ORAL ARGUMENT NOT YET SCHEDULED

No. 15-5294

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WESTERN ORGANIZATION OF RESOURCE COUNCILS;

FRIENDS OF THE EARTH,

Plaintiffs-Appellants,

v.

RYAN ZINKE, *et al.*,

Defendants-Appellees,

STATE OF WYOMING;

STATE OF NORTH DAKOTA;

WYOMING MINING ASSOCIATION,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT BRIEF OF INTERVENORS THE STATE OF WYOMING, THE STATE OF NORTH DAKOTA AND WYOMING MINING ASSOCIATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A)-(C), the undersigned counsel certifies the following:

A. Parties and Amici.

All Parties, Intervenors, and Amici appearing before the district court and in this court are listed in the Brief for Plaintiffs-Appellants.

B. Rulings Under Review.

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

C. Related Cases.

Undersigned counsel is unaware of any related cases before this Court or any other court.

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GLOSSARY

APA	Administrative Procedure Act
BLM	Bureau of Land Management
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act

JURISDICTION

Plaintiffs Western Organization of Resource Councils and Friends of the Earth brought this action in the United States District Court for the District of Columbia. Alleging violations of the National Environmental Policy Act and the Administrative Procedure Act, Plaintiffs asked the district court to order the Department of the Interior and the Bureau of Land Management to update a 1979 programmatic environmental impact statement governing the leasing of coal mining on federal lands by performing a supplemental environmental impact statement to examine the impact of climate change. The Plaintiffs also sought an injunction prohibiting any action on applications for new coal leases or on modifications to existing leases until the BLM completed the supplemental environmental impact statement. The district court had jurisdiction under 28 U.S.C. § 1331.

On August 27, 2015, the district court granted the federal Defendants' Corrected Motion to Dismiss the Complaint for failure to state a claim. JA___ (Dkt. 41). On October 26, 2015, the Plaintiffs filed a timely notice of appeal. JA___ (Dkt. 43). This Court has jurisdiction over the final decision of the district court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In 1979, the BLM prepared a programmatic environmental impact statement for evaluating coal leasing on federal lands. Subsequently, the Bureau implemented a national coal management program based on regional areas. The program was ineffective and the Bureau replaced it with a process driven by private industry bids for specific tracts. Given that there is currently no leasing pursuant to the national coal management program, does NEPA require a supplemental review of the 1979 statement?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

INTRODUCTION

The Intervenors concur with the federal Defendants and respectfully join their motion to dismiss. However, the Defendant-Intervenors Wyoming, North Dakota, and the Wyoming Mining Association offer an alternative ground for affirming the district court's decision dismissing the Plaintiffs' complaint.

The Plaintiffs' case hinges on a mistaken understanding of the nature of coal leasing on federal lands. Specifically, the demand by the Plaintiffs' that the Department of Interior supplement the 1979 programmatic EIS to evaluate the effects of climate change is a pointless request. The 1979 programmatic EIS evaluated coal leasing on federal land using government estimates of supply and demand within certified coal production regions. That program is defunct and all of the coal production regions have been decertified. In over twenty years, the program has not offered a single lease for coal mining on federal land.

Since the demise of that program, coal leasing on federal lands has used a market-based system that relies on industry applications for specific coal tracts. This leasing-by-application process **does** include consideration of climate change in each site specific NEPA analysis (EIS or Environmental Assessment, "EA") prepared in

response to each leasing application. Consequently, Plaintiffs' complaint fails to state a legally cognizable claim in their complaint.

STATEMENT OF THE CASE

I. Regulation Of Coal Mining On Federal Lands

In the Mineral Leasing Act of 1920, Congress provided that "[d]eposits of coal . . . and lands containing such deposits owned by the United States . . . shall be subject to disposition in the form and manner provided in this Act." 30 U.S.C. § 181. Congress authorized the Secretary of Interior "to prescribe necessary and proper rules and regulations to do any and all things necessary to carry out and accomplish the purposes of this Act." *Id*. § 189. Acting under this broad authority, the Secretary leased substantial federal coal reserves from 1920 until 1970 without any formal leasing procedures. *See* U.S. Dep't of Interior, *Federal Coal Management Program: Final Environmental Statement* 2-5 (April 1979) (1979 programmatic EIS)[1]; JA__.

In 1970, the BLM, which oversees the Interior Department's coal leasing, discovered evidence of leasing irregularities. Although coal leases in western states increased ten-fold from 1945 to 1970, coal production in the region fell by thirty

[1] *Available at* https://archive.org/stream/federalcoalmanag07unit#page/n3/mode/2up.

percent over the same period. *Id*. at 1-9. Thus, "[o]f the total acreage under lease, over 90 percent was not producing coal." *Id*. The BLM concluded this meant that leases were not being developed but rather held for speculative purposes and, in response, it suspended coal leasing. *Id*.; *see also Nat. Res. Def. Council v. Hughes*, 437 F. Supp. 981, 985 (D.D.C. 1977) (noting problem of speculation).

While the Interior Department and the BLM evaluated how to better manage the nation's coal reserves, two influential events occurred. First, the United States experienced an energy crisis. 1979 programmatic EIS 1-8 (describing "the Nation's serious energy problem"). In response, President Jimmy Carter crafted a National Energy Plan, which focused on dramatically increasing production of coal from federal reserves. *Id*. (explaining goal of "doubling 1977 annual production by 1985"); *see also id.* at 1-37 (noting objective to "[i]ncrease annual coal production by at least 400 million tons over 1976 levels"). The National Energy Plan played a prominent role in what would become the national coal management program.

Second, Congress enacted three statutes impacting mining of federal coal reserves. In August 1976, it enacted the Federal Coal Leasing Act Amendments, which authorized the Secretary to delineate coal leasing tracts, ensure economic recovery of coal reserves, and offer coal tracts for lease. *See* Pub. L. No. 94-377, 90 Stat. 1083 (1976) (codified at 30 U.S.C. §§ 181 through 196). Two months later, Congress passed the Federal Land Policy Management Act, which dramatically

overhauled management of the majority of the public lands containing coal reserves. *See* Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified at 43 U.S.C. §§ 1701 through 1787 and imposing comprehensive land management planning requirements). And finally, in 1977 Congress enacted the Surface Mining Control and Reclamation Act, which created a cooperative federalism system for regulating surface mine operations and reclaiming lands affected by those operations. *See* Pub. L. No. 95-87, 91 Stat. 445 (1977) (codified at 30 U.S.C. §§ 1201 through 1328).

These factors – historical problems in federal coal leasing, President Carter's policy push for increased coal production, and the new legislation impacting coal – drove the Interior Department to undertake a comprehensive rule-making effort. That effort culminated in July 1979 with the Interior Department's adoption of new coal leasing regulations. *See* Coal Management; Federally Owned Coal, 44 Fed. Reg. 42615 (July 19, 1979).

The 1979 regulations set forth two distinct processes for coal leasing. The predominant leasing process, known as the national coal management program,[2] emphasized government-driven leasing of coal reserves within designated coal production regions certified by the Secretary. *See generally* 43 C.F.R. § 3420. Under

[2] Also referred to as the "competitive regional leasing" process. *Wildearth Guardians v. Salazar*, 783 F. Supp. 2d 61, 63-64 (D.D.C. 2011).

this program, the United States Department of Energy would biennially update five, ten, and fifteen year national coal production levels based on anticipated supply and demand. 1979 programmatic EIS 3-3, 3-57 to -58. The Interior Department would use those "national energy projections to establish how much coal is to be leased." *Id*. at 1-3; 43 C.F.R. § 3420.2(c)(7).

The program provided for implementation of those national production levels within the coal production regions, each of which would be assigned four year lease sale schedules to meet regional sales and production targets. 43 C.F.R. § 3420.3-4(g); 1979 programmatic EIS 3-6. To meet those schedules and fulfill production targets, regional coal teams would delineate, rank, and offer for sale those tracts that the regional teams believed would best serve program objectives, including production targets. 1979 programmatic EIS 3-2. To achieve the national production goals, the program collectively considered the activities within each of the twelve coal production regions.

The 1979 regulations also established a separate leasing process, known as leasing-by-application. *See generally Wildearth Guardians*, 783 F. Supp. 2d at 64; 43 C.F.R. § 3425. Unlike the national program, leasing-by-application was not administered to achieve national energy policy goals. 1979 programmatic EIS 3-60 (noting that leasing production goals apply only to the regional leasing program). Instead of a coordinated national coal management program, leasing-by-application

is an applicant driven process for reviewing individual industry applications to lease coal tracts on an *ad hoc* basis. *Wildearth Guardians*, 783 F. Supp. 2d at 64; 43 C.F.R. § 3425.0-2. (the purpose of leasing-by-application "is to provide an application process through which the Department may consider holding lease sales apart from the competitive leasing process set out in §§ 3420.3 through 3420.5-1 . . . in areas outside coal production regions"). In effect, "the BLM created two competitive leasing processes – one applying within coal production regions and a second applying outside coal production regions." *Wildearth Guardians*, 783 F. Supp. 2d at 74.

Leasing-by-application has never involved Department of Energy production goals, regional sales schedules and targets, or even government selection and offering of tracts. *Wildearth Guardians*, 783 F. Supp. 2d at 63-64 (comparing the lease-by-application process with the national coal management program process); 43 C.F.R. § 3425. Rather, the lease-by-application process initially applied only in areas outside of the designated coal production regions that contained the majority of federal coal reserves.[3] 43 C.F.R. § 3425.0-2.

[3] Lease-by-application could occur within a designated coal production region in limited circumstances "where an emergency need for unleased coal deposits is

The Interior Department anticipated that regional leasing under the national coal management program would be the dominant form of federal coal leasing. Characterizing the regional leasing system as a "Federal coal management program" with "national impacts," 1979 programmatic EIS 1-3, the Interior Department performed a programmatic analysis of the environmental impacts of the national program pursuant to NEPA, 42 U.S.C. §§ 4321 through 4370h. The Interior Department applied a two-tiered approach to complying with NEPA; one tier "to consider interregional and national impacts and one to consider site-specific and cumulative intraregional impacts." 1979 programmatic EIS 3-68. The first tier programmatic statement "address[ed] the total national demand for coal." *Id*. at 1-5.

Consistent with the top-down approach embraced in the national program, the programmatic analysis used the Department of Energy's "coal production projections" out to 1985 and 1990. *Id*. at 2-27. Those projections included high, medium, and low estimates based on different underlying economic assumptions. *Id*. at 1-3. Each component of the programmatic analysis, such as air quality and socioeconomic impacts, relied on the Department of Energy's national production projections. *See, e.g.*, *id*. at 5-37, 5-99, 5-109, 5-128.

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demonstrated." *Wildearth Guardians*, 783 F. Supp. 2d at 73 (quoting 43 C.F.R. §§ 3425.02, 3425.1-5).

The programmatic statement nonetheless evaluated alternatives, including "leas[ing] to meet industry indications of needs," or leasing-by-application. *Id*. at v. That approach to coal leasing, the Interior Department observed, would "shift the responsibility . . . for the final decision on how much and which coal will be offered for lease sale (from the Department to the industry . . .)." *Id*. at 3-1. Accordingly, the industry-driven, leasing-by-application process "would likely result in coal leasing, coal production, and coal-related development activity levels for each coal region different from those which would occur under the preferred [national] program." *Id*. at 3-2. The Interior Department also noted that the production goals at the core of the national program "are incompatible with the lease to meet industry indications of need alternative, which relies on industry nominations to resolve the question of leasing levels." *Id*. at 3-60. Because industry driven, leasing-by-application was antithetical to the nationally focused regional leasing program, leasing-by-application was one of the "options not preferred by the Secretary[.]" *Id*. at 3-1.

The Secretary adopted the national program as the Interior Department's "comprehensive coal management program." United States Department of Interior, *Federal Coal Management Program: Final Environmental Impact Statement Supplement* 16 (Oct. 1985) (1985 supplemental EIS)[4]; JA__. The Interior

[4] *Available at* https://archive.org/details/finalenvironment9489unit.

Department assembled regional coal teams for each coal producing region, which prepared regional environmental impact statements for anticipated leasing levels based on the Department of Energy's production goals. *Id*. at 19; *see also* Wyoming and Montana; Powder River Regional Coal Team Meeting, 46 Fed. Reg. 44517 (Sept. 4, 1981); Uinta-Southwestern Utah Regional Coal Leasing and Utah Power and Light Co. Coal Lands Exchange; Availability of Draft Environmental Impact Statement, 45 Fed. Reg. 68468 (Oct. 15, 1980).

The national program faced challenges from the outset. In 1982, the Interior Department revised the program in an effort to encourage more leasing because multiple federal agencies, including the Departments of Energy and Justice, had "concluded that the Department of the Interior was not proposing to lease enough coal." Coal Management; Federally Owned Coal; Amendments to Coal Management Program Regulations, 47 Fed. Reg. 33114, 33118 (July 30, 1982). That same year, the Interior Department held the first coal lease sale under the new program, leasing 1.6 billion tons of coal, the largest lease of federal reserves in history. Report of the Commission on Fair Market Value Policy for Federal Coal Leasing at 3 (Feb. 1984).[5] The Interior Department intended the sale to be "a symbol

[5] *Available at* http://babel.hathitrust.org/cgi/pt?id=mdp.39015055347564;view=1up;seq=7.

of the resumption of Federal coal leasing after a decade-long moratorium" and proof that the Department "could implement announced coal leasing plans on a regularly scheduled basis." *Id*. at 88-89.

The sale led to charges that the Interior Department had received far less than fair market value for the leases. *Id*. at 2. In response, Congress ordered the Interior Secretary to appoint an independent commission to review the new coal leasing program and issue recommendations on how to ensure receipt of fair market value for coal leases. *See* Pub. L. No. 98-63, 97 Stat. 301, 328 (1983). Congress effectively suspended coal leasing under the new program until the Fair Market Value Commission, known as the Linowes Commission after its chairman, submitted its report to Congress.[6] Pub. L. No. 98-146, § 112, 97 Stat. 919, 937 (1983).

The Commission's report identified programmatic problems with the controversial lease sale. The report critically questioned the new leasing program's focus on national energy projections.[7] The Commission concluded that one of the

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[6] See *Report of the Commission on Fair Market Value Policy for Federal Coal Leasing* at xi (Feb. 1984).

[7] The two plaintiffs in this case participated in the Commission's proceedings. *See Report of the Commission on Fair Market Value Policy for Federal Coal Leasing* at xv.

key reasons for the lackluster prices obtained for the leases was that the Interior Department held the largest federal coal sale in history in the midst of a soft coal market. *Report of the Commission on Fair Market Value Policy for Federal Coal Leasing* at 3. Because that sale comported with the national production goals of the leasing program, the Commission questioned "the feasibility of predicting future coal demands and supplies with the precision [the coal leasing program] assumed." *Id*. at 72. Not seeing a simple solution in a program built around national production goals, the Commission forecast that "there is likely to be a significant lag between coal market changes and the leasing program response." *Id*. at 91.

Though submission of the Commission's report lifted Congress' moratorium on leasing, the Interior Secretary maintained it until completion of additional program reviews and revisions. *See* Southern Appalachian Federal Coal Production Region -- Alabama Subregion, 52 Fed. Reg. 608, 608 (Jan. 7, 1987) (describing the Secretary's suspension of leasing). In 1986, the Interior Department completed its program revisions to ensure receipt of a fair market value for coal lease sales and to align the program with environmental policies. Coal Management -- General; Competitive Leasing; and Environment; Amendments Implementing Certain Recommendations of the Commission on Fair Market Value for Federal Coal Leasing, 51 Fed. Reg. 18884 (May 23, 1986).

Along with the changes to the program, the Interior Department supplemented the analysis that it had included in its 1979 programmatic EIS. *See generally* 1985 supplemental EIS. That supplemental analysis, like the Linowes Commission Report, began to question the wisdom of a program driven by national energy projections. Noting that the national program "heavily emphasized supply and demand forecasts," the Interior Department remarked that, "[a]s events since 1979 have shown, it is difficult to predict accurately how energy users and suppliers would respond to changing energy supplies, new energy and environmental legislation, and changing energy prices. It is similarly difficult to predict to what extent users will either adopt conservation measures and alternative energy sources, or consumers will be willing to change their behavior[.]" 1985 supplemental EIS at 73-74. As a result of these doubts, the Interior Department forecast that "the Secretary of the Interior may choose to continue the existing program . . . or he may decide to select . . . no program at all." *Id*. at 16.

After the Interior Department reopened leasing with the 1986 program revisions, it received little interest from prospective lessees. In some designated coal regions, the leasing program failed to generate even a single lease sale. *See*, *e.g.*, Coal Management Program; San Juan River Federal Coal Production Region, 53 Fed. Reg. 44956, 44956 (Nov. 7, 1988) (noting that "[a] regional coal sale . . . was never held[.]"). In the absence of meaningful leasing activity, the Interior

Department could not justify maintaining the administrative infrastructure necessary to support the nationally oriented leasing program. *See, e.g.,* Notice cancelling the Uinta-Southwestern Utah Federal Coal production Region and opening the twenty-six county area to lease by application, 52 Fed. Reg. 48327, 48327 (Dec. 21, 1987) ("assessments indicate that industry interest, based on market conditions and existing potential production capacities, does not justify the federally initiated coal lease sale program"); *see also* Public Participation in Coal Leasing, 64 Fed. Reg. 52239, 52240 (Sept. 28, 1999).

Accordingly, the Interior Department decertified all of the major coal producing regions. *See, e.g., id.*; Coal Management Program; San Juan River Federal Coal Production Region, 53 Fed. Reg. at 44956; Southern Appalachian Federal Coal Production Region -- Alabama Subregion, 52 Fed. Reg. 608 (Jan. 7, 1987); Cancellation; Fort Union Federal Coal Production Region and Opening of Regions to Lease Coal in North Dakota and Montana, 53 Fed. Reg. 13195 (April 21, 1988); Decertification of the Powder River Coal Production Region, 55 Fed. Reg. 784 (Jan. 9, 1990). Because the nationally oriented leasing program applied only in certified coal production regions, decertification of all the coal production regions effectively ended the national coal management program. *See, e.g.*, Cancellation; Fort Union Federal Coal Production Region and Opening of Regions to Lease Coal in North

Dakota and Montana, 53 Fed. Reg. at 13195 (noting "that lease by application procedures should be used in lieu of the regional activity planning process").

To replace the ineffective national program, the Interior Department implemented the industry-driven, lease-by-application process. *See Wildearth Guardians*, 783 F. Supp. 2d at 65 (explaining that decertification "replac[ed] the competitive regional leasing process with the leasing-by-application process"). The change from a unified national leasing program to a demand-based leasing process represented a substantial shift in the Interior Department's approach to coal leasing. Most broadly, "[t]he leasing-on-application process is initiated by individuals or companies, unlike the regional coal leasing process which is Government initiated." Public Participation in Coal Leasing, 64 Fed. Reg. at 52240; *Wildearth Guardians*, 783 F. Supp. 2d at 63-64 (explaining the differences between the national leasing and lease-by-application processes). As a result, under the lease-by-application process, "[t]here is no need to establish a leasing level because the amount of coal applied for provides the starting point for the amount of coal to be analyzed." Public Participation in Coal Leasing, 64 Fed. Reg. at 52240. Similarly, unlike regional leasing in the national process, the lease-by-application process does not require a "leasing schedule because BLM usually offers coal tracts based on at most one or two applications in leasing-on-application lease sales." *Id.* The regional coal teams, which previously oversaw almost every facet of leasing under the national program,

now meets "on an ad hoc basis to advise BLM on lease-on-application coal sales." *Id*.

In short, by replacing the national process with leasing-by-application, the Interior Department did precisely what it foreshadowed just a few years before: it replaced the "program" with "no program at all." 1985 supplemental EIS at 16. Since decertification of the coal production regions and the consequent suspension of the national process, the Interior Department has "leased Federal coal exclusively through the leasing-on-application process."[8] *Id*.

Because the lease-by-application process does not involve national production goals, which formed the basis of the 1979 programmatic EIS analysis, the BLM cannot rely on the goals as the inputs for environmental analyses of leases-by-application. Instead, the BLM utilizes the amount of coal sought in a leasing application to frame the environmental impacts analysis. As a result, the BLM

[8] Highlighting the ineffectiveness of the national coal management competitive regional leasing process is that after decertification of the Powder River Coal Production Region coal production in the Powder River Basin increased 242% from 1990 to 2006 under the lease-by-application process. *Wildearth Guardians*, 783 F. Supp. 2d at 65.

fulfills its NEPA obligations in the lease-by-application process not at the programmatic level, but at a site-specific level as leasing applications arise.

For example, in 2009, the BLM completed its cumulative NEPA analysis of four separate lease applications that were pending before the agency. *See, e.g.*, United States Department of Interior, Bureau of Land Management, *Final Environmental Impact Statement for the South Gillette Area Coal Lease Applications* (Aug. 2009) (Vol. 1).[9] To evaluate the environmental impacts of the proposed leases, the BLM relied on the amount of coal sought under each lease application rather than a national production goal or a regional sales target. *See id.* at ES-10 (Table ES-1) (noting quantities of recoverable coal). Based on those data inputs from the lease applications, the BLM evaluated the potential environmental effects, including climate change, of issuing the proposed leases. *Id*. at 4-108 through -122.

The BLM estimated "the amount of [greenhouse gas] emissions that could be attributed to coal production that could result from leasing of the proposed [lease tracts], as well as from the forecast coal production from all mines in the Wyoming [Powder River Basin.]" *Id*. at 4-110. It also established the significance of the leasing actions in relation to overall greenhouse gas emissions and considered the potential

[9] *Available at* https://archive.org/details/southgilletteare01wwce.

risks of climate change, including variations in precipitation, species populations, and the frequency and severity of forest fires. *Id*. at 4-110, -113. The BLM has consistently followed this approach to fulfilling its NEPA obligations in relation to the lease-by-application process. *See*, *e.g.*, United States Department of Interior, Bureau of Land Management, *Final Environmental Impact Statement for the West Antelope II Coal Lease Application* 4-99 to -110 (Dec. 2008) (Vol. 1).[10] By using this approach, "the BLM satisfie[s] its obligations under NEPA to consider climate change." *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 challenge to lease applications under the leasing-by-application process).

II. Procedural History

On November 24, 2014, the Plaintiffs filed suit in the district court. JA__ (Dkt. 1). They claimed that NEPA required the BLM to supplement its 1979 programmatic EIS with an analysis of "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-related direct and indirect effects." JA___ (Dkt. 1 at 63, ¶ 189). The Plaintiffs asserted that the failure to update the 1979 programmatic

[10] *Available at* http://coaldiver.org/documents/final-environmental-impact-statement-for-the-west-antelope-ii-coal-lease-application-wyw163340.

EIS was arbitrary and capricious and agency action unlawfully delayed or withheld, giving rise to a claim for relief under the Administrative Procedure Act, 5 U.S.C. § 706. JA__ (Dkt. 1 at 65, ¶ 196). The Plaintiffs asked the district court to declare that the Interior Department and the BLM had violated the APA and NEPA by not supplementing the 1979 programmatic EIS and to enjoin the BLM from taking action on any coal lease applications until completion of a supplemental EIS. JA__ (Dkt. 1 at 65-66).

The federal Defendants moved to dismiss the complaint for failure to state a claim arguing that there was no "proposed action" by a governmental agency in the leasing process that would impose a legal duty to perform a supplemental EIS. JA__ (Dkt. 13-1 at 5). The Intervenors Wyoming, North Dakota, and the Wyoming Mining Association filed separate motions to dismiss arguing that, in addition to the absence of any "proposed action," the BLM was not legally required to supplement the 1979 programmatic EIS because the program that that EIS evaluated was defunct. JA__ (Dkts. 30, 38, 39).

The district court granted the federal Defendants' motion to dismiss.[11] JA__ (Dkt. 41). The district court held that "[t]here is no underlying 'proposed action' in

[11] Since it granted the federal Defendants' motion to dismiss, the district court did not rule on the merits of the Intervenors' motions, dismissing them for mootness.

this case to trigger an obligation to supplement the 1979 EIS because the federal coal management program has been implemented." JA__ (Dkt. 42 at 6). The district court noted that "[l]easing decisions are made pursuant to a pre-approved and EIS-supported program . . . [a]nd there is no allegation that the federal defendants have issued, and continue to issue leases in a manner other than what was contemplated under the program implemented in 1979[.]" *Id*. Since the Plaintiffs could not cite to any "proposed action" by the federal Defendants, there was no violation of NEPA or the APA. *Id*. JA__ (Dkt. 42 at 10).

The Plaintiffs filed a timely notice of appeal. Then, on January 15, 2016, Secretary Jewell issued an order "directing the BLM to conduct a broad, programmatic review of the Federal coal program it administers through preparation of a Programmatic EIS under NEPA" . . . to consider . . . "a range of concerns raised about the Federal coal program including" whether the program was generating a fair return, the changing nature of market conditions, and the relation of coal production to reducing greenhouse gas emissions. Notice of Intent To Prepare a Programmatic Environmental Impact Statement To Review the Federal Coal Program, 81 Fed. Reg. 17720, 17721 (March 30, 2016); *see also* Secretarial Order

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JA__ (Dkt. 42 at 2). This brief reiterates the argument made to the district court as an alternate basis for this Court to affirm the district court's ruling.

No. 3338.[12] Five months later, on June 14, 2016, this Court granted a joint motion to hold these proceedings in abeyance pending completion of the programmatic EIS. Subsequently, on March 29, 2017, Secretary Zinke revoked Order No. 3338 finding that "the public interest is not served by halting the Federal coal program for an extended time, nor is a programmatic EIS required to consider potential improvements to the program." Secretarial Order No. 3348 at 1 (sec. 4).[13] The parties jointly moved to lift the abeyance and set a briefing schedule. This Court granted the motion.

STANDARD OF REVIEW

This Court reviews *de novo* the grant of a motion to dismiss for failure to state a claim. *Trudeau v. FTC*, 456 F.3d 178, 183 (D.C. Cir. 2006). "In determining whether a complaint fails to state a claim, [the court] may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matter of which [the court] may take judicial notice." *Id*. (quoting *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624-25 (D.C. Cir. 1997)).

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[12] *Available at* http://www.documentcloud.org/documents/2691724-Secretarial-Order-3338-Coal.html.

[13] *Available at* https://www.doi.gov/sites/doi.gov/files/uploads/so_3348_coal_moratorium.pdf (PDF download).

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests whether the plaintiff has properly stated a claim upon which relief may be granted." *Ariz. Mining Ass'n v. Jackson*, 708 F. Supp. 2d 33, 39 (D.D.C. 2010). A claim for relief can survive a motion to dismiss under Rule 12(b)(6) only if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). Although plausibility is a lesser standard than probability, the facts alleged in a complaint "must be enough to raise a right to relief above the speculative level[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (quotation omitted). A claim for relief must, therefore, provide more than "labels and conclusions" and more than a "formulaic recitation of the elements of a cause of action[.]" *Iqbal*, 556 U.S. at 678.

SUMMARY OF ARGUMENT

The Plaintiffs failed to allege that the Interior Department or the BLM have proposed action, such as recertification of any coal production regions, under the defunct national coal management program that would obligate either agency to perform a supplemental EIS to update the 1979 programmatic EIS. Accordingly, Plaintiffs' complaint fails to state a cognizable claim.

The 1979 programmatic EIS evaluated the impacts associated with coal leasing on a regional basis, which impacts were, in turn, dependent upon national

production goals. That program later proved to be unworkable because those implementing it were unable to accurately predict the supply and demand of coal. To remedy the situation, the Interior Department decertified all of the designated regional coal areas, thus terminating the process of coal leasing established according to the 1979 programmatic EIS and the subsequent 1985 supplemental EIS. Since decertification, coal leasing on federal lands has been by lease-by-application which is an industry-driven approach based on applications for specific tracts of land. The environmental impacts of the lease-by-application process were not part of the 1979 programmatic EIS or the 1985 supplemental EIS. The evaluation of lease-by-applications occurs at the site-specific, rather than the programmatic level.

The upshot is that neither the Department of Interior nor the BLM has taken any action under the regional leasing program since decertification of the regions over twenty years ago. The Plaintiffs have not made any allegation of current or planned actions for recertification of the coal production regions under the national coal management program. Thus, there is no "proposed action" obligating the Department of Interior or the BLM to supplement the 1979 programmatic EIS. As a result, even if accepted as true, the Plaintiffs' allegations do not establish a violation of NEPA or the APA. Accordingly, the district court properly dismissed the Plaintiffs' complaint for failing to state a claim.

ARGUMENT

Plaintiffs assert that the on-going leasing of federal land for coal mining necessitates an update of the 1979 programmatic EIS to account for advancements in the state of the scientific knowledge regarding climate change. Pls.' Br. at 29-30. Their argument, however, fails to recognize that the 1979 programmatic EIS evaluated a coal leasing program using regional designations with leasing determinations based on national coal supply and demand projections that has not been used since 1999. The program evaluated in the 1979 programmatic EIS is defunct. A supplemental update of that EIS would be a waste of time and resources as it would have no effect on the current coal leasing process on federal lands. Consequently, Plaintiffs have failed to allege a major agency action that would trigger any legal requirement for an evaluation of the current coal leasing process under NEPA or the APA. Under the leasing-by-application process, the BLM satisfied its legal obligations under NEPA by the evaluation of environmental impacts based on the actual leasing application proposals.

I. The BLM has no obligation to supplement the 1979 programmatic EIS until the agency takes action.

NEPA requires federal agencies to evaluate and publish a statement of the effects of proposed "major Federal actions significantly affecting the quality of the human environment[.]" 42 U.S.C. § 4332(C). NEPA does not dictate any substantive

result in agency decision making; instead, it just requires agencies to consider and share with the public the potential impacts of proposed actions. *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citation omitted).

Under NEPA, it can be appropriate for federal agencies to undertake a programmatic analysis when there are "pending concurrently before an agency" multiple proposals that "will have [a] cumulative or synergistic environmental impact[.]" *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). However, the decision whether to undertake a programmatic analysis is discretionary. *See Kleppe*, 427 U.S. at 412; *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 892 (D.C. Cir. 1981).

The regulations implementing NEPA only require federal agencies to supplement a past analysis 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(c)(1)(ii) (emphasis added). But, as the rule makes clear, supplementation is required only where new circumstances or information are relevant to a "proposed action[.]" *Id.*; *see also Fla. Keys Citizens Coal., Inc. v. United States Army Corps of Eng'rs*, 374 F. Supp. 2d 1116, 1146 (S.D. Fla. 2005).

A. The 1979 programmatic EIS analyzed the regional leasing program as the proposed major federal action.

The Interior Department repeatedly made it clear that the proposed action it evaluated in its 1979 programmatic EIS was the regional leasing program. *See, e.g.*, 1979 programmatic EIS at v (describing the regional leasing program as the "preferred alternative"); *see also id*. at 3-1. Throughout the analysis, the Interior Department described the regional leasing program as the "Federal coal management program[.]" *See, e.g.*, *id.* at 1-3. Thus, the Interior Department based its 1979 environmental analysis on the national coal production goals that were the focal point of the regional leasing program. *See, e.g.*, *id.* at 5-37, 5-99, 5-109, 5-128. Those national production goals provided the baselines for estimating environmental impacts that would flow from the Interior Department's national program. *Id*. Because the program was devoted to achieving national coal production goals, it was entirely sensible for the Interior Department to evaluate the environmental impacts at the programmatic level. *Kleppe*, 427 U.S. at 410, 412.

By contrast, the Interior Department did not identify leasing-by-application as the preferred alternative for the proposed action. 1979 programmatic EIS at 3-1. The Interior Department explained that the leasing-by-application process "would likely result in coal leasing, coal production, and coal-related development activity levels for each coal region different from those which would occur under the preferred

program." *Id*. at 3-2. The Interior Department intended for the regional leasing program to be the norm and the leasing-by-application process the exception. *Id*. at v, 1-3.

Thus, the 1979 programmatic EIS evaluated the environmental impacts associated with the proposed regional leasing program. In this regard, the flow charts in Figures 3-1 through 3-4 of the 1979 programmatic EIS statement are particularly instructive, as they summarize the preferred federal coal management program under consideration. *See* 1979 programmatic EIS at 3-4, 3-14 through 3-16. The charts do not include the lease-by-application process. Similarly, the 1985 supplemental EIS evaluated the "proposed action to continue the federal coal management program." 1985 supplemental EIS at 4.

The proposal to adopt the regional leasing program as the "federal coal management program" necessitated the preparation of the programmatic statement. A programmatic evaluation is appropriate for the type of broad federal action like the government-driven regional leasing. *See* 40 C.F.R. § 1502.4(b). The lease-by-application process, driven by private parties based on market conditions and industry needs, is not appropriate for programmatic evaluation because it is site-specific in nature.

B. The BLM has not taken any action under the regional leasing program.

The BLM has not taken any significant action under the regional leasing program since it decertified the coal production regions more than two decades ago. Public Participation in Coal Leasing, 64 Fed. Reg. at 52240. Nor has the BLM proposed any action under that program. Since decertification, the market-driven lease-by-application process has been the exclusive means for competitive leasing of coal on federal lands. *Id*. Under that *ad hoc* process, coal leasing activities do not implicate the 1979 programmatic EIS, which evaluated the impacts of the defunct regional leasing program.

The Plaintiffs' claim depends on characterizing the lease-by-application process and the regional leasing program collectively as "the federal coal management program." JA__ (Dkt. 1 at 2, ¶ 1). However, when the Interior Department created the "federal coal management program," it used that term to refer only to the regional leasing process. 1979 programmatic EIS at 1-3. The agency made it clear that the lease-by-application process was not the federal coal management program. *Id*. at 3-1.

The Plaintiffs' failure to define the "program" in any meaningful sense is telling. Their most detailed explanation of the federal coal mining program is set

forth in their complaint and is nothing more than a laundry list of legal authorities related to coal leasing:

> [The program] is administered by BLM, an agency within the Department of Interior, according to various acts of Congress, including the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq*.; Federal Leasing Amendments Act of 1976, Pub. L. No. 94-377, 90 Stat. 1083; Surface Mining Control and Reclamation of 1977, 30 U.S.C. § 1201 *et seq.*; and Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq*.

JA__ (Dkt. 1 at 3, ¶ 3). The Plaintiffs add that "BLM has promulgated regulations implementing the Program at 43 C.F.R. Parts 3400-3480 and issued guidance supplementing these regulations, *see, e.g.*, BLM Handbook H-3070-1, Economic Evaluation of Coal Properties."[14] *Id*.

The Plaintiffs' all encompassing "federal coal management program" is no more a program "than a 'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Administration." *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 (1990) (rejecting argument to characterize individual agency actions as a collective program). The breadth of the regulatory activities embraced in the legal authorities that the Plaintiffs claim to constitute the "program" belies the existence of any program. *See, e.g.*, 43 U.S.C. §

[14] *Available at* http://www.wyofile.com/wp-content/uploads/2013/08/Coal-economic-evaluation-process.pdf (PDF download).

1752(a) (establishing under the Federal Land Policy and Management Act the terms for grazing leases on BLM lands); 30 U.S.C. § 1253 (authorizing state regulatory programs under the Surface Mining Control and Reclamation Act).

These authorities do relate to the Interior Department's and the BLM's coal leasing activities, and to differing degrees and for varying reasons, some of these authorities spurred the Interior Department to create the regional leasing program. Due to decertification, however, they do not collectively constitute any sort of coal management program in operation today. *See Nat'l Wildlife Fed'n*, 677 F.2d at 890 ("a once vast and variegated program can become reduced to a few uncompleted, smaller-scale enterprises"). As a result, the "program" is "simply the name by which [the Plaintiffs] have . . . referred to the continuing (and thus constantly changing) operations of the BLM." *See Lujan*, 497 U.S. at 890. The Plaintiffs' use of the word "program" does not represent a legally valid construct to which the district court, or this Court, could apply a NEPA analysis.

C. Since the BLM has not taken action under the national coal program, the agency has no obligation to update the 1979 programmatic EIS.

Congress made clear that federal agencies are obligated to comply with NEPA only when faced with a proposed "major Federal action[.]" 42 U.S.C. § 4332(C). The regulations implementing NEPA unequivocally state that an agency is obligated

to supplement a NEPA analysis only where new information bears "**on the proposed action** or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii) (emphasis added). Until the BLM or the Interior Department proposes an action under the national coal management leasing program, neither agency is under any obligation to revise the 1979 programmatic EIS. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989) (an agency's obligation to supplement a NEPA analysis arises only if "there remains major Federal action to occur"); *see also Kleppe*, 427 U.S. at 406 (an agency's NEPA obligation arises when "it makes a recommendation or report on a *proposal* for federal action") (quotation omitted) (emphasis in original).

In fact, updating the 1979 programmatic EIS to consider climate change impacts would be a frivolous exercise. The 1979 programmatic EIS relied on the national coal production goals that guided regional leasing to establish the environmental effects analyzed. *See, e.g.*, 1979 programmatic EIS 5-37, 5-99, 5-109, 5-128. The Interior Department could programmatically evaluate the impacts of the national program because it dictated the amount, where, and when the leasing of coal took place under that program. However, as the Interior Department discarded that program in favor of the industry driven, demand-based lease-by-application process, there are no national coal production goals to form the "factual predicate" for a supplemental NEPA analysis. *Kleppe*, 427 U.S. at 402.

In other words, absent a proposal for action under the national coal management leasing program, "there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement." *Id*. at 401; *see also Young v. Gen. Servs. Admin.*, 99 F. Supp. 2d 59, 72 (D.D.C. 2000) ("agencies don't just go out and do NEPA just to do NEPA") (citation omitted). Since total coal production under the lease-by-application process depends on industry interest, not national production goals, the Department cannot hypothesize the total national coal production estimates to replace the production goals in the 1979 programmatic EIS. *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 668 (9th Cir. 1998) ("NEPA does not require an agency to consider the environmental effects that speculative or hypothetical projects might have on a proposed project") (citation omitted). Indeed, the government's inability to accurately predict the market for coal proved to be the national program's Achilles heel.

D. The decision in *Wildearth Guardians v. Salazar*, 783 F. Supp. 2d 61 (D.D.C. 2011) does not contradict the Intervenors' position on the scope of the 1979 programmatic EIS.

Because it accepted the rationale of the federal Defendants, the district court did not address the Intervenors' arguments. JA__ (Dkt. 42 at 2). However, the district court noted a "dispute amongst the various parties concerning the scope of the federal coal management program for which an EIS was prepared." *Id*.; (Dkt. 42 at 5, n.2). That dispute, the court found, was resolved by *Wildearth Guardians v.*

Salazar, 783 F. Supp. 2d 61, 73 (D.D.C. 2011) in which "[a]nother member of this Court has already found that the program assessed by the 1979 EIS includes both 'the competitive regional application process . . . [and] the leasing-for-application process." *Id*. The district court declined to "narrowly characterize the program . . . the program assessed did not include leasing through the application process" because the parties propounding the narrow view had "provide[d] no basis for the Court to deviate from the finding in *Wildearth Guardians*." *Id*.; (Dkt. 42 at 5-6, n.2).

In *Wildearth Guardians v. Salazar*, the plaintiffs asserted that the BLM was required to recertify the Powder River Basin as a coal production region. 783 F. Supp. 2d at 61. In support of this assertion, they argued that because the 1979 Final Rule described the regional leasing process as the "normal leasing process," the BLM's broad statutory and regulatory discretion to certify, decertify, or recertify the basin had been limited. *Id*. at 72-73. The court rejected that assertion and concluded that there was no indication that the BLM intended to prioritize the regional leasing process over the lease-by-application process. *Id*.

Whether the BLM prioritized the regional leasing program over the lease-by-application process in the 1979 Final Rule is not the same issue as whether the federal coal management program evaluated in the programmatic environmental impact statement somehow incorporates the alternative lease-by-application

process. Since the 1979 programmatic EIS was not at issue, *Wildearth Guardians* does not provide any guidance on the scope of that EIS.

II. Because the BLM has no current obligation to supplement the 1979 programmatic EIS, the Plaintiffs have failed to state a claim.

Even accepting as true the factual allegations in the Plaintiffs' complaint, those facts are not "enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 555-56 (2007). The Plaintiffs have not alleged that the Interior Department or the BLM have taken any action under the national coal management program that would trigger a NEPA obligation to revisit the 1979 programmatic EIS. *See generally* JA__ (Dkt. 1). Their claim for relief depends on an erroneous collective characterization of the United States' coal leasing activities as a "program" that finds no support in the law or the regulatory history. As a result, the Plaintiffs' complaint alleges little more than "labels and conclusions" coupled with a "formulaic recitation of the elements to a cause of action[.]" *Iqbal*, 556 U.S. at 678. Since the Plaintiffs have failed to allege a claim upon which a court could grant relief, the district court properly dismissed their claim. *See, e.g., Sierra Club v. United States Army Corps of Eng'rs*, 64 F. Supp. 3d 128, 146-47 (D.D.C. 2014) (granting 12(b)(6) motion to dismiss NEPA claim where agency has not taken an action to trigger its NEPA obligation). This Court should affirm that dismissal.

CONCLUSION

This litigation is the most recent in a long line of cases attempting to put an end to the development of federal coal reserves. *See, e.g.*, *Wildearth Guardians*, 738 F.3d 298; *Wildearth Guardians v. BLM*, 8 F. Supp. 3d 17 (D.D.C. 2014). Like others before it, this case is "less a challenge to a discrete action taken by the BLM [or the Interior Department] than a challenge to the BLM's [and the Interior Department's] broader policy decision to phase out coal production regions . . . and to conduct its federal coal leasing program pursuant to the leasing-by-application process going forward." *Wildearth Guardians*, 783 F. Supp. at 68.

The Plaintiffs' cumulative dissatisfaction with federal coal leasing does not entitle them to "seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891 (emphasis in original). So long as the BLM and the Interior Department utilize the leasing-by-application process, evaluating environmental impacts based on actual leasing application proposals satisfies the agencies' "obligations under NEPA to consider climate change." *Wildearth Guardians*, 738 F.3d at 322.

Accordingly, this Court should grant the Intervenors' motion and affirm the decision of the district court.

Respectfully submitted this 6th day of December 2017.

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CERTIFICATE OF SERVICE

I certify that on this 6th day of December, 2017, I electronically filed the foregoing *Joint Brief of Intervenors* with the Clerk of Court using the CM/ECF system, which will serve copies of such filing upon all ECF-registered counsel.

/s/ Mike Robinson
Wyoming Attorney General's Office

APPENDIX

INDEX OF APPENDIX

5 USCS § 706

Copy Citation

Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES PART I. THE AGENCIES GENERALLY CHAPTER 7. JUDICIAL REVIEW

Notice

Part 1 of 3. You are viewing a very large document that has been divided into parts.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 USCS § 1291

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Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART IV. JURISDICTION AND VENUE CHAPTER 83. COURTS OF APPEALS

Notice

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§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

28 USCS § 1331

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Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART IV. JURISDICTION AND VENUE CHAPTER 85. DISTRICT COURTS; JURISDICTION

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§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

30 USCS § 181

Copy Citation

Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 TITLE 30. MINERAL LANDS AND MINING CHAPTER 3A. LEASES AND PROSPECTING PERMITS GENERAL PROVISIONS

§ 181. Lands subject to disposition; persons entitled to benefits; reciprocal privileges; helium rights reserved

Deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite (including all vein-type solid hydrocarbons), or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.

The term "oil" shall embrace all nongaseous hydrocarbon substances other than those substances leaseable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons).

The term "combined hydrocarbon lease" shall refer to a lease issued in a special tar sand area pursuant to section 17 [30 USCS § 226] after the date of enactment of the Combined Hydrocarbon Leasing Act of 1981 [enacted Nov. 16, 1981].

The term "special tar sand area" means (1) an area designated by the Secretary of the Interior's orders of November 20, 1980 (45 FR 76800-76801) and January 21, 1981 (46 FR 6077-6078) as containing substantial deposits of tar sand.

The United States reserves the ownership of and the right to extract helium from all gas produced from lands leased or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof.

30 USCS § 189

Copy Citation

Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 TITLE 30. MINERAL LANDS AND MINING CHAPTER 3A. LEASES AND PROSPECTING PERMITS GENERAL PROVISIONS

§ 189. Rules and regulations; boundary lines; States rights not affected; taxation

The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act; *Provided*, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

30 USCS § 1253

Copy Citation

Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 TITLE 30. MINERAL LANDS AND MINING CHAPTER 25. SURFACE MINING CONTROL AND RECLAMATION CONTROL OF THE ENVIRONMENTAL IMPACTS OF SURFACE COAL MINING

§ 1253. State programs

(a) Regulation of surface coal mining and reclamation operations; submittal to Secretary; time limit; demonstration of effectiveness. Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 521 and 523 and title IV of this Act [30 USCS §§ 1271 and 1273, and 1231 et seq.], shall submit to the Secretary, by the end of the eighteenth-month [eighteen-month] period beginning on the date of enactment of this Act [enacted Aug. 3, 1977], a State program which demonstrates that such State has the capability of carrying out the provisions of this Act [30 USCS §§ 1201 et seq.] and meeting its purposes through--

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act [30 USCS §§ 1201 et seq.];

(2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which sanctions shall meet the minimum requirements of this Act [30 USCS §§ 1201et seq.], including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;

(3) a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this Act [30 USCS §§ 1201 et seq.];

(4) a State law which provides for the effective implementations [implementation], maintenance, and enforcement of a permit system, meeting the requirements of this title [30 USCS §§ 1251 et seq.] for the regulations [regulation] of surface coal mining and reclamation operations for coal on lands within the State;

(5) establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 522 [30 USCS § 1272] provided that the designation of Federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; [and]

(6) establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations; and

(7) rules and regulations consistent with regulations issued by the Secretary pursuant to this Act [30 USCS §§ 1201 et seq.].

(b) Approval of program. The Secretary shall not approve any State program submitted under this section until he has--

(1) solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed State program;

(2) obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of a State program which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151-1175), and the Clean Air Act, as amended (42 U.S.C. 1857 et seq.);

(3) held at least one public hearing on the State program within the State; and

(4) found that the State has the legal authority and qualified personnel necessary for the enforcement of the environmental protection standards.

The Secretary shall approve or disapprove a State program, in whole or in part, within six full calendar months after the date such State program was submitted to him.

(c) Notice of disapproval. If the Secretary disapproves any proposed State program in whole or in part, he shall notify the State in writing of his decision and set forth in detail the reasons therefor. The State shall have sixty days in which to resubmit a revised State program or portion thereof. The Secretary shall approve or disapprove the resubmitted State program or portion thereof within sixty days from the date of resubmission.

(d) Inability of State to take action. For the purposes of this section and section 504 [30 USCS § 1254], the inability of a State to take any action the purpose of which is to prepare, submit or enforce a State program, or any portion thereof, because the action is enjoined by the issuance of an injunction by any court of competent jurisdiction shall not result in a loss of eligibility for financial assistance under titles IV and VII of this Act [30 USCS §§ 1231 et seq. and 1251 et seq.] or in the imposition of a Federal program. Regulation of the surface coal mining and reclamation operations covered or to be covered by the State program subject to the injunction shall be conducted by the State pursuant to section 502 of this Act [30 USCS § 1252], until such time as the injunction terminates or for one year, whichever is shorter, at which time the requirements of sections 503 and 504 [30 USCS §§ 1253 and 1254] shall again be fully applicable.

42 USCS § 4332

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Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY POLICIES AND GOALS

Notice

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§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [42 USCS §§ 4321 et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[;]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.].

43 USCS § 1752

Copy Citation

Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 TITLE 43. PUBLIC LANDS CHAPTER 35. FEDERAL LAND POLICY AND MANAGEMENT RANGE MANAGEMENT

§ 1752. Grazing leases and permits

(a) Terms and conditions. Except as provided in subsection (b) of this section, permits and leases for domestic livestock grazing on public lands issued by the Secretary under the Act of June 28, 1934 (48 Stat. 1269, as amended; 43 U.S.C. 315 et seq.) or the Act of August 28, 1937 (50 Stat. 874, as amended; 43 U.S.C. 1181a-1181j), or by the Secretary of Agriculture, with respect to lands within National Forests in the sixteen contiguous Western States, shall be for a term of ten years subject to such terms and conditions the Secretary concerned deems appropriate and consistent with the governing law, including, but not limited to, the authority of the Secretary concerned to cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, or to cancel or suspend a grazing permit or lease for any violation of a grazing regulation or of any term or condition of such grazing permit or lease.

(b) Terms of lesser duration. Permits or leases may be issued by the Secretary concerned for a period shorter than ten years where the Secretary concerned determines that--

(1) the land is pending disposal; or

(2) the land will be devoted to a public purpose prior to the end of ten years; or

(3) it will be in the best interest of sound land management to specify a shorter term: Provided, That the absence from an allotment management plan of details the Secretary concerned would like to include but which are undeveloped shall not be the basis for establishing a term shorter than ten years: Provided further, That the absence of completed land use plans or court ordered environmental statements shall not be the sole basis for establishing a term shorter than ten years unless the Secretary determines on a case-by-case basis that the information to be contained in such land use plan or court ordered environmental impact statement is necessary to determine whether a shorter term should be established for any of the reasons set forth in items (1) through (3) of this subsection.

(c) First priority for renewal of expiring permit or lease.

(1) Renewal of expiring or transferred permit or lease. During any period in which

(A) the lands for which the permit or lease is issued remain available for domestic livestock grazing in accordance with land use plans prepared pursuant to section 202 of this Act [43 USCS § 1712] or

section 5 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (88 Stat. 477; 16 U.S.C. 1601) [16 USCS § 1604],

(B) the permittee or lessee is in compliance with the rules and regulations issued and the terms and conditions in the permit or lease specified by the Secretary concerned, and

(C) the permittee or lessee accepts the terms and conditions to be included by the Secretary concerned in the new permit or lease, the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease.

(2) Continuation of terms under new permit or lease. The terms and conditions in a grazing permit or lease that has expired, or was terminated due to a grazing preference transfer, shall be continued under a new permit or lease until the date on which the Secretary concerned completes any environmental analysis and documentation for the permit or lease required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and other applicable laws.

(3) Completion of processing. As of the date on which the Secretary concerned completes the processing of a grazing permit or lease in accordance with paragraph (2), the permit or lease may be canceled, suspended, or modified, in whole or in part.

(4) Environmental reviews. The Secretary concerned shall seek to conduct environmental reviews on an allotment or multiple allotment basis, to the extent practicable, if the allotments share similar ecological conditions, for purposes of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321et seq.) and other applicable laws.

(d) Allotment management plan requirements. All permits and leases for domestic livestock grazing issued pursuant to this section may incorporate an allotment management plan developed by the Secretary concerned. However, nothing in this subsection shall be construed to supersede any requirement for completion of court ordered environmental impact statements prior to development and incorporation of allotment management plans. If the Secretary concerned elects to develop an allotment management plan for a given area, he shall do so in careful and considered consultation, cooperation and coordination with the lessees, permittees, and landowners involved, the district grazing advisory board established pursuant to section 403 of the Federal Land Policy and Management Act (43 U.S.C. 1753), and any State or States having lands within the area to be covered by such allotment management plan. Allotment management plans shall be tailored to the specific range condition of the area to be covered by such plan, and shall be reviewed on a periodic basis to determine whether they have been effective in improving the range condition of the lands involved or whether such lands can be better managed under the provisions of subsection (e) of this section. The Secretary concerned may revise or terminate such plans or develop new plans from time to time after such review and careful and considered consultation, cooperation and coordination with the parties involved. As used in this subsection, the terms "court ordered environmental impact statement" and "range condition" shall be defined as in the "Public Rangelands Improvement Act of 1978.".

(e) Omission of allotment management plan requirements and incorporation of appropriate terms and conditions; reexamination of range conditions. In all cases where the Secretary concerned has not completed an allotment management plan or determines that an allotment management plan is not necessary for management of livestock operations and will not be prepared, the Secretary concerned shall incorporate in

grazing permits and leases such terms and conditions as he deems appropriate for management of the permitted or leased lands pursuant to applicable law. The Secretary concerned shall also specify therein the numbers of animals to be grazed and the seasons of use and that he may reexamine the condition of the range at any time and, if he finds on reexamination that the condition of the range requires adjustment in the amount or other aspect of grazing use, that the permittee or lessee shall adjust his use to the extent the Secretary concerned deems necessary. Such readjustment shall be put into full force and effect on the date specified by the Secretary concerned.

(f) Allotment management plan applicability to non-Federal lands; appeal rights. Allotment management plans shall not refer to livestock operations or range improvements on non-Federal lands except where the non-Federal lands are intermingled with, or, with the consent of the permittee or lessee involved, associated with, the Federal lands subject to the plan. The Secretary concerned under appropriate regulations shall grant to lessees and permittees the right of appeal from decisions which specify the terms and conditions of allotment management plans. The preceding sentence of this subsection shall not be construed as limiting any other right of appeal from decisions of such officials.

(g) Cancellation of permit or lease; determination of reasonable compensation; notice. Whenever a permit or lease for grazing domestic livestock is canceled in whole or in part, in order to devote the lands covered by the permit or lease to another public purpose, including disposal, the permittee or lessee shall receive from the United States a reasonable compensation for the adjusted value, to be determined by the Secretary concerned, of his interest in authorized permanent improvements placed or constructed by the permittee or lessee on lands covered by such permit or lease, but not to exceed the fair market value of the terminated portion of the permittee's or lessee's interest therein. Except in cases of emergency, no permit or lease shall be canceled under this subsection without two years' prior notification.

(h) National Environmental Policy Act of 1969.

(1) In general. The issuance of a grazing permit or lease by the Secretary concerned may be categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) if--

(A) the issued permit or lease continues the current grazing management of the allotment; and

(B) the Secretary concerned--

(i) has assessed and evaluated the grazing allotment associated with the lease or permit; and

(ii) based on the assessment and evaluation under clause (i), has determined that the allotment--

(I) with respect to public land administered by the Secretary of the Interior--

(aa) is meeting land health standards; or

(bb) is not meeting land health standards due to factors other than existing livestock grazing; or

(II) with respect to National Forest System land administered by the Secretary of Agriculture--

(aa) is meeting objectives in the applicable land and resource management plan; or

(bb) is not meeting the objectives in the applicable land resource management plan due to factors other than existing livestock grazing.

(2) Trailing and crossing. The trailing and crossing of livestock across public land and National Forest System land and the implementation of trailing and crossing practices by the Secretary concerned may be categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(i) Priority and timing for completion of environmental analyses. The Secretary concerned, in the sole discretion of the Secretary concerned, shall determine the priority and timing for completing each required environmental analysis with respect to a grazing allotment, permit, or lease based on--

(1) the environmental significance of the grazing allotment, permit, or lease; and

(2) the available funding for the environmental analysis.

(j) Applicability of provisions to rights, etc., in or to public lands or lands in National Forests. Nothing in this Act shall be construed as modifying in any way law existing on the date of approval of this Act [enacted Oct. 21, 1976] with respect to the creation of right, title, interest or estate in or to public lands or lands in National Forests by issuance of grazing permits and leases.

40 CFR 1502.4

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Code of Federal Regulations TITLE 40 -- PROTECTION OF ENVIRONMENT CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY PART 1502 -- ENVIRONMENTAL IMPACT STATEMENT

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

40 CFR 1502.9

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Code of Federal Regulations TITLE 40 -- PROTECTION OF ENVIRONMENT CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY PART 1502 -- ENVIRONMENTAL IMPACT STATEMENT

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

43 CFR 3420.3-4

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Code of Federal Regulations TITLE 43 -- PUBLIC LANDS: INTERIOR SUBTITLE B -- REGULATIONS RELATING TO PUBLIC LANDS CHAPTER II -- BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR SUBCHAPTER C -- MINERALS MANAGEMENT (3000) PART 3420 -- COMPETITIVE LEASING SUBPART 3420 -- COMPETITIVE LEASING GROUP 3400 -- COAL MANAGEMENT § 3420.3 ACTIVITY PLANNING: THE LEASING PROCESS.

§ 3420.3-4 Regional tract ranking, selection, environmental analysis and scheduling.

(a)

(1) Upon completion of tract delineation and preparation of the tract profiles, the regional coal team shall rank the tracts in classes of high, medium or low desirability for coal leasing. Three major categories of consideration shall be used in tract ranking: coal economics; impacts on the natural environment; and socioeconomic impacts. The subfactors the regional coal team will consider under each category are those the regional coal team determines are appropriate for that region. The regional coal team will make its determination after publishing notice in the Federal Register that the public has 30 days to comment on the subfactors. The regional coal team will then consider any comments it receives in determining the subfactors. BLM will publish the subfactors in the regional lease sale environmental impact statement required by this section. Tracts may also be ranked for other coal management purposes, such as emergency leasing under subpart 3425 of this title or exchanges under subparts 3435 and 3436 of this title.

(2) The regional coal team may modify tract boundaries being ranked, if appropriate, to reflect additional information.

(3) In ranking tracts, the regional coal team shall solicit the recommendations of the Federal and State agencies having appropriate expertise, including the Geological Survey, the Fish and Wildlife Service and the Federal surface management agency, if other than the Bureau of Land Management.

(4) Where Federal leasing decisions are likely to have impacts on lands held in trust for an Indian tribe, the regional coal team shall solicit the recommendations of the tribe and the Bureau of Indian Affairs.

(5) A statement that descriptions of the tracts to be ranked are available shall be included with the notice announcing any regional coal team meeting at which those tracts shall be ranked. BLM will publish

the notice no later than 45 days before the meeting. The notice will list potential topics for discussion. An opportunity for public comment on the tract rankings shall be provided during the regional coal team meeting.

(b)

(1) Upon completion of tract ranking, the regional coal team shall select at least 1 combination of tracts that approximates the regional leasing level. One combination of tracts within the regional leasing level shall be identified as the proposed action for study in the environmental impact statement. The team shall also select tract combinations representing alternative leasing levels. The team may identify alternative combinations of tracts within a leasing level.

(2) The regional coal team may adjust the tract ranking and select tracts to reflect considerations including:

(i) The compatibility of coal quality, coal type and market needs;

(ii) Environmental and socioeconomic impacts;

(iii) The compatibility of reserve size and demand distribution for tracts;

(iv) Public opinion;

(v) Avoidance of future emergency lease situations; and

(vi) Special leasing opportunity requirements.

(c) After tract ranking and selection, a regional lease sale environmental impact statement on all tract combinations selected by the regional coal team for the various leasing levels and all other reasonable alternative leasing levels shall be prepared by the Bureau of Land Management in accordance with the provisions of the National Environmental Policy Act. The statement shall consider both:

(1) The site-specific potential environmental impacts of each tract being considered for lease sale; and

(2) The intraregional cumulative environmental impacts of the proposed leasing action and alternatives, and other coal and noncoal development activities.

(d) The results of the ranking and selection process, including the tract rankings, the tract selected and the list of ranking criteria used shall be published in the regional lease sale environmental impact statement required by paragraph (c) of this section. Detailed information on each of the tracts shall be available for inspection in the Bureau of Land Management State offices that have jurisdiction over lands within the coal production region (See 43 CFR subpart 1821). BLM will publish a notice in the Federal Register of the 60-day comment period and the public hearing on the draft environmental impact statement. BLM also will publish the notice at least once per week for two consecutive weeks in a newspaper of general circulation in the area of the sale.

(e) Public hearings shall be held in the region following the release of the draft regional lease sale environmental impact statement to announce and discuss the results of the ranking and selection process and the potential impacts, including proposed mitigation measures.

(f) When the comment period on the draft environmental impact statement closes, the regional coal team will analyze the comments and make any appropriate revisions in the tract ranking and selection. The final regional lease sale environmental impact statement will reflect such revisions and will include all comments received.

(g) When BLM completes and releases the final regional lease sale environmental impact statement, the regional coal team will meet and recommend specific tracts for lease sale and a lease sale schedule. The regional coal team will provide notice in the Federal Register of the date and location at least 45 days before its meeting. The chairperson shall submit the recommendations to the Director. Any disagreement as to the recommendation among the team shall be documented and submitted by the chairperson along with the team recommendation. The Director shall submit the final regional environmental impact statement to the Secretary for his/her decision, together with the recommendation of the team and any recommendations the Director may wish to make.

(h) The tract ranking, selection and scheduling process and the regional lease sale environmental impact statement shall be revised or repeated as needed. The Secretary may, in consultation with the Governor(s) of the affected State(s) and surface management agencies, initiate or postpone the process to respond to considerations such as major land use planning updates, new tract delineations or increases or decreases in the leasing levels.

Statutory Authority

The Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 et seq.), the Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351-359), the Multiple Mineral Development Act of 1954 (30 U.S.C. 521-531 et seq.), the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.), the Department of Energy Organization Act of 1977 (42 U.S.C. 7101 et seq.), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) and the Small Business Act of 1953, as amended (15 U.S.C. 631 et seq.).

43 CFR 3425.0-2

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Code of Federal Regulations TITLE 43 -- PUBLIC LANDS: INTERIOR SUBTITLE B -- REGULATIONS RELATING TO PUBLIC LANDS CHAPTER II -- BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR SUBCHAPTER C -- MINERALS MANAGEMENT (3000) PART 3420 -- COMPETITIVE LEASING SUBPART 3425 -- LEASING ON APPLICATION GROUP 3400 -- COAL MANAGEMENT

§ 3425.0-2 Objective.

The objective of this subpart is to provide an application process through which the Department may consider holding lease sales apart from the competitive leasing process set out in §§ 3420.3 through 3420.5-2 of this title, where an emergency need for unleased coal deposits is demonstrated, or in areas outside coal production regions or outside eastern activity planning areas.

Statutory Authority

The Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 et seq.), the Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351-359), the Multiple Mineral Development Act of 1954 (30 U.S.C. 521-531 et seq.), the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.), the Department of Energy Organization Act of 1977 (42 U.S.C. 7101 et seq.), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) and the Small Business Act of 1953, as amended (15 U.S.C. 631 et seq.).