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Subject: Energy Policy Action of 2005, Adjusted Use of Section 390 Categorical Exclusions for Oil and Gas due to Western Energy Alliance v. Salazar

To: Regional Foresters

On August 12, 2011, the Federal District Court for the District of Wyoming issued a memorandum opinion and order in *Western Energy Alliance v. Salazar*, 10-CV-237F (D. Wyo.) concerning guidance issued by this office on June 9, 2010, (enclosed) and a BLM Instruction No. 2010-118 concerning use of Section 390 Categorical Exclusions for Oil and Gas. The court determined that the guidance constituted legislative rules that required notice and comment.

The court gave the following specific instruction:

... **the Court VACATES and ENJOINS** the May 17, 2010, BLM Instruction Memorandum No 2010-118 and **the June 9, 2010, Forest Service letter to the extent that they address and limit the use of Section 390 CXs by: (1) establishing a screening process to consider extraordinary circumstances when using any Section 390 CE; (2) interjecting a new condition within Section 390 CX2 to limit its use only if the specific location and/or well pad site for the proposed drilling was adequately analyzed in an existing activity-level or project specific NEPA document; and (3) eliminating BLM's ability to use Section 390 CX3 for actions based solely on a NEPA document associated with a land use plan.** The court takes this action nationwide, on the basis that the 2010 Instructions, as specifically noted above, constitute legislative rules adopted contrary to public notice and comment procedures required by law. The Court declines to address the substantive claims advanced by WEA (Emphasis added).

Effective immediately, the agency is prohibited from considering extraordinary circumstances in accordance with FSH 1901.15, Chapter 30 when evaluating use of any Section 390 CE. The remaining portions of the June 9, 2010, guidance remain in effect. Please note that while Items 2 and 3 of the Court's Order are directed to BLM-specific instructions and do not appear in the Forest Service's guidance, Forest Service employees should not seek to impose such restrictions.

We will continue to coordinate with the Department of the Interior, Department of Justice and the Office of the General Counsel concerning these matters and will keep you apprised of further developments.



If you have any questions, please contact Assistant Director for Minerals Barry Burkhardt at (303) 275-5147.

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