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Citizens for Clean Energy v. United States Department of the Interior

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Citizens for Clean Energy v. United States Department of the Interior, 384 F. Supp. 3d 1264 (D. Mont. 2019)

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In 2017, Secretary of the Interior Ryan Zinke issued a new order lifting the previous administration's 2016 Jewell Order that had placed a moratorium on mineral leases until a programmatic EIS was completed. The new order repealed the moratorium, cancelled the programmatic EIS, and instructed the BLM to expedite new mineral lease applications. Several plaintiffs challenged Zinke's order, and the United States District Court for the District of Montana ruled that it was a major federal action that triggered NEPA analysis and that the agency acted arbitrarily and capriciously when it issued the order without any environmental review.

I. INTRODUCTION

In *Citizens for Clean Energy v. U.S. Department of the Interior*,[1] the United States District Court for the District of Montana ruled on summary judgment motions filed by multiple environmental groups ("Organizational Plaintiffs"), the States of California, New Mexico, New York, and Washington ("State Plaintiffs"), and the Northern Cheyenne Tribe of American Indians (collectively "Plaintiffs") against the Department of Interior ("DOI"). Plaintiffs sought environmental review of federal coal leases before DOI lifted a moratorium instituted by the previous administration.[2] Plaintiffs argued that lifting the moratorium was a major federal action and was subject to environmental review under the National Environmental Policy Act ("NEPA").[3] DOI, the U.S. Bureau of Land Management ("BLM"), the States of Wyoming and Montana, and the National Mining Association (collectively "Defendants") responded that lifting the moratorium was merely a policy shift and not a final agency action reviewable under the Administrative Procedure Act ("APA").[4]

II. FACTUAL AND PROCEDURAL BACKGROUND

In early 2016, then Secretary of the Interior Sally Jewell, issued an order (the "Jewell Order") that directed BLM to conduct a comprehensive environmental review of the federal coal program, which had not been updated since 1979.[5] The Jewell Order further imposed a moratorium on federal coal leases until the completion of a programmatic environmental impact statement ("PEIS").[6] In March 2017, after appointing Ryan Zinke ("Zinke") as Secretary of the Interior, President

1. 384 F. Supp. 3d 1264 (D. Mont. 2019).
2. *Id.* at 1274.
3. *Id.* at 1276.
4. *Id*.
5. *Id.* at 1276–77.
6. *Id.*

Trump issued an executive order instructing Zinke to "take all steps necessary and appropriate to amend or withdraw the Jewell Order."[7] Zinke issued his order (the "Zinke Order"), directing BLM to "process coal lease applications and modifications expeditiously in accordance with regulations and guidance existing before the issuance of [the Jewell Order]."[8] In addition to lifting the moratorium, the Zinke Order also concluded that completing a new PEIS or supplementing the 1979 PEIS of the federal coal leasing program was not necessary.[9] Plaintiffs sued DOI in March 2017, and the parties filed cross-motions for summary judgment in the spring and fall of 2018.[10] Defendants asserted that the Zinke Order was a mere policy shift and did not constitute a major federal action triggering environmental review under NEPA.[11] Defendants further argued that Plaintiffs lacked standing and the claim was not ripe for adjudication.[12]

III. ANALYSIS

The court examined Defendants' challenges of standing and ripeness before addressing Plaintiffs' NEPA claims, which alleged DOI and BLM failed to conduct any kind of environmental review to lift the moratorium and failed to complete a programmatic EIS of the federal coal leasing program.[13] The court then analyzed the Northern Cheyenne Tribes' trust obligation claim and Plaintiffs' Federal Land Policy Management Act ("FLPMA") and Mineral Leasing Act ("MLA") claims.[14]

A. Standing

Defendants asserted that Plaintiffs lacked Article III standing because the alleged harm was conjectural and no imminent threat existed.[15] Defendants' claim rested on the notion that four events must happen before Plaintiffs could establish imminent harm: "(1) an operator applies to lease land or to modify a lease where Plaintiffs' members recreate; (2) a BLM office completes an environmental assessment ("EA") or [environmental impact statement ("EIS")] and determines the fair market value of the coal and approves the lease modification; (3) a surface mining permit is issued; and (4) the mining plan is approved."[16]

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7. *Id.* at 1271 (internal quotations omitted).
8. *Id.* at 1271–72 (internal quotations omitted).
9. *Id.* at 1272.
10. *Id.* at 1270–71.
11. *Id.* at 1272.
12. *Id.* at 1273–75.
13. *Id.* at 1273–82.
14. *Id.* at 1282.
15. *Id.* at 1273.
16. *Id.*

However, the court reasoned that waiting until individual leases have been processed and coal had been leased and mined would ignore Plaintiffs' procedural injuries.[17] The court stated a procedural injury occurs "'when governmental decision makers make up their minds without having before them an analysis of the likely effects of their decision on the environment.'"[18]

The court held that DOI ignored the requirements of NEPA before ending the moratorium on issuing coal-leases.[19] Demonstrating a "threatened concrete interest[,]" the State Plaintiffs each showed harm within their geographic boundaries from emissions associated with burning coal and held an interest in how the production, transportation, and consumption of coal affect the earth and air.[20] Additionally, the Organizational Plaintiffs and the Northern Cheyenne Tribe were able to show a threatened concrete interest by alleging environmental harm from issuance of pending coal leases, as well as harm to cultural sites used in ceremonies.[21] Accordingly, Plaintiffs asserted a procedural right under NEPA and were denied an opportunity to influence the disposition of coal-lease applications, and Defendants' engagement in the NEPA process would redress these procedural issues.[22] Based on these holdings, the court concluded that Plaintiffs had sufficiently alleged a procedural injury to establish standing.[23]

B. NEPA

As to the merits, Plaintiffs asserted that the Zinke Order, which reversed the Jewell Order placing a moratorium on federal coal leases, constituted a final, major federal action requiring NEPA review.[24] Plaintiffs also asserted that Defendants' failure to comply with NEPA by neglecting to complete any environmental analysis of the Zinke Order is reviewable under the APA.[25]

The court held the Zinke Order marked a major federal action—rather than a distinct policy shift—that had the potential to have a significant impact on the environment, further holding that Defendants' failure to begin NEPA review was arbitrary and capricious.[26] The court

17. *Id.* at 1275.

18. *Id.* (quoting Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 971 (9th Cir. 2003)).

19. *Id.* at 1277.

20. *Id.* at 1274 (quoting WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1154 (9th Cir. 2015)).

21. *Id.*

22. *Id.* at 1275.

23. *Id.* (also holding Plaintiffs' claims were ripe because the alleged procedural injury had already occurred and the action may be the sole opportunity to challenge the entire coal-leasing program nationwide).

24. *Id.* at 1276–80.

25. *Id.* at 1279–81.

26. *Id.* at 1281.

analogized *California ex rel. Lockyer v. U.S. Department of Agriculture*[27] —where the Bush administration overturned a seven-month-old nationwide plan enacted by the Clinton administration—to the current case.[28] The Clinton administration's plan was meant to ensure the connectivity of roadless areas in the national forest.[29] President Bush's administration sought to overturn the plan with a new rule it concluded was a categorical exclusion ("CE") because it was "merely procedural in nature and scope . . . [with] no direct, indirect, or cumulative effect on the environment."[30] The United States Court of Appeals for the Ninth Circuit reasoned in *Lockyer* that because the plan benefitted the roadless areas and their ecosystems, it could not be characterized as merely procedural.[31] The court found that the *Lockyer* analysis applied to *Citizens for Clean Energy* because the moratorium was a nationwide programmatic plan reversed by the subsequent administration[32] that also benefited the areas closed off to mineral leases and their environments.[33]

Plaintiffs asserted that NEPA required DOI to complete an EIS with respect to the Zinke Order; however, the court noted that the requisite "hard look" of environmental impacts under NEPA does not categorically require an EIS.[34] Still, the court stated that NEPA requires some environmental analysis, which can be accomplished through "a less extensive EA and a finding of no significant impact statement ("FONSI")," or an EIS.[35] Additionally, the court discussed CEs, where under this designation, environmental review is not necessary to comply with NEPA as long as the proposed action does not individually or cumulatively have a significant effect on the human environment.'[36] The court did not find it appropriate, however, for DOI to refrain from environmental analysis all together because a substantial question existed that "the lifting of the moratorium could cause environmental impacts from expedited coal mining on public lands."[37]

The court determined that DOI's decision to lift the moratorium was reviewable under the APA because it was a final agency action.[38] The court stated that the conditions which prove an agency action is final are: (1) "the action must mark the 'consummation' of the agency's decision

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27. 575 F.3d 999 (9th Cir. 2009).
28. *Citizens for Clean Energy*, 384 F. Supp. 3d at 1278.
29. *Id.* (citing California ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1008 (9th Cir. 2009)).
30. *Id.* (quoting *Lockyer*, 575 F.3d at 1008).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 1276, 1281.
35. *Id.* (citing *Lockyer*, 575 F.3d at 1012; 40 C.F.R. § 1508.4).
36. *Id.* at 1276, 1279 (citing *Lockyer*, 575 F.3d at 1012, 1018; 40 C.F.R. § 1508.4).
37. *Id.* at 1279–82 (citing *Lockyer*, 575 F.3d at 1012).
38. *Id.* at 1281.

making process . . . it must not be of a merely tentative or interlocutory nature;" and (2) "the action must be one by which 'rights or obligations have been determined,' from which 'legal consequences will flow.'"[39] The court found that the Zinke Order met the requirements for final agency action because the DOI made a conscious decision not to initiate the NEPA process.[40]

Finally, Plaintiffs requested the court to order DOI to complete preparation of the PEIS as set out in the Jewell Order or, alternatively, to supplement the 1979 PEIS to weigh the impacts of coal combustion on greenhouse gases in the atmosphere.[41] However, the court held that nothing in NEPA nor DOI's own documents supported this relief[42] because the major federal action was the initial PEIS from 1979—not the reliance on it—even if the information is outdated.[43] The court noted that NEPA is a procedural process which ensures an agency will make an informed decision by taking a "hard look" at the "environmental consequences[,]"[44] and that significant deference is given to federal agencies on how they choose to obtain that information.[45] The court further stated that an agency must only show that it did not act arbitrarily or capriciously in what avenue of environmental analysis it chose— whether an EIS, an EA/EIS, an EA/FONSI, or a CE.[46] Because Defendants may satisfy NEPA's requirements in variety of manners, the court deferred to Defendants to first take the prerequisite step to determine the "extent of environmental analysis that the Zinke Order requires" pursuant to NEPA.[47]

C. Unreviewable Claims

Plaintiffs additionally asserted that the Zinke Order, and the DOI's underlying failure to prepare an EIS, breached the Federal Government's trust obligation to the Northern Cheyenne Tribe.[48] Because the court ruled that the Zinke Order triggered NEPA—while lacking the authority to compel the DOI to prepare an EIS—the court was therefore unable to review the trust claim, as it was contingent upon completion of NEPA review.[49]

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39. *Id.* at 1280 (citing Bennett v. Spear, 520 U.S. 154, 177–78 (1997)).
40. *Id.* at 1280-81
41. *Id.* at 1281.
42. Additionally, federal courts "cannot compel an agency to take specific actions." *Id.* (citing Gardner v. U.S. Bureau of Land Mgmt., 638 F.3d 1217, 1221 (9th Cir. 2011)).
43. *Id.* at 1277–78.
44. *Id.* at 1272.
45. *Id.* at 1282.
46. *Id.*
47. *Id.* (also noting that if DOI or BLM did not find an EIS necessary, they must explain the insignificance Zinke Order's impacts with a "convincing statement of reasons") (internal citation omitted)).
48. *Id.*
49. *Id.*

Further, Plaintiffs claimed that DOI violated FLPMA and MLA by failing to provide an explanation for striking down the Jewell Order and replacing it with the Zinke Order.[50] The court held this issue was unripe and said it would not reach a decision on it until DOI had completed its environmental analysis under NEPA.[51]

IV. CONCLUSION

The United States District Court for the District of Montana held that the DOI's Zinke Order violated NEPA by failing to include analysis of the potential environmental impacts of its decision to replace the Jewell Order.[52] The court declined to rule on several of Plaintiffs' claims, including the trust obligation to the Northern Cheyenne Tribe and claims under FLPMA and the MLA, until DOI had an opportunity to comply with NEPA.[53] Additionally, the court refused to compel the DOI to complete a new PEIS or supplement the 1979 PEIS.[54] The court ordered the parties to, in good faith, discuss appropriate remedies and come to an agreement consistent with the court's decision, and further ordered the parties to brief the application of the *Monsanto* factors for an injunction, if they could not reach an agreement.[55]

In May 2019, approximately a month after the court issued this decision, the BLM issued a draft EA stating that lifting the moratorium would have no significant environmental impact.[56] An agency must do more than nothing and provide convincing reasons for its action. Although courts give agencies deference, this opinions also demonstrate that they are reluctant to evaluate the sufficiency of the agencies' analysis when they have chosen the correct path to comply with NEPA.

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* (citing Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010)).
56. Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal Environmental Assessment, DOI-BLM-WO-WO2100-2019-0001-EA (U.S. Dep't of Interior May 22, 2019).