IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-3025-PAB

HIGH COUNTRY CONSERVATION ADVOCATES, et al.,

Plaintiffs/Petitioners,

v.

UNITED STATES FOREST SERVICE, et al.,

Federal Defendants/Respondents, and

MOUNTAIN COAL COMPANY, LLC,

Respondent/Defendant-Intervenor.

PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

Pursuant to Fed. R. App. P. 8(a)(1), Plaintiffs High Country Conservation Advocates et al. (collectively "Conservation Groups") respectfully move for an injunction pending appeal of the Court's October 2 order denying Plaintiffs' Motion to Enforce Remedy. Conservation Groups have appealed the order to the Tenth Circuit and seek an injunction to preserve the status quo pending the appeal and prevent Mountain Coal Company ("Mountain Coal") from conducting additional irreparable surface disturbance in the Sunset Roadless Area.

Conservation Groups' counsel has conferred with counsel for both Federal Defendants and Intervenor Mountain Coal, and both oppose this Motion.

BACKGROUND

The relevant background is set forth in this Court's October 2 Order. Conservation Groups appealed that order on October 5, 2020. Because construction that will lead to irreparable

harm is imminent, Conservation Groups also are seeking an emergency injunction from the Tenth Circuit.

ARGUMENT

Conservation Groups meet the four-part standard for an injunction: (1) they are likely to succeed on the merits of their appeal; (2) they will suffer irreparable harm in the form of tree cutting and clearing for additional drill pad construction and drilling of methane ventilation boreholes within the Sunset Roadless Area if the injunction is denied; (3) the irreparable injury to Conservation Groups and the environment outweighs the purely economic and self-inflicted harm of Mountain Coal; and (4) the injunction will not adversely affect the public interest. See Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2002), abrogated on other grounds by Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276 (10th Cir. 2016).

I. Conservation Groups are Likely to Succeed on the Merits.

This Court wrongly rejected Conservation Groups' request for enforcement of the remedy. First, the Court focused on the question of "whether the Tenth Circuit's vacatur of the North Fork Exception requires the Court to vacate Mountain Coal's lease modifications as well, as plaintiffs request." Order 8, ECF No. 99. In fact, Conservation Groups made no such request. See Pls.' Corr. Reply in Supp. of Emergency Mot. to Enforce Remedy 5–6, ECF No. 89. While the lease modifications have not been struck down, Mountain Coal cannot exercise its road construction rights under the lease modifications absent a valid North Fork Exception. Id. If the Forest Service adopts a valid Exception, Mountain Coal will be free to operate under its existing lease modifications. Id.

The Court's reliance on WildEarth Guardians v. U.S. Bureau of Land Management, 870 F.3d 1222 (10th Cir. 2017), is misplaced. There, the Tenth Circuit held that BLM had violated the National Environmental Policy Act when adopting coal leases but, after balancing the equities, decided to remand without vacatur of the leases. Here, the Tenth Circuit considered and rejected Mountain Coal's request to remand the North Fork Exception EIS without a full vacatur. High Country Conservation Advocs. v. U.S. Forest Serv., 951 F.3d 1217, 1228–29 (10th Cir. 2020). Yet, this Court's decision treats the Tenth Circuit's consideration of the equities as a nullity—vacatur of the North Fork Exception has the same impacts as remand without vacatur.

With respect to the fundamental legal question at issue—what is the impact of vacatur of the North Fork Exception?—this Court punts, holding that Conservation Groups cannot pursue that claim in this case. Order 10, ECF No. 99. However, as this Court concedes, courts have authority to interpret and enforce their own remedy orders. Id. at 6 (citing Anglers Conservation Network v. Ross, 387 F. Supp. 3d 87, 93 (D.D.C. 2019)). In a situation such as this where an intervenor made statements to the Tenth Circuit indicating it understood the impacts of vacatur and then acted contrary to those statements, this Court should exercise that authority. Indeed, this Court's decision renders Mountain Coal's violation of the Tenth Circuit's order essentially unreviewable. Federal Defendants have acquiesced to Mountain Coal's activities based on prior lease modifications challenged in this case. There is not likely to be any additional federal decision making.

II. Absent an Injunction Pending Appeal, Conservation Groups Will Suffer Irreparable Harm.

A preliminary injunction is warranted because "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long

duration, *i.e.*, irreparable." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987), abrogated in part on other grounds by Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); see also Davis, 302 F.3d at 1116 ("This [environmental] harm is irreparable in the sense that it cannot adequately be remedied by nonequitable forms of relief."). Therefore, to show irreparable harm, Conservation Groups need only establish a "significant risk" of environmental injury. Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1258 (10th Cir. 2003).

Mountain Coal plans to imminently bulldoze two additional drilling pads totaling one acre adjacent to the illegally constructed road in the Sunset Roadless Area. Sept. 2020 Decl. of Weston Norris ¶ 4, ECF No. 97.1. These drilling pads will allow Mountain Coal to drill methane boreholes and to excavate large amounts of coal. The scraping of two additional drilling pads will cause substantial and irreparable harm to the environment. The following photographs, taken of the construction that occurred during the week of June 1, show the vast destruction caused by bulldozing drilling pads in the Sunset Roadless Area. Decl. of Brett A. Henderson ¶¶ 7–17, ECF No. 89.4; Decl. of Matt Reed ¶¶ 3–11, 14–15, ECF No. 89.5.

The scars left behind by Mountain Coal's illegal activities will persist for decades if not longer. Henderson Decl. ¶¶ 14–17. Indeed, bulldozing a protected roadless area is the epitome of irreparable harm. See, e.g., Idaho Sporting Cong. Inc. v. Alexander, 222 F.3d 562, 569 (9th Cir. 2000) (holding logging constituted irreparable injury); Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1382 (9th Cir. 1998) (same). And it is well-established that such harm to the environment cannot be remedied absent an injunction. See Amoco Prod. Co., 480 U.S. at 545; Cal. ex rel. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 914 (N.D. Cal. 2006), aff'd, 575 F.3d 999 (9th Cir. 2009).

Further, scraping additional drilling pads in the Sunset Roadless Area will irreparably harm Conservation Groups' members, who rely on the remote and pristine wildlands for solitude and quiet recreation. Henderson Decl. ¶¶ 12–17; Reed Decl. ¶¶ 11–16. Interfering with people's enjoyment of wild landscapes "is considered 'irreparable' since land is viewed as a unique commodity for which monetary compensation is an inadequate substitute." Pelfresne v. Vill. of Williams Bay, 865 F.2d 877, 883 (7th Cir. 1989). Such areas will be enjoyed not only by

Conservation Groups and their members but also "by many generations of the public," thereby warranting an injunction to protect these interests. Neighbors of Cuddy Mountain, 137 F.3d at 1382; see Henderson Decl. ¶ 14.

III. The Irreparable Environmental Injury Outweighs Any Harm to Mountain Coal or the Agencies.

If environmental harm "is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. Co., 480 U.S. at 545. Because environmental injury—unlike economic injury—is by its nature irreparable, the environmental harm caused by Mountain Coal's illegal acts should outweigh any economic injury it might suffer. See id.; Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1177 (9th Cir. 2006) (concluding that the potential for economic losses "does not outweigh the potential irreparable damage to the environment" (citation omitted)), abrogated on other grounds by Winter, 555 U.S. at 21–22; Colo. Wild, Inc. v. U.S. Forest Serv., 523 F. Supp. 2d 1213, 1222 (D. Colo. 2007) (finding economic harm is "not irreparable and does not outweigh" environmental harm).

Here, the balance of hardships favors enjoining Mountain Coal's unlawful bulldozing of additional drilling pads and related surface disturbance because this irreparable harm is certain to occur. Sept. 2020 Decl. of Weston Norris ¶ 4, ECF No. 97.1; see Amoco, 480 U.S. at 545. In contrast, Mountain Coal has claimed that enjoining its illegal activities would force layoffs, but no evidence supports that assertion. Decl. of Weston Norris ¶ 8, ECF No. 84.1. Nor has Mountain Coal addressed how it might avoid such impacts. In 2017, Mountain Coal indicated that previously approved mining on the parent leases would continue for another decade.

FSLeasingII-209, ECF No. 89.1. Mountain Coal also has access to mine longwall panel SS1 in the Sunset Roadless Area, which would be unaffected by the Groups' requested relief.[1] Further, Mountain Coal obtained its lease modifications knowing that Conservation Groups were challenging the underlying North Fork Exception and proceeded with construction in the Sunset Roadless Area despite its prior recognition that vacatur of the North Fork Exception would preclude such activities. Accordingly, any harm suffered is "self-inflicted." Davis, 302 F.3d at 1116. The balance of hardships therefore strongly favors an injunction.

IV. An Injunction Pending Appeal Would Serve the Public Interest.

An injunction in this case will not "adversely affect" the public interest. Id. at 1111. There is a "strong public interest in preserving our [roadless] national forests in their natural state," Lockyer, 459 F. Supp. 2d at 914 (quotation omitted), and in preserving the "biological integrity and the undeveloped character" of them. Colo. Wild v. U.S. Forest Serv., 299 F. Supp. 2d 1184, 1190–91 (D. Colo. 2004). Given such interests, this Court has recognized that "[t]he clearcutting of the timber . . . obviously will have a significant effect on the environment for many years," justifying equitable relief. Wyo. Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1250 (10th Cir. 1973), overruled on other grounds by Vill. of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992) (en banc).

[1] Conservation Groups seek relief only for construction undertaken after the Tenth Circuit's order and mandate. This relief would not stop all mining in the lease modification area. Before the Tenth Circuit ruled, Mountain Coal completed road construction for longwall panel SS1 in this area. Decl. of Chad Stewart ¶ 10, ECF No. 80.1. The Colorado Division of Reclamation, Mining and Safety has not issued a stop-work order for this panel since the road construction is complete.

Here, despite the pandemic, thousands have opposed Mountain Coal's illegal activities, seeking to protect the Sunset Roadless Area from further irreparable harm. Henderson Decl. ¶ 19. Enjoining Mountain Coal from bulldozing drilling pads and engaging in further surface disturbance will serve the public interest by protecting these remote wildlands.

CONCLUSION

For these reasons, Conservation Groups move this Court for an injunction pending appeal pursuant to Fed. R. App. P. 8(a)(1).

Respectfully submitted October 5, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I filed the foregoing **PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL** with the Court's electronic filing system, thereby generating service upon the following parties of record:

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