



United States
Department of
Agriculture

Forest
Service

Rocky
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File Code: 1570

Date: November 7, 2012

Edward B. Zukowski
Earthjustice
1400 Glenarm Pl., #300
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Dear Mr. Zukoski,

On September 24, 2012, you filed a Notice of Appeal (NOA) on behalf of WildEarth Guardians (the lead appellant), Defenders of Wildlife, Sierra Club, High Country Citizens' Alliance, and Rocky Mountain Wild. You were appealing an August 2, 2012 decision by acting Grand Mesa, Uncompahgre and Gunnison (GMUG) National Forests Supervisor Sherry Hazelhurst to give consent to the Bureau of Land Management (BLM) to modify federal coal leases COC-1362 and COC-67232 for the West Elk Mine. Your appeal was timely and the appellants have standing to appeal.

Pursuant to 36 CFR 215.17 an attempt was made to seek informal resolution of the appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR 215.18 - formal review and disposition procedures. I have reviewed the appeal record, including your written NOA, the Record of Decision (ROD), Final Environmental Impact Statement (FEIS), Draft Environmental Impact Statement (DEIS) and supporting documentation. I have weighed the recommendation from the Appeal Reviewing Officer and incorporated it into this decision. A copy of the Appeal Reviewing Officer's recommendation is enclosed. This letter constitutes my decision on the appeal and on the specific relief requested.

ACTION BEING APPEALED

The decision would give consent to the BLM Colorado State Office to add about 800 acres with associated lease stipulations to federal coal lease COC-1362 and about 921 acres with stipulations to lease COC-67232. Some stipulations from the parent lease are carried forward while new stipulations are added specific to the lease modifications. Coal in the existing leases is mined in the underground West Elk Mine near Somerset, Colorado. Lease COC-67232 is held by Ark Land Company and lease COC-1362 is held by Mountain Coal Company (MCC). The applications to modify the existing leases were made to ensure that compliant and super-compliant coal reserves are recovered and not bypassed. These applications are being processed by the BLM under their regulations at 43 CFR 3432.



APPEAL REVIEWING OFFICER'S FINDINGS AND RECOMMENDATION

The Appeal Reviewing Officer, Bill Bass, Bighorn National Forest Supervisor, found that:

Documentation in the record demonstrated compliance with applicable laws, regulations and policies in light of the appeal issues raised by the appellant:

1. Disclosure of impacts of mining on private and adjacent federal lands;
2. How social and economic impacts were considered;
3. How cumulative impacts were considered;
4. Adequacy of the FEIS to disclose a "hard look" on effects to visibility; location of roads and surface venting wells; irreversible and irretrievable commitments of resource;
5. Endangered Species Act consultation;
6. Consideration of alternative lease stipulations;
7. Consideration of alternatives to methane release;
8. Consideration of greenhouse gas mitigation;
9. Reliance on the Colorado Roadless Rule;
10. Conformance with the exception requirements of the Colorado Roadless Rule;
11. Treatment of an alternative under the 2001 Roadless Rule;
12. Consideration of an alternative for no surface occupancy of the Sunset Roadless Area;
13. Consideration of effects to the Sunset Roadless Area;
14. Addressing direct volatile organic compounds (VOC) associated with methane venting;
15. Addressing the contribution to ozone pollution;
16. Meeting Forest Plan compliance with air quality standards;
17. Adequacy of Forest Plan air quality direction;
18. Coal suitability recommendations and roadless values.

ARO Bass recommended affirmation of the Forest Supervisor's decision on all issues and to deny requested relief.

The requested relief was that:

1. The Record of Decision be withdrawn;
2. Any consent to the BLM be accompanied by NEPA documentation that fully complies with relevant laws and the issues raised in the appeal;
3. The decision on this appeal include a full response to each issue raised in the appeal;
4. No agency resources be used to implement the decision or otherwise consent to the modifications without the above.

APPEAL DECISION

I agree with the ARO's analysis as presented in the enclosed letter. All appeal issues raised have been considered and the record is adequate to support the Forest Supervisor's decision. I affirm the Forest Supervisor's decision to consent to the BLM to modify coal leases COC-1362 and COC-67232 with the accompanying stipulations discussed in the FEIS. I deny requested relief to set aside the decision or complete additional analysis.

The project may be implemented on, but not before, the 15th business day following the date of this letter (36 CFR 215.9(b)). My decision constitutes the final administrative determination of the Department of Agriculture (36 CFR 215.18(c)).

/s/ Brian Ferebee

BRIAN FEREBEE

Deputy Regional Forester, Resources

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File Code: 1570
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Date: November 6, 2012

Subject: Recommendation Memorandum for Appeal of Federal Coal Lease Modifications
COC-1362 and COC 67232 for the West Elk Mine

To: Appeal Deciding Officer, Brian Ferebee

As the designated Appeal Reviewing Officer, this is my recommendation on the disposition of the appeal filed by WildEarth Guardians, et. al. under the regulations at 36 CFR 215, on the decision to modify coal leases COC-1362 and COC 67232 for the West Elk Mine. Acting Grand Mesa, Uncompahgre, and Gunnison (GMUG) National Forests Supervisor Sherry Hazelhurst signed the decision being appealed on August 2, 2012. Pursuant to 36 CFR 215.19(b), this will constitute my written recommendation concerning the disposition of the appeal.

APPELLANTS

A timely appeal was received on September 24, 2012 from WildEarth Guardians, the lead appellant. Other groups in the appeal include Defenders of Wildlife, High Country Citizens' Alliance, Rocky Mountain Wild, and Sierra Club.

BACKGROUND

The decision being appealed is to give consent to the Bureau of Land Management (BLM) to add acreage to two existing coal leases and to modify lease stipulations to protect non-mineral resources. The selected alternative is disclosed as Alternative 3 in an accompanying Final Environmental Impact Statement (FEIS). The consent is needed because the Forest Service is the surface managing federal agency.

The decision would give consent to the BLM Colorado State Office to add about 800 acres with associated lease stipulations to federal coal lease COC-1362 and about 921 acres with stipulations to lease COC-67232. Some stipulations from the parent lease are carried forward while new stipulations are added specific to the lease modifications. Coal in the existing leases is mined in the underground West Elk Mine near Somerset, Colorado. Lease COC-67232 is held by Ark Land Company and lease COC-1362 is held by Mountain Coal Company (MCC). The applications to modify the existing leases were made to ensure that compliant and super-compliant coal reserves are recovered and not bypassed. These applications are being processed by the Bureau of Land Management (BLM) under their regulations at 43 CFR 3432.

Within the lease modification areas, the coal would be accessed and recovered by underground longwall mining methods from the existing West Elk Mine. The coal would be transported using



the existing coal transportation system and surface facilities. Under a foreseeable mine plan scenario, surface impacts within the modification areas would include impacts from constructing methane gas drainage wells and associated access routes required to safely mine the coal resources. Methane gas is a byproduct of the process of mining coal using longwall systems. Methane concentrations in excess of five percent can be explosive, and thus it must be removed from the mine. Specific locations of the methane drainage wells are not known at this time, and will not be known until specific mine plans are approved by the Colorado Division of Reclamation, Mining and Safety; BLM; Office of Surface Mining, Reclamation and Enforcement; and the Mine Safety and Health Administration, during the mine permitting process, subsequent to a leasing decision by the BLM. For the analysis associated with the decision being appealed, the cumulative surface impacts associated with mining were estimated with new impacts based on those similar to recent mining.

About 915 of the approximately 921 acres of the proposed modification to lease COC-67232, and about 786 of the approximately 800 acres of the proposed modification to lease COC-1362 are within the Sunset Colorado Roadless Area (CRA). CRAs are covered by the Colorado Roadless Rule (CRR) which was promulgated on July 3, 2012 and codified at 36 CFR 294. The CRR is now the controlling law and the nationwide 2001 Roadless Rule is no longer in effect in Colorado.

RELIEF REQUESTED

The appellants request the following:

1. The Record of Decision be withdrawn;
2. Any consent to the BLM be accompanied by NEPA documentation that fully complies with relevant laws and the issues raised in the appeal;
3. The decision on this appeal include a full response to each issue raised in the appeal;
4. No agency resources be used to implement the decision or otherwise consent to the modifications without the above.

ISSUES AND DISCUSSION

Appeal Issue 1: Disclosure of Impacts of Mining on Private and Adjacent Federal Land

The appellants (p. 5) state that the FEIS fails to disclose the direct, indirect and/or cumulative impacts of mining on private and adjacent federal land that cannot occur without the lease modifications. They point to statements in the FEIS on pages 52, 190, and 531 that explain that the lease modifications “allow for the production of 5.6 million tons of fee coal on adjacent [private] lands ... as well as an additional 3.3 million tons from existing adjacent federal coal reserves.” They state that the effects on private land should properly be characterized as direct or indirect effects of the alternatives, but at an absolute minimum, the cumulative impacts should have been made.

Appellants allege that there is insufficient detail of direct, indirect, or cumulative effects because (1) there are no maps or other information showing the location of additional minerals to be mined on private land (p.7), which include the presence of an important population of Colorado

River cutthroat trout; (2) there is only a cursory discussion of the potential impacts of private land and adjacent public land mining on subsidence (p. 9); (3) there are no descriptions of the locations of methane drainage well pads and roads on private and adjacent lands outside the lease modifications (p. 10); (4) air quality impacts (FEIS, p. 81) assume that the mine would be extended 1.6 years from the lease modifications, but mining of private and federal lands outside the lease modifications will extend the mine by 2.9 years (FEIS, p. 52) (appeal, p. 10); (5) there is a failure to properly disclose the impacts of adjacent mining operations on the threatened Canada Lynx and other sensitive species (p. 11).

Discussion

It's important to begin my discussion by reiterating an important point about the nature of this decision in the background section above. Forest Supervisor Hazelhurst in her Record of Decision (ROD) explains that "specific locations of the methane drainage wells and roads are not known at the leasing stage and will not be known until specific mine plans are approved...." (ROD, p. 2) However, it is also important to note that the Forest Service decision is the first in a series of decisions that will result in effects from coal mining that are reasonably foreseeable. This is what the FEIS has described. A reasonably foreseeable mine plan has been used for the various action alternatives. (FEIS, p. 50) In addition, the currently leased federal coal was the previously the subject of a full environmental impact statement.

The FEIS explains that available information shows that the rate of mining after this decision is unchanged from the current mining operation production rates. (FEIS, p. 51). This means that the incremental effect across the landscape is expected to be unchanged. Coal is being recovered by a longwall method of underground coal mining. (p. FEIS, p. 51). Essentially, the surface effects from the venting of methane gas will move across the landscape at an equal rate over time. The FEIS explains that available information shows that venting wells would each have an average active life of about 1 to 3 months, with about 2 or 3 wells active at any time. (FEIS p. 50)

The BLM's Geologic and Engineering/Maximum Economic Recovery Report (p. 5, noted in FEIS, p. 531) explains that longwall blocks are likely to be 1,080 feet wide and from 8,000 to 15,000 feet long and mined on retreat yielding a total of 65% recovery on an average of 10.5 feet thick coal. The FEIS explains that the first longwall would come from the north and move through the lease modifications toward the southeast. (FEIS, p. 51). The longwalls would extend across private land to the west and across the existing leases to the northeast. (Geology Specialist Report map) An estimated 10.1 million tons of coal would be recovered, in addition to 3.3 million tons on the current lease to the north, and 5.6 million tons on private lands.

The FEIS discloses the available information about the potential mining operations. How far the longwalls extend onto adjacent private lands depend upon the angle of the longwall in relationship to the property or lease boundary, and the length of the longwall (FEIS, p. 38). The maps in the FEIS on pages 14, 15, 107, 162, 171 show the vicinity of potential mineral operations on both Federal and private lands under a reasonable development scenario.

Contrary to Appellant's assertions, as demonstrated by the maps in the FEIS, Mountain Coal Company (MCC) is not required to mine all of its private lands to access coal in the Lease Modification area. Whether some of these lands are necessary, and the extent to which private lands are necessary, have been disclosed based on the best available information today. The impacts of the mining on private lands is a result of MCC's independent business decision to mine all of their coal at this time due to economics and current panel alignment on the parent federal leases. It is speculative to say that coal on these private lands can never be mined "but for" the federal coal lease. To the extent MCC has made the decision to mine its coal at this time, the impacts of their decision have been adequately disclosed based on the best information available to the Forest Service.

The Geology Specialist Report in the project record contains a map that shows the area of potential surface subsidence due to the collapsing of the underground mine after coal is removed. It shows an area which extends onto private land to the west and the existing lease to the north. Again, the specific extent onto private land depends upon the length of the longwall.

Regarding surface activities such as roads or well pads, it is not possible to predict what development will occur on private land, other than the reasonably foreseeable mining plan.

Private land owners have no legal obligation to tell the Forest Service or any Federal agency what they intend to do. However, Forest Supervisor Hazelhurst took the information that private land owners gave her and made reasonable expectations of development similar to what will happen in the National Forest. She had no authority to require the private land owner to analyze and disclose effects on private lands in a manner similar to public lands. To the extent that she could quantify direct or indirect effects, they were displayed.

The appellants describe an important fishery in the East Fork of Minnesota Creek at the southwest corner of Section 22. However, this is outside of the area of surface disturbances such as subsidence shown on project maps. The Fishery Report in the project record shows that the important cutthroat trout area is south, not west of the leasing decision.

The appellants correctly point out confusion in the FEIS regarding how long the mine will be extended. However, it is worth noting that the FEIS discloses current available information that the rate of gas or particle emissions will remain unchanged as the mine moves across the landscape. The mine is currently permitted by the State (FEIS, p. 516, 523-524). The duration of the air effects will vary by alternative. (FEIS, p. 71).

Regarding Canada Lynx habitat, the FEIS on pp. 119-120 and pp. 126-128 shows available information, including a cumulative effects analysis that includes private land. Other sensitive species are discussed on pp. 132-147.

Conclusion

After reviewing the record, I find that the known effects of possible coal extraction under private lands to the West were considered as well as effects of the lease modification and the original lease to the North. I recommend that the Forest Supervisor be affirmed on this point.

Appeal Issue 2: Social and Economic Impacts

The appellants (p. 13) state that (1) the analysis fails to account for all costs associated with the lease modification, notably the social costs of carbon, and (2) the analysis inflates benefits.

Appeal Issue 2a: Social Costs of Carbon

The appellants (p. 15-16) state that the FEIS omits any discussion of the social costs of carbon (CO₂) emissions from coal combustion, or the CO₂-equivalent release of methane gas. They point to an estimate in the draft EIS that social costs may approach \$21 per ton, which an interagency report suggests may rise to \$24 per ton in 2015 (p. 18). The appellants have estimated that total social costs may approach \$1.1 billion which exceed the FEIS's estimate of direct economic impacts. (appeal, p. 17, FEIS, p. 190). The appellants contend (p. 20-21) that this omission is important because economic factors were important in the Forest Supervisor's decision.

Discussion

The Forest Service did not conduct a cost-benefit analysis and such an analysis is not required by NEPA. Not all effects need to be monetized and should not be when there are important qualitative considerations. (40 CFR 1502.23) Forest Supervisor Hazelhurst considered broader factors than social and economics of the area in her decision (ROD, p. 8). She considered the role and responsibility of the Forest Service in meeting overall energy needs for the nation. This consideration, along with legal responsibilities, led her to the consent to lease decision. She explained that "the purpose of ensuring recovery of high-quality coal reserves" would not be met in the no-action alternative (ROD, p. 9). She considered the Federal Government's policy "to foster and encourage mineral development", "to help meet energy resource needs", the National Energy Plan, and an Executive Order directing federal agencies to take steps to increase the energy supply to our nation. (ROD, p.8).

Appellants correctly point out that social and economic effects in the area were a factor that Ms. Hazelhurst considered in making her decision (appeal, p. 21, ROD, p. 9). She was guided by the Energy Policy Act of 2005, and one of the purposes of the Energy Policy Act of 2005 is to ensure jobs for the future with secure, affordable, and reliable energy. As Ms. Hazelhurst states, 380 direct jobs and 2,660 indirect jobs may be affected by the decision. This consideration is relevant to the decision.

In her decision, she also considered and balanced un-quantified environmental impacts, values and resources. Resource effects are presented in the FEIS (ROD, p.8). I discuss how methane gas release was considered later in section 7 of this letter. Regarding emissions from coal-combustion, the FEIS discloses available information about the markets for coal, where coal might be shipped, and estimated potential emissions. (FEIS, p. 80) Broader effects on climate change are discussed on pp. 83-88.

Conclusion

Based on the guidance given to the Forest Service in federal authorizing statutes and NEPA, and my review of the FEIS and ROD, I recommend that the Forest Supervisor be affirmed on this point.

Appeal Issue 2b: Royalties and Coal Prices

Appellants note (pp. 21-22) that the FEIS overstates economic benefits by (1) assuming an 8% royalty payment instead of a 5% rate being requested by the coal company, and (2) assuming a \$55 per ton price in the FEIS when a \$40 per ton price was used in the draft and spot prices have dropped to \$35 per ton.

Discussion

Mountain Coal Company's application for a royalty rate reduction from 8 to 5 percent was approved on September 14, 2012, after the Forest Supervisor made her decision. At the time she made her decision, it was appropriate to use the 8% royalty rate in existence at that time.

Appellants correctly point out discrepancies in the FEIS with respect to the price per ton of coal. When disclosing the economic effects under alternative 1 and 4 (FEIS, p. 190-191) the price of coal was listed at the gross coal value of \$55 per ton. Under Alternative 3, however, the price of \$40 per ton was used. This inconsistency is recognized. However, the monetary value of the coal was not the controlling determination of the Forest Supervisor's decision and the difference in coal values between alternatives did not weigh in her decision making process. Rather, her decision was based on the reasons articulated in the ROD and her consideration of the laws pertaining to the roles and responsibilities of the Forest Service in meeting the overall energy needs for the nation in a manner consistent with the management of National Forest System lands. As such, I find this discrepancy in the gross value assigned to the coal between the alternatives was not material and did not influence her decision and selection.

Conclusion

While there is a mistake in the value of the coal among alternatives, this value difference did not weigh in the decision-making process nor did it change the comparison of the alternatives in a meaningful manner. This mistake is acknowledged, but is not a reason for remanding the decision as courts do not overturn EISs for "flyspecking" reasons. The royalty rate was correct when she made her decision. It was also not a controlling factor in the decision and did not change the comparison of the alternatives. I find that these changes do not modify or outweigh the factors considered by Ms. Hazelhurst, and I recommend that the decision be affirmed on this point.

Appeal Issue 3: Overall Cumulative Effects Discussion

Appellants state (p. 23) that the summary section 3.37 of the FEIS (pp. 193-195) lists other actions or activities but provides almost no evaluation of what the impact of those projects might

be. Appellants also state that the resource-specific cumulative impacts analyses also contain little to none of the information required by NEPA.

Discussion

This is a general section of the appeal without many specifics except air quality effects of drilling within the Bull Mountain Unit, and impacts from the Oak Mesa coal exploration project. Therefore, I will broadly respond to this appeal issue. The summary section 3.37 does describe specific impacts such as employment in the mining sector of the economy, and the relative low amounts of soil subsidence in the area. The individual resource-specific impact analyses also summarize known information about cumulative impacts in the area. Regarding the Bull Mountain Unit, potential air emissions are discussed in the FEIS on p. 82, with an explanation that emissions cannot yet be quantified because the project is still being developed. Regarding the Oak Mesa project, the FEIS on p. 194 discusses a proposal to drill exploration holes, in addition to other projects. It further explains that exact levels of drilling in the area are not known at this time. The dispersion modeling analysis included all sources and used conservative assumptions to ensure the analysis would not underestimate the particulate matter emissions. (FEIS, p. 71)

Conclusion

Based on my review, NEPA requirements to address cumulative effects have been met. I recommend that the Forest Supervisor be affirmed on this point.

Appeal Issue 4: FEIS “Hard Look” Effects Analysis

Appellants present three separate issues under the general issue regarding the adequacy of the FEIS to display a “hard look” at the environmental effects of the lease modification on visibility, well pads and roads in Lease Modification COC-67232, and on the irreversible and irretrievable commitments of resources from action alternatives.

I base my review of the adequacy of the FEIS under the “hard look” required by courts. A “hard look” requires examination of the relevant data and articulation of a rational connection between the facts found and the decision made. *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 713 (10th Cir.2009), cited in *WildEarth Guardians v U.S. Forest Service*, 828 F. Supp. 2d 1223, 1236 (2011). An agency’s decision is presumed valid and the party challenging the agency’s action bears the burden of proof. *Citizen’s Committee to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir.2008). This will be the basis for my review.

Appeal Issue 4a: Visibility

Appellants contend (p. 24) that potential impacts of the mine on visibility and the need for particulate matter (PM) controls from the mine were not considered because the FEIS erred in relying on the Colorado Regional Haze plan. Appellants assert the Regional Haze plan did not address the need for PM controls at the West Elk Mine or the visibility impacts. Appellants argue that the State’s regional haze plan did not model the specific visibility impacts from the

mine and cannot be relied upon to determine that the mine's visibility impacts were not sufficiently large to warrant additional particulate matter controls.

Discussion

The rate of mining under the lease modification will be the same as the existing production rate. (FEIS, p. 51) It is expected that the cumulative impacts of the coal mine and current regional emissions, as reflected in monitoring data presented in the FEIS (p. 82), will stay at current levels. The appellants do not argue the findings of the State's regional haze analysis (cited on p. 82), but merely contend that supplemental information is required. The FEIS concludes on p. 517 that the state implementation plan represents a comprehensive examination of visibility in Class I areas throughout the State.

The FEIS also explains on p. 61 that the state examined the impacts of regional emission sources, including the emissions of the West Elk Mine at its permitted rate as well as project emissions through 2018, and concluded that the Mine would not have a significant impact on visibility in the West Elk Wilderness. The FEIS also concludes that there was no need for additional emission controls on the mine to meet the visibility goals for Wilderness (p. 62). Appellants cite to no study to prove that this modeling analysis is incorrect.

Conclusion

I find that the available information was disclosed in the FEIS and that this data was sufficient to take a hard look at the issues presented by the Appellants. The Forest Supervisor properly considered the views of the State regulatory agency as well as the relevant monitoring data and modeling analysis, and based on this information concluded that there was no need for additional PM or emission controls on the mine. I recommend that the Forest Supervisor be affirmed on this point.

Appeal Issue 4b: Specific Location of Roads and Methane Drainage Wells

Appellants on pp. 27-29 state that available information from exploration proposals ten years apart show similar potential development (1.5 miles of road connecting 5 or 6 exploration wells), but the locations were not disclosed in the FEIS, and the FEIS projects only a third of the development (0.5 miles of road and 4 well pads). Ignoring this information is a failure to take a "hard look" at effects and it skews the decision to reject Alternative 4.

Discussion

As discussed earlier, this project is in the initial stage. Subsequent determinations on the exact placement of the longwalls, and the specific need for mine ventilation, will determine the exact layout of surface venting well pads and access roads. The appellants refer to initial exploration proposals, but the FEIS (p. 533) explains that the proponent mine company didn't intend to move forward with them. Due to mine plan changes and exploration in areas further north on parent leases, changes will likely be proposed. Apparently, the mining company originally wanted to

develop and submit a new exploration proposal on the lease modifications, but they have not done so at this time.

My review is based on whether the Forest Supervisor considered all the available information, the uncertainty of preliminary proposals, and weighed this uncertainty in her decision. In particular, appellants (p. 29) are concerned about how this uncertainty may affect the Forest Supervisor's conclusions about the degree that alternatives 3 and 4 would impact wilderness-capable lands (ROD, p. 10). The question about the capability of these areas for Wilderness is addressed in later in this decision letter. In addition, I do not find that the difference between 0.5 miles or 1.5 miles, or the difference between 4 or 6 well pads would change the relative differences between the alternatives. It's not apparent that this difference would be a major effect to the roadless character of a 5,880-acre roadless area, especially given the Forest Supervisor's observation about the "temporary nature of the expected post-lease disturbance and past reclamation success at the West Elk Mine." (ROD, p. 10)

Conclusion

I find that the available information was disclosed in the FEIS, the uncertainty of that information was described, and that the conclusions in the ROD are consistent with that information. I recommend that the Forest Supervisor be affirmed on this point.

Appeal Issue 4c: Disclosure of Irreversible and Irretrievable Commitments of Resources

Appellants state that the FEIS does not treat the release of methane without capture as an irretrievable or irreversible commitment. (p. 29). They also state that the FEIS fails to make the same determination of some irreversible loss of soil as the prior E-Seam FEIS. (p. 30)

Discussion

Methane is discussed later in this decision letter under appeal point 7. The FEIS clearly discloses that there is a possibility that methane may be released and not captured, which makes the methane irretrievable. I do not find an inconsistency between the irreversible loss of soil in this document and the prior E-Seam FEIS. The FEIS on p. 102 acknowledges that "even with implementation of these management practices, some soil loss may occur...." When soil is lost, it is irretrievable and irreversible.

Conclusion

I find that the FEIS is adequate on this point and recommend that the Forest Supervisor be affirmed on this point.

Appeal Issue 5: Endangered Species Act Consultation

In citing requirements under the Endangered Species Act to consult with the U.S. Fish and Wildlife Service, appellants raise three appeal issues.

Appeal Issue 5a: Consideration of Effects on Private Land and the Parent Leases

In an issue related to issue 1 described earlier, appellants state that the Biological Assessment (BA) does not address effects on private and adjacent federal lands and fails to identify the location of the effects. (Sections V-B, V-C, and V-D of appeal, pp. 33-40) They state that the BA analyzes only direct and indirect impacts within the lease modifications area (p. 33). They state that because the BA fails to disclose all of the effects, the consultation is invalid (p.35). They point out that the assumptions in the FEIS (p. 601-602) are incorrect about the location of effects, and they state that the BA fails to address impacts of road and pad construction, and subsidence, outside of the lease modification (p. 39)

Discussion

I concluded under appeal issue 1 above that the effects on private land and the parent leases were adequately addressed in the analysis. The Forest Supervisor met the requirements of the Endangered Species Act by preparing the BA and consulting with the Fish and Wildlife Service. The Fish and Wildlife Service provided a letter of concurrence indicating their agreement with the determination of effects. (FEIS, p. 601).

Conclusion

I find that the available information was disclosed in the FEIS and the BA, and the Forest Supervisor properly relied on the expertise and authority of the Fish and Wildlife Service. I recommend that the Forest Supervisor be affirmed on this point.

Appeal Issue 5b: Determination Relied on Unlikely Mitigation Measures

Appellants state that the Fish and Wildlife Service's concurrence on road effects on Canada lynx relied upon mitigation measures not reasonably specific not reasonably certain to occur. They note flexible language about avoiding new roads in forested stringers if possible, and decommissioning project-specific roads not needed for other objectives. (p. 41-42)

Discussion

The record shows the Fish and Wildlife Service relied on previous programmatic consultation on Canada Lynx and Colorado fishes (June 16, 2010 concurrence letter). Regarding the programmatic lynx consultation associated with amendments to Forest Plans, there is some flexibility regarding road locations. The direction in the Southern Rockies Lynx amendments to plans is listed as "guidelines" – allowing for flexibility for local conditions. (See Guidelines HU-G7, G9, Southern Rockies Lynx Management 2008 Forest Plan Amendments) The flexible language in the lease modification is consistent with the programmatic consultation. The project record indicates that the Fish and Wildlife Service was contacted as late as June 26, 2012 to verify that they still concurred with the project.

Conclusion

I find that the Forest Supervisor followed all laws, regulations, and policies regarding consultation under the Endangered Species Act. I recommend that the Forest Supervisor be affirmed on this point.

Appeal Issue 6: Consideration of Alternative Lease Stipulations

Appellants state that some of the lease stipulations to be applied in the lease modification area do not adequately protect non-mineral resources. (p. 24)

Appeal Issue 6a: Flexibility of Stipulations to Project Lynx

In an issue related to issue 5b described earlier, appellants state that the stipulation in the parent leases to locate new roads away from forest stringers was changed and weakened for the modification areas. (p. 43)

Discussion

I concluded in section 5b above that the stipulations in the lynx modification are consistent with the purpose of a guideline in a Forest Plan, and appropriately consulted on.

Conclusion

I recommend that the Forest Supervisor be affirmed on this point.

Appeal Issue 6b: Stipulations to meet Forest Plan by avoiding greater than 60 Percent Slopes

Appellants note that stipulations concerning geological hazards from the parent leases have been retained for the two lease modifications. However, parent lease COC-67232 does not contain a prohibition on slopes greater than 60 percent, which violates the Forest Plan. (p. 43-45)

Discussion

Currently the “general direction” in the GMUG Forest Plan, as amended, for consenting to BLM for coal leases on unclassified lands is: “Negative recommendations or consent denials will be based on consideration of . . . (3) for surface-based access, product transportation and ancillary facilities necessary to operations, *slopes steeper than 60 percent*, high erosion hazard, high geologic hazards.” (emphasis provided) (GMUG Forest Plan, p. III-64) The general direction also refers to standard stipulations used at the time in appendix H of the plan. (GMUG Forest Plan, p. III-63).

Appellants correctly point out that the master list of stipulations in the ROD and in the FEIS on p. 23 do not contain the 60 percent requirement for the parent lease COC-67232 and the modification to that lease. Parent lease COC-67232 was issued before this requirement was

contained in the Forest Plan and the parent lease stipulation was carried forward in the lease modification.

Although the stipulation in lease modification COC-67232 does not contain the current forest plan direction, the FEIS states that that the action alternatives will meet the Forest Plan.(p. 40). In addition, the standard notice for the stipulation explains that the permittee/lessee *must comply with all the rules and regulations of the Secretary of Agriculture*. This compliance which would include the planning regulations and the 60 percent requirement (emphasis provided) (p. 16). The FEIS acknowledges the 60 percent requirement as required by the Forest Plan and supported the Watershed Conservation Practices Handbook, and explains that these have already been covered by prior environmental review. (p. 40). As such, the failure to carry forward the current GMUG Forest Plan standard for lease modification COC-67232 relative to 60 percent slopes is corrected by the requirement to comply with all current rules and regulations.

Conclusion

Although the lease modification did not carry forward the Forest Plan's 60 percent requirement in one stipulation, the standard notice and the FEIS are clear that the decisions and the lease modifications will be consistent with the Forest Plan, which includes the 60 percent requirement. I recommend affirming the Forest Supervisor on this point.

Appeal Issue 6c: Fencing Out Cattle in Re-Seeding/Reclamation Areas

Appellants state that a stipulation is needed to require fencing to keep cattle from areas being re-seeded or reclaimed. (pp. 45-47) They state that the rationale in the FEIS is arbitrary and capricious, that says that this type of requirement would be more appropriate working within the State permitting process, not at the leasing stage. (FEIS, p. 570)

Discussion

I find that the rationale in the FEIS is not arbitrary. It explains that until site specific information is available, the use of a uniform fencing stipulation could negatively impact livestock management or other multiple use activities.

Conclusion

I recommend affirming the Forest Supervisor on this point.

Appeal Issue 7: Methane Release

Appellants contend that the FEIS fails to analyze reasonable alternatives to reduce the methane release from the coal lease modifications such as oxidation, flaring, or capturing for power generation. (pp. 47- 74) They state that opposing viewpoints of the EPA and Dr. Thomas Power were not considered (pp. 51-53).

Discussion

The Forest Service considered in detail four alternatives. One of these alternatives was added in response to appellant's comments. The Forest Service considered but eliminated from detailed study: mitigation of greenhouse gases by using ventilation air methane (VAM) or capturing and/or conditioning the methane drainage well (MDW) methane for use onsite; protecting the area by using various NSO stipulations; preventing all future disturbances in roadless areas; shrinking the boundaries of the lease; and the purchase of carbon credits or off-set mitigations. The FEIS described why various alternatives to mitigating methane release from the mine were considered but eliminated from detailed study (FEIS pp. 37-40).

The appellants assert that climate change will have significant impacts on the GMUG and that the FS has an obligation to analyze alternatives to mitigate greenhouse gas. The effects of this mine on global climate change and its specific changes to biotic and abiotic systems cannot be quantified or predicted at this time. FEIS p. 83.

The appellants also assert there are technologies proffered by Dr. Power and EPA available and not considered by the Forest Service which would mitigate this methane release by various means, and that these alternatives should also have been considered in greater detail.

The Forest Service acknowledged the rapid advance of changing technologies, fluctuations in energy prices, and the opinions of Dr. Power and EPA concerning the available technological solutions to mitigate the release of methane from coal mines in defined circumstances. The Forest Service addressed these concerns by adding mitigation measures in the FEIS at pp. 66-69. This section examines potential methane mitigation measures for all alternatives which can be imposed by BLM. This section in the FEIS was also in response to EPA's July 11, 2012 recommendation to either amend the FEIS Alternatives Section or add a new FEIS section which discusses how individual methane mitigation technologies could be utilized at the mine.

The Forest Service determined that adding this mitigation was the best approach to ensure that these evolving technologies are adequately considered. In addition, MCC's 2009 economic evaluation report of potential methane mitigation measures is required to be periodically updated and will provide for consideration of those technologies which have improved since the initial 2009 MCC report. As stated in the FEIS "Periodic evaluations capture the current state of technology developments applicable to the mine's operational parameters, fluctuations in energy prices that affect the short and long term economic feasibility of adoption, and the status of the carbon offset markets..." (FEIS p. 66). In addition to adding these mitigation requirements which provide for the current state of technology, the Forest Service included stipulations in the FEIS (pp. 29-32) and the ROD (p. 6) which provide for protection of the surface resources on National Forest System lands from all methane mitigation activities.

The absence of engineering and mine placement presents difficulties in prescribing exact mitigation measures, which may be dependent on many unknown factors, such as available space and/or technology. See also IBLA 2011-191, *Appeal Decision of WildEarth Guardians and Sierra Club* (March 27, 2012) for a discussion and critique of various alternatives to reduce

methane and greenhouse gas emissions and *WildEarth Guardians v. U.S. Forest Service*, 713 F. Supp. 2d 1243 (D. CO 2010).

Conclusion

I find that the Forest Service considered a broad range of alternatives and that this range, coupled with the mitigation requirements applicable to all alternatives and the present status of mine plan development was a reasonable range and meets the purpose and need for the EIS and the requirements of NEPA. I find that the Forest Service considered and addressed opposing viewpoints by preparing stipulations and considering mitigation which address the current and evolving states of technologies and markets. I recommend affirming the Forest Supervisor on this point.

Appeal Issue 8: Greenhouse Gas Mitigation Measures Not Adequately Addressed

The appellants state that the FEIS analysis of VAM oxidation, methane flaring, carbon offsets, and methane capture and use was flawed, based on false assumptions, and/or characterized by misinterpretations and erroneous conclusions. (pp. 75-76)

Discussion

This is a general section of the appeal that is related to the discussion under appeal issue 7 above. Therefore, I will respond with general comments that relate back to the previous section of this decision letter. Specific locations and amounts of methane release are not known at this stage. Nevertheless, the Forest Supervisor considered opposing viewpoints and available information. She listed possible mitigation measures addressing the current and evolving states of technology and markets.

Conclusion

Because the Forest Supervisor considered available information and considered known technologies and markets, I recommend affirming the Forest Supervisor's decision on this point.

Appeal Issue 9: Colorado Roadless Rule

Appellants state that the Forest Supervisor cannot adopt alternative 3 because the Colorado Roadless Rule was adopted in violation of law. (pp. 76-82) They state that the Colorado Roadless Rule EIS failed to take a "hard look" at impacts to water resources, particularly wetlands and groundwater, because the Forest Service provides no baseline information or assessment of impacts regarding these resources. Furthermore, they state that the Colorado Rule FEIS's cursory treatment of water resources demonstrates that the Forest Service did not take a hard look at potential environmental consequences because it improperly minimized negative adverse effects (p. 77). They also state that the Colorado Roadless Rule EIS failed to take a 'hard look' at impacts outside of roadless areas. (p. 79). They state that it failed to take a 'hard look' at impacts on water conveyance structures (p. 80) and the impacts on greenhouse gas emissions. (pp. 80-82)

Discussion

The lease modification is in an area previously covered under the 2001 Roadless Rule but exempted by the Colorado Roadless Rule. The appellants contend that Forest Service cannot select alternative 3 because the Colorado Roadless Rule was adopted in violation of law. The Colorado Roadless Rule has not been found to be in violation of any law, regulation or policy by any court of law; therefore, selection of any alternative implementing the rule can occur.

The appellants also contend that the Colorado Roadless Rule EIS failed to take a hard look, specifically in regards to water resources, impacts outside of roadless areas, impacts from water conveyance structures and GHG emissions. The scope of the Colorado Roadless Rule EIS analysis is described as follows.

The scope of the analysis is programmatic in nature. The actions to be analyzed consist of establishing regulatory prohibitions with specific exceptions. There are no ground-disturbing activities proposed or authorized by any of the alternatives. All subsequent proposals for activities would require the preparation of a separate site-specific analysis and decision, pursuant to the NEPA. The potential environmental consequences are based on projected probable actions and are primarily described in qualitative and comparative terms. CRR FEIS, pages 54-55.

The implementing regulations for NEPA allow for preparation of an EIS for broad Federal actions such as the adoption of an agency regulation. (40 CFR 1502.4(b)) The regulations state: “(w)hen preparing statements on broad actions, agencies may find it useful to evaluate the proposal(s) in one of the following ways: . . . (2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.” (40 CFR 1502.4(c)(2))

Because the Colorado Roadless Rule is a broad state-wide rule, a general impact analysis is permitted. A more detailed site-specific impact analysis occurs when a proposal for actual ground disturbance occurs, such as this lease modification. The Colorado Roadless Rule FEIS conducted impact analysis on water resources (CRR FEIS pages 112-124), including impacts to wetlands (CRR FEIS page 120) and impacts from water conveyance structures (CRR FEIS pages 119-123). The impact analysis for water resources were described by activity type and/or area type (i.e. wetlands, municipal watersheds). Direct, indirect and cumulative effects on water resources were generically described for all four alternatives considered.

In addition, greenhouse gas (GHG) emissions were discussed in the air resource section (CRR FEIS page 134) and climate change section (CRR FEIS pages 135-141) of the FEIS. The Colorado Roadless Rule FEIS described impacts from GHG emissions relative to the proposed alternatives. The decision to not quantify GHG emissions is not arbitrary and capricious because the extent of tree cutting, coal mining and oil/gas leasing is speculative. The fact that the economic impacts were quantified does not make the decision not to quantify GHG emissions arbitrary and capricious. There is no statutory, regulatory or other requirement to quantify GHG emissions from a proposal. However, there are requirements to assess the costs and benefits in dollars of a regulation (Executive Order 13563 and 12866).

The area that was analyzed in the effects analysis for the Colorado Roadless Rule FEIS included those areas considered to be roadless under both the 2001 Roadless Rule and the Colorado Roadless Rule (CRR FEIS pages 53-54). Forest Service guidance for determining the analysis area is to utilize the affected area in which a specific resource may be affected by management actions. FSH 1909.15, Chapter 10, Section 15.2a. In the case of the Colorado Roadless Rule FEIS, the management actions (prohibitions of certain activities within roadless areas) are specific to only roadless areas. Management direction outside of roadless areas would remain constant in all the alternatives. Therefore, including actions outside of roadless areas for the direct and indirect impact analyses would provide minimal benefit or additional information in regards to the decision being made.

However, the Colorado Roadless Rule FEIS did consider certain reasonably foreseeable future actions in the cumulative impact analyses. Table 3-7 of the FEIS (CRR FEIS pages 62-63) describes the reasonably foreseeable actions considered in the cumulative effects analyses. Therefore a hard look was taken for areas outside roadless areas in regards to cumulative impacts.

Conclusion

I find the Colorado Roadless Rule provided sufficient analyses and looked at water resources, impacts outside of roadless areas, impacts from water conveyance structures and GHG emissions. In addition, because the Colorado Roadless Rule has not been found to be in violation of the law, the appellant's contention that the Forest Service cannot adopt alternative 3 is incorrect. I recommend affirming the responsible official on this issue.

Appeal Issue 10: Exception Requirements of Colorado Roadless Rule

The appellants state (pp. 83- 85) that the Forest Supervisor failed to make the required determination that motorized access in "not feasible," and new record evidence would contradict such a determination. Because the Forest Supervisor failed to determine that "motorized access without road construction is not feasible," her finding does not meet one of the exceptions to the Colorado Roadless Rule, and so no road construction can take place in the Sunset Roadless Area within the Lease Modifications.

The appellants further state that even if the ROD included the correct findings, new evidence in the record would contradict any Forest Service conclusion that the development of, or motorized access to, the Lease Modifications without road construction is not "feasible." Specifically, MCC's attorney has stated that MCC does not yet have the required information to determine whether the Lease Modifications can be developed without roads. If the project proponent "cannot know for certain" whether access without roads is feasible or not, the Forest Service cannot find that "motorized access without road construction is not feasible." (p. 84)

Discussion

The appellants contend that the project is inconsistent with Colorado Roadless Rule because a finding was not made that "motorized access without road construction is not feasible" and that

new information contradicts whether such a determination could be made. The Colorado Roadless Rule requires that the responsible official must determine that roads are needed and motorized access without a road is not feasible.

The FEIS explores whether roads are needed through Alternative 2. The FEIS states that methane drainage wells are needed, which require the need for drill pads and heavy equipment access. (FEIS, page 51) Alternative 2 explores various means of access without roads through the use of helicopters, horizontal or directional drilling, and cross-country motorized access. Forest Supervisor Hazelhurst clearly makes the determination that motorized access without road construction is not feasible on page 17 of the ROD. Specifically she states: *“development of the lease modifications without roads (Alternative 2) is not feasible at this time. Therefore, motorized access via roads is necessary.”*

On pages 9-10 of the ROD, Forest Supervisor Hazelhurst outlines the issues with accessing the area without a road. She states although it is physically possible to access the area without roads, it is technically infeasible due to resource impacts and from a safety, technological, and productivity standpoint.

Although Forest Supervisor Hazelhurst’s determinations are not worded identically to the Colorado Roadless Rule language, they meet the requirements of the rule. Clearly the statement, “motorized access via roads is necessary”, means the same thing as the Roadless Rule’s requirement to determine that a road is needed for coal related activities. Also, Forest Supervisor Hazelhurst’s determination that “development of the lease modifications without roads is not feasible at this time” means the same as the Roadless Rule’s requirement to determine that motorized access without road construction is not feasible.

The new information the appellants are referring to is a comment on the DEIS made by Michael Drysdale on behalf of MCC. FEIS page 549. This is not new information. The determination that motorized access without road construction is not feasible is not up to the coal company or any other commenter. It is the responsible official’s determination made while considering comments from the public, as well as the information contained within the EIS and other information available at the time of the decision.

Conclusion

I find the responsible official made the proper determinations required by the Colorado Roadless Rule. In addition, I find that the “new evidence” the appellant references was not new information and was considered at the time the responsible official made her determinations. I recommend affirming the responsible official on this issue.

Appeal Issue 11: Alternative Under Previous 2001 Roadless Rule

The appellants state that the Forest Supervisor violates NEPA by failing to properly analyze the 2001 Roadless Rule alternative (p. 85)

Discussion

The appellants contend that the Forest Supervisor violated NEPA by failing to take a hard look at Alternative 2, the 2001 Roadless Rule alternative. NEPA requires the agency to “rigorously explore and objectively evaluate” a reasonable alternative and to “devote substantial treatment to each alternative considered in detail... so that reviewers may evaluate their comparative merits.” 40 CFR 1502.14.

At the time of the writing of the DEIS for this project, the 2001 Roadless Rule was the controlling direction for management of roadless areas. Thus an alternative was developed to be consistent with the 2001 Roadless Rule. At the time of the writing of the FEIS, the Colorado Roadless Rule was recently promulgated and became the controlling direction for management of Colorado roadless areas. Alternative 2 was retained as an alternative considered in detail in the FEIS despite the concerns over technical feasibility of this alternative because it provides a useful benchmark for comparison.

The ROD states that at this time, Alternative 2 is not technically feasible and outlines the rationale for this conclusion, stating that aerial mobilization is currently not practical and cross-country travel is untested and would result in greater adverse impacts to water and soils. ROD page 9. Alternative 2 in the FEIS considered use of helicopters, horizontal boreholes/directional drilling, different mining methods and cross-country motorized travel. Impacts of Alternative 2 were examined to the same degree as the other alternatives to allow reviewers to comparatively evaluate the merits of each alternative.

Conclusion

I find the FEIS rigorously explored and objectively evaluated Alternative 2, the 2001 Roadless Rule alternative. The FEIS evaluated Alternative 2 to the degree to allow reviewers to comparatively evaluate the merits of each alternative. I recommend affirming the responsible official on this issue.

Appeal Issue 12: Alternative for Non Surface Occupancy in Sunset Roadless Area

The appellants contend that the Forest Supervisor failed to analyze a reasonable alternative that would prohibit surface occupancy within the Sunset Roadless Area’s wilderness capable lands. (pp. 86-88)

Discussion

The FEIS explains that there are no lands within the project area which have been recommended or available for Wilderness designation, or are now Wilderness. However, alternative 4 was developed responsive to appellants’ and others’ concerns. (p. 573-574). The appellants state that this response lacks merit for several reasons. (appeal, p. 87) They state that just because the lack of wilderness recommendations in the current Forest Plan does not prevent the agency from considering, as one alternative, protecting those multiple use values from the damage and destruction that road and drainage well pad construction will cause.

NEPA requires agencies to rigorously explore and objectively evaluate all reasonable alternatives. (40 CFR 1502.14(a)) Alternative 4, consenting to only COC-1362 lease, effectively incorporates the no surface occupancy (NSO) alternative the appellant recommends for analysis because none of the areas determined to be capable for wilderness in the Sunset Roadless Area are contained in lease COC-1362 (see FEIS, Figure 3.30a, page 169). Therefore, Alternative 4 is virtually the same as the NSO alternative the appellant recommends for analysis. The rule of reason allows an agency to not consider in detail alternatives that are similar to other alternatives analyzed.

Reasonable alternatives must meet the purpose and need of a project. In this case, the purpose is to access coal reserves through modifying existing leases. A large portion of lease COC-67232 includes areas determined to be capable for wilderness. Prohibiting surface use over a large area would effectively prohibit coal mining in that area due to the need for methane drainage wells for miner safety. Therefore, an NSO over a large portion of a proposed lease would not meet the purpose of the project.

Although a portion of the Sunset Roadless Area was determined to be capable for wilderness, this area was determined to be not available for wilderness due to mineral values and boundary management difficulties. FEIS, page 467. The Colorado Roadless Rule reinforces this determination which designated this area as the North Fork Coal Mining Area specifically to facilitate the exploration and development of coal resources. The agency developed specific rules for the North Fork Coal Mining Area to address State-specific concerns for continuation of coal mining in this area to provide for approximately 2,100 jobs. (77 Federal Register 128) The North Fork Coal Mining Area is about 19,100 acres which is less than 0.5% of the roadless areas in the State of Colorado. Applying an NSO stipulation over thousands of acres or even hundreds of acres would substantially impact the intended effect of providing jobs through the North Fork Coal Mining Area of the Colorado Roadless Rule.

Conclusion

I find that not considering an alternative with an NSO stipulation in areas determined to be capable for wilderness does not violate NEPA. I recommend affirming the responsible official on this issue.

Appeal Issue 13: Impacts to Sunset Roadless Area

The appellants state that the FEIS fails to take a hard look at the impacts to the Sunset Roadless Area. (pp. 88-107). They state that road construction in roadless areas generally has significant, damaging impacts to the roadless and potential wilderness character of the land. They state that FEIS fails to focus its analysis at the appropriate spatial scale to recognize impacts to roadless characteristics. They also contend that the Forest Supervisor's assertions that the roadless characteristics of the proposed lease modification areas are compromised, disagrees with inventory results.

Discussion

The FEIS discusses the impacts to roadless characteristics and areas on pages 165 to 182. Impacts are disclosed by alternative for each roadless characteristic in tables 3.30a, 3.30b, 3.30c and 3.30d. Impacts on the Sunset Roadless Area are disclosed in the “Summary” section for each alternative. Cumulative effects are disclosed on pages 181 and 182. Impacts were viewed in context of the site level and at the roadless area spatial scales for each alternative.

I dispute the appellant’s claim that *Lands Council v. Martin*, 529 F.3d 1219, 1230 (9th Cir. 2008) requires the agency to analyze impact on the lands’ potential for designation as wilderness. However, the FEIS addresses this issue in Appendix B, Unsuitability Analysis and Report. On page 467, the FEIS recognizes a 2005 analysis conducted by the forest in which the area “was determined to be not available for wilderness due to mineral values” and “boundary management of the area would be difficult.” The FEIS also recognizes the area capable of wilderness on page 167 of the FEIS.

The determination that roadless characteristics in the Sunset Roadless Area are compromised does not conflict with the agency’s latest review of the area, which was completed in conjunction with the development of the Colorado Roadless Rule. All roadless characteristics need not be present or of high quality for an area to be considered as roadless. The agency does not dispute that the Sunset Roadless Area is truly roadless. The characterization of the roadless area just describes the existing condition to provide a baseline for comparison. The determination that the area is compromised was based on the past and present activities in the area, including livestock improvements and exploration activities, which is outlined on page 172 of the FEIS.

Although the term “short-term” is never clearly defined in years, the FEIS states that “full restoration of disturbed areas containing aspen and spruce/fir could take up to 25 years”. Therefore, in full context, one can determine that the short-term impacts to roadless characteristics would be realized for 25 years after restoration efforts begin, which is consistent with the statements in the FEIS that adverse impacts to roadless characteristics would generally be for the life of the project and recovery times.

The appellant contends that because other resource impacts are mid to long-term, such as impacts to vegetation and forage, that the conclusion of a short-term impact to roadless characteristics is contradictory and contrary to evidence before the Agency. As stated before, not all roadless characteristics need to be present or of high quality for an area to be considered as roadless. Page 172 of the FEIS narrows the impacts of the proposal down to four roadless characteristics: 1) high quality or undisturbed soil, water and air; 2) habitat for threatened, endangered, proposed, candidate and sensitive species and those species dependent on large, undisturbed areas of land; 3) primitive, semi-primitive non-motorized and semi-primitive motorized recreation; and 4) naturally appearing landscapes with high scenic quality. The impacts described as short-term within the roadless area analysis are specifically for roadless characteristics, which are not the same as impacts to vegetation or forage. For example, one can have a long-term impact to vegetation, such as old growth, and have a short term impact to roadless characteristics because an area does not need to be old growth to be a roadless area.

Conclusion

I find that the FEIS took a hard look at impacts to the Sunset Roadless Area and roadless characteristics. In addition I did not find the roadless analysis to be contradictory and contrary to the evidence before the Agency. I recommend affirming the responsible official on this issue.

Appeal Issue 14: Volatile Organic Compounds (VOC)

The appellants state that the FEIS fails to address direct VOC emissions in association with methane venting. (pp. 107-112)

Discussion

The FEIS explains (p. 75-76) that the mine currently emits and will continue to emit, under all alternatives, ozone precursors at relatively low levels. Underground coal mines are typically not large sources of NO_x and VOCs – however, any emissions of ozone precursors will add to the cumulative concentrations of these pollutants into the atmosphere as potential conversion into ozone. (p. 76) The State of Colorado will be requiring the West Elk Mine to provide more data in order to accurately estimate annual VOC emissions from the mine. (p. 76)

The FEIS discloses available monitoring data. It shows two samples of the mine and an analysis of the major constituents including VOCs. (p. 75) However, using these samples to estimate annual emissions from the mine could unreliably over- or under -estimate the emissions. (p. 509-511). The Colorado Air Pollution Control Division has examined the VOC concentration measurements and will be requiring all coal mines in the state, including the West Elk Mine to gather additional data to provide a more accurate annual estimate of VOC emissions. The FEIS indicates that at this time, there is no indication that VOC emissions from the mine have contributed to any violation of the ozone standard in western Colorado. (p. 511)

Conclusion

I find that the Forest Supervisor has adequately considered the available data on VOCs as well as the viewpoints of the appellants. I find that the FEIS meets the “hard look” requirement, and I recommend affirming the Forest Supervisor on this point.

Appeal Issue 15: Ozone

This appeal issue is an extension of the previous one. The appellants state that the FEIS provides no information or analysis to demonstrate that VOC emissions from the West Elk Mine would not be substantial, and thus the Forest Supervisor has no reasoned basis for declining to analyze or assess ozone impacts. (p. 113-114)

Discussion

This issue is discussed under appeal issue 14 above.

Conclusion

As stated above, the Forest Supervisor has made a qualitative analysis of the relationship of the decision to the cumulative impact from ozone levels. I recommend affirming the Forest Supervisor on this point.

Appeal Issue 16: Forest Plan Compliance with State and Federal Air Quality Standards

The appellants state that the Forest Plan standard to comply with all Federal, State, and local air quality standards create an affirmative duty on the Forest Service, independently from the duties of other Federal or State entities. (pp. 115-117)

Discussion

The legal framework for air quality compliance is discussed in the FEIS on pp. 56-59. The Forest Plan requires coordination with appropriate Federal, State, or local entities, so this is not an independent obligation. As the Federal land managing agency, the Forest Service is responsible for assuring that surface resources are considered in consenting to the BLM to lease. As explained in the background section of my letter, the mine will be required to obtain permits from other Federal and State agencies.

The FEIS in section 3.3 has disclosed available information on air quality. It is also worth noting the FEIS finding that since the mine is already in operation and the annual rate of coal mining is not expected to increase, the cumulative impacts of the coal mine emissions along with current regional emissions are largely reflected in the monitoring data present. (p. 82)

Conclusion

I find that the Forest Supervisor has complied with the Forest Plan and applicable air quality laws and regulations. I recommend affirming the Forest Supervisor on this point.

Appeal Issue 17: Adequacy of Forest Plan Air Quality Direction

The appellants state that the GMUG Forest Plan must be supplemented to address significant new information regarding air quality. (pp. 117-119)

Discussion

The National Forest Management Act (NFMA) and accompanying forest planning regulations at 36 CFR 219 give the Forest Supervisor the discretion as to when and how to revise or amend a plan. Although a number of new federal air quality standards have been adopted and implemented since the air quality section of the plan was last amended in 1991, this project decision is in conformance with the plan, and new standards have been analyzed in this FEIS. (See my discussion in this letter under appeal issues 14 through 17 above).

Conclusion

I find that the Forest Supervisor has complied with NFMA and the associated planning regulations, and I recommend affirming the Forest Supervisor on this appeal issue.

Appeal Issue 18: Coal Suitability Recommendation and Roadless Values

The appellants state that the suitability recommendations in Appendix B of the FEIS fails to consider impacts to inventoried roadless areas that are capable of being protected as Wilderness. (pp. 119-121).

Discussion

The appellant contend that the Forest Service does not address the roadless or wilderness values of the lands in its suitability determination. Appellant's arguments are not persuasive. Criterion 4 of the Forest Service's Suitability Determination addresses the unsuitability of federal lands designated as wilderness study areas. The analysis concludes that no lands within the review area are designated Wilderness Study Areas and the current Forest Plan manages these lands for multiple use. Forest Service recommendations for proposed wilderness are discretionary and the Forest Supervisor gave careful consideration to the eligibility of this area for wilderness characteristics in 2005. At that time the area was determined to be not suitable for wilderness due to mineral values and difficult boundary management issues. (See FEIS Appendix B). In addition, as stated in my response to Appeal Issue 13, the roads in this area are temporary and will not impact the long term roadless character of these lands.

In 2012 the Colorado Roadless Rule replaced the 2001 Roadless Rule in Colorado. This rule protected the characteristics of roadless areas while addressing state-specific situations, including facilitating the exploration and development of coal resources in the North Fork coal mining area. 77 Fed. Reg. 128 (July 3, 2012) (36 CFR Part 294). The Forest Service determined in the Colorado Roadless Rule to accommodate the continued operation of coal mining by allowing for the construction of *temporary* roads needed for existing and future coal leases subject to protections of the Colorado Roadless Rule.

Conclusion

Based on these factors as well as the record in this case, I find that the Forest Service's Suitability Recommendation properly addressed the roadless and wilderness value of these lands in its suitability determination. I recommend that the Forest Supervisor be affirmed on this point.

RECOMMENDATION

Based on the discussion and conclusions above, I recommend that the Forest Supervisor's August 2, 2012, Record of Decision be affirmed and that the Appellants' request for relief be denied.

/s/ Bill Bass

BILL BASS
Appeal Reviewing Officer
Forest Supervisor, Bighorn National Forest