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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,* )

THE STATE OF WYOMING, )  
THE STATE OF NORTH DAKOTA, )  
WYOMING MINING ASSOCIATION, )

*Intervenor-Defendants.* )

Case No. 1:14-cv-01993-RBW

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**STATE OF NORTH DAKOTA’S MOTION TO DISMISS**

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The State of North Dakota moves this Court to dismiss with prejudice the Complaint filed by Western Organization of Resource Councils and Friends of the Earth's (collectively, "Plaintiffs") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. The State of North Dakota has submitted a memorandum of law in support of this motion and a proposed order.

Respectfully submitted this 24th day of July, 2015.

*/s/ Paul M. Seby*

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**STATE OF NORTH DAKOTA’S MEMORANDUM IN SUPPORT OF ITS  
MOTION TO DISMISS**

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By Order dated July 15, 2015, the Court granted the State of North Dakota's ("North Dakota") Unopposed Motion to Intervene. ECF No. 37. In that same Order, the Court denied without prejudice North Dakota's Rule 12(b)(6) motion to dismiss (ECF No. 18) and granted leave for North Dakota to re-file its Rule 12(b)(6) motion in compliance with the limitations imposed in the Court's Order. ECF No. 37 at 14 & n. 11. Specifically, the Court directed North Dakota to avoid arguments and legal citations redundant to those already raised in previously filed motions to dismiss. *Id.* at 14-15.

Consistent with the Court's Order, and as further described below, North Dakota respectfully joins in the motions to dismiss previously filed by the Federal Defendants (ECF No. 13-1) and the State of Wyoming (ECF No. 30).

### **INTRODUCTION**

In the interest of avoiding redundancy, North Dakota incorporates by reference the Introduction and Background sections contained in the State of Wyoming's Motion to Dismiss. ECF No. 30 at 1-17.<sup>1</sup>

### **ARGUMENT**

As explained in the Federal Defendants' and Wyoming's Motions to Dismiss, Plaintiffs' Complaint must be dismissed under Rule 12(b)(6) for failure to state a claim on which relief can be granted. *Id.* at 1, 17-18; ECF 13-1 at 7-8.

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<sup>1</sup> Where North Dakota cites to a page in a previously filed brief, North Dakota incorporates by reference the legal argument as well as the cited legal authority.

Plaintiffs' Complaint must be dismissed for two reasons:

*First*, Plaintiffs have failed to allege that Federal Defendants have taken any action under the "national coal management program" that would be a *final* agency action subject to challenge under section 706(2)(a) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701-706. ECF No. 13-1 at 7-8.

*Second*, Plaintiffs have failed to allege that the Federal Defendants have a mandatory duty to supplement the 1979 Environmental Impact Statement ("1979 EIS"), which evaluated the environmental impact of the "national coal management program," such that a claim exists under section 706(1) of the APA. ECF No. 13-1 at 9; ECF No. 30 at 17-20, 23-26.

North Dakota agrees with Wyoming's contention that the 1979 EIS was intended to evaluate the regional leasing program as the "national coal management program." ECF No. 30 at 21. Therefore, because the Federal Defendants have not taken any action nor proposed any action under the obsolete regional leasing program, there is no final agency action to challenge nor any duty to supplement the 1979 EIS. *Id.* at 23-26. However, even if the Court agrees with Plaintiffs' and the Federal Defendants' broader interpretation of the "national coal management program," dismissal is still warranted because Plaintiffs failed to allege any ongoing or continuing federal action that would trigger the requirement to supplement the 1979 EIS. *See* ECF No. 13-1 at 9-10.

## CONCLUSION

For the foregoing reasons, and the reasons cited in Federal Defendants' and Wyoming's Motions to Dismiss incorporated herein, North Dakota respectfully moves the Court to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief may be granted.

Respectfully submitted this 24th day of July, 2015.

*/s/ Paul M. Seby*

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**[PROPOSED] ORDER GRANTING STATE OF NORTH DAKOTA'S  
MOTION TO DISMISS**

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This matter comes before the Court on the State of North Dakota's motion to dismiss the Complaint filed by Western Organization of Resource Councils and Friends of the Earth for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). The State of North Dakota has demonstrated that the Department of Interior and the Bureau of Land

Management have no legal duty to supplement the 1979 programmatic environmental impact statement for the national coal management program. Thus, Plaintiffs have stated no claim upon which relief may be granted. The Court hereby grants the State of North Dakota's motion to dismiss.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2015.

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District Judge

**List of Parties to Be Notified of Order**

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