High Country Conservation Advocates v. U.S. Forest Serv., 2014 WL 2922751, --- F.Supp.2d --- (D. Colo. 2014), overturned the issuance of a federal coal lease modification authorizing exploration to expand an existing underground coal mine in the Sunset Roadless area of the North Fork Valley, Colorado. Among other things, the court found the lease modification FEIS arbitrary in its discussion of the social, economic, and environmental effects of greenhouse gas (GHG) emissions. In particular, the court decided that the agencies should have considered the social cost of carbon, used by the federal government in cost-benefit analyses of major proposed regulations. The CEQ has resisted providing guidance to agencies on accounting for the costs of climate change. In a path-breaking passage that follows, Judge Jackson required it.

> As explained above, an EIS must disclose and evaluate all of the effects of a proposed action—direct, indirect, and cumulative. * * * The agencies do not argue that they could ignore these effects. In fact, they acknowledged that there might be impacts from GHGs in the form of methane emitted from mine operations and from carbon dioxide resulting from combustion of the coal produced. Beyond quantifying the amount of emissions relative to state and national emissions and giving general discussion to the impacts of global climate change, they did not discuss the impacts caused by these emissions. Instead, they offered a categorical explanation that such an analysis is impossible. [Eds.: the following excerpt from the EIS is typical of the language agencies have been using to address emissions of GHGs]
>
> > Standardized protocols designed to measure factors that may contribute to climate change, and to quantify climatic impacts, are presently unavailable....
> >
> > Predicting the degree of impact any single emitter of [greenhouse gases] may have on global climate change, or on the changes to biotic and abiotic systems that accompany climate change, is not possible at this time. As such, ... the accompanying changes to natural systems cannot be quantified or predicted at this time.
>
> But a tool is and was available: the social cost of carbon protocol. Interagency Working Group on Social Cost of Carbon, Technical Support Document (Feb. 2010). The protocol—which is designed to quantify a project's contribution to costs associated with global climate change—was created with the input of several departments, public comments, and technical models. The protocol is provisional and was expressly designed to assist agencies in cost-benefit analyses associated with rulemakings, but the EPA has expressed support for its use in other contexts [e.g. notably, for the State Department's Keystone XL Pipeline EIS].

In case there was any doubt about the protocol's potential for inclusion in the Lease Modification EIS, the agencies included it in the draft EIS. The draft weighed several specific economic benefits—coal recovered, payroll, associated purchases of supplies and services, and royalties—against two costs: the cost of disturbing forest and the cost of methane emissions from the mine (measured in terms of dollars per ton of carbon dioxide as estimated by the social cost of carbon protocol) (coming out to $6.9 million in impacts from GHG emissions at a price of $21 per ton of carbon dioxide). The BLM included a similar analysis in its preliminary EA on the Lease Modifications.

As noted above, these attempts at quantification of the Lease Modification's contribution to the costs of global climate change were abandoned in the FEIS. The analysis was removed, in part it seems, in response to an email from one of the BLM's economists that pointed out that the social cost of carbon protocol is "controversial."

* * *

[T]he FEIS, on its face, offers a factually inaccurate justification for why it omitted the social cost of carbon protocol. A tool existed, and indeed it was in the draft EIS. This justification "runs counter to the evidence before the agency [and] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise...." New Mexico ex rel. Richardson, 565 F.3d at 704.

Furthermore, this error is more than a mere "flyspeck." The agencies expressly relied on the anticipated economic benefits of the Lease Modifications in justifying their approval.

Even though NEPA does not require a cost-benefit analysis, it was nonetheless arbitrary and capricious to quantify the benefits of the lease modifications and then explain that a similar analysis of the costs was impossible when such an analysis was in fact possible and was included in an earlier draft EIS. In effect the agency prepared half of a cost-benefit analysis, incorrectly claimed that it was impossible to quantify the costs, and then relied on the anticipated benefits to approve the project.

* * *

I believe the agencies' post-hoc arguments raised in this litigation further illustrate the arbitrariness of their actions. First, as I mentioned above, the agencies argue that the protocol is provisional and designed for rulemakings, not NEPA documents. Whether the provisional nature or the declaration that the protocol was designed for rulemaking might have served as a non-arbitrary reason

for removing the protocol from the draft is a hypothetical question that the record does not present. I will note, however, that even had such reasons been included, they do not explain why these agencies believed the protocol was inaccurate or not useful in this instance. Likewise, even if the agencies had argued the protocol was controversial because it is imprecise, the only evidence in the record that appears to support that rationalization is the economist's email noting that there is no scientific consensus about the exact dollar amount to assign to carbon emissions. As he noted, there is a wide range of estimates about the social cost of GHG emissions. But neither the BLM's economist nor anyone else in the record appears to suggest the cost is as low as $0 per unit. Yet by deciding not to quantify the costs at all, the agencies effectively zeroed out the cost in its quantitative analysis. See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1217 (9th Cir. 2008) (holding that NEPA requires agencies to analyze the effects of its actions on global climate change); id. at 1200 (finding it arbitrary and capricious to assign a cost of $0/ton to emissions when none of the identified estimates was that low).

Second, the agencies cite cases where courts upheld decisions to omit quantitative analyses of the effect of a project's GHG emissions in favor of a more generalized qualitative analysis of those effects. But in two of those cases, the protocol was never suggested as a possible tool, and the courts appear to have based their holdings, at least in part, on the fact that no such tool existed at the time. See WildEarth Guardians v. Jewell, 738 F.3d 298, 309 (D.C.Cir. 2013) ("Because current science does not allow for the specificity demanded by the Appellants, the BLM was not required to identify specific effects on the climate in order to prepare an adequate EIS."); WildEarth Guardians v. U.S. Forest Serv., 828 F.Supp.2d 1223, 1240 (D.Colo. 2011) ("WildEarth has not identified any method in the record (or elsewhere) that would enable the Forest Service to describe with particularity how the project would contribute to overall climate change."). * * * I am not persuaded by these cases, or by anything in the record, that it is reasonable completely to ignore a tool in which an interagency group of experts invested time and expertise. Common sense tells me that quantifying the effect of greenhouse gases in dollar terms is difficult at best. The critical importance of the subject, however, tells me that a "hard look" has to include a "hard look" at whether this tool, however imprecise it might be, would contribute to a more informed assessment of the impacts than if it were simply ignored.

In short, the agencies might have justifiable reasons for not using (or assigning minimal weight to) the social cost of carbon protocol to quantify the cost of GHG emissions from the Lease Modifications. Unfortunately, they did not provide those reasons in the FEIS, and their post-hoc attempts to justify their actions, even

> if the Court were permitted to consider them, are unpersuasive. Therefore I find that the FEIS's proffered explanation for omitting the protocol was arbitrary and capricious in violation of NEPA.

In addition to overturning the lease modification, the court also invalidated the portion of the Colorado Roadless Rule that exempted part of the North Fork Valley from the otherwise stringent restrictions on road building in order to facilitate expansion of coal mining there.