Public Land and Resources Law Review

Volume 0 *Case Summaries 2015-2016*

High Country Conservation Advocates v. United States Forest Service, 52 F. Supp. 3d 1174 (D. Colo. 2014)

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High Country Conservation Advocates v. United States Forest Service, 52 F. Supp. 3d 1174 (D. Colo. 2014)

Case Note

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INTRODUCTION

High Country Conservation Advocates v. United States Forest Service concerns the United States Forest Service's ("Forest Service") and the Bureau of Land Management's ("BLM") (together "the Agencies") authorizations of on-the-ground mining exploration activities in the Sunset Roadless Area of western Colorado.[1] The United States District Court for the District of Colorado's holding has far-reaching consequences for federal agencies' analysis and disclosure of impacts on the climate under the National Environmental Policy Act ("NEPA"). NEPA mandates federal agencies complete procedural requirements for actions with potential to cause significant social, environmental, and economic impacts.[2] This includes the types of actions at issue in *High Country*—mineral leasing and resource management planning.

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1 52 F. Supp. 3d 1174, 1181 (D. Colo. 2014); *see* Colorado Roadless Management Area, 36 C.F.R. §§ 294.40 to 294.49 (2012).

2 *See* 42 U.S.C. § 4331 (1970).

The plaintiffs, High Country Conservation Advocates, WildEarth Guardians, and the Sierra Club (together "Plaintiffs"), disagreed with the Agencies and two coal companies, Ark Land Company and Mountain Coal Company (together "Arch Coal"), over the adequacy of two Environmental Impact Statements ("EIS") and an Environmental Assessment ("EA") prepared pursuant to NEPA.[3] Their arguments arose from different interpretations of what constitutes rigorous exploration and objective evaluation of impacts on the climate. This note will examine the legal history surrounding the specific facts of *High Country*, as well as the evolving incorporation of climate-related considerations in NEPA analysis.

I. FACTS OF *HIGH COUNTRY CONSERVATION ADVOCATES V. UNITED STATES FOREST SERVICE*

The issues in *High County* arose out of three interconnected federal agency decisions that permitted coal-mining activities in the Sunset Roadless Area under the Colorado Roadless Rule.[4] Finalized in July 2012, the Colorado Roadless Rule EIS included modifications to the nation-wide Roadless Area Conservation Rule ("National Roadless Rule") that addressed Colorado-specific needs and concerns.[5] One such modification was an exemption for coal mining related road construction in the North Fork Valley coal mining area.[6] This designated area includes approximately 20,000 acres of previously protected lands, including the Sunset Roadless Area.[7] The Sunset Roadless Area contains 5,800 acres of relatively wild, "undeveloped forest and scrub land" in western Colorado.[8] Located on lands managed by the Forest Service within the Grand Mesa, Uncompahgre, and Gunnison National Forests, the Sunset Roadless Area neighbors three operational underground coal mines, including the West Elk coal mine.[9] Operating since 1981, the West Elk coal mine is primarily located beneath lands managed by the Forest Service.[10] Arch Coal currently holds the West Elk coal mine leases.[11]

In 2009, Arch Coal requested that the BLM add lands to its preexisting West Elk coal mine leases.[12] The requested lease modifications included 1,701 acres in the Sunset Roadless Area.[13] Overall, the proposed lease modifications would enable Arch Coal to mine approximately nineteen million additional tons

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[3] *High Country*, 52 F. Supp. 3d at 1181, 1183-84.

[4] *Id.* at 1184.

[5] *Id.*

[6] *Id.*

[7] *Id*.

[8] *Id*. at 1183.

[9] Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado, 77 Fed. Reg. 39,576, 39,578 (July 3, 2012).

[10] *High Country*, 52 F. Supp. 3d at 1183.

[11] *Id*. at 1184.

[12] Fed. Defs.' Resp. Br. 5, *High Country*, 52 F. Supp. 3d 1174 (D. Colo. 2014) (No. 13-cv-01723) (on file with *Pub. Land & Resources L. Rev.*).

[13] *High Country*, 52 F. Supp. 3d at 1184.

of coal and extend the West Elk coal mine's life by about three years.[14] The BLM approved the lease modifications in November 2011, and the Forest Service consented to the modifications as the managing agency for the overlaying lands.[15] The decision to approve the lease modifications was supported by an EA.[16] The Plaintiffs used the Forest Service's administrative appeal process to successfully appeal the decision.[17] As a result, the Forest Service conducted a more intensive examination of the potential environmental impacts, and prepared the Lease Modification EIS with the assistance of the BLM and the Office of Surface Mining, Reclamation and Enforcement ("OSM").[18] After completing the NEPA process for the Lease Modification EIS, the Forest Service issued its decision approving Arch Coal's proposed lease modifications in August 2012.[19] The Plaintiffs' subsequent attempt to appeal this decision through the administrative appeal process was denied November 2012.[20]

The BLM approved the lease modifications and adopted the Forest Service's Lease Modification EIS in December 2012.[21] In response, the Plaintiffs appealed the BLM's approval through the Interior Board of Land Appeals ("IBLA"), which resulted in an automatic forty-five day stay in the finalization of the BLM's decision.[22] The stay expired when the IBLA declined to issue a decision within the forty-five day period, and the BLM's approval of the lease modifications was finalized and took effect.[23]

After the lease modifications became effective in April 2013, Arch Coal submitted a proposal to the BLM that detailed planned exploration activities.[24] The Agencies prepared an EA and approved an anticipated six miles of new roads and exploratory drilling pads in June 2013.[25] In response, the Plaintiffs sued the Agencies and moved for a preliminary injunction to halt construction.[26] The Plaintiffs withdrew their emergency motions after Arch Coal agreed to wait until the summer of 2014 to commence exploration activities.[27]

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[14] Pls.' Opening Br. on the Merits 8, *High Country*, 52 F. Supp. 3d 1174 (D. Colo. 2014) (No. 13-cv-01723).

[15] *High Country*, 52 F. Supp. 3d at 1184.

[16] Pls.' Opening Br., *supra* note 14, at 10.

[17] *High Country*, 52 F. Supp. 3d at 1184.

[18] Fed. Defs.' Resp. Br., *supra* note 12, at 5.

[19] *High Country*, 52 F. Supp. 3d at 1184.

[20] *Id.*

[21] *Id*.

[22] Pls.' Opening Br., *supra* note 14, at 13.

[23] *High Country*, 52 F. Supp. 3d at 1185; *see* 43 C.F.R. § 4.21(a)(2) (2010).

[24] *High Country*, 52 F. Supp. 3d at 1185.

[25] *Id*.

[26] *Id*.

[27] *Id*.

II. PROCEDURAL HISTORY

The Plaintiffs filed their complaint in the District of Colorado on July 2, 2013, alleging the Agencies' Lease Modification EIS, Colorado Roadless Rule EIS, and Exploration Plan EA violated NEPA.[28] The following week, Arch Coal was granted leave to intervene.[29] The Plaintiffs contended that the Agencies did not adequately disclose the impacts the Lease Modification EIS and the Colorado Roadless Rule EIS would have on the climate.[30] They also alleged that the Agencies failed to take a "hard look" at the Exploration Plan's impact on recreational interests and did not adequately consider at least one reasonable alternative.[31] In response, the Agencies asserted that their general discussion of possible impacts to the climate was sufficient because standardized measurements quantifying impacts on the climate were unavailable.[32] Furthermore, the Agencies justified not quantifying greenhouse gas ("GHG") emissions in the Colorado Roadless Rule EIS by stating, "mining activity under the Colorado Roadless Rule is speculative and emission rates depend on mine-specific factors" determined by exploration.[33] Arch Coal individually argued that the Plaintiffs lacked standing to challenge the Colorado Roadless Rule EIS, asserting that the Plaintiffs' particular harms were unrelated to the alleged inadequate analysis of impacts on the climate.[34]

After Arch Coal agreed not to begin exploration activities until July 1, 2014, the parties drafted a joint case management plan.[35] However, shortly after filing their opening brief, the Plaintiffs realized the case might not be decided on the merits before Arch Coal started exploration, and in order to protect their interests, the Plaintiffs filed a motion for preliminary injunction.[36] United States District Judge R. Brooke Jackson received the case May 15, 2014, and scheduled oral argument on the preliminary injunction motion for July 19, 2014.[37] The court, however, determined it was able to decide the case on the merits before the scheduled preliminary injunction hearing.[38] As a result, the hearing focused on the merits.[39]

III. HOLDINGS

Under the Administrative Procedure Act, a court may only set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise

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28 *Id*. at 1181, 1184-85.
29 *Id.* at 1185.
30 Pls.' Opening Br., *supra* note 14, at 1-2.
31 *High Country*, 52 F. Supp. 3d at 1198-99.
32 *Id*. at 1190.
33 *Id*. at 1195.
34 *Id.* at 1186.
35 *Id*. at 1185.
36 *Id*.
37 *Id*.
38 *Id*.
39 *Id*.

not in accordance with law."[40] A court may not otherwise substitute its own judgment for that of the agency.[41] Agency decisions are given deference, particularly if they involve "technical or scientific matters within the agency's area of expertise."[42]

A. Plaintiffs Have Standing to Bring All Claims

The court found the Plaintiffs had standing to challenge the Agencies' decisions.[43] In order to establish standing, the Plaintiffs must demonstrate the invasion of a legally protected interest is "concrete and particularized, . . . actual or imminent," causally connected to the challenged action, and redressable by a favorable decision.[44] Arch Coal argued the "proper analysis must also trace the concrete injury to the particular legal theory advanced by the plaintiff."[45] The court, however, found that "rais[ing] the bar on standing by requiring additional proof beyond injury, causation, and redressability" was inappropriate and lacked precedential support.[46] Therefore, the court determined the Plaintiffs had standing.[47] As the court stated, "if bulldozing beg[an] in the Sunset Roadless Area," the Plaintiffs would suffer an "injury in fact" to their recreational interests, which would be traceable to the Agencies' actions, and could be redressed by the court.[48]

B. Lease Modification Environmental Impact Statement

Although the court determined the Agencies adequately considered the impacts to adjacent lands and the effects of methane venting, it held that "their explanation of the social, environmental, and economic effects" of GHG emissions was arbitrary and capricious.[49] The court observed that beyond a general discussion of climate change and quantification of emissions, the Agencies abandoned any attempts to quantify the climate change costs of the lease modifications, stating such analysis was presently impossible.[50] However, the Agencies retained their anticipated economic benefits analysis of the lease modifications, which they expressly relied on to justify their approval.[51]

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[40] 5 U.S.C. § 706(2)(A) (1966).

[41] *High Country*, 52 F. Supp. 3d at 1186 (citing Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 555 (1978)).

[42] *Id*. (citing Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1246 (10th Cir. 2011)).

[43] *Id*.

[44] *Id*. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

[45] *Id.*

[46] *Id.* at 1187.

[47] *Id*.

[48] *Id*.

[49] *Id*.

[50] *Id*. at 1189-90.

[51] *Id.* at 1191.

The court determined that analysis of climate change costs was possible using the Social Cost of Carbon Protocol.[52] Published and regularly updated by the Interagency Working Group on Social Cost of Carbon, the Social Cost of Carbon Protocol was designed to enable agencies to "incorporate the social benefits of reducing carbon dioxide (CO_2) [sic] emissions into cost-benefits analyses of regulatory actions."[53] The court was not persuaded that it was reasonable for the Agencies to "ignore a tool in which an interagency group of experts invested time and expertise."[54] The court held it was arbitrary and capricious to quantify the benefits of the lease modifications and not the costs when such analysis was possible using the Social Cost of Carbon Protocol.[55] Furthermore, the court determined that though the Agencies may have had justifiable reasons for not using the Social Cost of Carbon Protocol, the reasons were not adequately stated in the Lease Modification EIS.[56]

C. Colorado Roadless Rule Environmental Impact Statement

The court found that the North Fork mining area exemption of the Colorado Roadless Rule EIS violated NEPA by failing to (1) adequately disclose GHG pollution from mine operation; (2) adequately disclose GHG pollution from coal combustion; and (3) adequately "address, acknowledge, or respond to an expert report criticizing the [A]gencies' assumptions about GHG pollution."[57]

The Agencies declined to quantify or analyze the potential impacts of GHG emissions from expanded mine operations, reasoning that the mining activity was speculative and emission rates could not be understood until further exploration occurred.[58] The court determined that projecting GHG emissions was possible and, therefore, it was arbitrary for the Agencies to offer detailed economic projections of the Colorado Roadless Rule's benefits while omitting feasible projections of associated costs.[59]

The court further rejected the Agencies' explanations for omitting estimates of GHG emissions associated with the combustion of coal. The court dismissed the Agencies' conclusion that since coal is a global commodity "there would be [a] perfect substitution between coal provided by the North Fork Valley and coal mined elsewhere."[60] Instead, despite the Agencies' attempt to distinguish the present case, the court was persuaded by the reasoning in *Mid*

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[52] *Id*. at 1190.

[53] INTERAGENCY WORKING GRP. ON SOC. COST OF CARBON, U.S. GOV'T, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866 1 (Feb. 2010), *available at* http://www.epa.gov/oms/climate/regulations/scc-tsd.pdf [hereinafter SOCIAL COST OF CARBON].

[54] *High Country*, 52 F. Supp. 3d at 1193.

[55] *Id*. at 1191.

[56] *Id.* at 1191-92.

[57] *Id.* at 1194-95.

[58] *Id*. at 1195.

[59] *Id.* at 1196.

[60] *Id.* at 1197.

States Coalition for Progress v. Surface Transportation Board.[61] In *Mid States*, the Surface Transportation Board similarly argued that emissions would occur regardless of the project's approval.[62] The United States Court of Appeals for the Eighth Circuit characterized this argument as "illogical at best."[63] In *High Country*, the court similarly determined that, contrary to the perfect substitution argument, at some point the additional supply of coal would impact the demand, and "coal that otherwise would have been left in the ground [would] be burned."[64]

D. Exploration Plan Environmental Assessment

The court determined the Exploration Plan EA failed to (1) adequately analyze the plan's effects on recreational interests; and (2) adequately analyze at least one reasonable alternative proposed by the Plaintiffs.[65] The court found the proposed exploration activities would certainly impact two recreational trails in the area.[66] Furthermore, the Agencies did not properly explain their dismissal of the Plaintiffs' suggested elimination of a "redundant" road.[67]

IV. REMEDIES

Arch Coal was immediately enjoined from proceeding with the Exploration Plan, and the court directed the parties to "confer and attempt in good faith to reach agreement as to remedies" for the remaining NEPA violations.[68] In September 2014, after additional briefing on remedies, the court vacated both the lease modifications and the North Fork coal mining area exception of the Colorado Roadless Rule.[69] The court determined that "NEPA's goals of deliberative, non-arbitrary decision-making would seem best served by the [A]gencies approaching these actions with a clean slate."[70]

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[61] *Id*. (discussing Mid States Coal for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003)).

[62] *Mid States*, 345 F.3d at 549.

[63] *Id*.

[64] *High Country*, 52 F. Supp. 3d at 1197-98.

[65] *Id*. at 1198-1200

[66] *Id.* at 1199.

[67] *Id*. at 1200.

[68] *Id*. at 1200-01.

[69] High Country Conservation Advocates v. U.S. Forest Serv., 67 F. Supp. 3d 1262, 1266 (D. Colo. 2014).

[70] *Id*. at 1182.

V. DISCUSSION OF LEGAL BACKGROUND

A. Coal Leasing on Federal Lands

Coal-mining operations underneath and adjacent to the Sunset Roadless Area are cooperatively managed by the Forest Service and the BLM under the Mineral Leasing Act. The Mineral Leasing Act governs leasing of federally-owned "coal, petroleum, natural gas, and other minerals."[71] In general, the BLM regulates and manages coal leases on Forest Service lands, and Forest Service consent is required prior to BLM approval of any mining leases under Forest Service lands.[72] The Forest Service is further authorized to impose additional resource protection measures on the leases.[73] The same "dual-agency permitting process" applies to mining lease modifications.[74]

B. National Environmental Policy Act and Climate Change

Designed to ensure public participation and transparent decision-making, NEPA requires federal agencies to consider environmental impacts of and reasonable alternatives to proposed actions.[75] As a procedural statute, NEPA prescribes the necessary process, but does not mandate substantive requirements.[76] Nevertheless, its procedural requirements are not merely formalities.[77] Rather, they obligate agencies to "consider every significant aspect of the environmental impact of a proposed action," and "inform the public that it has considered environmental concerns in its decision-making process."[78]

NEPA requires agencies to prepare an EIS to analyze the impacts of proposed alternatives prior to implementing an action with significant potential effects on the human environment.[79] Agencies may elect to prepare an Environmental Assessment ("EA") to briefly analyze the necessity of a more in-depth EIS.[80] Although typically more concise than an EIS, an EA still evaluates the alternatives to and environmental impacts of the proposed action.[81] An agency need not develop an EIS if it determines in an EA that the proposed action will have no significant impacts on the human environment.[82] If an agency

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[71] WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation and Enforcement, No. 13-cv-00518-RBJ, ___ F. Supp. 3d ___, 2015 WL 2207834, at *2 (D. Colo. May 8, 2015).

[72] *High Country*, 52 F. Supp. 3d at 1182.

[73] *Id*.

[74] *Id*. at 1183.

[75] *Wyoming*, 661 F.3d at 1236.

[76] *High Country*, 52 F. Supp. 3d at 1181.

[77] *WildEarth Guardians*, 2015 WL 2207834, at *2 (citing Citizens' Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169, 1177-78 (10th Cir. 2008)).

[78] *Id*. (quoting *Krueger*, 513 F.3d at 1177-78).

[79] 42 U.S.C. § 4332(C)(i)-(v) (1975).

[80] 40 C.F.R. § 1508.9(a)(1) (1977).

[81] *Id*. at § 1508.9(b).

[82] 40 C.F.R. § 1508.13 (1977).

makes such a determination it will issue a Finding of No Significant Impact ("FONSI").[83]

In an EIS, the agency must "[r]igorously explore[,] . . . objectively evaluate," and "devote substantial treatment" to all reasonable alternatives.[84] In order to do so, the agency must take a "hard look" at the relevant information.[85] A hard look requires the agency to examine relevant data and articulate a rational connection between the "facts found and the decision made."[86] An EIS does not need to include an explicit monetary cost-benefit analysis.[87] If an agency includes such analysis, however, it cannot be misleading.[88]

Analysis and disclosure requirements under NEPA often create "incentives for agencies to employ mitigation measures to bring the impact of an action below the 'significance' threshold" to avoid the preparation of an EIS.[89] These incentives remain largely unrealized in the context of climate change.[90] Climate change is a fundamental environmental issue that "falls squarely within NEPA's focus."[91] However, at the time of *High Country*, general uncertainty existed as to the disclosure and analysis required under NEPA for the impacts of agency actions on the climate.[92] Although impacts on the climate are typically reasonably perceivable, the extent of their effects is often speculative.[93] For example, an agency may reasonably perceive that burning coal will impact the climate, however, it may be unable to definitively state or measure the actual resulting degree of climate change. Nevertheless, an agency may not simply ignore a speculative effect.[94]

When an agency cannot obtain sufficient information to fully disclose potential foreseeable impacts, an EIS must contain:

> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or

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[83] *Id.*

[84] 40 C.F.R. § 1502.14 (1977).

[85] WildEarth Guardians v. U.S. Forest Serv., 828 F. Supp. 2d 1223, 1236 (D. Colo. 2011).

[86] *Id*.

[87] 40 C.F.R. § 1502.23 (1977).

[88] *High Country*, 52 F. Supp. 3d at 1182 (citing Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446 (4th Cir. 1996)).

[89] Sarah E. Light, *NEPA's Footprint: Information Disclosure as a Quasi-Carbon Tax on Agencies*, 87 TUL. L. REV. 511, 535 (2013) (referencing Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903 (2002)).

[90] *Id.* at 511.

[91] COUNCIL OF ENVTL. QUALITY, REVISED DRAFT GUIDANCE ON THE CONSIDERATION OF GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE IN NEPA 2 (Dec. 2014), *available at* http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-quidance.

[92] Light, *supra* note 89, at 572.

[93] *Mid States*, 345 F.3d at 549.

[94] *Id*.

> unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.[95]

Federal courts have recently upheld agency decisions to omit quantitative analyses of potential impacts on the climate in favor of more general qualitative analyses.[96] The United States District Court for the District of Columbia recently held in *WildEarth Guardians v. United States Forest Service* that the Forest Service's stated inability to "provide an estimate of the effect of this project on global climate change because of the lack of appropriate models and research" complied with NEPA.[97] In another recent decision, *WildEarth Guardians v. Jewell*, the United States Court of Appeals for the D.C. Circuit similarly held the BLM's explanation that, "given the state of science, it is not possible to associate specific actions with the specific global impacts such as potential climate effects," fulfilled NEPA's analysis and disclosure requirements.[98] However, neither case suggested the Social Cost of Carbon Protocol as a possible tool, and the courts' holdings were apparently based on the presumption of the non-existence of such a tool.[99]

C. Colorado Roadless Rule

The Forest Service administers and manages the health, diversity, and productivity of the National Forest System lands to meet present and future needs.[100] In order to protect undeveloped natural lands, the Forest Service started developing an inventory of roadless areas in the 1970s.[101] As of 2011, approximately one-third of all National Forest System lands are designated inventoried roadless areas.[102] Roadless areas are important sources of clean

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[95] 40 C.F.R. § 1502.22(b)(1) (1977).

[96] *See*, *e.g.*, WildEarth Guardians v. Jewell, 738 F.3d 298 (D.C. Cir. 2013); WildEarth Guardians v. U.S. Forest Serv., 828 F. Supp. 2d 1223 (D. Colo. 2011).

[97] 828 F. Supp. 2d at 1240.

[98] 738 F.3d at 309 (bracket, internal citation, and quotations omitted).

[99] *High Country*, 52 F. Supp. 3d at 1193.

[100] Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244 (Jan. 12, 2001).

[101] Jayne v. Sherman, 706 F.3d 994, 996 (9th Cir. 2013) [hereinafter *Jayne II*], *adopting opinion in full*, Jayne v. Rey, 780 F. Supp. 2d 1099, 1102 (D. Idaho 2011).

[102] *See* U.S. DEP'T OF AGRIC., FOREST SERV., LAND AREAS OF THE NATIONAL FOREST SYSTEM 1 (Sept. 2011), *available at* http://www.fs.fed.us/land/staff/lar/LAR2011/LAR2011_Book_ A5.pdf; U.S. DEP'T OF AGRIC., FOREST SERV., IRA 2001 ROADLESS ACRES PER FOREST (CORRECTED), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5433333.pdf.

drinking water, fish and wildlife habitat, undisturbed landscape, and recreational areas.[103]

In 2001, concerns regarding encroaching development led the Forest Service to promulgate the National Roadless Rule.[104] The National Roadless Rule considered tree cutting, selling, and removal, and road construction to have the "greatest likelihood of altering and fragmenting the landscapes, resulting in immediate long-term loss of roadless area values."[105] Recognizing the need for tailored approaches in certain states with specific concerns, the Forest Service in 2005 allowed individual states to petition for alternative management requirements.[106] Colorado submitted a petition in 2006 to develop a state-specific rule.[107] The Colorado-specific concerns included facilitation of "exploration and development of coal resources in the North Fork coal mining area."[108] The Forest Service issued its final EIS on the Colorado Roadless Rule after an extensive multi-year federal, state, and public effort.[109] A product of collaborative and compromise-oriented policymaking, the Colorado Roadless Rule balanced conservation interests with economic needs.[110]

Comprised of approximately 4.2 million acres of Colorado Roadless Areas, the Colorado Roadless Rule incorporates 409,500 acres of formerly unprotected land, and strengthens protections in previously designated roadless areas.[111] These increased protections are offset by several major environmental concessions, including the North Fork coal mining area.[112] The North Fork coal mining area exemption allows for the construction of temporary roads for coal mining related exploration and surface activities, as well as continued operation of three existing coal mines that collectively "account[] for about 40% of all the coal production in the State of Colorado."[113] Although the exemption facilitates continued exploration and development of coal resources in the North Fork Valley, it does not directly authorize such activities.[114] Instead, individual projects are required to undertake separate environmental analysis and approval.[115]

While the Forest Service asserts the Colorado Roadless Rule provides greater protections than the National Roadless Rule,[116] the Plaintiffs argue that the Colorado Roadless Rule's protections are in fact weaker than those of the

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103 *Id*. at 3,245, 3,263.
104 *Jayne II*, 706 F.3d at 996.
105 66 Fed. Reg. at 3,244.
106 *Jayne II*, 706 F.3d at 996-97.
107 77 Fed. Reg. at 39,577.
108 *Id*.
109 Ark Initiative v. Tidwell, 895 F. Supp. 2d 230, 234 (D.D.C. 2012).
110 *High Country*, 52 F. Supp. 3d at 1195.
111 77 Fed. Reg. at 39,577.
112 *Id*. at 39,579.
113 *Id*.
114 *High Country*, 52 F. Supp. 3d at 1184.
115 *Id*.
116 77 Fed. Reg. at 39,578.

National Roadless Rule.[117] According to the Plaintiffs, the Colorado Roadless Rule permits temporary roads for coal exploration and mining that could ultimately allow for the "mining (and combustion) of hundreds of millions of tons of coal that would be inaccessible under the [N]ational Roadless Rule."[118]

CONCLUSION

A. Impacts of the High Country *Holding*

While only precedential for federal agencies within the District of Colorado, *High Country* considerably affects the decision-making process for federal agencies nationwide, and particularly land management agencies. Additionally, it substantially impacts Arch Coal, which relied on the North Fork mining exception of the Colorado Roadless Rule for continued exploration and development of coal resources.

In addition to bolstering the Plaintiffs' recent successes at establishing legal standing to challenge agencies' disclosures and analyses of impacts on the climate under NEPA,[119] *High Country* is the first case to set-aside an agency's decision as arbitrary and capricious for its failure to adequately consider impacts on the climate. It is also the first case to fully reject the perfect substitution argument commonly used by agencies to describe the climate-related impacts of coal extraction.

Prior to *High Country*, a lack of clear formal guidance existed for how agencies should address impacts on the climate under NEPA.[120] As a result, agencies were exposed to increasing litigation. At the time, the Social Cost of Carbon Protocol was expressly intended for cost-benefit assessment in rulemaking contexts.[121] Neither the Council on Environmental Quality ("CEQ") nor the Environmental Protection Agency ("EPA") had formally accepted the Social Cost of Carbon Protocol as a tool to quantitatively measure factors that potentially contribute to climate change. Yet, despite the lack of formal CEQ or EPA guidance and the controversial nature of the Social Cost of Carbon Protocol, the court determined the Agencies should have included it in the Lease Modification EIS cost-benefits analysis.[122] Furthermore, the court emphasized that the Agencies must provide justifiable reasons for not using an available analytical tool in their EIS.[123]

Potentially in response to the *High Country* decision regarding the Social Cost of Carbon Protocol, the CEQ recently issued draft guidance to provide direction on the consideration of impacts on the climate and to reduce the "risk of

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[117] Pls.' Opening Br., *supra* note 14, at 15.

[118] *Id*.

[119] *See WildEarth Guardians*, 828 F. Supp. 2d 1223; *WildEarth Guardians*, 738 F.3d 298.

[120] *See* Light, *supra* note 89, at 534-35.

[121] *See* SOCIAL COST OF CARBON, *supra* note 53, at 4.

[122] *High Country*, 52 F. Supp. 3d at 1190-93.

[123] *Id*. at 1193.

litigation driven by uncertainty in the assessment process."[124] The Social Cost of Carbon Protocol is now recognized by the CEQ as a tool to monetize costs and benefits. The CEQ also recognizes that available quantitative GHG estimation tools should guide agency decisions regarding appropriate analysis.[125] Despite the availability of such tools, however, agencies are not mandated to quantify impacts on the climate.[126] When an agency determines quantitative analysis is not appropriate, the CEQ recommends the agency complete a qualitative analysis and provide a legitimate reason for the decision.[127]

A recent decision by the United States District Court for the District of Oregon in *League of Wilderness Defenders v. Connaughton* demonstrates the interplay between qualitative and quantitative analyses of impacts on the climate.[128] Instead of requiring the use of an available tool to quantify impacts on the climate, the court in *Connaughton* focused its analysis on whether the Forest Service relied on a tool to quantify the costs of an action and then selectively omitted it from the final EIS while continuing to rely on the benefits associated with the action.[129] *Connaughton* reveals that in application, *High Country* does not necessarily require agencies to use available tools to quantify impacts on the climate, but rather it not arbitrarily avoid or apply such tools. As a result, *High Country*'s holding may ultimately discourage agencies from quantifying the costs and benefits of projects unless absolutely necessary.

Another noteworthy holding in *High Country* was the court's rejection of the commonly used perfect substitution argument.[130] The perfect substitution argument states that as a global commodity, the demand for coal will be unaffected by increases in availability.[131] In other words, as a global commodity, there is a steady demand for coal. Therefore, the same amount of coal will be consumed whether it is mined in the North Fork valley or somewhere else.[132] The court's rejection of the perfect substitution argument supports an earlier holding by the United States Court of Appeals for the Eighth Circuit in *Mid States*, and has broad potential repercussions on the analysis of coal mining under NEPA. Moving forward, the question is whether the court's reasoning will be applied on a case-by-case basis, depending on the surrounding facts and circumstances, or as part of a comprehensive reform of how agencies analyze the impacts of coal extraction actions on the climate.

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[124] COUNCIL OF ENVTL. QUALITY, *supra* note 91, at 3.

[125] *Id*. at 4.

[126] *Id*. at 15-16.

[127] *Id.* at 16.

[128] League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton, No. 3:12-cv-02271-HZ, 2014 WL 6977611, slip op. at 26 (D. Or. Dec. 9, 2014).

[129] *Id.*

[130] *High Country*, 52 F. Supp. 3d at 1197-98.

[131] *Id.* at 1197.

[132] *Id*.

B. Subsequent Related Holdings

High Country signals an emerging movement toward compelling agencies to incorporate analyses of impacts on the climate into NEPA reviews. In May 2015, *High Country* was reinforced by a ruling regarding the OSM's approval of two mining plan modifications for the Colowyo and Trapper coal mines in northwest Colorado.[133] The plaintiff in *WildEarth Guardians v. United States Office of Surface Mining* challenged the approval of mine plan modifications, arguing in part that the OSM violated NEPA by failing to take a hard look at the environmental impacts of pollutants produced by the proposed expansions.[134] In addition to a number of other arguments, the defendants asserted the speculative nature of coal combustion made it impossible to consider its effects.[135] Similar to his holding in *High Country*, Judge Jackson rejected this notion, and held that perfect foresight was not required for agencies to consider the extent of indirect effects.[136] Referencing *High Country*, the court ruled, "insofar as a federal agency was able to estimate the amount of coal to be mined it could likewise predict the environmental effects of the combustion of that coal."[137]

Another decision, *Dine Citizens v. United States Office of Surface Mining*, held that the OSM failed to "adequately consider the reasonably foreseeable combustion-related effects" of expanding the Navajo Mine, a coal mine in New Mexico.[138] Judge John L. Kane of the District of Colorado determined the "doubts concerning the validity of OSM's actions" outweighed the prospective economic harm of vacating the OSM's EA and FONSI.[139] Although the decision does not discuss or reference *High Country*, it similarly marks an important shift in the analysis of impacts on the climate under NEPA and a movement toward a more thorough approach.

C. Moving Forward

While the Agencies have not appealed the *High Country* holding as of the date of publication, they have already taken other measures to address the inadequacies of the Colorado Roadless Rule EIS. Considering the substantial economic impacts of the North Fork coal mining area, it does not come as a surprise that on April 7, 2015, the Forest Service published a notice of intent to prepare a supplemental EIS to reinstate the North Fork coal mining area

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[133] *WildEarth Guardians*, 2015 WL 2207834 at *15.

[134] *Id*. at *10.

[135] *Id*. at *15.

[136] *Id*.

[137] *Id*.

[138] Dine Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation and Enforcement, No. 12-cv-01275-JKL, ___ F. Supp. 3d ___, 2015 WL 996605, at *10 (D. Colo. Mar. 2, 2015).

[139] Dine Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation and Enforcement, No. 12-cv-01275-JLK, 2015 WL 1593995, at *3 (D. Colo. Apr. 5, 2015).

exception.[140] The supplemental EIS will address the Colorado Roadless Rule's deficiencies identified in *High Country*.[141] If the Agencies successfully address the court's holdings, their application of the Social Cost of Carbon Protocol will likely inform the disclosure and analysis of impacts on the climate in future agency decisions.

[140] Roadless Area Conservation; National Forest System Lands in Colorado, 80 Fed. Reg. 18,598, 18,598 (Apr 7, 2015).

[141] *Id*. at 18,598-99.