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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.	Case No. 4:17-cv-00030-BMM (lead) Case No. 4:17-cv-00042-BMM [Consolidated]
STATE OF CALIFORNIA, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	**INTERVENOR-DEFENDANT NATIONAL MINING ASSOCIATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs seek to end all federal coal activities indefinitely in one fell swoop. Unable to obtain that result from the elected branches of federal government that make and implement federal coal policy, Plaintiffs ask this Court to judicially legislate their desired policy. This Court must reject that gambit for any of at least three reasons.

First, as explained at length in our motion to dismiss (ECF Nos. 210, 211)[1] and Federal Defendants' cross-motion for summary judgment (ECF No. 219, 220), this litigation is ineluctably moot. That is because its *entire* subject, and the *only* basis for the Court's prior found jurisdiction, is Department of the Interior ("DOI") Secretarial Order 3348 issued on March 29, 2017 ("Zinke Order")—nothing more—and that Zinke Order was already expressly vacated by Secretarial Order 3398 on April 16, 2021 ("Haaland Order," *see* Exhibit 1). Moreover, Federal Defendants already are conducting a programmatic review of federal coal leasing as Plaintiffs profess to desire. Plaintiffs can obtain no further judicial relief here.

Second, Plaintiffs' supplemental complaints and present summary judgment motions even more transparently reveal that this litigation amounts to an impermissible programmatic challenge. For the second time in this litigation,

[1] All cited ECF filings in this case are to the docket of the lead case, No. 4:17-cv-00030-BMM, and the pagination within those documents, unless stated otherwise.

Plaintiffs seek to retroactively broaden the scope of their own filed complaints, and now effectively want current, longstanding federal coal regulations declared unlawful. But as the Supreme Court and other case law have repeatedly held, courts cannot entertain such lawsuits seeking judicial oversight of federal agencies' administration of their responsibilities. It is not for this Court to set federal coal policy, and Plaintiffs have no greater prerogative to do so either.

Third, even if the Court were to overlook the defunctness of the Zinke Order and its associated National Environmental Policy Act ("NEPA") review, and reach the merits of Plaintiffs' claims, they necessarily fail. Plaintiffs' various NEPA and other Administrative Procedure Act ("APA")-based claims are all permutations of the same rudimentary argument that Federal Defendants did not prepare a Programmatic Environmental Impact Statement ("PEIS") before so much as *considering* whether to issue any future federal coal lease (i.e., what it means to "process" a lease application). This argument in turn relies on a blatant misrepresentation of both the Zinke Order and the preceding Secretarial Order 3338 it revoked ("Jewell Order").

Specifically, this Court cannot "reinstate" a standalone, indefinite "moratorium" on federal coal leasing that never existed, even before the Zinke Order which terminated the wholly discretionary PEIS that was the *sole condition precedent* for any leasing "pause." Moreover, Plaintiffs cannot compel a PEIS

under NEPA that the Jewell Order itself deemed "discretionary" and the courts—including this Court—uniformly have ruled DOI has no obligation to prepare absent newly proposed regulations. Nor do the State Plaintiffs identify any judicially enforceable obligation under any other statute violated by the former Zinke Order. Plaintiffs' insistence on pressing this litigation during DOI's ongoing programmatic review under Secretarial Order 3398 also exposes that Plaintiffs' actual interest lay not in additional DOI review, but rather in impermissibly preordaining and dictating the outcome of that review. The Court should grant summary judgment for all Defendants and finally end this litigation.

BACKGROUND

The January 15, 2016, Jewell Order was entitled "Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program." AR 5419-5428.[2] Plaintiffs disingenuously continue to ignore the key term "Discretionary"; indeed, the State Plaintiffs' latest summary judgment brief merely mentions the title (ECF No. 201 at 11), and the Group Plaintiffs omit it completely. No law compelled the Jewell Order or any aspect thereof. Nor, contrary to Plaintiffs' repeated misrepresentations, did the Jewell Order announce any federal coal policy. Per its plain text, it did "not propos[e] any regulatory

[2] "AR" citations are to DOI's Administrative Record filed on December 1, 2020 (ECF No. 194).

action at this time," and did not prejudge any existing lease terms "*that the PEIS may* ultimately determine to be less than optimal." AR 5425, 5426 (emphasis added). Nor did the Jewell Order mandate completion of the PEIS. It was effective only until "amended, superseded, *or revoked*, whichever occurs first." AR 5428 (emphasis added). It also afforded no enforcement right or benefit, including in this Court. *Id.*

Critically, the Jewell Order did *not* create a standalone moratorium on federal coal leasing. It merely temporarily "pause[d]" the "process[ing]" of some coal leasing applications only "until the completion of the PEIS." AR 5426-5427. Thus, the *sole* function of the pause was to prepare a discretionary PEIS. *Per the Jewell Order, without the discretionary PEIS, there was no pause.* Moreover, the Jewell Order excluded many federal coal applications and operations from its interim pause pending the PEIS. AR 5427-5428. It also expressly did "not apply to other [Bureau of Land Management ("BLM")] actions related to the Federal coal program," including "development and implementation of resource management plans" specifying where federal coal leasing is appropriate. AR 5427.

The Jewell Order was subject to no prior NEPA review or other statutory findings (e.g., under the Federal Land Policy and Management Act ("FLPMA")) that Plaintiffs allege the Zinke Order lacked. After the Jewell Order issued, the ensuing PEIS process produced a "scoping report." *See* 81 Fed. Reg. 17,720 (Mar.

30, 2016) (Notice of Intent and Scoping, that "begins the process of defining the scope of the [PEIS] . . . and identifying the issues that may be addressed"). The scoping report was just as it sounds—a compilation of received public comments to inform topics to address in the Draft PEIS. It carried no legal import and contained no regulatory proposal or findings. That is, the scoping report could not, and did not, predetermine the results of the subsequent PEIS, a result that would be fundamentally inconsistent with NEPA. *See, e.g.*, AR 56265 ("This report is intended to provide an educated starting point for the work on the PEIS . . . .").

The March 29, 2017, Zinke Order ended the PEIS process—and by necessity the limited leasing pause for which the PEIS process was a condition precedent. AR 4416-4417; *see* Environmental Assessment ("EA") at 5, AR 5 ("In the absence of any legal obligation, funding, or intent to move forward with completing the PEIS, the underlying purpose and rationale for the pause no longer exists."); AR 56638 ("The Leasing Moratorium is Unnecessary if the PEIS is Discontinued."); AR 56638-56639 ("If the PEIS is discontinued, the reason for creating the moratorium will be gone."). DOI prioritized other activities above preparation of a discretionary PEIS and also lacked Congressional appropriations for such a PEIS. Finding of No Significant Impact ("FONSI") at 3, AR 69; EA at 5, AR 5 ("Thus, at various times, all three branches of government separately weighed in against the completion of the PEIS."). The Zinke Order did not lease or authorize

development of a *single* acre of federal land or a *single* ton of federal coal. Nor did it alter the criteria by which BLM decides federal coal lease applications, and the requirement for each leasing action to undergo NEPA review. Indeed, Plaintiffs do not dispute that after the Zinke Order each federal coal lease, regardless if previously covered by the Jewell Order (of which there were only four since 2017), received a NEPA review. Like the Jewell Order, the Zinke Order created no legally enforceable right or benefit; rather, it was "intended to improve the internal management of the Department." AR 4417.

The Zinke Order remained in effect until April 16, 2021. On that date, it was revoked by the Haaland Order. Unlike the Jewell Order, the Haaland Order did not direct a PEIS or an associated leasing pause. It directed DOI to "review and revise as necessary all policies and instructions that implemented" the revoked Zinke Order and other simultaneously revoked prior Secretarial Orders. Haaland Order at 2. Specifically, it called for a report within 60 days outlining potential policy or rule changes to be consistent with the Haaland Order, including a "plan and timeline." *Id.* As Federal Defendants explain, DOI has since moved forward with its ongoing review of federal coal leasing. Fed. Defs. Op. Br., ECF No. 222 at 8. Inexplicably, Plaintiffs first opposed staying this litigation pending that review (ECF No. 205), then less than 30 days later supported a stay (ECF No.

208), and then again flipped positions because DOI had not yet delivered on Plaintiffs' policy demands for federal coal (ECF No. 217 at 3-4).

STANDARD OF REVIEW

To avoid duplication, we incorporate by reference Intervenor-Defendants States of Montana and Wyoming's summary judgment brief's discussion of the applicable judicial standard of review for agency actions under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. As a threshold matter, however, that APA standard is irrelevant when the Court lacks subject matter jurisdiction over Plaintiffs' claims. "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE MOOT.

To avoid duplication, we incorporate by reference herein the points and authorities in support of our motion to dismiss for mootness (ECF No. 211), and briefly summarize them here.

It is blackletter law that the Court can only adjudicate claims actually before it. *See, e.g., Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 877 (9th Cir. 2006). This is why the Court required Plaintiffs to supplement their original complaints to revise their claims and challenge the adequacy of the completed NEPA review for the Zinke Order. Yet Plaintiffs' supplemental complaints again plainly relied on *exclusively* the Zinke Order to gain access to this

Court. *See, e.g.*, ECF No. 176 ¶¶ 1, 3; ECF No. 156 (Case No. 17-42) ¶ 8. The very first sentence of the Group Plaintiffs' summary judgment brief likewise challenges the "March 29, 2017 decision to rescind a moratorium on federal coal leasing." ECF No. 203 at 1. Both complaints seek relief tied to vacating the Zinke Order and associated NEPA review. *See, e.g.*, ECF No. 176 at 27; ECF No. 156 (Case No. 17-42) at 37; *see also* ECF No. 203 at 2 (Group "Plaintiffs request that this Court vacate the EA and the Zinke Order . . . ."). This Court similarly relied exclusively on the Zinke Order to find jurisdiction and an unmet NEPA obligation. *See, e.g.*, AR 143, 145 (ECF No. 141).

To the extent that the Zinke Order ever provided Plaintiffs a proper jurisdictional foothold in this Court (which it did not), it is now indisputably gone. The Haaland Order expressly and unambiguously revoked the Zinke Order: "The following Secretary's Orders (SO) have been found to be inconsistent with, or present obstacles to, the policy set forth in [Executive Order] 13990 and are hereby revoked: • SO 3348 – 'Concerning the Federal Coal Moratorium' (March 29, 2017)." *See* Exhibit 1. This Court cannot vacate what DOI already vacated. And because the Zinke Order is no more, the adequacy of its NEPA review—the only claims added by the supplemental complaints—is no longer a live issue, either.

What is more, after we filed our motion to dismiss for mootness, Federal Defendants have re-commenced and taken concrete steps in a programmatic

review of federal coal. *See* ECF 220 at 4 n.3. In doing so, Federal Defendants have effectively provided Plaintiffs the discretionary programmatic review that they purport to desire and aim to compel via this litigation. Dismissal of this litigation as moot in no way diminishes DOI's ability to consider future federal coal changes via proper notice and comment rulemaking. *See*, *e.g.*, FONSI at 8, AR 74; EA at 19, AR 19 ("[C]anceling preparation of the PEIS does not preclude the BLM from making future improvements to the Federal coal leasing program."); EA Appendix A at 6-7, AR 50-51. Nor will future federal coal leasing occur absent BLM approval, NEPA review, and judicial review if challenged.

Accordingly, there is no "ongoing" Article III "controversy" presented by Plaintiffs' supplemental complaints. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975) (citation omitted). At this juncture, any merits opinion, including on the adequacy of NEPA review for an already-rescinded action, would be improperly advisory only. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). The Court thus must dismiss these cases as moot.

II. PLAINTIFFS' CLAIMS ARE AN IMPERMISSIBLE PROGRAMMATIC CHALLENGE.

Naturally, Plaintiffs wish not to relinquish the jurisdiction they secured while the Zinke Order was in effect. To that end, Plaintiffs' summary judgment

briefs now—for the second time—argue broader policy issues and speculative future agency actions beyond the plain scope of their supplemental complaints. But even if the Court were to indulge Plaintiffs' shifting of the goalposts, it cannot entertain or adjudicate arguments beyond the Zinke Order because they present an improper programmatic challenge. For the same reason, Plaintiffs this time cannot cure by again supplementing their complaints.

Time and again, consistent with their proper Article III role to interpret rather than make law, the Supreme Court and other courts have rejected attempts to attack an entire agency program and judicially effectuate wholesale policy change. For example, in a case involving another asserted BLM "program" for managing federal lands, the Supreme Court held that "the flaws in the entire 'program'—consisting principally of the many individual actions referenced in the complaint and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 890-93 (1990); *see also id.* at 891 ("But respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.") (emphasis in original). The Supreme Court cogently explained:

> The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and

> forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect. *Toilet Goods Ass'n*, 387 U.S., at 164–166, 87 S.Ct., at 1524–1526. Such an intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole "program" to be revised by the agency in order to avoid the unlawful result that the court discerns. But it is assuredly not as swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire. Until confided to us, however, more sweeping actions are for the other branches.

Id. at 894.

Plaintiffs "may think that the third branch is more convenient or accessible, but the APA—consistent with Article III—will not permit such forays outside the 'traditional, ... normal[ ] mode of operation of the courts,' which remains limited to 'controvers[ies] ... reduced to more manageable proportions.'" *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1011 (9th Cir. 2021). The Ninth Circuit in *Whitewater* further found that "this limitation on judicial review precludes 'broad programmatic attack[s],' whether couched as a challenge to an agency's action or 'failure to act.' . . . . Plaintiffs cannot obtain review of all of [agency] individual actions pertaining to, say, 'employment-based immigration' in one fell swoop by simply labeling them a 'program.'" *Id.* at 1010-11 (citations

omitted). Other cases hold similarly.[3] Consistently, as the District of Wyoming has pointedly observed, "[w]ish as they might, neither the States, industry members, nor environmental groups are granted authority to dictate oil and gas policy on federal public lands." *Wyoming v. U.S. Dep't of Interior*, 366 F. Supp. 3d 1284, 1290 (D. Wyo. 2018), *order vacated, appeal dismissed sub nom. Wyoming v. U.S. Dep't of Interior*, 768 F. App'x 790 (10th Cir. 2019) (unpublished).

[3] *See, e.g., Native Ecosystems Council v. Marten*, 800 F. App'x 543, 544 (9th Cir. 2020) (unpublished) ("We begin with [plaintiff's] claim that Appellees' decision to use ecosystem management as an analytical framework violates NFMA and NEPA. NEC's claim 'seek[s] wholesale improvement' of an internal decision-making process" and is not subject to APA challenge.); *Zixiang Li v. Kerry*, 710 F.3d 995, 1004 (9th Cir. 2013) ("We have no authority to compel agency action merely because the agency is not doing something we may think it should do."); *Norton v. S. Utah Wilderness All. ("SUWA")*, 542 U.S. 55, 64, 124 S. Ct. 2373, 2379–80, 159 L. Ed. 2d 137 (2004) ("The limitation to discrete agency action precludes the kind of broad programmatic attack we rejected in [*Lujan, supra*]."); *Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 877 (11th Cir. 2009) ("Systemic improvement and sweeping actions are for the other branches, not for the courts under the APA."); *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 491-92 (5th Cir. 2014) (rejecting a "blanket challenge to all of the Government's actions with respect to *all* permits and leases granted for natural resource extraction on a significantly large amount of land" because the "challenge is to the way the Government administers these programs and not to a particular and identifiable action taken by the Government"); *cf. Louisiana v. Biden*, No. 2:21-CV-778, 2021 WL 4312502, at *14 (W.D. La. Aug. 23, 2021), report and recommendation adopted, No. 2:21-CV-0778, 2021 WL 4314795 (W.D. La. Sept. 22, 2021) (denying motion to dismiss where "plaintiffs are not challenging the DOI's overall management of the leasing program" for federal oil and gas).

This rule against judicial policymaking is especially prevalent in cases like this one asserting NEPA-based claims. "This court is cognizant of the need to take caution that NEPA and other statutory schemes are not manipulated beyond Congress' intent in attempts by litigants to raise policy objections to proposed federal actions." *N. Cheyenne Tribe v. Hodel*, Case No. 82-cv-116-BLG, 12 Indian Law Rep. 3065, 3074 (D. Mont. May 28, 1985) (involving "final decision to sell coal leases" on certain federal lands, and citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777-78 (1983)); *see also Lujan*, 497 U.S. at 891 (1990) (plaintiff may only challenge some "particular action that causes it harm"); *Found. on Econ. Trends v. Lyng*, 817 F.2d 882, 886 (D.C. Cir. 1987) ("NEPA was not intended to resolve fundamental policy disputes."). In contrast to the "final decision to sell coal leases" on federal lands in *Hodel*—and the challenged actions in all of Plaintiffs' other cited cases—Plaintiffs here challenge no actual decisions on federal coal planning, leasing, or development. That conclusion is only strengthened by DOI's own vacatur of the Zinke Order.

Without the Zinke Order in effect, Plaintiffs' efforts to maintain their lawsuits are even more transparently an impermissible programmatic challenge. At base, Plaintiffs here urge the Court to decide "matters of policy" that this Court has long desired to avoid: "whether coal leasing is desirable or whether leasing is

necessary from a national energy standpoint." *Hodel*, 12 Indian Law Rep. at 3074. This litigation is not, and cannot be, about the merits of federal coal leasing.

Plaintiffs have made plain that they wish to end coal leasing. *E.g.*, Nichols Decl., ECF No. 117-3 ¶ 11 ("Our ultimate aim has been to advocate for a gradual end to the federal coal program."). Whereas Plaintiffs previously pointed to the Zinke Order, Plaintiffs now take issue with the *Haaland Order* because it does not mimic the Jewell Order they like or impose Plaintiffs' desired "policy" changes for federal coal leasing—namely ending it via a novel, permanent "moratorium." For example, the Group Plaintiffs now complain that "Federal Defendants have not yet signaled any change from the prior administration's coal-leasing policy" and that the Haaland Order "was not reinstating the moratorium or discontinuing coal leasing." ECF No. 203 at 2; *see also id.* at 36; ECF No. 205 at 1; ECF No. 201 at 3. In opposing a further abeyance of these cases challenging the Zinke Order and its compliance with NEPA, Plaintiffs proffered only a *non sequitur* that "that process for initiating reforms has stalled." ECF No. 217 at 3. Plaintiffs have revealed their true intent to preserve the current litigation as a cudgel to force federal coal policy changes, rather than challenge the Zinke Order's APA compliance as alleged in their actual complaints. But any issues regarding the Haaland Order, the legality of federal coal leasing under existing regulations, or

the nature or wisdom of various federal coal reforms are neither presented in this litigation nor amenable to judicial review. Plaintiffs' claims thus fail.

III. THE NEPA REVIEW OF THE ZINKE ORDER WAS SUFFICIENT.

Plaintiffs' various criticisms of the EA and FONSI that DOI prepared for the Zinke Order boil down to a single contention: DOI did not prepare the Jewell Order's PEIS. But no one claims DOI did so. The salient point is DOI had no such obligation under either NEPA or the Court's April 19, 2019 Order, AR 115-148, directing DOI to initiate a NEPA review of the Zinke Order. The Court already correctly declined to discern any DOI legal obligation to prepare a new or supplemental PEIS for the current federal coal leasing program. *See* ECF No. 170 at 15-16 ("The Court's Order here simply proves less expansive than Plaintiffs' interpretation, or as the orders in the cases cited by Plaintiffs. Plaintiffs essentially repeat their request for the Court to order a programmatic review and preparation of a PEIS. . . . This Court already considered and declined to impose this request on Federal Defendants."). Plaintiffs' contrary arguments rely on disingenuous misrepresentations of the Jewell and Zinke Orders and of this Court's prior rulings. Namely, Plaintiffs seek to recast the Zinke Order as terminating a free-standing, interminable ban on federal coal leasing. *See, e.g.*, ECF No. 203 at 1 (opening line of brief, mislabeling the Zinke Order as a "decision to rescind a moratorium on

federal coal leasing"). To avoid duplication we also concur with the NEPA arguments in Montana and Wyoming's summary judgment brief.

The specific proposed action defines the proper scope of a NEPA review.[4] Here, the EA and FONSI accurately characterize the Zinke Order, as well as the Jewell Order it rescinded. As explained above, the Jewell Order was not simply a moratorium, nor did it announce any policy to end federal coal leasing. The Jewell Order instead commenced a discretionary PEIS to determine whether and what future policy changes might be proposed. Moreover, any leasing "pause" was partial and could continue only so long as that discretionary PEIS was underway. Thus Plaintiffs are simply wrong in suggesting that the proper starting point for the EA was "no leasing."[5] *E.g.*, ECF No. 203 at 12-13.

[4] The Group Plaintiffs also mislabel the EA as a "second attempt to justify the Zinke Order." ECF No. 203 at 9. That misunderstands NEPA. An EA is merely an environmental analysis to inform agency decisionmaking.

[5] Plaintiffs also presume that vacating the Zinke Order will automatically reinstate the earlier Jewell Order. That is not the law, as even Plaintiffs concede and the Court has recognized. *See* Groups' Op. Br. 40 n.10. To be sure, the Secretary may elect to reinstate a previously-revoked Secretarial Order. For example, Secretarial Order 3289 addressing climate change considerations on federal lands stated, "this Order replaces Secretarial Order No. 3226, Amendment No. 1, issued on January 16, 2009, and reinstates the provisions of Secretarial Order No. 3226, issued on January 19, 2001." But the Haaland Order did no such thing. It instead left it to the subordinate DOI bureaus to propose next steps. Plaintiffs cite no case judicially reinstating a Secretarial Order, let alone one commencing a discretionary PEIS and an associated pause on certain agency actions during that PEIS. To do so would require the Court to improperly rewrite the Jewell Order, converting a discretionary PEIS and pause into a mandatory requirements.

The Zinke Order, in turn, terminated the PEIS before it was completed. Simply put, without the PEIS, there was no pause. In fact, the Zinke Order was unnecessary to end the Jewell Order's temporary pause, because BLM at any time could have just ended the concomitant PEIS.[6] The EA and FONSI thus reasonably evaluated the effects of federal coal leases that would not have been issued had the Jewell Order PEIS remained underway with its attendant pause through its expected completion date in early 2019. BLM in its PEIS scoping report affirmed that PEIS schedule. AR 56431. Any different assumption in the EA, including no end date as Plaintiffs urge, would have been pure speculation. Again, the Zinke Order ordered no coal lease issuance or coal production; rather, BLM is to process and render decisions—approvals or rejections—on lease applications and modifications. The EA and FONSI also looked for any significant cumulative effects of the interim leases, and found none existed due to their lack of proximity and other characteristics. NEPA required nothing more than DOI analyzed.

Plaintiffs still operate under the erroneous presumption that DOI was compelled to complete a new or supplemental PEIS because it started one, when even the Jewell Order stated no such thing. An undisputedly voluntary PEIS and

[6] For this reason, and because any pause was inextricably tied to an ongoing discretionary PEIS, the Group Plaintiffs' assertion that a "moratorium" on leasing "would have otherwise remained in place" absent the Zinke Order is unsupported and wrong. *See* ECF No. 203 at 20-21.

pause may end at any time. *See Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 24 (D.D.C. 2017) ("CBD") (case law did not support plaintiffs' assertion "that an agency can convert a voluntary task into a mandatory one simply by embarking on it."). The plaintiff in *CBD* (also a Plaintiff here) argued that "by publicly commencing a review of its NEPA procedures, Interior effectively imposed upon itself a mandate to complete its review." 260 F. Supp. 3d at 23. The court rejected this argument, explaining "absent a preexisting legislative (or otherwise legally binding) duty to complete a task, an agency does not spawn such a duty simply by commencing the task." *Id.*; *see also Northcoast Env't Ctr. v. Glickman*, 136 F.3d 660, 669 (9th Cir. 1998) (preliminary research and development efforts are not an agency action under the APA, or a trigger for NEPA review). Indeed, NEPA reviews of proposed agency actions frequently are withdrawn or never completed. *See id.* ("The bottom line is this: [plaintiffs] identified no authority suggesting that agencies have either a general, freestanding obligation to finish any and all tasks that they undertake, or a specific obligation to complete a review of their NEPA procedures and decide if revisions are warranted, and this Court is not aware of any."). It still is unclear what, if any, activities DOI or BLM will take or policies they will adopt to implement the Haaland Order for federal coal leasing, and such speculation is not justiciable under NEPA or otherwise.

Moreover, regardless of any policy changes DOI ultimately might elect to undertake, no NEPA or other legal requirement exists for DOI to impose a moratorium. In fact, DOI's regulations provide the opposite. 43 C.F.R. § 46.160 ("During the preparation of a program or plan NEPA document, the Responsible Official may undertake any major Federal action in accordance with 40 CFR 1506.1 when that action is within the scope of, and analyzed in, an existing NEPA document supporting the current plan or program, so long as there is adequate NEPA documentation to support the individual action."). The Ninth Circuit's decision in *ONRC Action v. Bureau of Land Mgmt.* is instructive on this point. 150 F.3d 1132 (9th Cir. 1998). BLM there refused to institute a moratorium on logging and other activities pending completion of an EIS for developing an ecosystem management strategy. The court rejected the plaintiffs' NEPA and APA claims, holding that "BLM's failure to implement a moratorium was not a final agency action" even while BLM was preparing the EIS. *Id.* at 1135-37.

Particularly with the Zinke Order vacated, Plaintiffs' claims are now indistinguishable from those the D.C. Circuit unanimously rejected in *Western Organization of Resource Councils v. Zinke,* 892 F.3d 1234 (D.C. Cir. 2018) ("*WORC*"). In that case, like here, the appellants attacked the government's existing federal coal regulations and prior PEIS as "outdated." Affirming the district court, *WORC* unambiguously held that the government had no NEPA

obligation to prepare a new or supplemental PEIS absent a proposed regulatory amendment. The D.C. Circuit concluded:

> The federal action establishing the Federal Coal Management Program was completed in 1979. And the Secretary has not proposed to take any new action respecting the Program. In these circumstances, neither NEPA nor the APA requires the Secretary to update the PEIS for the Federal Coal Management Program. We therefore lack authority to compel the Secretary to do so.

Id. at 1237. DOI's "prior statements" or "own documents" suggesting potential supplementation also did not "create a legal duty" to update its prior PEIS. *Id.* at 1245-46. The D.C. Circuit observed that "[e]ach lease issued under the Program represents a new 'federal action'" subject to NEPA review, and the plaintiffs still could challenge specific coal leasing decisions' compliance with NEPA when those decisions occur. Id. at 1240, 1246. Likewise here, DOI has no duty to revisit the federal coal leasing regulations or prepare a PEIS for that purpose. *See also Wildearth Guardians v. Salazar*, 783 F. Supp. 2d 61, 68 (D.D.C. 2011) ("But Plaintiffs' first claim for relief is less a challenge to a discrete action taken by the BLM than a challenge to the BLM's broader policy decision to phase out coal production regions . . . to conduct its federal coal leasing program pursuant to the leasing-by-application process going forward."). Though this Court previously distinguished *WORC* on the basis that the Zinke Order "provides the agency action

that proved missing from WORC" (AR 133), the Zinke Order no longer exists, and in any event required no new PEIS.

In sum, based on the Court's previous finding that the Zinke Order was a final agency action triggering NEPA review, DOI dutifully undertook that review of the Zinke Order. That DOI did not also undertake a new PEIS for a different, not proposed action establishes no NEPA violation. Further proving the Zinke Order's lack of impacts, DOI is now conducting a programmatic review anyway.

IV. NO FLPMA, MLA, OR TRUST DUTY VIOLATION OCCURRED.

The State Plaintiffs' attempts to manufacture and enforce new "statutory mandates" and APA claims under general policy provisions of FLPMA and the Mineral Leasing Act ("MLA"), and only select parts of them, are also unavailing. *See* ECF No. 201 at 25-28. Even the Group Plaintiffs allege no such claims.

These provisions are inapplicable and mandate no particular action enforceable in this Court. At base, Plaintiffs again improperly request the Court to enact substantive policy around federal coal management. As the Supreme Court held in rejecting similar FLPMA and APA claims, the "prospect of pervasive oversight by the federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA." *SUWA*, 542 U.S. 55, 67 (2004); *see also ONRC*, 150 F.3d at 1139-40 (plaintiff "has not

identified a clear duty under NEPA or FLPMA with which BLM must comply," including under 43 U.S.C. § 1701(a)(8)).

FLPMA is "at its core" a "land use planning statute." *Wyoming v. U.S. Dep't of Interior*, No. 16-cv-0280, 2017 WL 161428, at *6 n.7 (D. Wyo. Jan. 16, 2017). Its hortatory policy provisions provide no enforceable standards. 43 U.S.C. § 1701(a)(8)-(9); *cf.* 43 U.S.C. § 1701(a)(12) (policy that "public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals…"); *ONRC*, 150 F.3d at 1139 ("[FLPMA] Section 1701 provides several policy statements which require due consideration, but do not provide a clear duty to update land management plans or cease actions during the updating process."); *Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.,* No. 2:09-cv-1750-LKK-JFM, 2010 WL 5200944, at *11 (E.D. Cal. Dec. 15, 2010), *aff'd*, 697 F.3d 1192 (9th Cir. 2012) (finding plaintiffs, by "relying on section 1701, a 'Congressional declaration of policy,' . . . are once again attempting to transform a statement of policy into a command regarding the Forest Service's authority to regulate mining claim access on [forest] lands."). Rather, FLPMA's concept of "fair market value" applies only in the context of conveyances of interests in public lands. 43 U.S.C. §§ 1713(d), 1721(b)(2), 1722(a) & (b), 1763(g).

For the MLA's part, the "public interest" term in 30 U.S.C. § 201(a) is unenforceable and inapplicable because it addresses how tracts of federal coal are

divided at the time of leasing, and the Zinke Order did not actually authorize any leases. Indeed, it provides that the Secretary may "divide any lands" eligible for coal leasing into "leasing tracts of such size as he finds appropriate and in the public interest . . . ." 30 U.S.C. § 201(a). Likewise, fair market value is determined in relation to a "bid" for a lease. *Id.*

The State Plaintiffs cite no contrary authority, including no case that has prescribed or applied a FLPMA or MLA "fair market value" or "public interest" standard as State Plaintiffs purport to engineer here for the first time. Notably, Plaintiffs do not challenge the existing BLM federal coal leasing regulations' legality under FLPMA or the MLA, nor have they ever done so previously.

Lastly, the Group Plaintiffs' argument that DOI violated its trust obligation to the Northern Cheyenne Tribe merely reargues its same unavailing NEPA claims under a different heading. Plaintiffs also fail to identify any statute or regulation that creates a specific obligation violated here. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) (Secretary's trust obligations are "established and governed by statute rather than the common law"). Nor do Plaintiffs allege mismanagement of Tribal resources. *See Inter-Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (United States "incurs specific fiduciary duties toward particular Indian tribes when it manages or operates Indian lands or resources"). To be sure, the Jewell Order, and thus the

Zinke Order too, "d[id] not apply to coal leases in tribal or allotted lands."[7] AR 5427.

Plaintiffs' related argument that the Zinke Order was an impermissible "reversal in policy" fares no better. *See* ECF No. 201 at 25; ECF No. 203 at 16. Neither the Jewell Order nor the Zinke Order affirmatively made any policy, findings, or decisions to reverse. They simply began, then ended, a voluntary PEIS process and a coterminous "pause" on processing of some applications during the pendency of the PEIS. Despite Plaintiffs' repeated allegations, nowhere did the Jewell Order deem the PEIS, pause, or any reforms "necessary." *See* ECF No. 201 at 25; ECF No. 203 at 16, 31. By definition, the whole purpose of the PEIS was to consider and make any such findings. And neither the Jewell Order nor Zinke Order yielded regulatory proposals. The existing federal coal regulations remain in place, and it would have been baseless speculation for the EA to assume any particular regulatory changes. Plaintiffs construe the NEPA process exactly backwards by advocating for a PEIS that justifies their already formed opinions on the future of federal coal leasing. Therefore, Plaintiffs' construct and cases regarding actual changes in substantive agency rulemakings or policy do not apply.

[7] The Court should also reject the Group Plaintiffs' footnote reliance on a *subsequently* issued Presidential memorandum that is outside the administrative record and inapplicable to the Zinke Order and its NEPA review. *See* ECF No. 203 at 34 n.8.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment for all Defendants, and dismiss Plaintiffs' complaints.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations pursuant to the Court's July 13, 2021 Order (ECF No. 214), January 5, 2022 Order (ECF No. 218), and Local Rule 7.1 because this brief contains 6,038 words, as computed by Microsoft Word, excluding the parts of the brief exempted under the Local Rule, and has been prepared in 14-point Times New Roman font using Microsoft Word.

/s/ Mark L. Stermitz
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2022, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Mark L. Stermitz
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