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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

WILDEARTH GUARDIANS and GRAND CANYON TRUST, Plaintiffs, v. S.M.R. JEWELL, *et al.* Defendants, State of Utah and Canyon Fuel Company, LLC, Intervenor Defendants.	Case No. 2:16-cv-00168-DN **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO ADD DOCUMENTS TO THE ADMINISTRATIVE RECORD AND AUTHORIZE LIMITED DISCOVERY** DISTRICT JUDGE DAVID NUFFER

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INTRODUCTION

Federal Defendants U.S. Bureau of Land Management (BLM) and U.S. Forest Service take inconsistent positions on Plaintiffs' Motion to Add Documents to the Administrative Record and Authorize Limited Discovery. They claim, for example, that Plaintiffs' request to add climate-change information to the record raises only a question for the merits: whether the 2002 environmental impact statement (EIS) should have been supplemented under the National Environmental Policy Act (NEPA). But they simultaneously argue that Plaintiffs "must make their case on the basis of the record that the agencies considered,"[1] without referencing the same climate-change information that is significant and the agencies did not consider. That makes no sense. To resolve the merits, the Court must have access to this new information, and this Motion is the proper vehicle for presenting the documents so that they may be used on the merits. Elsewhere, Federal Defendants recognize that "it was necessary for each agency to consider new information" before the Flat Canyon coal lease was issued on July 31, 2015.[2] Yet they argue that the analysis of fair market value, prepared in early 2015, should not be part of the records because "the decision challenged in this case" is "BLM's 2002 leasing decision" so that "the end-date for the administrative records"[3] is 2002. Meanwhile, the agencies' records include documents through July 2015. The Court should reject these inconsistent and unjust positions.

Plaintiffs' Motion identifies documents that should be added to the administrative records – either through supplementation or completion – so that the Court can fully scrutinize BLM and the Forest Service's coal-leasing decisions. In response, Federal Defendants do not contest that many of the documents – the NEPA documents discussing other regional coal leases and mines and the greater sage grouse – should be supplemented to the records. Federal Defendants' arguments on other documents lack merit. They contend that documents concerning climate

1 ECF Doc. 77 at 13
2 *Id*. at 5.
3 *Id*. at 9-10.

change should not be added because the agencies did not overlook the issue of climate change. But that ignores the point that the agencies ignored the new climate-change information that contradicts the rationale used to avoid a supplemental EIS. Further, the "missing" air permit and standards, which the agencies relied on for not analyzing the air quality impacts, should be supplemented to the records, even if Federal Defendants the agencies did not consider them. Other documents were actually considered in the 2015 decision to issue the Flat Canyon coal lease. By law, BLM had to – and did – prepare a "fair market value" analysis prior to issuing the lease and therefore it should be added to the records. And while federal agencies may change their position on whether the 2002 EIS requires NEPA supplementation, documents in the records do not explain the agencies' abrupt change on this question. Plaintiffs should thus be allowed to explore this record deficiency through discovery.[4]

ARGUMENT

I. The court should order "completion" of the records.

A. BLM considered its analysis of Fair Market Value.

Applicable regulations governing competitive coal leasing on federal land prohibit BLM from offering a lease for sale below fair market value.[5] BLM therefore must prepare a fair market value analysis[6] and solicit public comment on fair market value "at least 30 days before noticing the lease for sale."[7] The fair market analysis is also relevant to BLM's determination of

[4] The parties agreed that the following documents were considered and will be added to the record: (1) Conservation Plan for Greater Sage-grouse in Utah (Feb. 14, 2013); (2) U.S. Bureau of Land Management, Instruction Memorandum No. 2012-043: (3) Greater Sage-Grouse Interim Management Policies and Procedures (Dec. 22, 2011); (4) U.S. Fish & Wildlife Service, Greater Sage-Grouse: Conservation Objectives Team Draft Report Fact Sheet (Aug. 2012); (5) GIS data delineating Preliminary Priority Habitat for greater sage grouse in Utah, as the term PPH is used in BLM IM No. 2012-043, at the time the BLM's Determination of NEPA Adequacy (DNA) (DOI-BLM-UT-PFO-UTU-77114) was prepared (ca. February 2015); (6) Breeding Bird Density maps developed by Doherty (2010), as described in BLM IM No. 2012-043. *See* ECF Doc. 70-14 at 4; ECF Doc. 70-15 at 4.

[5] 43 C.F.R. § 3422.1(c).

[6] *Id*.

[7] *Id*. § 3422.1(a).

whether issuing the lease is in the "public interest."[8] According to record documents[9] and BLM itself,[10] a fair market value analysis began on January 23 2015 and was completed on April 29, 2015. Before offering and issuing the lease, BLM "determined that [Canyon Fuel's] bid met or exceeded the BLM's pre-sale fair market value (FMV) estimate."[11] BLM's fair market analysis should be added to the record because it was considered.

Nonetheless, Federal Defendants say this document can be shielded from judicial review because, they now allege, the leasing action occurred in 2002.[12] This proposition cannot be squared with the fact that the records prepared by the agencies contain documents through 2015. It also has no merit. In 2002, BLM and the Forest Service completed a NEPA process: they finalized an EIS and issued records of decision under NEPA. Notably, however, the Forest Service did not consent to the lease and BLM did not notice the lease sale, offer the lease or issue the lease. As the Tenth Circuit stated, "federal courts have repeatedly considered the act of issuing a lease to be final agency action which may be challenged in court."[13]

A letter BLM sent to Plaintiffs on July 31, 2015 also undermines Federal Defendants' flawed argument.[14] After Canyon Fuel Company informed BLM of its renewed interest in the Flat Canyon lease, as the letter explains, "BLM reopened the leasing process, which required completion of the FMV [fair market value] process."[15] BLM fully recognized "[t]he FMV process for Flat Canyon was not finalized … [in 2002]."[16] Far from suggesting its decision-

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8 43 C.F.R. § 3425.1-8.
9 ECF Doc. 70-16 at BLM2550.
10 ECF Doc. 77 at 9.
11 ECF Doc. 70-16 at BLM2549.
12 ECF Doc. 77 at 9.
13 *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1157 (10th Cir. 2013), *citing New Mexico v. BLM*, 565 F.3d 683 (10th Cir. 2009); *see also Chihuahuan Grasslands Alliance v. Kempthorne*, 5445 F.3d 884, (10th Cir. 2008) (finding NEPA claims moot when lease was terminated).
14 ECF Doc. 70-16.
15 ECF Doc. 70-16 at BLM2550.
16 *Id.*

making process concluded in 2002, the "BLM informed the company that it was necessary to conduct a rigorous study pursuant to the new policy to determine FMV for the tract."[17]

The agencies' 2013 Supplemental Information Report (SIR) and 2015 Determination of NEPA Adequacy (DNA) further contradict their argument.[18] NEPA only occurs if there is a meaningful opportunity to consider the environmental impacts of an agency action.[19] And NEPA requires a supplemental EIS where, as here, "there remains 'major Federal action' to occur."[20] Because both agencies found their respective actions were incomplete,[21] they assessed the significance of new information in a SIR and DNA. In fact, Federal Defendants acknowledge in the "background" section of their Opposition Brief that "it was necessary" to analyze whether to supplement the EIS,[22] an acknowledgment that means they agree that "major Federal action" remained to occur after the 2002 Records of Decision.

B. The Court should authorize targeted discovery to complete the record.

Completing the record through limited discovery is warranted here because there is a significant unexplained gap in the record. Record documents before July 17, 2012 show the agencies agreed that a supplemental EIS was required before completing their approval actions, whereas documents after this date state new information must be evaluated to decide whether a supplemental EIS is needed.[23] This shift in position, involving a key question at issue for resolving Plaintiffs' second and third claims, is unexplained. "[T]he very paradigm of arbitrary

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17 *Id*. ("BLM revised and updated the Flat Canyon FMV estimate to reflect the new policy.").

18 So too was the agencies' decision to prepare addenda to their 2002 Biological Assessment and Biological Evaluation, two sets of analysis required by the National Forest Management Act and Endangered Species Act. *See e.g.*, FS6028-29 (describing Forest Service's "*proposed* action" as "consent[ing] the leasing by the BLM") (emphasis added).

19 *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

20 *Marsh*, 490 U.S. at 374; *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72-73 (2004); *Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115 (10th Cir. 2009).

21 ECF Doc. 70-11 at BLM2877 ("[T]he [lease] was never fully approved.").

22 ECF Doc. 77 at 5.

23 *See* ECF Doc. 70 at 7-8.

agency action" is an "unexplained inconsistency."[24]

Despite the paper trail to the contrary, Federal Defendants dispute the notion that the agencies changed their position, characterizing the reversal as a "*supposed* change in position."[25] But the Regional Forester who is in charge of the Forest Service's Intermountain Region determined first that "a supplement[al] Environmental Impact Statement (EIS) will need to be prepared"[26] but then later changed his mind.[27] Notably, the record explains the initial conclusion to prepare a supplemental EIS: "it has been so long" since the 2002 EIS,[28] "the 2002 EIS would not be adequate for leasing without a supplement being prepared,"[29] and "the [NEPA] analysis and decision previously made is 'stale' due to changes in the resource conditions."[30] But the record contains no justifications for the agencies' new position that a non-public, internal review would decide *whether* a supplemental EIS was needed.

Federal Defendants suggest the agencies' initial position on NEPA supplementation cannot bind the agency.[31] That contention misses the point. BLM and the Forest Service determined a supplemental EIS was required. They explained why. Days later, they reversed course. Record document do not explain this change. Discovery is needed to fill this record gap.

II. Supplementing the records is warranted to facilitate judicial review.

A. Air quality documents should be added to the records.

The 2002 EIS and 2013 SIR claimed that air emissions from mining the Flat Canyon lease would comply with air-quality permits (a construction permit and an operation permit) and

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24 *Holder v. Martinez Gutierrez*, 132 S.Ct. 2011, 2019 (2012).
25 ECF Doc. 77 at 15 (emphasis added).
26 ECF Doc. 70-6 at BLM2646 (suggesting EIS supplement would take "2.5 to 3 years").
27 ECF Doc. 70-13 at BLM 2648.
28 ECF Doc. 70-11 at BLM2877.
29 ECF Doc. 70-4 at FS9797.
30 ECF Doc. 70-6 at BLM2646.
31 ECF Doc. 77 at 15.

"air quality standards"[32] and that, consequently, a detailed NEPA evaluation of adverse air impacts was unnecessary.[33] Federal Defendants now insist they likely did not consider these documents.[34] If this is correct, then the lack of an air quality analysis and the claimed justification for not conducting the required review under NEPA is unsupported and arbitrary.[35]

Federal Defendants also claim the permits and standards can be properly excluded because they are missing from agency files.[36] This reason alone is not sufficient. If the agency considered the air permits and documents, they should be obtained from other sources, including from the State of Utah agencies (an intervenor in this case) that issued permits, and added to the record.[37] The agencies did just this for other documents supposedly missing from agency files.[38]

Regardless, though Federal Defendants argue against completing the records – since the agencies cannot certify that these document were directly or indirectly considered, they do not contest that these air permits and standards should be "supplemented" to the records.[39] Judicial review under the APA asks whether an agency's decisions are supported by a reasoned analysis and substantial evidence. Here, the agencies are relying on the air permits and standards to support and explain their decision *not* to analyze and publicly disclose Flat Canyon's air quality impacts.[40] One of the bases for supplementing the record is therefore satisfied – "the agency action is not adequately explained and cannot be reviewed properly without considering the cited

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[32] The reference to "air quality standards" in the NEPA documents is vague. It is unclear which pollutants the standards cover and which standards were applied.

[33] ECF Doc. 70-17 at BLM123; ECF Doc. 70-7 at FS5820.

[34] ECF Doc. 77 at 10.

[35] 5 U.S.C.§ 706(2)(A).

[36] ECF Doc. 77 at 10.

[37] *See Ctr. for Native Ecosystems v. Salazar*, 711 F.Supp.2d 1267, 1274–75 (D. Colo. 2010).

[38] When explaining why some record documents post-date the July 31, 2015 leasing decision, agency attorneys said that BLM and Forest Service staff obtained documents by searching the internet after finding them missing from their files. ECF Doc. 70-15 at 3.

[39] *See* ECF Doc. 70 at 11.

[40] ECF Doc. 70-17 at BLM 123.

materials."[41]

B. Federal Defendants concede documents relating to cumulative impacts from other coal leasing and the greater sage grouse should be added.

Based on their Opposition Brief, Federal Defendants do not dispute that the administrative records should be supplemented with environmental review documents associated with approving other federal coal reserves in the region.[42] NEPA requires that BLM and the Forest Service consider the cumulative impacts of their actions. Yet nowhere in any of the NEPA documents prepared for the Flat Canyon lease did the agencies analyze the cumulative effects of coal mining and combustion from Flat Canyon, other Skyline mine leases,[43] three Utah leases, and other coal leases in the region.[44] Under applicable Tenth Circuit standards for supplementing the record, BLM and the Forest Service have thus "ignored relevant factors it should have considered in making its decisions," and "the agency action … cannot be reviewed properly without considering [these] materials."[45] The NEPA documents identified in Plaintiffs' Motion concerning the cumulative impacts of these other coal-mining approvals in the region should be supplemented to the records.

Plaintiffs' Motion also asks that documents relating to impacts on the greater sage grouse are supplemented to the records.[46] In response, the agencies state they will add the "sage grouse conservation [objectives] report" (Exhibit 34 to Plaintiffs' Motion) to the records.[47] Meanwhile Federal Defendants do not contest supplementing the records with Utah's draft sage grouse land

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41 *See Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001).

42 *See* ECF Doc. 70 at 19-26 (identifying NEPA and other documents prepared in approving other coal leases and mines).

43 In addition to the Flat Canyon lease, the Skyline Mine operates under the Winter Quarters leases, among others.

44 *See Wilderness Workshop v. Crockett*, 2012 WL 1834488, *5 (D. Colo. May 21, 2012) (finding cumulative air quality impacts can be demonstrated by reviewing NEPA documents for other past and present projects).

45 *See Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001).

46 ECF Doc. 70 at 26-29.

47 ECF Doc. 77 at 11 n. 1.

use plan amendments and attendant draft environmental impact statement.

C. The Court should require record supplementation with documents revealing new information about climate change impacts.

Plaintiffs have moved to supplement the record with 14 documents that contain new information about climate change. Federal Defendants contend that because the 2013 SIR has a brief explanation as to why the agencies will not analyze climate change in a supplemental EIS,[48] they did not "overlook" the issue.[49]

The relevant question is not whether the agencies overlooked the issue altogether, but whether the agencies' reason for not assessing climate change ignored factors relevant to that decision. The agencies' excuse for not evaluating climate change in a supplemental EIS was that it would be difficult.[50] But the 14 climate change documents that Plaintiffs seek to add show the agencies did not consider new information about the tools available for conducting the analysis, Exhibits 18-20 and 30-31, and did not consider a wealth of new research about climate change developed after the 2002 EIS, Exhibit 21-29. These documents pertain to whether, as Federal Defendants put it, the agencies were "reasonable" in not preparing a supplemental EIS based on contentions that "protocols … are presently unavailable"[51] and impacts "cannot be accurately estimated."[52] While BLM and the Forest Service may not have overlooked climate change generally speaking, they overlooked information addressing the specific reason for their conclusion that climate change did not require a supplemental EIS.

Federal Defendants also contend that the question of whether the Court reviews this significant new information should only be considered when addressing the merits.[53] But that is not the procedure contemplated in this case. It is incumbent on Plaintiffs to seek record

48 ECF Doc. 70-17 at BLM122-123.
49 ECF Doc. 77 at 11-13.
50 ECF Doc. 70-7 at FS5820-21.
51 ECF Doc. 70-7 at FS5820.
52 *Id*.
53 ECF Doc, 77 at 11.

supplementation at this time. This is true even though the standards for supplementing the record do overlap some with the standards of review found in the APA.[54] The circumstances recognized by the Tenth Circuit for supplementing the record include: "the agency action is not adequately explained and cannot be reviewed properly without considering [additional] materials" and "the record is deficient because the agency ignored relevant factors it should have considered in making its decision."[55] The APA's arbitrary and capricious standard similarly asks whether the agency "considered the relevant factors, [and] articulated a rational connection between the facts found and the choice made."[56] Nonetheless, the question about what documents are available to demonstrate that the agencies did not consider all relevant factors and failed to explain their NEPA findings are properly raised now.

Canyon Fuel, the State of Utah and, to a lesser extent, Federal Defendants suggest that the agencies completed decisions on the Flat Canyon coal lease in 2002, when they issued the Records of Decision. They argue that the administrative records therefore closed in 2002 and the requested climate change documents cannot be added. Again, this argument is flawed. Federal Defendants' records contain many documents that post-date 2002. The agencies' assessment of new information in the SIR and DNA also belies this litigation argument. New information must be evaluated only if "there remains 'major Federal action' to occur" regarding the Flat Canyon coal leasing decision.[57] Although sometimes a record of decision signifies the end of an agency's process,[58] here, it did not. At the company's request in 2002, the Forest Service did not provide BLM with its consent and BLM did not notify the public of a lease sale, hold a lease auction, or issue the lease to Canyon Fuel. And, in 2002, BLM had not yet determined or

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[54] 5 U.S.C. § 706(2)(A).
[55] *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001).
[56] *Baltimore Gas & Elec. v. Natural Resources Defense Council*, 462 U.S. 87, 105 (1983); *Olenhouse v. Commodity Credit*, 42 F.3d 1560, 1574-75 (10th Cir. 1994).
[57] *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72-73 (2004); *Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115 (10th Cir. 2009).
[58] 40 C.F.R. § 1505.2

considered the lease's fair market value, as is required before a lease is offered for sale.[59] Finally, the hallmarks of "final agency actions" require more than the 2002 Records of Decision.[60] Among other things, a final action is "one by which 'rights or obligations have been determined' or from which 'legal consequences will flow."[61] Lease issuance meets this requirement.[62] The Records of Decision in this case do not.[63]

III. Arguments based on a failure-to-act theory are timely

Federal Defendants contend Plaintiffs cannot make any record arguments that assume their Third Claim raises a failure-to-act theory.[64] Plaintiffs' Motion to Amend the Complaint, through which Plaintiffs seek to add failure-to-act allegations, is pending. But the parties agreed to brief this Motion in accordance with the September 29th deadline, rather than wait for a ruling on the June 24, 2016 Motion to Amend, to avoid unnecessary delay.[65] The ruling on the Motion to Amend will likely be relevant to whether review of claim three is limited to the records.

Federal Defendants' comment that Plaintiffs have not specified which documents should be added reflects a lack of understanding. Failure-to-act claims are not restricted to a record, but instead allow the parties to use all relevant and appropriate evidence when briefing the merits.

CONCLUSION

For the reasons set forth here and in Plaintiffs' Motion, the requested documents should be added to the administrative records and limited discovery should be authorized.

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[59] 43 C.F.R. § 3422.1(c).

[60] 5 U.SC. §§ 551(13) (APA definition for "agency action").

[61] *Bennett v Spear*, 520 U.S. 154, 177-78 (1997); *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1329 (10th Cir. 2007).

[62] *S. Utah Wilderness Alliance v. Palma*, 707 F.3d at 1157.

[63] Although Canyon Fuel Company raises a statute of limitation concern, that defense is meritless. A challenge to BLM and the Forest Service's leasing decisions for Flat Canyon first accrued when the lease was issued on July 31, 2015. *See* 28 U.S.C. § 2401(a).

[64] ECF Doc. 77 at 3.

[65] *See* ECF Doc. 70 at 5, n. 21.

Respectfully submitted,

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