Travis Jordan, MT Bar #53199056
Senior Assistant Attorney General
James Kaste, WY Bar No. 6-3244
Deputy Attorney General
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-7895 (phone)
(307) 777-3542 (fax)
travis.jordan@wyo.gov
james.kaste@wyo.gov

Attorneys for State of Wyoming

AUSTIN KNUDSEN
Montana Attorney General
David M.S. Dewhirst
Solicitor General
Kathleen L. Smithgall
Assistant Solicitor General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov

Attorneys for State of Montana

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

CITIZENS FOR CLEAN ENERGY, *et al.*,
Plaintiffs,
v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants,
and

STATE OF WYOMING, *et al.,*
Intervenor – Defendants.

STATE OF CALIFORNIA, *et al.*,
Plaintiffs,
v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants,
and

STATE OF WYOMING, *et al.,*
Intervenor – Defendants.

Case No. 4:17-cv-00030-BMM (lead)

Case No. 4:17-cv-00042-BMM
[Consolidated Case]

INTERVENOR-DEFENDANTS STATE OF WYOMING AND STATE OF MONTANA'S JOINT MEMORANDUM IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs want an indefinite end to federal coal leasing. That is a political decision and the political process rejected it. In this case, Plaintiffs challenged the Zinke Order.[1] But the Zinke Order was revoked and a different Secretary of Interior is pursuing a new path. Thus, there is no live controversy about the adequacy of the Zinke Order's environmental assessment left shelved as the result of a presidential election, a new administration, and a different Secretary of Interior.

A motion to dismiss the case for mootness is pending before this Court. In it, the State of Wyoming and State of Montana concur this case is moot because the Zinke Order is no longer in effect. (ECF No. 222). However, to the extent this Court proceeds to the merits of this case, it should deny Plaintiffs' motions for summary judgment because the environmental assessment (now vanquished in a bureaucratic no man's land) complied with the requirements of NEPA. Specifically, the scope of that environmental assessment was reasonable because it adequately defined the purpose and need for the proposed action. The environmental assessment also took a hard look at the actual impacts associated with the now defunct secretarial order and considered a reasonable range of alternatives.

[1] (*See, e.g.,* ECF No. 173-1 at ¶ 3) ("This case challenges Federal Defendants' decision to issue Secretarial Order 3348 (the "Zinke Order"), issued on March 29, 2017[.]").

BACKGROUND

The Parties have previously briefed, in great detail, a significant portion of the factual and procedural background of this case and this Court is familiar with the facts and its prior ruling. Wyoming and Montana, therefore, provide the Court with a concise recitation of the facts and procedural developments most relevant to the pending motions for summary judgment. Wyoming and Montana also incorporate by reference the factual and procedural background they articulated in their prior brief. (*See* ECF No. 126 at 2-11).

I. Statutory Framework

NEPA is a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process. *See* 40 C.F.R. § 1500.1 (2019).[2] An agency may prepare an EA to determine whether an EIS is necessary. *See* 40 C.F.R. § 1501.5(b) (2019); *see also W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1049-50 (9th Cir. 2013). An EA serves as a "concise public document." 40 C.F.R. § 1508.9(a) (2019). Agencies preparing an EA shall "include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b) (2019).

[2] The Council on Environmental Quality amended 40 C.F.R. part 1500 effective September 14, 2020. For purposes of this litigation, this Court should apply the NEPA regulations in effect at the time the Bureau's EA was completed. *See, e.g., Bair v. Cal. Dep't of Transp.*, 982 F.3d 569, 577 n.20 (9th Cir. 2020).

Courts afford agencies considerable discretion to define the purpose and need for a project under NEPA. *See Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998). Although an agency must still "give full and meaningful consideration to all reasonable alternatives" in an EA, the agency's obligation to discuss alternatives is less than in an EIS. *See N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (per curiam).

II. Procedural History

A. The Federal Coal Leasing Program

The MLA, as amended by the Federal Coal Leasing Amendments of 1976, provides that federal coal deposits "shall be subject to disposition." (AR000004)[3]; *see also* 30 U.S.C. § 181. The Bureau adopted a comprehensive coal leasing regulation in July 1979, establishing a federal coal program. *See* 44 Fed. Reg. 42584, 42615 (July 19, 1979). The federal coal leasing program was accompanied by a PEIS under the requirements of NEPA. *W. Org. Res. Councils v. Zinke*, 892 F.3d 1234, 1236 (D.C. Cir. 2018). The Bureau amended the coal leasing regulations in 1982, and supplemented the PEIS in 1985. *Id.*

[3] Citations beginning with "AR" are to the administrative record lodged by the Federal Defendants' on November 30, 2020 (ECF No. 194).

B. The Jewell Order - Secretarial Order No. 3338

On January 15, 2016, Secretary Sally Jewell, issued Secretarial Order No. 3338 (Jewell Order). (AR005419-28). The purpose of the Jewell Order was to "determine whether and how the current system for developing Federal coal should be modernized[.]" (AR005419). The Jewell Order paused federal coal leasing pending the completion of the PEIS but provided exceptions for emergency leasing and other limited activities. (AR005427-28). Despite the pause, nearly 100 million tons of federal coal leases were authorized under Jewell Order exemptions. (AR000017; AR000022).

Secretary Jewell also ordered the preparation of a "discretionary [PEIS] … [to analyze] potential leasing and management reforms to the [] Federal coal program." (AR005419). Secretary Jewell did not propose "any regulatory action at [that] time" explaining that "the purpose of the [PEIS] [was] to identify, evaluate, and potentially recommend reforms to the Federal coal program." (AR005425). Secretary Jewell released a scoping report for the PEIS in January 2017. (AR000004). At that time, she anticipated the completion of the PEIS in March 2019. (AR2017_01654).[4]

[4] Citations beginning with "AR2017" are to the administrative record lodged by the Federal Defendants' on August 11, 2017 (ECF No. 68) and are cross-referenced by the November 30, 2020 administrative record. (*See* ECF No. 195-1 at 4).

C. The Zinke Order - Secretarial Order No. 3348

On March 29, 2017, Secretary Ryan Zinke issued Secretarial Order No. 3348 (Zinke Order). (AR004416-17). Secretary Zinke explained that the Zinke Order was in response to Executive Order 13868 which directed him to "amend or withdraw" the Jewell Order and "commence Federal coal leasing activities consistent with all applicable laws and regulations." (AR004424). He did not authorize any new coal leasing with the Zinke Order; instead, the Order required the Bureau to process coal leasing applications in accordance with existing law. (AR000005).

Secretary Zinke revoked the Jewell Order because he concluded "the public interest is not served by halting the federal coal program for an extended time, nor is a PEIS required to consider potential improvements to the program." (AR004416). Accordingly, he halted work on the PEIS and lifted the pause on processing coal lease applications. (AR004417). In doing so, he considered the Bureau's internal analysis on the need for the PEIS after Secretary Jewell left office. (*See* AR004427-40). In that analysis, the Bureau explained that the PEIS was no longer justified because the four primary reforms identified by the Jewell PEIS scoping report had been addressed or were in the process of being addressed by other Bureau actions. (*See* AR004429-36). The Bureau also explained that it now lacked funding to proceed with the PEIS because Congress did not allocate the necessary funding to complete the review. (AR004437; *see also* AR000005). The Bureau, therefore,

recommended that Secretary Zinke discontinue the PEIS and explained that the pause was no longer necessary. (*See* AR004437-40).

D. This Court's 2019 Order

Plaintiffs challenged the Zinke Order, arguing that the rescission of the Jewell Order constituted a major federal action that triggered the requirements of NEPA. (ECF No. 116 at 19-20; ECF No. 118 at 16). They also alleged that the Zinke Order violated NEPA and the APA because the Bureau was obligated to complete a PEIS before issuing it. (*See e.g.,* ECF No. 118 at 21-24).

On April 19, 2019, this Court granted Plaintiffs' motion for summary judgment in part and denied it in part. (AR000147). The Court held that the Zinke Order constituted major federal action sufficient to trigger NEPA. (AR000137-38). However, in denying Plaintiffs' motion, the Court found that it lacked the authority to compel the Bureau to prepare a PEIS evaluating the federal coal leasing program. (AR000145). The Bureau then initiated the process to evaluate the environmental impacts of the Zinke Order in an EA. (*See* ECF No. 143 at 1).

E. Zinke Order Environmental Assessment

On February 25, 2020, the Bureau published its final EA which analyzed the environmental consequences of the Zinke Order as the proposed action. (AR000001; AR000068). The Bureau explained the purpose and need for the EA as follows:

> The purpose and need for the Zinke Order was to respond to the Trump Order. The Trump Order directed all Federal agencies to advance

> domestic energy security and economic strength. To this end, it specifically directed the Secretary of the Interior to "lift any and all moratoria on Federal land coal leasing activities" related to the Jewell Order. On a purely practical level, the Zinke Order's cancellation of the PEIS ratified Congress's effective cancellation of the PEIS by denying funds required to complete it.

(AR000011). The Bureau also explained that the EA was prepared in response to this Court's April 19, 2019 order. (*See* AR000011; AR000067).

The EA discloses the environmental impacts associated with resuming the processing of coal lease applications twenty-four months ahead of schedule because the PEIS under the Jewell Order was scheduled for completion in March 2019. (AR000011; *see also* AR2017_01654). The Bureau approved six federal coal leases between the Zinke Order and the presumed date on which leasing activities would have resumed under the Jewell Order. (AR000010). Two of the six coal lease applications were exempt under the Jewell Order, therefore, the Bureau considered the environmental effects of the four federal coal leases attributable to the Zinke Order. (*Id*.).

The Bureau considered a no action alternative in the EA that reviewed the environmental conditions in the absence of the Zinke Order. (AR000016). Because a permanent pause on leasing is contrary to the MLA's express direction that federal lands shall be offered for leasing, the Bureau eliminated a no leasing alternative. (AR000016) (*citing* 30 U.S.C. § 201(a)(1)). The Bureau considered a second alternative which evaluated the impact of resuming normal coal leasing procedures

in March 2017 under the Zinke Order. (AR000017-18). The Bureau also reviewed additional alternatives proposed in comments and concluded that detailed analysis was not warranted because none of the proposed alternatives met the purpose and need of the proposed action. (AR000019). The Bureau concluded that, because coal leasing under the Jewell Order would have resumed by March 2019, issuing four federal coal leases on an earlier timeline under the Zinke Order resulted in no significant impacts. (AR000076).

F. The Haaland Order - Secretarial Order No. 3398

Secretary Deb Haaland issued Secretarial Order No. 3398 (Haaland Order) on April 16, 2021. U.S. Dep't of Interior, Secretarial Order 3398, *Revocation of Secretary's Orders Inconsistent with Protecting Public Health and the Environment* (Apr. 16, 2021).[5] The Haaland Order revoked the Zinke Order. *Id.* at § 4; *see also* (ECF No. 217 at 4). Secretary Haaland also committed to review the federal coal program. *Id.* at § 5; *see also* (ECF No. 217 at 4-5). She published a notice of intent to review the federal coal leasing program in the Federal Register on August 20, 2021. *See* 86 Fed. Reg. 46873 (Aug. 20, 2021). Secretary Haaland is currently processing public comment on the proposal and remains committed to reviewing the federal coal program. (*See* ECF No. 217 at 4-5).

[5] https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3398-508_0.pdf

G. Plaintiffs' Supplemental Complaints

This Court granted leave for the Plaintiffs to file supplemental complaints challenging the Bureau's analysis in the EA on July 23, 2020. (ECF No. 175). Plaintiffs argue that the EA violated NEPA on three grounds: (1) the scope of the EA was impermissibly narrow; (2) the EA failed to take a hard look at the impacts of the federal coal program; and (3) the EA failed to consider a reasonable range of alternatives. (ECF No. 176 at 19-25; ECF No. 173-2 at 27-35). Conservation Plaintiffs also allege the federal government violated its trust obligation to the Northern Cheyenne Tribe. (ECF No. 176 at 25-27). State Plaintiffs also allege the Zinke Order violated its statutory obligations under the MLA, FLPMA, and the APA. (ECF No. 173-2 at 35-37).

STANDARD OF REVIEW

The Court reviews challenges to agency actions under the APA, 5 U.S.C. § 706, which requires courts to uphold agency actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013) (quoting 5 U.S.C. § 706(2)(A)). An agency decision is only arbitrary and capricious if it "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." *Managed Pharmarcy Care v. Sebelius*, 716 F.3d 1235, 1244 (9th Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

"This standard of review is 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 866 (9th Cir. 2017) (quoting *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)). "Because agency action is presumed to be valid, the challenging party bears the burden of proving that the action violates § 706(2)(A)." *Wildwest Inst. v. Bull*, 468 F. Supp. 2d 1234, 1242 (D. Mont. 2006).

ARGUMENT

The EA complied with NEPA. The scope of the EA was consistent with the Bureau's statutory obligations and the purpose of the proposed action. The EA took a hard look at the environmental consequences directly associated with the proposed action. Finally, the range of alternatives considered in the EA was reasonable given the purpose of Secretary Zinke's Order.

I. The scope of the Bureau's EA complied with NEPA.

State Plaintiffs argue the scope of the EA violated NEPA's implementing regulations by failing to consider the connected, cumulative, and similar actions associated with the Zinke Order. (ECF No. 201 at 17-19). Conservation Plaintiffs take a different approach and argue that the Bureau's "baseline" conditions

improperly constrained the scope of the EA. (ECF No. 203 at 11). Plaintiffs misapply the standard for evaluating the scope of the EA.

Courts apply a reasonableness standard when considering whether the scope of an EA is impermissibly narrow. *See Westlands Water Dist. v. Dep't of Interior*, 376 F.3d 853, 867-68 (9th Cir. 2004); *see also Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070 (9th Cir. 2010). This Court should start its analysis by evaluating the reasonableness of the agency's statement of purpose and need. *See Wild Wilderness v. Allen*, 871 F.3d 719, 728-29 (9th Cir. 2017); *see also Mont. Envtl. Info. Ctr. v. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1087 (D. Mont. 2017).

Courts have also been reluctant to determine that an agency's articulated purpose for a proposed action is too narrow. *Kettle Range Conservation Grp. v. U.S. Forest Serv.*, 148 F. Supp. 2d 1107, 1117 (E.D. Wash. 2001) ("This court is not aware of any case in which the Ninth Circuit found a statement of purpose to be unreasonably narrow."); *see Muckleshoot Indian Tribe v. U.S. Forest Serv.,* 177 F.3d 800, 812-13 (9th Cir. 1999) (adopting the agency's narrow purpose even though it essentially ruled out any alternatives which did not resemble the preexisting plan); *and Friends of Se's. Future*, 153 F.3d at 1066-67 (upholding purpose which excluded consideration of any alternative that would provide less timber to the market).

Finally, this Court should afford the Bureau considerable discretion to define the purpose and need for a project. *Friends of Se.'s Future*, 153 F.3d at 1066 (9th Cir. 1998). In assessing reasonableness, courts must consider the statutory context of the federal action at issue and any other congressional directives. *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.,* 689 F.3d 1060, 1070 (9th Cir. 2012) (considering statutory context to determine reasonableness of purpose and need statement); *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013) ("[A]n agency must consider the statutory context of the proposed action and any other congressional directives … ."). Accordingly, this Court should first consider the reasonableness of the Bureau's purpose and need for the EA.

A. The Bureau reasonably defined the purpose and need for the EA.

The purpose for the EA was to respond to this Court's order which determined the Zinke Order was a major federal action that triggered compliance with NEPA. (AR000011). The proposed action in the EA is the Zinke Order. (AR000054). The purpose for the Zinke Order was to execute Executive Order 13783. (AR000011). Executive Order 13783 directed Secretary Zinke to take "all steps necessary and appropriate" to amend or withdraw the Jewell Order. (AR004424). The Bureau explained the Zinke Order was needed because the statutory framework established by Congress does not provide the Secretary with explicit authority to pause federal

coal leasing. (*See* AR000004). The Bureau also explained the Zinke Order was necessary because Congress, in effect, cancelled the PEIS when it denied funding for its completion. (*See* AR000011).

The Bureau's purpose and need for the proposed action was reasonable for three reasons. First, the Bureau defined the need for the project based on its statutory obligation to make federal coal deposits "subject to disposition." (AR000004); *see also HonoluluTraffic.com v. Fed. Transit Admin.,* 742 F.3d 1222, 1230 (9th Cir. 2014) ("The [EIS's] stated objectives comply with the intent of the relevant federal statutes."). The Bureau's proposed action was not unreasonably narrow because it explained the need to offer federal coal for leasing comes directly from pertinent statutory authorities. *See League of Wilderness Defs.*, 689 F.3d at 1070.

Second, the Bureau's stated purpose for the proposed action responded to Executive Order 13783 which required federal agencies to advance domestic energy security. (AR000068). Agency actions incorporating goals consistent with the objectives of executive orders are reasonable. *See, e.g., Colo. River Indian Tribes v. Dep't of Interior*, No. 14-cv-02504 JAK (SPx), 2015 WL 12661945, at *22 (C.D. Cal. June 11, 2015) (unpublished); *W. Watersheds Project v. Salazar*, No. 11-cv-00492 DMG (Ex), 2011 WL 13124018, at *15 (C.D. Cal. Aug. 10, 2011) (unpublished).

Finally, the Bureau explained that the proposed action was needed because Congress canceled funding for the PEIS initiated by the Jewell Order. (*See* AR000011). In light of the considerable deference provided to agencies to define the purpose and need for an EA, this Court should uphold the Bureau's purpose and need because it was informed by a congressional directive. *See, e.g., Mont. Envtl. Info. Ctr.*, 274 F. Supp. 3d at 1088-90 (finding that the agency's purpose in an EA, which relied on congressional policy, did not violate NEPA).

Plaintiffs argue the scope of the EA was impermissibly narrow because the EA did not consider the environmental consequences of all future federal coal leasing. (*See* ECF No. 201 at 19; ECF No. 203 at 12). But, in defining the scope of an EA, agencies cannot consider every possible future consequence and need to draw the line somewhere. *See, e.g.*, *WildWest Institute v. Bull*, 547 F.3d 1162, 1173 (9th Cir. 2008) (citation omitted) ("Agencies have 'discretion to determine the physical scope used for measuring environmental impacts' so long as they do not act arbitrarily and their 'choice of analysis scale … represent[s] a reasoned decision.'"). Here, the Bureau explained "[t]he limited scope of the leasing pause [Jewell Order] reduced the potential impact of its rescission, and by extension, any potential impacts of the Zinke Order." (AR000006). As a result, the Bureau concluded that the impact of future leasing "does not relate to the purpose and need or inform a question of significance." (AR000014).

The Bureau explained how relevant statutory obligations, executive authorities, and congressional directives informed the scope of its EA. These reasons are all sufficient, and therefore, the purpose and need for the EA was reasonable. *See Muckleshoot Indian Tribe*, 177 F.3d at 813 (citing *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

B. The federal coal leasing program is not a connected action.

Instead of challenging the purpose and need for the Bureau's proposed action, State Plaintiffs argue that the Bureau impermissibly narrowed the scope of the EA by violating a series of implementing regulations under NEPA. (*See* ECF No. 201 at 17-18). Specifically, State Plaintiffs argue that the Bureau's review of the four coal leases associated with lifting the Jewell Order early is a "connected action" to the whole federal coal leasing program. (*See id.*) (citing 40 C.F.R. § 1508.25(a)(1) (2019). Their argument, however, is not supported by the law.

The Ninth Circuit "appl[ies] an 'independent utility' test to determine whether multiple actions are so connected as to mandate consideration in a single [NEPA document]." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). Actions are "connected" under this test where they are "inextricably intertwined" such that neither would exist but for the other. *Nw. Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995) (describing "connected actions" as actions that are akin to "links in the same bit of chain,"

contrasted with those that are "separate segments of chain," and thus not "connected actions" under NEPA regulations).

The Zinke Order is not inextricably intertwined with how the Bureau will make future coal leasing decisions. The Bureau explained in the EA that "the Zinke Order does not preclude the [Bureau] from reviewing, studying or making improvements to the federal coal leasing program in the future." (AR000054). Secretary Haaland confirmed this when she initiated her own review of the federal coal program after revoking the Zinke Order. *See* 86 Fed. Reg. 46873.

Additionally, courts do not generally consider future mining activities a "connected action" under 40 C.F.R. § 1508.25(a) (2019) when the details of future activities are unknown. *See Chilkat Indian Village of Klukwan v. BLM*, 399 F. Supp. 3d 888, 919 (D. Alaska. 2019) ("the [c]ourt finds that future [mining] development activities are not a "connected action" under 40 [C.F.R.] § 1508.25(a)"). Therefore, the EA did not violate NEPA's implementing regulations because the decision to lift the Jewell Order early has no bearing on future, yet to be proposed, federal coal leases.

Moreover, concluding that the environmental review under the Zinke Order warrants a programmatic review of the entire federal coal leasing program results in speculative NEPA analysis which threatens agency paralysis. *See Nw. Res. Info. Ctr., Inc.*, 56 F.3d at 1069 ([this court] "cannot force an agency to aggregate diverse

actions to the point where problems must be tackled from every angle at once. To do so risks further paralysis of agency decisionmaking."). Future federal coal leasing will require NEPA analysis as details for those projects are developed, but State Plaintiffs fail to explain how lifting the Jewell Order early is connected to the consideration of every federal coal lease indefinitely into the future.

C. The federal coal leasing program is not a cumulative action.

State Plaintiffs also argue that the scope of the EA was impermissibly narrow because reinstituting the federal coal leasing program is a "cumulative action." (ECF No. 201 at 18). Applicable NEPA regulations define "cumulative action" for the purpose of scoping as "actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(2) (2019).

The "cumulative action" requirement in NEPA only requires the Bureau to consider proposed actions that are actively under consideration. *See* 40 C.F.R. § 1508.23 (2019); *see also Nw. Bypass Grp. v. U.S. Army Corps of Eng'rs*, 552 F. Supp. 2d 97, 126 (D.N.H. 2008) ("A 'proposed action' 'exists at that stage in the development of an action when an agency subject to [NEPA] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated.'"). Here, the Bureau did not have an obligation to consider potential leasing under the federal coal

leasing program as a "cumulative action" because it had not yet proposed any leasing. Furthermore, the Bureau has no meaningful way to evaluate future coal leasing that does not yet exist.

The way courts have applied the "cumulative action" obligation is instructive. For example, the Ninth Circuit required the Forest Service to prepare a single EIS for multiple timber sales when those sales formed part of a single timber salvage project that was announced simultaneously, was reasonably foreseeable, and was located in the same watershed. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214-15 (9th Cir. 1998); *see also Churchill Cty. v. Norton*, 276 F.3d 1060, 1078-79 (9th Cir. 2001); *Nw. Ecosystem All.*, 475 F.3d at 1148-49. Those factors are not present here. The four lease sales reviewed by the EA under the Zinke Order are on separate time scales from other potential leasing decisions and are not otherwise part of a proposed agency action to lease lands for mining within a particular geographic area. (*See* AR000009; *and* AR000018-19).

Thus, the Bureau's decision to limit the EA to the four federal coal leases resulting from the Zinke Order was not arbitrary or capricious. The Bureau had no obligation to consider the impact of prospective, yet to be proposed, leasing that might or might not occur in the same area at some indeterminate time. *See Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305-06 (9th Cir. 2003).

D. The federal coal leasing program is not a similar action.

Finally, State Plaintiffs argue that the lease sales evaluated as a result of the Zinke Order are "similar actions" under 40 C.F.R. § 1508.25(a)(3) (2019). (ECF No. 201 at 18). "Similar actions" are actions "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." 40 C.F.R. § 1508.25(a)(3) (2019). State Plaintiffs have not shown how the four federal coal lease sales reviewed under the Zinke Order share common timing or geography with future leasing under the federal coal leasing program.

The Ninth Circuit affords agencies more deference in deciding whether to analyze similar actions in a single NEPA document than "connected actions" or "cumulative actions." *See Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 1001 (9th Cir. 2004) (finding the "similar actions" definition does not contain the same mandatory language in the regulation as "connected actions" or "cumulative actions."). The Bureau considered four federal coal leases issued between May 2018 and February 2019 under the Zinke Order. (AR000010-11). State Plaintiffs have no factual basis to suggest that these four coal leases share common timing with yet to be proposed leases under the federal coal leasing program. Additionally, the four federal coal leases reviewed in the EA were limited geographically to Utah and Oklahoma. (*Id.*). Even if the State Plaintiffs can convince this Court that its review

of the four federal coal leases in the EA are similar to every potential coal leasing decision made indefinitely in the future across the nation, the Bureau maintains the discretion whether or not to evaluate the environmental impacts in a single environmental document. *See* 40 C.F.R. § 1508.25(a)(3) (2019).

E. The Bureau's baseline for the EA was reasonable.

Conservation Plaintiffs argue the EA adopted an artificial and unreasonable "baseline" that unlawfully constrained the scope of analysis. (ECF No. 203 at 11). Specifically, Plaintiffs argue that the EA should have considered a baseline where the Jewell Order, and the pause, remained indefinitely in effect. (*See* ECF No. 203 at 12) ("The Jewell Order governed Federal Defendants' coal leasing on federal land and prohibited most new federal coal leasing, **with no expiration date**.") (emphasis added). Plaintiffs' argument, however, is based on the flawed premise that Secretary Jewell's executive action forever ended federal coal leasing.

The administrative record directly contradicts Plaintiffs' purported "baseline" assumption. Secretary Jewell's January 2017 scoping report for the PEIS explains how long the pause was expected to last:

> The [Jewell] Order calls for the limitations on the issuance of federal coal leases to be applied **until the completion of the PEIS**. A PEIS typically takes several years to complete, providing adequate time for public comment and review at each stage of the process. **It is expected that the review will take approximately three years to complete**.

(AR2017_00346). The baseline in the EA was clearly consistent with Secretary Jewell's action. The Bureau explains that its baseline "retains the pause on the issuance of coal leases established by the Jewell Order through the timeframe in which the BLM would have completed the PEIS." (AR000016).

An agency's baseline conditions "must be based on accurate information and defensible reasoning." *Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2016). This is a highly deferential standard. *Id*. The weight of the administrative record reveals that the baseline relied on an accurate understanding of the status quo under the Jewell Order and was supported by defensible reasoning.

First, the baseline in the EA relied on Secretary Jewell's own words in the Jewell Order. The Jewell Order described the suspension of coal leasing as a "pause" designed to allow the recommendations of the PEIS to inform "future leasing decisions." (*See* AR005426). Contrary to the Plaintiffs' version of the status quo, the use of the word "pause" in the Jewell Order clearly indicated the moratorium was temporary and that coal leasing would resume in the future.[6] The Bureau explained in the EA that it relied on the same rationale for adopting a baseline where the pause in the Jewell Order was temporary. (*See* AR000016; *see also* AR000049).

[6] "Pause" – a temporary stop; or temporary inaction especially caused by uncertainty. Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/pause

Second, the twenty-four month baseline was based on Secretary Jewell's own timeline. Secretary Jewell's proposed timeline in the January 2017 scoping report anticipated completing the PEIS in March 2019. (AR2017_01654). The Bureau explained in the EA that it relied on the same timeline because that is the best available information on when the PEIS was expected to be completed. (AR000016; *see also* AR00050).

Conservation Plaintiffs argue that the baseline is flawed because, in March 2017, the Bureau concluded that the PEIS fell behind schedule and likely would not have been completed on time. (*See* ECF No. 203 at 13-14). The baseline in the EA, however, examines the status quo set by Secretary Jewell who established an aggressive timeline for completing the PEIS. (*See, e.g.,* AR00050; AR004436). As the Bureau explained, the Jewell Order initiated a temporary pause with exemptions, not an indefinite moratorium on all coal leasing activities. (AR000049-50). The Bureau, therefore, had to select a timeline in which the Jewell Order was lifted. Instead of blindly speculating, the Bureau selected Secretary Jewell's timeline. This baseline was reasonable because it assumed what would occur had Secretary Jewell been allowed to complete the PEIS on her own terms.

Finally, the Bureau explained in the EA that any baseline which ends all federal coal leasing in perpetuity is plainly inconsistent with statutory obligations. (*See* AR000016; *see also* AR00055). Because the MLA promotes the mining of coal

on the public domain, the Bureau explained that "the Jewell Order was never intended to establish an indefinite pause on all coal leasing activities; rather it contemplated a limited pause in some leasing activities for the explicit purpose of facilitating preparation of the PEIS." (AR00004).

In fact, the exemptions in the Jewell Order allowed for a greater amount of leasing than Plaintiffs suggest. (*See* AR000017) ("[T]he Jewell Order's leasing pause did not preclude all coal leasing. There were exemptions and exclusions that allowed many lease applications to be processed and issued."). For example, the Bureau authorized nearly 100 million tons of federal coal leasing under the Jewell Order exemptions. (AR000022). Therefore, Plaintiffs' argument that the Jewell Order required the Bureau to adopt a baseline "no leasing" condition in the EA does not match the plain terms of the Jewell Order.

The Bureau was under no obligation to consider a "no leasing" baseline in the EA because the Jewell Order was temporary and subsequently did not end all federal coal leasing. Moreover, the baseline in the EA was accurately informed and defensibly reasoned because the Bureau relied on the language of the Jewell Order, its timeline, and the statutory authorities in determining that without the Zinke Order coal leasing would have resumed following the completion of the PEIS.

II. The Bureau took a "hard look" at the environmental impacts of rescinding the Jewell Order.

Plaintiffs argue that the EA failed to take a "hard look" at the environmental consequences associated with the entire federal coal leasing program. (ECF No. 201 at 19-20; ECF No. 203 at 17-18). But NEPA only requires that the agency take a "'hard look' at the environmental consequences of its **proposed action**." *See Blue Mountains Biodiversity Project*, 161 F.3d at 1211 (emphasis added). The Bureau's proposed action in the EA was to rescind the Jewell Order early. (AR000068). This proposed action does not trigger any requirement for the Bureau to review the entire federal coal leasing program.

This Court should apply a "rule of reason" standard in reviewing the adequacy of a NEPA document. *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 992-93 (9th Cir. 2004) (citation omitted). NEPA does not require the government "to do the impractical." *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 764 (9th Cir. 1996); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (noting that "practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements"). The Court's task is to ensure that the agency has taken a "hard look" at the potential environmental consequences of the proposed action. *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 993.

State Plaintiffs cite a host of alleged impacts the Bureau failed to consider, but they are not relevant to the proposed action. For example, State Plaintiffs argue the

EA failed to consider the environmental impacts of shipments of coal from mines in Montana and Wyoming. (ECF No. 201 at 21). But these alleged impacts are not relevant to the Zinke Order because the leasing decisions evaluated by the Zinke Order do not involve mining activity from either state. (AR000023-24). Under the hard look standard, the Bureau only has an obligation to consider relevant factors, and therefore, did not need to address in detail the unrelated environmental impacts that State Plaintiffs now allege. *See Am. Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001, 1007 (9th Cir. 2020).

Plaintiffs, in essence, call on the Bureau to perform the impractical – to evaluate the potential environmental impact of all future coal leasing regardless of whether the leasing has been proposed or not.

With respect to the proposed action, the Bureau provided a reasoned explanation of the environmental effects that the four federal leases under the Zinke Order will have on greenhouse gas emissions, socioeconomic impacts, and water quality. (*See* AR000020-39). Plaintiffs take particular issue with the outcome of the Bureau's analysis in the EA. (*See* ECF No. 201 at 20; ECF No. 203 at 26-27). But NEPA does not mandate "particular results;" instead NEPA prescribes the process the agency must follow to evaluate and approve an action that will have environmental consequences. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The EA took the requisite hard look at the environmental

impacts of its proposed action which was limited to the four federal coal leases that advanced under the Zinke Order.

III. The Bureau considered a reasonable range of alternatives that met the purpose of its proposed action.

Plaintiffs argue that the Bureau failed to consider a reasonable range of alternatives with meaningful differences. (ECF No. 201 at 23-24; ECF No. 203 at 28). But the range of alternatives considered by the Bureau were reasonable because the alternatives met the stated purpose and need for the EA. *See* 40 C.F.R. § 1508.9(b) (2019); *City of Carmel-by-The-Sea v. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) ("The stated goal of a project necessarily dictates the range of "reasonable" alternatives…."); *see also* Argument, Section I.A. Additionally, the Bureau considered alternatives with distinct outcomes – the difference between allowing the Jewell Order to run its course and the Zinke Order which lifted the pause twenty-four months early. (*See* AR000068).

Statutory objectives "serve as a guide" to determine the reasonableness of the objectives outlined in environmental analysis. *Westlands Water Dist.*, 376 F.3d at 866. Here, the Bureau's range of alternatives were reasonable because the proposed action was consistent with its obligation under the MLA to make federal coal deposits subject to disposition. (AR000004); *see also Forelaws on Bd. v. Johnson*, 743 F.2d 677, 685 (9th Cir. 1984) (suggesting that whether an agency's action comports with its statutory duty is relevant to whether the agency properly evaluated

a range of alternatives under NEPA). The Bureau also explained that a no leasing alternative was not viable because refusing to lease federal coal on a permanent basis was both inconsistent with the Bureau's statutory obligations and failed to meet the purpose of the proposed action. (AR000071; *see also* AR000016). The Bureau did not need to consider alternatives that do not respond to the purpose and need of the proposed action. *See, e.g., Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973).

Executive Orders can also shape the purpose of a proposed action and, in turn, inform the reasonable range of alternatives to consider. *See City of Carmel*, 123 F.3d at 1166; *see also Surfrider Found. v. Dalton*, 989 F. Supp. 1309, 1329-30 (S.D. Cal. 1998). The EA considered the appropriate range of alternatives to address the specific mandates of the Executive Order which included commencing federal coal leasing by lifting the pause under the Jewell Order. *See W. Lands Project v. BLM*, No. 13-cv-399, 2014 WL 2892256, at *17 (S.D. Cal. June 25, 2014) (unpublished) (finding agency considered the relevant factors, including specific mandates of existing Executive Order, and articulated a rational connection between the facts found and choices made as required by NEPA).

State Plaintiffs contend that the two alternatives considered by the Bureau in the EA are "virtually identical" and improper under the Ninth Circuit's ruling in *Muckleshoot*. (ECF No. 201 at 24) (citing *Muckleshoot*, 177 F.3d at 813). But that

case involved an EIS and has no application here because the Bureau prepared an EA. Many courts have recognized this distinction. *See, e.g., Protect Lake Pleasant, LLC v. Connor*, No. CIV 07-0454-PHX-RCB, 2010 WL 5638735, at *32 (D. Ariz. July 30, 2010) (unpublished) (citing *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) ("That is a critical distinction because, as mentioned earlier, 'an agency's obligation to consider alternatives under an EA is lesser than one under an EIS.'"). *Muckleshoot,* therefore "provides little support for requiring similar rigor" when, as here, the court is reviewing an EA. *Shasta Res. Council v. U.S. Dep't of Interior*, 629 F. Supp. 2d 1045, 1055 (E.D. Cal. 2009).

Moreover, the two alternatives considered in the EA are not identical because each alternative evaluates different outcomes. The baseline alternative considered the impact of coal leasing following the completion of Secretary Jewell's proposed PEIS, whereas the proposed alternative considered the immediate resumption of coal leasing under the Zinke Order. (*See* AR000016-18). Furthermore, NEPA, and its associated regulations, do not impose a numerical floor on alternatives the agency must consider. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005).

State Plaintiffs do not explain how the Bureau's choice of alternatives hampered informed decisionmaking. (*See* ECF No. 201 at 24). "NEPA's goal is informed decision-making …. It does not require agencies to consider information

that is not helpful." *350 Mont. v. Bernhardt*, 443 F. Supp. 3d 1185, 1196 (D. Mont. 2020) (internal citation omitted). The Bureau provided the necessary information for the public to consider the alternatives between acting on the Zinke Order and postponing agency action until after the PEIS would have been completed under the Jewell Order. Therefore, the Bureau met its obligation under NEPA. *See Friends of Tahoe Forest Access v. U.S. Dep't of Agriculture*, 641 F. App'x 741, 744 (9th Cir. 2016) ("Plaintiffs have failed to show how considering additional alternatives would have fostered more informed decision making than the alternatives that the [agency] analyzed and rejected based on the adverse environmental impacts it perceived."). In light of the Bureau's statutory obligation to make federal coal deposits available for leasing, it considered a reasonable range of alternatives.

IV. The Bureau explained its need for the Zinke Order.

State Plaintiffs argue the Bureau violated its statutory obligations by failing to explain how the Zinke Order ensured that the public received a "fair return" from federal coal leasing. (ECF No. 201 at 25-26). State Plaintiffs overlooked the administrative record. The Bureau's March 2017 recommendation for adopting the Zinke Order explained why Secretary Jewell's programmatic review was no longer needed. (*See* AR004427-40).

Specifically, the Bureau explained that it already addressed a majority of the "fair return" issues raised by the PEIS and that any remaining concerns could be

addressed using the Bureau's discretionary authority. (*See* AR004429-31). The Bureau also explained that "there is no statutory indication that Congress intended to consider [carbon-based externalities] when directing the Secretary to ensure a fair return" from the federal coal program. (AR004432). The Bureau, in fact, provided an adequate explanation why the Zinke Order was necessary and explained how the decision ensured a "fair return" to the public. *See Alaska Oil & Gas Ass'n v. Prizker*, 840 F.3d 671, 682 (9th Cir. 2016) (finding internal memorandum explaining change in policy was neither arbitrary nor capricious).

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' claims, deny their motions for summary judgment, and grant Wyoming and Montana's cross-motion for summary judgment.

Dated this 27th day of January 2022.

/s/ *Travis Jordan*
Travis Jordan MT Bar No. 53199056
Senior Assistant Attorney General
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
Telephone: (307) 777-7895
Facsimile: (307) 777-3542
travis.jordan@wyo.gov

Attorney for State of Wyoming

/s/ Kathleen Smithgall
Kathleen L. Smithgall
MT Bar No.67323943
Assistant Solicitor General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
p. 406.444.2026
kathleen.smithgall@mt.gov

Attorney for State of Montana

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Wyoming's Memorandum in Support of its Cross Motion for Summary Judgment complies with the requirements of Rule 7.1(d)(2). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 6,990, excluding caption, certificate of compliance, table of content and authorities, and certificate of service. The undersigned relied on the word count of the word processing system used to prepare this document.

/s/ *Travis Jordan*
Travis Jordan

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing is being filed with the Clerk of the Court using the CM/ECF system, thereby serving it on all parties of record on this 27th day of January, 2022.

/s/ *Travis Jordan*
Travis Jordan