

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NEW MEXICO WILDERNESS ALLIANCE;
SOUTHWEST ENVIRONMENTAL CENTER;
and, REP AMERICA (REPUBLICANS FOR
ENVIRONMENTAL PROTECTION) – NEW
MEXICO CHAPTER,

Plaintiffs,

vs.

GALE NORTON, in her official capacity as
Secretary of the Interior; KATHLEEN CLARKE, in
her official capacity as the Director of the Bureau of
Land Management; LINDA RUNDELL, in her
official capacity as New Mexico State Director for
the Bureau of Management; and, the BUREAU OF
LAND MANAGEMENT,

Defendants.

Case No.

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

INTRODUCTION

1. In this action, Plaintiffs challenge the Bureau of Land Management’s (“BLM”) establishment and utilization of a federal advisory committee to provide recommendations pertaining to the implementation of a *draft* Resource Management Plan amendment (“RMP”) for fluid mineral leasing and development in Sierra and Otero Counties, New Mexico in violation of the Federal Advisory Committee Act (“FACA”), 5 U.S.C. App. 2.

2. BLM and Defendant Linda Rundell established an advisory committee (the “Committee”) during a November 2003 meeting of the BLM’s New Mexico Resource Advisory Council (“RAC”) as an *ad hoc* “working group.” BLM assigned the Committee the task of formulating recommendations to the BLM on future issuance of private oil and gas leases within the 105,000-acre Chihuahuan desert grassland on Otero Mesa. BLM, through RAC President Dr. Tony Popp, selected the members of the Committee. Also, BLM and Dr. Popp have scheduled a series of meetings of the Committee to begin on January 8, 2004. These meetings

are not publicly noticed and only persons “invited” by Dr. Popp and BLM can participate in the meetings.

3. Plaintiffs seek a declaration from this Court that Defendants are violating FACA by establishing and utilizing the Committee. In particular, the Committee falls within the definition of an “advisory committee” under FACA, but was not legally chartered as such by the BLM. Moreover, BLM has not ensured that that the Committee is “fairly balanced in terms of the points of view represented.” Finally, the scheduled meetings of the Committee were not properly noticed and are not open to public participation. 5 U.S.C. §§ 5(b)(2), (c), 9(c), 10(a), (b), and (c). Plaintiffs further seek an order enjoining defendants and the BLM from utilizing, consulting, meeting with, or obtaining information and advice from the Committee until BLM ensures that the Committee is in compliance with FACA.

JURISDICTION

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

5. Venue is properly before this District Court pursuant to 28 U.S.C. § 1391(e).

PARTIES

6. Plaintiff NEW MEXICO WILDERNESS ALLIANCE (“NMWA”) is a non-profit corporation dedicated to the protection, restoration and continued enjoyment of New Mexico's wild lands and Wilderness areas. NMWA members regularly attend and participate in meetings of BLM advisory committees, such as the RAC. NMWA members have actively participated in public meetings pertaining to the development of the draft RMP for fluid mineral leasing and development in Sierra and Otero Counties, New Mexico. NMWA previously submitted comments on the draft environmental impact statement for the RMP and advocates a final RMP that will provide for greater protection of the Otero Mesa grasslands. NMWA has over 2500 members, all but one of whom are individually being denied the opportunity to participate in meetings of the BLM advisory committee that is the subject of this complaint.

7. Plaintiff SOUTHWEST ENVIRONMENTAL CENTER (“SEC”) is a non-profit corporation dedicated to restoring and protecting the unique natural heritage of the southwest. SEC members have attended and participated in meetings of the RAC. SEC seeks to ensure that BLM fully considers the need to protect the Otero Mesa grasslands under the draft RMP for fluid mineral leasing and development in Sierra and Otero Counties, New Mexico. SEC and its members have previously submitted comments on the draft environmental impact statement for the RMP. SEC has over 500 members, all of whom are individually being denied the opportunity to participate in meetings of the BLM advisory committee that is the subject of this complaint.

8. Plaintiff REP AMERICA (REPUBLICANS FOR ENVIRONMENTAL PROTECTION) – NEW MEXICO CHAPTER (“REP-NM”), is a non-profit corporation dedicated to resurrecting and restoring the GOP’s conservation tradition as a fundamental element of the Republican Party. REP-NM seeks to ensure that the BLM fully considers, in a public forum, the conservation issues associated with the draft RMP amendment for fluid mineral leasing and development in Sierra and Otero Counties, New Mexico. Each of REP-NM’s members are individually being denied the opportunity to participate in meetings of the BLM advisory committee that is the subject of this complaint.

9. Defendant GALE NORTON is sued in her official capacity as the Secretary of the Interior. Norton is the federal official responsible for establishing advisory committees to the BLM.

10. Defendant KATHLEEN CLARKE is sued in her capacity as the Director of the Bureau of Land Management. Clarke is the federal official responsible for BLM’s compliance with federal laws, including FACA.

11. Defendant LINDA RUNDELL is sued in her official capacity as the New Mexico State Director of the United States Bureau of Land Management. In addition, Ms. Rundell is the local designated federal official responsible for administering FACA as it pertains to advisory committees to the New Mexico BLM office.

12. Defendant Bureau of Land Management is an agency of the United States within the Department of the Interior.

LEGAL AND FACTUAL BACKGROUND

A. FACA And The Department Of Interior's Implementing Regulations.

13. Congress passed FACA into law in 1972 in order to better regulate the establishment, operation, administration, and duration of advisory committees to federal agencies. See 5 U.S.C. App. 2, § 2.

14. FACA defines an “advisory committee” as “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof” which is . . . “established or utilized by one or more [federal] agencies.” 5 U.S.C. App. 2, § 3.

15. Under FACA, an advisory committee cannot meet or take any action until an advisory committee charter is prepared and filed with Congress which defines, inter alia, the committee’s objective, activities, and duties. 5 U.S.C. App. 2, § 9.

16. FACA requires that federal agencies ensure that “the membership of the advisory committee . . . be fairly balanced in terms of view presented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2, § 5(b)(2) and (c).

17. Subject to very limited exceptions, FACA requires that advisory committee meetings be timely noticed in the Federal Register, attended by a designated federal official, be open to the public, and allow interested persons to attend and file statements. 5 U.S.C. App. 2, § 10. In addition, minutes must be kept of each advisory committee meeting and all committee records must be available to inspection by the public. Id.

18. The Department of Interior (“DOI”) has adopted regulations further defining the obligation and duties of the BLM under FACA. 43 C.F.R. §§ 1784.0-1 et seq.

19. DOI regulations state that advisory committees to BLM required by statute are to be established by charter signed by the Secretary of the Interior (“Secretary”) and filed with Congress. 43 C.F.R. §§ 1784.1-1. Advisory committees to BLM not specifically required by statute are to be established only after a formal determination on the record by the Secretary that establishment of the committee is in the public interest. Id. Such determination must be published in the Federal Register. Id.

20. DOI regulations require that each advisory committee be structured to provide “fair membership balance, both geographic and interest-specific, in terms of the functions to be performed and points of view to be represented.” Further, each advisory committee “shall be formed with the objective of providing representative counsel and advice about public land and resource planning, retention, management, and disposal.” 43 C.F.R. §§ 1784.2-1(a).

21. Except in limited circumstances, candidates for appointment to an advisory committee must be “sought through public calls for public nominations.” 43 C.F.R. §§ 1784.4-1. Such calls “shall be published in the Federal Register and are made through media releases and systematic contacts with individuals and organizations interested in the use and management of public lands and resources.” Id.

22. Finally, DOI regulations require that all meetings of advisory committees or subcommittees be publicly noticed in the Federal Register at least 30 days in advance and that the meetings be open to public participation. 43 C.F.R. §§ 1784.4-2(a) & 1784.4-3. The regulations provide that “[a]nyone may appear before or file a statement with a committee or subcommittee regarding matters on a meeting agenda” and “the scheduling of meetings and the preparation of agendas shall be done in a manner that will encourage and facilitate public attendance and participation.” 43 C.F.R. § 1784.4-3.

B. The BLM’s Proposed Resource Management Plan Amendment And Otero Mesa.

23. The BLM, pursuant to the Federal Land Policy and Management Act (“FLPMA”), is currently engaged in a process to amend the Resource Management Plan (“RMP”) for certain federally-owned public lands in Sierra and Otero Counties in New Mexico.

Once amended, the RMP will govern future oil and gas leasing, exploration, and development in the area.

24. A draft environmental impact statement (EIS) for the RMP amendment was circulated for public comment in early November 2000. As of the date of this Complaint, the BLM has not finalized the EIS or the amended RMP. Under FLPMA, a final decision on the RMP amendment cannot be made until at least 60 days after the final EIS is issued. As such, the final content of the RMP is unknown, and any future oil and gas leasing at Otero Mesa is still just speculation.

25. One of the areas being considered under the RMP amendment for future oil and gas development is the 105,000-acre Chihuahuan desert grassland on Otero Mesa. There was public comment from a number of diverse interests regarding any future oil and gas development in these grasslands and other sensitive areas in and around Otero Mesa. Scientists, conservationists and New Mexico state officials are concerned that oil and gas development will destroy or degrade these grasslands and, in doing so, harm mule deer, pronghorn sheep, and Apolmado falcon populations that rely upon this habitat. Others are concerned that oil and gas activities will destroy the unique wilderness value of this largely remote and roadless area. Local ranchers have also raised concerns that oil and gas activities may adversely disrupt existing grazing areas.

26. Under both FLPMA and FACA, members of the public representing these and other interests at Otero Mesa have the legal right to participate in the formation of the proposed RMP amendment. See 43 U.S.C. §§ 1712 (f) and 1739; 43 C.F.R. §§ 1784.0-1 et seq.

C. The New Mexico Resource Advisory Council.

27. The proposed RMP amendment was prepared by BLM in consultation with the New Mexico Resource Advisory Council (“RAC”). The RAC is a federal advisory committee established under section 309(a) of FLPMA and chartered according to DOI regulations. See 43 U.S.C. § 1739; 43 C.F.R. §§ 1784.6 et seq. The most recent copy of the RAC’s charter (September 2003) is attached as Exhibit A.

28. As with all FACA committees, the RAC is comprised of a balanced membership (i.e., mineral interests, ranching/grazing interests, conservationists, and government) in respect to both “views presented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2, § 5(b)(2) and (c).

29. Under the RAC’s charter, limited “subgroups” may be formed by the RAC. See Exhibit A at 5. Chairpersons and members of subgroups must “be appointed by the Council members with the concurrence of the designated federal official.” Id. at 6. Meetings of all subgroups must be open to the public (id.) and, as with all BLM advisory committees and subcommittees, RAC subgroup meetings must be publicly noticed and scheduled in a manner to promote the fullest public participation. 43 C.F.R. § 1784.4-3.

D. Establishment Of The Advisory Committee By BLM.

30. One of the alternatives under consideration in the proposed RMP is to allow for future oil and gas development at Otero Mesa under a “unitization” requirement. Under this requirement, the Otero Mesa grasslands would be divided into a certain number of “units” for purposes of natural gas exploration and development. Oil and gas leases would be issued by BLM for only a limited number of units at any given time. The basic framework for this unitization requirement was discussed with the RAC and the public at the November 2003 RAC meeting.

31. BLM officials expressly stated at the November 2003 meeting that “BLM will establish a ‘working group’ of interested citizens to define what the boundaries [of these units] should be, how many [units], and other ‘sideboards.’” Later, at the same November 2003 meeting, at the request of Linda Rundell, BLM State Director and FACA DFO, the RAC agreed to “take on” the responsibility of facilitating these Committee meetings. Both the RAC and BLM initially acknowledged that these meetings would need to be publicly noticed.

32. On December 9, 2003, Jim Scarantino, Executive Director of the NMWA, received a letter from Dr. Tony Popp, President of the RAC, on official BLM RAC letterhead. This letter advised Mr. Scarantino that “the [RAC] has been asked to organize a working group to provide recommendations to the BLM on specific implementation of the unitization requirement.”

Further, Dr. Popp advised that the “working group will recommend the number of unit(s), identify the geographic boundaries of the unit(s), and develop a template for the unit agreement and unit operating agreement.” However, Dr. Popp also advised that the Committee “will not discuss” whether “public lands should be open to leasing or closed to leasing” or whether restrictions should be applied to oil and gas leases. A copy of this letter is attached hereto as Exhibit B.

33. Dr. Popp’s letter did not indicate that the Committee’s meetings were open to participation by Mr. Scarantino, other NMWA members, or the public in general. Instead, Dr. Popp “requested” that NMWA provide only Greta Balderamma (a NMWA organizer) as a member of the Committee. Dr. Popp noted that only Ms. Balderamma was invited, as he “limited his request for representatives to specific individuals and will not consider substitutes.” The letter also stated that NMWA should contact a BLM official, Ms. Amy Lueders, to confirm that Ms. Balderamma would attend.

34. In an enclosure to Dr. Popp’s letter, a series of five (5) meetings was scheduled for the Committee beginning January 8, 2004.

35. None of these meetings have been noticed in the Federal Register.

36. Plaintiffs SEC and REP-NM were not provided any notice of the Committee’s meetings by BLM or asked to participate as a Committee member.

37. On December 23, 2003 Plaintiff NMWA sent a letter to the BLM and Defendant Linda Rundell requesting the BLM not use the Committee to provide recommendations on implementation of the proposed RMP, the unitization requirement, or oil and gas activities at Otero Mesa, and advised BLM of its FACA violations. NMWA received a response from BLM to its letter on January 2, 2004 in which BLM denied any FACA violation. BLM stated that the meetings of the Committee would “go on as planned,” and did not open them to public participation.

FIRST CLAIM FOR RELIEF

(Administrative Procedure Act § 706 (2)(A) – Establishment Of An Advisory Committee In Violation Of FACA)

38. Each and every allegation set forth in Paragraphs 1 – 37 of the Complaint is incorporated herein by reference.

39. The Federal Advisory Committee Act (“FACA”), 5 U.S.C. App. 2, requires agencies to comply with FACA when establishing or utilizing a federal advisory committee.

40. As the Committee was directly established by the BLM at the November 2003 RAC meeting, and as the Committee is to be utilized by the BLM to provide recommendations “on specific implementation of the unitization requirement” under the draft RMP amendment for Sierra and Otero Counties, the Committee is within the definition of a federal advisory committee under FACA. See 5 U.S.C. App. 2, § 3; 43 C.F.R. § 1784.0-5(a).

41. BLM is and agency subject to FACA. See 5 U.S.C. App. 2, § 3.

42. A BLM advisory committee may not meet or take action until it is properly established in accordance with FACA and DOI regulations. 5 U.S.C. App. 2, § 9; 43 C.F.R. § 1784.1-1.

43. The Committee was not chartered by BLM as an advisory group under FACA and DOI regulations. Defendant Secretary of the Interior Norton has signed no charter establishing the Committee, no declaration regarding the need for this advisory committee has been issued or published in the federal register, and/or no charter establishing the Committee has been filed in Congress. See 5 U.S.C. App. 2, § 9; 43 C.F.R. § 1784.1-1.

44. Accordingly, establishment and utilization of the Committee by BLM is, and will continue to be, in violation of FACA. By allowing the Committee to meet as an advisory committee to formulate recommendations pertaining to oil and gas development under the draft RMP amendment, BLM and the Defendants have acted and are acting arbitrarily, capriciously, and not in accordance with FACA, 5 U.S.C. App. 2.

SECOND CLAIM FOR RELIEF

(Administrative Procedure Act § 706 (2)(A) – Violation Of The FACA “Balanced Membership” Requirement)

45. Each and every allegation set forth in paragraphs 1– 37 of the Complaint is incorporated herein by reference.

46. FACA requires that “the membership of the advisory committee . . . be fairly balanced in terms of view presented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2, § 5(b)(2) and (c). DOI regulations further require that each advisory committee “be formed with the objective of providing representative counsel and advice about public land and resource planning, retention, management, and disposal.” 43 C.F.R. §§ 1784.2-1(a).

47. To ensure a balanced advisory committee, DOI regulations require that members be selected through a public call for nominations. 43 C.F.R. § 1784.4-1. BLM did not follow such procedure in forming the Committee. Instead, BLM selected the Committee’s participants through Dr. Popp, using unknown criteria.

48. By establishing and utilizing an advisory committee without following DOI regulations to a balanced membership, BLM and the Defendants have acted and are acting arbitrarily, capriciously, and not in accordance with FACA, 5 U.S.C. App. 2.

THIRD CLAIM FOR RELIEF

(Administrative Procedure Act § 706 (2)(A) – Violation Of The FACA Notice and Public Participation Requirements)

49. Each and every allegation set forth in paragraphs 1– 37 of the Complaint is incorporated herein by reference.

50. BLM advisory committee meetings must be noticed in the Federal Register 30 days in advance, must be open to the public, and must allow for interested persons to attend and file statements. 5 U.S.C. App. 2, § 10; 43 C.F.R. § 1784.4-2 (a). In addition, minutes must be kept of each advisory committee meeting and all committee records must be available to inspection by the public. Id. These requirements extend to all BLM advisory committee subcommittees and sub-groups. See id. at § 2; 43 C.F.R. § 1784.4-2 (a); and Exhibit A at 6.

51. BLM and Defendants have scheduled a series of meetings of the Committee beginning January 8, 2004. These meetings were scheduled without publishing a public notice in the

Federal Register 30 days before to the meeting. As such, members of the public, including individual members of the NMWA, SEC and, REP-NM, were not advised of these meetings by BLM.

52. Participation in the Committee meetings is limited solely to individuals “invited” to participate. Members of the public, including individual members of the NMWA, SEC and REP-NM, are precluded from attending these meetings and filing written or oral statements.

53. By scheduling meetings of an advisory committee without providing public notice and ensuring the right of the public to participate, BLM and the Defendants have acted and are acting arbitrarily, capriciously, and not in accordance with FACA, 5 U.S.C. App. 2 and DOI regulations.

PRAYER FOR RELIEF

Wherefore, the Plaintiffs respectfully request that this Court:

1. Declare that the BLM and defendants have acted and are acting arbitrarily, capriciously, and not in accordance with FACA by establishing and utilizing the Committee to provide BLM recommendations on the future issuance of gas & oil leases at Otero Mesa without: (1) properly chartering the Committee under FACA; (2) ensuring that the Committee is “fairly balanced in terms of the points of view represented;” and, (3) properly noticing and ensuring open public participation before scheduling meetings of the Committee beginning in January 2004;

2. Enjoin the meeting of the Committee until BLM properly charters this advisory committee and ensures compliance with FACA’s balanced representation and open meeting requirements;

3. Enjoin BLM from working with the Committee until BLM properly charters this advisory committee, and ensures compliance with FACA’s balanced representation and open meeting requirements;

4. Enjoin BLM from utilizing, considering and/or accepting any recommendation from the Committee until BLM properly charters this advisory committee and ensures compliance with FACA’s balanced representation and open meeting requirements;

5. Award Plaintiffs' costs, including reasonable attorneys' fees and expert witness fees; and
6. Provide such other relief as this Court deems just and proper.

Respectfully submitted,

Dated: January 2, 3004

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