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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CITIZENS FOR CLEAN ENERGY, et al.,

Plaintiffs,

and

THE NORTHERN CHEYENNE TRIBE,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,

Case No. 4:17-cv-30-BMM

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON SUPPLEMENTAL COMPLAINT

Defendants, and STATE OF WYOMING, et al., Defendant-Intervenors.	
STATE OF CALIFORNIA, et al., Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants, and STATE OF WYOMING, et al., Defendant-Intervenors.	Case No. 4:17-cv-42-BMM (consolidated case)

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INTRODUCTION

Federal Defendants' March 29, 2017 decision to rescind a moratorium on federal coal leasing opened to development 255 billion tons of recoverable coal on the 570 million acres that comprise the federal mineral estate. That decision—embodied in Secretarial Order 3348 (the "Zinke Order")—unleashed significant threats to public health, water and air quality, climate, and our public lands that would have been precluded by the moratorium. Nearly three years after issuing the Zinke Order, under direction from this Court, Federal Defendants begrudgingly completed an environmental assessment ("EA") to evaluate the environmental consequences of the Zinke Order. But Federal Defendants' belated attempt to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, was little better than their initial omission of NEPA review. Rather than evaluating the ongoing and future environmental impacts of their decision to begin new coal leasing, Federal Defendants conducted a narrow evaluation of just four coal leases they already issued. Based on that EA, Federal Defendants irrationally concluded that the decision to end the coal-leasing moratorium caused no significant environmental impacts.

This approach violated NEPA. NEPA requires "coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information, only to

regret its decision after it is too late to correct." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998) (quotation and citation omitted). Federal Defendants' backward-looking EA ignored the direct, indirect, and cumulative impacts of the coal leasing enabled by the Zinke Order and thus fell short of NEPA's standards. Federal Defendants' failure to comply with NEPA also violated their trust obligation to the Northern Cheyenne Tribe, whose repeated requests for consultation on federal coal leasing have gone unanswered.

Although the Biden administration has identified the critical need to reduce U.S. greenhouse gas emissions that cause climate change, Federal Defendants have not yet signaled any change from the prior administration's coal-leasing policy that is a major source of such emissions. And while Interior Secretary Deborah Haaland recently issued an order purporting to revoke the Zinke Order, the Interior Department clarified that it was not reinstating the moratorium or discontinuing coal leasing.[1] Thus, to prevent significant, unstudied impacts from federal coal leasing that would be prohibited under the moratorium, Plaintiffs request that this Court vacate the EA and the Zinke Order based on Federal Defendants' ongoing

[1] Secretarial Order 3398 (April 16, 2021), at https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3398-508_0.pdf. See Argument, Section III.

failure to comply with NEPA's requirement to evaluate the Order's environmental consequences.

LEGAL AND FACTUAL BACKGROUND

I. NEPA

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA has two fundamental purposes: first, to ensure that agencies take a "hard look" at the consequences of their actions; and second, to ensure meaningful public involvement "in both the decisionmaking process and the implementation of that decision." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-50 (1989) (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

Pursuant to NEPA, federal agencies must prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment" that thoroughly analyzes "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) alternatives to the proposed action." 42 U.S.C. § 4332(2)(C). An agency may first prepare an EA to evaluate the significance of potential effects and corresponding need for an EIS. 40 C.F.R. § 1508.9(a)(1), (b). "In determining whether a proposed action will significantly impact the human environment, the agency must consider '[w]hether

the action is related to other actions with individually insignificant but cumulatively significant impacts.'" Or. Nat. Res. Council v. U.S. Bureau of Land Mgmt., 470 F.3d 818, 822 (9th Cir. 2006). If the agency's analysis raises "substantial questions" as to whether a project may cause significant environmental effects, an EA is insufficient and an EIS is required. Blue Mountains Biodiversity Project, 161 F.3d at 1216 (quoting Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir.1998)).

II. THE CHALLENGED ACTION

On March 28, 2017—two months into the Trump Administration—then-Interior Secretary Ryan Zinke issued Secretarial Order 3348, terminating a moratorium that would otherwise prevent the Bureau of Land Management ("BLM") from issuing most new federal coal leases. Supp_AR-4416-17. The history of the moratorium, adopted under Secretarial Order 3338 (the "Jewell Order"), and the Zinke Order that eliminated the moratorium, is discussed in this Court's April 19, 2019 Order granting Plaintiffs' summary judgment motion on their original complaint in this case, and is not repeated here. See Citizens for Clean Energy v. U.S. Dep't of the Interior, 384 F. Supp. 3d 1264 (2019) [Doc. No. 141]. The following background picks up where the Court's Order left off.

On April 19, 2019, this Court held that Federal Defendants violated NEPA by failing to evaluate the environmental consequences of the Zinke Order.

Specifically, the decision to revoke the federal coal-leasing moratorium, embodied in the Zinke Order, immediately ended protections from most new coal leasing for all federal public land and constituted a "major federal action" triggering NEPA; the Zinke Order had immediate legal consequences, rendering it a final agency action; and thus, "Federal Defendants' decision not to initiate the NEPA process proves arbitrary and capricious." Citizens for Clean Energy, 384 F. Supp. 3d at 1281. The Court further found that Plaintiffs raised "a substantial question as to whether the project may cause significant environmental impacts." Id. at 1279 (citation omitted). Although the Court did not direct BLM to perform any specific type of NEPA analysis, the Court recognized that "[i]f Federal Defendants determine that an EIS would not be necessary … Federal Defendants must supply a 'convincing statement of reasons' to explain why the Zinke Order's impacts would be insignificant." Id. at 1282 (citation and quotation omitted).

In its Order, the Court explained that the effect of the Zinke Order, which was to "lift the environmental protections" under the 2016 Jewell Order that had directed both a moratorium on most new federal coal leasing and the preparation of a Programmatic Environmental Impact Statement ("PEIS") to study reforms to the coal-leasing program. Id. at 1280. "With the Zinke Order's implementation, all BLM land became subject to lease applications with terms of twenty years. The Zinke Order directed new lease applications to be 'expedit[ed.]' The PEIS process

immediately stopped without full review of the concerns raised in the Jewell Order." Id. (alteration in original).

The Court declined to rule on Plaintiffs' further claim that Federal Defendants' failure to comply with NEPA also violated their trust obligation to the Northern Cheyenne Tribe, stating "[t]he Court remains unable to evaluate this claim until Federal Defendants have completed their NEPA analysis." Id. at 1282.

On May 22, 2019, Federal Defendants released a 35-page Draft EA and announced a 15-day public comment period. See Federal Defendants' Notice of Partial Compliance with April 19, 2019 Order and of the Availability of an Environmental Assessment (May 22, 2019) [Doc. 143]. BLM later extended the comment period by 4 days to address a technical glitch with its online commenting system but did not grant the numerous public requests for a lengthier extension to afford a more meaningful opportunity for public involvement. Supp_AR-45. During the agency's short comment period, BLM received more than 47,900 public comments expressing concern about coal leasing's impacts on public lands, air, water, climate, and cultural resources. Id.; see also Supp_AR-48-66 (EA responses to comments). Additionally, on May 23, 2019, the Northern Cheyenne Tribe renewed its request for government-to-government consultation regarding the coal-leasing moratorium. Supp_AR-52567-69.

On February 25, 2020, Federal Defendants released a Final EA. BLM described the purpose of the EA as an effort to "respond to the U.S. District Court of Montana's order issued on April 19, 2019." Supp_AR-11. Before issuing the EA, Federal Defendants failed to respond in any fashion to the Northern Cheyenne Tribe's renewed consultation request, let alone undertake consultation. Supp_AR-39 (EA's claim that Tribal consultation was unnecessary).

In the EA, Federal Defendants expressly disavowed any analysis of the consequences of opening all federal public land to coal leasing. Supp_AR-14. Specifically, the EA stated that "[t]he BLM considered, but did not analyze in detail, the effects resumption of normal leasing procedures would have on leasing and evaluation of its potential effects because this issue does not relate to the purpose and need or inform a question of significance." Id. Instead, the EA considered the environmental impacts of just four coal leases issued between March 2017 (when the Zinke Order terminated the moratorium) and March 2019 (when BLM presumed the moratorium would have ended in the absence of the Zinke Order). Supp_AR-18. For those four leases, the EA evaluated the environmental effects of issuing the leases "between 1 and 11 months earlier than they could have been in the absence of the Zinke Order." Supp_AR-14.

BLM expressly declined to analyze several pertinent issues, including how the agency's proposed action of lifting the moratorium would affect "BLM's

leasing management framework for issuing Federal coal leases and the potential associated impacts;" "the issuance of Federal coal leases and the evaluation of potential impacts from such leasing"; and "management of greater sage-grouse and its habitat." Supp_AR-13-15. Ultimately, the EA concluded that BLM's proposed action would not "change the cumulative levels of [greenhouse gas] emissions resulting from coal leasing," Supp_AR-26; would not cause appreciable socioeconomic impacts, Supp_AR-32; and would not "result in direct or indirect effects, or cumulative effects to water resources … beyond those studied in the NEPA analysis for the four leases issued between March 2017 and March 2019," Supp_AR-39.

Other than the proposed action (i.e., the Zinke Order) and a no action alternative, the EA did not consider any alternative courses of action. Supp_AR-19; see Supp_AR-47 (EA stating that "available information on policy alternatives remains insufficient to inform a NEPA analysis of proposed and alternative actions").

Based on the EA, on February 26, 2020, BLM issued a "Finding of No Significant Impact" ("FONSI"), concluding BLM's environmental review process. Supp_AR-67-77. Plaintiffs filed a supplemental complaint challenging BLM's action on July 20, 2020.

STANDARD OF REVIEW

This challenge is reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706; W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 481 (9th Cir. 2011). The APA directs a reviewing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An action is arbitrary and capricious where the agency: has relied on factors which Congress has not intended it to consider; entirely failed to consider an important aspect of the problem; 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 the product of agency expertise. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Under these standards, "[c]ourts must carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Friends of Yosemite Valley v. Norton, 348 F.3d 789, 793 (9th Cir. 2003) (quotation and alterations omitted).

ARGUMENT

Federal Defendants' second attempt to justify the Zinke Order still is unlawful. The EA's arbitrarily limited scope and analysis violates Federal

Defendants' NEPA obligation to adequately consider the impacts of opening coal leasing on all federal public lands that were previously protected by the coal-leasing moratorium. Specifically, as described below, Federal Defendants: 1) arbitrarily truncated their analysis by adopting a no-action alternative that irrationally assumed the moratorium would have expired or been terminated after only three years, despite no expiration date in the moratorium itself; 2) failed to take a "hard look" at the Zinke Order's full scope of direct, indirect, and cumulative impacts and correspondingly failed to rationally justify not preparing an EIS; and 3) omitted consideration of any alternatives that would reduce the significant impact of restarting federal coal leasing under terms Federal Defendants' previously deemed in need of reform. Further, by rescinding the coal-leasing moratorium in violation of NEPA, Federal Defendants also violated their trust responsibility to the Northern Cheyenne Tribe. Accordingly, Federal Defendants' EA and associated decision to rescind the moratorium should be set aside.[2]

[2] Plaintiffs' standing is demonstrated by the declarations filed on July 27, 2018, Docs. 117-1 through 117-6.

I. THE EA VIOLATED NEPA

A. The EA Violated NEPA by Adopting an Artificial and Unreasonable Baseline

Federal Defendants' EA was invalid from the start because they identified an improper "baseline" that unlawfully constrained the scope of analysis. Under NEPA, baseline conditions are described in the "no action" alternative, which reflects the "status quo" against which the impacts of the proposed action and its alternatives are to be measured. Ctr. for Biological Diversity v. U.S. Dep't of Interior, 623 F.3d 633, 642 (9th Cir. 2010). "The 'no action' alternative may be thought of in terms of continuing with the present course of action until that action is changed." Council of Envtl. Quality, Forty Most-Asked Questions, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981). "Establishing appropriate baseline conditions is critical to any NEPA analysis. 'Without establishing the baseline conditions which exist ... before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply with NEPA.'" Great Basin Res. Watch v. Bureau of Land Mgmt., 844 F.3d 1095, 1101 (9th Cir. 2016) (quoting Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988)); see also 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1508.9(b); 40 C.F.R. § 1502.14(d).

In violation of NEPA, the EA adopted a no-action alternative that failed to reflect the status quo that existed before Federal Defendants terminated the

moratorium on March 29, 2017. Before that date, the Jewell Order governed Federal Defendants' coal leasing on federal land and prohibited most new federal coal leasing, with no expiration date. Supp_AR-5419-28 (Jewell Order). As of the date of the Zinke Order, BLM had pending lease applications encompassing at least 1.8 billion tons of federal coal that would be mined from 28 mines across nine states. Supp_AR-4439. Under the Jewell Order, BLM conceded that "no leasing decisions can be made until the moratorium is lifted." Id. In other words, "continuing with the present course of action" under the Jewell Order meant that those 1.8 billion tons of coal subject to pending lease applications—in addition to coal that could be subject to future leasing—would remain in the ground. 46 Fed. Reg. at 18,027.

"The Zinke Order changed the status quo." Citizens for Clean Energy, 384 F. Supp. 3d at 1278. In contrast with the protections afforded by the Jewell Order, "[w]ith the Zinke Order's implementation, all BLM land became subject to lease applications with terms of twenty years." Id. at 1280.

In these circumstances, "the baseline conditions which exist[ed]" before the Zinke Order were the protections against new leasing afforded by the Jewell Order. Great Basin Res. Watch, 844 F.3d at 1101. To accurately evaluate the Zinke Order's impacts, the EA was required to include a no-action alternative that reflected these baseline conditions of no leasing. Ctr. for Biological Diversity, 623

F.3d at 642. Instead, the EA's no-action alternative erroneously assumed that the moratorium would have ended three years after it was adopted, regardless of the Zinke Order. Supp_AR-16.[3]

As justification for this position, the EA pointed only to Federal Defendants' aspirational timeframe for completing the PEIS by March 2019, three years after the NEPA process commenced. Id.; see also Supp_AR-14 (describing effect of Zinke Order as "[t]erminating the pause 24 months earlier than initially planned"). This is wrong, first, because the moratorium did not have an expiration date: instead, it was to "remain in effect until its provisions are amended, superseded, or revoked." Supp_AR-5428; see also AR-1654 (describing estimated timeline for the agency to prepare a PEIS, but no date for eliminating the moratorium).

Second, even if Federal Defendants could justify a no-action alternative in which the moratorium is short-lived, their own findings contradict their assumed, three-year timeframe. Federal Defendants themselves emphasized that "it is highly unlikely that the PEIS could have been completed in the allotted timeframe because the process [wa]s already roughly one year behind schedule" as of March 2017 and further delay was likely because the PEIS process lacked funding.

[3] The last time Federal Defendants imposed a coal-leasing moratorium pending NEPA review of the program, "[t]he required 'No Action' alternative consisted of maintaining the suspension of coal leasing indefinitely." Nat'l Wildlife Fed'n v. Babbitt, No. CIV. A. 88-0301, 1993 WL 304008, at *3 (D.D.C. July 30, 1993).

Supp_AR-4436-37. Due to this delay, Federal Defendants reasoned that "a greater number of leases are likely to be affected" by the moratorium than if BLM adhered to its aspirational three-year timeline for completing a PEIS. Supp_AR-4439. Indeed, Federal Defendants pointed to these circumstances and the resulting burden to coal development as a reason justifying their decision in the Zinke Order to end the moratorium. Supp_AR-4437-39. Thus, even Federal Defendants did not believe the impacts of the moratorium on coal development would be limited to three years. Whether the appropriate timeframe was four years, ten years as in prior reviews,[4] or some other duration, Federal Defendants' three-year assumption was unreasonable.

BLM's baseline scenario was additionally flawed because it unreasonably assumed that following a comprehensive PEIS evaluating identified problems with the federal coal program, BLM would have immediately rejected all the studied reforms, ended the moratorium, and restarted leasing under the same terms that BLM previously determined "requir[ed] modernization." AR-1604; see Supp_AR-16 (asserting in the EA that "[i]t is a reasonable assumption that the temporary

[4] A moratorium imposed in connection with the last comprehensive analysis of the federal coal program (completed in 1979) lasted approximately a decade and was lifted only "after a PEIS had been completed, a new leasing system had been adopted through regulation, and litigation was resolved." Supp_AR-5423-24 (Jewell Order's description of previous coal program reviews).

pause would have been lifted upon the issuance of the PEIS ROD, and leasing activities for non-exempt leases would have resumed at some level in March of 2019"). While it may be difficult "to determine with any certainty the likely results of (or likely policy changes attributable to) completing an unfinished, unfunded PEIS," Supp_AR-19 (EA), the entire reason Federal Defendants commenced a PEIS process was because they determined that coal-leasing reforms were essential, AR-1604. Thus, BLM's assumption for its baseline scenario that the moratorium would be lifted without any changes to leasing at all reflected the least likely outcome of its comprehensive review. Such unreasonable speculation about the outcome and timeframe of the PEIS process was arbitrary. See Great Basin Res. Watch, 844 F.3d at 1101 (affirming that "whatever method the agency uses, its assessment of baseline conditions 'must be based on accurate information and defensible reasoning'") (quoting Or. Nat. Desert Ass'n v. Jewell, 840 F.3d 562, 570 (9th Cir. 2016)). Moreover, because the no-action alternative reflected the elimination of the moratorium and resumption of federal coal leasing—i.e., the action embodied in the Zinke Order—it presumed "the existence of the very plan being proposed," in violation of NEPA. Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1037-1038 (9th Cir. 2008) (quoting lower court decision).

In addition to being unreasonable, BLM's new position that the moratorium would have been lifted in March 2019 without any reforms to mitigate the environmental impacts of federal coal leasing represents an unexplained reversal from BLM's prior position. See Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 966 (9th Cir. 2015) (en banc) ("Unexplained inconsistency between agency actions is a reason for holding an interpretation to be an arbitrary and capricious change.") (quotation and citation omitted), cert. denied sub nom. Alaska v. Organized Vill. of Kake, Alaska, 136 S. Ct. 1509 (2016). In the Secretary's words in January 2016, a moratorium on significant new coal leasing was necessary to avoid "locking in" the harmful impacts of new coal leasing. Supp_AR-5426.[5] Indeed, "[g]iven the serious concerns raised about the federal coal program and the large reserves of undeveloped coal already under lease to coal companies, it does not make sense to continue to issue new leases under outdated rules and processes." Supp_AR-17429 (emphasis added). Two primary areas Federal Defendants singled out as "requiring modernization" before the moratorium could be lifted were: 1) the "impact of the program on the challenge of climate change;" and 2) measures to ensure a "fair return to Americans for the

[5] To the extent that BLM argues that the approach adopted in the EA avoids "locking in" these harmful impacts, the EA's arbitrarily constrained scope and the failure to account for these impacts at the site-specific level of analysis, discussed supra Argument, Section I(B), discredit that argument.

sale of their public coal resources." AR-1604 (2017 Scoping Report). BLM cannot justify its subsequent assertion that the moratorium would have been lifted in 2019 without any changes to federal coal leasing or its environmental effects merely by labeling it "a reasonable assumption." Supp_AR-16.

In sum, BLM's no-action alternative does not reflect the conditions that preceded the Zinke Order and failed to afford any meaningful opportunity to compare the impacts of BLM's decision "re-open public land to coal leasing," Citizens for Clean Energy, 384 F. Supp. 3d at 1279, to the alternative choice of leaving the moratorium in place. This violated NEPA in two related ways: BLM adopted the incorrect baseline and omitted the required no-action alternative. Great Basin Res. Watch, 844 F.3d at 1101.

B. The EA Unlawfully Failed to Take a "Hard Look" at the Significant Environmental Impacts of Re-Opening Federal Lands to Coal Leasing

Federal Defendants' EA is also invalid because it unlawfully failed to take the required "hard look" at the environmental consequences of rescinding the coal-leasing moratorium. Blue Mountains Biodiversity Project, 161 F.3d at 1211. To satisfy its NEPA obligation, BLM must consider the full scope of activities encompassed by its proposed action. 40 C.F.R. § 1508.25. In holding that the Zinke Order was a major federal action subject to NEPA, this Court recognized, "[w]ith the Zinke Order's implementation, all BLM land became subject to lease

applications with terms of twenty years." Citizens for Clean Energy, 384 F. Supp. 3d at 1280. For the same reason that BLM was required to perform a NEPA analysis in the first instance—i.e., to analyze the environmental impacts of opening tens of thousands of acres of public land to coal leasing, id.—the scope of that NEPA analysis must also include evaluation of "all direct, indirect, and cumulative impacts" of re-starting the entire federal coal-leasing program. 40 C.F.R. § 1508.25. Instead, Federal Defendants arbitrarily constrained the scope of the EA to consider the impacts of just four individual coal leases. Supp_AR-14. Because the EA does not evaluate the full direct, indirect, and cumulative effects of reopening federal public lands to coal leasing, it violates NEPA. 40 C.F.R. § 1508.25.

Under NEPA, "[t]he scope of [an agency's] analysis of environmental consequences … must be appropriate to the action in question." Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1072 (9th Cir. 2002). Here, this analysis must include consideration of connected, cumulative, and similar actions of re-starting the federal coal-leasing program, including the evaluation of the cumulative impacts of all pending leases. Id.; see also Delaware Riverkeeper Network v. F.E.R.C., 753 F.3d 1304, 1314 (D.C. Cir. 2014) (stating that "when determining the contents of an EA or an EIS, an agency must consider all 'connected actions,' 'cumulative actions,' and 'similar actions'") (quoting 40

C.F.R. § 1508.25). Consistent with these requirements, NEPA also mandates comprehensive review of federal programs where, as here, the environmental consequences of connected actions "will have a compounded effect on [the] region." Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n, 677 F.2d 883 (D.C. Cir. 1981); see 40 C.F.R. § 1502.4(b) (programmatic review "should be timed to coincide with meaningful points in agency planning and decisionmaking"). In this case, "[t]he breadth and scope of the possible projects made possible by the Secretary's [lifting of the moratorium] requires the type of comprehensive study that NEPA mandates adequately to inform the Secretary of the possible environmental consequences of his approval." Cady v. Morton, 527 F.2d 786, 795 (9th Cir. 1975).

Federal Defendants' analysis violated these requirements by adopting a narrow scope of review that did not allow a "hard look" at the full environmental consequences of its decision to lift the moratorium; failing to rationally justify that narrow scope; and foregoing an EIS notwithstanding the significant impacts of Federal Defendants' decision.

1. The EA's narrow scope failed to account for the full environmental consequences of lifting the moratorium.

At the outset, in comparing the effects of the Zinke Order against the artificial baseline conditions of the flawed no-action alternative, Federal Defendants unlawfully constrained the EA's scope to considering the

environmental impacts of just four coal leases issued between March 2017 (when the Zinke Order terminated the moratorium) and March 2019 (when the EA presumed the moratorium would have ended absent the Zinke Order). Supp_AR-18. The EA did not consider the impacts of future leasing decisions beyond March 2019. Supp_AR-14. Even as to the four leases considered, the EA evaluated only the environmental effects of issuing the leases "between 1 and 11 months earlier than they could have been in the absence of the Zinke Order." Id. Applying this artificially constrained scope of analysis, the EA absurdly concluded that the decision to re-open all federal public lands to new coal leasing would yield no change in greenhouse gas emissions or climate impacts, Supp_AR-26; no "appreciable market effects impacting usage or emissions over any period," Supp_AR-32; no socioeconomic impacts, id.; and no impact on water resources, Supp_AR-33.[6]

Further, by arbitrarily limiting the scope of its analysis, BLM sidestepped analyzing the actual effect of the Zinke Order, which was to lift the protections of the coal-leasing moratorium. The moratorium's protections "of approximately 65,000 acres of public land that were subject to pending lease applications" would

[6] BLM declined to study other resource impacts based on its arbitrary claim that "[l]ifting the pause did not change the intensity or degree of impacts that would have occurred under the No Action Alternative." Supp_AR-56.

have otherwise remained in place. Citizens for Clean Energy, 384 F. Supp. 3d at 1279. "With the Zinke Order's implementation, all BLM land became subject to lease applications with terms of twenty years." Id. at 1280 (emphasis added). Significantly, absent the decision in the Zinke Order to repeal the federal coal-leasing moratorium, coal-lease applicants would have no ability to move forward with most leasing and subsequent mining. As BLM put it, "no leasing decisions c[ould] be made until the moratorium is lifted." Supp_AR-4439. The Zinke Order thus opened the door to the large-scale environmental impacts that accompany federal coal leasing and mining nationwide. Federal Defendants' failure to analyze these impacts violated NEPA. See Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 784 (9th Cir. 2006) (holding EIS was required before extending expired oil and gas leases where, "[w]ithout the affirmative re-extension of the 1988 leases, Calpine would have retained no rights at all to the leased property and would not have been able to go forward with the [development of a gas plant]").

BLM's unlawfully constrained scope of analysis rendered arbitrary its conclusion regarding the environmental significance of the Zinke Order. For example, as to climate impacts, the EA conceded that the cumulative greenhouse gas emissions from the coal lease applications that were or would be suspended under the Jewell Order—and could be issued under the Zinke Order—would amount to **more than one billion tons/year**. Supp_AR-26. This volume equates

to **16.3%** of the United States' total greenhouse gas emissions in 2017. Id. These harmful emissions are allowed under the Zinke Order but would be prevented by continuation of the Jewell Order. But BLM obscured this impact, asserting in comparing the Zinke Order against its artificial baseline that "the total quantity of [greenhouse gas] emissions would be the same under both alternatives." Id. This was arbitrary. See Ctr. for Biological Diversity, 623 F.3d at 642-46 (In NEPA review of proposed land exchange, it was arbitrary for the Department of the Interior to effectively conclude that environmental consequences would be identical with and without the land exchange where the regulatory framework is different in the two scenarios.).

2. BLM's legal justification for the arbitrarily constrained scope is contrary to law.

Federal Defendants' rationales for the EA's constrained scope do not satisfy the APA's standards for reasoned decisionmaking. 5 U.S.C. § 706(2)(A). BLM's first justification for the unlawfully narrow scope of its NEPA review revives a strategy Federal Defendants adopted earlier in this litigation, which this Court has already rejected. In defending BLM's initial failure to conduct any NEPA review, this Court found that, "by characterizing the Zinke Order as a mere policy shift and return to the status quo," Federal Defendants improperly attempted to "circumvent[] [a thorough] environmental analysis." Citizens for Clean Energy, 384 F. Supp. 3d at 1279 (discussing Cal. ex rel. Lockyer v. U.S. Dep't of Agric.,

575 F.3d 999, 1011-12 (9th Cir. 2009)). Now, in defending the scope of the EA, BLM repeats this error, asserting that "the Zinke Order merely established a policy that BLM will not defer proceedings on lease applications." Supp_AR-6 n.3; see also Supp_AR-6 (characterizing the Zinke Order as an "administrative polic[y]"). As a result of this flawed conclusion, the agency viewed the impacts of the Zinke Order as "limited to hastening by up to 24 months the impacts of the four Federal coal leases, not exempt or excluded from the Jewell Order's coal-leasing pause." Supp_AR-11-12. Federal Defendants' characterization of the Zinke Order as a "mere policy shift and return to the status quo" no more justifies the EA's unreasonably narrow scope than Federal Defendants' previous failure to comply with NEPA in the first instance. Citizens for Clean Energy, 384 F. Supp. 3d at 1279.

Further, the EA pointed to site-specific NEPA analyses as a substitute for any broader review of Federal Defendants' decision to re-open public lands to coal leasing. See Supp_AR-56 (stating that "[i]mpacts of specific leasing actions are appropriately analyzed in site specific NEPA documents and are outside the scope of the Final EA"). But contrary to Federal Defendants' approach, NEPA requires "coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" Blue Mountains

Biodiversity Project, 161 F.3d at 1216 (quotation and citation omitted); see also 40 C.F.R. § 1502.4(b) (programmatic review should be "timed to coincide with meaningful points in agency planning and decisionmaking"). To that end, NEPA does not allow an agency to wait until the last possible moment to analyze the consequences of its broad decisions; instead, "[a]gencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." Pit River Tribe, 469 F.3d at 785 (emphasis added) (quoting 40 C.F.R. § 1501.2).

By waiting to review the impacts of federal coal leasing until individual leases are issued, BLM precluded potential alternative approaches to coal leasing that could more broadly reduce cumulative environmental impacts of the program. Because "[f]uture decisions" at the lease level "will be constrained by" Federal Defendants' decisions to restart the federal coal-leasing program, comprehensive NEPA review is required. California v. Block, 690 F.2d 753, 762-63 (9th Cir. 1982). Indeed, the need for numerous lease-specific EISs under the restarted coal-leasing program highlights, rather than diminishes, the need for comprehensive review of this national program. At a minimum, BLM was required in its environmental analysis to evaluate the impact of restarting the federal coal-leasing

program by analyzing all pending leases in a single EIS. Its failure to do so violated NEPA.

BLM's site-specific analysis of one lease addressed in the EA—the Alton coal lease, which was issued after the Zinke Order ended the moratorium—illustrates the inadequacy of site-specific environmental review to analyze the programmatic and cumulative impacts of lifting the moratorium. BLM limited its cumulative impacts analysis for that lease to projects in two Utah counties rather than considering pending and foreseeable actions across the federal coal program. Supp_AR-1565. Additionally, BLM neither described nor quantified the impacts of the Alton coal lease greenhouse gas emissions on climate change in combination with other federal coal leases. Supp_AR-1336-37. As a result, the environmental analysis dismissed the greenhouse gas emissions attributable to the Alton coal lease as a miniscule percentage of global fossil fuel emissions from coal production. Supp_AR-1336-37.

Absent comprehensive review of all pending leases, BLM's constrained, site-specific approach could allow it to perpetually evade NEPA's requirement to evaluate the connected and cumulative impacts of the federal coal-leasing program. See Nat'l Wildlife Fed'n, 677 F.2d at 890 ("The existence of a comprehensive program with cumulative environmental effects cannot be escaped by disingenuously describing it as only an amalgamation of unrelated smaller

projects."); see also California v. Block, 690 F.2d at 762–63 (the critical decision to commit an area to a specific use is "irreversible and irretrievable" and future site-specific analysis concerning the area will be "meaningless" as subsequent decisions will be constrained by the initial program choice); Citizens for Better Forestry v. U.S. Dep't of Agric., 481 F. Supp. 2d 1059, 1067, 1089–90 (N.D. Cal. 2007) (change to programmatic forest-planning regulation triggered NEPA because it eliminated environmentally protective planning requirements that "in turn will likely result in less environmental safeguards at the site-specific plan level") (quotation and alteration omitted).

In sum, BLM violated NEPA by limiting the scope of its EA to evaluating only the impacts of accelerating a small handful of individual leases, rather than evaluating the impacts of opening all federal public lands to all potential leasing. Thus, the EA violates NEPA requirements for comprehensive review of broad or connected actions. 40 C.F.R. § 1508.25.

3. The EA does not justify a finding of no significant impact.

In addition, because of its unlawfully constrained scope, the EA failed to "supply a 'convincing statement of reasons' to explain why the Zinke Order's impacts would be insignificant" such that an EIS would not be required. Citizens for Clean Energy, 384 F. Supp. 3d at 1282 (quoting Blue Mountains Biodiversity Project, 161 F.3d at 1212). To demonstrate the need for an EIS, Plaintiffs "need

not show that significant effects will in fact occur," but only raise "substantial questions whether a project may have a significant effect" on the environment. Blue Mountains Biodiversity Project, 161 F.3d at 1212. As described above, the environmental impacts of re-opening public lands to coal leasing—including the climate change impacts—were significant. E.g., Supp_AR-26 (annual greenhouse gas emissions of pending leases would amount to 16.3% of all U.S. greenhouse gas emissions); 40 C.F.R. § 1508.27 (defining "significant"). And while Federal Defendants claim it is proper to consider only the effects of leases that would have remained suspended by the moratorium rather than all federal coal-leases, Federal Defendants themselves conceded that the moratorium was unlikely to be eliminated in three years absent the Zinke Order, Supp_AR-4436-37, meaning "a greater number of leases are likely to be affected" than studied in the EA, Supp_AR-4439. At a minimum, these circumstances give rise to "substantial questions" whether the decision to rescind the moratorium would cause significant environmental effects that must be studied in an EIS. Blue Mountains Biodiversity Project, 161 F.3d at 1212. Thus, while the invalidity of the EA itself justifies setting aside the Zinke Order, Federal Defendants' failure to prepare an EIS provides an additional and independent reason for doing so.

C. The EA Violated NEPA By Failing to Analyze a Reasonable Range of Alternatives

In considering only two alternatives—both of which involved restarting federal coal leasing without any change to how and to what extent leasing is accomplished—the EA also violated NEPA's requirement to consider a reasonable range of alternatives to the proposed action. 42 U.S.C. § 4332(2)(C); see 40 C.F.R. § 1501.5(c) (requirements for environmental assessments); see also Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1245 (9th Cir. 2005) ("NEPA requires that alternatives … be given full and meaningful consideration," whether the agency prepares an EA or an EIS). Consideration of alternatives to avoid environmental damage is "the heart" of NEPA review. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1217 (9th Cir. 2008) (quoting 40 C.F.R. § 1502.14).

Federal Defendants' paltry alternatives analysis was unlawful. As this Court held, NEPA requires Federal Defendants to account for the "environmental harm that could result from lifting the moratorium." Citizens for Clean Energy, 384 F. Supp. 3d at 1279. Essential to this review is consideration of alternatives to address and mitigate that harm. Ctr. for Biological Diversity, 538 F.3d at 1217-18. Yet BLM's EA assessed only two alternatives: 1) the Proposed Action (terminating the coal-leasing moratorium in March 2017) and 2) the unlawful no-action alternative (terminating the coal-leasing moratorium in March 2019).

Supp_AR-16-19. The EA consistently found that the "the intensity or degree of impacts" were identical under these alternatives. Supp_AR-56; see also Supp_AR-26 (finding greenhouse gas emissions "the same under both alternatives"); Supp_AR-33 (finding water impacts the same). Federal Defendants refused to consider any alternatives that reflect a change in Federal Defendants' leasing practices or could alleviate the environmental consequences of the federal coal-leasing program. Supp_AR-19.

In essence, Federal Defendants failed to consider any course of action other than the one they had already undertaken with the Zinke Order—reopening public land to coal leasing with no change to where, how, and subject to what conditions such leasing would occur. Courts in the Ninth Circuit—including this Court—have consistently rejected such an approach. See Ctr. for Biological Diversity, 538 F.3d at 1218 (invalidating EA where the alternatives considered "hardly differ[ed] from the option [the agency] ultimately adopted"); see also Friends of Yosemite Valley, 520 F.3d at 1039 (NEPA analysis ruled invalid where the studied "alternatives were not varied enough to allow for a real, informed choice"); W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt., No. CV 16-21-GF-BMM, 2018 WL 1475470, at *9 (D. Mont. Mar. 26, 2018) (BLM violated NEPA by "fail[ing] to consider any alternative that would decrease the amount of extractable coal available for leasing"); Mont. Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127,

1145-46 (D. Mont. 2004) (holding that the alternatives analysis in an EA was insufficient where all options analyzed were "based on the assumption that oil and gas leasing will take place").

In refusing to study reasonable alternatives in the EA, Federal Defendants wrongly assumed that only one course of action could carry out their purpose of rescinding the moratorium under President Trump's executive order of March 28, 2017. Supp_AR-19; see Supp_AR-11 (EA purpose and need statement). That order directed the Interior Secretary to "take all steps necessary and appropriate to amend or withdraw [the Jewell Order], and to lift any and all moratoria on Federal land coal leasing activities." Supp_AR-4424. Further, the order "shall be implemented consistent with applicable law." Supp_AR-4426. In revoking the federal coal-leasing moratorium the very next day, Federal Defendants did not comply with "applicable law"—namely, NEPA—and failed to consider alternatives for where and how coal would be leased.

BLM's statutory obligations required it to consider such alternatives that would reduce the environmental harm of coal leasing. See Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 866 (9th Cir. 2004) ("Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS.").

BLM previously recognized its statutory roles to conserve public lands and ensure that lessees fairly compensate taxpayers for the cost of coal resources:

> BLM's stewardship role as a proprietor and sovereign regulator, which is charged by Congress with managing and overseeing mineral development on the public lands, not only for the purpose of ensuring safe and responsible development of mineral resources, but also to ensure conservation of the public lands; the protection of their scientific, historic, and environmental values; and compliance with applicable environmental laws. In addition, the BLM has a statutory duty to ensure a fair return to the taxpayer and broad discretion to decide where, when, and under what terms and conditions mineral development should occur.

AR-1603-04 (2017 PEIS Scoping Report). Consistent with these obligations, commentors on the EA suggested alternatives to reduce impacts on public lands and wildlife by, e.g., designating areas unsuitable for leasing, and on the climate by, e.g., accounting for climate harm in lease royalty rates. E.g., Supp_AR-17308. But the EA rejected each of these alternatives as inconsistent with the "purpose and need of the proposed action." Supp_AR-19.

As a result, the EA unlawfully allowed for only one outcome—termination of the coal-leasing moratorium without implementing any reforms BLM previously deemed necessary. For this reason too, Federal Defendants' failure to consider a reasonable range of alternatives in the EA is arbitrary and capricious, and unlawful. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9; 5 U.S.C. § 706(2).

II. FEDERAL DEFENDANTS VIOLATED THEIR TRUST OBLIGATION TO THE NORTHERN CHEYENNE TRIBE

By rescinding the coal-leasing moratorium in violation of NEPA, Defendants also violated their trust responsibility to the Northern Cheyenne Tribe. The U.S. Supreme Court has long recognized the "undisputed existence of a general trust relationship between the United States and the Indian people." United States v. Mitchell, 463 U.S. 206, 225 (1983). The trust duty commits the federal government to protect Indian tribes' rights, resources, and interests. Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831). In discharging this responsibility, federal agencies must observe "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

Mineral Leasing Act and NEPA regulations implement Federal Defendants' obligations toward tribal governments affected by the decision to rescind the federal coal-leasing moratorium. BLM's regulations direct that federal coal is to be "developed in consultation, cooperation, and coordination with ... Indian tribes." 43 C.F.R. § 3420.0–2. Under NEPA, federal agencies are required to "[i]nvite the participation of … any affected Indian tribe" at the very outset of environmental review. 40 C.F.R. § 1501.7(a)(1). Further, to satisfy their trust obligations, "agencies must at least show 'compliance with general regulations and statutes not specifically aimed at protecting Indian tribes,'" including NEPA's environmental

review requirements. Pit River Tribe, 469 F.3d at 788 (quoting Morongo Band of Mission Indians v. F.A.A., 161 F.3d 569, 574 (9th Cir. 1998)); see also Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior, 755 F. Supp. 2d 1104, 1110 (S.D. Cal. 2010) (stating that "[v]iolation of this fiduciary duty [to tribes] to comply with … NEPA requirements during the process of reviewing and approving projects vitiates the validity of that approval and may require that it be set aside").

This District has specifically recognized the Secretary's fiduciary responsibility to the Northern Cheyenne Tribe in leasing federal coal on non-tribal lands. N. Cheyenne Tribe v. Hodel, Case No. CV 82-116-BLG, 12 Indian Law Rep. 3065 (D. Mont. May 28, 1985), injunction rev'd by, 851 F.2d 1152, 1158 (9th Cir. 1988), remanded to N. Cheyenne Tribe v. Lujan, 804 F. Supp. 1281, 1285 (D. Mont. 1991) (recognizing validity of prior merits ruling).[7] This responsibility carries special force in the context of the Northern Cheyenne Tribe's requests for government-to-government consultation on the federal coal-leasing program, first before the Zinke Order issued, AR-15199-200, and again before Federal Defendants' finalized the EA, Supp_AR-52567-69. The Northern Cheyenne Reservation lies within the Powder River Basin. As the Tribe explained, "coal

[7] The Indian Law Reporter publication is attached as Exhibit 1 to Plaintiffs' July 27, 2018 opening brief, Doc. 118.

mining on these federal lands would have significant socioeconomic and environmental impacts on the Tribe and its members." Supp_AR-52568. "Harm to the Tribe's lands and waters [from coal leasing] strikes at the heart of the Tribe's sovereignty." Supp_AR-18741 (Tribe's comments on draft EA). Despite this harm, Federal Defendants still have not responded to the Tribe's consultation requests and did not evaluate impacts of the coal leasing program to the Northern Cheyenne Tribe. Supp_AR-18742.[8]

Federal Defendants violated their "minimum fiduciary duty" to the Northern Cheyenne Tribe by failing to take a hard look at the direct, indirect, and cumulative impacts of reopening federal public land to coal leasing—including impacts to the Northern Cheyenne Tribe outlined in the Tribes' unanswered requests for consultation. Pit River Tribe, 469 F.3d at 788. This Court previously found that

[8] The inadequacy of Federal Defendants' response to the Tribe's consultation requests is evidenced by President Biden's January 26, 2021 "Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships," which declares in part that "our Nation faces crises related to health, the economy, racial justice, and climate change — all of which disproportionately harm Native Americans. History demonstrates that we best serve Native American people when Tribal governments are empowered to lead their communities, and when Federal officials speak with and listen to Tribal leaders in formulating Federal policy that affects Tribal Nations." See https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/. The complete lack of consultation on federal coal leasing falls well short of this commitment.

the Tribe's "claim based on the Federal Government's trust obligation proves contingent upon Federal Defendants' conclusions related to the NEPA review that the Court has ordered." Citizens for Clean Energy, 384 F. Supp. 3d. at 1282. Because that review is completed and remains insufficient to satisfy Federal Defendants' NEPA and trust obligations, Federal Defendants violated their fiduciary obligations to the Northern Cheyenne Tribe.

III. THIS COURT SHOULD REMEDY FEDERAL DEFENDANTS' NEPA VIOLATIONS BY VACATING THE CHALLENGED ACTIONS

To remedy Federal Defendants' serious NEPA and trust violations, this Court should set aside the challenged EA and associated decision to reopen federal public lands to coal leasing that is embodied in the Zinke Order. The APA provides that the "reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) & (D). Thus, "[v]acatur is the standard remedy under the APA and NEPA if a court determines that an agency action is unlawful." California v. Bernhardt, 472 F. Supp. 3d 573, 630 (N.D. Cal. 2020); see also Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1095 (9th Cir. 2011) ("When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action."); Alsea Valley All. v. Dep't of Commerce, 358 F.3d 1181, 1185 (9th Cir. 2004)

("Although not without exception, vacatur of an unlawful agency rule normally accompanies a remand.") (citation omitted).

Vacatur is necessary to remedy Federal Defendants' NEPA violations despite Interior Secretary Deborah Haaland's recent order purporting to "revoke" the Zinke Order. Secretarial Order 3398 (April 16, 2021). Following Secretary Haaland's order, the Interior Department clarified that the nominal revocation did not reinstate the moratorium or "take any action on coal development."[9] Thus, the actions effectuated by the Zinke Order—i.e., revoking the Jewell Order and terminating the coal-leasing moratorium—remain in effect. It is those actions that are subject to review in this proceeding.

Courts decline to vacate an unlawful agency action "only in 'limited circumstances.'" Pollinator Stewardship Council v. U.S. E.P.A., 806 F.3d 520, 532 (9th Cir. 2015) (quoting Cal. Cmties. Against Toxics v. U.S. E.P.A., 688 F.3d 989, 994 (9th Cir. 2012)). None applies here. First, when determining whether vacatur is appropriate, courts "consider whether vacating a faulty rule could result in possible environmental harm, and [courts] have chosen to leave a rule in place when vacating would risk such harm." Id. (citing Idaho Farm Bureau Fed'n v.

[9] Assoc. Press, Interior Secretary Haaland revokes Trump-era orders on energy (Apr. 16, 2021), at https://www.pbs.org/newshour/politics/interior-secretary-haaland-revokes-trump-era-orders-on-energy.

Babbitt, 58 F.3d 1392, 1405–06 (9th Cir. 1995)). Such circumstances are not present here, because vacating Federal Defendants' unlawful analysis and moratorium decision would prevent, rather than cause, environmental harm.

Second, courts "weigh the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed" to determine whether a case presents the "limited circumstances" warranting remand without vacatur. Pollinator Stewardship Council, 806 F.3d at 532 (citation and quotation omitted). Here, the seriousness of Federal Defendants' NEPA and trust violations warrants vacatur of the challenged actions, including the decision to rescind the coal-leasing moratorium. Federal Defendants' failure to meet NEPA requirements to take a hard look at a program's environmental impacts and alternatives to avoid them "involve more than mere technical or procedural formalities that the [agency] can easily cure." Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv., 109 F. Supp. 3d 1238, 1244-45 (N.D. Cal. 2015) (finding that NEPA cumulative impacts analysis is "an integral part of fulfilling NEPA's purpose" and agency's failure to conduct such analysis warranted vacatur). Indeed, Federal Defendants already attempted to cure their initial failure to conduct any NEPA review, but the resulting EA still failed altogether to consider the direct, indirect, and cumulative impacts of reopening federal public lands to leasing or alternatives to avoid or

mitigate those impacts. Federal Defendants' repetition of serious legal error warrants vacatur.

To vacate the challenged actions and reinstate the federal coal-leasing moratorium, the Court need not evaluate the factors for injunctive relief. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165-66 (2010). Setting aside an unlawful agency decision through vacatur "prohibits, as a practical matter, the enforcement of" that decision, but is not "the practical equivalent of 'enjoining'" the agency. Alsea Valley All., 358 F.3d at 1186. As the Supreme Court observed in Monsanto, if vacatur of an agency's action is sufficient to redress the plaintiff's injury, "no recourse to the additional and extraordinary relief of an injunction [is] warranted." 561 U.S. at 165-66; see also, e.g., O.A. v. Trump, 404 F. Supp. 3d 109, 153–54 (D.D.C. 2019) (declining to issue an injunction that would not "have [a] meaningful practical effect independent of … vacatur") (quoting Monsanto, 561 U.S. at 165); Reed v. Salazar, 744 F. Supp. 2d 98, 120 (D.D.C. 2010) (setting aside challenged agency action and declining to issue injunctive relief where it was unnecessary "to redress the NEPA violation found by the Court").

Such is the case here, where the effect of setting aside the challenged decision is to nullify its legal consequences. See Black's Law Dictionary (11th ed. 2019) (definition of "set aside" is to "annul or vacate"); id. (definition of "vacate" is to "nullify" or "make void"). Thus, for example, the U.S. Supreme Court in

Monsanto explained that the effect of vacating an agency's decision deregulating genetically engineered alfalfa was to prohibit planting of such alfalfa until such time as the agency made a new decision that complied with NEPA. 561 U.S. at 165-66. Similarly, upon finding that agencies violated NEPA and their fiduciary duty to Tribes when extending leases for geothermal development, the Ninth Circuit invalidated the lease extensions and the development approvals that were premised on those lease extensions. Pit River Tribe, 469 F.3d at 788. District courts have similarly employed vacatur to eliminate the legal effect of agency decisions found to violate NEPA, restoring the status quo that predated those decisions. See, e.g., W. Watersheds Project v. Zinke, 441 F. Supp. 3d 1042, 1085-86 (D. Idaho 2020) (setting aside BLM's instructional memorandum for processing oil and gas lease application and clarifying that the pre-existing instructional memorandum would take its place); Pub. Employees for Envtl. Responsibility v. U.S. Fish & Wildlife Serv., 189 F. Supp. 3d 1, 5 (D.D.C. 2016) (vacating nationwide order authorizing killing of cormorants, meaning such killing could not proceed absent individual permits).

Because the entire purpose and effect of the Zinke Order was to rescind the moratorium embodied in the Jewell Order, the effect of vacating the Zinke Order is to nullify that decision and render off-limits future coal leasing that could not occur but for the Zinke Order. See Monsanto, 561 U.S. at 165-66. This Court need not

enjoin such future coal leasing, id., but should clarify that the effect of vacatur is to reinstate the moratorium that preceded the Zinke Order unless and until Federal Defendants make a new decision to allow future coal leasing that complies with NEPA.[10]

Accordingly, Federal Defendants' challenged EA and associated decision to rescind the moratorium should be set aside as Federal Defendants take the requisite "hard look" at the consequences of that decision. Robertson, 490 U.S. at 350.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for summary judgment and vacate the Federal Defendants' challenged EA and decision to rescind the coal-leasing moratorium.

Respectfully submitted this 18th day of May, 2021.

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[10] This Court stated in its May 22, 2020 remedy order concerning Plaintiffs' initial complaint that Paulsen v. Daniels, 413 F.3d 999 (9th Cir. 2005), held that "the effect of invalidating an agency rule is to reinstate the rule previously in force." Order 18 [Doc. 170] (emphasis in Order) (quoting Paulsen, 413 F.3d at 1008). However, the Paulsen decision has been applied to agency decisions other than regulations. See W. Watersheds Project, 441 F. Supp. 3d at 1084-86. In any event, because setting aside the challenged decision eliminates its legal effect of rescinding the Jewell Order, this Court does not need to specifically apply Paulsen to this case.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 8,996 words, in compliance with the Court's October 19, 2020 Scheduling Order [Doc. 193].

/s Jenny K. Harbine
Jenny K. Harbine

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was today served via the Court's CM/ECF system on all counsel of record.

/s/Jenny K. Harbine
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