No. 22-1056

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITIZENS FOR CONSTITUTIONAL INTEGRITY, and

SOUTHWEST ADVOCATES, INC.,

Plaintiffs-Appellants,

v.

THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
No. 21-cv-923-RM-STV
The Honorable Judge Raymond P. Moore

PLAINTIFFS-APPELLANTS' BRIEF

ORAL ARGUMENT REQUESTED

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RULE 26.1 DISCLOSURE

Plaintiffs-Appellants Citizens for Constitutional Integrity and Southwest Advocates, Inc., (collectively, Citizens) have no parent corporation or stock-owning, publicly-held corporation to disclose.

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Tenth Circuit Rule 28.2(C)(3) directs Citizens to identify a related appeal: *Citizens for Constitutional Integrity v. United States*, No. 21-1317, *briefing complete* (10th Cir. Mar. 28, 2022).

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 701-706
BLM	Bureau of Land Management
Citizens	Citizens for Constitutional Integrity and Southwest Advocates, Inc.
EA	Environmental Assessment
The Expansion	The King II Mine's Dunn Ranch coal-mine expansion, I-App-14[1]
GCC	GCC Energy, Inc.
The Mine	The King II Mine
NEPA	National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 to 4370m-12
The Order	February 16, 2022, order, II-App-245
OSMRE	The Office of Surface Mining Reclamation and Enforcement, the Department of the Interior, Secretary of the Interior Deb Haaland, Acting OSMRE Director Glenda Owens, and Acting Assistant Secretary for Land and Minerals Management Laura Daniel-Davis
SMCRA	Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328)

[1] This brief cites X-App-YY to refer to Appendix Volume X, page YY.

STATEMENT OF JURISDICTION

The district court had jurisdiction because Citizens for Constitutional Integrity and Southwest Advocates, Inc., (Citizens) claimed federal officers and agencies violated federal laws—namely Federal Defendants Office of Surface Mining Reclamation and Enforcement, the Department of the Interior, Secretary of the Interior Deb Haaland, Acting OSMRE Director Glenda Owens, Acting Assistant Secretary for Land and Minerals Management Laura Daniel-Davis, and the United States (collectively, OSMRE)—in approving the Dunn Ranch coal mine expansion of the King II Mine (the Expansion). *See* I-App-25; I-App-14; 28 U.S.C. §§ 1331, 1361. This Court has jurisdiction over this appeal because the February 16, 2022, order (the Order), refused injunctive relief. II-App-245; *see* 28 U.S.C. § 1292(a)(1). Citizens filed their notice of appeal nine-days later, on February 25, and that falls within the sixty-day period for appeals. II-App-252; *see* Fed. R. App. P. 4(a)(1)(B)(i)-(iii).

STATEMENT OF ISSUES

Courts traditionally issue preliminary injunctions when plaintiffs demonstrate likely success on the merits and the balance of the equities favoring the injunction. Nonetheless, for "any order or decision" under a comprehensive coal-mining statute, the Surface Mining Control and Reclamation Act of 1977 (SMCRA) § 526(c), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328, 1276(c)), Congress directed courts to issue "temporary relief" if (1) the movant provided notice, (2) the movant established likely success on the merits, and (3) the relief will not harm public health, public safety, or the environment.

1. Whether SMCRA's plain text requires courts to apply Section 1276(c) in cases challenging the Secretary's SMCRA decisions.

2. SMCRA requires OSMRE to determine a coal mine's surface water impacts before approving it. Although OSMRE knew the mining company sought more water rights, OSMRE concluded the Expansion would consume one-third of its actual water-use. Whether OSMRE likely violated SMCRA by relying on incorrect data.

3. SMCRA also requires OSMRE to determine a coal mine's groundwater impacts before approving it. The Expansion will divert irrigation water for mining. OSMRE approved it without determining the volume of irrigation water that was infiltrating the ground and replenishing groundwater aquifers. Whether OSMRE likely violated SMCRA by approving the Expansion without that information on groundwater impacts.

STATEMENT OF THE CASE

I. Introduction

"[W]ater-resources impacts [a]re important." *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 858 (10th Cir. 2019). In the high desert of southwestern Colorado, water shapes life. A well can provide perpetual water, or residents can live in constant awareness of water hauled and stored, and in constant fear of running out at the wrong time.

A coal mining company, GCC Energy, LLC, sought two mining approvals in quick succession to expand the King II Mine. OSMRE did not sustain its attention in analyzing the details of the second one. It never caught on that the Expansion would use three times as much water as GCC told it, although GCC also told OSMRE it was seeking more water. GCC obtained that additional water by diverting irrigation water, and OSMRE knew irrigation water importantly replenished groundwater, but never calculated how much would no longer do so. OSMRE breached its SMCRA duties to collect sufficient information, to assess the Expansion's hydrologic impacts, and to minimize disturbance to the hydrologic balance.

Citizens are appealing from the Order that denied their motion for temporary relief under 30 U.S.C. § 1276(c).[2] Because stopping the Expansion will not harm public health, public safety, or the environment, Section 1276(c) compels temporary relief during the litigation. Citizens have been objecting to the Mine expansions for seven years because the Mine threatened their water supply. They deserve their hearing and day in court before the Mine pollutes or depletes their wells.

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[2] Section 526(c) of SMCRA states:

> In the case of a proceeding to review any order or decision issued by the Secretary under this Act, including an order or decision issued pursuant to subparagraph (c) or (d) of section 525 of this title pertaining to any order issued under subparagraph (a)(2), (a)(3), or (a)(4) of section 521 of this title for cessation of coal mining and reclamation operations, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if—
>
> (1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;
>
> (2) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and
>
> (3) such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources.

(codified at 30 U.S.C. § 1276(c)).

II. Legal Background

OSMRE approved the Expansion under SMCRA. I-App-14. Congress enacted SMCRA in 1977 to protect the environment, public health, and public safety. It found "many surface mining operations" risked "destroying or diminishing the utility of land," causing "erosion and landslides," polluting water, destroying fish and wildlife habitats, impairing natural beauty, and degrading "the quality of life in local communities." 30 U.S.C. § 1201(c).

Congress saw especially difficult problems in arid, western states. It found that coal mining in that arid climate with water "in short supply," risked disrupting "stream and river channels forming part of the hydrologic regime" and would "pose difficult and in some cases insurmountable reclamation problems." H.R. Rep. No. 95-218 at 59 (1977). Congress's analysis found greater risks of coal mining in arid areas because "the erosional balance of stream valleys is more fragile." *Id.* at 112. It adopted the National Academy of Science's prediction that, for mined areas receiving less than ten inches of rain, society may not accept the decades or centuries natural processes may take to rehabilitate the area. *Id.* at 60.

Congress responded to coal mining's grave risks with broad protections for the land and for the people who live near coal mines. It sought to avert, "for Western coal mining regions," a similar "despoliation that has ravaged Appalachia . . ." H.R. Rep. No. 94-1445 at 10 (1976). Congress intended to "minimize damage to the environment and to soil productivity" and sought to "protect the health and safety of the public." 30 U.S.C. § 1201(d). Specifically, it aimed to "fully protect[]" from coal mines all "persons with a legal interest in the land . . . ." *Id.* § 1202(b).

SMCRA's substantive directives contrast sharply against directives in, for example, National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 to 4370m-12. "NEPA itself does not mandate results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). SMCRA, however mandates results. It "is a comprehensive statute that regulates all surface coal mining operations." *United States v. Navajo Nation*, 556 U.S. 287, 300 (2009).

SMCRA regulates coal mining by withholding permits until mining companies commit to environmental performance standards. *Nat'l*

Wildlife Fed'n v. Hodel, 839 F.2d 694, 699 (D.C. Cir. 1988). Those performance standards emphasize maintaining the quantity and quality of surface water and groundwater. SMCRA requires OSMRE to assess the mine's impacts "upon the hydrology of the area and particularly upon water availability." 30 U.S.C. § 1257(b)(11). It prohibits OSMRE from approving mine permits unless the mine minimizes disruption to and prevents material damage to surface water and groundwater. *Id.* §§ 1260(b)(3), 1265(b)(10).

III. Factual Background

The Expansion jeopardizes the groundwater that feeds Citizens' members wells, and it takes surface water from the La Plata River, which now runs dry as never before. I-App-188. The high-desert climate of southwestern Colorado has low precipitation and very low humidity. II-App-23. With the 2,462-acre Expansion west of East Alkali Gulch, GCC is expanding deeper underneath Ute Mountain Ute land in La Plata County. I-App-72, -76. OSMRE analyzed it in an environmental assessment (EA). I-App-72.

GCC had sought two immediately successive approvals to expand the King II Mine and thereby avoided any requirements to analyze them

together. OSMRE approved one expansion of the King II Mine, *east* of East Alkali Gulch, on January 4, 2018, I-App-77. Six days later, on January 10, 2018, GCC proposed the Expansion *west* of East Alkali Gulch. I-App-76 to -77. If GCC had proposed the Expansion seven days sooner, NEPA could have required OSMRE to delay the first approval, so it could consider both coal-mine proposals in a single environmental impact statement. *See* 40 C.F.R. § 1501.9(e)(1) ("Actions . . . that . . . are closely related . . . should be discussed in the same impact statement."); *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1229 (10th Cir. 2008) ("improper segmentation is usually concerned with projects that have reached the proposal stage.").

OSMRE knows the King II Mine has already polluted nearby residents' wells: "Adjacent landowners are reporting coal dust and methane smell in well water." I-App-179. In late May 2022, GCC's excavating machines will start digging deep into the western slope of East Alkali Gulch. II-App-254.

A. The Expansion will take water from the La Plata River.

Members who live near the Expansion see grave risks on the horizon. Julia Dengel is a clinical social worker. I-App-181 to -182. She lives

downgrade from the mine and loves seeing the nearby bobcats, prairie dogs, coyotes, harrier hawks, kestrels, and golden eagles; because the Mine is taking more water, the ecosystem will support less wildlife. I-App-182 to -185. Ms. Dengel uses her well water for laundry and bathing, and she plans to use the water for horses. I-App-183 to -184. Her life would change dramatically if the Expansion polluted her well-water because she would have to haul water. I-App-184 to -185.

Member Lisa Hanna-Floyd is a retired ecology professor, who taught in Arizona for decades. I-App-187. While teaching, she kept a home on the La Plata River. I-App-186 to -189. Ms. Hanna-Floyd loves the piñon-juniper landscape and seeing the deer, bobcats, great-horned owls, and willow flycatchers. I-App-186 to -188. The river flowed year-round, until recently. I-App-188. She expects the Mine is causing that. I-App-188 to -190.

The U.S. Geologic Survey concluded that, by 1985, mining had already polluted the groundwater near the Hay Gulch irrigation ditch, which diverts water from the La Plata River. I-App-229. Those effects may extend to "distant drainages," and more "data collection would

provide a more complete framework for assessing" the impacts of mining on groundwater quality. *Id.*

Recent expert analysis confirms that expanded mining will risk pollution reaching community members' wells. Registered professional environmental engineer Randolph Fischer found the Mine could harm human health and the environment, and that pollution from the mine could migrate downgrade to contaminate groundwater. I-App-242. Fischer concluded that unmapped interconnections among the geologic formations in and near the Mine could transport that pollution, and the pollution could drain into the La Plata River and degrade surface water quality and damage the aquatic ecosystem. I-App-242 to -243.

Fischer also feared that mining subsidence could create cracks and leaks that would drain the water from perched aquifers supplying residents' well water. *See id.* Even if the Mine removed coal from below household wells, settling ground could cause wells to go dry. *See id.*

B. The Mine obtained water rights by diverting irrigation water.

GCC consumes water by spraying it on the coal face during mining to suppress coal dust. I-App-91. Without water, coal dust could cause explosions and miners could breathe it and suffer injuries. *See id.*

Surface water in the vicinity "is very limited." II-App-24. It runs only in ephemeral gulches in response to storm events, or it flows in irrigation ditches. I-App-110. To ensure a consistent water supply for the Expansion, GCC leased surface water rights from Huntington Ranches, LLC. II-App-5, -9.

A water-rights corporation, Hay Gulch Ditch, Inc., controls and allocates water rights to its shareholders, like Huntington Ranches. II-App-5. The corporation diverts La Plata River water via the Hay Gulch irrigation ditch to its users. *Id.* In 2011, the water court confirmed that, every year, Huntington could divert to the Mine fifteen acre-feet of water that Huntington had used for irrigation. II-App-5. An acre-foot of water, like it sounds, equals the amount of water it takes to cover one acre in one foot of water. Water Science School, U.S. Geologic Survey, Dictionary of Water Terms (June 15, 2018), usgs.gov/special-topics/water-science-school/science/dictionary-water-terms. Later, the water court confirmed GCC's lease of 68.81 additional acre-feet of water rights from Huntington. II-App-80.

In the EA, OSMRE reported the Mine was using 14.07 acre-feet of water, although it had 34 acre-feet of water rights. I-App-91. Then,

GCC told OSMRE that it sought those 68.81 additional acre-feet of water rights. *See id.*; II-App-80. OSMRE never asked why. In the meantime, GCC had told La Plata County that the Mine would use up to 40 acre-feet. II-App-261 ("GCC reports that it used 30 acre-feet (AF) of water in 2014 and may have a need for up to 40 AF.").

GCC's own documents recognize that crops never consume every drop of irrigation water, that some irrigation water infiltrates to recharge underground aquifers, that the infiltration can prevent droughts. II-App-173. La Plata County also recognized the important impact "irrigation water supply has on domestic water wells." II-App-133. But OSMRE never analyzed the effects on groundwater quantity from diverting that irrigation water to mining. Consequently, no one knows how much groundwater the Expansion will prevent from reaching aquifers, over twenty-two years of operation. I-App-91.

IV. Procedural Background

The Amended Complaint claims OSMRE violated SMCRA by approving the Expansion without accounting for these important water uses and impacts. I-App-45 to -49. In November 2021, Citizens moved for temporary relief to stop the Expansion before mining equipment

breached the west side of East Alkali Gulch and started mining coal as early as February 2022. I-App-51.

On February 16, 2022, the Order denied Citizens' motion for temporary relief. II-App-245. It approved of OSMRE's assumption that GCC sought more water rights for no reason. II-App-249. Then, it interpreted SMCRA to require Citizens to prove harm from OSMRE's failure to determine the volume of irrigation water, diverted to the Expansion, that otherwise would have infiltrated and replenished underground aquifers. II-App-251.

The Order also granted OSMRE's motion to dismiss three other claims from Citizens' Amended Complaint. II-App-245. Citizens did not appeal from that part of the Order. II-App-252.

By the time of the February 2022 Order, GCC had already erupted from the existing Mine into East Alkali Gulch and had already built a highway-width road across the gulch. *See* II-App-239; I-App-85 to -89. But winter weather had delayed excavation until late May 2022. II-App-254. Citizens appealed from the Order to the extent it denied temporary relief. II-App-252. Then, they moved the district court for an injunction pending appeal. I-App-12. In a minute order seven days

later, the district court denied that motion without further briefing. *Id.*; II-App-262.

After that, Citizens moved this Court under Federal Rule of Appellate Procedure 8(a)(2) and SMCRA, 30 U.S.C. § 1276(c), for an injunction pending appeal by May 15 to stop the Expansion during this appeal. That fully briefed motion remains pending.

V. Standard of Review

Citizens brought their claim under SMCRA's citizen-suit provision, 30 U.S.C. § 1270. I-App-31. SMCRA sets no standard for judicial review of agency actions, so courts apply the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, standards. *See United States v. Bean*, 537 U.S. 71, 77 (2002); *Robbins v. Bureau of Land Mgmt.*, 438 F.3d 1074, 1085 (10th Cir. 2006).

The APA directs both agencies and courts. It requires agencies to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (*State Farm*), 463 U.S. 29, 43 (1983) (quotations omitted).

The APA requires courts to take a "thorough, probing, in-depth review" of agency decisions. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 104, 107 (1977). When agencies breach their duties, the APA directs courts to "hold unlawful and set aside agency action, findings, and conclusions" that qualify as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

In making those determinations, courts ask whether the agency based its decision "on a consideration of the relevant factors and whether there has been a clear error of judgment." *State Farm*, 463 U.S. at 43 (quotations omitted). Courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* at 43. They also may not accept "counsel's post hoc rationalizations for agency action." *Id.* at 50. They can only uphold agencies' decisions, "if at all, on the basis articulated by the agency itself." *Id.* When agencies err, "the [agency's] decision must be vacated and the matter remanded to [the agency] for further consideration." *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam).

This Court reviews *de novo* district court decisions on the merits of APA claims, and it gives "no deference to the district court's decision." *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1260, 1263-64 (10th Cir. 2001) (reviewing documents and reversing the district court), *overruled by statute on other grounds as recognized in Citizens Exposing Truth v. Kempthorne*, 492 F.3d 460, 465 (D.C. Cir. 2007); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1564 (10th Cir. 1994) ("our standard of review is *de novo* and . . . we have been required to scrutinize the 1600 page administrative record"); *see Fla. Power Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("[p]lacing initial [APA] review in the district court . . . requir[es] duplication of the identical task in the district court and in the court of appeals").

SUMMARY OF ARGUMENT

In Section 1276(c), Congress created an easier test to stop coal mining during litigation. Under the traditional preliminary injunction test, the court determines (1) whether the plaintiff will likely prevail on the merits of its claims, and then it balances (2) the likely irreparable injury to the plaintiff without the injunction, (3) the likely irreparable injury to the defendant with the injunction, and (4) the public interest.

Section 1276(c) directs courts to use a different test when a plaintiff claims the Secretary of the Interior violated SMCRA. That section directs temporary relief upon determining only (1) whether the plaintiff gave notice, (2) whether the plaintiff will likely succeed on the merits, and (3) whether temporary relief "will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources." Because the Expansion Approval qualifies as an "order or decision" by the Secretary, Citizens need only satisfy that test for a court to issue temporary relief stopping the Expansion during the litigation.

No one disputes notice or asserts that stopping the Expansion will harm public health, public safety, or the environment. Thus, SMCRA directs temporary relief upon Citizens showing a likelihood of success on the merits of either of its two claims.

First, OSMRE did not know how much precious water the Mine was using. GCC told OSMRE it was using 14.07 acre-feet but told La Plata County it could use up to 40. *Compare* I-App-91 *with* II-App-261. In the EA, OSMRE recognized GCC was seeking more water rights, but it never asked why. Without accurate information on the Expansion's

water use, OSMRE cannot have satisfied its SMCRA duties to collect "sufficient data" to assess the Expansion, to determine its probable hydrologic impacts, and to minimize disturbance to the hydrologic balance. 30 U.S.C. §§ 1257(b)(11), 1260(b)(3), 1265(b)(10). To minimize surface and groundwater impacts, SMCRA allows OSMRE to require the Expansion to mine coal more slowly and thus to use less water per year. It could not make any decision without accurate information.

Second, when OSMRE approved of GCC diverting irrigation water for the Expansion, OSMRE never calculated an accurate baseline of groundwater quantity. GCC recognized the importance of irrigation water infiltrating and replenishing groundwater aquifers. For twenty-two years, however, the Expansion would prevent that effect. *See* I-App-91. Without an accurate baseline, OSMRE cannot have collected sufficient data, determined the probable hydrologic impacts of the Expansion, minimized disturbances to the hydrologic balance, or prevented material damage.

Citizens will likely prevail on the merits of their claims, and SMCRA consequently compels temporary relief during the litigation.

ARGUMENT

I. SMCRA's plain text requires courts to issue temporary relief without balancing the equities.

Citizens moved for temporary relief under 30 U.S.C. § 1276(c), to stop the Expansion during the litigation. I-App-51. OSMRE and GCC advocated for applying the traditional preliminary injunction balancing test. *See* II-App-248. The district court declined to decide which test to apply. It held that Citizens could satisfy neither test because they were unlikely to establish success on the merits. II-App-248 to -249. SMCRA's plain text requires this Court to apply its test with its lower burden for issuing temporary relief.

A. SMCRA's plain text, "any order or decision," applies here.

The Secretary's delegee approved the Expansion, I-App-14, and Section 1276(c) applies to that decision. Section 1276(c) applies to "*any order or decision* issued by the Secretary under this Act, including [Section 1275 appeals] . . . ." SMCRA, Pub. L. No. 95-87 § 526(c) (emphasis added). Although the U.S. Code states "under this chapter," the Statutes at Large make clear that "chapter" means SMCRA. *See* 1 U.S.C. § 112 ("[t]he United States Statutes at Large shall be legal evidence of laws . . . in all courts of the United States"); *Harrison v.*

PPG Indus., Inc., 446 U.S. 578, 588 n.3 (1980) ("the phrase, 'any other final action,' is modified not by 'under these sections,' but rather by 'under this Act.'"). SMCRA's plain text controls. "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737, 1738 (2020) ("only the words on the page constitute the law adopted by Congress and approved by the President.").

When Congress uses "expansive language," like the word "any," courts give that language its "literal" effect. *See Harrison*, 446 U.S. at 589, 589 n.6 ("the phrase, 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action."). *Harrison* controls the meaning of Section 1276(c).

In *Harrison*, the Supreme Court addressed the 1977 amendments to the Clean Air Act—amendments by the same Congress that passed SMCRA. *Id.* at 584-85. Congress had assigned jurisdiction to courts of appeals for reviewing EPA actions under eight specific sections and "any other final action of the [EPA] Administrator under this Act . . . ."

id. at 580. Resisting jurisdictional assignment to the Court of Appeals, the chemical manufacturing company argued under *ejusdem generis* that the phrase "any other final action" applied only to actions similar to actions in the eight specific sections. *Id.* at 585, 588-89. In interpreting ambiguous statutes, the *ejusdem generis* canon suggests that, when "general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated." *Id.* at 588.

The Supreme Court rejected those arguments because it held the statute's text clear: "we discern no uncertainty in the meaning of the phrase, 'any other final action.'" *Id.* at 588, 592 ("it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute."). It recognized special significance in the word "any" as "expansive language." *Id.* The same Congress wrote the same word "any" into Section 1276(c), which similarly contains no uncertainties. *Harrison* controls. The plain text "any order or decision" in Section 1276(c) covers the Expansion Approval as a Secretarial decision under SMCRA.

B. Section 1276(c) requires courts to use its test to issue temporary relief.

In Section 1276(c), Congress directed courts to issue temporary relief summarily while reviewing the Secretary's actions. Section 1276(c) presents one of the rare situations in which "an unequivocal statement by Congress may modify the courts' traditional equitable jurisdiction." *Fish v. Kobach*, 840 F.3d 710, 751 n.24 (10th Cir. 2016) (quotations omitted).

The traditional injunctive relief test requires a plaintiff to demonstrate

1. "[T]hat he is likely to succeed on the merits,
2. "[T]hat he is likely to suffer irreparable harm in the absence of preliminary relief,
3. "[T]hat the balance of equities tips in his favor, and
4. "[T]hat an injunction is in the public interest."

Winter v. NRDC, 555 U.S. 7, 20 (2008); *see* 10th Cir. R. 8.1.

SMCRA requires courts to apply a different test. Plaintiffs need only provide notice and demonstrate a likelihood of success on the merits—as long as stopping the mining would not harm human health, human safety, or the environment. Section 1276(c); *Va. Surface Mining*

Reclamation Ass'n. v. Andrus, 604 F.2d 312, 315 (4th Cir. 1979) (overturning a court for applying the equitable injunction factors).

The Supreme Court has recognized Congress's broad power to "intervene and guide or control the exercise of the courts' discretion" in issuing injunctions. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Courts' common law discretion always yields to Congress's directions. "[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies . . . ." *N. Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982). Congress can instruct courts on the test to apply, and those instructions override any contrary, judicial tests. *Yakus v. United States*, 321 U.S. 414, 442 (1944) ("The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions.").

As part of its power, Congress "may authorize summary action subject to later judicial review of its validity." *Id.* The Supreme Court recognized that authorization of summary relief under SMCRA. *Hodel v. Va. Surface Mining Recl. Ass'n*, 452 U.S. 264, 300 (1981). It

overturned a district court for "substitut[ing] a judicial policy preference for the scheme adopted by Congress." *Id.* at 303.

Congress already "considered the competing interests affected by [SMCRA]," and courts have no authority to rebalance them. *Andrus*, 604 F.2d at 316. Therefore, when weighing the equities for an injunction, SMCRA allows courts to consider only whether stopping the mining will "adversely affect" public health or public safety, or would harm "land, air, or water resources." 30 U.S.C. § 1276(c)(3). It requires no proof of irreparable harm to Citizens. *See Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1090 n.5 (6th Cir. 1981) ("the statute does not specify any consideration of irreparable harm to the plaintiff but rather contains a distinct preoccupation with the public health and environmental consequences.").

Here, no one has shown stopping the Expansion would harm public health, public safety, or the environment. And Citizens provided notice by filing the motion through the district court's CM/ECF system. I-App-51; Fed. R. Civ. P. 5(b)(2)(E), (d)(1)(B), (d)(3)(A). That leaves the Court, in deciding whether to issue temporary relief, to focus solely on the legal merits of Citizens' SMCRA claims.

II. OSMRE determined incorrectly the amount of water the Expansion would use.

GCC told different facts to different government agencies. OSMRE never caught on to that shell game. It arbitrarily and capriciously issued the Expansion approval based on inaccurate volumes of water the Expansion would consume.

SMCRA affirmatively requires OSMRE to collect "sufficient data" to assess "the probable hydrologic consequences of the mining . . . particularly upon water availability." 30 U.S.C. § 1257(b)(11). With that data, it requires OSMRE to "minimize the disturbances to the prevailing hydrologic balance," *id.* § 1265(b)(10), and to "prevent material damage to hydrologic balance." *Id.* § 1260(b)(3). SMCRA allows OSMRE to require slower coal mining to minimize disturbances to surface and groundwater hydrologic balance. *See id.* § 1265(b)(10). Without accurate information on the Expansion's water-use, OSMRE could not decide whether to require any mitigation measure as part of the Expansion's permit.

Citizens need not show definitively what OSMRE would have done with that information; they need only show OSMRE's failure to consider it in making decisions. *See Massachusetts v. EPA*, 549 U.S. 497, 518

(2007) ("A litigant who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result" (alteration and quotations omitted)). OSMRE violated SMCRA.

A. OSMRE arbitrarily and capriciously failed to investigate why GCC sought six times more water rights than its water-use.

OSMRE inexplicably failed to investigate or to explain why GCC needed to acquire more water rights—an additional six times more—than it was using. Consequently, it violated its SMCRA duties.

The EA states:

- The Mine controlled 34.07 acre-feet of water rights. I-App-91.
- The Mine was using 14.07 acre-feet of water. *Id.*
- The Mine sought additional 44 acres of water to consume.

Id. The water-court case clarifies that 44 acres equals 68.81 acre-feet of water. II-App-80.

But the EA never explains why the Expansion needed six times more water. OSMRE cannot assess water impacts or minimize hydrological impacts when it does not know why the Expansion needs more water

and how it will use that extra water. For that reason alone, OSMRE acted arbitrarily and capriciously by approving the Expansion without all the facts. Courts overturn agency actions, like this, with "unexplained inconsistencies." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-27 (2016) (alteration omitted); *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 58-59 (D.C. Cir. 2015); *cf. Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983) ("[If] the agency did not make a reasonably adequate compilation of relevant information and . . . the EIS [Environmental Impact Statement] sets forth statements that are materially false or inaccurate, [the district court] may properly find that the EIS does not satisfy the requirements of NEPA, in that it cannot provide the basis for an informed evaluation or a reasoned decision.").

Even more striking, the EA's facts are wrong. The Mine is not using 14.07 acre-feet of water per year. I-App-91. GCC told La Plata County, the Mine could use up to 40 acre-feet. II-App-261. That explains why GCC sought more water rights. Because OSMRE relied on erroneous data, it violated SMCRA's requirements to minimize impacts on the hydrologic balance and to assess impacts on the hydrologic balance. "If

an agency fails to examine the relevant data—which examination could reveal, *inter alia*, that the figures being used are erroneous—it has failed to comply with the APA." *Burwell*, 786 F.3d 46, 57 (cited approvingly by *Cure Land, LLC v. USDA*, 833 F.3d 1223 (10th Cir. 2016)).

B. The Expansion will use 184 % more water than it told OSMRE.

This Court recently overturned another agency's mine approvals in this same area because it miscalculated water use at half of actual use. *Diné Citizens*, 923 F.3d at 836, 856-59 (10th Cir. 2019) (setting aside a decision that miscalculated water use by, perhaps at most, 82 %). OSMRE's miscalculation here, by proportion, exceeds even that dramatic failure. *Diné Citizens* compels overturning OSMRE's decision here.

In the San Juan Basin, the Bureau of Land Management (BLM) had issued a 2003 analysis of the environmental impacts of new oil and gas wells, whose numbers the BLM estimated at 9,942. *Id.* at 836. By 2014, new hydraulic fracturing (fracking) technology had allowed mining companies to drill even more wells by pumping water with chemicals into the ground to fracture geologic formations. *Id.* at 837-38. But the

BLM never recalculated the cumulative, increased water-use based on that new technology for 3,960 additional wells. *Id.* at 854, 857-58. The BLM had calculated all wells would use 2.8 billion gallons in total, but the plaintiffs and the Court calculated about 5 billion gallons. This Court called that 82 percent difference "more than a mere flyspeck" because it "dramatically exceeds the total water use contemplated in the 2003 EIS." *Id.* at 856 (quotations and alteration omitted). It remanded the well approvals with directions to vacate them.

GCC will use 184 % more water than OSMRE expected. OSMRE's more severe underestimation of water use here compels the same result.

Expansion Water Consumption

1 acre-foot = 325,851 gallons[3]	Acre-Feet per year	1 Year (gals.)	22 Years (gals.)
GCC to OSMRE	14.07	4,584,724	100,863,919
GCC to La Plata County	40	13,034,040	286,748,880
Difference	25.93	8,449,316	185,884,961

GCC told OSMRE that it was using 14.07 acre-feet of water, or 4,584,730 gallons. I-App-91. But GCC told La Plata County it was using up to 40 acre-feet, or 13,034,057 gallons: 184 percent more. II-App-261

[3] Water Science School, U.S. Geologic Survey, *Dictionary of Water Terms*.

(13,034,057 / 4,584,730 - 1 = 184 %). Because OSMRE failed to understand how much more water the Expansion would use, *Diné Citizens* compels the conclusion that OSMRE acted arbitrarily and capriciously.

C. The Order approved irrational *post hoc* justifications for OSMRE's decision.

To excuse OSMRE's clear failure, the Order filled in OSMRE's analytical gaps with several post hoc justifications. Ultimately, none of them substantiates or excuses OSMRE's failures.

Not the agency, its attorneys, nor even a court can supplement an agency's "contemporaneous explanations" with "post hoc justifications." *Dep't of Homeland Sec. v. Regents of Univ.*, 140 S. Ct. 1891, 1909 (2020); *see Olenhouse*, 42 F.3d at 1580 (overturning a district court for "attempt[ing] itself to supply a reasoned basis"). "The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted." *Dep't of Homeland Sec.*, 140 S. Ct. at 1909. OSMRE's contemporaneous explanations are arbitrary and capricious.

The Order credited OSMRE's counsel's arguments that GCC could have wanted seven times as much water rights for no reason. II-App-249. That rationale appears nowhere in the EA, but even if it did, it

would qualify as arbitrary and capricious. No *rational* business would waste money leasing water rights it would never use, and the Supreme Court rejects rationales based on arbitrary business decisions. "[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); *Barber v. Magnum Land Servs., LLC*, No. 1:13CV78, at *17 (N.D. W. Va. Oct. 14, 2014) ("it is even more unreasonable to believe that gas companies would spend money on leases unnecessarily."). Without explaining a rational connection between the Expansion's water use and need for more water, OSMRE violated SMCRA and the APA. *See State Farm*, 463 U.S. at 52 ("the agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." (quotations omitted)).

The Order also upheld OSMRE's decision by relying on OSMRE's "cumulative hydrologic impact assessments performed in 2018 and 2020." II-App-250. But the Order pointed to no statement where OSMRE accurately determined the Expansion's water use. Documents analyzing other impacts do not save OSMRE's arbitrary and capricious

failure to accurately determine water-use. *Cf. Diné Citizens*, 923 F.3d at 839 (recognizing NEPA requires agencies to "consider every significant aspect" (quotations omitted)).

Even if OSMRE could point to some administrative record document with on-point analysis, that preliminary document could replace the EA's incorrect, final analysis. "Environmental assessments . . . are not internal, informal, or preparatory. Rather, they are public documents meant to be an agency's *final* analysis . . . ." *Cure Land*, 833 F.3d at 1232 n.6 (10th Cir. 2016) (emphasis added); *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979). Failures to explain inconsistencies in EAs can "preclude an agency from articulating the requisite rational connection between the facts found and the decision made, thereby rendering that agency's decision arbitrary and capricious." *Cure Land*, 833 F.3d at 1232 n.6. Those inconsistencies do so here. They demonstrate OSMRE's arbitrary and capricious analysis and failure to assess and to minimize impacts on surface water.

The Order also excused OSMRE's failure because "GCC sought supplemental water supply to meet applicable land use requirements." II-App-249. But the EA's statement only underscores OSMRE's failure.

It states: "In 2015, GCC filed (2015CW3029) [a water rights case] for supplemental water supply to meet the requirements of LPC's [La Plata County's] land use code." I-App-91. That reference to a "land use code" means La Plata County, unlike OMSRE, required GCC to acquire more water rights because the Mine was consuming so much water: "the existing water supply did not produce an adequate quantity of water for current operations, and additional supply is needed." II-App-261. OSMRE was asleep at the switch by failing to grapple with the reasons GCC sought more water rights. It made "a clear error of judgment." *See State Farm*, 463 U.S. at 43 (quotations omitted).

Finally, the Order referenced the "groundwater monitoring program" as substantiating OSMRE's decision. II-App-251. Post-decision monitoring does not save an arbitrary and capricious decision. Monitoring does not allow agencies to ensure "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349. That justification violates NEPA and SMCRA. *See id.*

When OSMRE acts as the regulating authority that approves mining applications, SMCRA gives it direct regulatory powers to approve

permits. 30 U.S.C. § 1254(d). Perhaps OSMRE would have limited the Expansion to using 14.07 acre-feet of water, and to slow the mining proportionately. If OSMRE does not know how much water the Expansion will use, it cannot demonstrate it collected "sufficient data" to assess "the probable hydrologic consequences of the mining . . . particularly upon water availability," it assessed the probable hydrologic impacts, or it minimized effects on surface water. *See* 30 U.S.C. §§ 1257(b)(11), 1260(b)(3), 1265(b)(10). Without knowing the basic facts, OSMRE cannot exercise its discretion whether to slow mining. OSMRE failed to "examine the relevant data and articulate a satisfactory explanation for its action . . . ." *State Farm*, 463 U.S. at 43.

III. Without baseline irrigation water infiltration data, OSMRE could not determine the Expansion's impacts on groundwater.

OSMRE also failed to analyze the volume of diverted irrigation water that would otherwise replenish underground aquifers. OSMRE violated SMCRA and acted arbitrarily and capriciously because it "entirely failed to consider an important aspect of the problem . . . ." *Id.*

A. OSMRE failed to determine all of the Expansion's impacts on groundwater.

OSMRE defined the no-action, baseline alternative as "no mining plan modification." I-App-93. But it never calculated how much irrigation water would infiltrate into underground aquifers under that alternative. Without that data, it could not determine the Expansion's effects on groundwater, and without that data, it could not satisfy SMCRA.

Agencies can only determine a project's effects and comply with the SMCRA and the APA when they have an accurate and complete baseline data without the project. "Without accurate baseline data, an agency cannot carefully consider information about significant environment impacts," which "result[s] in an arbitrary and capricious decision." *N.C. Wildlife Fed'n v. N. Carolina Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) (quotations and alterations omitted); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2012) ("The problem here, however, is that the Board did not collect this data in the first place, and was therefore unable to consider it during the EIS [environmental impact statement] process."). Courts frequently

"find NEPA violations when an agency miscalculates the 'no build' baseline . . . ." *N.C. Wildlife Fed'n*, 677 F.3d at 603.

GCC's contractors recognized the importance of irrigation water replenishing underground aquifers. "Hay Gulch is subject to fairly consistent irrigation water infiltration, which may buffer longer-term drought effects." II-App-173. In other words, irrigation water replenishes groundwater aquifers. This impact accords with another GCC-contractor's "general principle that in arid climates, surface water feeds groundwater systems." II-App-24.

La Plata County fears that less irrigation water is now recharging underground aquifers because of "fewer acres of land irrigated." II-App-133. It has been seeking more analysis of that effect. "The direct and indirect impact that irrigation water supply has on domestic water wells and conversely how domestic water wells depend on and affect irrigation should be acknowledged." *Id.*

For twenty-two years, the Expansion will divert up to 68.81 acre-feet of irrigation water to suppress coal dust. I-App-91; II-App-80. That amounts to 22,421,837 gallons per year, or 493,280,410 gallons over twenty-two years. No one knows how much of that irrigation water

would no longer infiltrate through the farm to replenish the underground aquifers because OSMRE never calculated that amount.

If OSMRE had determined the volume of irrigation water that was no longer infiltrating into the groundwater, it may have used its comprehensive regulative authority to require the Expansion to obtain the water from another source. *See* 30 U.S.C. §§ 1254(d), 1265(b)(10). Or it may have required GCC to replace the lost groundwater from a different source. But because OSMRE never gathered the data, no one can know what it would have required GCC to do.

Courts "set aside agency action under the [APA] because of failure to adduce empirical data that can readily be obtained." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) (citing *State Farm*). OSMRE failed to collect "sufficient data" to assess the Expansion's consequences "upon water availability," to assess the probable hydrologic impacts, and to minimize effects on groundwater. 30 U.S.C. §§ 1257(b)(11), 1260(b)(3), 1265(b)(10). It acted arbitrarily and capriciously and violated SMCRA by "entirely fail[ing] to consider an important aspect of the problem . . . ." *See State Farm*, 463 U.S. at 43.

B. SMCRA assigns the burden of determining actual impacts to OSMRE.

Although OSMRE identified no document determining the volume of irrigation water that was infiltrating into groundwater. The Order nevertheless upheld the Expansion Approval because "[Citizens] have not identified any actual impacts—they merely speculate about potential impacts." II-App-251. The lack of evidence describing the "actual impacts" of diverted irrigation water does not establish Citizens' failure, but proves OSMRE's failure to complete the groundwater analysis SMCRA required. *See Massachusetts v. EPA*, 549 U.S. at 518 (recognizing injury if there exists "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision").

Recently, the United States Court of Appeals for the District of Columbia Circuit overturned an agency when it "did not forthrightly and accurately identify the relevant environmental concern—the *actual effects* of the" action. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 931 (D.C. Cir. 2017) (alteration, emphasis, and quotations omitted; emphasis added); *see also WildEarth Guardians v. Bernhardt*, No. CV 17-80-BLG-SPW, at *18 (D. Mont. Feb. 3, 2021) ("OSM[RE]

failed . . . to discuss the *actual effects* of non-greenhouse gas emissions" (emphasis added)).

In another case, the D.C. Circuit overturned an agency that attempted to thrust its analysis responsibilities onto plaintiffs. *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 523 (D.C. Cir. 2018) (Garland, C.J.). There, the tribe claimed the agency violated NEPA by approving a uranium mine near the tribe's "cultural, historical, and religious sites." *Id.* The agency acknowledged NEPA violations but declined to stop mining until the tribe proved irreparable harm. *Id.* at 522-23. In overturning the agency, the D.C. Circuit held that NEPA does not "permit an agency to condition performance of its [environmental analysis] obligation on a showing of irreparable harm." *Id.* The court labeled that procedure a "classic Catch-22." *Id.* It recognized that "placing the burden on the Tribe to show harm was especially inappropriate because the inadequate EIS may well make doing so impossible." *Id.* at 534-35.

Here, the Order presented the same Catch-22 by requiring Citizens to prove impacts before OSMRE analyzed and disclosed those impacts. SMCRA, like NEPA, requires the agency to complete the environmental

analysis before approving a coal-mining permit. *See* 30 U.S.C. §§ 1256(a), 1260(b), 1266(b); *Nat'l Wildlife Fed'n*, 839 F.2d at 701. Because OSMRE failed to disclose the groundwater impacts from diverting irrigation water before approving the Expansion, it violated SMCRA.

This Court has made clear that "the grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record. The agency must make plain its course of inquiry, its analysis and its reasoning." *Olenhouse*, 42 F.3d at 1575. Without any agency evidence, without any agency analysis, and without any agency reasoning, a court "may not simply affirm." *Id.* The Order made that exact mistake. OSMRE failed to analyze the groundwater impacts from diverting irrigation water, and it therefore lacked data or analysis for concluding that the Expansion collected "sufficient data" to assess the Expansion's consequences "upon water availability," to assess the probable hydrologic impacts, and to minimize effects on groundwater. 30 U.S.C. §§ 1257(b)(11), 1260(b)(3), 1265(b)(10). Without that data, it acted arbitrarily and capriciously and violated SMCRA. *See Fox Television*, 556 U.S. at 519; *State Farm*, 463 U.S. at 43.

CONCLUSION

Because Citizens will likely prevail on the merits, because they gave notice, and because stopping the Expansion will not harm public health, public safety, or the environment, Section 1276(c) compels temporary relief stopping the Expansion during the rest of the case.

Citizens seek oral argument to explain SMCRA's uncommon procedural and substantive requirements.

Respectfully submitted, April 19, 2022,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the length limit in 32(a)(7)(B)(i) because it contains 7,582 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 10th Circuit Rule 32(B). I used Microsoft Word to count the words.

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5)(A) and 32(a)(6), and 10th Circuit Rule 32(A). This brief used 14-point Century Schoolbook in Microsoft Word.

This brief complies with 10th Circuit Rule 25.5 and the Tenth Circuit's CM/ECF User's Manual § II.J because I made all privacy redactions and scanned the filing for viruses with the most recent version of Norton 360, which discovered no viruses.

Dated: April 19, 2022, *s/ Jared S. Pettinato*
Jared S. Pettinato

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 21-cv-00923-RM-STV

CITIZENS FOR CONSTITUTIONAL INTEGRITY, and
SOUTHWEST ADVOCATES, INC.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT,
DEB HAALAND, in her official capacity as Secretary of the Department of the Interior,
GLENDA OWENS, in her official capacity as Acting Director of the Office of Surface Mining Reclamation and Enforcement, and
LAURA DANIEL DAVIS, in her official capacity as Senior Advisor to the Secretary, exercising the delegated authority of the Assistant Secretary for Land and Minerals Management,

Defendants,

and

GCC ENERGY, LLC,

Intervenor.

ORDER

This civil action is before the Court on Defendants' Partial Motion to Dismiss (ECF No. 26) and Plaintiffs' Motion for Temporary Relief (ECF No. 30). Both Motions have been fully briefed and are ripe for review. (ECF Nos. 42-46.) For the reasons below, the Court grants Defendants' Motion and denies Plaintiffs' Motion.

I. BACKGROUND

In March 2018, the Department of the Interior approved a mining plan modification

allowing Intervenor GCC Energy, LLC ("GCC") to expand its coal mining operations at the King II Mine in southwestern Colorado. *See Citizens for Const. Integrity v. United States*, No. 20-cv-03668-RM-STV, 2021 WL 4241336, at *2 (D. Colo. Aug. 30, 2021), *appeal docketed*, No. 21-1317 (10th Cir. Sept. 16, 2021). In doing so, the Department did not apply the stream protection rule promulgated in December 2016 by Defendant Office of Surface Mining Reclamation and Enforcement ("OSMRE") because that rule had been invalidated by Congress and the President pursuant to the Congressional Review Act ("CRA"). *See id.* at *1. Seeking to require the Department to apply the invalidated rule (and to vacate its approval of the modification), Plaintiffs filed a lawsuit in this Court in December 2020 asserting that the CRA was unconstitutional.

Meanwhile, in January 2021, the Department approved a subsequent modification and expansion at the Mine—the Dunn Ranch Area Expansion. Plaintiffs filed the instant action, seeking to vacate the Department's approval of the Dunn Ranch Area Expansion for the same reasons asserted in the previous case. The cases were consolidated in the interest of judicial economy.

In August 2021, the Court granted Defendant's Motion to Dismiss in the earlier filed case, rejecting Plaintiffs' constitutional challenges to the CRA. The following month, Defendants moved to dismiss the instant case, and Plaintiffs filed a Notice of Appeal and an Amended Complaint. The Amended Complaint includes the same three constitutional claims that were asserted in the original Complaint and in the earlier filed case as well as two new claims premised on the legal theory that OSMRE violated the Surface Mining Control and Reclamation Act ("SMCRA") when it approved the Dunn Ranch Area Expansion.

Due to the different trajectories of the two cases, the Court unconsolidated them and directed that the Amended Complaint and other relevant pleadings be docketed in this case. The Court now turns to the pending Motions.

II. PARTIAL MOTION TO DISMISS

In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). The complaint must allege a "plausible" right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007); *see also id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). Conclusory allegations are insufficient, *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009), and courts "are not bound to accept as true a legal conclusion couched as a factual allegation," *Twombly*, 550 U.S. at 555 (quotation omitted).

Defendants argue that Plaintiffs' three constitutional claims are "meritless and precluded." (ECF No. 26 at 4.) The Court agrees that these claims are meritless for the reasons set forth in its August Order. From the Court's perspective, nothing has changed with respect to the CRA and the invalidated stream protection rule since the August Order. Defendants' Motion to Dismiss in the earlier case has been fully litigated at the district court level and no new arguments have been presented. The Court disagrees with Plaintiffs' contention that the doctrine of constitutional avoidance precludes ruling on the pending Motion and further finds that it need not rely on preclusion principles or any grounds aside from the rationale set forth in the August

Order to conclude that Defendants are entitled to dismissal of these claims.

III. MOTION FOR TEMPORARY RELIEF

Plaintiffs seek relief under the temporary relief provision of the SMCRA, 30 U.S.C. § 1276(c), which provides, in relevant part, as follows:

> In the case of a proceeding to review any order or decision issued by the Secretary under this chapter . . . the court may, under such conditions as it may prescribe, grant temporary relief as it deems appropriate pending final determination of the proceedings if—
>
> > (1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;
> >
> > (2) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and
> >
> > (3) such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources.

Intervenor and Defendants treat Plaintiffs' Motion as a request for a preliminary injunction. To obtain injunctive relief, a plaintiff must establish "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest." *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) (quotation omitted). Because injunctive relief is an extraordinary remedy, the plaintiff's right to relief must be clear and unequivocal. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005).

Under either standard, Plaintiffs' must demonstrate a substantial likelihood of prevailing

on the merits.[1] Their failure to do so is fatal to their Motion. Plaintiffs primarily object to OSMRE's environmental assessment ("EA") supporting its decision to approve the Dunn Ranch Lease Expansion and the degree to which OSMRE considered the probable hydrologic consequences of its decision. *See* 30 U.S.C. § 1257(b)(11). In their Motion, they identify "two fundamentally inconsistent statements in the EA: one on surface water and one on groundwater." (ECF No. 30 at 14.)

Three key statements in the EA form the basis of Plaintiffs' argument with respect to surface water:

> [1] Approximately 14.07 acre-ft of water is used by GCC from the Huntington Ditch each year for mining dust suppression and bath house facility operational use;
>
> [2] [GCC's water right] decree provides up to 34.07 acre feet annually from three sources of water: Huntington irrigation dry-up, diversion from the La Plata River, and well water; [and]
>
> [3] In 2015, GCC filed (2015CW3029) for supplemental water supply to meet the requirements of [La Plata County's] land use code.

(ECF No. 31-1 at 21.) Plaintiffs contends that "[i]f GCC had a decree for 34.07 acre-feet, and sought more, it is not using only 14.07 acre-feet." (ECF No. 30 at 14.) But there is nothing inherently inconsistent about using less than all of one's water rights. (*See* ECF No. 43 at 24 ("Simply put, GCC has obtained the rights to more water than the mine uses.").) Further, as explained in the EA, GCC sought supplemental water supply to meet applicable land use requirements. Moreover, as OSMRE notes in its Response, it did not rely solely on the EA to

[1] To prevail on the merits on their SMCRA claims, Plaintiffs must show the approval of the Dunn Ranch Area Expansion was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

analyze potential hydrologic impacts. Its decision was also informed by a cumulative hydrologic impact assessments performed in 2018 and 2020. *See* 30 C.F.R. § 784.14(f). And, as part of its approval of the expansion, it also approved a groundwater monitoring program. (ECF No. 43 at 21.) OSMRE notes as well that the water court concluded that the Dunn Ranch Area Expansion would not affect surface water use when it approved industrial use of water previously used for irrigation. (*Id.* at 22-23 (citing *In re GCC Energy, LLC*, No. 2015CW3029, 7 (Colo. D. Ct. Water Div. Jan. 6, 2017)).) Accordingly, the isolated statements cited by Plaintiffs fall well short of providing a basis for finding Plaintiffs are likely to succeed in establishing that OSMRE inadequately assessed the probable hydrologic impacts or that its decision to approve the Dunn Ranch Area Expansion was arbitrary or capricious.

Plaintiffs also argue that the EA is inaccurate and internally inconsistent because it states that the Mine uses and does not use groundwater, citing a water court order authorizing up to three groundwater wells at the Mine, the second statement from the EA quoted above, and an additional statement in the EA that "[n]o ground water is used at the mine." (ECF No. 31-1 at 21.) But although the decree provides for a quantity of water that includes well water, it does not follow that GCC is actually using well water. As explained in OSMRE's Response, the water GCC uses at the Mine is diverted stream water, so the additional statement above is accurate. (ECF No. 43 at 24; *id.* at 25 ("[T]he mine does not use groundwater sourced from within the permit area—consistent with the EA statement.").) The Court finds any apparent inconsistency in these statements is not sufficient to render OSMRE's decision a clear error judgment in violation of the SMCRA.

Plaintiffs contention that OSMRE failed to consider losses to groundwater caused by

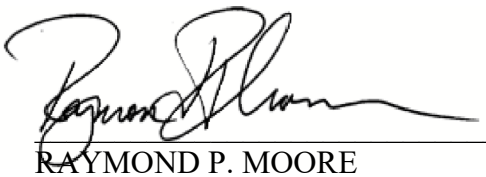
shifting from irrigation to industrial use is also unavailing. Plaintiffs have not identified any actual impacts—they merely speculate about potential impacts. On the current record, Plaintiffs have not shown they are likely to succeed in establishing that OSMRE failed to consider adequately the groundwater impacts associated with the Dunn Ranch Area Expansion.

IV. CONCLUSION

Accordingly, Defendants' Partial Motion to Dismiss (ECF No. 26) is GRANTED, and Plaintiffs' Motion for Temporary Relief (ECF No. 30) is DENIED.

DATED this 16th day of February, 2022.

BY THE COURT:



RAYMOND P. MOORE
United States District Judge

Activity in Case 1:21-cv-00923-RM-STV Citizens for Constitutional Integrity et al v. USA et al Order on Motion for Preliminary Injunction

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U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

The following transaction was entered on 3/4/2022 at 8:59 AM MST and filed on 3/4/2022

Case Name: Citizens for Constitutional Integrity et al v. USA et al

Case Number: 1:21-cv-00923-RM-STV

Filer:

Document Number: 59(No document attached)

Docket Text:

ORDER: Before the Court is Plaintiffs' Motion for an Injunction Pending Appeal [55], requesting temporary relief while they appeal the Court's previous denial of their request for temporary relief. For the same reasons stated in the Court's February 16, 2022, Order, the Motion is DENIED. SO ORDERED by Judge Raymond P. Moore on 3/4/2022. (Text Only Entry)(rmsec)

1:21-cv-00923-RM-STV Notice has been electronically mailed to:

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1:21-cv-00923-RM-STV Notice has been mailed by the filer to:

30 U.S.C. § 1276

Section 1276 - Judicial review

(a) Review by United States District Court; venue; filing of petition; time

(1) Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this chapter shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 1251, 1265, 1266, and 1273 of this title shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

(2) Any order or decision issued by the Secretary in a civil penalty proceeding or any other proceeding required to be conducted pursuant to section 554 of title 5 shall be subject to judicial review on or before 30 days from the date of such order or decision in accordance with subsection (b) of this section in the United States District Court for the district in which the surface coal mining operation is located. In the case of a proceeding to review an order or decision issued by the Secretary under the penalty section of this chapter, the court shall have jurisdiction to enter an order requiring payment of any civil penalty assessment enforced by its judgment. This availability of review established in this subsection shall not be construed to limit the operations of rights established in section 1270 of this title.

(b) Evidence; conclusiveness of findings; orders

The court shall hear such petition or complaint solely on the record made before the Secretary. Except as provided in subsection (a), the findings of the Secretary if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(c) Temporary relief; prerequisites

In the case of a proceeding to review any order or decision issued by the Secretary under this chapter, including an order or decision issued pursuant to subsection (c) or (d) of section 1275 of this title pertaining to any order issued under paragraph (2), (3), or (4) of

subsection (a) of section 1271 of this title for cessation of coal mining and reclamation operations, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if-

(1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;

(2) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

(3) such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources.

(d) Stay of action, order, or decision of Secretary

The commencement of a proceeding under this section shall not, unless specifically ordered by the court, operate as a stay of the action, order, or decision of the Secretary.

(e) Action of State regulatory authority

Action of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law, but the availability of such review shall not be construed to limit the operation of the rights established in section 1270 of this title except as provided therein.

30 U.S.C. § 1276

Pub. L. 95-87, title V, §526, Aug. 3, 1977, 91 Stat. 512.