] and the BLM's determination that this alternative is not technically or economically feasible (SFEIS Section 2.3.7.5)." OSM ROD (AR 000034–35). Indeed, OSM's entire analysis of the alternative can be found in a single paragraph. *Id.* at AR 000035.[14] But the record directly contradicts OSM's conclusion.

[14] As noted above in Part II.A, the adequacy of BLM's justification for not analyzing a methane flaring alternative at the leasing stage is currently on appeal at the Tenth Circuit, and rests largely on the validity of BLM's insistence that such an alternative would be considered by MSHA as part of the ventilation plan or OSM as part of the mining plan review challenged here. Thus, even if the Forest Service and BLM's excuses for not evaluating a mandatory flaring alternative

First, the Forest Service and BLM *did not* conclude that flaring was either technically or economically infeasible. Instead, in the Leasing FEIS, BLM and the Forest Service expressly made no such finding, stating: "*W*e *do not speculate whether [flaring] is infeasible or uneconomical*." Leasing SFEIS (AR001180) (emphasis added). In fact, section 2.3.7.5. of the SFEIS, which OSM explicitly relies on here, consists of three paragraphs generally describing a methane flaring alternative. Leasing SFEIS (AR 000268–69). Critically, *none of the three paragraphs state that methane flaring is technically or economically infeasible.* Indeed, each paragraph tends to indicate the opposite, noting the existence of commercially available flares (paragraph 1), flaring at active coal mines around the globe (paragraph 2), and MSHA's designated process to review coal mine flaring proposals in the U.S. (paragraph 3). *Id.*

Specifically, the first SFEIS paragraph notes that flaring converts methane to carbon dioxide, and thus reduces the global warming potential of the emissions by approximately 87 percent on a CO_2e basis. *Id.* at AR 000268.[15] The SFEIS further states that "[p]ortable methane flares are also commercially available," and notes that the mine would need to submit a fire prevention plan to the Forest Service if the Mine used methane flares. *Id.*

The second SFEIS paragraph notes that while no active U.S. coal mines use methane flares, they are already in use at active coal mines in the United Kingdom, Ukraine, Australia,

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in detail at the leasing stage were legally sufficient (which they were not), that would not justify OSM's refusal to consider a flaring alternative at the mining plan stage.

[15] Agencies use "carbon dioxide equivalents" or "CO_2e" to compare the warming influence of different greenhouse gases. Converting methane and other non-carbon dioxide greenhouse gases to CO_2e is common practice in NEPA documents and allows for a unified comparison of methane and carbon dioxide from federal projects. Under this method, carbon dioxide is assigned a value of 1, and methane between 28 and 36, based on a 100-year timeframe. Leasing SFEIS (AR 000307). When measured over a 20-year period, methane has a global warming potential of 87. Raven Ridge Report (AR 003285).

and South Africa. *Id.* Moreover, the SFEIS states that the "[methane drainage well] assumptions (percent methane content) used in the collection system analysis do not preclude the use of a centralized enclosed flare as a potential mitigation option." *Id.* The third paragraph states that "use of a flare would have to be proposed to and approved by [MSHA]" and notes that MSHA "has a process in place to analyze the safety aspects of any design within an application." *Id.* at AR 000269. Thus, nothing in the SFEIS section that OSM specifically cited in its ROD supports OSM's conclusions that the methane flaring alternative is technically or economically infeasible or that BLM and the Forest Service reached that conclusion.

The District Court's decision in *High Country III* confirms that the Forest Service and BLM did not foreclose future consideration of a methane flaring alternative on economic or technical grounds, but rather deferred such analysis based largely on OSM's opportunity to better consider a mandatory flaring alternative as it developed additional information in its Mining Plan review. Quoting the statements in the Forest Service's 2016 Leasing ROD, the District Court explained that its holding rested in large part on the Forest Service's determination that analysis of a methane flaring alternative was more appropriate at a later stage, not – as OSM claimed here – that such an alternative was either technically or economically infeasible:

> The Court finds that the Agencies' determination that, even if methane flaring can be shown to be economically feasible, detailed consideration of whether methane flaring should be used in the West Elk Mine would be more appropriate at a later date because it "requires detailed engineering and economic considerations" available at later stages in the process does not constitute a NEPA violation.

High Country III, 333 F. Supp. 3d at 1126. Because OSM has offered an explanation for its decision not to analyze a flaring alternative "that runs counter to the evidence before the agency," its Mining Plan approval is arbitrary. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

OSM mischaracterizes the Leasing SFEIS's assessment of methane flaring, and OSM's conclusion that flaring is not technically or economically feasible lacks support in the record. First, OSM notes that the "mine ventilation plan submitted" to the state by Arch "does not include information on how methane flaring would be technically feasible." OSM ROD (AR 000035). But OSM ignores the Raven Ridge Report, submitted to it by Conservation Groups, which demonstrated that methane flaring could be accomplished at West Elk using existing technology already in use in Colorado. Moreover, OSM does not suggest that MSHA concluded here that methane flaring would be infeasible from a technical standpoint—nor could it. As Arch stated in a 2009 report to BLM on methane mitigation opportunities, "it may be feasible to design and implement a safe flaring system." Leasing SFEIS (AR 000528, 000543). OSM cannot dodge its responsibility to review "all reasonable alternatives," 40 C.F.R. § 1502.14, as part of its Mining Plan review based on Arch's self-serving omission of economic feasibility analysis to a *different* agency as part of a ventilation plan process. Moreover, MSHA cannot unilaterally impose flaring as a condition of mining. *See Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406–07 (D.C. Cir. 1976) ("While the [ventilation] plan must also be approved . . . . even where the agency representative is adamant in his insistence that certain conditions be included, the operator retains the option to refuse to adopt the plan in the form required.").

Second, OSM arbitrarily misrepresents BLM's post-SFEIS summary relating to the economic feasibility of methane mitigation. Relying on a BLM summary of an Arch report on the economic feasibility of methane mitigation, OSM ROD (AR 000035),[16] OSM accepts Arch's self-serving definition of "economic feasibility," which required the company to make an

[16] Based on statements in OSM's ROD, it does not appear OSM ever reviewed Arch's analysis directly, but instead relied solely on BLM's summary of the document.

"internal rate of return" and "avoid sustaining an economic loss" on any flaring or other mitigation. *See* Leasing SFEIS (AR 000527–28, 000539) (attaching Arch's 2009 methane economic analysis). OSM effectively predetermined the non-feasibility of any methane mitigation alternative—no matter how inexpensive—by adopting Arch's arbitrary definition of "economically feasible." OSM ROD (AR 000035); BLM's Post-SFEIS Methane Review (AR 000046). Under Arch's skewed definition of "economic feasibility," the company would have to make a profit on any mitigation measure, otherwise the measure would be deemed uneconomic. Implementation of mitigation measures need not be profitable in order to be feasible, and OSM offers no support in NEPA, the NEPA regulations, or any case law for such a proposition. The 2009 report states that Mountain Coal Company's parent company, Arch Coal, "is a broadly diversified, multi-billion dollar corporation with substantial assets, a proven market track record, and established, long term revenue streams." Leasing SFEIS (AR 000539). OSM does not explain how such an important alternative – one designed to protect our planet from the ongoing climate crisis that presents an existential threat to humanity – can properly be considered "impractical" under these circumstances. OSM's failure to *even consider* a reasonable alternative that would require a company worth billions to simply mitigate *some* of the climate harms caused by its mining of publicly-owned coal beneath publicly-owned lands renders the decision arbitrary and capricious.

2. OSM's Improper Dodge Completes an Agency Shell Game That Avoids Consideration – by Any Agency – of a Reasonable Alternative.

The long-running agency shell game with respect to considering a mandatory methane flaring alternative started at the Colorado Roadless Rule Exception stage, continued during the leasing stage, and culminated with OSM's issuance of the Mining Plan. At the Colorado

Roadless Rule Exception stage, the Forest Service stated that it was not appropriate to address a mandatory flaring alternative at that time in part because "methane flaring is best considered *at the leasing stage* when there is more information on the specific minerals to be developed and the lands that would be impacted by a flaring operation." Colorado Roadless Rule Exception SFEIS (AR 004078) (emphasis added). But at the subsequent coal leasing stage, the Forest Service and BLM again kicked the can down the road, as explained in detail above. *Infra* Part I.C.1. In the Response to Comments included as part of their Leasing SFEIS, BLM and the Forest Service stated "[w]e do not speculate whether [flaring] is infeasible or uneconomical, *leasing* is just not the appropriate time to address potential permitting actions that related to in-mine safety for which no *mine plan* or ventilation plan has been prepared." Leasing SFEIS (AR 001180) (emphasis added). The agencies further stated that "[t]hese engineering designs *would* become part of the subsequent State or *OSM[] mine permitting processes* and MSHA ventilation plan process." Leasing SFEIS (AR 000264) (emphasis added). The Forest Service's Leasing ROD states that consideration of flaring "requires detailed engineering and economic considerations that *would occur later*." Forest Service ROD (AR 003390) (emphasis added). Now that OSM has reached that Mining Plan stage, however, it similarly refused to analyze flaring in detail, claiming that a flaring alternative has already been considered and conclusively rejected.

NEPA requires agencies to consider "all reasonable alternatives." 40 C.F.R. 1502.14. By refusing to consider a reasonable alternative, which meets both of the Tenth Circuit's guideposts and does not fit into any of the recognized exceptions, OSM violated this clear mandate. The existence of this "viable, but unexamined alternative" renders OSM's alternatives analysis legally "inadequate." *Diné Citizens*, 747 F. Supp. 2d at 1256.

II. OSM VIOLATED NEPA BY FAILING TO TAKE A HARD LOOK AT CUMULATIVE CLIMATE IMPACTS.

NEPA imposes "action-forcing procedures … requir[ing] that agencies take a hard look at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). These "environmental consequences" may be direct, indirect, or cumulative. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8. The "hard look" requirement ensures that the "agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec.,* 462 U.S. at 97. An agency's hard look examination "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Forest Guardians v. U.S. Fish & Wildlife Serv.,* 611 F.3d 692, 712 (10th Cir. 2010).

OSM failed to take a hard look at the cumulative impacts of expanding the West Elk Mine on climate. Cumulative impacts are the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* In the context of climate change, it is the incremental contribution of emissions across myriad sources that have, together, resulted in the current crisis, which is why courts have recognized that "[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1217 (9th Cir. 2008). NEPA's cumulative impacts requirement guards against "the tyranny of small decisions," *Kern v. BLM*, 284 F.3d 1062, 1078 (9th Cir.

2002), and the U.S. Supreme Court has held that "when several proposals . . . that will have cumulative or synergistic environmental impacts upon a region are pending concurrently before an agency, their environmental consequences must be considered together." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

The record demonstrates both the magnitude of the threat posed by climate change, and the importance that federal decisionmaking consider how a given project's impacts contribute to or otherwise amplify this threat. The Forest Service's Leasing SFEIS (explicitly adopted by OSM in its ROD) recognized the effects of greenhouse gas emissions on climate change:

> Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over time spans of decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, and sea level has risen. Each of the last three decades has been successively warmer at the Earth's surface than any preceding decade since 1850. In the Northern Hemisphere, 1983–2012 was likely the warmest 30-year period of the last 1400 years (medium confidence).

Leasing SFEIS (AR at 000313).

Moreover, the Leasing SFEIS acknowledged that the federal coal program is a major contributor to total U.S. greenhouse gas emissions, noting that "in 2015, Federal coal made up approximately 43% of the total [national] production." *Id*. at AR 000337. *See also Citizens for Clean Energy v. U.S. Dep't of the Interior*, 384 F. Supp. 3d 1264, 1280 (D. Mont. 2019) (noting Department of the Interior determination "that over forty percent of coal production in the United States came from federal land"). In 2016, the Department of the Interior concluded that life-cycle emissions from coal produced from public lands contributes about 10% of total U.S. greenhouse

gas emissions.[17] Yet neither the Leasing SFEIS nor OSM ever assessed the cumulative impacts of greenhouse gas emissions from the West Elk Mine expansion when added to other past, present, and reasonably foreseeable federal coal mining projects. Accordingly, OSM failed to take a hard look at cumulative climate impacts on a regional and national scale.

OSM cannot rely on the Leasing SFEIS for an analysis of the cumulative impacts of expanding coal mining at West Elk because the Leasing SFEIS did not include such analysis. AR 000337. Instead, the Leasing SFEIS calculated combustion emissions from West Elk coal *in isolation* as a percentage of U.S. and global total emissions, and compared West Elk coal production emissions *in isolation* to total coal combustion by U.S. power plants. *Id*.

Two recent cases highlight the critical distinction between assessing the impacts of an individual action in isolation versus taking into account other past, present, and future actions as required to assess the action's *cumulative* impacts. In *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019), plaintiffs brought a NEPA challenge to specific BLM oil and gas leasing decisions. The court held that BLM failed to take a "hard look" at greenhouse gas emissions from the challenged lease sales, distinguishing between individual project impacts and broader *cumulative* impacts. *Id.* at 85. As the court articulated: "Although BLM may determine that each lease sale individually has a de minimis impact on climate change, the agency must also consider the cumulative impact of GHG emissions generated by past, present, or reasonably foreseeable *BLM lease sales in the region and nation*." *Id*. at 77 (emphasis added). Accordingly, the court held that "to the extent other BLM actions in the region—such

[17] Bureau of Land Mgmt., *Notice of Intent To Prepare a Programmatic Environmental Impact Statement To Review the Federal Coal Program and To Conduct Public Scoping Meetings*, 81 Fed. Reg. 17,720, 17,724 (Mar. 30, 2016).

as other lease sales—are reasonably foreseeable when an EA is issued, BLM must discuss them as well." *Id*.

In 2018, the District Court of Montana similarly invalidated a U.S. State Department EIS for the Keystone XL pipeline because the EIS omitted any analysis of the cumulative climate impact of Keystone XL and another pipeline, the Alberta Clipper, that was undergoing State Department review at the same time. *Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 573 (D. Mont. 2018), *order amended and supplemented,* 369 F. Supp. 3d 1045 (D. Mont. 2018), and *appeal dismissed and remanded sub nom. Indigenous Envtl. Network v. United States Dep't of State*, No. 18-36068, 2019 WL 2542756 (9th Cir. June 6, 2019). The District Court held that the State Department's "error left out significant information from the climate analysis in the Department's possession," and that the Department thus "failed to paint a full picture of emissions" as required by NEPA. *Id.*

NEPA requires OSM to analyze and disclose the cumulative climate impacts of the West Elk Mine expansion when added to other reasonably foreseeable past, present, and future OSM coal mining approvals. Here, however, OSM failed to discuss *any* other OSM actions – past, present, or future – and never quantified the cumulative impact of expanding West Elk in light of the overall emissions from other federal coal mining approved by or pending before the Department of the Interior and OSM.[18] Instead, OSM adopted the SFEIS's analysis without

[18] OSM did not invite public comments as part of its Mining Plan review, but a partial list of federal coal mining projects recently approved and pending before OSM and the Department of the Interior at the time OSM issued its Mining Plan record of decision are listed in Conservation Groups' Petition For Review of Agency Action. AR 004277–79. These include, for example, OSM's August 2018 approval of a 28.5 million ton mine plan modification at the Bull Mountain Mine, and pending OSM reviews for a 98.6 million to expansion of the Caballo coal mine and a 58 million ton expansion of the Dry Fork mine in Wyoming, in addition to other BLM federal coal decisions.

conducting a cumulative analysis of climate impacts. OSM has never considered the *cumulative* effects on climate change resulting from the incremental impact of the West Elk expansion "when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. Despite a robust body of scientific information and data before the agency warning about climate disruption and identifying the federal coal program's role in driving coal production, greenhouse gas emissions, and climate change, the agency disclaimed responsibility and "failed to consider an important aspect of the problem" when it refused to take a hard look at cumulative climate change impacts in its decisions to authorize the expansion of the West Elk Mine. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

III. OSM VIOLATED NEPA BY FAILING TO TAKE A HARD LOOK AT MINING'S DIRECT AND INDIRECT IMPACTS TO WATER RESOURCES.

A. OSM Failed to Analyze Mining's Direct Impacts to Perennial Waters in the Mine Expansion Area.

OSM failed to take a hard look at the direct impacts of mining on perennial waters in the mine expansion area. Direct effects "are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a); *see also id.* § 1502.16(a) (recognizing agency consideration must include "any adverse environmental effects which cannot be avoided"); *Friends of the Earth v. U.S. Army Corps of Eng'rs,* 109 F. Supp. 2d 30, 38 (D.D.C. 2000) (chastising agency for failing to consider direct impacts of project implementation and thus failing to take a "hard look").

OSM violated NEPA's hard look requirement when it identified the presence of perennial waters in the project area and acknowledged these resources could be affected by coal mining, but then failed to analyze mining's impacts on these waters. In its NEPA Adequacy Review

Form, which OSM did not make available for public comment, the agency disclosed previously unidentified perennial springs in the project area that could be directly impacted by the Mine expansion. AR 000043-44 (NEPA Adequacy Review Form). OSM did not, however, analyze impacts to newly classified streams and seeps; instead, the agency merely characterized the presence of previously-unidentified resources as prompting only a "minor edit" to the SFEIS. *Id.* The record belies this assertion.

Based on its review of new hydrologic information in a 2016 Hydrology Report prepared by Arch consultants,[19] OSM concluded "it is likely that there are perennial springs" associated with South Prong Creek and Horse Creek within the Mine expansion area, and that South Prong and Horse Creeks themselves are perennial and intermittent streams, not ephemeral streams as identified in the SFEIS.[20] *Id*. OSM's new findings require a new analysis of impacts, not merely a re-naming of stream classifications. The Leasing SFEIS had concluded that "[t]here [were] no known perennial springs for the lease modification areas" and therefore did not analyze mining's impacts on these perennial water sources. AR 000364. That prior assessment was instead limited to the brief statement that "no discernible loss of water [from non-perennial springs] is anticipated" from the Mine expansion. Leasing SFEIS (AR000372). Once OSM identified that perennial waters were present within the Mine expansion area and that the SFEIS had misidentified these waters as ephemeral waters, OSM was required to analyze mining impacts to

[19] The complete citation for the "2016 Hydrology Report" is never provided in the NEPA Adequacy Review Form, but the reference appears to be to the following report: HydroGeo, Inc., Technical Memo: West Elk Mine Summary of Water Year 2016 Surface Water and Groundwater Quantity and Quality Date (June 2017) (AR 001490–1746).

[20] The West Elk expansion area sits at the headwaters of the North Fork of the Gunnison River. Leasing SFEIS (AR 000339). Largely feeding into Minnesota Creek, which flows into the North Fork near the Town of Paonia, the drainage area for the Mine expansion is generally located in an area of "little surface water." *Id*. at AR 000959.

perennial waters, which the Forest Service and BLM did not previously study in the Leasing SFEIS.

The reclassification of water resources is important in more than just name, as the record shows that underground mining can cause land subsidence that can permanently dewater perennial waters. NEPA Adequacy Review Form (AR 000043-44). OSM noted, without further analysis, that land subsidence resulting from Mine expansion may alter both above- and below-ground hydrology, including by dewatering perennial streams and natural springs. *Id*. OSM also noted that "elevated values" for sediment affecting groundwater quality were "possibly related to mining operations," *id*. at AR 000043, contradicting the Leasing SFEIS's prior attribution of water quality impacts solely to "higher spring runoff values." AR 000364. Although OSM disclosed the presence of perennial springs and streams in the Mine expansion area, and generally recognized that mining could directly impact perennial streams, the agency failed to take the essential next step of *analyzing the impacts* of mining on these water resources.

To comply with NEPA's hard look requirement, OSM must not only disclose that perennial waters are present in the project area, the agency must also analyze whether and how coal mining will affect these newly-identified natural resources. In evaluating impacts, agencies must inform the public and decisionmakers of direct, indirect, and cumulative effects "and their significance." 40 C.F.R. § 1502.16(a)-(b). Thus, agencies must "evaluate the severity" of the adverse effects" they identify through the NEPA process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). To serve NEPA's "twin aims" of informing agency decisionmakers and the public, this evaluation must be in terms that will meaningfully inform these intended audiences of the magnitude and consequences of these effects. *Balt. Gas & Elec. Co.*, 462 U.S. at 106-107.

OSM concluded that perennial waters in the expansion area could "see a reduction or loss of flow" due to coal mining, but provided no explanation for its conclusion that this is merely a "minor edit" rather than a significant new circumstance requiring meaningful environmental analysis. NEPA Adequacy Review Form (AR 000043–44). OSM provided no analysis, for example, of the likelihood or extent of anticipated flow loss, the seasonal timing of reduced flows, or when, if ever, flows would be expected to return to pre-mining levels. *Id.* In a similar situation, the Tenth Circuit rejected a federal agency's determination that potential groundwater contamination from oil and gas wastewater injection was "not a realistic concern" and that any impacts would be "minimal" where the agency failed to adequately support its conclusion. *Richardson*, 565 F.3d at 713. The Court explained that it did not "sit in judgment of the *correctness*" of the evidence indicating a risk of contamination; rather, the Court concluded that the agency failed to take a hard look at the issue because it did not examine the relevant data and support its conclusion that the groundwater contamination risk was minimal. *Id*. at 715. *See also Nat'l Audubon Soc'y v. Dep't of the Navy,* 422 F.3d 174 (4th Cir. 2005) (holding agency failed to take a hard look where its "conclusion that impacts on [migratory birds] would be 'minor'" was "difficult to reconcile with [the agency's] failure to conduct more detailed analysis on both the relevant species and the unique properties of the habitat" affected by the agency action).

To the extent OSM may seek to avoid analyzing mining's impacts to perennial waters on the basis of harmless error – by characterizing the new information as "minor edits and clarifications" to the Leasing SFEIS – OSM's effort must fail. NEPA Adequacy Review Form (AR 00043). Both NEPA and applicable case law make OSM's failure to follow NEPA's mandatory procedures not a harmless error. NEPA regulations contain their own version of the "harmless error" rule, limiting it to "trivial violations of these regulations." 40 C.F.R. § 1500.3.

NEPA violations excused under this regulation have not involved failure to follow NEPA's procedural requirements for analyzing impacts, but rather truly "trivial" matters. *See*, *e.g.*, *Ass'ns Working for Aurora's Residential Env't v. Colo. Dep't of Transp.*, 153 F.3d 1122, 1129 (10th Cir. 1998) (excusing NEPA contractor's late filing of disclosure statement). Because informed decisionmaking through analysis of project impacts is one of the "twin aims" at the very heart of NEPA, *Baltimore Gas & Elec. Co.*, 462 U.S. at 97, a failure to analyze the impacts of mining on perennial waters cannot constitute a trivial mistake.

OSM's mere disclosure of previously-unidentified perennial waters in the Mine expansion area is not sufficient to comply with NEPA. Once OSM identified a resource that may be affected by Mine expansion and that was not analyzed in the SFEIS, NEPA required that the agency analyze mining's impacts to that resource. *Robertson*, 490 U.S. at 351-52. By failing to analyze mining's impacts to perennial waters before approving the Mining Plan, OSM "entirely failed to consider an important aspect of the problem" and its approval is therefore arbitrary. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

B. OSM Failed to Analyze How Mining's Impacts to Perennial Waters Would Indirectly Impact Wildlife and Fish.

OSM also failed to take a hard look at the direct and indirect effects resulting from dewatering newly-identified perennial waters on wildlife and fish. Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," 40 C.F.R § 1508.8(b), and may include "effects on air and water and other natural systems, including ecosystems." *Id.* Because such ecosystem impacts are "reasonably foreseeable" results of OSM's approval of the Mining Plan, NEPA requires OSM to assess them.

Record evidence demonstrates that wildlife regularly use the perennial waters potentially impacted by mining. Because dewatering perennial waters within the Mining Plan area could negatively impact wildlife, OSM must analyze these reasonably foreseeable impacts.[21] In 2018, consultants for Arch Coal identified five "significant spring and pond features" and 13 smaller spring and pond features within a 500-foot buffer of projected longwall panels. Hydrogeology Solutions Technical Memo (Mar. 22, 2018) (AR 001234). Surveys revealed signs of animal activity at many of the springs and ponds in the Mine expansion area, including numerous elk "wallows" (AR 001267, 1284, 1286, 1287, 1288, 1300), beaver ponds (AR 001251), bear sightings (AR 001291), and other signs of animal activity (AR 001286, 1287, 1288). Given this documented, regular use of these perennial waters by various wildlife species, it is reasonably foreseeable that wildlife could be negatively impacted by mining activities that dewater these springs, streams, and ponds. OSM, however, never examined or disclosed potential impacts to wildlife resulting from dewatering perennial water sources in the area. The agency provided no support or explanation for its conclusion that potentially drying up perennial springs and streams required only "minor edits and clarifications" to the Leasing SFEIS, and, in doing so, OSM violated NEPA's 'hard look' mandate.

Further, OSM failed to analyze reasonably foreseeable impacts on fish from dewatering perennial springs and streams in the Mining Plan area. In the Aquatic/Fisheries Resource

[21] Impacts to wildlife and fish are directly caused by mining-induced subsidence and dewatering of perennial waters and could arguably be considered either direct or indirect impacts. However, because impacts to wildlife may not occur immediately upon stream dewatering, Conservation Groups assess such impacts as "indirect." Ultimately, however, OSM is required to take a hard look at both direct and indirect impacts, so the distinction is immaterial to the court's analysis. *See e.g., League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.,* 689 F.3d 1060, 1075 (9th Cir. 2012) ("Taking a 'hard look' includes considering all foreseeable direct and indirect impacts.") (internal quotations omitted).

Specialist Report prepared for the Roadless Rule Exception EIS, the Forest Service found that the Gunnison National Forest harbored several important native fish species, including bluehead, flannelmouth, and mountain suckers, and a "relatively high number of areas" containing native Colorado cutthroat trout. (CRR-0077567). The record further indicates that there are rare fish, including cutthroat trout, within 1/3 of a mile of the Mine expansion area. Leasing SFEIS (AR 001041). There is no evidence in the record, however, that the fish populations in and near the Mine Expansion area have ever been specifically surveyed.

In light of the documented presence of native fish species in mountain streams near the Mine expansion area, *id.*, once OSM identified perennial waters potentially impacted by mining, NEPA required the agency to assess potential indirect impacts to fish from dewatering these resources. Further, OSM could not rely on the Leasing SFEIS for this analysis because that document did not assess impacts to fish because the agency assumed that the area lacked suitable fish habitat, based on an incorrect assumption that the area lacked perennial waters. AR 000427 ("As there are only intermittent streams in the analysis area, there are no [Management Indicator Species] fish with suitable habitat present and therefore will not be discussed."). Since OSM has now determined that this assumption was incorrect and that there are, in fact, perennial springs and streams in the area, NEPA Adequacy Review Form (AR 000043), it is reasonably foreseeable that such perennial waters could provide suitable fish habitat that would be impaired by dewatering. These potential impacts were not assessed at the leasing stage, and OSM thus violated NEPA's hard look requirement by failing to analyze how mining in the expansion area could indirectly affect wildlife and fish through dewatering perennial springs and streams. Because OSM "entirely failed to consider an important aspect of the problem," its Mining Plan approval is therefore arbitrary. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

REMEDY

Vacatur of the Mining Plan is the appropriate remedy for OSM's NEPA violations. Under the APA, the reviewing court "shall . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573 (10th Cir. 1994). "'Shall' means shall" under the APA. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999). As this court previously concluded in vacating earlier agency decisions related to the West Elk Mine, "[v]acatur is the normal remedy for an agency action that fails to comply with NEPA." *High Country II*, 67 F. Supp. 3d at 1263. *See also id*. at 1263 n.1 (explaining that vacatur of agency decision does not require analysis of injunction factors).

Recently, the Tenth Circuit vacated BLM's approval of oil and gas leases based on the agency's NEPA violations, and in doing so the Court set out the controlling framework for analyzing NEPA remedies in this circuit. *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019). Quoting the Supreme Court's *Monsanto* decision, the Tenth Circuit explained that courts need not analyze permanent injunction factors where vacatur of the agency decision provides NEPA plaintiffs with sufficient relief. As explained by the Court, "[b]ecause vacatur is 'sufficient to redress [Appellants'] injury, no recourse to the additional and extraordinary relief of an injunction [is] warranted.'" *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 166 (2010)). While courts retain equitable discretion to depart from vacatur to craft an alternate remedy, they do so only in unusual and limited circumstances. *See W. Oil &*

Gas v. EPA, 633 F.2d 803, 813 (9th Cir. 1980) (fashioning alternative remedy where vacatur would thwart the objective of the statute at issue).[22]

Here, vacatur of the Mining Plan approval is the only remedy that serves NEPA's fundamental purpose of requiring agencies to look *before* they leap, and the only one that avoids a "bureaucratic steam roller." *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002) (*abrogated on other grounds by Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016)). Vacatur of the Mining Plan will also insure that any subsequent BLM review is not a pro-forma exercise in support of a "predetermined outcome." *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006); *accord Diné CARE v. OSM*, No. 12-cv-1275-JLK, 2015 WL 1593995, at *3 (D. Colo. Apr. 6, 2015) (vacating approval of mining operations in mine expansion area to assure NEPA compliance on remand would not become "a mere bureaucratic formality."); *Montana Envtl. Information Center v. U.S. Office of Surface Mining*, No. CV 15–106–M–DWM, 2017 WL 5047901, at *6 (D. Mont. Nov. 3, 2017) (vacatur appropriate because "error lies at the heart of NEPA's requirement that agencies make informed decisions").

Without vacatur, on remand any OSM evaluation of a methane flaring alternative, or any alternative that lessens or avoids impacts to the newly-identified perennial streams, could potentially become moot. Conservation Groups understand that road-building and well-drilling activities in preparation for mining has already begun, Timmons Declaration, Dkt. No. 3-20 at 3–

[22] In *WildEarth Guardians v. Jewell*, 870 F.3d 1222, 1239–40 (10th Cir. 2017), the Tenth Circuit remanded the matter to the District Court, but did so in order to allow the parties to make equitable arguments to the District Court in the first instance. As the Court explained, because of the unusual circumstances of that case, a tailored remedy might be appropriate where various levels of mining had already occurred on three of the four challenged leases. *Id.* at 1240.

4, with mining activities expected to last approximately 2.7 years. Leasing SFEIS (000248). The obligation to develop and consider alternatives to an agency's preferred course of action is the "heart" of the NEPA process. 40 C.F.R. § 1502.14. Here, any meaningful evaluation of available alternatives could be eviscerated if mining continues while OSM prepares the legally required analysis. Once methane is emitted into the atmosphere or coal is mined, neither can be put back underground. At that point the egg will have already been scrambled. *Accord Milk Train v. Veneman*, 10 F.3d 747, 756 (D.C. Cir. 2002).

Accordingly, Conservation Groups request this Court vacate OSM's Mining Plan approval and Record of Decision.

CONCLUSION

This Court previously, and properly, vacated prior versions of the Colorado Roadless Rule Exception, Lease Modifications, and exploration plan where it found NEPA violations. *High Country II*, 67 F. Supp. 3d at 1264–67. This Court should do the same here because OSM violated NEPA when it failed to consider a methane flaring alternative and failed to take a hard look at the environmental impacts of mining in the expansion area. Conservation Groups respectfully request that this Court (1) declare the Federal Defendants' approval of the West Elk Mining Plan violated NEPA; (2) vacate the West Elk Mining Plan approval; (3) enjoin Federal defendants from re-issuing the West Elk Mining Plan approval until they have demonstrated compliance with NEPA; (4) grant any other relief the Court deems just and equitable; and (5) grant Conservation Groups their litigation costs and attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

Respectfully submitted on this 19th day of August 2019.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing CONSERVATION GROUP' OPENING BRIEF ON THE MERITS was served on all counsel of record through the Court's ECF system on this 19th day of August 2019.

/s/ Daniel Timmons
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