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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WESTERN ORGANIZATION OF RESOURCE COUNCILS and FRIENDS OF THE EARTH, *Plaintiffs*, v. SALLY JEWELL, in her capacity as Secretary of the Interior, DEPARTMENT OF THE INTERIOR, NEIL KORNZE, in his capacity as Director, Bureau of Land Management, BUREAU OF LAND MANAGEMENT, *Defendants*.	)	Case No. 1:14-cv-01993-RBW

MEMORANDUM IN SUPPORT OF STATE OF NORTH DAKOTA'S MOTION TO DISMISS

Applicant in Intervention the State of North Dakota ("North Dakota" or the "State"), through undersigned counsel and pursuant to Federal Rule of Civil

Procedure 12(b)(6), respectfully move for dismissal of the Complaint filed by Western Organization of Resource Councils and Friends of the Earth (collectively, "Plaintiffs") in this case on November 24, 2014.

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INTRODUCTION

Plaintiffs filed a Complaint on November 24, 2014 asking this Court to enjoin the Department of the Interior ("DOI" or "Interior Department") and the Bureau of Land Management ("BLM") (collectively, "Federal Defendants") from approving requests for new or modified federal coal leases unless and until they update a 1979 coal leasing programmatic environmental impact statement ("PEIS") as purportedly required by the National Environmental Policy Act ("NEPA"). In their request for relief, Plaintiffs allege that Federal Defendants must comply with NEPA by preparing a supplemental environmental impact statement ("supplemental EIS") to analyze the asserted effects of greenhouse gas emissions from the mining and combustion of coal extracted from federal lands. However, Plaintiffs identify no legal duty requiring the DOI or BLM to prepare a supplemental EIS.

NEPA requires federal agencies to evaluate the impacts of "major federal action[s]." 42 U.S.C. § 4332(C). Despite Plaintiffs' contentions, Federal Defendants have proposed no changes to the 1979 coal management regulations and there is therefore no major federal action that could trigger a supplemental NEPA analysis to address greenhouse gas emissions. Accordingly, Plaintiffs have failed to state a claim upon which relief may be granted. North Dakota

respectfully requests that the Court dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and enter judgment in favor of Federal Defendants.

BACKGROUND

I. The Mineral Leasing Act of 1920, and Coal Leasing Regulations

The Mineral Leasing Act of 1920 ("Mineral Leasing Act") enables the Secretary of the Interior to lease federal coal reserves to government entities and private parties for coal development. 30 U.S.C. § 181. It implements this responsibility to manage federal coal reserves in conjunction with several other statutes, including the Federal Coal Leasing Amendments Act, Pub. L. No. 94-377, 90 Stat. 1085 (1976), the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1787, the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328, and an "Act to further amend the Mineral Leasing Act of 1920," Pub. L. 95-554, 92 Stat. 2073-2075 (Oct. 30, 1978).

A. The 1979 Creation of the Regional Leasing Program and the Lease By Application Process.

To implement its responsibilities under these statutes, the Interior Department in 1979 issued comprehensive regulations for management of federal coal. *See* 43 C.F.R. Subpart 3400; Coal Management; Federally Owned Coal, 44 Fed. Reg. 42,584 (Jul. 19, 1979). These regulations offered two models for coal leasing: (1) the regional leasing program, 43 C.F.R. Subpart 3420; and (2) the lease by application process, 43 C.F.R. Subpart 3425.

Under the regional leasing program, the federal government was responsible for issuing leases for federal coal tracts within designated coal production regions identified by the BLM after setting regional planning targets. *See* 43 C.F.R. Subpart 3420; Identification of Coal Production Regions Having Major Federal Coal Interests, 44 Fed. Reg. 65,196 (Nov. 9, 1979). The regional leasing program enabled broad federal government planning by delegating authority to the Department of Energy to evaluate coal needs and set regional production goals based in part on the expected and potential production for existing coal leases. 44 Fed. Reg. at 42,619. The Interior Department would then adopt these goals, either in full or after making necessary changes, and use them to determine the amount of coal to be leased in a specific region. *Id.* After these goals were set, the Interior Department had the authority to assign four-year lease sale schedules aimed at meeting the regional production and leasing targets. 44 Fed. Reg. at 42,622. Regional coal teams would then rank coal tracts and lease them in an effort to best meet the production goals and promote the nation's energy policy. 44 Fed. Reg. at 42,621.

Unlike the regional leasing program, the lease by application process was largely industry-driven. Rather than applying for coal leases pursuant to a coordinated regional program, this process allowed industry applicants to pursue coal leases outside of the competitive leasing process in certain circumstances. *See*

44 Fed. Reg. at 42,625. Such circumstances included "where an emergency need for unleased coal deposits is demonstrated, or in areas outside coal production regions or outside eastern activity planning areas." *Id.* Thus, this process enabled individual applicants to apply for coal leases in limited situations and in areas outside of designated coal production regions.

The Interior Department conducted a NEPA analysis on the regional leasing program and issued a programmatic environmental impact statement in April 1979. *See* U.S. Dept. of the Interior, Federal Coal Management Program: Final Environmental Statement (April 1979) ("1979 PEIS"), *available at* https://archive.org/stream/ federalcoalmanag07unit#page/n3/mode/2up. The 1979 PEIS referred to the regional leasing program as the "Federal coal management program" and compared it to seven alternatives pursuant to NEPA. *Id.* at 1-2 to 1-3. The Interior Department ultimately adopted the regional leasing program, under the name "Federal coal management program," as the national program for coal management. *See* U.S. Dept. of the Interior, Federal Coal Management Program: Final Environmental Impact Statement Supplement 16 (Oct. 1985) ("1985 supplemental EIS"), *available at* google.com/books (search for "federal coal environmental impact supplement 1985"). The BLM revised the 1979 regulations in 1986 in an attempt to respond to economic changes within the energy market. *See* Coal Management—General, 51 Fed. Reg. 18,884 (May 23,

1986). It relied on a 1985 supplement to the 1979 PEIS to comply with NEPA. Def's Mot. to Dismiss, ECF No. 13-1 at 4; *see generally* 1985 Supplemental EIS.

B. Abandonment of the Regional Leasing Program in Favor of the Lease By Application Program.

Lessees showed minimal interest in the regional leasing program after the 1986 revisions, and the BLM decertified the eight coal production regions by 1990. *See, e.g.*, Decertification of the Power River Coal Production Region, 55 Fed. Reg. 784 (Jan 9, 1990); Cancellation; Fort Union Federal Coal Production Region, 53 Fed. Reg. 13,195 (April 21, 1988). These decertifications "had the effect of replacing the competitive regional leasing process with the leasing-by-application process." *WildEarth Guardians v. Salazar*, 783 F. Supp. 2d 61, 65 (D.D.C. 2011). Today, the lease by application process remains as the BLM's structure for federal coal leasing. *See WildEarth Guardians v. Salazar*, 859 F. Supp. 2d 83, 89 (D.D.C. 2012).

Pursuant to this lease by application process, individual applicants are responsible for identifying public lands with coal reserves and proposing specific coal tracts for leasing. *See WildEarth Guardians*, 783 F. Supp. 2d at 64 (citing 43 C.F.R. §§ 3425.0-2, 3425.1-5. After a party submits a request for a lease by application, the BLM undertakes a NEPA analysis on each lease. *See* BLM, Competitive Leasing (June 16, 2008) ("BLM Competitive Leasing Guidance"), *available at*

http://www.blm.gov/wy/st/en/programs/energy/Coal_Resources/coalfaqs/competitive_leasing.html. The BLM addresses climate change in these lease-specific NEPA analyses and thereby meets its NEPA requirements. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 311 (D.C. Cir. 2013) (upholding the BLM's NEPA analysis of climate change in response to a leasing application process).

II. The National Environmental Policy Act

NEPA requires federal agencies to identify and consider the environmental effects of proposed federal actions, and to disclose relevant information to the public so that it might inform the agencies' decision-making processes. 42 U.S.C. § 4332(2)(C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). "Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Id.* at 350; *see also* 40 C.F.R. § 1501.1. To meet this goal, agencies are required to prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3. Agencies preparing an EIS must "insure the professional . . . and scientific integrity, of the discussions and analyses in environmental impact statements." 40 C.F.R. § 1502.24.

Agencies are required to supplement their analysis through a supplemental EIS if an agency makes "substantial changes in the proposed action that are relevant to environmental concerns" or if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9. "Supplementation is necessary only if there remains major Federal action to occur." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) (internal alterations omitted). Thus, supplementation does not apply to rulemakings that have been completed and regulations that have been adopted. *See EMR Network v. Fed. Commc'ns Comm'n*, 391 F.3d 269, 272 (D.C. Cir. 2004) ("But the regulations having been adopted, there is at the moment no 'ongoing' federal action, and no duty to supplement the agency's prior environmental inquiries.").

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 218 (D.C. Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court

to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Furthermore, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (citing *Papasan v. Allain*, 478 U.S. 265 (1986)). Nor must it "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (citing *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

ARGUMENT

To survive a motion to dismiss, Plaintiffs must state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6). Despite the allegations in the Complaint, Federal Defendants have proposed no changes to the 1979 coal management regulations and there is therefore no major federal action that could trigger a

supplemental NEPA analysis to address greenhouse gas emissions. Accordingly, Plaintiffs have failed to state a claim upon which relief may be granted and their Complaint should be dismissed.

Plaintiffs' begin their request for relief by asserting that "NEPA imposes a mandatory, non-discretionary duty" to supplement the 1979 PEIS by analyzing "the effect of greenhouse gas emissions from the mining and combustion of coal extracted under the continuing federal coal management program on global climate and on climate change-related direct and indirect effects." Complaint, ECF Doc. No. 1 ¶¶ 188, 189. Plaintiffs next assert that this purported violation is "contrary to the standards of the APA [("Administrative Procedure Act")]" with citation to sections 5 U.S.C. §§ 706(1) and 706(2)(A) Complaint, ECF Doc. No.1 ¶ 192. Plaintiffs further allege that by failing to supplement the 1979 PEIS, the "BLM has unlawfully withheld and unreasonably delayed, contrary to the APA, the issuance of a supplemental PEIS addressing the effect of the federal coal management program on climate change." Complaint, ECF Doc. No. 1 ¶ 196. However, in making these claims, Plaintiffs fail to identify any legal obligation requiring the BLM to supplement the PEIS and reference no agency action that would invoke the Administrative Procedure Act's grant of a right of action. Indeed, Plaintiffs challenge no final agency action that could establish a private right of action under the Administrative Procedure Act. Thus, the Court should dismiss Plaintiffs'

Complaint, with prejudice, for failure to state a claim on which relief can be granted.

I. Plaintiffs Fail to Challenge a Final Agency Action.

Parties are entitled to obtain judicial review under Section 702 of the APA if they are "suffering legal wrong because of agency action, or [are] adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. In other words, the private right of action under the APA exists only when a party can identify an agency action that has caused it harm. *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 196 (D.C. Cir. 2003) (citing *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 882 (1990)) ("To establish standing under [APA Section 702], "the person claiming a right to sue must identify some 'agency action' that affects him in the specified fashion; it is judicial review 'thereof' to which he is entitled."); *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) (citations omitted) ("Whether there has been "agency action" or "final agency action" within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable.").

Plaintiffs in this case fail to adequately assert an "agency action" reviewable by the Court pursuant to APA section 702. The only action Plaintiffs identify is the regional leasing program analyzed in the 1979 PEIS. However, the regional

leasing program underwent adequate NEPA analysis in 1979, and the BLM has taken no new action on the regional leasing program since 1990. Accordingly, there is no final agency action for Plaintiffs to challenge.

Plaintiffs' misplaced belief that a redressable final agency action exists seems to hinge on a fundamental misunderstanding of the federal coal leasing process and an inaccurate characterization of the "federal coal management program." Plaintiffs' Complaint states that "[n]either the 1979 PEIS, the NEPA document that continues to govern the federal coal management program, nor the supplemental EISs prepared in 1985 take the requisite 'hard look' at the Program's contribution to climate change or at the Program's contribution to the effects of climate change." Complaint, ECF Doc. No. 1 ¶ 189.

However, the Complaint fails to define this "federal coal management program." Instead, Plaintiffs state only that this program is "administered by BLM, an agency within the Department of the Interior, according to various Acts of Congress." Complaint, ECF Doc. No. 1 ¶ 3 (citing several statutes including Mineral Leasing Act of 1920, the Federal Coal Leasing Amendments Act of 1976, the Surface Mining Control and Reclamation Act of 1977, and the Federal Land Policy and Management Act of 1976). The Complaint contains no reference to a specific action taken pursuant to this program that requires redress from the Court.

In merely referencing coal-related statutes rather than explaining the "federal coal management program," Plaintiffs do not distinguish between the regional leasing program, which was analyzed as the preferred alternative and implemented through the 1979 PEIS, and the lease by application program implemented after the regional program became obsolete and today remains the exclusive coal leasing mechanism. Indeed, the 1979 PEIS clearly shows that the proposed action analyzed and ultimately implemented by the BLM is the regional program. *See* April 1979 PEIS at 3-1 and 3-2 (defining the preferred alternative to include the elements of the regional program). The agency referred to this regional program throughout its PEIS as the "Federal coal management program." *E.g.*, *id.* at 1-3. As discussed above, this regional program relied on government-initiated leasing based on production projections within coal production regions. 44 Fed. Reg. at 42,619. The regional program underwent NEPA analysis first in the 1979 PEIS, and again in the 1985 supplemental EIS. *See generally* 1979 PEIS and 1985 supplemental PEIS. Thus, the BLM fully complied with its NEPA obligations by conducting a programmatic environmental impact statement for the regional leasing program.

As discussed above, the BLM ultimately decertified its eight coal production regions utilized under the regional program by 1990. *See, e.g.*, Decertification of the Powder River Coal Production Region, 55 Fed. Reg. 784 (Jan. 9, 1990). It has

taken no action pursuant to the regional program since that time, and it now issues federal coal leases pursuant to the lease by application process. *See WildEarth Guardians v. Salazar*, 859 F. Supp. 2d 83, 89 (D.D.C. 2012).

North Dakota endorses this lease by application system, as it recognizes the significance that each federal coal lease has to the state in which the relevant tract is located, and the distinct state-related interests that might accompany a certain tract of land. For example, North Dakota may attach specific importance to certain types of land for a variety of reasons, while other states may not factor these concerns into their coal management programs. As such, it is important that impacts to these interests are given sufficient attention through lease-specific NEPA analysis. The BLM addresses climate change in these lease-specific NEPA analyses and thereby meets its NEPA requirements. *See* BLM Guidance; *WildEarth Guardians v. Jewell*, 738 F.3d 298, 311 (D.C. Cir. 2013) (upholding the BLM's NEPA analysis of climate change in response to a leasing application process).

II. Because No Final Agency Action Has Been Taken, Federal Defendants Have No Legal Duty to Undertake a Supplemental EIS.

Despite Plaintiffs' conflation of the regional program and the lease by application program in its Complaint, the BLM has taken no action under the regional program or pursuant to the 1979 PEIS that is subject to NEPA.

As related to the NEPA obligation to prepare a supplemental EIS, agency action exists only when "there remains major Federal action to occur." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989). Indeed, NEPA requires an agency to supplement an EIS when there are circumstances or information "bearing on the *proposed* action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii) (emphasis added); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) (citations and internal quotations omitted) (holding that an agency action occurs at "the time at which [the agency] makes a recommendation or report on a Proposal for federal action"). In this case, all federal actions have been taken. The BLM conducted an adequate NEPA analysis on the 1979 regulations and the regional leasing program, as shown through the 1979 PEIS. Federal Defendants continue to conduct NEPA analyses on each lease issued through the lease by application process and address any potential effects of greenhouse gases through those documents. No federal action remains outstanding or yet to occur.

Thus, Plaintiffs can assert no challengeable agency action and no trigger to the private right of action under APA section 702. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990) ("[T]he person claiming a right to sue must identify some 'agency action' that affects him in a specified fashion."). Indeed, Plaintiffs do not, and cannot, identify the "proposed action" triggering the NEPA requirement that an agency undertake a supplemental EIS. *See* 40 C.F.R. §

1502.9(c)(1)(ii) (emphasis added) (stating that a supplemental EIS is required when there are "significant new circumstances or information . . . bearing on the *proposed action* or its impacts). As such, there is no agency action ripe for review by this Court. *See S. Utah Wilderness Alliance*, 542 U.S. at 73 (internal alterations omitted) ("Supplementation is necessary only if there remains major Federal action[n] to occur.").

CONCLUSION

The Complaint, which does not even define the "federal coal management program" it is challenging, contains insufficient facts to state a claim that is plausible on its face. *See Iqbal*, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."); *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (citation omitted) (a court need not "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint.").

For the foregoing reasons, the State of North Dakota respectfully requests that the Court dismiss Plaintiffs' Complaint with prejudice for failure to state a claim upon which relief may be granted and enter judgment for Defendants.

Respectfully submitted this 19th day of February, 2015.

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