IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-3025-PAB

HIGH COUNTRY CONSERVATION ADVOCATES, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Federal Respondents,

and

MOUNTAIN COAL COMPANY, LLC,

Intervenor-Respondent.

FEDERAL RESPONDENTS' OPPOSITION

TO EMERGENCY MOTION TO ENFORCE REMEDY

Petitioners have filed an Emergency Motion to Enforce Remedy. ECF No. 77 (the "Motion"). Essentially, the Motion seeks to enforce vacatur of the North Fork Exception to the Colorado Roadless Rule, which was ordered by the Tenth Circuit and recently effectuated by this Court. Petitioners contend that without the Exception, "the Colorado Roadless Rule prohibits road construction for mining purposes in the roadless areas" and that road construction activity occurring during the week of June 1, 2020, while prior to entry of any vacatur order, was illegal. *Id*. at 1. Petitioners seek to "maintain the status

quo" by requesting that the Court require the United States Forest Service ("Forest Service") to withdraw its purported approval of recent road building and coal leasing exploration activities and to order the mining company "to immediately halt all surface disturbing activities[.]" *Id*. at 2.

As for the requested relief regarding the Forest Service, the motion should be denied because, as Petitioners acknowledge, the activities at issue took place after the Tenth Circuit's order, but prior to this Court effectuating the Tenth Circuit's mandate by entering an order vacating the North Fork Exception. Petitioners' requested relief goes beyond the Tenth Circuit's mandate, as the Tenth Circuit did not vacate the lease modifications, under which the mining company conducts activities associated with its leases. Before the North Fork Exception was actually vacated, the Forest Service had no opportunity to revisit prior decisions authorizing the mining company from building roads associated with its leases. Petitioners are seeking injunctive relief without offering a legal basis for such relief. Accordingly, their Motion should be denied.

BACKGROUND

Petitioners brought National Environmental Policy Act ("NEPA") challenges to agency actions relating to coal mining exploration and leasing. Specifically, they challenged "the approval of the North Fork Exception to the Colorado Roadless Rule ("CRR") by the [Forest Service] and the joint approval of lease modifications in favor of defendant-intervenor Mountain Coal Company, LLC ("Mountain Coal") by the Forest Service and Bureau of Land Management ("BLM")[.]" ECF No. 62 at 1-2. The re-promulgation of the North Fork Exception was supported by a Supplemental

Environmental Impact Statement (the "North Fork SFEIS") and approval of the lease modifications was supported by a separate Supplemental Environmental Impact Statement (the "Leasing SFEIS"). This Court upheld the challenged agency actions and entered judgment on August 16, 2018. ECF No. 63.

Petitioners appealed, and the Tenth Circuit issued an opinion on March 2, 2020. *High Country Conservation Advocates v. U. S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020). That decision focused on two issues – whether the North Fork SFEIS violated the "arbitrary and capricious" standard of review for failing to sufficiently consider Petitioners' proposed "Pilot Knob Alternative" and whether the Leasing SFEIS was similarly deficient with regard to Petitioners' proposed "Methane Flaring Alternative." *Id.* at 1220-21. The Tenth Circuit panel majority found:

> we reverse as to the North Fork SFEIS, holding that the Forest Service violated NEPA by failing to study in detail the "Pilot Knob Alternative" proposed by plaintiffs. Accordingly, we remand to the district court with instructions to vacate the North Fork Exception. With respect to the Leasing SFEIS, we hold NEPA did not require consideration of the "Methane Flaring Alternative" proposed by plaintiffs.

Id. The panel majority concluded "we **VACATE** the district court's judgment and **REMAND** the case for entry of an order vacating the North Fork Exception." *Id.* at 1229.

The activities at issue involve Mountain Coal's operations in conjunction with the West Elk mine, as governed by the Mineral Leasing Act of 1920, as amended, Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), and Energy Policy Act of 2005. *See* Declaration of Chad Stewart ¶ 2 ("Stewart Decl.") (Ex. 1 hereto). These laws and

accompanying regulations establish a system in which BLM issues the lease (and any modifications) but the Forest Service "decides whether to consent to BLM leasing and prescribes stipulations for the protection of NFS lands and/or reviews existing stipulations on the parent coal leases to determine if the restrictions are adequate to protect the non-mineral resources." *Id.*; *see* 30 U.S.C. § 201(a)(3)(A)(iii), 43 C.F.R. § 3425.3(b). The Motion addresses activities authorized by lease modifications COC-1362 and COC-67232, which include potential effects, as disclosed and analyzed in the Leasing SFEIS, associated with construction "of about 6.5 miles of roads as a portion of 72 acres of total surface disturbance" on National Forest lands within the lease modification area in the Sunset Colorado Roadless Area. Stewart Decl. ¶ 3. The SFEIS also analyzed on-lease exploration, including the potential effects from 17.76 acres of disturbance from temporary road location. *Id.*

During 2017 and 2018 the Forest Service consented to, and BLM approved, the lease modifications, construction of exploration roads, and SMCRA permit revisions. *Id.* ¶¶ 4-8. With respect to the roadbuilding activities at issue, on July 2, 2018, Mountain Coal applied to the Colorado Division of Reclamation, Mining and Safety ("CDRMS") for a SMCRA permit revision (Permit Revision 15) for the modified leases that would allow methane drainage wells and associated access roads. The Forest Service provided a letter of concurrence in Permit Revision 15 dated July 31, 2018, which advised "these lease modifications are still in active litigation. However, there is no preliminary injunction or temporary restraining order in place as of the date of this letter affecting the implementation of the proposed PR-15." *Id.* ¶ 8, Ex. 1-C. CDRMS approved Permit

Revision 15 by letter dated November 15, 2018, providing "authorization to construct approximately 6.5 miles of roads . . . on PR-15 maps for panels SS1 through SS4" including National Forest lands primarily within the Sunset Roadless Area. *Id.* ¶ 9. During summer, 2019, the Company "completed about 7,308 feet of access road (main SS1 panel road and SS1-2/3 spur) and 7 well pads" resulting "in approximately 7.7 acres of total disturbance (4.2 acres of road disturbance + 3.5 acres pad disturbance)." *Id.* ¶ 10.

Road construction and related activity under the Company's permit had ceased for the winter at the time of the Tenth Circuit's decision on March 2, 2020. In a May 21, 2020, meeting, representatives of the Company and the Forest Service discussed the agency's "plans to initiate the necessary administrative process and environmental analysis to consider amendment of the Colorado Roadless Rule to reinstate the North Fork Coal Mining Area Exception." *Id.* ¶ 13. The Company did not announce road building plans at this meeting, but did so in a May 29, 2020, phone call to the Forest Service, during which a Company representative said "they would be preparing June 1, 2020 to commence road construction activities for panel SS2 and would begin road construction on June 2, 2020." *Id.* ¶ 14. Petitioners learned of this activity and filed an unopposed Motion for Entry of Tenth Circuit Mandate on June 11, 2020. ECF No. 76. On June 12, 2020, Petitioners filed the Emergency Motion to Enforce Remedy. ECF No. 77.[1]

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[1] On June 17, 2020, CDRMS ordered "all surface disturbing activities in the Sunset Roadless area must cease immediately, except as expressly permitted herein." Order 4 (ECF No. 79-1). To "abate violation" the Order states "Mountain Coal must provide the Division with detailed information regarding its assertion that it maintains legal right of entry to the Sunset Roadless area and why it is not in direct conflict with the District Court order vacating the North Fork Exception to the Colorado Roadless Rule." *Id.*

LEGAL STANDARDS

A motion to enforce remedy "is the usual method for requesting a court to interpret its own judgment." Motion 5 (quoting *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004), *aff'd*, *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24 (D.C. Cir. 2005)). The court "should grant a motion to enforce if a 'prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it.'" *Sierra Club v. McCarthy*, 61 F. Supp. 3d 35, 39 (D.D.C. 2014) (quoting *Heartland Hosp.*, 328 F. Supp. 2d at 11). However, "[i]f the plaintiff has received all relief required by that prior judgment, the motion to enforce is denied." *Heartland Hosp.*, 328 F. Supp. 2d at 11. At most, "a motion to enforce a judgment gets a plaintiff only 'the relief to which [the plaintiff] is entitled under [its] original action and the judgment entered therein.'" *Heartland Reg'l Med. Ctr.*, 415 F.3d at 29 (quoting *Watkins v. Washington*, 511 F.2d 404, 406 (D.C. Cir. 1975)). A motion to enforce judgment "does not provide a means for a court to reconsider its judgment or for a plaintiff to raise new arguments that should have been offered in prior proceedings." *Resolute Forest Products, Inc. v. U. S. Dep't of Agric.*, 427 F. Supp. 3d 37, 41 (D.D.C. 2019), *appeal dismissed*, No. 20-5027, 2020 WL 1918282, (D.C. Cir. Apr. 1, 2020).

ARGUMENT

Petitioners' motion requests that the Court: (1) order the Forest Service "to immediately withdraw consent to any approvals authorizing Mountain Coal to engage in surface disturbing activities within the North Fork Exception area" and (2) order Mountain Coal "to immediately halt all surface disturbing activities within the North Fork Exception

area . . . . ” Motion 2-3, 13. Petitioners’ motion should be denied because, at the time of the road construction activities at issue, this Court had not yet vacated the North Fork Exception. Further, the request to halt all surface disturbing activities is overly broad and is not properly supported. The Court should deny Petitioners’ motion.

I. Petitioners Seek Relief Exceeding the Scope of the Mandate.

Petitioners have not satisfied their burden in seeking emergency relief. Further, Petitioners requested belief goes beyond what is required by the mandate and seeks detailed, but unsupported, injunctive relief.

The motion is styled as one “to enforce remedy” through which the Court can “interpret its own judgment” or address “a defendant [who] has not complied with a judgment entered against it.” Motion 5-6 (citations omitted). A motion to “enforce remedy” is confined by the judgment sought to be enforced. “The Court ‘is generally the authoritative interpreter of its own remand.’” *Anglers Conservation Network v. Ross*, 387 F.Supp.3d 87, 93 (D.D.C. 2019) (quoting *AT & T Wireless Servs., Inc. v. FCC*, 365 F.3d 1095, 1099 (D.C. Cir. 2004)). However, “a motion to enforce a judgment gets a plaintiff only ‘the relief to which [the plaintiff] is entitled under [its] original action and the judgment entered therein.’” *Heartland Reg’l Med. Ctr.*, 415 F.3d at 29 (quoting *Watkins*, 511 F.2d at 406).

Petitioners incorrectly characterize the “mandate rule.” They assert the “district court’s entry of the mandate is a purely non-discretionary task.” Motion 9 (citing *Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co*., 962 F.2d 1528, 1534 (10th Cir. 1992)). That case does say “a district court must comply strictly with the mandate rendered by the

reviewing court" and further advises "the district court must be circumscribed by our mandate." *Colo. Interstate Gas Co.*, 962 F.2d at 1534.[2] Some earlier Tenth Circuit decisions reflect this narrow interpretation of the mandate rule. *See e.g. El Paso Nat. Gas Co. v. Kelly*, 321 F.2d 645, 645 (10th Cir. 1963) ("Upon remand from an appellate court with a specific mandate the trial court is limited to the imperative of the mandate and is without jurisdiction to vary or extend it." (quoting *Britton v. Dowell, Inc.*, 243 F.2d 434, 434-35 (10th Cir. 1957)). However, this narrow interpretation does not accurately reflect the current state of the law or the full range of circumstances. When the mandate directs that the district court decision is "vacated and the case is remanded for further proceedings consistent with the terms of [the Circuit Court] opinion . . . the mandate does not expressly limit the Court's discretion to hear matters on remand that are not foreclosed by the terms of the Tenth Circuit's opinion." *Entek GRB LLC v. Stull Ranches LLC*, 113 F. Supp. 3d 1113, 1116 (D. Colo. 2015), *aff'd*, 840 F.3d 1239 (10th Cir. 2016). Despite their insistence to the contrary, Petitioners' request for emergency relief goes far beyond a ministerial response by the district court to the mandate. Instead, their request is one for injunctive relief – they are asking the Court, not only to vacate the North Fork Exception, but also to issue specific directions to the parties about future acts they must take or refrain from taking.

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[2] The early Supreme Court case Petitioners cite similarly provides "[a]fter the decision by this court, the court below had no power but to enter a judgment according to the mandate, and to carry that judgment into execution. This was the end of the case." *Litchfield v. Dubuque & R.R. Co.*, 74 U.S. 270, 271 (1868).

The relief that Petitioners seek is beyond the scope of the mandate. While the Tenth Circuit ordered vacatur of the North Fork Exception, it did not similarly vacate the lease modification decisions. Yet Petitioners' motion seeks relief which would modify, if not nullify, the lease modifications. Petitioners describe the mandate as requiring this Court to fashion a judgment or remedy that is ministerial in nature, yet in the present motion advances "arguments . . . wholly untethered to the dictates of [any] remedial order." *Anglers Conservation Network*, 387 F. Supp. 3d at 96-97. Petitioners "have no basis to seek, by a motion to enforce a remedial order related to their [North Fork SFEIS] claim, to have the Court determine that Defendants have now violated the [Leasing SFEIS claim] and order relief accordingly." *Id.* at 97; *Compare WildEarth Guardians v. Bernhardt*, Civ. A. No. 16-1724 (RC), 2019 WL 3253685, at *3 (D.D.C. July 17, 2019) ("Plaintiffs' argument fails because they have received all relief required by the text of this Court's March 19, 2019 injunctive order."), *with High Country Conservation Advocates v. U, S. Forest Serv.*, 67 F. Supp. 3d 1262, 1266-67 (D. Colo. 2014) (vacating North Fork Exception and vacating lease modifications). Petitioners' motion strays beyond the issues which now remain in this case.

Petitioners cannot ask this Court to "enforce" a remedy that is inconsistent with the Tenth Circuit's mandate. Therefore, their emergency motion should be denied.

II. The Forest Service Did Not Act Improperly by Allowing Road Building Activities Prior to the Court's Vacatur of the North Fork Exception.

Previously issued decisions authorizing any temporary road building remained in place before this Court entered an order vacating the North Fork Exception. Indeed, it was

incumbent upon the Petitioners to assess, and if necessary, protect their own interests by requesting that this Court enter an order vacating the exception, which they eventually did. Petitioners contend the Tenth Circuit's holding "had immediate and retroactive legal effect." Motion 9. That is incorrect. The North Fork Exception was not vacated until this Court entered its order in response to the Tenth Circuit's ruling. Therefore, the inaction of the Forest Service vis-à-vis previously authorized interim road building was appropriate. Petitioners acknowledge as much, recognizing in their June 11, 2020, unopposed motion that "this Court has not executed the mandate" and that such an order was necessary "[t]o carry out the Tenth Circuit's mandate . . . . " ECF No. 76 at 2.

The Forest Service was not able to act upon the Circuit Court's mandate before this Court entered an order effectuating that mandate. The mandate is the mechanism by which the district court "reacquire[s] jurisdiction over the case." *Burton v. Johnson*, 975 F.2d 690, 693 (10th Cir. 1992). This allows "the district court to carry out some further proceedings" which can range from being "purely ministerial" to "more significant proceedings." *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998). Despite these differences "[t]here is no separate rule for 'ministerial' mandates as opposed to more complicated mandates" because "such a rule would leave uncertain who should determine whether a mandate rises above the 'ministerial' level." *Crickon v. United States*, No. 3:12-cv-0684-SI, 2013 WL 2359011, at *7 (D. Or. May 28, 2013). Thus, "the parties to the case are generally not obligated to act on the appellate mandate until after the district court issues its order implementing the mandate. At that time, the parties are obligated to follow the district court's order." *Id*. To require the parties to act upon the

mandate would contravene basic purposes of the mandate rule, which include "to preserve the finality of judgments, to prevent 'continued re-argument of issues already decided, . . . and to preserve scarce court resources.'" *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1132–33 (10th Cir. 2003) (quoting *Huffman v. Saul Holdings Ltd. P'ship* , 262 F.3d 1128, 1132 (10th Cir. 2001)). Thus, the activities of the mining company were allowed to occur largely due to the Plaintiffs' own inaction in seeking to have the mandate executed.

Petitioners do not directly address this issue, but instead contend that the other parties have attempted to "exploit the lag time between the Tenth Circuit's vacatur order and this Court's formal entry of that order . . . . " Motion 9. Petitioners have failed to cite any authority suggesting the Forest Service had an obligation to act before issuance of the order implementing the mandate. Nor have they explained their own inaction between issuance of the mandate and filing of the present motion. "[I]t is important that both private litigants seeking to enforce environmental statutes and judges presiding over environmental cases remain aware at all times of the practical aspects of the litigation, and guide their actions accordingly. Primary responsibility rests, of course, with the private litigants, as it is their duty to seek the necessary relief in a timely manner and to keep the court informed of all developments." *Kettle Range Conservation Grp. v. U.S. Bureau of Land Mgmt.*, 150 F.3d 1083, 1088 (9th Cir. 1998) (Reinhardt, J., concurring). It is not unusual in cases of this nature for parties on any side to perceive or anticipate a need to request appropriate judicial action. *See e.g.*, *Cal. ex rel Lockyer v. U. S. Dep't of Agric.*, 468 F. Supp. 2d 1140, 1141-42 (N.D. Cal. 2006) (granting request for "further injunctive relief" following the district court's earlier order awarding initial relief).

In sum, the mandate is the procedural mechanism by which the district court will effectuate the appellate court's disposition of the case. The Forest Service was not obligated to act in advance of any district court order following remand, and therefore had no obligation or authority to prevent road building activities prior to the issuance of the mandate.

III. Petitioners Have Not Met the Requirements for Injunctive Relief.

The second prong of Petitioners' requested relief outlines an injunction addressing numerous specific activities. Petitioners request that the Court:

> order Mountain Coal to comply with the vacatur order by refraining from constructing or re-constructing any roads or tree cutting in the Sunset Roadless Area and from engaging in any further surface disturbing activity that could not occur but for Mountain Coal's unlawful act of bulldozing a road through that protected area, including but not limited to drilling pad construction.

Motion 13. This request is flawed on multiple levels.

Petitioners have failed to properly present a request for injunctive relief. This is a critical shortcoming, for "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (citation omitted). Further, a sufficient showing on each of the four factors of the injunctive relief standard are necessary "in assessing the propriety of any injunctive relief, preliminary or permanent." *Id.* A proper injunction order must reflect the Court's analysis and exercise of discretion on each of the four elements. *Id.* at 32; *Colo. Envtl. Coal. v. Office of Legacy Mgmt.,* 819 F. Supp. 2d 1193, 1223 (D. Colo. 2011), *amended by*, Civ. A. No. 08-cv-01624-WJM, 2012 WL 628547 (D. Colo. Feb. 27, 2012)

("Injunctive relief does not automatically issue, nor is it presumptively proper, upon a finding of a NEPA violation."). The posture of the case further requires Petitioners to address the different considerations "governing preliminary and permanent injunctions." *DTC Energy Grp., Inc. v. Hirschfeld*, Civ. A. No. 17-cv-01718-PAB-KLM, 2020 WL 1333090, at *4 (D. Colo. Mar. 23, 2020).

There is simplistic appeal in the assumption that no roads can exist in Roadless Areas, but the cases reflect far more nuanced applications. For example, temporary vehicle and heavy equipment use associated with construction of a pipeline has been allowed, where any prohibition on "roads" was reasonably construed "narrowly as referring to an area whose exclusive purpose is for motor vehicle through-traffic, rather than the localized use of motorized equipment ancillary to an altogether different, and non-prohibited, purpose." *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1226-27 (10th Cir. 2008).[3]

Even if temporary road placement is deemed inconsistent with the CRR, the Court is not obligated to impose an injunction, and any injunctive relief might take various forms. In the 2001 Roadless Rule litigation, the district court initially ordered "[t]he parties shall meet and confer regarding any specific language that they believe should be included in the

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[3] The Colorado Roadless Rule provides other exceptions to the prohibition on road construction for roads needed for reserved or outstanding rights, 36 C.F.R. § 294.43(b)(1), (c)(1)(i). The lease stipulations further demonstrate the need to interpret Forest Service regulations and conditions within the framework of other rights, conditions or obligations under different agency interpretations and other authority. *See* FSLeasingII 0000037-39. Petitioners ignore this analysis, simply presuming that all road construction and any activity facilitated by road access is legally prohibited upon vacatur of the North Fork Exception.

Court's injunction." *Cal. ex rel Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006). Later, the district court issued a series of orders following motions seeking clarification and emergency injunctive relief, noting "the equities weigh against applying the Court's ruling retroactively to enjoin this particular project." *California ex rel Lockyer v. U.S. Dep't of Agric.*, Nos. C05-03508/C05-04038 EDL, 2006 WL 2827903, at *2 (N.D. Cal. Oct. 3, 2006). In a subsequent motion for "further injunctive relief" plaintiffs apparently "followed the Court's admonition not to seek to enjoin projects that are already underway based on the Court's previous balancing of the equities in declining to enjoin the timber harvesting that had already commenced on the ground in the Mike's Gulch and Blackberry projects." *California ex rel Lockyer*, 468 F. Supp. 2d at 1141-42. The extent of activities which might occur during any "lag time" is similarly demonstrated in *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 776 F. Supp. 2d 960, 976-77 (D. Alaska 2011), *aff'd*, 795 F.3d 956 (9th Cir. 2015) (en banc). Petitioners cite the case for the proposition that the typical remedy following vacatur of a regulation is to reinstate the rule previously in force (Motion 7) but this overlooks the nuance of the district court's remedy, which outlined a long list of projects allowed to continue, notwithstanding any inconsistency with the reinstated Roadless Rule. *See* Judgment, *Organized Vill. of Kake*, 776 F. Supp. 2d 960 (D. Alaska 2011) (No. 1:09-cv-00023 JWS) (Ex. 2 hereto).

This case departs notably from the parties' prior litigation, in which both the North Fork Exception and the lease modifications were vacated. *High Country Conservation Advocates*, 67 F. Supp. 3d at 1264-1265 (finding circumstances there to be "more like a Gordian knot that needs cutting than a simple tangle that the government can untie with a

little extra time"); *see also Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1259 (D. Colo. 2012) (denying request to "set aside" oil and gas leases "to the fullest possible extent" based, in part, on the Court's "concerns as to whether such relief falls within the scope of the instant action" targeting NEPA compliance but "not to the decision to issue leases"). These distinctions are not mere semantics, for the Circuit Court has "done all of the following when placed in a similar posture: (1) reversed and remanded without instructions, (2) reversed and remanded with instructions to vacate, and (3) vacated agency decisions." *WildEarth Guardians v. U. S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239-40 (10th Cir. 2017) (declining request to vacate leases while recognizing "the question remains . . . whether mining the lease tracts should be enjoined"). Here, the lease modifications remain intact following remand solely on the North Fork Exception.

It is incumbent upon the moving party to provide a basis for a favorable ruling. Petitioners' motion fails this requirement and neglects several important elements. Petitioners have not attempted the presentation required to support their request for detailed injunctive relief.

CONCLUSION

The Court should deny Petitioners' Emergency Motion to Enforce Remedy.

DATE: June 22, 2020

Respectfully submitted,

PRERAK SHAH
Deputy Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

/s/ *Paul A. Turcke*
PAUL A. TURCKE
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
202-353-1389 || 202-305-0506 (fax)
paul.turcke@usdoj.gov
MICHELLE-ANN C. WILLIAMS
202-305-0420 || 202-305-0506 (fax)
michelle-ann.williams@usdoj.gov

Counsel for Federal Respondents

OF COUNSEL:

Kenneth Paur
Arthur Kleven
Kenneth Capps
Office of General Counsel
Mountain Region
U.S. Department of Agriculture
Lakewood, Colorado

Kristen Guerriero
Office of the Solicitor
Rocky Mountain Region
U.S. Department of the Interior
Lakewood, Colorado

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2020, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ *Paul A. Turcke*
Paul A. Turcke