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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' REPLY IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION OF ORDER REQUIRING SUPPLEMENTATION OF THE ADMINISTRATIVE RECORD**
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.

INTRODUCTION

Federal Defendants file this reply in support of their motion for reconsideration of the Court's November 21, 2017 order on the scope of the administrative record in these consolidated cases. Fed. Defs.' Mot. for Leave to Seek Recons., ECF No. 94-1 ("Motion"); Nov. 21, 2017 Order, ECF No. 85 ("Order"). The Order granted Plaintiffs' motion to supplement the record, which sought documents in four categories. ECF No. 75. Federal Defendants seek reconsideration only as to Category 3, consisting of thirty-six environmental analyses prepared under the National Environmental Policy Act ("NEPA") in support of individual coal leasing decisions made over the past decade.

The Court should grant the motion for reconsideration for three reasons: first, because the Category 3 documents, consisting of an estimated 10,000 pages, were not considered by agency decision makers but rather were cherry-picked by Plaintiffs; second, because the analyses have no bearing on the actual questions the Court must resolve in addressing the NEPA counts pled in these cases; and third, because Plaintiffs persist in refusing to identify a "relevant factor" the agency was required to, but did not, consider, despite having been challenged on the point twice. These reasons for disallowing the Category 3 documents are discussed in turn below.

ARGUMENT

Plaintiffs' opposition to the motion for reconsideration begins with the fiction that Federal Defendants "invoked" the thirty-six analyses to "justify" their decision to lift the leasing moratorium. Pls.' Br. in Opp'n to Mot. for Recons. 1, ECF No. 99 ("Opp'n"). They did not. As Federal Defendants explained in opposing the motion to supplement, ECF No. 78, the Bureau of Land Management ("BLM") prepared a memorandum in March 2017 recommending that the moratorium be lifted. *See* AR 00013-26. That memorandum explains the grounds for its recommendation, based on consideration of several important factors, including the Mineral Leasing Act's "fair return" requirement, and concerns involving resource protection and management, program administration, and climate change.

With respect to the latter, the memorandum explained that, "[c]urrently," BLM's practice for coal leasing decisions is to "appropriately analyze[] impacts on climate change as required by existing guidance and judicial decisions." AR 00018. In the sentence which follows, BLM elaborated that its "current practice is to analyze the impacts of [a given] leasing decision on climate change, including the cumulative impacts of the leasing decision associated with Greenhouse Gas (GHG) emissions related to coal mining, transport, and subsequent combustion." *Id*. In short, these two sentences plainly convey that BLM endeavors to comply

with applicable law and policy and that its NEPA documents currently examine the factors generally accepted today as appropriate in a study of climate impacts.

Then, in the two sentences which follow – sentences to which Plaintiffs give disproportionate significance – BLM explained that many of its "recent" NEPA analyses have been challenged in court and upheld, with one noted exception. *Id.* In supporting footnotes, the agency cited the judicial decisions, but not the underlying NEPA analyses. *Id.* at nn. 9-10. In fact, the memorandum reflects no suggestion that decision makers examined the environmental analyses at issue in the cited judicial decisions, let alone the thirty-six analyses hand-selected by Plaintiffs. To the contrary, BLM Deputy Division Chief Alfred Elser attested in October that the analyses were in fact not considered, Decl. of Alfred Elser, ¶ 2 ECF No. 78-1, although Federal Defendants respectfully note that the November Order appeared to dismiss this testimony as merely "suggest[ing]" non-consideration. Order 10.

Despite the focus of the passage at issue on judicial decisions, Plaintiffs argue it reflects an invocation by BLM of the *content* of the thirty-six NEPA analyses, something which BLM did, according to Plaintiffs, to "justify" its recommendation that the moratorium be lifted. Opp'n 1. But while BLM relied on many factors to support its recommendation, including its "current practice" of complying with NEPA and agency policy, at no point did BLM assert that lifting

the moratorium is appropriate because its thirty-six most recent environmental analyses prepared for leasing decisions demonstrate that the agency adequately examines climate change impacts, or any similar construction that could be characterized as an invocation. The Court should reject Plaintiffs' false narrative, which is wrongly premised on a view that Interior officials cannot comprehend the agency's current practice without actually examining past environmental analyses to see how things have been done. To the contrary, conscientious agency personnel responsible for these matters understand the NEPA process, they understand the guidance and the case law, and they are aware of the agency's current NEPA practice with regard to coal leasing.

The second reason why the Court should grant reconsideration and disallow Category 3 is that the documents have no bearing on the actual questions the Court must resolve in addressing Plaintiffs' claims that a programmatic review of some sort is required. The complaint in each case contends that the agency failed to prepare a supplement to a certain 1979 Programmatic Environmental Impact Statement ("1979 PEIS"). Compl. ¶¶ 68-69 (ECF No. 1, CV 17-30-BMM), Compl. ¶¶ 62-63 (ECF No. 1, CV 17-42-BMM).[1] Plaintiffs in number CV 17-30-BMM also seek to show, as an alternative to supplementing the 1979 PEIS, that a

[1] The 1979 PEIS was prepared to comply with NEPA in promulgating the 1979 regulations that established Interior's modern coal program, a rulemaking that was completed long ago.

new programmatic EIS is required. Compl. ¶¶ 64-66 (ECF No. 1, CV 17-30-BMM) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 400 (1976)); *see also* ECF No. 76 at 1 (stating that the "key question in this litigation is whether Federal Defendants violated [NEPA] when they authorized new coal leasing without first preparing a [programmatic EIS]").

The foray Plaintiffs ask the Court to make into an estimated 10,000 pages of past environmental analysis is improper and Plaintiffs offer no defensible basis for abandoning the rule of record review in this Administrative Procedure Act ("APA") case. Supplementation of an EIS is governed by the NEPA regulation at 40 C.F.R. § 1502.9, as Count Two in each complaint acknowledges. The Supreme Court has twice held that this regulation only requires supplementation in the case of *ongoing* major federal actions, provided certain additional conditions are met. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 73 (2004). The regulation does not require supplementation in the case of *completed* actions. *Marsh*, 490 U.S. at 374; *Norton*, 542 U.S. at 73. Notably, the 1979 rulemaking is a completed action, as the only other court to consider the issue has held. *W. Org. of Res. Councils v. Jewell (WORC)*, 124 F. Supp. 3d 7, 12 (D.D.C. 2015) (citing *Norton*, 542 U.S. at 73), *appeal docketed*, No. 15-5294 (D.C. Cir. Oct. 28, 2015). In the absence of a proposed action, the D.C. District Court explained, there is no legal duty to

perform supplemental NEPA analysis. *Id.* at 13 (stating that BLM was under "no duty to supplement the 1979 programmatic EIS for the federal coal management program because there is no remaining or ongoing major federal action that confers upon them a duty to do so.").

Here, the only question for the Court on the two supplementation counts (which are erroneously advanced under APA section 706(2), 5 U.S.C. § 706(2), as previously discussed by Federal Defendants, *see* Mot. 7-9) is whether the Court agrees with the D.C. District Court that promulgation of the 1979 regulations is a completed action. This question is not informed by the thirty-six analyses. If the Court agrees that promulgation of the regulations is a completed action, as it should in light of Supreme Court precedent, then the two supplementation counts fail and the Court's inquiry regarding those counts is at an end. If the Court does not agree, then the only remaining question is whether the conditions of 40 C.F.R. § 1502.9(c) which trigger a duty to supplement have been met.[2] The thirty-six analyses do not aid this inquiry. Where the standard applicable in an inaction claim under section 706(1) is whether supplementation is "legally required," *Norton*, 542 U.S. at 63 (emphasis omitted), there is no need for the Court to consider ten years' worth of environmental analyses. If a duty to supplement the 1979 PEIS exists, it

[2] Those conditions require "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(ii).

exists regardless of whether the analyses proffered by Plaintiffs examined climate change well or poorly or not at all.

A similar analysis applies to the claim, in case number CV 17-30-BMM, that the agency was arbitrary in lifting the leasing moratorium without completing a *new* programmatic EIS. NEPA's implementing regulations specify that EISs "may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18)." 40 C.F.R. § 1502.4(b). The regulations further state that EISs are required for "major Federal actions . . . [s]ignificantly . . . [a]ffecting . . . [t]he quality of the human environment," *id*. § 1502.3 (internal citations omitted), and elsewhere they define major federal actions as including "a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." *Id*. § 1508.18(b)(3).

In advancing this claim, Plaintiffs make no allegation that Interior has adopted "new agency programs or regulations." *Id*. § 1502.4(b). Instead they imply that lifting the moratorium is tantamount to adoption of a "new program" and thus demands a programmatic analysis. They do so by characterizing the decision as "open[ing] the door to new coal leasing and its attendant consequences without first performing an environmental review . . . ." Compl. ¶ 1 (no. CV 17-30-

BMM); or "open[ing] up thousands of acres of public land to new coal leasing without first evaluating the far-reaching impacts of that decision in a programmatic [EIS]." Pls.' Reply Br. in Supp. of Mot. to Suppl. the Administrative R. 1, ECF No. 79. In a similar vein, Plaintiffs in CV 17-42-BMM contend the decision to lift the moratorium "restart[ed] the federal coal leasing program . . . ." Compl. ¶ 1 (No. CV 17-42-BMM), ECF No. 1.[3]

To succeed on their claim that a new programmatic EIS was required, Plaintiffs must show that lifting the moratorium constitutes a "new program" or otherwise conforms to the regulatory definition of a "major federal action" in 40 C.F.R. § 1508.18(b)(3). Once the Court resolves this narrow question, whether it rules for Plaintiffs or Defendants, its inquiry is at an end, and this is so *regardless*

[3] These descriptions are inaccurate for at least two reasons. First, the federal coal program as a whole was never halted. Many aspects of it, such as production on active leases and issuance of new leasing decisions under the exceptions enumerated in Secretarial Order 3338, continued to occur even during the moratorium on new leasing. In fact, both plaintiff groups appear to acknowledge the program's continuing operation. *See e.g.*, Compl. ¶ 34 (No. CV 17-42-BMM) (noting that BLM currently "oversees 306 coal leases encompassing over 475,000 acres in 10 states."); *see also* Pls.' Br. 2-3. Second, the decision to lift the moratorium merely allows operators to *apply* for coal leases. Before any impacts of coal development could be felt, Interior would have to review and approve those applications and, in each instance, would be required to conduct NEPA analysis. *See* 43 C.F.R. § 3425.3 (requiring that "[b]efore a lease sale may be held under this subpart, the authorized officer shall prepare an environmental assessment or [EIS] of the proposed lease area in accordance with 40 CFR parts 1500 through 1508"). Thus Plaintiffs' recurring charge that adverse environmental impacts are set to occur without environmental review is simply wrong.

of the content of the thirty-six environmental analyses. As with claims that the 1979 PEIS must be supplemented, the thirty-six analyses simply do not inform the question whether a new PEIS is required. Federal Defendants respectfully submit that the question whether any programmatic review is required, be it in the form of a new PEIS or a supplement to the 1979 PEIS, is narrow in scope and legal in nature and will not be aided by the excursion Plaintiffs seek.

The third and final reason for disallowing the Category 3 documents is that the "relevant factors" exception to the rule of record review has no application where Plaintiffs fail to identify a "relevant factor" overlooked, that is, a factor that "the agency should have considered but did not." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). Federal Defendants raised this point in opposing the motion to supplement, as well as in their motion for reconsideration, and Plaintiffs have twice declined to offer any meaningful response. Instead, Plaintiffs contend that neither they nor the Court failed to identify a "relevant factor" overlooked because the Court

> properly recognized that judicial review of such documents is necessary to determine whether Federal Defendants considered all relevant factors when they asserted the adequacy of lease-specific environmental analyses to justify their refusal to prepare a [PEIS].

Opp'n 2. Not only is this reasoning circular, it also presumes, once again, that the agency actually invoked the thirty-six analyses to justify its decision.

In essence, Plaintiffs argue they did not fail to identify a relevant factor overlooked because they proffered materials which, so they say, are "necessary" to determining "whether Federal Defendants considered all relevant factors." *Id*. But if all a plaintiff need do to have a court consider extra-record evidence of interest to plaintiff is move to supplement the record, proffer that evidence, and argue it is "necessary" for the Court to determine if some, or any, unspecified factor was not considered, then the exception would swallow the rule. And if the Category 3 documents are subject to review by the Court, then why not any number of additional documents, which might reveal that some arguably relevant but unspecified factor was overlooked? Plaintiffs' supposed standard for supplementation of the record, which the Order appears to have adopted, lacks objectively-discernible bounds. Insofar as Plaintiffs refuse to identify a relevant factor overlooked, other than to point amorphously to the "content" of the estimated 10,000 pages comprising the thirty-six analyses, the Court should disallow the Category 3 documents.

The Court should disallow Category 3 for the additional reason that the Ninth Circuit has explained that a "relevant factor" is one "the agency should have considered but did not." *Asarco*, 616 F.2d at 1160. Implicit in this language is a requirement that a court, in ordering supplementation, satisfy itself that the supplementing materials demonstrate factors the agency should have considered.

This cannot occur where a plaintiff does not identify the "relevant factor" supposedly overlooked.

Finally, Plaintiffs argue that if the Court agrees with Federal Defendants that review of Count Two (i.e., failure to supplement the 1979 PEIS) is subject to section 706(1), then the Category 3 documents should nonetheless be considered because "judicial review in section 706(1) cases is not limited to an administrative record at all." Opp'n 2. This misstates the law. APA section 706 expressly requires review on the record, without regard to whether a claim is pursued under section 706(1) or section 706(2). *See* 5 U.S.C. § 706 (providing that "the court shall review the whole record or those parts of it cited by a party . . . .").

Federal Defendants of course acknowledge the Ninth Circuit's statement in *San Francisco BayKeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002), that review in a section 706(1) case "'is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record.'" *Id. at* 886 (quoting *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000)). However, this does not mean courts may conduct *de novo* proceedings based on wide-ranging evidence hand-selected by a plaintiff. The Ninth Circuit in *San Francisco BayKeeper* simply affirmed the district court's decision to consider a single extra-record document, one prepared by the agency to explain the rationale for its chosen course. In so ruling, the Ninth Circuit reasoned

that "when a court is asked to review agency inaction before the agency has made a final decision, there is often no official statement of the agency's justification for its actions or inactions." *Id.*; *see also Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 511-12 (9th Cir. 1997) (explaining that, in an inaction case, the court may consider "supplemental statements *of an agency position* because there is no date certain by which to define the administrative record") (emphasis added). These formulations are a far cry from Plaintiffs' incorrect theory that there is no "administrative record at all." Opp'n 2. In point of fact, there is a record, as *San Francisco BayKeeper* recognizes, simply not one to which the court is strictly limited.

Plaintiffs' theory is further undermined by language in *Asarco* cautioning that, when a court does decide to look outside the record, "it should consider evidence relevant to the substantive merits of the agency action only for background information . . . or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision." *Asarco*, 616 F.2d at 1160. Federal Defendants note that the Order adding Category 3 to the record imposes no express limits on Plaintiffs' use of these materials in merits briefing. *Asarco*, however, instructs that use of extra-record materials be limited to the narrow purpose for which they were sought. This serves the important purpose of allowing the court to make a well-informed decision while honoring, to the greatest extent possible, the rule of record

review. Allowing the use of Category 3 documents as currently contemplated by the Order defeats the purposes that underlie *Asarco*'s holding.

CONCLUSION

For the reasons set out above, and in Federal Defendants' Motion for Reconsideration, and in their opposition to Plaintiffs' Motion to Supplement the Record, the Court should grant the motion for reconsideration and revise its November 21 Order by disallowing the Category 3 materials.

Respectfully submitted this 21st day of February, 2018.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing is being filed with the Clerk of the Court using the CM/ECF system, thereby serving it on all parties of record on February 21, 2018.

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