



October 4, 2022

VIA CERTIFIED MAIL

Grand Mesa, Uncompahgre
and Gunnison National Forests
Attn: Niccole Mortenson
Mt. Emmons Land Exchange
2250 South Main Street
Delta, CO 81416

Re: Gunnison County's Comments Regarding Proposed Mt. Emmons Land Exchange

Dear Ms. Mortenson,

On behalf of the Board of County Commissioners of Gunnison County ("Gunnison County" or "County") and as a Cooperating Agency, we submit the following comments to the United States Forest Service ("USFS" or "Forest Service") Grand Mesa, Uncompahgre and Gunnison National Forests' ("GMUG's") proposed land exchange with Mt. Emmons Mining Company ("MEMC") in relation to lands located in both Gunnison and Saguache Counties ("Exchange"). Because the USFS has designated the County as a Cooperating Agency in this process, please do not consider the comments contained in this letter to be the only, or final, comments that the County may submit regarding the Exchange during the exchange process. Gunnison County reserves the right to submit additional or different comments as the process continues and as a Cooperating Agency.

INTEREST OF GUNNISON COUNTY

Gunnison County is the fifth-largest county by land area in Colorado, with a total area of 3,260 square miles. Land under the jurisdiction of the USFS consists of almost 2,000 square miles of this area, including the Gunnison National Forest, which is a substantial part of the GMUG. Pursuant to Colorado law, the County retains, and exercises, authority to regulate land use planning, environmental quality, and protection of lands within its borders. *See, e.g., Colo. Rev. Stat. §§ 18-9-117, 29-20-101, 30-28-101 et seq., 30-11-107 et seq., 38-1-202, 42-1-102, 42-4-106, 43-1-217, 43-2-112, 43-2-201, 43-2-201.1; Bd. of Cty. Comm'rs v. BDS Int'l, LLC, 159 P.3d 773, 785 (Colo. App. 2006); Asphalt Paving Co. v. Bd. of Cty. Comm'rs, 425 P.2d 289, 293 (Colo. 1967).* In particular, pursuant to Colorado law the County has adopted a comprehensive set of land use and planning regulations for unincorporated Gunnison County, known as the Gunnison County Land Use Resolution ("LUR").

Gunnison County has also long engaged as a stakeholder in the community's quest to obtain long-term, viable solutions to the Keystone molybdenum mine site ("Site") located on the slopes of Mt. Emmons west of the Town of Crested Butte, Colorado ("Town"), the unpatented mining claims currently held by MEMC in and around Mt. Emmons, and the Keystone Mine Water Treatment Plant owned and operated by MEMC. To that end, on February 12, 2016, the County, along with the Town, the State of Colorado and MEMC, entered into a Memorandum of Understanding ("MOU"), in which the parties expressed their intent to mutually work together to achieve, amongst others, the following goals: "Support Mt. Emmons in acquiring the Site and assist in ensuring compliance with all applicable environmental laws and regulations[,] [and] [p]ursue disposition of the mining and mill site claims and fee simple lands in a mutually beneficial way."

On July 20, 2021, the County, the Town and MEMC furthered their understandings by executing an MOU which detailed a mutual intent with regarding to the present land exchange.¹ The terms of the 2021 MOU included details on placing the lands MEMC would receive in the Exchange into a conservation easement, supporting federal withdrawal of mineral development in the federal lands surrounding Mt. Emmons, and permanent disposition of MEMC's mineral claims and right to mine the Site after the Exchange is consummated. The 2021 MOU also expressed the Town's and the County's support for reasonable amounts of water in feasible location for mining reclamation and remediation activities.

Recently, MEMC negotiated a Conservation Easement and Mineral Extinguishment Agreement over the Site consistent with many of the County's stated goals and intent in the 2016 and 2021 MOUs, including MEMC's abrogation of both its development and mining rights at the Site, and providing the County the third-party right to enforce some of its key provisions. As USFS is aware, both MEMC, the Town and the County consider this agreement critical to the Exchange.²

Consistent with the above-referenced MOUs, the County filed a Statement of Opposition in the matter of *Mt. Emmons Mining Company*, Case No. 2021CW003021 (Colo. Water Ct. Div. 4), in which MEMC has applied to the Colorado Water Court for a finding of reasonable diligence in relation to conditional water rights MEMC asserts in relation to the Site. The United States has also filed Statement of Opposition in this matter.

¹ The County notes that the reference to the "MOI" on page 52 of the exchange Feasibility Analysis ("FA") does not fully or accurately describe the 2021 MOU.

² The 2021 MOU details that "[t]he goal of the MOU Parties is to have the Conservation Easement [and corresponding Mineral Extinguishment Agreement] drafted, approved, executed and deposited into a neutral third-party escrow holding company prior to the issuance of the Record of Decision and exchange of patent and deeds resulting from the completion of the Land Exchange. Upon approval of the exchange as proposed, and the issuance of the patent providing title of the lands to MEMC, and final resolution of any legal challenges to the approval and issuance of title to the land to MEMC, or lapse of time for filing such challenges, MEMC will instruct the escrow holding company to record the Conservation Easement [and Mineral Extinguishment Agreement] with the Gunnison County Clerk and Recorder's Office."

COMMENTS ON THE PROPOSED EXCHANGE

Gunnison County provides the following comments on the proposed Exchange:

I. THE ATI AND THE DECISION DOCUMENT SHOULD FULLY RECOGNIZE THE COUNTY'S POST-EXCHANGE REGULATORY AUTHORITY OVER THE THREE FEDERAL PARCELS TO BE EXCHANGED.

Gunnison County appreciates that the FA acknowledges the LUR's applicability to the parcels implicated by the proposed Exchange. *See* FA at 16.³ However, given the importance of the LUR to ensure proper and complete regulatory oversight over the Site post-exchange, the County urges USFS to amend the Agreement to Initiate ("ATI")⁴ to add MEMC's recognition of and compliance with the LUR as an additional condition, agreement or understanding between the parties to the Exchange. The County further requests that both an amended ATI and the Decision Document contain repeated and robust references to the authority of the County⁵ over land uses at the Site and remaining non-federal parcels in the draft decision document. Employing its regulatory authorities, the County intends to take all appropriate steps to protect the health, safety and welfare of its citizens and visitors by ensuring, for example, continued viability of water treatment, reclamation and remediation efforts at the Site, compliance with the non-development provisions of the Conservation Easement ("CE"), and the prohibition of active mining operations per the CE (coupled with the Mineral Extinguishment Agreement discussed in detail below) and other applicable agreement(s) or law.

The Handbook contemplates that USFS consider "the non-Federal party's prospective and legal use of the property based on county zoning," which the County interprets to apply to this exchange and to its LUR. *See* FSH 5409.3 § 32.41. The County therefore asks USFS to take similar such steps as part of the exchange by amending the ATI to require MEMC's acknowledgement of the LUR's governance over the parcels it is intended to receive in the exchange. Because MEMC has acknowledged in multiple documents and communications the authority of the County and the applicability of the LUR, the County does not see this request as a difficult one to fulfill.

³ The County suggests that reference to the LUR (as well as State water quality permit requirements and Town of Crested Butte Watershed Protection District regulations) should have been included in FA's discussion on future intended use of the current federal parcels. *See id.* at 17.

⁴ The Forest Service Land Acquisition Handbook ("Handbook") contemplates that "[t]he ATI may be amended at any time with the consent of both parties." *See* FSH5409.13 § 32.8 (2004).

⁵ The County understands that the Town of Crested Butte will similarly urge USFS to take steps to robustly acknowledge the Town's watershed protection regulations over the Site; the County concurs with the Town's request.

II. THE ATI SHOULD BE AMENDED AND THE DECISION DOCUMENT SHOULD REFERENCE BOTH THE CONSERVATION EASEMENT AND THE MINERAL EXTINGUISHMENT AGREEMENT AND THE NEED FOR SUCH AGREEMENTS AS PART OF THE EXCHANGE.

Given its importance to the Exchange, Gunnison County thanks USFS for including the CE as a condition in the ATI and for its references in the FA. That stated, the County requests USFS amend the ATI to apply the same conditions and discussion to the Mineral Extinguishment Agreement, to which the County has been unable to find any reference in either the ATI or the FA, and to reiterate this in the Decision Document. From the County's perspective, the Mineral Extinguishment Agreement is as equally important as the CE, and the CE alone fails to accomplish the County's relevant goals as set forth in the 2016 and 2021 MOUs. The County thus asks USFS to amend the ATI and preserve in the Decision Document this critical component of the Exchange. Because MEMC has approved both the CE and the Mineral Extinguishment Agreement, the County does not see this proposal as controversial.

III. USFS SHOULD SUPPORT AN ADMINISTRATIVE MINERAL WITHDRAW AS PART OF THE EXCHANGE.

The FA states that USFS is not considering a request for an administrative withdraw of mineral development in the federal parcels surrounding the Site. *See* FA at 53. The County asks USFS to reconsider this position. Recognizing there have been previous discussions between stakeholders regarding ways to accomplish the goal of preventing mining in and around the Site, Gunnison County affirmatively reiterates its support for an administrative mineral withdraw and urges, the President, the Department of the Interior, the Department of Agriculture and USFS itself to pursue and accomplish this objective. USFS is probably already aware that on August 25, 2022, Senators Michael Bennet and John Hickenlooper, House of Representatives Member Joe Neguse, and Governor Jared Polis wrote to the President and the Secretaries of Interior and Agriculture urging them to initiate a mineral withdraw for the federal parcels surrounding the Site. On September 16, 2022, the individual members of the Gunnison County Board of County Commissioners wrote to the President joining in this request. We further understand that numerous other stakeholders around Colorado and the nation have voiced their support for this administrative withdraw.

Accordingly, the County not only restates its request here, but asks that the Decision Document modify the FA's statement and to state instead the USFS's support the request of the County, the State of Colorado, our Senators and a member of Congress to proceed with an administrative withdraw as outlined in the above-referenced correspondence.

IV. USFS SHOULD JOIN THE COUNTY IN ITS OPPOSITION TO WATER FOR ACTIVE MINING IN THE *MT. EMMONS* WATER CASE.

Gunnison County appreciates USFS's acknowledgement in the FA regarding the pending water rights adjudication, which as explained above and from the County's perspective, is also a critical component of the Exchange. Thus far in this litigation, however, the United States has not taken a position on MEMC's application despite filing as an opposer in the case. As the

2021 MOU makes clear and as USFS is aware from the County's filings in that case, the County does not oppose a finding of reasonable diligence for limited, factually supported, and feasible amounts of water by MEMC for the limited purposes of reclamation, remediation and water treatment plant operations at the Site. But, the County objects to such a finding for *any* amount of water to be used in future active mining operations. The County therefore urges USFS, through the Department of Justice, to expressly assert this same position in the litigation. Although the Exchange, coupled with MEMC's repeated statements that it does not intend to mine the Site, may moot this issue, the County contends that USFS should take this position regardless of the results of the Exchange to protect against an improper finding of reasonable diligence in relation to active mining.

The County, consistent with the MOUs, has and will continue to work with MEMC on needed and practicable water amounts and sources for limited non-mining purposes. The County nonetheless asserts that all opposers should join it in resisting any finding that could lead to the use of water for mining the Site.

V. THE DECISION DOCUMENT SHOULD REFERENCE THE FLEXIBILITY THE COUNTY WILL HAVE TO MANAGE COUNTY ROAD 12 AND THE KEBLER WINTER TRAILHEAD POST EXCHANGE.

With regard to the aspect of the exchange transaction which could include conveyance of that portion of County Road 12 currently lying within USFS lands, the County generally agrees that post-conveyance the County presently intends to manage that area consistent with current management practices, particularly with regard to federal special use authorization permit holders, the County nonetheless requests the Decision Document should note that once under sole County jurisdiction, there would exist no further Federal regulation or oversight and the County would be free to manage that area consistent with its own regulations and State law. The County has not yet taken affirmative steps to determine its management regulations, processes and procedures and wants to maintain maximum flexibility in doing so. This reality should be reflected in the Decision Document.

CONCLUSION

Gunnison County appreciates the opportunity to provide the foregoing comments and will continue to work with USFS as a Cooperating Agency with regard to this land exchange.

As Chair of the Board of County Commissioners, the Board has authorized me to submit these comments on behalf of the Board.

Best regards,



Jonathan Houck
Chair

Gunnison County Board of County Commissioners