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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CITIZENS FOR CLEAN ENERGY *et al.* and THE NORTHERN CHEYENNE TRIBE, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR *et al.* Federal Defendants, and STATE OF WYOMING *et al.*, Intervenor-Defendants.	CV 17-30-BMM (lead consolidated case) **FEDERAL DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER REQUIRING SUPPLEMENTATION OF THE ADMINISTRATIVE RECORD AND SUPPORTING MEMORANDUM**
STATE OF CALIFORNIA *et al.* v. UNITED STATES DEPARTMENT OF THE INTERIOR *et al.*	CV 17-42-BMM (consolidated case)

Federal Defendants,

and

STATE OF WYOMING *et al.*,

Intervenor-Defendants.

MOTION

Pursuant to Fed. R. Civ. P. 59(e) and Local Rule 7.3(a), and in order to avoid "manifest error," *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003), (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (*en banc*) (*per curiam*)), Federal Defendants respectfully ask the Court to reconsider its November 21, 2017 order, which granted Plaintiffs' motion to supplement the administrative record in these consolidated cases. ECF No. 85 ("Order").

In particular, Federal Defendants ask the Court to reconsider the Order with respect to Category 3, one of four categories of documents as to which Plaintiffs sought supplementation.[1] Category 3 consists of thirty-six environmental analyses

[1] Federal Defendants do not seek reconsideration of the Order with respect to the other disputed categories of documents sought by Plaintiffs (that is, Categories 2 and 4), which present a much closer case, given that the documents sought were attachments to documents already included in the record. As to Category 1 (a single document), Federal Defendants have previously advised the Court and parties that they agree it is appropriate to add this item to the record.

(including environmental assessments and supplemental environmental impact statements), consisting of an estimated 10,000 pages and dating back ten years (to a time pre-dating the current era of heightened climate change awareness). As the Motion to Supplement indicates, ECF No. 76 at 27, Plaintiffs intend to rely on these analyses to argue that the climate change analyses prepared by the Bureau of Land Management ("BLM") for individual coal leasing decisions have historically been deficient and therefore it must prepare a supplement to a certain 1979 Programmatic Environmental Impact Statement ("1979 PEIS"). The 1979 PEIS was prepared to comply with the National Environmental Policy Act ("NEPA") in promulgating the 1979 regulations that established the modern coal program. *See* ECF No. 76 (Plaintiffs' Motion to Supplement) ("Mot.") at 27 (arguing the Court must consider these documents for Count Two).

Such a showing, however, would not address the specific question presented to the Court under the standard of review applicable to the agency inaction claim asserted in Count Two in both Complaints. Because such claims are properly pursued under Section 706(1) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), the question for the Court is whether supplementation of the NEPA analysis is "legally required" by the NEPA regulation Plaintiffs' rely on in Count Two, that is, 40 C.F.R. § 1502.9(c). *See Norton v. S. Utah Wilderness All.*,

542 U.S. 55, 63 (2004) (explaining that "the only agency action that can be compelled under the APA is action legally *required*").

Should the Court conclude that Plaintiffs did not improperly invoke the "arbitrary and capricious" standard of APA Section 706(2) in Count Two of the Complaints (as discussed further below), supplementation of the Administrative Record ("AR") with the Category 3 documents is still improper because Plaintiffs failed to identify a "relevant factor" overlooked. *See Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("relevant factors" are those which "the agency should have considered but did not"). And even if it turned out that the thirty-six environmental analyses entirely ignored climate change, that fact would not render incorrect or irrational the agency's characterization of its current practice in performing NEPA analysis when approving coal leasing applications. *See* AR at 18 (BLM memorandum recommending that the moratorium be lifted). That practice, as the memorandum states, is to follow relevant guidance and judicial decisions concerning NEPA compliance. *Id*. Dated environmental analyses cannot refute that or show it to be irrational.

For these reasons and those stated in the Supporting Memorandum which follows, Federal Defendants respectfully ask the Court to revise the Order by eliminating the requirement that Category 3 be included in the record.

SUPPORTING MEMORANDUM

INTRODUCTION

Plaintiffs in these consolidated cases assert claims under NEPA and other statutes challenging a 2017 decision by the Secretary of the Interior to (i) lift a 2016 moratorium on most new leasing of federal coal; and (ii) end preparation of a programmatic environmental impact statement (PEIS) for the Federal coal program. The previous administration had undertaken preparation of the PEIS *voluntarily* – not because any proposed "major Federal action significantly affecting the quality of the human environment" required it. 42 U.S.C. § 4332(C) (NEPA provision specifying what triggers the EIS requirement).

As explained below, the Order should be revised because the Category 3 documents are not properly included in the record. Plaintiffs failed to identify a relevant factor that was overlooked, and even if they had identified a factor overlooked, Count Two is properly brought under APA Section 706(1) as a failure to act; consequently, the "arbitrary and capricious" standard of APA Section 706(2) is inapplicable, as is the "relevant factors" exception thereto. *See Midwater Trawlers Coop. v. Dep't of Commerce*, 393 F.3d 994, 1007 (9th Cir. 2004)

(discussing the "relevant factors" exception as one applicable in "arbitrary and capricious" review under APA Section 706(2)).

ARGUMENT

In Count Two of each Complaint (hereafter collectively referred to as "Count Two"), Plaintiffs assert that "significant new circumstances or information," as specified in 40 C.F.R. § 1502.9(c) (NEPA supplementation regulation), demand that the agency complete a supplement to the 1979 PEIS. *See* Compl. at ¶ 68 (ECF No. 1 in CV 17-30-BMM) (Count Two), Compl. at ¶ 61 (ECF No. 1 in CV 17-42-BMM) (Count Two).

Plaintiffs in the state action also assert that the alleged failure to supplement the 1979 PEIS was "arbitrary" and "unlawful." *See* Complaint, ¶ 63. Relying on this same regulation, Plaintiffs in the first-filed action, No. CV 17-30-BMM, assert that the supposed failure was "arbitrary" and not "rational." *See* Complaint, ¶ 70. Each Plaintiff group contends that the challenged decision should be set aside because the law requires preparation of a supplement to the 1979 PEIS.

As noted, the 1979 PEIS was prepared to support promulgation of regulations, nearly forty years ago, establishing the modern coal program. Those regulations are not now undergoing revision. Because the 1979 PEIS was prepared

to support a now-completed rulemaking, it is not subject to supplementation. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989) (holding that NEPA supplementation is required for ongoing, not completed, actions). Specifically, the Court explained:

> If there remains "major Federal actio[n]" to occur, and if the new information is sufficient to show that the remaining action will "affec[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Id. (alterations in original) (citing 42 U.S.C. § 4332(2)(C)).

Federal Defendants include this discussion about the merits of the case at this stage solely to apprise the Court of the nature of the claim asserted in Count Two, which shapes the appropriate scope of review in these cases. If a duty to supplement the 1979 PEIS exists at all (and Federal Defendants contend it does not), it exists regardless of when, or whether, a moratorium was imposed or lifted. Despite this, Count Two attempts to artificially link the supplementation claims with the decision to lift the moratorium. It appears Plaintiffs do this so they can attempt to identify a final agency action, which they hope in turn would allow them to argue in support of Count Two, as they in fact do, that (i) the Secretary's decision is a "major Federal action" under NEPA; and (ii) their claim is subject to the "arbitrary and capricious" standard of review in Section 706(2). Compl. ¶¶ 62,

70 (CV 17-30-BMM) (alteration in original); *see also* Compl. ¶¶ 58, 63 (CV 17-42-BMM).

This course would offer Plaintiffs two advantages. First, by mischaracterizing the claim as one brought under Section 706(2), they are improperly seeking documents under the "relevant factors" exception to the rule of record review. Second, they are seeking to avoid adverse case law in the District of Columbia that rejected a supplementation claim concerning the very same 1979 PEIS. The claim in the D.C. case, which also pressed for more comprehensive consideration of climate impacts, is almost identical to Count Two here, except that it was brought under Section 706(1), not 706(2). *See W. Org. of Res. Councils v. Jewell ("WORC")*, 124 F. Supp. 3d 7, 12 (D.D.C. 2015).

In *WORC*, the court recognized Section 706(1) as the appropriate APA vehicle for asserting a duty to supplement in circumstances where, as here, the agency has made no formal finding that a supplemental EIS is *not* required.[2] The district court dismissed the claim, not because Section 706(1) was the wrong APA vehicle, but because there was no "major Federal action" under NEPA that would

[2] *Cf. Marsh*, 490 U.S. at 374 (1989) (holding that NEPA supplementation claims under 40 C.F.R. § 1502.9(c), in circumstances where the agency has in fact made a formal finding that a supplemental EIS is not required, are properly brought under Section 706(2)).

trigger an EIS requirement. This was because the subject action, the 1979 rulemaking, had been completed. As the Court explained,

> the possibility of major federal action remaining here was foreclosed after the federal coal management program was implemented in 1979 and that same program continues to govern the leases today. Once the federal coal management program went into effect, the proposed federal action came to an end. That the federal defendants continue to issue leases in a manner consistent with the federal coal management program introduced in 1979, does not constitute an "ongoing 'major [f]ederal action,'"

WORC, 124 F. Supp. 3d at 12 (D.D.C. 2015), citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 73 (2004).

Federal Defendants did not raise this precise contention in their opposition brief in this case, ECF No. 78, because it would require the Court – prior to summary judgment briefing – to consider the merits of Plaintiffs' claims, a practice generally avoided in preliminary stages of litigation. Instead, Federal Defendants' advanced the less specific argument that Plaintiffs had failed to identify any "relevant factor" overlooked, an assertion which applies whether the "arbitrary or capricious" standard of Section 706(2) or the "legally required" standard of Section 706(1) is deemed to apply.

The argument was summarily dismissed without indication what factor was overlooked. *See* Order at 8 (characterizing the argument as presented "without supporting authority"). The Court should reconsider its decision because Plaintiffs

bear the burden of demonstrating the need to supplement the record. *See San Luis & Delta–Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). If they claim that a relevant factor was overlooked, and seek to include documents to demonstrate it, logic and fairness demand that they state what that factor is when seeking to overcome the traditional presumption that a record has been properly designated. *See Wilson v. Hodel*, 758 F.2d 1369, 1372 (10th Cir. 1985) (discussing presumption).[3]

Federal Defendants advanced another argument in opposition that was not addressed: that "relevant factors" are those which "the agency should have considered but did not." *See* ECF No. 78 at 5 (quoting *Asarco,* 616 F.2d at 1160). Without first identifying any factor overlooked, the Court cannot engage in the consideration *Asarco* requires, that is, determining if a given factor is one that the agency "should have considered." *Id*. It is this concern that prompted Federal Defendants' assertion, dismissed as lacking supporting authority, that Plaintiffs must identify "some reason, legal or otherwise" why the agency must consider certain information. ECF No. 78 at 9. *Asarco* makes clear that a relevant factor is

[3] Should Plaintiffs argue in response that the factor overlooked is climate change, or the need to consider it, Federal Defendants note that the agency discussed, at some length, the need to consider climate change in future coal leasing decisions and thus did not overlook the issue. *See* AR at 18-19 (BLM recommendation to the Secretary that the moratorium be lifted).

one which must be considered and Plaintiffs offer no reason why any particular factor must be considered.

In sum, the Court should reconsider its order because it will have challenging consequences for Federal Defendants, requiring them to confront an open-ended invitation from Plaintiffs to the Court to consider whether, in the vast array of materials hand-picked by Plaintiffs (but not considered by agency decision makers in deciding to lift the moratorium, *see* ECF No. 78-1 (Elser Declaration)), some yet-unspecified factor has been overlooked. This is prejudicial and surely portends arguments in merits briefing premised on an incorrect standard of review. In such a circumstance, it will be necessary for Federal Defendants to expend their limited pages in merits briefing addressing the appropriate standard of review in addition to the merits of Plaintiffs' claims.

Further, the Court should reconsider the Order because it could undermine the rule of record review, in this case or in future cases which follow the Court's holding. As Federal Defendants argued in their opposition, ECF No. 78 at 4, if all a plaintiff need do to have a court in an APA case consider extra-record evidence of plaintiff's choosing is move to supplement the record, proffer that evidence, and argue it is needed for the Court to determine if some, or any, unspecified factor was not considered, the exception would swallow the rule.

Finally, denial of reconsideration increases the risk that the Court would inadvertently "substitute its judgment for that of the agency," by relying on materials not considered by agency decision makers. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Federal Defendants respectfully urge the Court to avoid this potential pitfall.

CONCLUSION

For the foregoing reasons, Federal Defendants ask that the Court reconsider the Order and revise it by eliminating the requirement that Category 3 be included in the record.

Respectfully submitted this 29th day of December, 2017.

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