IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

DAKOTA RESOURCE COUNCIL and DACOTAH CHAPTER OF SIERRA CLUB Plaintiffs, v. SECRETARY OF THE INTERIOR SALLY JEWELL, in her official capacity, Defendant, and NORTH DAKOTA PUBLIC SERVICE COMMISSION, Defendant-Intervenor.	Civil Action No. 1:12-cv-65

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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DRC's Response to Motion for Summary Judgment with Exhibits
Public Service Commission
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INTRODUCTION

Plaintiffs Dakota Resource Council ("DRC") and Sierra Club respectfully submit this brief, by and through undersigned counsel, in support of their motion for summary judgment and in opposition to the cross-motions for summary judgment that Defendant Secretary of the Interior Sally Jewell ("Secretary") and Defendant-Intervenor North Dakota Public Service Commission ("NDPSC")(together "Defendants") subsequently filed. In this memorandum, Plaintiffs first show that judicial review, under the Administrative Procedure Act or otherwise, is not the proper standard of decision for a Surface Mining Control and Reclamation Act of 1977 ("SMCRA") citizen suit to compel compliance with an administrative duty, which must be evaluated on a statutory construction basis.

Plaintiffs then counter Defendants' inaccurate analysis of subject matter jurisdiction and standing. Finally, Plaintiffs explain why none of the Defendants' arguments alter, negate, or demonstrate compliance with the Secretary's mandatory, non-discretionary duty under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") that is the subject of Plaintiff's action to compel compliance. For these reasons, and for the reasons discussed below, the Court should deny Defendants' cross-motions for summary judgment and grant Plaintiffs' motion for summary judgment.

REPLY TO DEFENDANTS' RESPONSES TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

DRC and Sierra Club do not seek judicial review of agency actions, and this is not an Administrative Procedure Act ("APA") claim, therefore there is no restriction limiting evidence to the administrative record. Where Congress intended a legal challenge under SMCRA to be

decided on the administrative record, it said so. 30 U.S.C. § 1276(b). This is not a record review case. Exhibits outside the administrative record are evidence of the insufficiency of OSM's investigation into Plaintiffs' allegations that the North Dakota program is insufficiently stringent with regard to financial contributions to Commissioners. DRC and Sierra Club, along with Plains Justice and Neighbors United (together "Advocates"), notified OSM by letter dated August 10, 2011 of the existence of public campaign records documenting financial contributions to surface mining regulators in violation of SMCRA. OSM000108. OSM's failure to make these public records, as well as relevant Federal Election Commission public records, part of its administrative review in the matter is *prima facie* evidence of an inadequate OSM investigation. The administrative record includes even media reports on the Advocates' allegations, yet does not extend to the actual substance of the complaint, the campaign contributions made by coal mine operators to the Commissioners and the inadequacies in the North Dakota state program that allowed this situation to develop. DRC and Sierra Club submit the exhibits as examples to demonstrate the type of relevant and readily available evidence that OSM ignored as it supposedly "evaluated the allegations" in the Advocates' administrative complaint. OSM000122.

At Paragraphs 14, 26, 37, and 40, the Secretary's Response to Plaintiffs' Statement of Undisputed Facts declares that the Secretary "lacks sufficient knowledge to dispute the statement of fact," where those statements refer to specific allegations about financial contributions in violation of SMCRA made in Plaintiffs' August 10, 2011 letter to OSM. Doc. No. 32 at 7, 10, and 9; OSM000108. Evidently, the Secretary and OSM have not bothered to review public campaign contribution records available online through the North Dakota Secretary of State and referred to directly in Plaintiffs' correspondence requesting an investigation.

The instances of financial contributions by coal company owners, officers, employees, and their spouses to Commissioners described in Plaintiffs' 2011 letter to OSM would be sufficient to support this citizen suit, but DRC and Sierra Club are not restricted to that record. With regard to the objection that contributions to Commissioner Cramer's U.S. House campaign are not relevant to his activities as a surface mining regulator, DRC and Sierra Club reply that Commissioner Cramer continued to hold his PSC position and deliberate on surface mining matters until resigning at the end of 2012 to take his House seat. Until the time of his resignation, Commissioner Cramer's acceptance of financial contributions from coal company sources is evidence of the inadequacy of North Dakota's surface mining conflict of interest provisions.

To the extent that Defendants are arguing that the financial contribution records submitted to the court by DRC and Sierra Club are inaccurate, they are arguing that a factual dispute exists that would mitigate against summary judgment at this point. Because all campaign finance records submitted by DRC and Sierra Club to the court are public records freely available on government websites, Defendants' objections are merely an attempt to increase the cost of litigation to DRC and Sierra Club and a waste of the Court's time. However, to satisfy any question as to the authenticity of the documents, DRC and Sierra Club submit certification documents from the North Dakota Secretary of State as Exhibits A-J. The Federal Election Commission does not certify public records of campaign committees, so an affidavit of authenticity by the paralegal who prepared the FEC exhibits is attached as Exhibit K.

REPLY TO DEFENDANTS' STATEMENTS OF UNDISPUTED FACTS

I. Reply to Secretary's Statement of Undisputed Facts

Plaintiffs reply as follows to the Secretary's Statement of Undisputed Facts:

1. Plaintiffs do not dispute the statements in Paragraphs 1 – 2.

2. Plaintiffs do not dispute the statement at Paragraph 3 that the annual financial report forms completed by the North Dakota Public Service Commissioners ("Commissioners") do not explicitly require the Commissioners to report campaign contributions, but Plaintiffs deny that annual financial reporting need not include campaign contributions to the extent that the Secretary is asserting a conclusion of law or statutory interpretation of SMCRA.

3. Plaintiffs deny the statement at Paragraph 4 that Plains Justice, and by extension the Plaintiffs, allege or alleged inadequate state enforcement of the North Dakota program under SMCRA. Plaintiffs' claim is that the language of North Dakota's conflict of interest provisions in the state surface mining program is not as stringent as SMCRA, a violation of SMCRA.

4. Plaintiffs do not dispute that correspondence took place on the subject of North Dakota's conflict of interest provisions and campaign contributions to the Commissioners on the dates listed in Paragraphs 5 – 11, but deny the Secretary's statements to the extent that they claim that a proper review of the sufficiency of North Dakota's conflict of interest provisions took place.

5. Plaintiffs deny the statement at Paragraph 12 to the extent that the Secretary is arguing the sufficiency of OSM's investigation.

6. Plaintiffs do not dispute that the documents referenced at Paragraph 13, OSM000237-238, reference consideration of a referral to the Department of the Interior's Office of Inspector General.

7. Plaintiffs do not dispute the statements at Paragraphs 14 – 16.

8. Plaintiffs lack any knowledge of and so deny the Secretary's statement at Paragraph 17 that OSM's investigation is ongoing. Plaintiffs have no knowledge of any such investigation and OSM has offered no evidence of its existence.

II. Reply to NDPSC's Statement of Undisputed Facts

Plaintiffs do not dispute NDPSC's statements at Paragraphs 1 – 5.

LEGAL BACKGROUND

I. SMCRA and Its Implementing Regulations

A. Statutory Background

The Secretary incorrectly cites 30 U.S.C. § 1271(b)(state enforcement) and § 1254(b) as the only relevant sources of the Secretary's duty to implement a Federal program for an insufficiently stringent State program, ignoring the mandatory language of 30 U.S.C.§ 1254(a). DRC and Sierra Club have not made an enforcement claim, but have petitioned the court for an order to compel compliance with the Secretary's administrative duty under 30 U.S.C. § 1254(a). Section 1254 must be read in its entirety, or the Secretary's administrative duties under SMCRA, as well as the citizen suit provision, become nullities. "In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194 (1991) (citing *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817-18, 100 L.Ed.2d 313 (1988)).

SMCRA Section 504(a) (30 U.S.C. § 1254(a)) states:

> The Secretary shall prepare and, subject to the provisions of this section, promulgate and implement a Federal program for a State no later than thirty-four months after August 3, 1977, if such State – … (3) fails to implement, enforce, or maintain its approved State program as provided for in this chapter.

Under §1254(a), the Secretary has a mandatory, non-discretionary duty to prepare, promulgate, and implement a federal program where the state fails to "implement, enforce, or maintain its approved State program as provided for in this chapter." The Secretary does not attempt to rebut DRC's claim that § 1254(a) creates a mandatory, non-discretionary administrative duty.

Section 1254(b) provides the Secretary with the option of substituting federal enforcement for state enforcement where the state "is not enforcing any part of such program", but DRC and Sierra Club do not make such an argument and have never invoked § 1254(b) or 1271(b) as the bases for the Secretary's mandatory, non-discretionary duty. The Secretary seems to believe that DRC and Sierra Club seek "[d]irect intervention by the Secretary in the operation of state regulatory programs," an incorrect reading of the Complaint and Plaintiffs' memorandum in support of motion for summary judgment. Doc. No. 32 at 14. The Secretary's discussion of enforcement sections of SMCRA is no defense to DRC and Sierra Club's action to compel compliance with a separate mandatory administrative duty under SMCRA. The Secretary has therefore failed to present a defense for her failure to act on the § 1254(a) duty.

B. Regulatory Background

To support an argument that no mandatory duty exists in this matter, the Secretary relies on procedural regulations requiring the Director of the Office of Surface Mining ("Director") to take certain steps prior to substituting federal enforcement for state enforcement or withdrawing approval of a state program. Doc. No. 32, Secretary's Response Brief at 15, citing 30 C.F.R. Part 733. These regulations refer back to 30 U.S.C. § 1271, regarding state enforcement, and are not applicable to the mandatory duty standard under § 1254(a). In addition, the fact that the Secretary has some discretion in regulations directing how to perform the steps of a process rendered mandatory and non-discretionary by 30 U.S.C. § 1254(a), does not relieve the Secretary

of the duty itself. It is no defense to the failure to perform a mandatory, non-discretionary duty to argue that the Secretary has not performed the steps mandated by regulations as part of that duty, regardless of how much discretion exists in those steps. The duty remains. "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett v. Spear*, 520 U.S. 154, 172, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (hereinafter *Bennett*).

The "date-certain" deadline rule developed through a series of cases in which courts attempted to determine the timeline in which a mandatory duty must be performed. *See Raymond Proffitt Foundation v. U.S.E.P.A.*, 930 F.Supp. 1088, 1098-99 (E.D. Penn. 1996) (hereinafter *Raymond*)(discussing development of the rule, which the *Raymond* court declined to follow). The Eighth Circuit has made little use of this rule. In any event, Plaintiffs rely on 30 U.S.C. § 1254, which includes an explicit deadline for action by the Secretary.

C. Prohibited Financial Interests Under SMCRA

Defendants' position that North Dakota's conflict of interest rules are as stringent as SMCRA is unsupported by a direct comparison of North Dakota's statutes and regulations to SMCRA's, with recourse to the federal legislative history. Defendants would have this court rule that the language at 30 C.F.R. § 705.18 barring financial contributions from regulated coal companies to state regulators does not extend to contributions by coal company owners, officers, spouses and political action committees ("PACs") to state regulators' political campaigns. This argument ignores the plain language of the regulation:

> (a) Except as provided in paragraph (b) of this section, employees shall not solicit or accept, *directly or indirectly*, any gift, gratuity, favor, entertainment, loan or any other thing of monetary value, from a coal company which:
> (1) Conducts or is seeking to conduct, operations or activities that are regulated by the State Regulatory Authority; or

> (2) Has interests that may be substantially affected by the performance or non-performance of the employee's official duty.

(emphasis added). Defendants may be able to argue that South Heart Coal, for example, did not *directly* make gifts out of its corporate coffers to the Commissioners' private bank accounts, but it offends reason to argue that South Heart Coal did not make a prohibited gift through the *indirect* means of South Heart Coal owners, officers, spouses, and PACs funded and controlled by regulated coal companies making large donations to the commissioners' campaign funds.

If the word "indirectly" in the regulation is to have any significance, it must encompass the campaign contributions. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 543 U.S. 19, 31, 122 S.Ct. 441, 449 (2001) (citing *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)). "In determining the scope of a statute, we look first to its language." *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981). The regulatory language supports DRC and Sierra Club's claim. The fact that the Commissioners have discovered a novel way to accept financial contributions from coal companies does not undermine or weaken the SMCRA regulation they have violated in so doing – nor does it make the now-apparent inadequacy of the North Dakota program any less serious.

To the extent that the Obama Department of Justice is arguing – incredibly, given the administration's public position on campaign finance reform – that SMCRA's ban on financial contributions by coal companies to surface mining regulators may constitute a First Amendment violation where it applies to campaign contributions, Plaintiffs reply that the Second Circuit recently ruled favorably on the constitutionality of a similar restriction. Doc. No. 32 at 38; *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2010)(upholding a ban on campaign

contributions by state contractors, prospective contractors, and related individuals to candidates for state office). State courts have also upheld a range of contributions limits applicable to certain highly-regulated industries that are deemed to pose a greater threat of political corruption. *See, e.g.*, *Casino Ass'n of La. v. State ex rel. Foster*, 820 So.2d 494 (La. 2002) (rejecting arguments that a state law prohibiting any political contributions from any officer, director, or certain employees in the casino industry, or the spouse of any of the foregoing was unconstitutionally broad); *Soto v. New Jersey*, 565 A.2d 1088 (N.J. 1989) (upholding similar prohibition on casino-industry contributions); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61 (Ill. 1976) (rejecting arguments that a state law prohibiting any political contributions from any officer, associate, agent, representative, or employee of a liquor licensee was unconstitutionally broad).

What is more, SMCRA's whole legislative scheme and history militate against an interpretation that would subvert the conflict of interest standards by restricting the gift ban only to gifts made directly from a coal company's funds to the personal account of a regulatory employee. Coal companies could effortlessly evade such a toothless standard, an outcome SMCRA's drafters took pains to avoid. "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990). The House and Senate reports underlying SMCRA emphasize the importance of holding surface mining regulators to the highest ethical standards, barring them from accepting all but the most insignificant tokens from regulated entities. *See* 42 Fed.Reg. 56060 (Oct. 20, 1977). Congress also took a broad view of what might constitute an "indirect financial interest":

> Gifts from a coal mine operator to a State or Federal employee performing functions or duties under the Act may, if accepted, create an indirect financial interest.

42 Fed. Reg. 56062 (Oct. 20, 1977). This broad concept of an indirect financial interest was the basis for the ban on gifts and gratuities.

Briefing already submitted by DRC establishes that OSM required several changes to North Dakota's state program at the time of original approval to expand the scope of the conflict of interest rule to include individuals such as consultants from the gift ban. Doc. No. 28 at 17-18; *see* 30 C.F.R. § 705.5 and 705.18. The Secretary now argues against OSM's own earlier broad reading of the rule yet offers no previous agency interpretation of 30 C.F.R. § 705.18 that would support the unreasonably narrow reading she now urges upon the Court. Other than OSM's original expansion of North Dakota's conflict of interest provisions in the early 1980s, the agency has produced no "reasoned and consistent view" on the scope of the financial contributions ban, merely a convenient litigating position that deserves no deference. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988)(agency counsel's interpretation of a statute will not be given deference where the agency itself has articulated no position on the question). To the contrary, OSM originally endorsed a very broad reading through a deliberative process. It is that process to which this Court should defer.

The legislative and rulemaking history firmly supports DRC and Sierra Club's position. OSM's statement upon publication of 30 C.F.R. §§ 705 and § 706 emphasizes the "clear Congressional intent that affected employees maintain the highest standards of honesty, integrity and impartiality to avoid even the appearance of conflict of interest." 42 Fed.Reg. 56060 (Oct. 20, 1977). Referring to 30 C.F.R. § 705.18(a), the Secretary acknowledges that "OSM added this regulatory section 'to help ensure that State and Federal regulatory officials do not obtain an indirect financial interest in a coal mining operation by receiving a gift from a coal mine

operator.' 42 Fed. Reg. 56,060, 56,063 (Oct. 20, 1977)." Doc. No. 32 at 17-18. A coal mining operation "[m]eans the business of developing, producing, preparing or loading bituminous coal, subbituminous coal, anthracite, or lignite, or of reclaiming the areas upon which such activities occur." 30 C.F.R. § 705.5. This is precisely the business of the campaign contributors at issue here. The words coal mine operator, in their every day meaning, would easily include owners, officers, employees, agents and representatives of coal companies. These are the people who operate the coal mining facility. The regulatory language and legislative history plainly envision a prohibition on financial contributions from individuals associated with coal mining operations, for the purpose of upholding the highest ethical standards among regulators. *See, e.g.*, 42 Fed. Reg. 56060 (Oct. 20, 1977).

II. Standard of Decision

A. The Administrative Procedure Act Standard of Decision Does Not Apply

The Secretary attempts at every opportunity to turn this into an APA claim for judicial review. It is not. Contrary to the Secretary's assertion, DRC and Sierra Club do not and never have "assert(ed) that they seek judicial review pursuant to the citizen suit provision of SMCRA". Doc. No. 32 at 19. The phrase "judicial review" appears in neither the Complaint nor in DRC's brief in support of its motion for summary judgment in the matter, for the simple reason that this is an action to compel, similar to a mandamus action, not a suit for judicial review. Doc. Nos. 1 and 28.

The Secretary invokes the decisions in *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), and *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)("SUWA"), which involved the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* ("FDCA"), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500-596, respectively. Neither of these

statutes contains a provision similar to 30 U.S.C. § 1270(a)(2), expressly authorizing citizens to bring a civil action to compel a specific federal official to perform any non-discretionary duty that a specific regulatory statute imposes. *Cf.* 21 U.S.C. § 337 (authorizing States, but not citizens, to bring injunction actions to compel regulated entities, but not federal officials, to comply with the FDCA). The APA, lacking any citizen suit language, and its interpreting case law have no authority as a basis for the SMCRA citizen suit standard of decision.

The Secretary also invokes *Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998)("*Newton Cnty.*"), for the proposition that citizen suits must be evaluated based only on the administrative record, using an APA standard of decision. The comparison to DRC and Sierra Club's action to compel is inapposite. At the district court, the *Newton Cnty.* plaintiffs sought judicial review under the APA of a final agency administrative action under the National Forest Management Act. *Newton Cnty. Wildlife Ass'n v. Rogers*, 948 F.Supp. 50 (E.D. Arkansas 1996). While the Endangered Species Act and Clean Water Act do authorize citizen suits to compel mandatory administrative duties, the *Newton Cnty.* plaintiffs never invoked those statutory powers. Indeed, the ESA and CWA arguments appeared for the first time at the appellate level, as a justification for allowing evidence outside the administrative record. *Newton Cnty.* in fact has nothing to do with the type of claim now before this Court: an action to compel.

The Secretary's prime examples in support of the contention that the APA must apply to all citizen suit claims, *Sierra Club v. Whitman*, 268 F.3d 898, 902 (9th Cir. 2001), and *Sierra Club v. Jackson*, 724 F.Supp.2d 33 (D.D.C. 2010), are easily distinguished as enforcement cases dealing with agency decisions on how to handle alleged regulatory violations, not actions to compel performance of a mandatory duty. In *Bennett v. Spears*, the Supreme Court distinguished

between Endangered Species Act citizen suit and APA claims brought by the same plaintiff, rather than grouping them together under APA review, which would have been the logical course of action if the Secretary's position were correct. *Bennett*, 520 U.S. at 1165-66.

DRC and Sierra Club seeks an order to compel the Secretary to perform a mandatory administrative duty, not judicial review of an enforcement decision. *Chevron* analysis is not appropriate here because DRC and Sierra Club does not ask the court to determine whether it should defer to the Secretary's interpretation of SMCRA, but to determine whether, objectively, the statute creates a mandatory duty that the Secretary has not performed. *See Our Children's Earth Foundation v. U.S. E.P.A.*, 527 F.3d 842, 851 (9th Cir. 2008) (hereinafter "*Children's Earth*"); *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). DRC brings the simple claim that SMCRA requires the Secretary to take action to correct insufficiently stringent implementation of North Dakota's surface mining program with regard to financial contributions from coal mine operators to state regulators. To respond to this action, the Court need only read the statute and decide whether North Dakota's surface mining conflict of interest rules are less stringent than SMCRA, such that the Secretary has a duty to act. If so, then DRC and Sierra Club's motion for summary judgment should be granted and an order to compel issued.

The leap to arguing that under an APA standard of decision, decisions to investigate or enforce are discretionary and therefore not judicially reviewable, is unjustified by the Secretary's original flawed argument for applying an APA standard of decision, and therefore moot. Because the APA is a statute governing the judicial review process and this is not an action for judicial review, the APA standard of decision does not apply. Other courts have made clear than a citizen suit to compel action with a mandatory, non-discretionary duty is not subject to an APA

standard of review. Rather, the court's responsibility is straightforward statutory interpretation. *See, e.g.*, *Raymond*, 930 F.Supp. at 1097.

B. Standard of Decision for a Citizen Suit to Compel a Mandatory Agency Duty

Congress would not have created citizen suits to do the same thing as judicial review, because that would be duplicative. The canon of statutory construction has long held that statutes should be read to have independent meaning. "It is the 'cardinal principle of statutory construction' … [that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute'… rather than to emasculate an entire section.'" *Bennett*, 520 U.S. at 173. The applicable standard of decision for this suit to compel compliance is straightforward statutory construction.

To determine whether a citizen suit to compel in fact challenges non-discretionary agency duties, the court's "point of reference is the statute itself." *See Children's Earth*, 527 F.3d at 847. The use of "shall" at 30 U.S.C. § 1254(a) is of central importance. "When Congress specifies an obligation and uses the word 'shall,' this denomination usually connotes a mandatory command." *Id.* (citing *Alabama v. Bozeman*, 533 U.S. 146, 153, 121 S.Ct. 2079, 150 L.Ed.2d 188 (2001)). A Clean Water Act suit to compel agency action "must point to a nondiscretionary duty that is 'readily ascertainable' and not 'only the product of a set of inferences based on the overall statutory scheme.'" *Id.* at 851. DRC relies on just such a readily ascertainable duty, complete with a date certain for the Secretary to act.

ARGUMENT

I. Plaintiffs' Claim Addresses a Mandatory Administrative Duty, Not an Enforcement Action

DRC and Sierra Club do not seek prosecution of a SMCRA violation, so the Secretary's arguments regarding enforcement actions are moot. SMCRA Sections 504(b) and 521 (30 U.S.C. §§ 1254(b) and 1271), which the Secretary references repeatedly, relate explicitly and exclusively to enforcement actions and do not alter the Secretary's mandatory duty under 30 U.S.C. § 1254(a). The North Dakota program is both drafted and implemented in such a way that financial contributions are allowed in North Dakota that are banned under the plain language of SMCRA. The Secretary's own briefing expresses the intent to take no further action to remedy the situation. This is not an enforcement issue but a question of the Secretary's administrative oversight duty to ensure full program stringency. In this situation, DRC's only remedy is to invoke the Secretary's duty to replace the flawed State program in whole or part with a federal program.

The significance of the agency's administrative record and the supplemental documents filed by DRC is to establish that North Dakota is implementing the state program in an insufficiently stringent way and that OSM refuses to perform a mandatory, non-discretionary duty to correct the situation, such that there is a live case and controversy before this Court. DRC does not argue that OSM or the Secretary should enforce SMCRA directly upon violators of the state program, but that the Secretary has an administrative duty to correct an insufficiently stringent portion of the state program and has failed to do so. If the Secretary is arguing that enforcement is OSM's only power with regard to conflict of interest program inadequacies under SMCRA, then the Secretary implies that the rest of the language of 30 U.S.C. § 1254, creating an administrative duty to replace a faulty program, has no meaning.

Further, the Secretary's assertion that OSM's only investigative duty in the face of DRC's complaint was to "(assess) the information made available by Plaintiffs concerning the campaign

contributions" abdicates the agency's duty to make a full investigation of alleged inadequacies in a state SMCRA program. Nowhere does SMCRA create in citizen complainants a duty to present a complete analysis and an exhaustive set of facts in support of a complaint, such that OSM's only investigative duty is to review the record submitted by the complainant. The Secretary's argument would nullify the agency's administrative responsibility to ensure the full stringency of state programs, pushing it off onto affected citizens. SMCRA's legislative history makes clear that citizen suits are to function to keep federal administrators "on their toes" and ensure that regulatory agencies comply fully with SMCRA. SEN. REP. NO. 95-128, at 854 (1977).

II. This Court Has Subject Matter Jurisdiction Over DRC's Citizen Suit to Compel a Mandatory Agency Duty

A. SMCRA Creates Subject Matter Jurisdiction in the Federal District Courts Over Citizen Suit Challenges to the Secretary's Failure to Perform a Mandatory, Non-Discretionary Duty

This court has jurisdiction pursuant to 30 U.S.C. § 1270 and 28 U.S.C. § 1331. Under SMCRA's citizen-suit provision,

> any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter – (2) against the Secretary… where there is alleged a failure of… the Secretary… to perform any act or duty under this chapter which is not discretionary with the Secretary….

30 U.S.C. § 1270(a). Specifically, DRC relies upon 30 U.S.C. § 1254(a), which states that the Secretary "*shall* prepare…, promulgate and implement a Federal program for a State…, if such State… (3) fails to implement, enforce, or maintain its approved State program as provided for in this chapter" (emphasis added), and upon 30 U.S.C. § 1255(a):

> No state law or regulation in effect on August 3, 1977, or which may become effective thereafter, shall be superseded by any provision of this chapter or any regulation issued

> pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this chapter.

DRC alleges that North Dakota's surface mining conflict of interest provisions are inconsistent with, and less stringent than, SMCRA and its implementing regulations, and that the Secretary has a mandatory duty under § 1254(a) to remedy this inconsistency. The plain language of 30 U.S.C. § 1270 grants this court subject-matter jurisdiction over DRC's citizen suit claim alleging that the Secretary failed to perform a mandatory duty. 30 U.S.C. § 1270. Other federal district courts have already established that subject-matter jurisdiction exists in a citizen suit to compel action based on alleged agency failure to perform a mandatory duty. *See, e.g., Raymond*, 930 F.Supp. at 1097.

B. NDPSC's Standing Arguments Lack Merit

NDPSC relies upon an inaccurate statement of the standing requirements for a SMCRA citizen suit in its attack upon DRC and Sierra Club's standing affidavits. The standing language in SMCRA's citizen suit clause states that "any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance…." 30 U.S.C. § 1270. The Supreme Court has summed up the Article III standing test as requiring the party invoking the court's authority to:

> show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision….

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 758 (1982)(internal citations omitted). The current flaws in North Dakota's conflict of interest provisions may at any point deprive affiants of protected interests under SMCRA. Already the affiants find themselves unprotected, in a live NDPSC docket, by the full stringency of SMCRA's conflict of interest provisions due to the Secretary's

failure to act. There is also present harm to Plaintiffs in the need to track Commissioners' campaign contributions to determine if operators of regulated coal mining operations are making financial contributions that may be affecting NDPSC's deliberations, a duty that should fall on those responsible for ethics oversight, not Plaintiffs.

The affidavits make the case that the affiants rely on vigorous, full administration of the state program to protect their interests. Allowing surface mining regulators to accept large campaign contributions from coal mine owners and operators creates a serious threat of industry corrupting regulators, to the detriment of Plaintiffs, including affiants and others similarly situated in North Dakota, and in violation of the plainly stated goals of SMCRA's conflict of interest provisions.

DRC and Sierra Club have provided affidavits establishing a non-speculative, real threat to a protected interest. NDPSC's jurisdictional decisions and the pending surface mining permit decision for South Heart are only examples of the type of harm that the affiants, and members of the organizations representing them, stand to suffer if North Dakota's program inadequacies are not remedied. The affidavits date from the filing of the original complaint, so NDPSC argues incorrectly that Plaintiffs have any procedural error to "cure." Doc. Nos. 28-2, 28-3, 28-4. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571, 112 S.Ct. 2130, 2141-42 (1992) (existence of federal jurisdiction ordinarily depends upon facts as they exist when the complaint is filed).

There is, as the standing test requires, a non-speculative, real threat to the affiants' protected interests. The South Heart Coal application and jurisdictional decisions described in DRC and Sierra Club's motion for summary judgment are only examples, but good ones. The specter of regulators accepting tens of thousands of dollars from the owners of a coal company with a live application before the decision-making body offends the fundamentals of SMCRA's ethics

standards, and certainly represents a concrete, particularized, actual and imminent threat to Plaintiff's protected interests. Neither SMCRA nor Article III would require Plaintiffs to wait until the South Heart mine is operational to challenge the inadequacy in the state program. The inadequacy exists now and Plaintiffs have every right to seek redress. NDPSC wanders far afield from these basic standing issues, attempting to argue that the merits of the South Heart mine permit application are somehow contested here. Doc. No. 34-1 at 25. What Plaintiffs seek is a North Dakota surface mining regulatory commission untainted by financial contributions banned under SMCRA. This relief is well within the Court's power.

III. The Secretary Has a Mandatory, Non-Discretionary Duty to Act

The Secretary wrongly relies on 30 U.S.C. § 1254(b) to support her contention that she has no mandatory, non-discretionary duty to replace all or part of an insufficiently stringent state program with a federal program, when § 1254(a) plainly creates the administrative duty. Section 1254(b) relates to enforcement, a subcategory of the Secretary's broader duty to ensure that the State program is implemented, enforced, and maintained as SMCRA requires. The discretionary action available at § 1254(b) does not erase the mandatory, non-discretionary duty at § 1254(a). The Supreme Court has held repeatedly that the use of "shall" in a statute is "mandatory language." *United States v. Monsanto*, 491 U.S. 600, 607, 109 S.Ct. 2657, 2662, 105 L.Ed.2d 512 (1989); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 n. 15, 101 S.Ct. 1437, 1444 n. 15, 67 L.Ed.2d 641 (1981).

The need for some factual investigation to determine that a state's program is inadequately stringent in whole or in part does not automatically or uniformly make the Secretary's duty to act discretionary, or a matter of agency statutory interpretation deserving of *Chevron* deference. The facts that the Commissioners have accepted campaign contributions from coal mine operators

and that the state has defended the Commissioners' actions as consistent with the state program are central to Plaintiffs' case. However, the need to establish these objective facts does not relieve the Secretary of the duty to act to correct the program's inadequacy. Determining that North Dakota is allowing its surface mining regulators to accept gifts from coal mine operators that may create an indirect financial interest in coal mining operations is not an exercise of discretion or statutory interpretation.

IV. The Secretary's Actions Are Insufficient to Satisfy the Statutory Mandate

The Secretary's argument regarding the Commissioners' financial disclosure statements and other elements of the state program related to direct and indirect financial interests does not establish the Secretary's compliance with SMCRA duties, the subject of this litigation. State filings cannot satisfy the Secretary's duty to correct a flawed state program. Further, the disclosure statements filed by the Commissioners with OSM, while intended to "ensure compliance with Section 517(g)" of SMCRA, require only disclosure of direct and indirect financial interests, apparently as determined by the person filling out the form. 30 U.S.C. § 1267(g), Doc. No. 32 at 18. The form does not solicit, nor have the Commissioners ever provided to OSM, information about financial contributions by coal mine operators to the Commissioners in any form, political campaigns or otherwise. The regulations were enacted with the intention of preventing "an indirect financial interest" that "gifts from a coal mine operator to a State or Federal employee performing functions or duties under the Act" may create. 42 Fed. Reg. 56,060 (Oct. 20, 1977). However, the Secretary refuses even to engage the question presented by Plaintiffs: whether the campaign contributions violate SMCRA's ban on gifts and gratuities, thereby demonstrating the inadequacy of North Dakota's approved program.

As DRC and Sierra Club showed in their memorandum in support of their motion for summary judgment, the definition of employee in North Dakota's state surface mining program explicitly exempts the Commissioners, with the effect that language restricting employees' financial interests and gift acceptance does not apply to the Commissioners. Doc. No. 28 at 13-14. Yet the Secretary seems to consider this situation – the crux of DRC and Sierra Club's claim – a non-issue, never addressing it directly in the briefing. At no point in the rulemaking history is there any indication that OSM intended to allow North Dakota to exempt the Commissioners from conflict of interest provisions. It is flatly inconsistent with SMCRA for OSM to allow North Dakota to exempt the Commissioners themselves – the individuals with final decisionmaking authority on state surface mining program implementation and enforcement – from the ban on gifts and gratuities.

NDPSC *does* address the exemption of the Commissioners from North Dakota's definition of employee. In so doing, NDPSC in essence concedes Plaintiffs' case by stating that "the definition of employee under the ND program does not include the publicly elected Commissioners," then going on to argue that this doesn't matter because the Commissioners are included in SMCRA's definition of employee at 30 C.F.R. § 705.5. Doc. No. 34-1 at 2. Elsewhere in its brief, NDPSC points out that, through adoption of an OSM-approved state program, states receive primacy over the regulation of exploration and surface coal mining operations. *Id.* at 1, 3-5. Because North Dakota has primacy, the federal regulations drop out and are not applicable to the operation of the state program, except for OSM's oversight responsibilities, including ensuring the full stringency of the state program. *See generally* 30 U.S.C. § 1253 and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268-69 (1981). NDPSC concedes that North Dakota's conflict of interest rules for employees exclude

the Commissioners, which is precisely Plaintiffs' argument. But NDPSC misses the critical point that SMCRA's employee definition cannot act legally to cure the inadequacy in North Dakota's definition, because North Dakota has primacy. North Dakota refuses to acknowledge the inadequacy and OSM has failed to act. The only remedy available to Plaintiffs is this citizen action to compel the Secretary to perform her mandatory duty to cure the inadequate state program provisions via the remedies required by 30 U.S.C. § 1254(a).

V. The Secretary Fails to Respond to DRC's Argument That 30 U.S.C. § 1254(a) Provides the Basis for the Secretary's Mandatory Duty

At no point does the Secretary directly respond to DRC and Sierra Club's central argument that 30 U.S.C. § 1254(a) creates a mandatory duty in the Secretary to implement a federal program where the state program is not implemented, maintained, or enforced as SMCRA requires.

CONCLUSION

The Secretary's failure to perform a mandatory, non-discretionary duty to substitute partial or full Federal enforcement for North Dakota's surface mining program, or to withdraw partial or full approval of the North Dakota surface mining program, until the state can bring its conflict of interest provisions into consistency and compliance with SMCRA, is an actionable breach of federal law, sufficient to justify summary judgment in favor of Plaintiffs and an order to compel compliance.

Respectfully submitted this 13th day of May, 2013.

/s/ Carrie La Seur
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CERTIFICATE OF SERVICE

I certify that on the 13th day of May, 2013, Baumstark Braaten Law Partners served copies of the attached document by CM/ECF as follows:

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