IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB,

Plaintiffs,

v.

RICHARD OPPER, in his official capacity as Director of the Montana Department of Environmental Quality,

Defendant,

and

SPRING CREEK COAL LLC, WESTERN ENERGY COMPANY, WESTMORELAND RESOURCES INC., GREAT NORTHERN PROPERTIES LIMITED PARTNERSHIP, NATURAL RESOURCE PARTNERS L.P., CROW TRIBE OF INDIANS, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400,

Defendant-Intervenors.

CV12-34-H-DLC

ORDER

Defendant Richard Opper moved to dismiss this action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (doc. 18). Defendant-Intervenors Crow Tribe of Indians, International Union of Operating Engineers Local 400, Western Energy Company, Westmoreland Resources, Inc., Spring Creek Coal Company, LLC, Natural Resource Partners L.P., and Great Northern Properties Limited Partnership moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) (doc. 42). Both motions will be granted and this case will be dismissed because sovereign immunity bars the suit, the *Ex Parte Young* exception does not apply, and the case is not ripe.

I. Factual and Procedural Background

Plaintiffs the Montana Environmental Information Center ("MEIC") and the Sierra Club seek to compel Defendant Opper and the Montana Department of Environmental Quality ("DEQ") to comply with the mandatory duties imposed by Montana's federally approved Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.* ("SMCRA"). Plaintiffs allege Opper is failing to ensure that Montana coal mines do not harm water quality or damage the hydrology of streams and groundwater in Montana. Plaintiffs claim Opper's regulation of coal mining on federal lands in Montana, including permitting for ten previous coal mines since 1995, has not complied with SMCRA or the Montana Strip and Underground

Mining Reclamation Act, Mont. Code Ann. § 82-4-222(1)(m) ("MSUMRA"). Specifically, Plaintiffs contend Opper and the DEQ consistently fail to prepare Cumulative Hydrologic Impact Assessments ("CHIA") in accordance with SMCRA and MSUMRA.

Plaintiffs allege Defendant's failures have adversely affected the lands and waters surrounding the Rosebud Mine and in turn negatively impacted their members who live and recreate in that area. The Rosebud Mine is situated on a mix of federal and other lands and there currently is a pending permit revision application for the mine. Plaintiffs' complaint also challenges approval of the permit applications for the following entities: Western Energy Company, Spring Creek Coal Company, Westmoreland Resources, Inc., Bull Mountain Coal Mining, and Big Sky Coal Company. Plaintiffs allege Defendant failed by:

1. not formulating or applying meaningful, objective material damage criteria for defining "material damage to the hydrologic balance" outside the proposed permit area;
2. not expressly analyzing whether the operations proposed in the application would contribute to excursions from each applicable Montana water quality standard; and

3. approving applications without reasonably determining whether the operations proposed in the application were designed to prevent material damage to the hydrologic balance outside the permit area.

Plaintiffs seek declaratory judgment requiring Opper to rectify these failures, comply with what they allege are his nondiscretionary duties, and withhold approval of each pending and future permit until he has complied. In their response to Defendants' motions to dismiss, however, Plaintiffs clarified that they are not seeking to set aside any of the permits Opper has issued to date and are not seeking judicial review of those permits. (Doc. 46 at 58.)

Defendant moved to dismiss based on the State's sovereign immunity under the Eleventh Amendment and Montana's exclusive jurisdiction as a primacy state. Defendant also contends the case is not ripe because the DEQ has not prepared a CHIA for the area of the Rosebud Mine at issue. Defendant-Intervenors joined in Defendant's arguments, and moved for judgment on the pleadings for failure to exhaust available state remedies. Both motions will be granted for the reasons stated herein.

II. Standards of Review

To survive a motion to dismiss for failure to state a claim, a complaint must allege sufficient facts "to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Threadbare recitals of the

elements of a claim and conclusory allegations are disregarded in determining whether a claim is stated. *Alvarez v. Chevron Corp.*, 656 F.3d 925, 930-931 (9th Cir. 2011). Courts generally limit their considerations to the allegations in the complaint. *Id.* at 555-559. Those allegations are accepted as true and viewed in a light most favorable to the plaintiff. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) will be granted if the Plaintiff cannot establish subject matter jurisdiction over the action. A motion for judgment on the pleadings pursuant to Rule 12(c) "is properly granted when [, accepting all factual allegations in the complaint as true,] there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir.2009). The Rule 12(c) analysis is substantially identical to analysis of a motion to dismiss under Rule 12(b)(6).

III. Discussion

A. SMCRA

SMCRA was enacted in 1977 in an effort to strike an appropriate balance between protecting the environment from the harmful effects of coal mining and sustaining the nation's coal supply. 30 U.S.C. § 1202(a), (d), (f). SMCRA establishes a "'cooperative federalism' in which responsibility for the regulation of

surface coal mining in the United States is shared between the U.S. Secretary of the Interior and State regulatory authorities." *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001). SMCRA sets forth minimum national standards and the U.S. Secretary of the Interior determines whether state programs meet those standards.

Under 30 U.S.C. § 1253(a), a state may "assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations." *Id.* at 288-89. This exclusive state regulatory authority is commonly referred to as "primacy." To achieve primacy, a state must formulate a program that complies with the minimum national standards and demonstrate that it has the capability to enforce its laws. *Id.* at 288. Where a state has achieved primacy, "the State's laws and regulations implementing the program become operative for the regulation of surface coal mining, and the State officials administer the program, giving the state exclusive jurisdiction over the regulation of coal mining within its borders." *Id.* (internal citations omitted). However, there are procedures by which the federal government can revoke the state's jurisdiction if the program fails to adhere to minimum federal standards. *Id.* at 295 (citing 30 U.S.C. §§ 1253, 1254, 1267, 1271).

Although the Ninth Circuit Court of Appeals has not yet determined whether SMCRA's exclusivity clause prohibits suits such as Plaintiffs' here, other circuit courts have determined it does. In *Bragg*, the Fourth Circuit held that

> because the regulation is mutually exclusive, either federal law or State law regulates coal mining activity in a State, but not both simultaneously. Thus, after a State enacts statutes and regulations that are approved by the Secretary, these statutes and regulations become operative, and the federal law and regulations, while continuing to provide the "blueprint" against which to evaluate the State's program, "drop out" as operative provisions. They are reengaged only following the instigation of a § 1271 enforcement proceeding by the Secretary of the Interior.

Id. at 289; see also *Pennsylvania Federation of Sportsmen's Clubs, Inc., v. Hess*, 297 F.3d 310 (3rd Cir. 2002).

B. MSUMRA

Montana was granted primacy in 1982 after development and federal approval of a comprehensive regulatory program. 30 C.F.R. §§ 926.10-926.30. OSM and Montana entered into a Cooperative Agreement wherein the State regulates coal exploration operations and surface coal mining on federal lands within Montana. § 926.30. MSUMRA closely parallels the provisions of the federal statute. The following assessment serves as the CHIA for the Montana DEQ:

> (a) the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance has been made by the department and the proposed operation of the mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area; and

> (b) the proposed strip- or underground-coal-mining operation would not:
> . . .
> (ii) materially damage the quantity or quality of water in surface water or underground water systems that supply the valley floors described in subsection (3)(b)(i).

Mont. Code Ann. § 82-4-227(3). MSUMRA also provides a definition of "material damage" of the hydrologic balance where SMCRA does not:

> "Material damage" means, with respect to protection of the hydrologic balance, degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside of the permit area in a manner or to an extent that land uses or beneficial uses of water are adversely affected, water quality standards are violated, or water rights are impacted. Violation of a water quality standard, whether or not an existing water use is affected, is material damage.

Mont. Code Ann. § 82-4-203(31). MSUMRA provides a state remedy permitting comments on the procedures and findings during the CHIA process. Administrative and judicial review are also available for coal mining permits. Mont. Code Ann. §§ 82-4-205(2)-206. Finally, MSUMRA contains a citizen's suit provision similar to SMCRA's at 30 U.S.C. § 1270(a)(2). Mont. Code Ann. § 82-4-252.

The parties contest the role of the federal courts in a primacy state such as Montana. Plaintiffs assert that this court has jurisdiction under the "citizen suit" provision of 30 U.S.C. § 1270(a), which provides that any person who may be adversely affected may commence a civil action against any person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to

SMCRA and grants district courts jurisdiction without regard to the amount in controversy or the citizenship of the parties. Defendants argue that the *Bragg* court's rationale of exclusive regulatory jurisdiction prevails and the citizen suit provision contained within SMCRA does not apply here. Defendant Opper contends he is immune from suit under the Eleventh Amendment because he is sued in his official capacity.

SMCRA's citizen suits are permitted when citizens allege a regulator has failed to perform a nondiscretionary duty to the extent permitted by the Eleventh Amendment to the Constitution. 30 U.S.C. § 1270(a). The Eleventh Amendment guarantees state sovereign immunity and prohibits suits against states by private individuals in federal courts absent consent. *Board of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 363 (2001) (citations omitted). When a suit is brought only against State officials, it is barred if "the State is the real, substantial party in interest." *Bragg*, 248 F.3d at 291 (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984)).

Under the *Ex parte Young* exception to the sovereign immunity doctrine, federal courts may grant prospective declaratory or injunctive relief from ongoing violations of federal law by state officers. *Ex parte Young*, 209 U.S. 123 (1908). "The exception is premised upon the notion, sometimes called a fiction, that when a state officer violates federal law, he is stripped of his official character, thus

losing the cloak of state immunity." *Bragg*, 248 F.3d at 292 (internal citations omitted). The application of the exception is limited to circumstances in which injunctive relief is necessary under the supremacy clause. *Id.* Courts must weigh the adverse effect to the state's sovereign interest as well as the extent federal law, as opposed to state law, must be enforced to protect the federal interest. *Id.* at 293.

"[I]n contrast to other 'cooperative federalism' statutes, SMCRA exhibits extraordinary deference to the states." *Id.* SMCRA's regulation scheme is mutually exclusive–either the U.S. Secretary of the Interior or the State regulatory agency regulates surface coal mining, but not both. That is, when a state has primacy, state law governs matters involving the enforcement of minimum national standards. *Id.* at 295. However, SMCRA maintains an ongoing federal interest regarding the good standing of a state program. *Id.* Applying the *Ex Parte Young* exception to SMCRA "would circumvent the carefully designed balance that Congress established between the federal government and the States because the effect of a citizen suit to enjoin officials in a primacy State to comport with the federal provisions establishing the core standards for surface coal mining would end the exclusive State regulation and undermine the federalism established by the Act." *Id.* Enjoining state officials to comply with minimum standards would command compliance with state law because the state law is exclusively operative

and regulates the permitting process. Such an injunction–commanding a state official to comply with state law–is prohibited by *Pennhurst*.

Sovereign immunity bars Plaintiffs' citizen suit against Opper in federal court. The statute's exclusive jurisdiction language clearly demonstrates Congress' intent to make state and federal regulation of surface coal mining mutually exclusive. Montana is a primacy state and the federal government has not asserted its authority to disturb Montana's exclusive jurisdiction granted by SMCRA. A suit against Opper would, in essence, be a suit against the State of Montana. The *Ex Parte Young* exception does not apply because Plaintiffs' suit seeks to compel Opper to comply with state law. Plaintiffs do not claim that Defendant has failed outright to prepare CHIAs; rather, they contest the manner in which CHIAs are prepared. Plaintiffs' complaint invites the Court to meddle in Montana's coal mining permitting process. This request puts the State's policies and procedures at issue and thus falls outside the *Ex Parte Young* exception.

Further, Plaintiffs have appropriate state remedies. State administrative and judicial review are available for coal mine permits. Mont. Code Ann. §§ 82-4-205(2)-206. MSUMRA also contains a citizen's suit provision similar to SMCRA's at Mont. Code Ann. § 82-4-252. "[T]he federal interest in maintaining the State's compliance with its own program may be fulfilled via a suit in that forum, in a manner that does not offend the dignity of the State." *Bragg*, 248 F.3d

at 297. Defendant and Defendant-Intervenors' motions must be granted because Plaintiffs' citizen suit is prohibited by the Eleventh Amendment and Defendant's challenged duties are discretionary.

C. Defendant's Duties are Discretionary

To maintain a citizen suit against Opper, Plaintiffs must also establish that Opper is violating nondiscretionary duties. 30 U.S.C. § 1270(a)(2). A statute's text is examined to determine whether it imposes a nondiscretionary duty. "[T]he fusion of technical knowledge and skills with judgment [ ] is the hallmark of duties which are discretionary." *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978). A duty is nondiscretionary when its methodology is precise, exact, and beyond dispute. *Id.* SMCRA's citizen suit provision permits federal court lawsuits only for failure to perform clear-cut or ministerial functions. *Sierra Club v. Kempthorne*, 589 F. Supp. 2d 720, 732 (W.D. Va. 2008).

The material damage determination is a discretionary duty because it requires technical knowledge and judgment by Defendant Opper and the DEQ. Determining the criteria needed, or if criteria are needed, for the coal mining permit application process requires technical, site-specific judgments that cannot reasonably be described as nondiscretionary. Montana's groundwater pollutant standards are narrative as opposed to numeric, so the material damage determination involves case-by-case factual findings and analysis of the proposed

mining operations. This administrative process is discretionary, so Plaintiffs' citizen suit cannot proceed.

D. Ripeness

Defendant's ripeness arguments need not be reached because Plaintiffs' claims are barred by the Eleventh Amendment and SMCRA's citizen suit nondiscretionary requirement. However, even if Plaintiffs could state a claim for relief, their action would not yet be ripe. Plaintiffs concede they are not challenging past permits and cannot legally do so. Defendant has not yet issued a CHIA in connection with the Rosebud Area B extension application and thus there is no violation for Plaintiffs to challenge. Further, as Defendant-Intervenors argue at length, Plaintiffs have not exhausted their administrative remedies regarding the Rosebud Mine or any of the other permits discussed in their complaint. Even if Plaintiffs' citizen suit could proceed on the merits, it would not be ripe, again calling in question Plaintiffs' standing.

IV. Conclusion

Plaintiffs' citizen suit fails because it is barred by the Eleventh Amendment, Defendant's challenged duties are discretionary, and the *Ex Parte Young* exception does not apply. Defendant and Defendant-Intervenors motions must be granted. This action will be dismissed without prejudice to Plaintiffs' right to seek any

available relief in State court. *Miles v. California*, 320 F.3d 986, 989 (9th Cir.2003). Therefore,

IT IS ORDERED that Defendant's motion to dismiss (doc. 18) and Defendant-Intervenors' motion for judgment on the pleadings (doc. 42) are GRANTED. Plaintiffs' claims are dismissed without prejudice to Plaintiffs' right to seek any available relief in State court. The Clerk is ordered to close this case pursuant to Federal Rule of Civil Procedure 58.

DATED this 22nd day of January, 2013.

Dana L. Christensen, District Judge
United States District Court