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## W. Org. Res. Councils, et al. v. U.S. Bureau of Land Mgmt.

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***W. Org. Res. Councils, et al. v. U.S. Bureau of Land Mgmt.*, No. 4:20-cv-00076-GF-BMM, 2022 WL 3082475 (D. Mont. Aug. 3, 2022)**

**Sawyer J. Connelly\***

The United States District Court for the District of Montana granted Plaintiffs summary judgment against BLM and the State of Wyoming. The court ruled that BLM violated NEPA and the APA because it failed to consider alternative leasing programs and the broad downstream impacts of coal, oil, and gas leasing in two Powder River Basin resource management plans. This decision followed *WORC I & II*, in which the court remanded the same plans to BLM to correct deficiencies. Following BLM’s revisions, Plaintiffs again sued in this case, arguing the revisions were still deficient under NEPA.

I. INTRODUCTION

In *Western Organization of Resource Councils, et al. v. U.S. Bureau of Land Management*,<sup>1</sup> the United States District Court for the District of Montana again remanded Bureau of Land Management’s (“BLM”) Resource Management Plans (“RMPs”) for the Miles City Field Office in Montana and the Buffalo Field Office in Wyoming. This ruling effectively placed a one-year pause on any new or pending coal, oil, and gas leasing in the Powder River Basin. Environmental groups, including Western Organization of Resource Councils, Montana Environmental Information Center, Powder River Basin Resource Council, Northern Plains Resource Council, Center for Biological Diversity, WildEarth Guardians, and Sierra Club (collectively “Plaintiffs”), filed suit against BLM under the Administrative Procedures Act (“APA”). Plaintiffs alleged BLM’s RMPs violated the National Environmental Policy Act (“NEPA”) and the APA.<sup>2</sup> The State of Wyoming intervened for the defense.<sup>3</sup> The court held the RMPs violated NEPA because BLM failed to consider coal leasing alternatives, including a no-future leasing and reduced-leasing alternative.<sup>4</sup> The court also held the RMPs failed to adequately consider the downstream impacts of coal, oil, and gas leasing.<sup>5</sup>

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1. No. 4:20-cv-00076-GF-BMM, 2022 WL 3082475 (D. Mont. Aug. 3, 2022) [hereinafter *WORC*].

2. *Id.* at \*1; *see generally* *W. Org. Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 WL 1475470 (D. Mont. March 26, 2018) [hereinafter *WORC I*], *appeal dismissed*, No. 18-35836, 2019 WL 141346 (9th Cir. 2019); *W. Org. Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 WL 9986684 (D. Mont. July 31, 2018) [hereinafter *WORC II*].

3. *WORC*, 2022 WL 3082475.

4. *Id.* at \*5–6.

5. *Id.* at \*7–8.

## II. FACTUAL AND PROCEDURAL BACKGROUND

This case arose from BLM’s revisions and amendments to 98 RMPs in ten western states<sup>6</sup> which were intended to protect sage grouse across its native range.<sup>7</sup> RMPs are required by the Federal Land and Policy Act of 1976 (“FLPMA”) to guide management of the 245 million acres of BLM land.<sup>8</sup> An area identified in an RMP for coal leasing and development is subject to the Mineral Leasing Act.<sup>9</sup> An environmental impact statement is required for the proposed lease area to weigh the costs and benefits of development and non-development interests.<sup>10</sup> If a lessee seeks to develop a lease, they must submit a plan for operation and reclamation to the Secretary of the Interior.<sup>11</sup> The Office of Surface Mining Reclamation and Enforcement recommends approval or denial to the Secretary.<sup>12</sup> All aspects of the process are subject to NEPA.<sup>13</sup>

In the broader context of climate change, inaction by BLM regarding fossil fuel leasing programs has led to this and other litigation.<sup>14</sup> In 2015, citing climate change, Secretary of the Interior Sally Jewell issued a Secretarial Order placing an almost complete moratorium on federal coal leasing.<sup>15</sup> In 2017, Secretary of the Interior Ryan Zinke reversed Secretary Jewell’s order.<sup>16</sup> In 2021, Secretary of the Interior Deb Haaland issued an order revoking Secretary Zinke’s order and asking BLM “to submit a report with their ‘plan and timeline to reverse, amend or update’ the policies created to implement the Zinke Order.”<sup>17</sup>

At issue in this litigation were two RMPs, the Miles City Field Office in Montana and the Buffalo Field Office in Wyoming, both of which BLM approved in a single record of decision.<sup>18</sup> The Miles City Field Office and the Buffalo Field Office are adjacent field offices in the Power River Basin, which produces the largest amount of federal coal in

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6. *Id.* at \*1; *see generally* *WORC I*, 2019 WL 141346; *WORC II*, 2018 WL 9986684.

7. *WORC*, 2022 WL 3082475.

8. *WORC I*, 2018 WL 1475470 at \*2; *see also* 43 C.F.R § 1601.0-1–1601.0-8.

9. *WORC I*, 2018 WL 1475470 at \*2.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *See* *Citizens for Clean Energy v. DOI*, No. 4:17-CV-00030-BMM, 2022 WL 3346373 (D. Mont. Aug. 12, 2022).

15. *Id.* at \*1.

16. *Id.*

17. *Id.*

18. Notice of Availability of Record of Decision and Resource Management Plans for Buffalo and Miles City, 80 Fed. Reg. 57639, 57639 (Sept. 24, 2015).

the nation.<sup>19</sup> 15.4 million acres of BLM-administered mineral acres of coal were at issue between the two RMPs.<sup>20</sup>

The Powder River Basin RMPs were first challenged in 2016 by the same plaintiffs' coalition for failing to comply with NEPA.<sup>21</sup> In *WORC I & II*, the United States District Court for the District of Montana held that in revising the two RMPs, BLM failed to meet four requirements under NEPA, two of which are relevant to the court's analysis here:<sup>22</sup> (i) an alternatives analysis, and (ii) a downstream impacts analysis for federal coal, oil, and gas leasing.<sup>23</sup> The court ordered BLM to correct the issues with the RMPs within sixteen months by conducting a new coal screening and a remedial NEPA analyses.<sup>24</sup>

In November 2019, BLM approved revisions to the Powder River Basin RMPs, which are the subject of the litigation here.<sup>25</sup> Specifically, Plaintiffs argued that BLM's supplemental NEPA analysis violated NEPA because it did not consider a reasonable range of alternatives regarding coal leasing and that BLM violated NEPA and the APA by not considering the downstream impacts of federal coal, oil, and gas leasing.<sup>26</sup>

### III. ANALYSIS

First, the court ruled that BLM's motion for remand was denied. Second, the court held BLM failed to consider an adequate range of alternatives in its NEPA analysis. Third, the court held BLM failed to consider the downstream impacts of non-greenhouse gas emissions in its NEPA analysis.

#### A. *The Court Denied BLM's Motion for Voluntary Remand*

The court denied BLM's motion for voluntary remand.<sup>27</sup> Courts generally grant agency motions for remand when the agency seeks to revise the deficiencies set forth in the plaintiff's claim.<sup>28</sup> Because agencies have the power to decide in the first place, agencies have the power to reconsider.<sup>29</sup> In the Ninth Circuit, courts generally only refuse voluntary

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19. U.S. ENERGY INFO. ADMIN., *Coal Data Browser*, <https://perma.cc/ZA3F-PUL8> (last visited Aug. 20, 2022).

20. *WORC I*, No. CV 16-21-GF-BMM, 2018 WL 1475470 at \*2 (D. Mont. March 26, 2018).

21. *WORC*, No. 4:20-cv-00076-GF-BMM, 2022 WL 3082475 at \*1 (D. Mont. Aug. 3, 2022); *see also WORC I*, 2018 WL 1475470.

22. *WORC*, 2022 WL 3082475 at \*1.

23. *Id.*

24. *WORC II*, No. CV 16-21-GF-BMM, 2018 WL 9986684 at \*2 (D. Mont. July 31, 2018).

25. *WORC*, 2022 WL 3082475.

26. *Id.* at \*3.

27. *Id.*

28. *Id.*

29. *Id.* (quoting *Nat. Res. Def. Council, Inc. v. DOI*, 275 F. Supp. 2d 1136, 1141 (C.D. Cal 2002)).

remand when the request is frivolous or made in bad faith.<sup>30</sup> Here, the court determined BLM's motion was frivolous and lacked good faith.<sup>31</sup> BLM's motion failed to admit error and address the specific issues alleged by the Plaintiffs in this case.<sup>32</sup>

### *B. BLM's Actions Violated NEPA*

Courts review agency compliance with NEPA pursuant to the APA.<sup>33</sup> A court may set aside an agency action if it finds it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>34</sup> NEPA prescribes a specific process that agencies must follow when they act.<sup>35</sup> This process requires federal agencies to evaluate the environmental consequences of major federal actions that significantly affect the quality of the human environment.<sup>36</sup> The analysis must discuss a range of alternatives "which would avoid or minimize adverse impacts or enhance the quality of the human environment."<sup>37</sup> Here, the court held BLM did not adequately consider reasonable alternatives regarding coal leasing because each alternative showed the same amount of expected coal production.<sup>38</sup> Additionally, BLM failed to consider the downstream impacts of non-greenhouse gas emissions from coal combustion including particulate matter, sulfur dioxide, nitrous oxide, mercury, lead, and other toxins.<sup>39</sup>

#### *1. BLM did not Adequately Consider a Reasonable Range of Alternatives for Coal Leasing*

The court held that both the Buffalo and Miles City Field Offices' coal leasing alternatives violated NEPA because they did not consider a reasonable range of alternatives.<sup>40</sup> BLM's decision was arbitrary and capricious.<sup>41</sup> First, the court discussed the rules governing what constitutes a reasonable range of alternatives.<sup>42</sup> Second, the court analyzed the alternatives and found BLM did not consider an adequate range because the

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30. *Id.* (quoting *Cal. Against Toxics v. EPA*, 688 F.3d 989 (9th Cir. 2012)).

31. *Id.* at \*3.

32. *Id.* at \*4.

33. *Id.* at \*2.

34. *Id.* at \*2 (quoting 5 U.S.C. § 706(2)(A) (2022)).

35. *Id.* at \*2 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

36. *Id.*

37. *Id.* at \*2 (quoting 40 C.F.R. § 1502.1 (2022)).

38. *Id.* at \*8.

39. *Id.*

40. *Id.* at \*5.

41. *Id.*

42. *Id.* at \*4.

total amount of coal produced did not vary among alternatives.<sup>43</sup> Finally, the court rejected BLM’s two arguments that a no-leasing alternative was not in line with BLM policy and that BLM wanted to support existing mining operations.<sup>44</sup> The court found these arguments lacked merit because FLPMA and NEPA did not support them, respectively.<sup>45</sup>

The reasonable range of alternatives must cover the full spectrum of possibilities, consider the long-term needs of future generations, and cannot be identical.<sup>46</sup> First, a full spectrum is a range of alternatives at the low, middle, and upper ends of a broad class.<sup>47</sup> Only by providing alternatives that cover the full spectrum can BLM make a “reasoned choice.”<sup>48</sup> Second, statute mandates that alternatives discuss the long-term needs of future generations and balance both development and non-development interests.<sup>49</sup> Third, “essentially identical” alternatives violate NEPA.<sup>50</sup>

The court found BLM failed to consider a reasonable range of alternatives.<sup>51</sup> BLM’s alternatives were meaningfully different because the alternatives varied in acreages available for leasing.<sup>52</sup> However, the alternatives resulted in an “identical amount of expected coal production.”<sup>53</sup> The court determined that when a large number of alternatives exists, “NEPA requires BLM to bookend its analysis by considering a no-future-leasing alternative and at least one alternative that further reduced leasing by reducing the potential for expansion.”<sup>54</sup>

The court rejected BLM’s two counterarguments. First, FLPMA does not require BLM to prioritize mineral development.<sup>55</sup> Rather, FLPMA requires BLM to consider alternatives that analyze both development and non-development interests.<sup>56</sup> Therefore, BLM could not argue their land-use planning process prevented a no leasing alternative.<sup>57</sup> Second, the goal of NEPA is to protect the environment, “not the economic

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43. *Id.* at \*5.

44. *Id.* at \*6-7.

45. *Id.*

46. *Id.* at \*5; 43 U.S.C. § 1702(c) (2020).

47. *WORC*, 2022 WL 3082475 at \*5 (quoting Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (March 23, 1981)).

48. *Id.* (quoting *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982)).

49. *Id.* (quoting 43 U.S.C. § 1702(c) (2020)).

50. *Id.* (quoting *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1039 (9th Cir. 2008)).

51. *Id.* at \*5.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. 43 U.S.C. § 1702(c) (2020).

57. *WORC*, 2022 WL 3082475 at \*6.

interests of those adversely affected by agency decisions.”<sup>58</sup> Therefore, BLM could not argue a need to support existing mining operations.<sup>59</sup>

2. *BLM did not Adequately Consider the Downstream Impacts of Non-Greenhouse Gas Emissions*

The court held that BLM’s failure to analyze the consequences of downstream impacts of non-greenhouse gases under NEPA was arbitrary and capricious.<sup>60</sup> Previously, the same court in *WORC II* ordered BLM to assess, as required by NEPA, the downstream environmental impacts of “combustion of coal, oil, and gas resources potentially open to development” specific to the RMPs at issue in this case.<sup>61</sup> Here, the court determined that while BLM adequately analyzed the impacts of non-greenhouse gases on local air quality, that was only one discrete part of the court’s order in *WORC II*.<sup>62</sup> In this instance, BLM failed to look at the direct and indirect broader impacts of non-greenhouse gases as required by NEPA.<sup>63</sup> While the two RMPs considered greenhouse gas emissions like carbon dioxide, they failed to consider non-greenhouse gases like particulate matter, mercury, and lead, all of which affect the environment.<sup>64</sup> The court relied specifically on NEPA’s definition of indirect effects, “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”<sup>65</sup>

#### IV. CONCLUSION

This case presented a straightforward APA review of NEPA. The court held BLM’s action violated NEPA under the APA.<sup>66</sup> However, this ruling was significant in the context of climate change. Fossil fuels are finite, and while they play a vital role in the United States’ energy security and economy, that role is changing. The global market is shifting, and the U.S. is divesting from fossil fuels. This ruling signals to federal agencies that, when evaluating agency action, they have an obligation to justify their public interest conclusions against a much broader backdrop of downstream impacts – like climate change – constituting a more stringent obligation than they had even five years ago.

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58. *Id.* at \*7 (quoting *Nev. Land Action Ass’n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)).

59. *Id.* at \*6–7.

60. *Id.* at \*7.

61. *Id.* (quoting *WORC I*, 2018 WL 1475470 at \*13).

62. *Id.* at \*7.

63. *Id.*; see also *WORC I*, 2018 WL 1475470 at \*11–13.

64. *WORC*, 2022 WL 3082475 at \*7; see also *WORC I*, 2018 WL 1475470 at \*11–13.

65. *WORC*, 2022 WL 3082475 at \*8 (quoting 40 C.F.R. § 1508.8(b) (2022)).

66. *Id.* at \*8.

When looking at this case alongside the contemporaneous *Citizens for Clean Energy*<sup>67</sup>, the court is making it clear that the impacts of fossil fuels are part of the cost-benefit analysis in NEPA. As the Executive Branch considers policy regarding fossil fuel leasing programs on public lands, it should consider this litigation. Interest groups want action from the Executive Branch, and the current inaction inevitably leads to litigation.

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67. See *Citizens for Clean Energy v. DOI*, No. 4:17-CV-00030-BMM, 2022 WL 3346373 (D. Mont. Aug. 12, 2022).