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,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Federal Defendants, and

MOUNTAIN COAL, LLC,

Defendant-Intervenor.

PLAINTIFFS' EMERGENCY MOTION TO ENFORCE REMEDY

Plaintiffs High Country Conservation Advocates *et al.* (Conservation Groups) respectfully file this emergency motion to enforce the remedy in this case—vacatur of the North Fork Exception to the Colorado Roadless Rule—to halt illegal bulldozing in the Sunset Roadless Area's aspen and conifer forest. Absent the North Fork Exception, the Colorado Roadless Rule prohibits road construction for mining purposes in the roadless areas of the North Fork Coal Mining Area, including the Sunset Roadless Area. Yet, the week of June 1, 2020, Defendant-Intervenor Mountain Coal Company (Mountain Coal)—apparently relying on the fact that this Court had yet to take the non-discretionary step of formally entering the vacatur order—bulldozed about a mile of new road in the Sunset Roadless Area. Mountain Coal also has indicated that it has imminent plans to construct new roads and scrape new drilling pads for

methane drainage wells that are accessed by and adjacent to the illegal road. Mountain Coal undertook this road construction despite expressly telling the Tenth Circuit in its appellate brief that vacatur of the North Fork Exception would prohibit the mining company from doing any road construction or mining-related activities in the Sunset Roadless Area. Although Federal Defendants received notice of the road construction and are aware of Mountain Coal's additional construction plans, they have taken no action to halt this illegal bulldozing.

To prevent Mountain Coal from continuing to exploit the fact that this Court has not yet entered the Tenth Circuit's remedy order, on June 11, 2020, Conservation Groups filed an Unopposed Motion for Entry of the Tenth Circuit Mandate. ECF No. 76. Negotiations between all of the parties revealed that Mountain Coal, contrary to its representations to the Tenth Circuit, believes it has a right to construct additional roads and engage in other surface disturbing activities in the Sunset Roadless Area, and is imminently planning to do so. Although the parties attempted to negotiate a briefing schedule to resolve this dispute, Mountain Coal is unwilling to forgo causing further irreversible damage to the roadless area, other than new road construction, while this Court reviews these motions. Mountain Coal did not provide Conservation Groups with any compelling reason why, for the short time that it will take this Court to resolve this motion, it cannot pause drilling pad construction and other surface disturbing activities that would use and be adjacent to the newly constructed illegal road.

Accordingly, the Conservation Groups request that this Court maintain the status quo by (1) ordering 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) ordering Mountain Coal to immediately halt all surface disturbing activities within the

North Fork Exception area, both pending this Court's issuance of the Tenth Circuit's mandate and resolution of the legal issues presented in this motion. The Court should further set an expedited schedule for doing so. Once the remedy issue has been fully briefed, the Conservation Groups request that this Court order the Forest Service to withdraw its consent and Mountain Coal to halt all surface disturbing activities within the North Fork Exception area unless and until the Forest Service adopts a lawful exception to the Colorado Roadless Rule.

The Conservation Groups' attorney has conferred with attorneys for Federal Defendants and Mountain Coal, and both parties oppose this motion.

BACKGROUND

On appeal, the Conservation Groups prevailed in their challenge to the Forest Service's adoption of the North Fork Exception to the Colorado Roadless Rule. The Colorado Roadless Rule generally prohibits road construction within designated areas of National Forest lands in the state. 36 C.F.R. § 294.43. But the North Fork Exception allowed road construction for coal mining under certain conditions within the 19,000-acre North Fork Coal Mining Area. *Id.* § 294.43(c)(1)(ix).

On March 2, 2020, the Tenth Circuit held that the Forest Service violated the National Environmental Policy Act (NEPA) by adopting the North Fork Exception to the Colorado Roadless Rule without considering a reasonable alternative that would have protected an additional roadless area from the impacts of coal mining. U.S. Ct. App. Op., ECF No. 69.1. Neither Federal Defendants nor Mountain Coal sought to stay the Tenth Circuit's mandate, nor did they seek certiorari in the Supreme Court. The Tenth Circuit vacated this Court's judgment and remanded the case for entry of an order vacating the North Fork Exception. *Id.* at 22. On

April 24, 2020, the Tenth Circuit issued the mandate, which this Court received that day. Mandate of U.S. Ct. App., ECF No. 74.

During merits briefing before the Tenth Circuit, Mountain Coal urged the Tenth Circuit to remand without vacating the North Fork Exception because the result of vacatur would be to prohibit road construction for mining purposes:

> As is likely hoped by the Conservation Groups, vacatur of the entire North Fork Exception would again freeze coal exploration in the entire North Fork Coal Mining Exception Area and prevent Mountain Coal from further roadbuilding and mining in the Lease Modifications. This would certainly result in bypass of the coal in the Lease Modifications.

Br. of Intervenor-Appellee, App. Ct. ECF No. 25 at 49 (Ex. 1). The Tenth Circuit rejected this request and ordered vacatur of the North Fork Exception. U.S. Ct. App. Op., ECF No. 69.1 at 22.

On June 4, 2020, the Conservation Groups contacted Mountain Coal and learned that—despite its representations to the Tenth Circuit and the Court's subsequent vacatur order—during the week of June 1 the company constructed close to a mile of road in the Sunset Roadless Area. Decl. of Robin Cooley ¶ 5; *see also* Decl. of Sally Jane Pargiter ¶ 6 (displaying aerial photos). Mountain Coal's attorney has stated that the company intends to construct about twice as much road as it has already bulldozed in the Sunset Roadless Area during the 2020 construction season. Decl. of Robin Cooley ¶¶ 5, 6. Mountain Coal also imminently plans to conduct further surface disturbance to construct the five drilling pads accessibly only using the completed road segment. *Id.* ¶ 7. Mountain Coal uses these half-acre pads to drill wells to vent methane when mining occurs underground. *See* Sally Jane Pargiter Decl. ¶ 6 (showing photos of previously constructed drilling pads accessed by and adjacent to roads).

The Conservation Groups' attorneys contacted Federal Defendants' attorney nearly a week prior to the road construction to inquire whether Mountain Coal had plans to construct any roads in the Sunset Roadless Area considering the Tenth Circuit's order. Decl. of Robin Cooley ¶ 2. But Federal Defendants' attorneys refused to disclose any information about the construction activities to the Conservation Groups. *Id.* ¶ 3.

Although the parties have been in negotiations in an attempt to resolve this dispute or to propose a joint briefing schedule for this Court to resolve this dispute without the need for Conservation Groups to seek expedited relief, they have been unable to do so because Mountain Coal is unwilling to refrain from all surface disturbing activities (not just road construction) in the interim. Prohibiting all surface disturbance during briefing was a necessary condition for Conservation Groups since Mountain Coal intends to start drill pad construction "shortly." *Id.* ¶ 8. The parties did agree that Federal Defendants and Mountain Coal would not oppose Plaintiffs' Unopposed Motion for Entry of Tenth Circuit Mandate, which Conservation Groups filed yesterday, June 11, 2020. ECF No. 76. That motion disclosed that Conservation Groups would be filing this additional request for relief. *Id.*

ARGUMENT

As part of their inherent powers, courts "ha[ve] the authority to order compliance with [their] mandate[s]." *Zinna v. Congrove*, 755 F.3d 1177, 1181 n.1 (10th Cir. 2014) (citing *City of Cleveland v. Fed. Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977)) (holding that district court violated an appellate court mandate when it did not comply the mandate's clear directives). "A motion to enforce judgment is the usual method for requesting a court to interpret its own judgment." *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004), *aff'd sub*

nom. Heartland Reg'l Med. Ctr. v. Leavitt, 415 F.3d 24 (D.C. Cir. 2005) (citing *Sec. & Exch. Comm'n v. Hermil, Inc.*, 838 F.2d 1151, 1153 (11th Cir. 1988). A court "should grant a motion to enforce if a prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it." *Anglers Conservation Network v. Ross*, 387 F. Supp. 3d 87, 93 (D.D.C. 2019) (internal quotation marks omitted).

Here, the Tenth Circuit ordered vacatur of the North Fork Exception to the Colorado Roadless Rule, and in doing so the Tenth Circuit precluded any road construction or tree clearing activities in the Sunset Roadless Area—as Mountain Coal itself admitted in its Tenth Circuit briefing. This Court has no discretion not to enter the vacatur order. Mountain Coal illegally disregarded the mandated remedy in this case when it bulldozed a road through the Sunset Roadless Area.

I. Mountain Coal's Decision to Bulldoze a Road Through the Sunset Roadless Area Violates the Mandated Remedy in this Case.

Despite its previous representation to the Tenth Circuit acknowledging that vacatur of the North Fork Exception would preclude road building, and without any notice to the Conservation Groups or this Court, Mountain Coal chose to bulldoze first and let Conservation Groups ask questions later. Mountain Coal caused irreparable damage by constructing a road through the Sunset Roadless Area during the week of June 1, 2020. *See* Sall Jane Pargiter Decl. ¶ 6 (displaying linear slash through the forest). This illegal bulldozing occurred *after* Federal Defendants failed to answer Conservation Groups' reasonable inquiries the previous week as to the Forest Service's knowledge of the mining company's plans. Mountain Coal's attempt to thwart the Tenth Circuit's clear mandate to vacate the North Fork Exception, and the Forest Service's blind acquiescence, violates the law.

The Colorado Roadless Rule generally prohibits road construction in Colorado Roadless Areas unless a specific exception applies. 36 C.F.R. § 294.43(a). Here, the only exception that would have authorized the road construction was the North Fork Exception, which the Tenth Circuit ordered vacated on March 2, 2020. U.S. Ct. App. Op. at 22, ECF No. 69.1; *see also* 36 C.F.R. § 294.43(c)(1)(ix). This order eliminated the North Fork Exception from the Colorado Roadless Rule, and therefore there was no lawful basis for Mountain Coal's road construction.

Black's Law Dictionary defines "vacate" as "[t]o nullify or cancel; make void; invalidate." Black's Law Dictionary (11th ed. 2019). Vacatur "wipes the slate clean." *Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 824 F.3d 33, 52 (3d Cir. 2016). Moreover, the nullification worked by vacatur is not merely prospective. Rather, "[w]hen a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect and the agency must initiate another rulemaking proceeding if it would seek to confront the problem anew." *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) (internal quotation marks omitted); *see also Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (*en banc*) ("Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid" and the "effect of invalidating an agency rule is to reinstate the rule previously in force") (quoting *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005)); *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (vacatur "had the effect of reinstating the rules previously in force"). Indeed, as this Court previously held, the point of vacatur in a case finding NEPA violations is to provide a "clean slate." *High Country Conservation Advocates v. USFS*, 67 F. Supp. 3d 1262, 1265 (D. Colo. 2014).

Here, the Tenth Circuit ordered vacatur of the North Fork Exception and left all remaining provisions of the Colorado Roadless Rule in place: "Under our traditional equitable powers to fashion appropriate relief . . . the appropriate remedy is vacatur of the entire North Fork Exception." U.S. Ct. App. Op. at 22, ECF No. 69.1. Absent this relevant exception, the Colorado Roadless Rule generally prohibits road construction, reconstruction, and tree cutting for coal mining-related activities. 36 C.F.R. §§ 294.42(a), 294.43(a). Accordingly, the Forest Service had no authority to authorize Mountain Coal to construct roads in the Sunset Roadless Area, nor did Mountain Coal have any authority to construct roads within that roadless area. Indeed, as Mountain Coal correctly represented to the Tenth Circuit, vacatur of the North Fork Exception "freeze[s] coal exploration in the entire North Fork Coal Mining Exception Area and prevent[s] Mountain Coal from further roadbuilding and mining in the Lease Modifications" unless and until the Forest Service adopts a valid exception. Br. of Intervenor-Appellee, App. Ct. ECF No. 25 at 49 (Ex. 1).

Mountain Coal cannot now argue the opposite to justify constructing roads through the Sunset Roadless Area. The doctrine of judicial estoppel prevents "a party from playing fast and loose with the courts," *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980) (internal quotation marks omitted), by barring a party from "adopting a legal position in conflict with one earlier taken in the same or related litigation." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). The purpose of this doctrine is "to protect the integrity of the judicial process." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Mountain Coal made its representations that vacatur would "freeze" mining-related activities in an attempt to convince the Tenth Circuit not

to vacate the North Fork Exception. Judicial estoppel prevents Mountain Coal from ignoring its prior statements in attempt to take an entirely inconsistent position before this Court.

This Court also should not condone Mountain Coal's and the Forest Service's attempts to exploit the lag time between the Tenth Circuit's vacatur order and this Court's formal entry of that order to justify irreparable harm to a roadless area that is plainly inconsistent with the Tenth Circuit's holding. The district court's entry of the mandate is a purely non-discretionary task. *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1534 (10th Cir. 1992) ("The Rule is well established that a district court must comply strictly with the mandate rendered by the reviewing court."); *see also Litchfield v. Dubuque & P.R. Co.*, 74 U.S. 270, 271 (1868) ("After 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.").

Moreover, the Tenth Circuit's holding that vacatur was the appropriate remedy, issued on March 2, 2020, had immediate and retroactive legal effect. The principle that "judicial decisions operate retrospectively, is familiar to every law student." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982). An appellate court order must be given effect "as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). Accordingly, Mountain Coal and the Forest Service may not simply ignore the Tenth Circuit's order. To hold otherwise would create a perverse incentive for litigants to rush to take matters into their own hands any time an appellate court remanded with instructions to a district court to implement the remedy.

Moreover, even if this Court were to give Mountain Coal a free pass with respect to the already constructed road—which it should not—it should not allow Mountain Coal to bootstrap

in additional drilling pad construction or other surface disturbing activities accessible only using the illegal road. Mountain Coal comes to the Court with "unclean hands." *Deseret Apartments, Inc. v. United States*, 250 F.2d 457, 458 (10th Cir. 1957). It is a well-established principle that a court generally must not sanction unlawful and deceitful acts or otherwise turn a blind eye to them. *See Pan-Am. Petroleum & Transp. Co. v. United States*, 273 U.S. 456, 506 (1927) ("The general principles of equity . . . will not be applied to frustrate the purpose of [U.S.] laws or to thwart public policy."). Here, Mountain Coal has taken actions that are entirely inconsistent with representations that it made to the Tenth Circuit, rushed to bulldoze a road through the Sunset Roadless Area in disregard for the Tenth Circuit's decision and the Colorado Roadless Rule, and *now* claims that it can use that illegal road to scrape new drilling pads. This Court should not allow Mountain Coal to benefit from its illegal acts.

II. Mountain Coal Has No Valid Existing Rights to Construct New Roads.

To justify its actions, Mountain Coal's newly formed position is that, despite vacatur of the very exception that it acknowledges was necessary for mining to occur, there is no impact whatsoever to its lease modification rights. This makes no sense and is incorrect as a matter of law. Mountain Coal could not obtain valid road construction rights absent the North Fork Exception.

As explained, on March 2, 2020 the Tenth Circuit ordered vacatur of the North Fork Exception to the Colorado Roadless Rule, and this exception provided the *only* lawful basis on which the Forest Service could consent to road construction in the roadless area. *See supra* p. 7–8; FSLeasingII-0000056 (Forest Service Record of Decision (Dec. 11, 2017)) ("[A]n exception to the Colorado Roadless Rule was promulgated to allow for temporary road construction for

coal mining purposes in this area.").[1] The Tenth Circuit's ruling has retroactive effect, meaning that the Forest Service could not authorize road construction when it consented to the lease modifications in this case. *See Harper*, 509 U.S. at 97; *see also Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006) (invalidating timber sales that were reliant on a land management plan that was later overturned); *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 468 F. Supp. 2d 1140, 1142 (N.D. Cal. 2006) (proper remedy for unlawful repeal of Roadless Rule was to reinstate the rule "as if it were never unlawfully repealed" and enjoining road construction on existing oil and gas lease issued during unlawful repeal); *Kinkead v. Humana, Inc.*, 206 F. Supp. 3d 751, 754 (D. Conn. 2016) (appellate court's reversal of district court means that the defendants became liable to pay plaintiff overtime for the periods worked while district court decision was in effect). Accordingly, Mountain Coal has no vested right to construct roads in violation of the Colorado Roadless Rule. Although Mountain Coal's lease modifications have not been set aside, Mountain Coal cannot construct roads for coal mining purposes unless and until the Forest Service issues a valid exception to the Roadless Rule.

For the same reason, the lease modification stipulations also do not give Mountain Coal an existing right to construct new roads. The lease modification stipulations make the lease modifications subject to all the rules and regulations of the Forest Service, including the Colorado Roadless Rule, subject to the rights granted by the Secretary of the Interior in the

[1] The Colorado Roadless Rule protects rights that existed before the Rule's adoption on July 3, 2012. *See* 36 C.F.R. §§ 294.43(c)(1)(i), 294.48(a). But the lease modifications at issue here were issued and consented to in 2017, more than five years after the adoption of the Colorado Roadless Rule. BLM000001 (Bureau of Land Management Record of Decision (Dec. 2017)); FSLeasingII-0000045 (Forest Service Record of Decision (Dec. 11, 2017)). Accordingly, the only provision that would authorize road construction related to coal mining on the modified leases was the North Fork Exception. *See id.* § 294.43(a), (c)(1)(ix).

permit. FSLeasing-0069933 (Bureau of Land Management Record of Decision (Dec. 2017)) ("The permittee/lessee must comply with all the rules and regulations of the Secretary of Agriculture set forth at Title 36, Chapter II, of the Code of Federal Regulations . . . . when not inconsistent with the rights granted by the Secretary of the Interior in the permit."), FSLeasing-0069949 (Forest Service Record of Decision (Dec. 11, 2017)) (same). But given the retroactive vacatur of the North Fork Exception, the Forest Service lacked the authority to consent to any road construction and reconstruction in the Sunset Roadless area. *See* BLM00009 (North Fork Exception "facilitates access to federal coal resources in the [North Fork Coal Mining Area] by allowing for the construction or reconstruction of temporary roads" for . . . coal mining activities); FSLeasingII-0000056 (Forest Service reliance on North Fork Exception). Moreover, the lease modifications specifically stipulate that the leased lands within the roadless area "may be subject to restrictions on road-building pursuant to rules and regulations of the Secretary of Agriculture *applicable at the time any roads may be proposed on the lease.*" FSLeasingII-0000100 (emphasis added). Because the North Fork Exception is no longer applicable, Mountain Coal must comply with the Colorado Roadless Rule.

Moreover, Mountain Coal was well aware of the dispute over the legality of the North Fork Exception when it acquired the lease modifications. *See, e.g.*, BLM001238-BLM001240 (Plaintiffs' October 2017 objections to lease modifications arguing that the lease modifications were invalid because reinstatement of the North Fork Exception was illegal). A company that "deals with property while it is in litigation does so at his own peril." *Winkler v. Andrus*, 614 F.2d 707, 714 (10th Cir. 1989); *see also Kinkead*, 206 F. Supp. 3d at 755 (rejecting defendants' reliance on overturned district court opinion to avoid retroactivity of appellate decision,

recognizing that defendants were well aware that decision could be overturned). Here, as evidenced by its Tenth Circuit briefing, Mountain Coal plainly understood that the company has no vested rights to construct roads.

CONCLUSION AND REQUEST FOR RELIEF

Rather than accept the consequences of the Tenth Circuit's vacatur order, the effects of which Mountain Coal itself detailed to the Court, Mountain Coal has opted to rush ahead with bulldozing roads through a protected roadless area, even though it has no legal right to engage in such destructive activities. Meanwhile, the Forest Service has stood silently by. This Court should not condone such acts.

Pending this Court's resolution of this dispute, this Court should (1) order the Forest Service to immediately withdraw its consent to any surface disturbing activities in the North Fork Exception area, and (2) 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. Ultimately, as required under the order vacating the North Fork Exception, this Court should order the Forest Service to withdraw its consent and prohibit any additional road building or surface disturbance in the Sunset Roadless Area unless and until the Forest Service adopts a lawful exception to the Colorado Roadless Rule explicitly authorizing such activities.

Respectfully submitted June 12, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, I filed the foregoing **PLAINTIFFS' EMERGENCY MOTION TO ENFORCE REMEDY** with the Court's electronic filing system, thereby generating service upon the following parties of record:

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