

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.

HIGH COUNTRY CONSERVATION ADVOCATES,

Plaintiff,

v.

U.S. FOREST SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE;
SCOTT FITZWILLIAMS, in his official capacity as Forest Supervisor for the White
River National Forest; SCOTT ARMENTROUT, in his official capacity as Forest
Supervisor of the Grand Mesa, Uncompahgre, and Gunnison National Forest; JOHN
MURPHY in his official capacity as District Ranger for the Gunnison Ranger District of
the Grand Mesa, Uncompahgre, and Gunnison National Forest,

Defendants.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND PETITION FOR REVIEW OF AGENCY ACTION**

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief challenging the actions and/or inactions of Defendants in allowing the continued operation of an active mine water treatment plant, water management facilities, and mine waste dumps associated with the Keystone Mine on U.S. Forest Service lands without an approved Plan of Operations, without the

required financial assurance or bond, and without any review of the environmental impacts associated with these operations, as required by law.

2. The Keystone Mine consists of existing mine drainage and access tunnels excavated in the side of Mt. Emmons adjacent to Coal Creek, which runs through the Town of Crested Butte, and is within the Town of Crested Butte's municipal watershed. The Keystone Mine has longstanding and ongoing serious problems with heavy metal water contamination in the mine portal outflow.

3. As part of an attempt to control the pollution, the tunnel is plugged some distance inside the mountain, inundating portions of the underground mine workings and controlling the outflow. Currently, the controlled contaminated outflow is treated in an existing water treatment plant built on-site on U.S. Forest Service land and operated by the mine owner, U.S. Energy Corp. ("U.S. Energy"). The water treatment plant is necessary to prevent violations of state water quality standards resulting from the mine's water contamination.

4. Despite operating on U.S. Forest Service lands and having undergone changes and adjustments since it was constructed in the late 1970's, the water treatment plant operations have never been authorized through the required Plan of Operations, have never been subject to the required bond to ensure continued operation of the plant, and have never been subject to a review of the environmental impacts as required by law.

5. In attempts to administratively address this failure to require proper authorization, bond, and environmental review, Plaintiff High Country Conservation Advocates ("HCCA") has

repeatedly raised issues with the U.S. Forest Service as early as 2011 regarding the insufficiency of permitting and bonding for the operation of the water treatment plant and other facilities at the site.

6. In response to HCCA's efforts to resolve this issue, the U.S. Forest Service has conceded that its regulatory requirements mandate both an approved Plan of Operations and a sufficient bond for the operation of the water treatment plant and other operations on public land, but has nevertheless failed to implement these requirements.

7. The agency's actions and/or inactions in allowing the water treatment plant and other water management and waste dump facilities at the site to continue to operate on U.S. Forest Service land without an approved Plan of Operations, without a sufficient bond, and without any environmental review, violate the Forest Service Organic Act of 1897, the National Environmental Policy Act ("NEPA"), the 1970 Mineral Policy Act, the Administrative Procedure Act ("APA"), and implementing regulations.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question); 1346 (United States as defendant); 1361 (mandamus); 2201 (declaratory relief); 2202 (injunctive relief); and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* This Court has jurisdiction to grant Plaintiff's attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. There is a present and actual controversy between the parties.

9. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) as the defendants reside in this district, the lands at issue in this suit are in this district, the events giving rise to this suit occurred in this district, and plaintiff and plaintiff's members reside within the district.

PARTIES

10. Plaintiff HCCA (formerly "High Country Citizens' Alliance") is a non-profit grassroots conservation organization located in Crested Butte, Colorado. HCCA was founded in 1977 in direct response to the original proposal to construct and operate a molybdenum mine known as the Mt. Emmons Project. HCCA was extensively involved and commented upon the Forest Service's initial reviews of the Mt. Emmons Project in the late 1970's-early 1980s and has continued to the present day its extensive participation in all matters related to mineral activities on Mt. Emmons.

11. HCCA works to protect the health and natural beauty of the lands, waters, and wildlife in and around Gunnison County now and for future generations. Through this work, HCCA conserves and protects the natural environment and associated aesthetic and recreational uses of public and other lands and waters in the Gunnison River Valley region, including Mt. Emmons which forms a major part of the mountain backdrop for the town of Crested Butte. Mt. Emmons is affectionately known in the community as the "Red Lady" (due to the crimson coloring of the mountainside when viewed from Crested Butte). For 38 years, HCCA has hosted the "Red Lady Ball," a significant social event in the town of Crested Butte. The Red Lady Ball celebrates and

educates the public about HCCA's ongoing efforts to protect the lands and waters of Mt.

Emmons, especially from current and potential future mining-related activities on the mountain.

Although HCCA works on many conservation issues in the Gunnison Valley, HCCA's Red Lady work remains at its core. HCCA regularly participates in local, state and federal agency actions related to Mt. Emmons and the surrounding lands. For example, HCCA formally objected to the application for water rights that would have been associated with the Mt. Emmons Project.

HCCA spent considerable resources in the multi-year water rights proceedings in Colorado state courts over the water rights.

12. HCCA's members use and enjoy the lands and waters that are affected by the mine's discharges, waste dumps, and operations of the water treatment plant, including those U.S. Forest Service lands on which the water treatment plant and other facilities sit, and the downstream waters below the plant. HCCA's members use these and surrounding lands and waters affected by the operation and existence of the plant and other facilities at the site for skiing, hiking, outfitting, hunting, nature and wildlife study, spiritual and aesthetic enjoyment, photography, and other recreational and conservational purposes. HCCA's members include business owners who provide goods and services for tourism and depend on the continued operation of the water treatment plant to protect Coal Creek and the Town's watershed from negative impacts that would result if the contaminated water was discharged without treatment into Coal Creek. These uses are threatened and impaired by the failure of the U.S. Forest Service to ensure legally-authorized operations and bonding for the water treatment plant and other facilities and activities

at the site, as well as the agency's failure to subject such operations to public review under NEPA and USFS mining regulations. HCCA and its members have been, and currently are being, denied their rights under NEPA to participate in the required environmental and other reviews of operations at the site.

13. Defendant Scott Fitzwilliams is the Forest Supervisor for the White River National Forest. Mr. Fitzwilliams was the deciding officer on the appeal filed by U.S. Energy over the Gunnison District Ranger's determination finding a lack of authorization for the operation of the water treatment plant on U.S. Forest Service lands, and finding that a bond for the operation of that plant was appropriate and required.

14. Defendant Scott Armentrout is the Forest Supervisor for the Grand Mesa, Uncompahgre, and Gunnison National Forest. Mr. Armentrout is responsible for the management of the U.S. Forest Service lands upon which the water treatment plant operates. Mr. Armentrout was the recipient of two letters from HCCA dated May 13, 2013 and February 6, 2015, setting forth in detail the illegalities associated with the continued operation of the water treatment plant without any site-specific environmental reviews or authorizations and without adequate financial assurance or bond to ensure continued operations in a manner consistent with the U.S. Forest Service's legal obligations to minimize environmental impacts to federal resources. Despite these letters, Mr. Armentrout has failed to respond in any meaningful way.

15. Defendant John Murphy is the District Ranger for the Gunnison District of the Grand Mesa, Uncompahgre, and Gunnison National Forest. The U.S. Forest Service lands upon which

the water treatment plant operates are within the Gunnison District. Mr. Murphy is the District Ranger that, in response to letters from HCCA, determined on April 11, 2012 that the water treatment plant operations lacked a valid authorization for operations and that an adequate bond for the continued operation of the plant was appropriate and required.

16. Defendant U.S. Department of Agriculture is charged with administering public lands at issue in this litigation, including the national forest system. Defendant Forest Service is an agency within the U.S. Department of Agriculture.

STATUTORY AND REGULATORY BACKGROUND

17. NEPA is our national charter for protection of the environment. 40 C.F.R. § 1500.1(a). The purpose of NEPA is to ensure “that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience that may also play a role in both the decisionmaking process and implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

18. NEPA imposes a procedural requirement that an agency must contemplate the environmental impacts of its actions. 42 U.S.C. § 4332. “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b).

19. NEPA requires that the Forest Service “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14(a).

20. The regulations implementing NEPA require the Forest Service to disclose and analyze the environmental effects of the proposed action and alternatives to it. 40 C.F.R. § 1500.1(b). The regulation explains that “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” *Id.*

21. The Forest Service is required to disclose and analyze the direct, indirect, and cumulative effects of the proposed action on the environment. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8, 1508.25(c)(3), 1508.27(b)(7).

22. The Organic Act of 1897 authorizes the Forest Service to promulgate regulations for the national forests “to regulate their occupancy and use and to preserve the forests thereon from destruction.” 16 U.S.C. § 551. The Forest Service’s regulations governing mining operations implementing this directive from the Organic Act are found at 36 C.F.R. Part 228 subpart A (“228A regulations”).

23. These regulations require the submittal and approval of a Plan of Operations (“PoO”) for all operations on Forest Service public lands that “will likely cause a significant disturbance of surface resources.” 36 C.F.R. §228.4(a)(3). “If the District Ranger determines that an operation

is causing or will likely cause significant disturbance of surface resources, the District Ranger shall notify the operator that the operator must submit a proposed plan of operations for approval and that the operations can not be conducted until a plan of operations is approved.” 36 C.F.R. §228.4(a)(4).

24. Under the 228A regulations, “all [mining] operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest resources.” 36 C.F.R. § 228.8. “Operations” is defined in relevant part as “[a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part.” 36 C.F.R. § 228.3(a).

25. The 228A regulations provide that the applicant must fully describe “measures to be taken to meet the requirements for environmental protection in § 228.8.” 36 C.F.R. 228.4(c)(3). These requirements for environmental protection state that the “[o]perator shall comply with all applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151, et seq.)[the Clean Water Act].” 36 C.F.R. § 228.8(b). The 228A regulations also require that “in addition to compliance with water quality and solid waste disposal standards required by this section, operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.” 36 CFR § 228.8(e). Thus, the 228A regulations impose an affirmative duty on the mining operator to comply with water quality standards, and the Forest

Service with the affirmative duty to ensure that all operations are conducted in accordance with the provisions of Part 228, the Organic Act, and relevant environmental protection mandates.

26. Under the agency's mining regulatory authority, all mineral operations on U.S. Forest Service lands, including water quality treatment and control, must be covered by an adequate bond. *See* Forest Service Manual (FSM) 6500. *See also* 36 C.F.R. § 228.13. The Forest Service has an obligation to protect the public from "financial loss resulting from defaulted or terminated contracts, mining or other mineral extraction authorizations, licenses, special use authorizations...." FSM 6560.2. The agency must "guarantee repair of surface resource disturbance, equipment removal, waste disposal, and similar actions." FSM 6561.4. "All reclamation bonds will be annually reviewed for adequacy, considering such factors, for example, as changing site conditions and unforeseen disturbances." FSM 2817.24b – Reclamation Bond Reviews.

27. According to the Forest Service's reclamation and bonding policy:

RECLAMATION POLICY

The Forest Service reclamation policy is found in FSM 2840 and is summarized as follows:

2840.2 -Objectives.

The Forest Service manages the reclamation of lands disturbed by mineral and associated activities in order to:

1. Minimize the environmental impacts resulting from such activities.
2. Ensure that disturbed lands are returned to a use that is consistent with long-term forest land and resource management plans.

2840.3 – Policy

1. Reclamation shall be an integral part of Plans of Operation that propose surface disturbance.

2. All lands disturbed by mineral activities shall be reclaimed to a condition that is consistent with forest land and resource management plans, including applicable State air and water quality requirements.
3. All reclamation requirements included in a Plan of Operations shall include measurable performance standards. Reclamation requirements shall be those reasonable, practicable, and necessary to attain standards.
4. Reclamation shall be undertaken in a timely fashion and occur sequentially with ongoing mineral activities.
5. *Reclamation bonds, sureties, or other financial guarantees shall ordinarily be required for all mineral activities that require a Plan of Operations; dollar amounts of such guarantees shall be sufficient enough to cover the full cost of reclamation.*
6. To the extent practicable, reclaimed National Forest System land shall be free of long-term maintenance requirements.

FSM 2840 goes on to describe general requirements for reclamation components to be addressed in plans of operation, as well as reclamation performance standards, reclamation bonding and monitoring.

FOREST SERVICE RECLAMATION PUBLICATION & BOND FORM:

Training Guide for Reclamation Bond Estimation and Administration April 2004 publication that contains more detailed explanation of what to consider in evaluating plans of operation including information that a plan should include, potential environmental effects, mitigation measures, reclamation standards and bond calculation.

<http://www.fs.fed.us/geology/reclamation.html> (last viewed Sept. 24, 2015)(*italics added, bold in original*).

28. Forest Service bonding policy states that “[b]onds should address all [Forest Service] costs that would be incurred in taking over operations because of Operator default.” Training Guide for Reclamation Bond Estimation and Administration For Mineral Plans of Operation Authorized and Administered Under 36 CFR 228A, USDA – Forest Service, April 2004, at 7.

http://www.fs.fed.us/geology/bond_guide_042004.pdf (last viewed Sept. 24, 2015).

29. “Active water treatment systems require the operation of a water treatment plant. Bonds should address engineering, design, operating maintenance, and replacement costs, including labor, power, equipment and supplies.” *Id.* at 17. According to the Forest Service, longer-term costs must be factored into any such bond: “[f]acilities that may need long-term operation and maintenance include ... water treatment plant[s].... In some cases such maintenance may have to continue indefinitely (e.g. water treatment facilities, dams and diversions). Assume that some level of periodic maintenance will be necessary for all engineered facilities whose continued function is essential to meet reclamation standards. This includes the monitoring and other permitting costs that may be required under various state and federal laws.” *Id.* at 23.

30. The 1970 Mining and Minerals Policy Act also mandates successful and final reclamation of mine operations approved by the U.S. Forest Service, requiring “the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.” 30 U.S.C. 21a.

FACTUAL AND PROCEDURAL BACKGROUND

31. The Keystone Mine consists of existing mine drainage and access tunnels excavated in the side of Mt. Emmons. The mine tunnels and tunnel portal are owned by U.S. Energy Corp. (“U.S. Energy”), which is also the proponent of a new mine project on Mt. Emmons known as the Mt. Emmons Project.

32. As part of an attempt to control water pollution, the main tunnel is plugged some distance inside the mountain, inundating portions of the underground mine workings and controlling the outflow. The acid mine drainage from the tunnel contains heavy metals, including cadmium, lead, and zinc in concentrations that exceed applicable Colorado water quality standards.

33. Currently, the controlled contaminated outflow from the tunnel is directed to, and treated in, an existing water treatment plant built on-site on Forest Service land and operated, through an on-site contractor, by the mine owner, U.S. Energy. The water treatment plant treats an average of approximately 350 gallons per minute of contaminated water from the tunnel. The treatment plant also receives and treats water collected from seepage and runoff from the tailings waste facility, water interceptor ditches, and sanitary wastewater effluent from two small domestic systems on site.

34. U.S. Energy owns and controls mining claims on the federal public lands on which the water treatment plant is located. Various water control structures and mine waste tailings are also located on U.S. Energy's mining claims located on federal public land at the site. U.S. Energy owns the water treatment plant and is responsible for operation of the water treatment plant and other activities on its mining claims at the site. The Forest Service is responsible for, and has regulatory authority over, all activities and operations occurring on federal public lands at the site.

35. The water treatment plant discharges the treated water into Coal Creek. Coal Creek flows directly through the Town of Crested Butte and provides the town residents, including members of HCCA, with recreational, aesthetic, environmental, and economic benefits.

36. If the mine drainage was allowed to discharge untreated into Coal Creek, it would lead to immediate and significant violations of state water quality standards and cause substantial consequences for aquatic ecological systems, wildlife, and human health and safety.

37. The project has undergone numerous principals over the decades, from AMAX and Climax in the 1970's to Phelps Dodge, Kobex Minerals, and Thompson Creek Molybdenum more recently. All have withdrawn from ownership or involvement at the site, leaving U.S. Energy Corp. as holding the sole private interest in the Keystone Mine, the water treatment plant, mine waste dumps, and other activities at the private and public lands at the site.

38. On or about March 30, 1979, Climax Molybdenum Company, a division of AMAX, Inc. and predecessor in interest to U.S. Energy, submitted a Plan of Operations ("PoO" or "POO") to the Forest Service for the "Mount Emmons Project 1979 Field Season." The 1979 PoO was intended to cover drilling for hydrological investigations at two locations, drilling of two exploration holes, and construction activities for the Keystone Mine water treatment plant. The 1979 PoO did not cover operation of the water treatment plant. The U.S. Forest Service does not recognize the 1979 Plan of Operations as being a valid authorization held by U.S. Energy Corporation for the use and occupancy of Forest Service administered lands.

39. On or about June 8, 1979, the Forest Service signed a Record of Decision approving the proposed activities for the 1979 field season, including the drilling for hydrological investigations, drilling of exploration holes, and construction activities for the Keystone Mine water treatment plant.

40. The 1979 PoO for construction of the water treatment plant did not address in any substantial manner the operations of that plant, and did not even mention storm-water management activities occupying national forest lands. Nor did it provide for the required reclamation bond to cover short and long-term operation of the water treatment plant.

41. On or about June 14, 1979, the Forest Service signed a letter approving an addendum to the March 30, 1979 PoO for the 1979 field season. The conditions listed in the Addendum included the provision of a \$1,000 performance bond, to cover reclamation costs associated with the activities proposed and approved during the 1979 field season. The \$1,000 bond did not cover the costs to operate the water treatment plant, including costs to treat the mine tunnel discharges. Nor did that bond cover the costs to reclaim the mine waste tailings and other structures and facilities at the site.

42. On or about September 29, 1982, the Forest Service wrote to AMAX, Inc. as the owners of the Keystone Mine recommending that the company submit an operating plan for the water treatment plant and other facilities placed on public lands in connection with the Mt. Emmons Project.

43. On or about December 14, 1982, the Forest Service again wrote to AMAX, Inc., as owners of the Keystone Mine, reiterating the request to submit an operating plan for the water treatment plant.

44. In a letter dated May 21, 2008, Forest Service District Ranger James Dawson wrote a letter to the Colorado Water Quality Control Division regarding the water treatment plant. The letter noted the lack of a bond to cover the costs to operate the treatment plant, stating: "If any owner of the plant were to default on the operation of the treatment plant the effect to Coal Creek could be significant. If the bond could cover the operation of the plant for a several year period this would then allow for all parties affected to develop and implement an alternative action plan for the plants operation."

45. Despite this, the Forest Service has never required U.S. Energy, or any other entity, to submit a bond to cover the operation of the water treatment plant and reclamation of the mine waste tailings, water structures, and other facilities existing on public lands at the site.

46. On or about February of 2011, HCCA representatives corresponded with and met with representatives of the U.S. Forest Service, including Grand Mesa, Uncompahgre, and Gunnison National Forest Deputy Supervisor Sherry Hazelhurst and Gunnison District Ranger John Murphy, to discuss water quality contamination issues at Mt. Emmons, as documented by a State of Colorado Water Quality Control Division report dated December 27, 2010. Among the issues addressed by HCCA representatives was the lack of any authorized Plan of Operations or

adequate bond covering operation or maintenance of the Keystone Mine water treatment plant and associated structures and facilities at the site.

47. According to recent financial statements filed by U.S. Energy, the costs of operating and maintaining the water treatment plant are approximately \$2,000,000 annually. This figure does not include longer-term repair, retrofit, and upgrade of the plant that will be required in the future. According to U.S. Energy's Form 10-K for the year ending on 12-31-12, filed with the Securities and Exchange Commission on March 15, 2013, at pp. 17: "We are paying the annual costs (approximately \$2.0 million) to operate and maintain the water treatment plant and stormwater management system at the Mt. Emmons Project, and these costs could increase in the future."

<http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=9165976-941-526886&type=sect&dcn=0000101594-13-000008> (last viewed 9-24-15).

Mt. Emmons and Water Treatment Plant Operations. We recorded \$2.0 million in costs and expenses for the water treatment plant and \$921,000 for holding costs for the Mt. Emmons molybdenum property during the year ended December 31, 2012. During the year ended December 31, 2011, we recorded \$1.9 million in operating costs related to the water treatment plant and \$486,000 in holding costs. Holding costs during 2011 were partially funded by another party under an operating agreement. As a result of the termination of this agreement in 2011, our 2012 costs are higher as we now bear all the costs associated with the project.

Id. at p. 65.

48. These yearly costs have largely remained constant. According to the company's recent SEC filing for the second quarter of 2015:

Mt. Emmons and Water Treatment Plant Operations. We recorded \$913,000 in costs and expenses for the water treatment plant and \$547,000 for holding costs for the Mt. Emmons molybdenum property during the six months ended June 30, 2015. During the six months ended June 30, 2014, we recorded \$909,000 in operating costs related to the water treatment plant and \$505,000 in holding costs.

U.S. Energy Corp. Form 10-Q (Quarterly Report), Filed August 7, 2015 for the Period Ending 06/30/15, at p. 35.

http://www.sec.gov/Archives/edgar/data/101594/000010159415000035/form10_q.htm (last viewed Sept. 28, 2015). This Quarterly Report also demonstrates that U.S. Energy has experienced a deteriorating financial position over the last year.

49. Without a sufficient bond in place, the contaminated discharges treated by the water treatment plant places a significant liability on the U.S. Forest Service and the public. While the source of the contamination, the Keystone Mine, is on U.S. Energy's private land, the water treatment plant discharges into Coal Creek from the company's mining claims on Forest Service land, thereby subjecting the agency to liability under the federal Clean Water Act for any unpermitted discharge or any discharge in excess of permitting levels.

50. The water treatment plant is currently treating contaminated water originating at the Keystone Mine workings and tailings dumps and discharging pursuant to a State of Colorado permit (CDPS Permit No. CO-0035394). The permit includes effluent limitations for cadmium, zinc, and total suspended solids, as well as reporting requirements for other metals such as arsenic and copper.

51. In a March 17, 2011 letter to the company, then Forest Service Supervisor Charles S. Richmond requested in writing that U.S. Energy submit an updated Plan of Operations specifically to include a proposal for the ongoing operation of the water treatment plant.

52. In an August 30, 2011 meeting between the Forest Service, U.S. Energy, the federal Bureau of Land Management, and the company's consultant, the Forest Service reiterated its request for "timely/immediate submittal of POO specific to the treatment plant and stormwater management as it is currently being operated."

Ongoing activity updates:

...

Water treatment plant-discussion of whether to wait to cover in the full mine PoO or in a stand alone PoO addressing current operations. *FS specifically requested timely/immediate submittal of PoO specific to the treatment plant and stormwater management as it is currently being operated.* Once approved a reclamation bond for removal/demolition of features on NFS lands that could later be transferred to the State.

August 30, 2011 Meeting Notes, at 1 (emphasis in original).

53. On or about February 24, 2012, HCCA representatives sent a follow-up letter to Deputy Supervisor Hazelhurst and District Ranger Murphy reiterating HCCA's concerns regarding the lack of any Plan of Operations or bond covering the operation of the water treatment plant and other facilities on Forest Service land.

54. On or about February 27, 2012, the Forest Service sent an email to representatives of U.S. Energy requesting information necessary for the agency to respond to HCCA's February 24, 2012

letter. Among the items requested from U.S. Energy was information on when the company planned to submit additional information regarding the operation of the water treatment plant.

55. On or about March 14, 2012, U.S. Energy sent a letter to the Forest Service detailing its response to HCCA's February 24, 2012 letter to the U.S. Forest Service. In that letter, U.S. Energy asserted that no additional information, authorization, or bond was necessary for the operation of the water treatment plant because the Plan of Operations and bond (\$1,000) for the 1979 field season was sufficient.

56. On or about April 11, 2012, District Ranger Murphy issued by letter a determination to U.S. Energy finding that U.S. Energy lacked a valid Plan of Operations for occupation of Forest Service lands associated with the operation of the water treatment plant and related mine waste and other facilities. That District Ranger's determination required U.S. Energy to submit a new Plan of Operations to address this surface disturbance and activities and allow the agency to calculate an appropriate bond. As stated in that letter, at p. 1:

The U.S. Forest Service does not recognize the 1979 Plan of Operations (POO) as being a valid authorization held by U.S. Energy Corporation for the use and occupancy of Forest Service administered lands. I am requesting that an updated POO be submitted for all significant surface disturbance and activities associated with the operation of the Keystone Mine water treatment plant as well as for all surface water management structures and activities located on Forest Service administered lands.

A reclamation bond estimate will need to be provided for reclamation of surface disturbances and for reclamation of surface disturbances created by the previous operator(s).

57. On or about May 25, 2012, U.S. Energy filed an appeal of District Ranger Murphy's determination, designated as Regional Appeal Number 12-02-04-0027, contending that the 1979

PoO for the construction of the water treatment plant was sufficient authorization for operation and bonding for the facility. The appeal was assigned for administrative resolution to White River National Forest Supervisor Scott Fitzwilliams.

58. On or about June 19, 2012, White River National Forest Supervisor Scott Fitzwilliams sent a letter to U.S. Energy representatives advising the company that Supervisor Fitzwilliams would act as the Appeal Reviewing Officer for purposes of U.S. Energy's appeal. Supervisor Fitzwilliams also informed U.S. Energy that no stay of District Ranger Murphy's determination would be granted and that District Ranger Murphy was expected to issue a Responsive Statement to the points raised in U.S. Energy's appeal within approximately 30 days of the May 25, 2012 appeal date.

59. On or about June 26, 2012, in response to the appeal filed by U.S. Energy, District Ranger Murphy submitted a Responsive Statement in which he confirmed the District Ranger's position both that the 1979 Plan of Operations was not a valid authorization for operation of the water treatment plant and that an adequate and updated reclamation bond for the water treatment plan was appropriate and required by law. As stated in the agency's Responsive Statement: "In repeated conversations with U.S. Energy staff and attorneys, the Forest Service has made it clear that we do not believe U.S. Energy holds a valid authorization for operations of the Water Treatment Plant at Mt Emmons, or for Storm-water management activity associated with that plant and the old mine facilities there." Statement at p. 1.

60. The Statement further determined that, at pp. 4-5 (underline in original, *italics* added):

The 1979 PoO for construction of the WTP does not address in any substantial manner the operations of that plant, and does not even mention storm-water management activities occupying NF. Nor does it provide for the required reclamation bond. Much of the 1979 PoO, and the associated NEPA, addresses a very short term program of exploratory drilling, with very limited discussion of the WTP. There is no documentation in a PoO of facility upgrades that have taken place since 1979. There is no PoO that addresses the as-built WTP as compared with the proposed facility approved in the 1979 PoO. There is nothing addressing operations.

Information in the U.S. Energy March 14, 2012 letter (the last to [sic] pages of attachments) with regard to operations consisted of a listing of equipment and activities, but is not sufficient to allow review and approval as a PoO. A complete and adequate PoO should describe operations in terms of access, hours, lighting at night, truck and equipment traffic, people on site, spill prevention plans, hazardous material plans, fuels storage, chemical use, points of diversion, points of discharge, and perhaps more, depending on the specific operation. It should also include information on all of the facilities occupying National Forest System lands such as buildings, powerlines, ditches, monitoring wells, roads... and more. All of these things could have environmental effects the Forest Service is required to consider, leading possibly to reasonable mitigation measures in accordance with 36 CFR 228.8. This information is also needed to calculate an appropriate reclamation bond. *No bond currently exists for this very extensive operation on National Forest System lands. In accordance with 36 CFR 228.13(a), a reclamation bond is appropriate and is required.*

61. The agency also determined that the previous company submittals and Forest Service reviews of the treatment plant and other facilities and operations on public land were not sufficient to comply with NEPA:

The NEPA for the 1979 PoO ... is completely inadequate in terms of today's requirements. There is no Biological Assessment or compliance with the Endangered Species Act, nor is there a Biological Evaluation of Sensitive Species. Neither has a cultural survey ever been done or steps taken to ensure compliance with Section 106 of the National Historic Preservation Act (NHPA). All of these may also suggest mitigation measures or requirements the Forest Service should impose, consistent with 36 CFR 228.8.

Responsive Statement at 5.

62. The Statement, at p. 6, further held that:

In the case of U.S. Energy operations of the WTP [Water Treatment Plant] and Storm-water Management such review is clearly called for. NEPA supporting the 1979 PoO did not address any of the operations, or any of the ground disturbance and management associated with storm-water management. Recent dialog with the State with regard to possible violations, though resolved from an enforcement standpoint, none-the-less suggest a need to review, and possibly update, storm-water management activities and their effects on the National Forest in accordance with the direction above.

63. The Statement, at p. 7, determined that: “the activities and facilities discussed here, are creating environmental effects that should be considered and mitigated if possible, consistent with processes described at 36 CFR 228 for review and approval of a PoO as per above.”

64. On August 13, 2012, HCCA sent a letter to White River National Forest Supervisor Scott Fitzwilliams setting forth a detailed response to U.S. Energy’s appeal, contesting the company’s positions and reiterating the legal requirements that both a Plan of Operations authorization and a bond was necessary for the operation of the water treatment plant and other facilities at the site.

65. On October 24, 2012, White River National Forest Supervisor Scott Fitzwilliams, the U.S. Forest Service personnel charged with rendering a decision on U.S. Energy’s appeal, issued his Appeal Decision rejecting U.S. Energy’s argument and found that the 1979 Plan was not adequate to authorize operations of the water treatment plant. “My review of the AR [Appeal Record] confirms the District Ranger’s finding that the 1979 PoO merely addressed construction activities in the 1979 field season. Nothing in the 1979 PoO addressed continued operation of the water treatment plant or the surface water management facilities associated with the plant.”

October 24, 2012 Appeal Decision at pp. 1-2.

66. Forest Supervisor Fitzwilliams went on to find, however, that the appeal was moot and that no approved Plan of Operations authorizing operation of the plant or requirement for a bond or financial warranty was necessary pursuant to U.S. Forest Service regulations at 36 C.F.R. § 228.5(b) because U.S. Energy had, two weeks earlier, submitted a proposed “preliminary Plan of Operations” for mining-related activities that would rely on the water treatment plant.

67. The Appeal Decision, at 2, stated:

My decision is that the appeal of the District Ranger's April 11, 2012 decision is now moot because a new PoO has been submitted that addresses the water treatment plant. The regulations at 36 CFR 228.5(b) require the Forest Service to approve operations necessary for timely compliance with Federal and State law now that a proposed PoO has been submitted. There is no dispute that compliance with State permits requires continued operation of the water treatment plant and associated facilities. The appeal is dismissed as moot and the District Ranger is directed to determine whether continued operations need to be modified to minimize environmental impacts pursuant to 36 CFR 228.5(b) and 228.8.

68. The regulations cited by the Appeal Decision require that all mining “[o]perations shall be conducted in accordance with an approved plan of operations, except as provided in paragraph (b) of this section . . .” 36 C.F.R. § 228.5(a). Section 5(b) states that: “[p]ending final approval of the plan of operations, the authorized officer will approve such operations as may be necessary for timely compliance with the requirements of Federal and State laws, so long as such operations are conducted so as to minimize environmental impacts as prescribed by the authorized officer in accordance with the standards contained in § 228.8.” 36 C.F.R. § 228.5(b).

69. U.S. Energy did not further contest or appeal the October 24, 2012 Appeal Decision made by Forest Supervisor Fitzwilliams.

70. The proposed PoO submitted by U.S. Energy, and relied upon by the Appeal Decision, does not contain the information required under 36 C.F.R. Part 228 and the Responsive Statement to adequately cover the operation of the treatment plant and the surface water management facilities associated with the plant, including the required bond amount.

71. Pursuant to the Appeal Decision, the agency has allowed U.S. Energy to continue operation of the water treatment plant and associated facilities on public lands without the submittal of any bond to cover the costs to operate the plant and associated facilities and without any public review under NEPA.

72. There is currently no approved Plan of Operation for the operation of the water treatment plant, the surface water management facilities associated with the plant, nor the mine waste dumps at the site.

73. There is currently no bond to cover the costs to operate the plant or the surface water management facilities associated with the plant, nor for the reclamation of the mine waste dumps at the site.

74. Pursuant to 36 C.F.R. § 228.5(b), the Appeal Decision required the District Ranger to determine whether continued operations need to be modified to minimize environmental impacts pursuant to 36 C.F.R. §§ 228.5(b) and 228.8.

75. The Appeal Decision, at p. 2, also stated that: “The regulations at 36 CFR 228.5(b) require the Forest Service to approve operations necessary for timely compliance with Federal and State law now that a proposed PoO has been submitted.”

76. Despite the continued operation of the treatment plant and associated facilities at the site without any approved PoO or bond, neither the District Ranger nor any other Forest Service official has made the “determination,” or the decision to “approve operations,” required by the Appeal Decision and 36 C.F.R. §§ 228.5(b).

77. The Forest Service has not conducted any review pursuant to NEPA for the operation of the treatment plant, waste dumps, and the surface water management facilities associated with the plant. The Forest Service never submitted the Appeal Decision to any public review under NEPA or the agency’s 36 C.F.R. Part 228 regulations. The Appeal Decision is an agency action subject to NEPA and judicial review under the APA.

78. On or about April 12, 2013, U.S. Energy submitted to the U.S. Forest Service a revised Plan of Operations for mining Mt. Emmons. This Plan did not contain or propose any bond amount necessary for continued operation of the water treatment plant.

79. The Forest Service has not provided any opportunity for any public or NEPA review of the Appeal Decision or its actions or inactions in allowing the continued operation of the water treatment plant.

80. The U.S. Forest Service website detailing the progress of agency NEPA reviews fails to even list the April 12, 2013 PoO (or the October 24, 2012 PoO) as being part of any public or environmental review. The agency’s current “Schedule of Proposed Actions” (SOPA) does not contain any mention of either PoO, or any anticipated public review of either PoO, or of any review of the continued operation of the treatment plant, water management facilities, or waste

dumps at the site. <http://data.ecosystem-management.org/nepaweb/current-sopa.php?forest=110204#5> (viewed Sept. 25, 2015).

81. Despite having received the revised proposed PoO in April of 2013, the Forest Service has not solicited any public comment on that PoO. The Forest Service has not publically released any schedule for its review of that PoO under NEPA or the Part 228A regulations.

82. According to U.S. Energy's Form 10-K for the year ending on December 31, 2012, filed with the federal Securities and Exchange Commission on March 15, 2013, at pp. 29-30, the operation of the water treatment plant "is not related to proposed mining activities" proposed in the October, 2012 PoO for the Mt. Emmons Project (revised in April 2013):

The exploration and future development of our Mt. Emmons Project is highly speculative, involves substantial expenditures, and may be non-productive.

...

The Mt. Emmons Project is located on fee property within the boundary of U.S. Forest Service ("USFS") land. Although mining of the mineral resource would occur on the fee property, associated ancillary activities will occur on USFS land. The Company submitted a full mine plan of operations in part to satisfy the requirements of the conditional water rights decree on October 10, 2012. Under the procedures mandated by the National Environmental Protection Act ("NEPA"), the USFS is expected to prepare an environmental analysis in the form of an environmental impact statement to evaluate the predicted environmental and socio-economic impacts of the proposed mine plan. The NEPA process provides for public review and comment of the proposed plan.

The USFS is the lead regulatory agency in the NEPA process, and coordinates with the various federal and state agencies in the review and approval of the mine plan of operations. Various Colorado state agencies will have primary jurisdiction over certain areas. For example, enforcement of the Clean Water Act in Colorado is delegated to the Colorado Department of Public Health and Environment. A water discharge permit under the Colorado Discharge Permit System ("CDPS") is required before the USFS can approve the plan of operations. We currently have CDPS permits for the discharge from the water treatment plant and for stormwater

discharges associated with the Mt. Emmons Project, but this project is not related to proposed mining activities.

<http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=9165976-941-526886&type=sect&dcn=0000101594-13-000008> (last viewed Sept. 24, 2015)(emphasis in original).

83. Thus, Defendants have acted to allow the continued operations of the water treatment plant, waste dumps, and the surface water management facilities associated with the plant without any Plan of Operations approval or other lawful authorization, without adequate financial warranty/assurance or bond to cover any water treatment or environmental reclamation costs, and without any environmental review as required by NEPA, the Organic Act and agency regulations.

84. In the alternative, the Defendants have failed to act to require an approved PoO for operation of the water treatment plant, waste dumps, and the surface water management facilities associated with the plant, failed to require the submittal and posting of a bond to cover the costs to operate and reclaim these facilities, and failed to conduct the environmental and public reviews of these operations as required by NEPA, the Organic Act and agency regulations.

85. In an attempt to resolve these serious and ongoing issues, Plaintiff HCCA sent detailed letters to Forest Supervisor Scott Armentrout on or about May 13, 2013 and again on February 6, 2015. To date, Defendants have failed to respond in any meaningful way to HCCA's concerns as expressed in these letters and detailed herein. Given the lack of response or meaningful action to resolve the ongoing unauthorized and inadequately bonded operations of the water treatment

plant and other facilities, or conduct any type of environmental impact and public review, HCCA is forced to resort to this litigation.

CLAIMS FOR RELIEF

Claim One

Defendants Violated the National Forest Organic Act of 1897 and Implementing Regulations by Acting to Allow the Keystone Mine Water Treatment Plant and Associated Facilities and Operations on Public Land to Continue to Operate Without Any Plan of Operations Authorization, Without Any Adequate Bond, and Without Conducting Any Review of Measures Necessary to Minimize Environmental Impacts and Otherwise Protect Public Resources.

86. Plaintiff incorporates and reasserts all previous paragraphs as if fully set forth herein.

87. The U.S. Forest Service's actions and/or omissions described above regarding its actions and decisions to allow the water treatment plant and the surface water management facilities associated with the plant, and other facilities on public lands at the site, including discharges from the mine tunnel and mine waste tailings facilities, to continue to operate without any Plan of Operations authorization, without adequate bond, and without conducting any review of any measures necessary to minimize environmental impacts and protect public resources violates the Forest Service Organic Act of 1897, including 16 U.S.C. § 551, and implementing regulations and policies, including 36 C.F.R. Part 228.

88. The U.S. Forest Service's actions and/or omissions described above regarding its actions and decisions to allow the water treatment plant and the surface water management facilities associated with the plant, and other facilities on public land at the site, including discharges from the mine tunnel and mine waste tailings facilities, to continue to operate without any Plan of

Operations authorization, without adequate bond, and without conducting any adequate review of measures necessary to minimize environmental impacts and protect public resources are arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, in excess of statutory jurisdiction, authority, or limitations, without observance of procedure required by law and otherwise not in accordance with law, and therefore are subject to judicial review under, and violate, the APA, 5 U.S.C. § § 701-706, especially § 706 (2).

Claim Two

Defendants Violated the National Environmental Policy Act by Acting to Allow the Keystone Mine Water Treatment Plant and Other Facilities and Operations on Public Land to Continue to Operate Without Conducting any Environmental Impact Review as Required by Law.

89. Plaintiff incorporates and reasserts all previous paragraphs as if fully set forth herein.

90. The U.S. Forest Service's actions and/or omissions described above regarding its actions and decisions to allow the water treatment plant and the surface water management facilities associated with the plant, and other facilities on public land on site, including discharges from the mine tunnel and mine waste tailings facilities, to continue to operate without any Plan of Operations authorization, without adequate bond, and without conducting any adequate environmental impact and public review of its actions and decisions violate the National Environmental Policy Act, 42 U.S.C. § 4332, *et seq.* and implementing regulations and policies.

91. The U.S. Forest Service's actions and/or omissions described above regarding its actions and decisions to allow the water treatment plant and the surface water management facilities associated with the plant, and other facilities on public lands at the site, including discharges

from the mine tunnel and mine waste tailings facilities, to continue to operate without any Plan of Operations authorization, without adequate bond, and without conducting any adequate environmental impact and public review of its decisions and actions violates the National Environmental Policy Act, 42 U.S.C. § 4332, *et seq.* and implementing regulations and policies are arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, in excess of statutory jurisdiction, authority, or limitations, without observance of procedure required by law and otherwise not in accordance with law, and therefore, are subject to judicial review under, and violate, the APA, 5 U.S.C. § § 701-706, especially § 706 (2).

Claim Three

Defendants Have Failed to Take Action Required By Law by Failing to Require a Plan of Operations, Bond, and National Environmental Policy Act Review for Operation of the Keystone Mine Water Treatment Plant and Other Associated Facilities at the Site.

92. Plaintiff incorporates and reasserts all previous paragraphs as if fully set forth herein.

93. The U.S. Forest Service's actions and/or omissions described above in failing to act to require submission of, and approval of, an adequate Plan of Operations authorizing the operation of the water treatment plant and the surface water management facilities associated with the plant, and other facilities on public lands at the site, including discharges from the mine tunnel and mine waste tailings facilities, or any adequate bond for such operations or reclamation, and without conducting any review under the National Environmental Policy Act and agency regulations, as mandated by law, constitutes "agency action unlawfully withheld or unreasonably

delayed,” subject to judicial review under, and in violation of, the Administrative Procedure Act, 5 U.S.C. § 706(1).

Claim Four

Defendants Failed to Take Action Required by Federal Law by Failing to Conduct the Required Review of Measures Necessary to Minimize Environmental Impacts and Protect Public Resources Associated with the Continued Operation of the Keystone Mine Water Treatment Plant and Other Facilities and Operations at the Site.

94. Plaintiff incorporates and reasserts all previous paragraphs as if fully set forth herein.

95. The U.S. Forest Service’s actions and/or omissions described above in failing to act in allowing the water treatment plant and the surface water management facilities associated with the plant, and other facilities on public lands at the site, including discharges from the mine tunnel and mine waste tailings facilities, to continue to operate without any Plan of Operations or other legal authorization, without adequate bond, and without conducting an adequate review of measures necessary to minimize environmental impacts and protect public resources as required by the Forest Service Organic Act of 1897, including 16 U.S.C. § 551, and implementing regulations and policies, constitutes “agency action unlawfully withheld or unreasonably delayed,” subject to judicial review under, and in violation of, the Administrative Procedure Act, 5 U.S.C. § 706(1).

REQUEST FOR RELIEF

Plaintiff respectfully requests that this Court:

1. Determine and declare that the federal defendants have violated the 1897 Forest Service Organic Act, the National Environmental Policy Act, the APA, and their implementing regulations and policies in allowing the water treatment plant and the surface water management facilities associated with the plant, and other facilities on public lands at the site, including discharges from the mine tunnel and mine waste tailings facilities, to continue to operate without any legally-compliant Plan of Operations authorization, without adequate bond, and without conducting any adequate review of the environmental impact of the operations and its decision, including of measures necessary to minimize environmental impacts and protect public resources.
2. Order the Defendants to require that all operations on public land at the site, including the operation of the water treatment plant and the surface water management facilities associated with the plant, including discharges from the mine tunnel and mine waste tailings facilities, be covered and authorized by a valid and adequate Plan of Operations and valid and adequate financial assurance/bond.
3. Order the Defendants to subject all operations on public land at the site, including the operation of the water treatment plant and the surface water management facilities associated with the plant, including discharges from the mine tunnel and mine waste tailings facilities, to full public review under NEPA.

4. Award plaintiff their costs of litigation (including reasonable attorney, witness and consultant fees) under the Equal Access to Justice Act, 28 U.S.C. § 2412 and Fed. R. Civ. P. 54(d), and/or under any other statutory authority of the Court; and
5. Award such other relief as this Court deems appropriate, just, and proper.

RESPECTFULLY SUBMITTED this 5th day of October, 2015,

/s/ Roger Flynn

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(Pursuant to D.Colo. Local Rule 5.1(K))

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