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FRACK ATTACKS: GOVERNMENT COMPLIANCE -- OR LACK THEREOF -- WITH FEDERAL REGULATIONS ON TRIBAL LANDS

Hayes v. Chaparral Energy, LLC[1]

I. INTRODUCTION

Fracking is a technique used in oil and gas drilling that involves using large amounts of water, sand, and chemicals to extract fuel from the ground.[2] Fracking is more common today than it has been in the past, including on Indian lands. Because Indian lands are held in trust by the federal government, tribes have less discretion as to what to do with their lands than if the lands were privately held. While environmental effects must be considered, tribes generally benefit from royalties on oil and gas mining leases for fracking purposes. However, Bureau of Indian Affairs ("BIA") mismanagement has caused tribes to miss out on tens of millions of dollars in energy development opportunities.[3] Some tribes rely heavily

[1] Hayes v. Chaparral Energy, LLC, 2016 WL 1254427 (N.D. Okla. 2016), *appeal filed sub nom* Hayes v. Osage Minerals, *et al.* (10th Cir. May 24, 2016).
[2] Rita Ann Cicero, *Judge Blocks New Rule for Fracking on Public Lands*, 36 NO. 6 WESTLAW J. ENVTL. 3, at *1 (Oct. 14, 2015).
[3] Michael Bastasch, *Obama Allows Indians To Grow Pot, But Not Drill For Oil On their Own Lands*, THE DAILY CALLER NEWS FOUNDATION (Oct. 8, 2015, 1:18 PM), http://dailycaller.com/2015/10/08/obama-allows-indians-to-grow-pot-but-not-drill-for-oil-on-their-own-lands/. Opportunities involve both green energy and fossil fuels. *Id.*

on oil and gas revenues.[4] This note examines a case indicating that the BIA's mismanagement has been harmful, particularly in Osage County, Oklahoma. *Hayes* is the first of its kind to invalidate a federal lease and drilling permits approved by the BIA because of failure to comply with the National Environmental Policy Act ("NEPA").

II. FACTS AND HOLDING

In 1872, Congress established a reservation for the Osage Nation[5] in Oklahoma.[6] In 1904 and 1905, large quantities of oil and gas were discovered on the reservation.[7] Shortly thereafter, Congress enacted the Osage Allotment Act,[8] placing the mineral estate underlying the Osage lands in trust and directing the Secretary of the Interior to collect and distribute royalty income to tribal members on a quarterly, pro rata basis.[9]

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[4] *Id.*
[5] Barbara Moschovidis, *Osage Nation v. Irby: The Tenth Circuit Disregards Legal Precedent to Strip Osage County of its Reservation Status*, 36 AM. INDIAN L. REV. 189, 191 (2012). In 1870, the federal government removed the Osage from Kansas, sold the land, and used the proceeds to purchase land from the Cherokee. *Id.*
[6] *Hayes*, 2016 WL 1254427, at *1; *see* Act of June 5, 187217 Stat. 228 (1871) ("An Act to confirm to the Great and Little Osage Indians a Reservation in the Indian Territory.").
[7] *Hayes*, 2016 WL 1254427, at *1.
[8] Act of June 28, 1906, Pub. L. No. 59-321, 34 Stat. 539 (1905).
[9] *Id.* The government's trusteeship over the mineral estate was originally set to last twenty-five years but has been extended in perpetuity. *Hayes*, 2016 WL 1254427, at *1 (citing Pub. L. No. 95-496, § 2(a), 92 Stat. 1660 (1978)).

Osage Nation may lease portions of the mineral estate for exploration and development with the Secretary of the Interior's approval, under such rules and regulations as she may prescribe.[10] The Secretary of the Interior has delegated that approval authority to the Superintendent of the Osage Agency within the Bureau of Indian Affairs.[11] No operations are permitted upon any tract of land until the Superintendent approves a lease covering the tract.[12] To commence drilling, a lessee must obtain additional approval from the Superintendent.[13] The Superintendent's approval of leases and drilling permits on Osage lands constitutes federal action subject to NEPA.[14]

NEPA is a process-oriented statute requiring federal agencies to consider the environmental impact of their actions.[15] This dispute involves the government's obligations under NEPA with regard to approval of an oil and gas lease and two drilling permits in Osage County, Oklahoma.[16] In 1978, the District Court for the Northern District of Oklahoma entered a

[10] 2016 WL 1254427, at *1 (citing 1906 Act § 3).
[11] *Id.* (citing 25 C.F.R. §§ 226.4, 226.5(b) (2014)).
[12] *Id.*
[13] *Id.*
[14] *Id.* at *2.
[15] *Id.* at *1.
[16] *Id.*

judgment ordering the Secretary of the Interior and the Superintendent of the Osage Agency to prepare an Environmental Assessment.[17] The Assessment covered the effects of oil and gas operations under oil mining leases, gas mining leases, oil and gas mining leases, drilling permits, water use authorizations, and other documents the Secretary used relating to oil and gas operations on the land in Osage County.[18]

In 1979, the Osage Agency issued the Environmental Assessment, evaluating all aspects of its oil and gas leasing program in Osage County.[19] The Assessment provided a detailed explanation of the leasing program, a description of the county's existing and likely future environmental conditions, and an evaluation of the leasing program's actual or potential environmental impacts.[20] The Assessment also described drilling techniques and practices within the county, briefly mentioning fracking.[21] The Assessment ultimately concluded that the leasing program would not have a significant impact on the human

[17] *Id.* at *2.
[18] *Id.*
[19] *Id.* at *3.
[20] *Id.*
[21] *Id.*

environment.[22] Notably, the projections in the Assessment were limited to the year 2000.[23] Based on the Assessment's findings, the Osage Agency issued a Finding of No Significant Impact ("FONSI").[24]

In January 2013, Chaparral entered into an oil and gas lease with Osage Nation for a 160-acre portion of the Osage mineral estate underlying Plaintiff Hayes's property.[25] Then, the BIA approved the lease.[26] The BIA determined that its approval fell within the exception for mineral lease adjustment and transfer approval, which includes assignments and subleases.[27] In April 2014, Chaparral submitted a drilling permit application to the BIA, and the BIA approved the application.[28]

In May 2014, Chaparral submitted an amended drilling permit application, moving the proposed well site 100 feet to the west.[29] The BIA approved the amended application but did not prepare a new NEPA document, supplement, tier to, incorporate, or otherwise explicitly adopt

[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*

the 1979 Assessment's analysis.[30] In August 2014, Hayes brought suit against the United States, the Department of the Interior, the BIA, and Chaparral under the Administrative Procedure Act ("APA"),[31] alleging the government's approval of the lease and the original and amended drilling permits failed to comply with NEPA.[32] When a government agency fails to comply with NEPA before approving lease and drilling permits, then those lease and drilling permits will be declared void from the beginning.[33]

III. LEGAL BACKGROUND

A. *The Administrative Procedure Act*

The APA was enacted in 1946 and governs federal agency action.[34] An "agency" is an authority of the federal government,[35] and "agency action" includes an agency rule, order, or failure to act.[36] Final agency actions are subject to judicial review.[37] A person suffering legal wrong or adverse effects because of an agency action is entitled to judicial

[30] *Id.*
[31] 5 U.S.C § 551 *et seq.* (2012).
[32] *Hayes*, 2016 WL 1254427, at *4.
[33] *Id.* at *1. This holding has since been superseded so that failure to comply with NEPA renders lease approvals invalid. *Id.*
[34] 5 U.S.C. § 551 (2012).
[35] *Id.* There are some exceptions. *See id.* § 551(1).
[36] § 551(13).
[37] § 704.

review.[38] An agency's action may be overturned if a court determines the action was arbitrary and capricious.[39] Agency action is arbitrary and capricious if the agency (1) failed to consider an important aspect of the problem; (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or agency expertise;[40] (3) failed to base its decision on consideration of the relevant factors; or (4) made a clear error of judgment.[41]

B. *The National Environmental Policy Act and Council on Environmental Quality Regulations*

NEPA was enacted in 1970 and aims to avoid uninformed decision-making on environmental issues by requiring agencies to gather and document information concerning environmental impacts of that agency's actions.[42] NEPA requires federal agencies to prepare Environmental Impact Statements before taking any major federal actions that could significantly affect the quality of the human environment.[43] If

[38] § 702.
[39] § 704.
[40] Jagers v. Fed. Crop Ins. Corp., 758 F.3d 1179, 1184 (10th Cir. 2014).
[41] Utah Envt'l Cong. v. Troyer, 479 F.3d 1269, 1280 (10th Cir. 2007).
[42] *See* Lee v. U.S. Air Force, 354 F.3d 1229, 1237 (10th Cir. 2004).
[43] 42 U.S.C. § 4332(C)(ii) (2012).

an agency is uncertain whether an Environmental Impact Statement is required, it may elect to prepare a less-detailed Environmental Assessment.[44] NEPA ensures the agency will only reach a decision on a proposed action after carefully considering environmental impacts of the proposed action.[45]

Federal agencies are required to prepare an Environmental Assessment for any proposed action unless: (1) the agency has elected or is otherwise required to prepare an Environmental Impact Statement; or (2) the agency action is subject to a categorical exclusion.[46] If, after preparing an Environmental Assessment, the agency concludes that a proposed action will not significantly affect the environment, the agency may issue a FONSI and does not need to prepare a full Environmental Impact Statement.[47] Agency action can be either broad or specific.[48] Broad agency action includes adopting official policies, plans, or programs.

[44] Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 145 (2010).
[45] Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 717 (10th Cir. 2010).
[46] 40 C.F.R. §§ 1501.3, 1501.4(a), (b) (2014).
[47] McKeen v. U.S. Forest Serv., 615 F.3d 1244, 1248 n.3 (10th Cir. 2010).
[48] 40 C.F.R. § 1508.18(b) (2014).

Specific agency action includes approving specific projects.[49] Both broad and specific agency actions require compliance with NEPA.[50]

An Environmental Assessment allows the agency to consider environmental concerns while reserving agency resources.[51] An Impact Statement is a detailed document that identifies the potential impacts a proposal may have on the environment.[52] When available, agencies are encouraged to use existing analyses for assessing the impacts of a proposed action and any alternatives.[53] Supplementing, tiering to, incorporating by reference, or adopting previous Assessments are all acceptable methods for using existing analyses.[54]

The Council on Environmental Quality is tasked with interpreting NEPA and establishing regulations governing agencies' responsibilities

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[49] *Id.*
[50] *Id.*
[51] Park City Res. Council v. U.S. Dep't of Agric., 817 F.2d 609, 621 (10th Cir. 1987), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).
[52] Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.2d 1012, 1022 (10th Cir. 2002).
[53] 43 C.F.R. § 46.120(a) (2014).
[54] *Id.* at §§ 46.120(d), 46.135, 46.140; 1502.20, 1508.28 (Tiering is a procedure in which an agency may incorporate statements from an existing broader Environmental Impact Statement to provide analysis for a subsequent, narrower NEPA document. Tiering is appropriate when the sequence of analyses is from a program, plan, or policy Environmental Impact Statement to a site-specific analysis).

under NEPA.[55] The Council on Environmental Quality's regulations require federal agencies to adopt further procedures identifying specific actions which either normally require an Impact Statement or are categorically excluded.[56] The Department of the Interior's supplemental NEPA regulations permit it and its constituent bureaus to use an existing Environmental Assessment in its entirety if the agency determines, with appropriate supporting documentation, that the Assessment adequately appraises the environmental effects of the proposed action and reasonable alternatives.[57] An agency must supplement an Impact Statement or Assessment if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.[58] Generally, if a programmatic NEPA document is more than five years old, it should be carefully reexamined to determine whether supplementation is necessary.[59]

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[55] Sierra Club, Inc. v. Bostick, 787 F.3d 1043, 1063 (10th Cir. 2015).
[56] 40 C.F.R. § 1501.4(a) (2014).
[57] 43 C.F.R. § 46.120(c) (2014).
[58] § 1502.9(c)(1)(ii). *See* S. Utah Wilderness All. v. Norton, 301 F.3d 1217, 1238 n.19 (10th Cir. 2002), *rev'd on other grounds*, 542 U.S. 55 (2004).
[59] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,036 (Mar. 23, 1981). Other courts in the Tenth Circuit have considered this source when interpreting and implementing NEPA regulations. *See* Davis v. Mineta, 302 F.3d 1125, 1125 n.17 (10th Cir. 2002), *abrogated*

Because NEPA is procedural and does not provide a right of action, a court will review an agency's project approval, including compliance with NEPA, under the APA.[60] The court will not set aside the agency's decision unless the decision fails to meet statutory, procedural, or constitutional requirements, or unless the decision is an abuse of discretion, arbitrary, capricious, or otherwise not in accordance with the law.[61]

C. *Supreme Court of the United States and Tenth Circuit Precedent*

The Secretary of the Interior has the authority to ratify or reject leases relating to Indian lands.[62] Environmental analyses aid agencies in determining what course of action should be taken in each situation.[63] NEPA applies to all federal agencies, including the BIA.[64] Government approval of a project is the only involvement necessary to constitute major federal action.[65] In *Davis*, the Tenth Circuit ruled that the District of New

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by Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276 (10th Cir. 2016).
[60] Morris v. U.S. Nuclear Regulatory Comm'n, 598 F.3d 677, 690 (10th Cir. 2010).
[61] Sac & Fox Nation of Mo. v. Norton, 240 F.3d 1250, 1260 (10th Cir. 2001) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984)).
[62] Davis v. Morton, 469 F.2d 595, 595 (10th Cir. 1972).
[63] *Id.* at 596.
[64] *Id.* at 598 (citing Nat'l Helium Corp. v. Morton, 455 F.3d 650 (10th Cir. 1971)).
[65] *Id.* at 597.

Mexico had erred in holding that a lease to a development company, on the Tesuque Indian Reservation in Santa Fe County, did not constitute major federal action.[66] *Davis* held that just because Indian lands are held in trust does not take lease approval out of NEPA's jurisdiction.[67] So, unless another statute's obligations are clearly mutually exclusive from NEPA's mandates, NEPA's specific requirements remain in force.[68] Therefore, the Department's initial lease approval was invalid because the requisite environmental study did not precede the lease approval.[69]

Department of Interior approval is required for a lease on federal lands to be valid.[70] An agency's failure to comply with NEPA before approving a lease on federal lands renders the agency's lease approval invalid.[71] In *Sangre*, the development company from *Davis* alleged it had a vested interest protected under the Fifth Amendment at the time the alleged taking occurred, and the Department of the Interior rescinding its lease approval constituted a "taking" under the Fifth Amendment.[72] The

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[66] *Id.* at 596.
[67] *Id.* at 597.
[68] *Id.*
[69] Sangre de Cristo Dev. Co. v. U.S., 932 F.2d 891, 894 (10th Cir. 1991).
[70] *Id.* at 894.
[71] *Id.* at 894-95.
[72] *Id.* at 894. *See generally* U.S. CONST. amend. V.

Tenth Circuit held 25 U.S.C. § 415(a) requires a valid approval from the Department of the Interior in order for the lease contract to have legal effect, so the invalid lease contract between Sangre and the Pueblo vested no property interest in Sangre.[73] Therefore, Sangre could not have been divested of a leasehold interest because Sangre's interest never vested in the first place.[74]

Categorical exclusions influence whether an agency must prepare an environmental analysis for a particular action.[75] Once an agency establishes categorical exclusions, its decision to classify a proposed action as falling within a particular categorical exclusion will be set aside only if a court determines that the decision was arbitrary and capricious.[76] In *Citizens' Committee*, the Forest Service concluded an interchange of public and private lands fell within a categorical exclusion exempting land exchanges from NEPA review "where resulting land uses remain essentially the same."[77] Even though the public land was relatively

[73] *Sangre*, 932 F.2d at 895.
[74] *Id.*
[75] Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1023 (10th Cir. 2002).
[76] *Id.* (citing Friends of Richards-Gebaur v. Fed. Aviation Admin., 251 F.3d 1178, 1187 (8th Cir. 2001)).
[77] *Id.* at 1023-24 (quoting Forest Serv. Handbook 1909.15 § 31.1b(7)). The interchange

undeveloped, the Forest Service noted the public land was already subject to skiing activity; therefore transferring ownership would not alter its essential use or character.[78] The Tenth Circuit concluded the Forest Service did not act arbitrarily or capriciously when the Forest Service concluded the activity on the federal lands exchanged in the interchange would remain essentially the same.[79]

Courts perform a two-part test to determine whether the agency should have supplemented its Environmental Impact Statement or Environmental Assessment.[80] First, the court will look to see if the agency took a "hard look" at the new information to determine whether supplemental analysis was necessary.[81] Courts may consider whether the agency obtained expert opinions, gave careful scientific scrutiny, responded to all legitimate concerns raised, or otherwise provided a reasoned explanation for the new circumstance's lack of significance.[82]

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involved public land and a ski resort. *Id.* at 1012.
[78] *Id.* at 1024.
[79] *Id.*
[80] S. Utah Wilderness All. v. Norton, 301 F.3d 1217, 1238 (10th Cir. 2002), *rev'd on other grounds*, 542 U.S. 55 (2004).
[81] *Id.* (citing Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist., 914 F.2d 1174, 1177 (9th Cir. 1990)).
[82] *Id.* (citing Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 288 (4th Cir. 1999)).

Second, if the court determines the agency took the hard look, the court then reviews the agency's decision not to issue a supplemental Environmental Assessment or Impact Statement under the APA's arbitrary and capricious standard.[83]

In *S. Utah Wilderness Alliance*, the Wilderness Alliance challenged the Bureau of Land Management, and the Tenth Circuit remanded the case to the District of Utah to determine whether the Bureau of Land Management had failed to take a hard look at information suggesting off-road vehicle use in the disputed areas had substantially increased since the environmental analyses were issued.[84] The Supreme Court of the United States determined evidence of increased off-road vehicle use did not require the Bureau of Land Management to take a hard look at the need to supplement its Environmental Impact Statement.[85] The Supreme Court of the United States reiterated supplementation is only required if major federal action remains to be taken.[86] Although approving a land use plan is a major federal action requiring an Impact Statement, the

[83] *Id.* (citing Marsh v. Or. Res. Council, 490 U.S. 360, 377 (1989)).
[84] *Id.* at 1240. The challenged analyses were dated from 1990, 1991, 1980, and 1985. *Id.* at 1237 n.18.
[85] Norton v. S. Utah Wilderness All., 542 U.S. 55, 55 (2004).
[86] *Id.* at 73 (citing Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 374 (1989)).

action is completed when the plan is approved.[87] So, there was no ongoing major federal action that required supplementation at the time, although the Bureau of Land Management would be required to perform additional analysis if a plan is amended or revised.[88]

Categorical exclusions promote efficiency in the NEPA review process.[89] By definition, a categorical exclusion does not create a significant environmental effect, so analyses do not need to be performed unless there are extraordinary circumstances.[90] A court may reject the agency's interpretation of its categorical exclusions only when the interpretation is unreasonable, plainly erroneous, or inconsistent with the exclusion's plain meaning.[91] In *Bosworth*, the Utah Environmental Congress argued the Forest Service acted arbitrarily and capriciously by authorizing the Seven Mile Project pursuant to a categorical exclusion.[92] The Tenth Circuit first looked at the exclusion's plain meaning, then determined that the Forest Service previously did the extensive

[87] *Id.* (citing 43 C.F.R. § 1601.0-6 (2003)).
[88] *Id.* (citing §§ 1610.5-5, 5-6 (2003)).
[89] Utah Envtl. Cong. v. Bosworth, 443 F.3d 732, 742 (10th Cir. 2006) (quoting Fund for Animals v. Babbitt, 89 F.3d 128, 130 (2d Cir. 1996)).
[90] *Id.* at 741 (citing 40 C.F.R. § 1508.4 (2003)).
[91] *Id.* at 740 (quoting Bar MK Ranches v. Yuetter, 994 F.2d 735, 738 (10th Cir. 1993)).
[92] *Id.*

environmental analysis in creating the categorical exclusion.[93] Thus, to require monitoring, documentation, and review of data that do not trigger extraordinary circumstances would defeat the categorical exclusions' purpose.[94] So, according to the Tenth Circuit, the Seven Mile Project was in compliance with the APA and NEPA.[95]

Questions may arise when there is a broad agency action followed by a narrower, site-specific action.[96] If an agency adopts an official program and, in furtherance thereof, later approves a specific project, the agency ordinarily must prepare a separate Environmental Assessment or Impact Statement for both actions.[97] In *Richardson*, the parties disputed over how the natural gas drilling environmental analysis in the broad plan should be tiered.[98] The Tenth Circuit held it was clear from the record the Company had concrete plans to build thirty natural gas wells on the land, and the Company had obtained the permits for a gas pipeline, so the environmental impacts of the planned gas field were reasonably

[93] *Id.* at 750 (citing Colo. Wild. v. U.S. Forest Serv., 435 F.3d 1204, 1210 (10th Cir. 2006)).
[94] *Id.*
[95] *Id.* at 753.
[96] New Mexico *ex rel*. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 688 (10th Cir. 2009).
[97] *Id.* at 703.
[98] *Id.* at 716.

foreseeable before the specific lease was issued.[99] Thus, NEPA required analysis of the lease's site-specific impacts prior to issuance, and the Bureau of Land Management acted arbitrarily and capriciously in failing to conduct one.[100]

Courts distinguish between broad agency action followed by a specific project, like in *Richardson*, and merely a broad agency action. An agency may not be required to include a site-specific analysis of every area a broad agency action affects.[101] The Tenth Circuit has held neither NEPA nor the Council on Environmental Quality regulations require an agency to include a site-specific analysis for every particular area a proposed action affects.[102] *Wyoming* involves a challenge to the Forest Service's adoption of a nationwide rule prohibiting road construction and certain other activities on lands within the national forest system designated as road-less areas.[103] Wyoming asserted the Forest Service's Environmental Impact Statement for the proposed rule violated NEPA because it failed to include a site-specific analysis of every area the rule

[99] *Id.* at 718.
[100] *Id.* at 718-19.
[101] Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1254 (10th Cir. 2011).
[102] *Id.* at 1255.
[103] *Id.* at 1222.

affects.[104] The Tenth Circuit held broad agency action alone does not require site-specific environmental analysis.[105]

Neither NEPA nor the APA requires reversal for trivial errors.[106] Even if an agency violates the APA, its error does not require reversal unless a plaintiff demonstrates prejudice resulting from the error.[107] Deficiencies in environmental analyses that do not defeat NEPA's informed decision-making goals will not lead to reversal.[108] In *Hillsdale*, several groups brought challenges to a dredge and fill permit the Army Corps of Engineers ("Corps") issued under the Clean Water Act and NEPA.[109] The District of Kansas granted summary judgment for the Corps, and Hillsdale appealed, alleging the Corps failed to prepare an adequate Environmental Assessment and failed to prepare a full Impact

[104] *Id.* at 1254.
[105] *Id.* at 1256.
[106] *See* Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs, 702 F.3d 1156, 1165 (10th Cir. 2012).
[107] *Id.* (quoting Prairie Band Pottawatomie Nation v. Fed. Highway Admin., 684 F.3d 1002, 1008 (10th Cir. 2012)).
[108] *Id.* (quoting New Mexico *ex rel*. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 704 (10th Cir. 2009)).
[109] *Id.* at 1162.

Statement.[110] The Tenth Circuit concluded the record supported the Corps' decision, and the decision was not arbitrary and capricious.[111]

Even though courts give agencies tremendous deference in many aspects, a court will reject an agency's interpretation of a categorical exclusion when the interpretation is based on a legal conclusion inconsistent with the exclusion's plain meaning. When a lease requires agency approval to be legally operative and a court determines the agency approved such a lease in violation of NEPA, the determination necessarily invalidates the underlying lease unless or until valid agency approval.[112]

IV. INSTANT DECISION

In the instant case, Plaintiff challenges the BIA's approval of the Chaparral lease and drilling permits for failure to comply with NEPA.[113] The BIA responds that its lease approval fell within a categorical exclusion, and the 1979 Environmental Assessment and Finding of No Significant Impact covered its approval of the drilling permits.[114]

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[110] *Id.*
[111] *Id.*
[112] Hayes v. Chaparral Energy, LLC, No. 14-CV-495-GKF-PJC, 2016 WL 1175238, at *10 (N.D. Okla. Mar. 23, 2016).
[113] *Id.* at *4.
[114] *Id.* at *2.

Once an agency establishes categorical exclusion, its decision to classify a proposed action as falling within a particular categorical exclusion will be set aside only if a court determines the agency's decision was arbitrary and capricious.[115] So, the court must give substantial deference to the agency's interpretations of its own categorical exclusions, and the court may only reject that interpretation when it is unreasonable, plainly erroneous, or inconsistent with the exclusion's plain meaning.[116] The Department of the Interior has designated the BIA's approval of mineral lease adjustments and transfers, including assignments and subleases, as a categorical exclusion.[117] In determining its own approval of the Chaparral lease fell within the exclusion, the BIA necessarily interpreted the term "lease transfer" as including the initial transfer of a lease from a lessor to a lessee.[118] Plaintiff asserts the exclusion only applies to adjusting or transferring existing leases, not executing new

[115] *Id.* at *4 (citing Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1023 (10th Cir. 2002)).
[116] *Id.* (citing Utah Envtl. Cong. v. Bosworth, 443 F.3d 732, 735-36 (10th Cir. 2006)).
[117] *Id.* (citing U.S. Dep't of the Interior, Bureau of Land Mgmt., Department Manual 516 DM 10.5(G)(3) (2004)).
[118] *Id.*

leases.[119] The BIA responds its interpretation is reasonable and is entitled to controlling weight.[120]

First, the court looks to the categorical exclusion's text in assessing the parties' positions.[121] The exclusion covers the "approval of mineral lease . . . transfers."[122] The language's plain meaning precludes the BIA's interpretation.[123] The term "lease" refers to the initial transfer of a leasehold from a lessor to a lessee.[124] Therefore, a lease "transfer" necessarily denotes the transfer of rights under an existing lease from a lessor or lessee to some third party.[125] The BIA's interpretation would render the word "transfer" virtually meaningless, so it is incompatible with the exclusion's plain language.[126]

The court also looks to the language's context.[127] The term "lease transfers" is not used in isolation, and the language refers to lease

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[119] *Id.*
[120] *Id.*
[121] *Id.* at *5.
[122] *Id.* (quoting U.S. Dep't of the Interior, Bureau of Land Mgmt., Department Manual 516 DM 10.5(G)(3) (2004)).
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*

"adjustments and transfers."[128] Because a lease must exist before it can be adjusted, the text's grouping of "adjustments and transfers" suggests the provision was intended to apply to actions on existing leases.[129]

Second, the exclusion provision provides examples of a "lease transfer:" assignments and subleases, which both refer to transfers of an existing lease.[130] Because both assignments and subleases share the basic characteristic of existing leases, that further indicates the provision was not meant to apply to a new lease's creation.[131]

Third, the BIA's interpretation of "lease transfer" requires reading different language in two categorical exclusions as having the same meaning.[132] The BIA's Department Manual includes another categorical exclusion for approval of conveyances of interests in land where no change in the land use is planned.[133] If the BIA meant for "lease transfers"

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[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id. See* Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034, 2042 (2012) ("[T]he commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated"). *See also* 2A Norman J. Singer et al., SUTHERLAND STATUTORY CONSTRUCTION § 47:16 (7th ed. 2007) ("[W]hen two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, a general word is limited and qualified by a special word.").
[132] *Hayes*, 2016 WL 1254427, at *5.
[133] *Id.* (citing U.S. Dep't of the Interior, Bureau of Land Mgmt., Department Manual 516 DM 10.5(I) (2004)).

to include the initial transfer of a leasehold interest from lessor to lessee, the language clearly indicates the BIA knew how to and could have done so.[134] The BIA's use of different language in other exclusions strongly suggests it intended different meanings for each exclusion.[135] Therefore, the BIA's determination that its approval of the Chaparral lease fell within a categorical exclusion was premised on a plainly erroneous legal interpretation, making the approval arbitrary and capricious.[136] The lease contract between Chaparral and the Osage Nation vested no property interest in Chaparral because the regulations[137] require valid approval from the government for a lease contract to have legal effect.[138]

Plaintiff contends the 1979 Assessment was a broad, programmatic assessment of Osage County's oil and gas leasing program and is too general to allow the BIA to issue the two site-specific drilling permits.[139] Plaintiff also submits that there are relevant significant new circumstances,

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[134] *Id.*
[135] *Id.*
[136] *Id.* at *6.
[137] 25 C.F.R. § 226.34(a) (2014).
[138] *Hayes*, 2016 WL 1254427, at *5. An agency's failure to comply with NEPA renders the agency action at issue invalid. Sangre de Cristo Dev. Co., 932 F.2d 891, 894 (10th Cir. 1991).
[139] *Hayes*, 2016 WL 1254427, at *6.

so the BIA's reliance on the Assessment was arbitrary and capricious.[140] In response, the government argues the 1979 Assessment addressed all current and anticipated drilling in Osage County, so it automatically covers the BIA's approval of the Chaparral drilling permits.[141] Alternatively, the government submits any violation on its part was trivial and harmless.[142]

First, the Department of the Interior and the BIA are permitted to use an existing Environmental Assessment in its entirety if either entity determines the Assessment adequately appraises the environmental effects of the proposed action and reasonable alternatives.[143] The BIA's approval of a drilling permit is an agency action requiring, at a minimum, preparation of an Environmental Assessment.[144] The 1979 Assessment is a broad, programmatic document meant to describe and evaluate all aspects of the oil and gas leasing program in Osage County as it is supervised under existing BIA regulations.[145] The Assessment does not specifically address the environmental impact of BIA approval of the two Chaparral

[140] *Id.* at *9.
[141] *Id.* at *7.
[142] *Id.*
[143] *Id.* at *7 (citing 43 C.F.R. § 46.120(c) (2014)).
[144] *Id.*
[145] *Id.*

drilling permits.[146] Applicable Department of the Interior regulations require the BIA to make an explicit determination with supporting documentation that the BIA believes the 1979 Assessment sufficiently covers such drilling permit approval so as to obviate the need for a new Assessment.[147] Particularly, the supporting record must include an evaluation of whether new circumstances, information, or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.[148] Here, the BIA did not follow these procedures or make any effort to explicitly incorporate, tier to, or adopt the 1979 Assessment's analysis.[149] Therefore, the court held the BIA failed to comply with NEPA.[150]

The government's argument that a programmatic Environmental Assessment automatically covers all site-specific agency action subsequently taken in furtherance of the program was unpersuasive.[151] The government relied on a statement from the Tenth Circuit that neither NEPA nor the Council on Environmental Quality regulations require an

[146] *Id.*
[147] *Id.* (citing 43 C.F.R. §§ 46.120(c), 46.300 (2014)).
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*

agency to include a site-specific analysis for every particular area a proposed action affects.[152] The court deemed the government's reliance on that statement misplaced because the proposed action in that case was a broad administrative action, and the action in this case was site-specific.[153] There, the Tenth Circuit did not hold a site-specific analysis is never required under NEPA or that somehow a programmatic Environmental Assessment automatically covers all site-specific agency action subsequently taken in furtherance of a relevant program.[154] That case and its holding are irrelevant to the site-specific agency action at issue here because this case involves a broad action followed by a narrower, related action.[155]

Here, the broad action is the BIA's adoption of an oil and gas leasing program in Osage County, and the subsequent approval of the Chaparral drilling permits is the narrow action.[156] Applying the Tenth Circuit's holding, the BIA's 1979 Assessment for the oil and gas leasing program does not need to include a site-specific analysis of every area the

[152] *Id.* (citing Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209 (10th Cir. 2011)).
[153] *Id.* NEPA does not require that agencies prepare a site-specific analysis for every specific location affected by a broad administrative action. *Wyoming*, 661 F.3d at 1255.
[154] *Hayes*, 2016 WL 1254427, at *7.
[155] *Id.* at *8.
[156] *Id.*

oil and gas leasing program affects.[157] This application does not indicate the Assessment automatically covers all site-specific drilling permits issued as part of the broader leasing program.[158] Such a holding would plainly disregard applicable regulations and circuit precedent.[159] Relying on a broad, programmatic Assessment to support site-specific agency action seeks to obtain the benefits of a categorical exclusion without going through the notice and comment procedures necessary to promulgate a categorical exclusion.[160]

The government contends any NEPA violation on its part was trivial and harmless error.[161] Neither NEPA nor the APA requires reversal for trivial errors, but here the error was not harmless.[162] Here, the BIA has not gathered and documented information concerning the environmental impacts of its actions.[163] Even before the court, the BIA did not provide

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[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.* at*8 n.4.
[161] *Id.*
[162] *Id.*
[163] *Id. See* Lee v. U.S. Air Force, 354 F.3d 1229, 1237 (10th Cir. 2004).

any supporting documentation to show the 1979 Assessment adequately covers its approval of the two Chaparral drilling permits.[164]

The BIA's approval of the two drilling permits required, at a minimum, for the BIA to either prepare a new Environmental Assessment or determine the 1979 Assessment adequately appraised the proposed action's environmental effects with supporting documentation.[165] The BIA did not do either, and failure to do so was a material violation of NEPA.[166]

Reviewing an agency's decision not to prepare a supplemental Environmental Assessment is a two-step inquiry.[167] First, the court addresses whether the agency took a "hard look" at the new information to determine whether supplemental analysis is necessary.[168] Second, if the court determines the agency took the requisite "hard look," then the court reviews the agency's decision not to issue a supplemental Environmental Assessment under the APA's arbitrary and capricious standard.[169]

Plaintiff contends the 1979 Assessment requires supplementation because there have been significant legal and technological changes since

[164] *Hayes*, 2016 WL 125447, at *8 n.4.
[165] *Id.*
[166] *Id.*
[167] *Id.* at *9.
[168] *Id.* (quoting S. Utah Wilderness All. v. Norton 301 F.3d 1217, 1238 (10th Cir. 2002)).
[169] *Id.*

1979 relevant to the environmental impacts of drilling in Osage County, especially in regards to fracking's growth and development.[170] Plaintiff presents evidence that today, many well completions in Osage County involve fracking, unlike 1979, and the fracking involves much more fluid driven by significantly more horsepower than in 1979.[171] Given these changes, Plaintiff contends the BIA's reliance on the 1979 Assessment to support its approval of the two drilling permits was arbitrary and capricious.[172]

Neither the administrative record nor the parties' briefs contain any indication the BIA actually considered whether the 1979 Assessment requires supplementation.[173] Even though the BIA states it made this determination prior to approving the Chaparral drilling permits, there is nothing in the record to support that assertion.[174] But even if the BIA had made that determination, neither the record nor the government's brief contains any explanation for such a decision.[175] Therefore, the court

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[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.* at *10.
[174] *Id.*
[175] *Id.*

cannot say that the BIA took the requisite "hard look" at new information to assess whether supplementation might be necessary.[176]

Even if the BIA had consciously determined supplementation was unnecessary, that determination was arbitrary and capricious.[177] The 1979 Assessment does not contain any discussion of the environmental impacts of fracking.[178] The Assessment merely notes fracking technology exists and is in its experimental stages.[179] Today, numerous wells in Osage County involve fracking, and the systems, technology, and chemical completion fluids used in such operations have changed dramatically.[180] The government cannot reasonably contend these changes are insignificant or irrelevant to the environmental impacts of drilling operations in Osage County.[181] The government's reliance on the 1979 Assessment without supplementation was arbitrary and capricious.[182]

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[176] *Id.* (citing Norton v. S. Alliance Utah, 542 U.S. 55, 73 (2004)).
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*

BIA's approval of the two drilling permits violated NEPA for two independent reasons.[183] First, the BIA did not prepare a new Environmental Assessment for the action, and it did not follow the procedures necessary to rely on the 1979 Assessment.[184] Second, even if the BIA had followed the proper procedures, its reliance on the 1979 Assessment without supplementation was arbitrary and capricious.[185] BIA's approval of the Chaparral lease and two drilling permits failed to comply with NEPA.[186] Therefore, the lease and drilling permits have no legal effect.[187]

V. COMMENT

A. What kind of Environmental Impact Statement or Environmental Assessment is Appropriate?

Hayes is the first of its kind to invalidate a federal oil lease and drilling permits approved by the BIA because of failure to comply with NEPA. The court's decision to invalidate the leases fits within NEPA jurisprudence and reviews the BIA's determination that an Environmental

[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.* at *11.
[187] *Id.*

Assessment from 1979 sufficiently covered a proposed oil lease and drilling project. In the case at bar, the decision is appropriate given the substantial growth in fracking drilling methods since 1979. While this particular situation would rarely occur again in the future (presumably the BIA would not make this same determination again), courts require agencies to pay close attention to when external circumstances have changed so much as to require supplementation or more recent Environmental Assessments.[188] In the future, it may be difficult for agencies to tell when such external circumstances have changed to that degree to be "significant" before a judge makes such a finding.[189]

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[188] *Cf.* Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 378 (1989) (when reviewing an agency decision not to supplement an Environmental Impact Statement, courts should carefully review the record and the agency's decision based on the agency's evaluation of the significance of the new information).

[189] *See generally* Coker v. Skidmore, 941 F.2d 1306, 1311 n.7 (citing 40 C.F.R. § 1508.27 (2014)). CEQ regulations define "significant" in relevant part requiring consideration of both context and intensity. *Id.* "Context" means an action's significance must be analyzed in several contexts such as society as a whole, the affected region, the affected interests, and the locality. *Id.* Significance varies with the setting of the proposed action. *Id.* "Intensity" refers to the severity of impact. *Id.* The following should be considered when evaluating intensity: (1) Impacts that may be both beneficial and adverse. *Id.* A significant effect may exist if the Federal agency believes that on balance the effect will be beneficial; (2) The degree to which the proposed action affects public health or safety; (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas; (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial; (5) The degree to which the effects on the quality of the human environment are likely to be highly uncertain or involve unique or unknown risks . . . (9) The degree to which the action may adversely

An environmental assessment being merely outdated is not enough to make an agency's reliance on one arbitrary and capricious.[190] A judge must also make a finding that a change in circumstances makes reliance on the Assessment arbitrary and capricious.[191] Regulations and cases from other districts should have indicated to the BIA such findings are possible. Sometimes agencies are not aware of an action's compliance or noncompliance until they find themselves in court.[192] However, both agencies and the public benefit from informed decision making about the environmental impacts of agencies' programs and specific actions.

In the past, there has been some uncertainty as to when site-specific Environmental Impact Statements are required. Programmatic Environmental Impact Statements serve as generic rules that can resolve sets of issues for purposes of case-specific Environmental Impact Statements.[193] *S. Utah Wilderness Alliance* directs courts to first ask

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affect an endangered or threatened species or its habitat . . . (10) whether the action threatens a violation of Federal, State, or local law. *Id.*

[190] *Id.* at 1310.

[191] *Id.*

[192] *See* Rosebud Sioux Tribe v. Gover, 104 F. Supp. 2d 1194, 1197 (D. S.D. 2000), *vacated on other grounds*.

[193] Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 100-01 (1983) (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 535 n.13 (1978)).

whether there is an ongoing action that invites supplementation. This is a fact-specific inquiry dependent on the surrounding conditions. In one case, the court found no site-specific analysis was necessary because no specific plans had yet been submitted.[194] In another case, the court rejected that the agency should have prepared a site-specific Environmental Assessment instead of a broad Environmental Assessment leaving consideration of site-specific effects to later Assessments or Impact Statements.[195] Specifying the proper scope of an Environmental Impact Statement has been one of the most difficult questions for courts, and the form of action, details, functions, and facts have been considered in each case.[196]

Challenging the BIA's broad oil and gas leasing program is improper. Two Plaintiffs brought an action on their own behalf and on behalf of all surface owners and lessees in Osage County against the United States through the BIA and against Chaparral, among others.[197]

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[194] Def. of Wildlife v. Hall, 807 F. Supp. 2d 972, 980 (D. Mont. 2011) (no wolf removal plans had been submitted, and the agency properly concluded the wolf removal would not disrupt ecosystem functions or impact other species).
[195] High Sierra Hikers Ass'n v. U.S. Dep't of Interior, 848 F. Supp. 2d 1036, 1058 (N.D. Cal. 2012).
[196] William H. Rodgers, Jr., *National Environmental Policy Act (NEPA)—When—Statement timing—Supplemental EISs—Programmatic EISs—Examples from Indian Country*, ENVT. L. INDIAN COUNTRY § 1:23 (2015).
[197] Donelson v. U.S., 2016 WL 1301169, at *1 (N.D. Okla. 2016). Plaintiffs do not

Plaintiffs asserted under the APA and NEPA that since the 1979 Assessment was prepared, there have been significant changes in relevant environmental laws, regulations, and drilling processes.[198] Plaintiffs also alleged the Superintendent's failure to evaluate environmental impacts prior to lease approval renders the oil and gas leases void *ab initio*, identifying about 20,000 active wells in the class area.[199] In response, the Defendants contended because the Plaintiffs do not challenge any particular agency action, instead the entire oil leasing program, the allegations are insufficient to confer jurisdiction under the APA.[200] Courts can intervene only when a specific final agency action has an actual or immediately threatened effect.[201] The District Court for the Northern

include Hayes. On July 15, 2014, Robin Phillips, Superintendent for the Osage Agency, sent a letter to all lessees advising that all applications for permits to drill will require Environmental Assessments in the future as the result of another lawsuit in the same district. Complaint for Declaratory and Injunctive Relief at 13, Hayes v. Chaparral Energy, LLC, 2016 WL 1254427 (N.D. Okla. 2016).

[198] *Donelson*, 2016 WL 1301169, at *2.

[199] *Id.* Plaintiffs also asked the court to take judicial notice of the United States' filings in U.S. v. Osage Wind, LLC, 2015 WL 5775378 (N.D. Okla. 2015), in which the US acknowledged its fiduciary duty to protect the Osage Mineral Estate. *Donelson*, 2016 WL 1301169, at *6.

[200] *Id.* at *4. Programmatic improvement to agency programs are properly sought in the executive or legislative branches of government, unless Congress has created an appropriate exception. *Id.* (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990)).

[201] *Id.* (quoting *Lujan*, 497 U.S. at 894). Prohibition also applies to an agency's alleged failure to act. 5 U.S.C. § 551(13) (2012).

District of Oklahoma found against Plaintiffs because they challenged thousands of unspecified leases and drilling permits and did not identify even one particular agency action for challenge, precedent plainly prohibited the suit.[202]

Additionally, the age of Environmental Assessments and Impact Statements can lead to hasty generalizations. Outdated Environmental Assessments or Impact Statements alone are not sufficient for NEPA noncompliance.[203] In *Coker*, the Southern District of Mississippi held a fifteen year old Impact Statement for an entire flood control project could not serve as the basis for compliance with NEPA, and a supplemental Impact Statement was required.[204] There, the Corps admitted the Impact Statement was outdated and ordered a supplemental Impact Statement because the river flowline may have changed.[205] The court held an Environmental Impact Statement can become so outdated that it can no longer provide foundation for a subpart to be tiered to.[206] The Corps' decision not to supplement the Environmental Impact Statement was

[202] *Donelson*, 2016 WL 1301169, at *4. Federal Defendants have sovereign immunity from Plaintiffs' alleged programmatic NEPA violations. *Id.* at *5 n.2.
[203] Coker v. Skidmore, 941 F.2d 1306, 1310 (5th Cir. 1991).
[204] Coker v. Skidmore, 744 F. Supp. 121, 121 (S.D. Miss. 1990).
[205] *Id.* at 124-25.
[206] *Id.* at 125.

arbitrary and capricious.[207] However, Council on Environmental Quality regulations do not directly address whether an Environmental Impact Statement can become outdated.[208]

On appeal, the Fifth Circuit held the Corps was not required to prepare a supplemental Impact Statement without a finding that there were significant new circumstances relevant to environmental concerns and bearing on the proposed action or its impacts.[209] The proper inquiry was whether the Impact Statement was insufficient so as to require the preparation of a supplemental Impact Statement before the specific project (construction of a levee).[210] The District Court erred in holding the Corps' decision not to supplement the Impact Statement was arbitrary and capricious.[211] A court may only order preparation of a supplemental Impact Statement if there are significant new circumstances relevant to environmental concerns and bearing on the proposed action or its impacts.[212] Instead of remanding for further findings, the Fifth Circuit concluded since the District Court agreed with the Corps that there was no

[207] *Id.*
[208] *Id.*
[209] Coker v. Skidmore, 941 F.2d 1306, 1310 (5th Cir. 1991).
[210] *Id.* at 1309. The specific project was construction of a levee. *Id.* at 1310.
[211] *Id.*
[212] *Id.* (citing 40 C.F.R. § 1502.9(c)(1)(ii) (2014) and 33 C.F.R. § 230.11 (2014)).

evidence the levee itself would cause a significant environmental impact, there was no regulatory requirement for a supplemental Impact Statement.[213]

Sometimes aged Impact Statements are acceptable. The Fifth Circuit perceived tiering regulations allow for gaps in time between programmatic Impact Statements and site-specific Environmental Assessments and focused on the site-specific project's impacts.[214] Other districts have followed the Fifth Circuit's approach.[215] Hayes did not actually allege the 1979 Environmental Assessment was outdated.[216] Rather, Hayes alleged there had been significant changes in drilling technology that were not considered in the 1979 Assessment, specifically increased fracking within Osage County.[217] *Hayes* does not conflict with the Fifth Circuit's view.

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[213] *Id.* at 1307.
[214] Mark T. Story, *Environmental Law,* 24 TEX. TECH L. REV. 271 (1993).
[215] *See* Becker v. Fed. R.R. Admin., 999 F. Supp. 240 (D. Conn. 1996) (Plaintiffs failed to show the original proposed action substantially changed or there were significant new circumstances or information relevant to the project and its environmental impact where a change of forty minutes in the projected train running time altered the project. Plaintiffs failed to note the mere age of an [Environmental Impact Statement] is not grounds for invalidation). *See also* Lone Tree Council v. U.S. Army Corps of Eng'rs, 2007 WL 1520904 (E.D. Mich. 2007).
[216] *See* Complaint for Declaratory and Injunctive Relief, Hayes v. Chaparral, (No. 14-CV-495-GKF-PJC), 2016 WL 51254427.
[217] *Id.*

Agencies do not need to supplement Impact Statements every time new information comes to light after the Impact Statement is finalized.[218] However, agencies have a continuing duty to supplement their Impact Statements, and agencies must supplement when there are significant new circumstances relevant to environmental concerns and bearing on the proposed actions or its impacts. In future cases, reviewing an agency's evaluation of the new circumstances may not be so easy, and the significance of new facts and circumstances may be difficult for agencies themselves to evaluate. Guidance on whether a particular new circumstance is "significant" is not particularly helpful to courts or agencies. New circumstances are significant where "new information provides a seriously different picture of the environmental landscape."[219] So any given new fact may or may not be significant, depending on whether the agency perceives a particular new circumstance provides a seriously different picture of the environmental landscape and whether the agency's decision about that new circumstance was arbitrary and capricious.

[218] Marsh v. Or. Res. Council, 490 U.S. 360, 377 (1989).
[219] City of Olmsted Falls, OH v. FAA, 292 F.3d 261, 274 (D.C. Cir. 2002).

B. Why are Government Lease Approvals So Important to Tribes?

In a case similar to *Hayes* involving BIA lease approval, the lease agreement was for a hog production facility on tribal trust land in Mellette County, South Dakota.[220] The Assistant Secretary of the BIA sent a letter to the tribe stating the Area Director's lease approval for the project was void for failure to comply with NEPA.[221] However, the Assistant Secretary was not aware of the lease's noncompliance with NEPA until environmentalists and neighbors brought suit.[222] The tribe and the company sought a temporary restraining order barring BIA action, and the court agreed with the Assistant Secretary that NEPA requirements likely had not been met.[223] The District Court for the District of South Dakota disagreed with the Assistant Secretary's methods because the conclusory letter did not offer analysis or explanation why the Assessment had been inadequate, and the letter had been sent four to five months after the Assistant Secretary learned of the NEPA violations.[224] The court

[220] Rosebud Sioux Tribe v. Gover, 104 F. Supp. 2d 1194, 1197 (D. S.D. 2000).
[221] *Id.*
[222] *Id.* at 1206.
[223] *Id.* at 1202.
[224] *Id.* at 1206. "It's high time . . . the BIA conducts its affairs in a timely and business-like manner to give confidence to Tribes, all Native Americans, their business partners,

concluded the BIA had taken a hard look and an Environmental Impact Statement was not required because of the alternatives' narrow scope,[225] high controversy, or inadequate investigation of historic and cultural properties.[226]

NEPA competence within the BIA would have helped, and the project should have been more thoroughly studied, evaluated, and permitted before it was rushed ahead.[227] Later, newly elected Tribal Council decided they wanted the Assistant Secretary's voiding of the lease approval upheld and entered into a land return agreement, continuing to lease only a fraction of what had previously been leased.[228] Afterwards, management changed on the leased lands as well.[229]

Further, tribes, individuals, and development companies are concerned with timely agency action. Courts may compel the agency to

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and lending institutions so that they can rely upon the BIA to do what they say they are going to do. The principles of equity dictate that the Assistant Secretary's decision cannot be upheld." *Id.*

[225] *Id.* Private corporations are not required to consider alternatives that are not in their economic interest. *Id.* at 1209.

[226] *Id.* at 1213.

[227] William H Rodgers, Jr. & Elizabeth Burleson, *National Environmental Policy Act (NEPA) – Whether an EIS is Required – Major Actions and Significant Effects – Thresholds in Indian Country*, Envt. L. Indian Country § 1:19 (2015).

[228] Vi Waln, *Sun Prairie to Allow Ag Systems to Operate Hog Farm*, LAKOTA COUNTRY TIMES (Aug. 25, 2009), http://www.lakotacountrytimes.com/news/2009-08-25/front_page/002.html.

[229] *Id.*

act, but they cannot specify what the action must be.[230] In a case about the government's alleged failure to approve drilling permits, Hayes failed to plead facts tying the dispute to his property. Plaintiff, Osage Producers Association, brought an action pursuant to the APA against several government Defendants, alleging the government had unreasonably delayed issuing drilling permits, tacitly denying each and every permit pending before the Superintendent.[231] Plaintiff's complaint sought to compel agency action unlawfully withheld or unreasonably delayed, processing pending drilling permits.[232] The District Court for the Northern District of Oklahoma held Hayes' claimed interest of ensuring NEPA compliance on his land was not related to the subject of this action because the present litigation could not impair or impede his interest, regardless of the outcome, because the government must comply with NEPA.[233]

Leases are an income source for tribes because of royalties, but further complications arise when fracking is involved. The federal

[230] Osage Producers Ass'n v. Jewell, 2016 WL 80660, at *2 (N.D. Okla. Apr. 30, 2010) (quoting Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004)).
[231] *Id.* at *1.
[232] *Id.* at *2.
[233] *Id.* at *3.

government estimates ninety percent of wells drilled on federal and Indian lands used fracking in 2013.[234] Gas drillers' operations involve hundreds of truckloads and many hours of industrial operations, and there may be accidental spills and fires along with odors, lighting, and noises at the well.[235] Rural roads are not designed for major industrial cargoes, which may pose a serious threat to neighbors.[236] Neighbors bear all of the burden from fracking because the landowners will at least be compensated under the leases' terms.[237] Neighbors can also expect night flaring of burning gases and clouds of chemical dust.[238]

NEPA applies to several steps of the federal lands leasing process and affects oil and gas development activities. However, Environmental Impact Statements result in multilayer delays and multi-million dollar costs.[239] In one case concerning a well drilling, an oil and gas exploration company filed an application and permit to drill with the agency, and the

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[234] Rita Ann Cicero, *Feds ask 10th Circuit to Expedite Fracking Review*, 36 No. 16 WESTLAW J. ENVTL. 10, at *1 (Mar. 2, 2016).
[235] James T. O'Reilly, *Litigation About Fracking Wells & Waste*, The Law of Fracking § 14:15 (Sept. 2015).
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] Timothy M. Miller, et. al., *Leasing Federal Oil and Gas*, 32 E. MIN. L. FOUND. § 14.06 (2011).

agency completed an Environmental Assessment and issued a FONSI.[240] Plaintiffs, two nonprofit organizations, alleged the agencies failed to comply with NEPA in approving the drilling permit application.[241] The District Court for the Eastern District of Michigan held the agencies' action was arbitrary and capricious.[242] Years later, the agencies published their notice of intent to prepare an Environmental Impact Statement for the drilling project.[243] The agencies later published a revised notice of intent years after that.[244] Even later, the company withdrew the drilling permit application, cancelling the project, making the need to prepare the Impact Statement unnecessary.[245] So, sometimes agencies will have wasted their time and money when the lessee decides not to pursue its project.

Reform within the BIA is necessary to allow for timely and lawful compliance among leases. However, courts are not equipped to address this broad issue and can only address specific cases and controversies that

[240] Anglers of Au Sable v. U.S. Forest Serv., 402 F. Supp. 2d 826, 829 (E.D. Mich. 2005).
[241] *Id.* at 828.
[242] *Id.* at 835.
[243] Dep't of Agric., Forest Service, Huron-Manistee National Forests, Michigan, USA and State South Branch 1-8 Well, 75 Fed. Reg. 8297 (Feb. 24, 2010).
[244] Dep't of Agric., Forest Service, Huron-Manistee National Forests, Michigan, USA and State South Branch 1-8 Well, 77 Fed. Reg. 1665 (Jan. 11, 2012).
[245] Dep't of Agric., Forest Service, Huron-Manistee National Forests, Michigan, USA and State South Branch 1-8 Well, 77 Fed. Reg. 58807 (Sept. 24, 2012).

arise. Congress or the Department of the Interior are better suited to evaluate, revise, and implement BIA procedures for lease approvals, all while being mindful that regulations require agencies to consider whether there are significant new circumstances affecting their actions.

While this decision may disfavor the oil industry because of time and resources spent on Environmental Assessments, tribes will likely not be affected. Oil development companies will likely still be interested in fracking, so incurring the costs of Environmental Assessments likely will not deter them as long as the lease approval process is not too time-consuming. As a result, tribes will still receive royalties.

C. Department of the Interior Fracking Regulations

In 2012, the Department of the Interior proposed more stringent fracking regulations in respect to chemical disclosure, well integrity, formation integrity, and water management.[246] The argument against more regulations is that more regulations would require too much information for an agency to review before promptly issuing an authorization.[247]

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[246] *See* L. Poe Leggette, et. al, *Bureau of Land Management (BLM) Proposed Regulation of Hydraulic Fracturing*, FULBRIGHT & JAWORSKI LLP, 33 E. MIN. L. FOUND. § 22.15 (2012).
[247] *Id.*

Depending on the well's location, several permits may be required.[248] Some commenters believe the cost of compliance with several sets of regulation is far more than the cost of remediating rare cases where fracking causes damage.[249]

In 2015, the District Court for the District of Wyoming issued a preliminary injunction stopping implementation of the new fracking regulations on all public and Indian lands.[250] The court ruled the Department of the Interior lacked authority from Congress to regulate non-diesel fracking on public lands.[251] The trade associations argued the Safe Drinking Water Act[252] gives exclusive authority to regulate underground injections to states and the EPA.[253] The agency contended the regulations merely supplement existing Department of the Interior requirements.[254] The court found the agency's argument unpersuasive because Congress

[248] *Id.*
[249] *Id.*
[250] Wyoming v. U.S. Dep't of the Interior, No. 15-043, 2015 WL 5845145 (D. Wyo. Sept. 30, 2015).
[251] *Id.*
[252] 42 U.S.C. § 300h (2012).
[253] Wyoming v. U.S. Dep't. of the Int., 136 F. Supp. 3d 1317, 1353–54 (D. Wyo. 2015), *vacated and remanded sub nom* Wyoming v. Sierra Club, 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016).
[254] *Id.*

mostly exempted fracking from federal regulation, except when diesel fuel is injected into the ground.[255]

The agency and six environmental groups appealed the district court's injunction.[256] Appellants argued the injunction impairs the agency's ability to fulfill its statutory duty to ensure oil and gas operations on federal and Indian lands are properly conducted.[257] During the public comment period after the rule was proposed, many of the 1.5 million comments submitted either supported the rule or wanted it to be more protective of the environment.[258]

D. *Post-Hayes*

Post *Hayes*, the Osage Minerals Council ("Council") filed a motion to dismiss for failure to join a necessary and indispensable party.[259] Since the Council is part of Osage Nation which possesses sovereign immunity, the District Court for the Northern District of Oklahoma held joinder was

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[255] *Id.* "Congress clearly expressed intent that non-diesel hydraulic fracturing be removed from the realm of federal regulation, thereby lodging authority to regulate that authority within the states and tribes." *Id.*
[256] Wyoming v. Jewell, Nos. 15-8126 and 15-8134, 2016 WL 680277, *appellants' joint motion filed* (10th Cir. Feb. 8, 2016).
[257] *Id.* at *6.
[258] *Id.*
[259] Hayes v. Chaparral Energy, LLC, 14-CV-495-GKF-PJC, 2016 WL 1175238, at *1 (N.D. Okla. Mar. 23, 2016).

not feasible and therefore not required.[260] The Council's presence was unnecessary to accord complete relief among the existing parties: Hayes, Chaparral, and the BIA,[261] and the government had adequately represented the Council's interests.[262] The government proposed a remedial alternative to lessen or avoid prejudice to the Council, suggesting that the court identify the legal error in the lease approval and remand the case to the agency without voiding the lease.[263]

That remedy would be inconsistent with *Sangre*, which held the invalid lease contract there vested no property interest in Sangre.[264] When a lease requires agency approval to be legally operative and a court later determines the agency approved a lease in violation of NEPA, that determination necessarily invalidates the underlying lease unless or until valid agency approval.[265] *Sangre* made it clear that there is no meaningful distinction between a ruling that the Superintendent's lease approval violates NEPA and a ruling declaring the lease invalid.[266] The holding in

[260] *Id.* at *2.
[261] *Id.*
[262] *Id.* at *3.
[263] *Id.* at *5.
[264] Sangre de Cristo Dev. Co. v. U.S., 932 F.2d 891, 894 (10th Cir. 1991).
[265] *Hayes*, 2016 WL 1175238, at *10.
[266] *Id.* at *6. As a result, the court modifies and clarifies its order to remand the case to

Hayes that the Environmental Assessment is inadequate does not necessarily result in prejudice to the Council because the only result will be a new Assessment for the Superintendent to consider, which does not call for any action by or against the Council.[267] Chaparral and the Council still may obtain valid agency approval.[268] Dismissal would insulate an entire category of agency action from judicial review, precluding review of the Superintendent's oil and gas lease approval and drilling permits, so the court would not dismiss for failure to join the Council.[269]

Then, the court amended its opinion so the lease and drilling permits are no longer void *ab initio*, they are invalid instead. *Hayes* did not declare the lease permanently invalid; it merely determined that a condition precedent, the Superintendent's valid lease approval, had not been performed. As a result, the lease had no legal effect.[270] Void *ab initio* would foreclose some equitable remedies, which is one reason the Council

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the agency for further administrative proceedings. *Id.* at *11 n.6.
[267] *Id.* at *9.
[268] *Id.* At one point the Council suggested it could sue the BIA for damages, but sovereign immunity would bar such litigation. *Id.* at *11 n.3. Additionally, Chaparral has since filed for Chapter 11 bankruptcy and sold its leases to Warrior Exploration & Production, LLC ("Warrior"). Opening Brief for Intervenor Defendant-Appellant at *9, Hayes v. Osage Minerals, (No. 16-5060), 2016 WL 5407598, at *9. However, Warrior and the Council may still obtain valid agency approval.
[269] *Id.* at *11.
[270] *Id.* at *3, 6.

made the motion to intervene as an indispensable party.[271] The court did not mean to suggest the lease was permanently invalid.[272] Use of the term "invalid" fits more closely with all the opinions considered in this case note, including *Sangre*. Further, the complaint itself seeks a declaratory judgment that the lease and drilling permit are *invalid* so as to support a trespass claim.[273] The court remands the case for further agency proceedings, which is consistent with *Hillsdale*.

V. CONCLUSION

While the costs of agency compliance with NEPA are high, Congress intended agency compliance when it enacted NEPA because the public generally benefits from informed decision-making. The BIA should shoulder the costs of compliance or require lessees to do so,[274] but

[271] Judge Frizzell's determination that the Council was not an indispensable party will be reviewed for an abuse of discretion, meaning there is only a limited chance the Tenth Circuit will reverse the order.
[272] *Id.* at *11 n.6.
[273] Complaint for Declaratory and Injunctive Relief, Hayes v. Chaparral at 1, (No. 14-CV-495-GKF-PJC), 2016 WL 54212. Although it also asks that the oil and gas leases be voided *ab initio* elsewhere. *See generally id.* The complaint also seeks compensatory damages, so the Tenth Circuit should not be persuaded by the Council's argument that Hayes' claims are moot because Hayes may still obtain compensatory damages from Chaparral's bankruptcy estate. *See generally* First Amended Complaint for Declaratory and Injunctive Relief (Dkt. No. 2) at 12, Hayes v. Chaparral Energy, LLC, -- F. Supp. 3d – (2016) (Case No. 14-CV-495-GKF-PJC), 2016 WL 1254427.
[274] The lessee has the responsibility of conducting and completing the Environmental Assessment, so the lessees pay for Assessments. *See* 40 C.F.R. § 1506.5(b) (2014). Then

remedial measures should be taken to ensure BIA competency and efficiency because tribes may be relying on the royalties from the leases. Tribes often do not want to delay the process because delay could possibly cause development companies to lose interest. Because most fracking regulation is left to the states, the least agencies can do is prepare or approve lessee-prepared Assessments for lease approvals and drilling permits when the circumstances so require. Normally, agencies are in the best position to evaluate when external circumstances have changed sufficiently from past Assessments, not courts. *Hayes* and *Rosebud Sioux Tribe* are extraordinary cases of BIA noncompliance with NEPA.[275] The BIA's internal procedures may need to be reworked internally or by the Department of the Interior to avoid NEPA compliance problems with lease approvals in the future without taking a substantially longer time. Parties will want to avoid the time-consuming and monetary costs of litigation like this one. **ERIKA DOPUCH**

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the BIA makes a FONSI or a Finding of Significant Impact. *See generally* Complaint for Declaratory and Injunctive Relief, Hayes v. Chaparral (No. 14-CV-495-GKF-PJC), 2016 WL 54212.

[275] Plenty of Notices of Intent to Prepare Environmental Impact Statements, Draft Environmental Statements, and Final Environmental Statements are available for viewing and comment in the Federal Register. *See generally* https://www.federalregister.gov/agencies/indian-affairs-bureau.