Chapter 18 • MINING AND MINERAL EXTRACTION
2013 Annual Report[1]

I. CASE LAW DEVELOPMENTS

A. Clean Water Act Section 404 Permitting of Mountaintop Removal Coal Mines

A good portion of the litigation involving mountaintop removal coal mines centered on section 404 of the Clean Water Act (CWA)[2] that grants permitting authority to the Army Corps of Engineers' (COE) for the discharge of dredged or fill material. Mountaintop removal valley fills constructed in waters of the United States are considered fill and therefore require a section 404 permit.

1. EPA's "Veto"

In evaluating section 404 permits, the COE specifies the area for the discharge of dredged or fill material by evaluating the environmental effects of the disposal site pursuant to section 404(b)(1) of CWA guidelines.[3] After specification, the United States Environmental Protection Agency (EPA) can prohibit, deny, restrict or withdraw the defined areas that can be used as fill disposal sites, including sites for valley fills.[4] EPA's authority under section 404(c) to prohibit, deny, restrict or withdraw areas for fill disposal has been described as a "veto." EPA used this authority to retroactively veto a section 404 permit nearly four years after it was issued to Mingo Logan for its Spruce No. 1 Mine in West Virginia leading to a legal challenge by the permittee.[5]

On April 23, 2013, the D.C. Circuit reversed the district court's holding that the EPA lacked statutory authority to withdraw the specification of disposal sites for a CWA section 404 permit after the permit was issued by the COE.[6] The D.C. Circuit disagreed with the lower court's interpretation of Congress' intent in light of the clear and unambiguous language in section 404(c), particularly Congress' use of the "expansive conjunction 'whenever.'"[7] The court held that "Congress made plain its intent to grant [EPA] authority to prohibit/deny/restrict/withdraw a specification at *any* time."[8]

This is the first time EPA has exercised its section 404(c) veto authority post-

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[2]33 U.S.C. § 1344 (2011).

[3]33 U.S.C. § 1344(b); Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230 (2013).

[4]33 U.S.C. § 1344(c); Section 404(c) Procedures, 40 C.F.R. § 231.

[5]Mingo Logan Coal Co. v. EPA, 714 F.3d 608 (D.C. Cir. 2013) (*Mingo Logan II*), *rev'g* 850 F. Supp. 2d 133 (D.D.C. 2012) (*Mingo Logan I*), *reh'g en banc denied*, No. 12-5150, 2013 U.S. App. LEXIS 15266 (D.C. Cir. July 25, 2013).

[6]*Mingo Logan II*, 714 F.3d at 616.

[7]*Id.* at 613. "As we have repeatedly stated throughout this opinion, the text of section 404(c) does indeed clearly and unambiguously give EPA the power to act post-permit." *Id.* at 615.

[8]*Id.* at 613 (emphasis in original).

permit.[9] Although rarely invoked – to this day, including Mingo Logan, EPA has used its section 404(c) authority on just thirteen occasions – EPA has previously only exerted its authority *prior* to the COE issuing the permit even though EPA maintains it has had retroactive veto authority for over thirty years.[10] In the eyes of the many amici that filed briefs in the matter opposing EPA, this retroactive decision has sowed uncertainty in CWA permitting "that was expressly intended to provide finality."[11]

Given the status and deference afforded the D.C. Circuit, particularly in its review of federal agency actions, this decision has national implications beyond one coal mine in Appalachia.[12] As such, this decision could have an impact on developments or operations across the nation. Due to the potential for national application of this decision, Mingo Logan filed a petition for writ of certiorari to the Supreme Court on November 13, 2013 and was supported by a litany of business and industry groups' amicus briefs.[13] A decision on whether or not to accept the petition has not been made as of this writing.

2. Section 404 Nationwide Permits for Valley Fills

In *Kentucky Riverkeeper, Inc. v. Rowlette*, the Sixth Circuit invalidated the COE's section 404 Nationwide Permit (NWP) 21 that provided a streamlined permitting process for valley fills associated with surface coal mining.[14] First, the court held that the COE failed to address the present effects of past actions in its cumulative-impact analysis.[15] Second, the court found that the COE failed to provide any documentation supporting the COE finding that mitigation will minimize cumulative impacts. Although deference is usually afforded to an agency's scientific expertise, the court cannot "excuse an agency's failure to follow the procedures required by duly promulgated regulations."[16]

3. Upholding Section 404 Individual Permits

Two courts rejected challenges to individual section 404 permits issued to coal operators in West Virginia and Kentucky by concluding the COE did not act arbitrarily or capriciously. *Ohio Valley Environmental Coalition, Inc. v. U.S. Army Corps of Engineers (OVEC)* addressed claims that the COE failed to properly account for the watershed's baseline conditions and failed to take a "hard look" at potential environmental consequences when it issued a section 404 permit to Highland Mining Company.[17] The

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[9]*Mingo Logan I*, 850 F. Supp. 2d at 150-51 & n.14.
[10]*Id.* at 150; *see also Chronology of 404(c) Actions*, EPA, http://water.epa.gov/lawsregs/guidance/wetlands/404c.cfm (last updated Sept. 23, 2013).
[11]*Mingo Logan I*, 850 F. Supp. 2d at 152.
[12]*See generally* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375 (2006) (D.C. Circuit is a national court uniquely situated to review the conduct of the national government).
[13]Case Docket, Mingo Logan Coal Co. v. EPA, No. 13-599 (2013), http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-599.htm (last updated Mar. 5, 2014).
[14]714 F.3d 402 (6th Cir. 2013) (invalidating the NWP 21 that was: issued in 2007, expired in 2012, and reauthorized until 2017 for approximately seventy mining operations).
[15]*Id.* at 411 (explaining 40 C.F.R. § 1508.7 (2013) requires the present effects of past actions be taken into account).
[16]*Id.* at 413.
[17]716 F.3d 119, 124, 127 (4th Cir. 2013).

Fourth Circuit held that the COE's evaluation, observations and assessments regarding historical and current data, as well as a review of site specific factors and the watershed as a whole, did not support the claim that the COE failed to properly account for the baseline conditions. Furthermore, contrary to the claim that the COE failed to take a hard look, the COE extensively reviewed conductivity and stream impairment during a long consultation period among the agencies and Highland that satisfied NEPA's hard look requirement.[18] Essentially, the challengers' arguments boiled down to no more than a substantive disagreement with the COE's decision.

In *Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers*, the district court rejected claims that the COE failed to take a "hard look," particularly with regards to adverse impacts upon human health and welfare, and to consider adverse effects upon water quality.[19] Regarding a hard look at adverse effects to human health and welfare, challengers relied upon several human health studies linking mining to negative health impacts, including increased birth defects.[20] However, the court rejected these claims on the basis that the human health studies addressed impacts of mining operations as a whole, while the COE review was limited in scope to only jurisdictional waters. In other words, the COE "was only required to address the collective and cumulative effects of the *authorized discharges*."[21] The studies were beyond the scope of the COE's authority and review. With regards to the claim the COE failed to adequately address adverse effects upon water quality, the court found that the COE adequately assessed the compensatory mitigation plan, that the in-lieu fee payments and off-site mitigation were appropriate and that conductivity, including the adaptive management plan to address high levels of conductivity, was adequately addressed.[22] Similar to *OVEC*, the court concluded that the COE adequately analyzed the issues and did not act arbitrarily or capriciously and that the challengers simply disagreed with the COE's decision.

B. Clean Water Act's Permit Shield

In *Wisconsin Resources Protection Council v. Flambeau Mining Co.*,[23] the Seventh Circuit held that the CWA's permit shield provision[24] applied to Flambeau's permit thus barring plaintiff's suit. The permit shields its holder from liability under the CWA if the holder discharges pollutants in accordance with the permit.[25] Plaintiffs alleged that the permit shield was inapplicable because Flambeau's separate WPDES permit was terminated sua sponte by Wisconsin. However, Wisconsin's regulations allowed for other permits, in this case a mining permit, to regulate stormwater discharges under the CWA without requiring a separate WPDES. Although Flambeau did not have a separate WPDES, its discharges were nonetheless regulated by its mining permit pursuant

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[18] *Id.* at 129.
[19] No. 3:12-CV-00682-TBR, 2013 U.S. Dist. LEXIS 120050, at *8-9 (W.D. Ky. Aug. 23, 2013), *injunction granted pending appeal*, 2013 U.S. Dist. LEXIS 133339 (W.D. Ky. Sept. 18, 2013).
[20] *Id.* at *7-8.
[21] *Id.* at *40 (emphasis in original).
[22] *Id.* at *45, *54-55, *61-62.
[23] 727 F.3d 700 (7th Cir. 2013) (concerning Flambeau's WPDES permit, Wisconsin's version of the National Pollution Discharge and Elimination System (NPDES) permit).
[24] 33 U.S.C. § 1342(k).
[25] *Flambeau*, 727 F.3d at 706 (quoting Piney Run Pres. Ass'n v. Cnty. Comm'rs, 268 F.3d 255, 266 (4th Cir. 2001)).

to the CWA.

Plaintiffs argued that this arrangement was improper and never approved by the EPA. The court, although stating there was evidence of EPA approval, did not address the argument because regardless of the court's analysis, basic principles of due process require a regulated party to be given fair warning what is required of it. That was not done here because Flambeau complied with what Wisconsin deemed was a valid WPDES permit and therefore, should not be penalized.[26] Flambeau is entitled to reasonably rely on duly enacted regulations. The court explicitly stated it does "not require a regulated party to establish that the regulating agency had actual authority to issue a facially proper, and therefore presumptively valid, regulation before complying with the agency's command."[27] Consequently, the permit shield applies where, as here, a facially valid permit is issued and the permittee lacks notice of the permit's potential invalidity. Having failed to show Flambeau violated its mining permit, Flambeau was entitled to summary judgment.[28]

C. Liability for Clean Water Act Violations After Mining Operations Have Ceased

In dispensing with defendant's motion to dismiss and plaintiffs' motion to amend their complaint, the district court in *Ohio Valley Environmental Coalition, Inc. v. Hernshaw Partners, LLC* determined that discharges of pollutants were considered to be ongoing, "even if the activities that caused the violations have ceased."[29] Plaintiffs allege a valley fill on defendant's property is the source of elevated selenium in the stream and therefore, defendant is discharging a pollutant in violation of the CWA. The court further agreed that a valley fill was a point source and rejected defendant's arguments that the activity, construction of the valley fill, occurred more than fourteen years ago and before defendant took possession of the property. The court held that it did not matter under the CWA who caused the discharge, just who owns the discharge.[30] Given these findings, the court allowed plaintiffs to move forward with their amended complaint.

D. Use of the Ten-Day Notice for Permit Defects

In *Farrell-Cooper Mining Co. v. U.S. Department of the Interior,*[31] the Tenth Circuit dismissed appellants' appeal because their claims were not ripe for review. Appellants had sought a declaration from the district court that Oklahoma Department of Mines (Oklahoma), and not the Office of Surface Mining, Reclamation, and Enforcement (OSMRE), had sole permitting authority pursuant to the Surface Mining Control and Reclamation Act (SMCRA) and that the "ten-day notice" (TDN) process could not be used for permit defects. The district court viewed the lawsuit as an attack on SMCRA's

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[26]*Id.* at 707; *cf.* Ohio Valley Envtl. Coal., Inc. v. Marfork Coal Co., No. 5:12-1464, 2013 U.S. Dist. LEXIS 119537 (S.D. W. Va. Aug. 22, 2013) (holding that the permit shield was inapplicable because West Virginia requires all mining NPDES permits to contain a condition that discharges shall not cause a violation of water quality standards (citing W. VA. CODE R. § 47-30-5.1.f (2013))).

[27]*Flambeau*, 727 F.3d at 709.

[28]*Id.* at 711.

[29]No. 2:13-cv-14851, 2013 U.S. Dist. LEXIS 169206, at *2-3, *14-19 (S.D. W. Va. Dec. 2, 1013).

[30]*Id.* at *25-26 (quoting W. Va. Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159 (4th Cir. 2010)).

[31]728 F.3d 1229 (10th Cir. 2013).

regulations, which could only be heard in the United States District Court for the District of Columbia Circuit. Therefore, it held that it lacked subject matter jurisdiction and declined to address the case on the merits.[32]

SMCRA provides a mechanism whereby states wishing to regulate surface coal mining within their jurisdictions can achieve "primacy" by having its program approved by OSMRE.[33] Oklahoma has achieved primacy and therefore has exclusive jurisdiction over the regulation of surface coal mining, subject to exceptions. One of the exceptions relevant to this case is the TDN. The TDN is an oversight mechanism for OSMRE to call a state's attention to a potential violation of SMCRA whereby the state has ten days to "take appropriate action" to remedy the violation or "show good cause" why the violation has not been abated.[34]

Pursuant to its exclusive jurisdiction, Oklahoma approved permit applications for two Farrell-Cooper mines that required reclamation pursuant to Oklahoma's interpretation of "approximate original contour" (AOC). In 2011, OSMRE issued two TDNs to Oklahoma to address alleged violations regarding Farrell-Cooper's failure to achieve AOC as interpreted by OSMRE. Oklahoma responded that the notices were premature because Oklahoma and OSMRE disagreed on the definition of AOC and were in discussions to resolve their respective interpretations. Oklahoma further maintained that there were no violations to correct because Farrell-Cooper's reclamation was in accordance with its Oklahoma permits.[35]

After rejecting Oklahoma's responses to the TDNs and requests for further review, OSMRE issued two notices of violation to Farrell-Cooper for failure to achieve AOC. Appellants argued that OSMRE's real concern was with Oklahoma's interpretation of AOC contained in Farrell-Cooper's permits – a permit defect – not Farrell-Cooper's operations conducted pursuant to the permit and therefore, the TDNs and notices of violation were improper.[36] Upon receiving the notices of violation, Farrell-Cooper filed administrative appeals which are ongoing.[37]

Instead of addressing subject matter jurisdiction, the Tenth Circuit analyzed whether the appellants' claims were ripe by assessing whether intervention in the matter would inappropriately interfere with agency action, the benefit of additional factual development and the hardship to the parties if the court declined to intervene. The court held that because the notices of violation were being administratively appealed, the Department of Interior may agree with appellants that OSMRE acted unlawfully and review by the court would disrupt this process. Thus appellants' claims were not ripe because they are conditioned upon pending administrative appeals.[38]

E. Mining on Public Lands

1. Mine Claim Maintenance Fees

In *Consolidated Golden Quail Resources, LTD*, the Interior Board of Land Appeals (IBLA) addressed the argument that mine claim maintenance fees were not due

[32] *Id.* at 1233-34.
[33] *Id.* at 1231-32.
[34] *Id.* at 1232 (citing 30 U.S.C. § 1271(a)(1) (2012) and Federal Inspections and Monitoring, 30 C.F.R. § 842.11(b)(1)(ii)(B)(*1*) (2013)).
[35] *Id.* at 1233, 1238.
[36] *Id.* at 1236-37.
[37] *Id.* at 1233.
[38] *Id.* at 1234-38.

for the 2010 assessment year under the claim maintenance fee statute in effect at the time such fees were due.[39] On March 11, 2009, Congress' inadvertent amendment to 30 U.S.C. § 28f became law and only required fees for 2004 through 2008.[40] Since claim maintenance fees were due on September 1, 2009 for the 2010 assessment year, and fees were only required for 2004 through 2008, the claimant argued it did not owe any fees for 2010. The IBLA rejected these claims, holding that Congress' intent was clear that maintenance fees were to be collected.[41] Since the fees were not paid when due, claimant's mining claims were forfeited by law.[42]

2. Temporary Cessation of Mining

In *Center for Biological Diversity v. Salazar*, the Ninth Circuit held that a mine plan of operations does not automatically terminate when the mine ceases operations such that a new plan of operations must be submitted and approved by the Bureau of Land Management (BLM) prior to resumption of mining operations.[43] The Arizona 1 uranium mine ceased production in 1992 and was placed on "standby and interim management status" until the operator applied to BLM to restart the mine in 2007. The appellants argued that under 43 C.F.R. § 3809.423 the plan of operations ceased being effective when the mine shut down in 1992. However, the court disagreed.

In particular, the court found that the plan of operations and the mining regulations in general provide for interim plans during temporary closures.[44] Further, BLM has the obligation to review the closed operation after five years of inactivity to determine whether the plan should be terminated and BLM may initiate bond forfeiture after determining that an operator has abandoned the mine.[45] Consequently, the court concluded that the regulations providing for interim management and BLM's review and termination of a plan of operations for a closed mine "would be meaningless if a plan of operations automatically became ineffective upon temporary cessation of mining activities."[46] The court affirmed the district court and agreed that a plan of operations is effective before and after temporary closures while closure periods are operated under the interim management portion of the plan unless BLM decides to terminate.

3. Constitutionality of Withdrawing Public Lands from Mining

In *Yount v. Salazar*,[47] the court addressed the constitutionality of section 204 of the Federal Land Policy and Management Act (FLPMA),[48] under which the Secretary of

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[39]183 Interior Dec. 250 (IBLA Mar. 14, 2013) (*CGQ*); *see* Consol. Golden Quail Res., LTD, 179 Interior Dec. 309 (IBLA 2010) (providing a more detailed background of the case), *aff'd*, Consol. Golden Quail Res. v. United States, 2:11-cv-01853-PMP-RJJ, 2012 U.S. Dist. LEXIS 145099 (D. Nev. Oct. 9, 2012), *remanded*, 2012 U.S. Dist. LEXIS 187432 (D. Nev. Dec. 6, 2012).

[40]Congress realized its mistake and amended 30 U.S.C. § 28f to fix it, as it was Congress' intent to require claim maintenance fees. *See CGQ*, 183 Interior Dec. at 253-54.

[41]*Id.*

[42]*Id.* at 255.

[43]706 F.3d 1085 (9th Cir. 2013).

[44]*Id.* at 1092 (citing 43 C.F.R. § 3809.401(b)(5) (2013)).

[45]*Id.* (citing 43 C.F.R. § 3809.424(a)(3) & (4)).

[46]*Id.*

[47]933 F. Supp. 2d 1215 (D. Ariz. 2013).

[48]43 U.S.C. § 1714 (2011).

the Interior had withdrawn approximately 1,000,000 acres in Arizona from location under the mining laws. Section 204(c) requires that withdrawals of 5,000 acres or more must be submitted to Congress for approval.[49] The court held that this legislative veto was unconstitutional because after delegating power to an executive agency, Congress cannot alter that grant through mere resolutions but must follow the Constitution's requirements for legislative action: "passage by a majority of both Houses and presentment to the President."[50]

Because the United States did not dispute the unconstitutionality of the legislative veto of section 204(c), the court focused on the severability of the remainder of section 204(c) that contains the authority for withdrawals of 5,000 acres or more. After examining the historical and legislative history of FLPMA and the language of the law itself, the court relied on FLPMA's severability provision to hold that the legislative veto was severable because "FLPMA will remain fully operative absent the legislative veto."[51] As such, the Secretary's large-tract removal authority remains intact.

4. Knowingly Locating a Mining Claim Over a Prior Claim May Serve as Basis for Claim of Punitive Damages

In *Andersen v. Echols*, the district court addressed a "claim jumping" case in which the defendants located their claims over the plaintiffs' claim in Butte County, California.[52] In an action to quiet title brought by the original claimants, the defendants alleged various defects in the original claimants' title and yearly filings. The court rejected these arguments, noting that the defendants were apparently misreading and erroneously relying on BLM guidance. The court also found that the original claimants' claim was properly located and all of their county and BLM filings had been timely made. In holding that the original claimants possessed title by way of their mining claim, the court noted that the plaintiffs did not request punitive damages but that it was clear defendants' actions appeared to be driven by "evil motive and intent."[53] As "evil motive and intent" is one basis for an award of punitive damages in federal cases in the Ninth Circuit, the district court's holding suggests filing over another's claim may in some circumstances subject the junior locator to a claim for punitive damages.

5. Placer Claimant Entitled to Patent for Mineral Estate Only Where Land Was Subsequently Designated as Wilderness and Claimant Had Not Applied for Patent at Time of Designation

In *McMaster v. United States*, the court addressed whether BLM properly granted McMaster a patent to only the mineral estate while reserving the surface estate to the United States.[54] McMaster's predecessors last located a placer claim near Redding, California in 1953. In 1984, the area was withdrawn from mineral entry subject to valid existing rights with the California Wilderness Act. In 1992, McMaster applied for a patent on the Oro Grande claim, and in 1994, the Secretary of the Interior issued McMaster a First Half Mineral Entry Final Certificate. In 2000, BLM issued a claim validity report confirming the discovery of valuable minerals in 1953. A draft of the

[49] *Id.* § 1714(c)(1).
[50] *Yount*, 933 F. Supp. 2d at 1220 (citing INS v. Chadha, 462 U.S. 919, 958 (1983)).
[51] *Id.* at 1235.
[52] No. 2:11-cv-01795CMK, 2013 WL 3894157 (E.D. Cal. July 25, 2013).
[53] *Id.* at *6 (citing Dang v. Cross, 422 F.3d 800, 807 (9th Cir. 2005)).
[54] 731 F.3d 881 (9th Cir. 2013).

report recommended issuing a patent for both the mineral and surface estate to McMaster, but BLM revised the report based on a May 22, 1998 Solicitor's Opinion[55] to only recommend a patent of the mineral estate.[56]

McMaster argued that since his claim was located prior to the wilderness designation, the "valid existing rights" language of the Wilderness Act protected his right to the surface estate.[57] The court first looked to BLM's regulation, manual and policy to determine whether "valid existing rights" required BLM to convey the surface. The court held that BLM's regulation does not address claims made prior to a wilderness designation and that its manual and policy, which are not legally binding, demonstrated that conveyance of both the surface and mineral estate was proper, but discretionary.[58]

The court then examined the solicitor's opinion that interpreted "valid existing rights" as referring to a claimant that had established the right to a patent before the wilderness designation by filing an application and complying with the requirements for obtaining the patent.[59] Given the ambiguity between BLM's own guidance and the Solicitor's Opinion, the court held the meaning of "valid existing rights" was ambiguous.[60] Before moving to the second step under *Chevron* deference, the court determined that the Solicitor's Opinion was not an agency interpretation that has the force of law. Therefore, the Solicitor's Opinion was not entitled to deference.[61]

The court, however, held that BLM's position based on the Solicitor's Opinion was entitled to deference because its definition of "valid existing rights" was consistent with the text of 16 U.S.C. § 1133(d)(3) as well as "the purpose of the Wilderness Act."[62] Therefore, BLM properly granted only a patent to the mineral estate because McMaster had not filed his application for a patent prior to the wilderness designation.[63]

6. BLM Unreasonably Delayed Action on Application for Mill Site Patents

In *Sims v. Ellis*, the district court examined plaintiff's claim that the BLM unreasonably delayed processing his mill site patent application.[64] The plaintiff operated the Democrat Mine on patented lode mining claims located in the Salmon–Challis National Forest, and in 1992 applied for patents on seven mill site claims associated with the Democrat Mine. Although the Secretary of the Interior issued a First Half Mineral Entry Final Certificate in 1995, BLM filed a contest in 2000 disputing the validity of the plaintiff's mill site claims because they were not being used for purposes related to the operation of the Democrat Mine. The parties stayed the action in 2002 to negotiate a land exchange, and stipulated to its dismissal in 2006. BLM still never processed the patent

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[55]Memorandum from Solicitor, U.S. Dep't of Interior, to Dir., Bureau of Land Mgmt., M-36994 (May 22, 1998) [hereinafter Solicitor's Opinion].
[56]*McMaster*, 731 F.3d at 884.
[57]*Id.* at 888 (referring to 16 U.S.C. § 1133(d)(3) (2012)).
[58]*Id.* at 888-89 (quoting BLM Manual H–3860–1, Mineral Patent Application Processing, VIII–7 (Apr 17, 1991) and Bureau of Land Management, Wilderness Management Policy, 46 Fed. Reg. 47,180, 47,199 (1981)).
[59]*Id.* at 889 (quoting Solicitor's Opinion, *supra* note 55, at 3).
[60]*Id.* at 889 (utilizing the first step of *Chevron's* "two-step inquiry to determine whether an agency interpretation warrants deference").
[61]*Id.* at 891-92.
[62]*Id.* at 892-93 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).
[63] *Id.* at 896-97.
[64]No. 1:12-CV-00505-EJL, 2013 U.S. Dist. LEXIS 132941 (D. Idaho Sept. 16, 2013).

application so in 2012, plaintiff sued BLM for its unreasonable delay.[65]

In review of claims of agency delay, the court generally applies the six-factor test set forth in *Telecommunications Research & Action Center v. Federal Communications Commission*.[66] As to factors one and two, the court held that while the plaintiff contributed to the delay by negotiating the failed land swap, once it became clear a swap would not occur, BLM was obligated to approve the application or refile the contest action.[67] Reviewing factors three and five, the court noted that the plaintiff had incurred extensive costs in operating the mine using the mill sites and the delay in processing the plaintiff's application undermined the confidence in BLM's decision making.[68] Finally, with regard to factors four and six, the court found that processing this application would not interfere with other agency priorities and that although no bad faith was shown, bad faith is not necessary to find unreasonable delay.[69]

Given that BLM has failed to process the application after twenty years, the court determined that there would be no guaranty the application would be processed without its intervention. For that reason, the court ordered BLM to approve the application or initiate a contest within thirty days of its order.[70]

II. REGULATORY DEVELOPMENTS

A. Priority of Renewable Energy Rights of Way Over Mining Claims

On April 30, 2013, BLM issued a final rule allowing it to temporarily segregate from operation of the public land laws those public lands included in pending wind or solar energy right-of-way (ROW) applications.[71] This was done to avoid conflicts between proposed renewable energy developments and mining claims located after the development was identified.[72] In the last five years, BLM has processed twenty-one wind and solar ROWs and in two instances, mining claims were located on the ROW lands after those lands were publically disclosed.[73] Segregations made under the rule expire upon (1) a decision to grant or deny the ROW, (2) the expiration date set in the Federal Register notice announcing the segregation or (3) a notice terminating the segregation. The total length of the segregation may not exceed two years, but can be extended once for a period of two years. [74]

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[65]*Id.* at *2-6.
[66]*Id.* at *19 (citing Telecomm. Research & Action Ctr. v. F.C.C., 750 F.2d 70, 79–80 (D.C. Cir. 1984)).
[67]*Id.* at *20-25 (analyzing factors one and two: reasonableness of time taken and statutory timetable).
[68]*Id.* at *25-28 (analyzing factors three and five: nature of what is delayed and interests prejudiced).
[69]*Id.* at *28-31 (analyzing factors four and six: effect on other agency priorities and intentional delay or bad faith).
[70]*Id.* at *30-31 (declining to make a decision for BLM as outside the court's authority).
[71]Segregation of Lands – Renewable Energy, 78 Fed. Reg. 25,204, 25,209 (Apr. 30, 2013) (to be codified at 43 C.F.R. pts. 2090 and 2800).
[72]*Id.*
[73]*Id.* at 25,205.
[74]*Id.* at 25,209, 25,213.

B. Phosphate Mine Permitting in Florida

In April 2013, the COE Jacksonville District finalized its "Final Areawide Environmental Impact Statement on Phosphate Mining in the Central Florida Phosphate District" (FAEIS).[75] The FAEIS assessed the past, present and reasonably foreseeable future effects of phosphate mining in an approximately 1.32 million acre (2100 square mile) area in central Florida where Florida's principal phosphate deposits are found. The individual and cumulative effects on the human environment of four pending COE applications for new mines or extensions of existing mines were assessed. The FAEIS concluded that, with required mitigation, the individual and cumulative effects of the four projects would be minor or not significant for all resources evaluated, except effects on economic resources because the four projects would realize significant economic benefits.[76] None of the permits for the four mines have been issued as of this writing.

[75]Environmental Impacts Statements; Notice of Availability, 78 Fed. Reg. 26,027 (May 3, 2013) (Final EIS) and Environmental Impacts Statements; Notice of Availability, 78 Fed. Reg. 41,927-28 (July 12, 2013) (Revised Final EIS).

[76]U.S. ARMY CORP OF ENGINEERS, FINAL AREAWIDE ENVIRONMENTAL IMPACT STATEMENT (AEIS) ON PHOSPHATE MINING IN THE CENTRAL FLORIDA PHOSPHATE DISTRICT (CFPD): EXEC. SUMMARY (2013).