

forth below, the Plaintiffs' motion is denied, the Defendant's motion is granted, and the Intervenor-Defendant's motion is granted.

I. BACKGROUND

On May 30, 2012, the Plaintiffs initiated a citizens' suit under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328. The Plaintiffs assert the North Dakota Public Service Commission (“PSC”) has a conflict of interest regarding enforcement of SMCRA in North Dakota because two of its Commissioners have accepted political campaign contributions directly or indirectly from entities the PSC regulates. The Plaintiffs seek an order compelling the United States Secretary of the Interior to withdraw approval of North Dakota's federally approved program for exclusive regulation of all surface coal mining activities on all non-federal and non-tribal lands in North Dakota.

A. SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

Congress enacted the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (“SMCRA”), to provide for the comprehensive regulation of surface coal mining and the reclamation of mined lands on all non-federal and non-tribal lands. See 30 U.S.C. §§ 1202, 1300. In 1979, the United States Department of Interior's Office of Surface Mining Reclamation and Enforcement (“OSM”) promulgated regulations to “establish the procedures through which the Secretary of the Interior will implement the Surface Mining Control and Reclamation Act of 1977” (hereinafter “SMCRA Regulations”). 30 C.F.R. § 700.1. The SMCRA regulatory scheme is based on state primacy, reflecting Congress's recognition that “because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject

to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations . . . should rest with the States.” 30 U.S.C. § 1201(f). After an initial period of direct regulation by the Department of the Interior, primary responsibility for the supervision of mining and reclamation activities is to be delegated to the individual states.

SMCRA created “a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs.” Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 289 (1981). This transfer of authority takes place when a state submits an acceptable regulatory program that is approved by the Secretary of the Interior. Under Section 503(a) of SMCRA, 30 U.S.C. § 1253(a), the state program must demonstrate that the “State has the capability of carrying out the provisions of this chapter and meeting its purpose through . . . a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter” Under Section 503(b), 30 U.S.C. § 1253(b), the Secretary may not approve any state program “until he has . . . found that the State has the legal authority and qualified personnel necessary for the enforcement of the environmental protection standards.” The accompanying regulations restate that the Secretary shall not approve a program unless it “provides for the State to carry out the provisions and purposes of the Act” and does not contain laws or regulations which would interfere with the Act. See 30 C.F.R. § 732.15.

Once a state achieves “primacy” under SMCRA, a “State regulatory authority,” under 30 U.S.C. § 1291(26), assumes the exclusive enforcement authority over the surface coal mining operations on its non-federal and non-tribal lands by submitting a permanent regulatory program for review and approval by the Secretary of the Interior. See 30 U.S.C. § 1253; Hodel, 452 U.S.

at 271. The program approval process requires an extensive review by OSM and the solicitation and consideration of comments on the proposed program from other agencies and the general public. See 30 U.S.C. § 1201(a)-(c). SMCRA requires any State program to meet two principal criteria: (1) the minimum SMCRA federal standards must be implemented as State law; and (2) the State has the capability to enforce the law. See 30 U.S.C. § 1253.

Once a state program has been approved, the state, not OSM, has the primary responsibility for all aspects of enforcing the regulatory program. SMCRA “does not provide for concurrent jurisdiction in the states and federal government” once a state’s program is approved by the Secretary of the Interior. Haydo v. Amerikohl Mining, Inc., 830 F.2d 494, 497 (3d Cir. 1987); Bragg v. W. Va. Coal Ass’n, 248 F.3d 275, 288-89 (4th Cir. 2001); Coteau Props. Co. v. Dep’t of Interior, 53 F.3d 1466, 1469 (8th Cir. 1995). When a state has primacy, OSM’s role is limited to monitoring the state program, which involves occasional on-site inspections “to evaluate the administration of approved State programs.” 30 U.S.C. § 1267(a). Based on those inspections, OSM may alert the state to possible violations of SMCRA, which triggers a regulatory enforcement review process.

In 1979, the Legislative Assembly of North Dakota repealed its former reclamation statute and enacted new coal mining and reclamation statutes to incorporate SMCRA’s minimum federal standards into state law. Pursuant to 30 U.S.C. § 1253(a)(1), this is the requisite first step to obtaining exclusive enforcement responsibility under SMCRA. See generally N.D.C.C. ch. 38-14.1-01. On February 29, 1980, North Dakota submitted its plan for implementing SMCRA to the Secretary of the Interior for approval. On December 15, 1980, the plan was approved. See 45 Fed. Reg. 82, 214 (Dec. 15, 1980) (codified at 30 C.F.R. pt. 934); see also 30 C.F.R. § 934.10. Since the Secretary’s approval of the North Dakota Program in 1980, the PSC has maintained

exclusive authority over surface coal mining and reclamation on its non-federal and non-tribal lands. See N.D.C.C. § 38-14.1-02(4); 30 C.F.R. pt. 934.

B. PROHIBITED FINANCIAL INTERESTS UNDER SMCRA

For a state to become the primary regulatory authority for all or part of its surface coal mining and reclamation operations, the approved program must also include policies and procedures regarding conflict of interest concerns. See 30 C.F.R. § 705.1. Section 517(g) of SMCRA provides “[n]o employee of the State regulatory authority performing any function or duty under [SMCRA] shall have a direct or indirect financial interest in any underground or surface coal mining operation” 30 U.S.C. § 1267(g). The Secretary of the Interior is authorized “to establish methods by which the provisions of this subsection will be monitored and enforced” by the Secretary and the state regulatory authority. See 30 C.F.R. pt. 705. North Dakota’s approved program contains a similar prohibition. N.D.C.C. § 38-14.1-38 (“No employee of the commission performing any function or duty under this chapter may have a direct or indirect financial interest in any underground or surface coal mining operation”).

Although SMCRA does not define “a direct or indirect financial interest[,]” OSM has promulgated regulations that define such interests. Specifically, the restrictions on financial interests of state employees provides the following definitions:

Direct financial interest. Means ownership or part ownership by an employee of lands, stocks, bonds, debentures, warrants, partnership shares, or other holdings and also means any other arrangement where the employee may benefit from his or her holding in or salary from coal mining operations. Direct financial interests include employment, pensions, creditor, real property and other financial relationships.

...

Indirect financial interest. Means the same financial relationships as for direct ownership, but where the employee reaps the benefits of such interests, including interests held by his or her spouse, minor child and other relatives, including in-laws, residing in the employee's home. The employee will not be deemed to have an indirect financial interest if there is no relationship between the employee's functions or duties and the coal mining operation in which the spouse, minor children or other resident relatives hold a financial interest.

30 C.F.R. § 705.5 (emphasis added). Similarly, included within the laws and regulations comprising the North Dakota Program are the PSC's "Restrictions on Financial Interests of Employees." See N.D. Admin. Code art. 69-05.2-02. OSM and the approved North Dakota Program define any direct or indirect financial interest in a surface coal mining operation as a "prohibited financial interest." Id.; see also 30 C.F.R. § 705.5.

The regulations on financial interests also address gifts and gratuities from coal companies.

See 30 C.F.R. § 705.18. The federal regulations state, in part:

- (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.

30 C.F.R. § 705.18 (emphasis added). Although not specifically considered within the regulatory definition of a direct or indirect financial interest, 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." Monitoring and Enforcing Restrictions of Financial Interests of State and Federal Employees Performing Functions or Duties Under Surface Mining Control and Reclamation Act of 1977, 42 Fed. Reg. 56,060, 56,063 (Oct. 20, 1977). Consistent with SMCRA and its implementing regulations, the North Dakota Program prohibits employees of the PSC from accepting gifts or anything of monetary value from coal

companies or coal mining operations, except as permitted by law. See N.D. Admin. Code § 69-05.2-02-06. Both SMCRA and the North Dakota Program exempt from the definition of “gift” such items of nominal value, including food and refreshments. See id.; see also 30 C.F.R. § 705.18(b)(1)-(2). For purposes of the above-defined prohibitions, an “employee” is defined in relevant part as “(a) any person employed by the State Regulatory Authority who performs any function or duty under the Act, and (b) advisory board or commission members and consultants who perform any function or duty under the Act, if they perform decisionmaking functions for the State Regulatory Authority under the authority of State law or regulations.” 30 C.F.R. § 705.5.

The decision to withdraw or regulate a state program is left to the OSM and the Secretary of the Interior. If OSM finds that a state has not established its competence or commitment to administer the state program, the Director shall either—

- (1) Substitute for the state regulatory authority direct Federal enforcement of all or part of the state program in accordance with paragraph (f) of this section; or
- (2) Recommend to the Secretary that he or she withdraw approval of the State program, in whole or in part, in accordance with paragraph (g) of this section. The recommendation shall be accompanied by all relevant information and shall include the reasons for the recommendation.

30 C.F.R. § 733.12(e).

On March 26, 2012, the Plaintiffs notified the Secretary of the Interior of their intent to file a federal civil lawsuit pursuant to SMCRA’s citizen suit provision, 30 U.S.C. § 1270(a)(2). The complaint was filed on May 30, 2012. See Docket No. 1. The complaint alleges the Secretary has engaged in a pattern and practice of violating the mandatory, non-discretionary duty to substitute a Federal surface mining program for that of any state that “fails to implement, enforce, or maintain its approved State program” as provided for under SMCRA, 30 U.S.C. § 1254. See Docket No. 1, p. 17. Specifically, the complaint alleges North Dakota’s implementation of the conflict of interest

statutes and regulations under the state surface mining program is inconsistent on its face with SMCRA conflict of interest rules promulgated under the authority of 30 U.S.C. § 1267(g). The Plaintiffs ask the Court to: 1) provide declaratory relief stating the Secretary has knowingly violated and continues to violate SMCRA and its implementing federal regulations; 2) compel the Secretary to withdraw approval of North Dakota's surface mining regulatory program and substitute Federal enforcement and implementation until the North Dakota program can be made consistent with SMCRA; 3) award Plaintiffs their costs and expenses; and 4) grant all other relief as necessary. See Docket No. 1, pp. 18-19.

II. STANDARD OF REVIEW

A. ADMINISTRATIVE PROCEDURE ACT

The Plaintiff seeks judicial review pursuant to the citizen suit provision of SMCRA, 30 U.S.C. § 1270. The Administrative Procedure Act ("APA") should be used to guide a court where another federal statute, such as SMCRA, authorizes judicial review but does not provide standards for review. See *Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998); *Sierra Club v. Glickman*, 67 F.3d 90, 96 (5th Cir. 1995). However, the APA only provides for judicial review in cases where an agency has allegedly failed to act, such as pursuant to a mandatory, non-discretionary duty. See 5 U.S.C. § 706(1). A claim under this provision can only proceed "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original); accord *Saini v. Heinauer*, 552 F. Supp. 2d 974, 977 (D. Neb. 2008).

When judicial review is allowed, the APA specifies that agency action, including an alleged failure to act, may be overturned only where it is found to be "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); Gatewood v. Outlaw, 560 F.3d 843, 846 (8th Cir. 2009). The standard of review of an agency action under 5 U.S.C. § 702 of the APA is “highly deferential.” Nw. Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1317 (8th Cir. 1981); Ranchers Cattlemen Action Legal Fund v. U.S. Dep’t of Agric., 566 F. Supp. 2d 995, 997 (D.S.D. 2008). This standard of review forbids a court from substituting its own judgment for that of the agency. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977); *accord* Ethyl Corp. v. Evtl. Prot. Agency, 541 F.2d 1, 34 (D.C. Cir. 1976) (en banc); Ranchers Cattlemen Action Legal Fund, 566 F. Supp. 2d at 997. The court presumes the agency action to be valid, with the court’s role merely to ensure the agency considered all of the relevant factors and its decision contained no “clear error of judgment.” Citizens to Pres. Overton Park, 401 U.S. at 415-16. In making this determination, a court reviews whether the agency action was arbitrary and capricious based on the record before the decision maker at the time the decision was made. Id. at 420.

B. SUMMARY JUDGMENT

Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates no genuine issues of material fact exist and, therefore, the moving party is entitled to judgment as a matter of law. Davison v. City of Minneapolis, Minn., 490 F.3d 648, 654 (8th Cir. 2007); *see* Fed. R. Civ. P. 56(a). Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. Id.

The Court must inquire whether the evidence presents sufficient disagreement to require the submission of the case to a jury or if it is so one-sided that one party must prevail as a matter of law. Diesel Mach., Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820, 832 (8th Cir. 2005). The moving party bears the burden of demonstrating an absence of a genuine issue of material fact. Simpson v. Des Moines Water Works, 425 F.3d 538, 541 (8th Cir. 2005), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011). The non-moving party may not rely merely on allegations or denials in its own pleading; rather, its response must set out specific facts showing a genuine issue for trial. Fed. R. Civ. P. 56(c)(1). The court must consider the substantive standard of proof when ruling on a motion for summary judgment. Anderson, 477 U.S. at 252.

III. LEGAL DISCUSSION

The Plaintiffs motion for summary judgment is based on the contention that North Dakota's implementation of the state surface mining program results in exempting North Dakota Public Service Commissioners from SMCRA conflict of interest requirements, a violation of the requirement that state laws and regulations be at least as stringent as SMCRA and the implementing federal regulations. 30 U.S.C. § 1253(a)(1). Specifically, the Plaintiffs argue North Dakota's conflict of interest provisions are less stringent than the letter and spirit of SMCRA. See Docket No. 28-1. The Plaintiffs allege the Secretary of the Interior is on notice of this situation and has failed to perform the resulting mandatory, non-discretionary duty of preparing, promulgating, and implementing a Federal program for North Dakota to remedy the state's failure to implement, enforce, or maintain its approved state program as provided for by SMCRA, pursuant to 30 U.S.C. § 1254(a)(3).

The Defendant contends summary judgment is appropriate because the Plaintiffs' claims are presumptively unreviewable by the Court and, even if the claims were reviewable, they would fail as a matter of law. See Docket No. 35. The Intervenor-Defendant (the PSC) argues summary judgment is proper because the Court lacks jurisdiction and the Plaintiffs fail to substantiate any violations of SMCRA or its regulations by the PSC. See Docket No. 34-1. As a threshold issue, the three motions for summary judgment are based on whether the Court has jurisdiction to adjudicate the underlying cause of action.

A. JURISDICTION

Federal courts are courts of limited jurisdiction and the Plaintiffs bear the burden of establishing jurisdiction by this Court to hear the claims. The Plaintiffs argue jurisdiction is proper pursuant to 30 U.S.C. § 1270 and 28 U.S.C. § 1331. The Plaintiffs allege SMCRA provides for citizen suits to compel the Secretary's compliance with SMCRA "where there is alleged a failure of . . . the Secretary" 30 U.S.C. § 1270(a).

The Defendant argues this Court lacks jurisdiction to consider the Plaintiffs' claims. While the Defendant's motion for summary judgment contains many arguments dispositive in their own right, the arguments rely on the same underlying principle that SMCRA does not mandate the Secretary of the Interior or OSM to take direct federal enforcement action over all or part of the approved state program. Specifically, the Defendant alleges the authority to undertake such an enforcement action is discretionary and unreviewable. The Defendant argues the Court lacks jurisdiction because challenges to an agency's use of enforcement discretion are presumptively unreviewable under longstanding principles of judicial review, and because the Plaintiffs cannot properly rely on SMCRA's citizen suit provision for subject matter jurisdiction.

1) **MANDATORY VS. DISCRETIONARY REVIEW**

A federal agency's decision to invoke its enforcement powers provided by statute or regulation is "presumed immune from judicial review" under the APA. Heckler v. Chaney, 470 U.S. 821, 831-33 (1985). The Supreme Court of the United States has recognized on several occasions that an agency's decision not to enforce some regulation "is a decision generally committed to an agency's absolute discretion." Id. at 831. "This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." Id.

The APA and SMCRA's citizen suit provision provide for judicial review in cases where an agency fails to take agency action that it is *required* to take. SMCRA does provide for federal enforcement of a state program in the event that a state is not enforcing any part of its program, but leaves the decision of whether to pursue direct federal enforcement to the discretion of the Secretary of the Interior. 30 U.S.C. § 1254(b) ("In the event that a State has a State program for surface coal mining, and is not enforcing any part of such program, the Secretary *may* provide for the Federal enforcement, under the provisions of section 1271 of this title, of that part of the State program not being enforced by such State." (emphasis added)); see also 30 U.S.C. § 1271(b) ("Whenever on the basis of information available to [her], the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, [s]he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice.").

The APA and SMCRA set forth a process by which to challenge a duly-enacted state law or administrative regulation. Judicial review is only available in instances where the Secretary of the Interior or Director of the OSM *must* act. SMCRA does not impose a mandatory duty on the

Secretary to substitute direct federal enforcement over North Dakota's surface mining program. The Secretary or Director will only replace the program in extremely serious situations. In this case, the Secretary and Director chose not to do so. While it appears from the SMCRA provisions that the Secretary does not have a mandatory duty to enforce a state coal mining program, the issue ultimately becomes whether the state or federal regulations are operative in a given situation.

The presumption against judicial review also extends beyond cases brought solely under the APA and includes cases that invoke citizen suit provisions as the basis for subject matter jurisdiction. See Sierra Club v. Whitman, 268 F.3d 898, 902 (9th Cir. 2001); Sec'y of Labor v. Twentymile Coal Co., 456 F.3d 151, 160 (D.C. Cir. 2006). The rule exists in part because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." Heckler, 470 U.S. at 831.

The Eighth Circuit has upheld the principle of limiting judicial review and deferring to agency expertise in statutory enforcement scenarios. See Greer v. Chao, 492 F.3d 962 (8th Cir. 2007); Dubois v. Thomas, 820 F.2d 943 (8th Cir. 1987). In Dubois, the district court held that the Clean Water Act imposed mandatory duties on the EPA Administrator to make findings or take enforcement actions. Dubois, 820 F.2d at 946-47. The Eighth Circuit reversed the district court's decision and held that the language, history, and well-established principles of statutory interpretation and judicial review of agency decisions required the "inescapable" conclusion that the duties to investigate or enforce were discretionary. Id. The Eighth Circuit noted that the district court "appear[ed] to have ignored the well established principle that agency decisions which refuse enforcement generally are unsuitable for judicial review." Id. at 948 (citing Heckler, 470 U.S. at 831). While acknowledging the use of the word "shall" in the context of an enforcement provision could lead to conflicting interpretations on its mandatory or discretionary nature, the Eighth Circuit

resolved that apparent conflict by applying the principle of judicial deference to an agency's interpretation of a statute it administers. Id. at 948-49 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).

In contrast to the federal statute at issue in *Dubois*, this dispute deals with an interpretation of SMCRA, which clearly uses the discretionary word "may" to describe when OSM may take direct federal enforcement of a state program. See 30 U.S.C. § 1254(b). Similarly, the Fourth Circuit Court of Appeals found, in a statutory scheme similar to SMCRA, that an agency's decision concerning potential violations of the Mine Safety and Health Act was committed to agency discretion by law and therefore not subject to judicial review. Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n, 528 F.3d 310 (4th Cir. 2008). The issue in *Speed Mining* concerned the agency's selection of the responsible entity to cite for an accident. The Fourth Circuit Court of Appeals found that the statutory scheme of the Mine Safety and Health Act provided no meaningful standard for review and reasoned that enforcement is an area of agency discretion, that the agency is in a better position than the courts to balance the factors guiding citation decisions, and that enforcement is the type of decision suitable for deference to agency expertise. Based on this reasoning, the Fourth Circuit ruled that the agency decision was not reviewable. Id. at 316-19. *Speed Mining* provides guidance for interpreting SMCRA because the Mine Safety and Health Act was a model for and parallels the enforcement provisions in SMCRA. Nat'l Coal Ass'n v. Lujan, 979 F.2d 1548, 1554 n.4 (D.C. Cir. 1992); United States v. Dix Fork Coal Co., 692 F.2d 436, 440 (6th Cir. 1982).

Applying these principles to the present case, the presumption against judicial review should also apply to the Secretary's enforcement powers under SMCRA. The relevant statutory language is found at 30 U.S.C. § 1254(b). The plain language of SMCRA is dispositive on the

question of whether the Secretary has a mandatory duty to substitute a federal program in North Dakota. The pertinent statutory language reads as follows:

In the event that a State has a State program for surface coal mining, and is not enforcing any part of such program, the Secretary may provide for the Federal enforcement, under the provisions of section 1271 of this title, of that part of the State program not being enforced by such State.

30 U.S.C. § 1254(b) (emphasis added). The command “may” does not impose on the Secretary of the Interior a mandatory, non-discretionary duty to provide for direct federal enforcement of a state program. See S. Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 455 (1979) (holding that agency’s investigation power was “written in the language of permission and discretion” where statute read that “the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of [a] rate”) (emphasis in original). The command in 30 U.S.C. § 1254(b) is clearly discretionary and permits the Secretary of the Interior to consider a wide array of enforcement tools in the event a state is failing to enforce any part of its own program.¹

Section 504(b) of SMCRA also refers to the enforcement process contained in Section 521. See 30 U.S.C. § 1254(b) (referring to 30 U.S.C. § 1271). The discretionary authority of the Secretary is highlighted in the first clause of Section 521, which states that “[w]henver on the basis of information available to [her], the Secretary has reason to believe that violations of all or any part of the approved State program result from a failure of the State to enforce such State

¹ The Court would reach the same result under 30 U.S.C. § 1254(a)(3). Even if the Secretary of the Interior *had* determined that the prohibited financial interest provisions of the North Dakota program were inconsistent with SMCRA, such a conclusion would not necessarily rise to the level of a failure to “implement, enforce or maintain [the State’s] approved State program” within the meaning of 30 U.S.C. § 1254(a)(3). Courts have recognized that OSM is vested with discretion to select appropriate measures to address situations where a state is not effectively administering, implementing, enforcing, or maintaining its approved regulatory program. See Pa. Fed’n of Sportsmen’s Clubs, Inc. v. Hess, 297 F.3d 310, 317 (3d Cir. 2002). It is clear from OSM’s regulations that there are corrective actions short of withdrawing approval of the State program and implementing a federal program that could cure any deficiencies without abrogating North Dakota’s primacy.

program or any part thereof effectively, he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice” 30 U.S.C. § 1271(b) (emphasis added); see Nat’l Mining Ass’n v. U.S. Dep’t of Interior, 177 F.3d 1, 10 (D.C. Cir. 1999) (stating that 30 U.S.C. § 1271 “sets out specific procedural requirements to be met before the Secretary may take remedial action against a state permittee (whether based on a federal inspection or [30 U.S.C. §] 1254(b) or in the course of enforcing a state program under [30 U.S.C. §] 1271(b))”); Sierra Club v. Jackson, 724 F. Supp. 2d 33, 41 (D.D.C. 2010) (“[w]here a condition precedent exists in the statute, the relevant authority or duty is only triggered once the condition is satisfied”).

The Court finds that whether the Secretary of the Interior has “reason to believe” a violation has occurred is a matter committed to her discretion by law. More important, because the decision whether to exercise such enforcement discretion is committed to the Secretary by law, it is presumptively unreviewable by this Court.

2) STATE VS. FEDERAL REGULATION

Because the regulation of SMCRA and an approved state program are mutually exclusive, either federal law or state law can regulate coal mining activity in a state, but not both simultaneously. Thus, after a state enacts statutes and regulations that are approved by the Secretary, these statutes and regulations become operative, and the federal law and regulations, while continuing to provide the “blueprint” against which to evaluate the state’s program, “drop out” as operative provisions. They are reengaged only following the instigation of a 30 U.S.C. § 1271 enforcement proceeding by the Secretary of the Interior. Bragg, 248 F.3d at 289. The discretionary power to revoke an approved state program is reserved for extreme circumstances because direct intervention by the Secretary of the Interior in the operation of state regulatory

programs is clearly intended as an extraordinary remedy. “Thus, in contrast to other ‘cooperative federalism’ statutes, SMCRA exhibits extraordinary deference to the States.” *Id.* at 293.

SMCRA continues to manifest an ongoing federal interest in assuring that minimum national standards for surface coal mining are enforced. However, when a state fails to enforce these minimum national standards, it does not automatically forfeit the right of exclusive regulation. SMCRA vindicates its national-standards policy through a limited and ordered federal oversight, grounded in a process that can ultimately lead to the withdrawal of the state’s exclusive control. *See* 30 U.S.C. §§ 1271, 1267; *see also* *In Re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 520 (D.C. Cir. 1981) (en banc) (hereinafter “*Regulation Litig.*”) (describing the oversight process). Because an approved state program must include “a *State law* which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter,” the minimum national standards are attained by state enforcement of its own law until federal withdrawal of the program occurs. 30 U.S.C. § 1253(a)(1) (emphasis added). “[I]t is with an approved state law and with state regulations . . . that mine operators must comply.” *Regulation Litig.*, 653 F.2d at 519.

Not all of the SMCRA provisions “drop out” upon the implementation of an approved state program. The SMCRA structural provisions setting forth the procedure through which a state can attain and lose its primacy status remain directly operative. *See* 30 U.S.C. §§ 1253, 1254, 1267, and 1271. However, the procedural provisions involving primacy status are not at issue in this case. Instead, the failure of the Secretary of the Interior to withdraw approval of the federally approved North Dakota program over all surface coal mining activities is being challenged. While this challenge involves an aspect of the primacy process, an order forcing the Secretary to enforce a statute that has been approved by the Secretary and the Director some thirty years ago is not

appropriate relief to be granted by this Court based on the discretionary authority given to the Secretary of the Interior.

Because North Dakota is a primacy state, its regulation of surface coal mining on non-federal lands within its borders is “exclusive.” See 30 U.S.C. § 1253(a); 30 C.F.R. § 948.10. The federal policy of encouraging “exclusive” state regulation was careful and deliberate. The Act’s preliminary findings explain that “because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States.” 30 U.S.C. § 1201(f). According to the Act, it is the individual states, not the federal government, that are to “develop [] and implement[] a program to achieve the purposes of this chapter.” 30 U.S.C. § 1202(g). To make this point absolutely clear, SMCRA provides explicitly that when states regulate, they do so exclusively, and when the Secretary regulates, she does so exclusively. Bragg, 248 F.3d at 294; see also 30 U.S.C. §§ 1253(a), 1254(a).

While it is true that Congress’ desire to implement minimum national standards for surface coal mining drives SMCRA, Congress did not pursue the direct regulation of surface coal mining as its preferred course to fulfill this desire. Nor did Congress invite the states to enforce federal law directly. By providing states the exclusive regulatory control through enforcement of their own approved laws, Congress intended that the federal law establishing minimum national standards would “drop out” as operative law and that the states laws would become the sole operative law. See Nat’l Wildlife Fed’n v. Lujan, 928 F.2d 453, 464 n.1 (D.C. Cir. 1991) (Wald, J., concurring) (recognizing that the provisions of SMCRA do not “technically apply” in primacy states). Thus, all of the *federal* provisions establishing the minimum national standards are not

directly operative in North Dakota so long as it remains a primacy state. See Haydo, 830 F.2d at 498 (noting that “SMCRA *itself* is not violated by an operator’s violation of a permit condition” (emphasis added)).

In sum, even though the states ultimately remain subject to SMCRA, the Act grants “exclusive jurisdiction” to a primacy state (one with an approved program), thereby conditionally divesting the federal government of *direct* regulatory authority. See 30 U.S.C. § 1253(a) (requiring a would-be primacy state to demonstrate that it has “the capability of carrying out the provisions of this chapter”). Therefore, when a state’s program has been approved by the Secretary of the Interior, one must look to state law on matters involving the enforcement of the minimum national standards; whereas, on matters relating to the good standing of a state program, SMCRA remains directly applicable. See Regulation Litig., 653 F.2d at 519 (observing that “judicial appeals of permit decisions are matters of State jurisdiction in which the Secretary plays no role”); see also 30 U.S.C. § 1276(e).

The issue is not whether the PSC Commissioners are violating the approved state program, but whether the provisions of the state program are in conflict with federal SMCRA provisions. The North Dakota Program was approved by the OSM and the Secretary of the Interior in 1980, and has been continually implemented since that time. The state provisions are the applicable state laws in North Dakota, and it is within the discretion of OSM and the Secretary of the Interior to challenge enforcement. The Plaintiffs argue that despite the federal government’s conditional grant of “exclusive jurisdiction” to North Dakota, the national minimum standards set forth in SMCRA retain operative force against the North Dakota Program. To construe SMCRA in the manner urged by the Plaintiffs would circumvent the carefully designed balance Congress established between the federal government and the states. The effect of a citizen suit to enjoin

federal officials in a primacy state to comport with the *federal* provisions establishing the core standards for surface coal mining would end the exclusive state regulation and undermine the federalism established by the Act. Thus, rather than advancing the federal interest in preserving this statutory design, the Plaintiffs' interpretation would arguably frustrate it.

The applicable North Dakota law is now the approved state program governing surface mining operations. It is true that for a state program to be approved, the program must comport with the provisions of SMCRA. The Plaintiffs seem to infer the North Dakota Program was approved with no verification that the conflict of interest definition was ever changed and since the implementation in 1980, no action has been taken by the OSM. See Docket No. 28-1, p. 18. If the Plaintiffs wished to challenge the enacted state program, the appropriate time for doing so has now long passed. The Court concludes as a matter of law that the authority to undertake an enforcement action of the state program is discretionary and unreviewable and, as such, the Court lacks jurisdiction.²

B. SUMMARY JUDGMENT MOTIONS

Presently pending before the Court are three motions for summary judgment. As previously mentioned, summary judgment is appropriate in circumstances when the evidence, viewed in a light most favorable to the non-moving party, indicates no genuine issues of material fact exist and, therefore, the moving party is entitled to judgment as a matter of law. Davison, 490 F.3d at 654; see Fed. R. Civ. P. 56(a). The Court's jurisdictional limitations prohibit the premature

² This order should in no manner be construed as an endorsement of the practice of PSC Commissioners accepting campaign contributions from individuals or political action committees closely associated with coal companies and coal mining activities. Although the acceptance of campaign contributions from such entities may be lawful and in compliance with SMCRA and North Dakota law, the decision to do so is ill-advised, devoid of common sense, and raises legitimate questions as to the appearance of impropriety.

adjudication requested by the Plaintiff and, as a result, these unreviewable claims must be dismissed. In light of the undisputed facts eliminating any genuine issue of material fact, the Plaintiffs' motion for summary judgment is denied; the Defendants' motion for summary judgment is granted; and the Intervenor- Defendant's motion for summary judgment is granted.

IV. CONCLUSION

For the reasons outlined above, the Defendant's Motion for Summary Judgment (Docket No. 33) is **GRANTED**, the Intervenor-Defendant's Motion for Summary Judgment (Docket No. 34) is **GRANTED**, and the Plaintiff's Motion for Summary Judgment (Docket No. 28) is **DENIED**.

IT IS SO ORDERED.

Dated this 22nd day of October, 2013.

/s/ Daniel L. Hovland

Daniel L. Hovland, District Judge
United States District Court