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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

RESPONSE AND REPLY BRIEF IN SUPPORT OF PLAINTIFFS' 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 no longer defend their March 29, 2017 decision to open the entire federal mineral estate to coal leasing, nor their analysis of that decision under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370m, that irrationally concluded the decision had virtually no environmental consequences. Left to justify that decision in the government's stead, Defendant-Intervenors National Mining Association ("NMA") and the States of Wyoming and Montana (collectively, "Wyoming") raise a host of legally irrelevant and factually unfounded arguments. None vindicates Federal Defendants' decision.

In response to the Tribe and Conservation Plaintiffs' challenge to the merits of Federal Defendants' unreasonable actions, NMA's and Wyoming's chief argument is that this case is moot. It is not. As explained in the Tribe and Conservation Organizations opposition to NMA's motion to dismiss—and not belabored here—the significant threats to public health, water and air quality, climate, and our public lands caused by the decision to lift the moratorium embodied in Secretarial Order 3348 (the "Zinke Order") did not end with the Zinke Order's purported recission. See Pls.' Joint Opp. to Mot. to Dismiss (ECF No. 227). The Bureau of Land Management ("BLM") continues to process coal lease applications and remains free to issue new coal leases that would have been precluded by the moratorium.

While Federal Defendants' decision to end the coal-leasing moratorium means that BLM may approve pending lease applications for more than a billion tons of coal, Supp_AR-26, they have not studied the lasting impacts of their decision, nor alternatives and mitigation at the program level that could avoid the most harmful impacts of coal leasing on federal public lands. Instead, Federal Defendants prepared an environmental assessment ("EA") that studied just four coal leases BLM already issued, and based on that analysis, concluded that the decision to end the coal-leasing moratorium caused no significant environmental impacts. This analysis violated NEPA, and in turn Federal Defendants' trust obligations to the Northern Cheyenne Tribe.

Not only do NMA and Wyoming fail to muster any legitimate defense of Federal Defendants' EA; they also make no argument regarding the appropriate remedy for Federal Defendants' serious NEPA and tribal trust violations. At this stage—almost five years after Federal Defendants' initial unlawful decision, during which time BLM leased 40 million tons of coal that would have remained in the ground under the moratorium, Supp_AR-18—only vacatur of the challenged decision, which would restore the moratorium that preceded it, can sufficiently remedy Federal Defendants' violations and prevent the future harm that flows from them. Respectfully, the Tribe and Conservation Plaintiffs request that this Court declare that the challenged decision and EA violate NEPA and Federal

Defendants' tribal trust obligations, vacate the challenged decision and EA, and remand to Federal Defendants for analysis consistent with NEPA before resuming coal leasing that would have been foreclosed by the moratorium.

ARGUMENT

I. THE EA VIOLATED NEPA

The unreasonableness of Federal Defendants' NEPA review is unmistakable. Federal Defendants' EA for the decision to lift a moratorium on most new federal coal-leasing, together with its protections for all public lands comprising the federal mineral estate, did not study the direct and indirect impacts of future coal leasing decisions. And in studying the impacts of four leases BLM already issued—comprising approximately 40 million tons of coal—the EA irrationally concluded that the decision would have no appreciable impacts on greenhouse gas emissions or climate change, water resources, wildlife, public lands, or any other resource. Supp_AR-26-33. Federal Defendants reached these conclusions by shirking their NEPA responsibility to consider the full scope of direct and indirect effects caused by their decision to reopen federal public lands to new coal leasing. Additionally, Federal Defendants adopted an artificial and unrealistic no action alternative, which formed an illegitimate baseline against which to compare the effects of the challenged decision. And Federal Defendants failed in the EA to evaluate reasonable alternatives to their March 2017 decision to open federal lands

to leasing without adopting any reforms they previously deemed necessary. NMA and Wyoming offer no legitimate defense for these failures.

For these reasons, Federal Defendants fell well short of their NEPA obligation to take a "hard look" at the environmental consequences of their moratorium 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)). Further, because the record demonstrates that there are, at a minimum, "substantial questions" as to whether Federal Defendants' decision may cause (and has caused) significant environmental effects, the EA is insufficient, and an environmental impact statement ("EIS") is required. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir.1998)).

A. Defendants Do Not Justify the EA's Unreasonably Limited Scope, Which Omitted the Direct and Indirect Effects of Federal Defendants' Decision to Eliminate the Coal-Leasing Moratorium.

NMA and Wyoming fail to justify the EA's arbitrarily narrow scope, which did not meaningfully consider the "environmental harm that could result from lifting the moratorium" as NEPA—and this Court's prior decision—require. Citizens for Clean Energy v. U.S. Dep't of the Interior, 384 F. Supp. 3d 1264, 1279 (D. Mont. 2019) (Slip Op. at ECF No. 141). "[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, "[t]he breadth and scope of the possible projects made possible by the Secretary's [lifting of the moratorium] require 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); see also State of Cal. v. Block, 690 F.2d 753, 762–63 (9th Cir. 1982) (holding that programmatic NEPA review is required where "[f]uture decisions … will be constrained by" the program's design); Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n, 677 F.2d 883, 888 (D.C. Cir. 1981) (requiring comprehensive review of connected actions with "a compounded effect on [the] region"). To match the scope of Federal Defendants' decision to reopen federal public lands to coal leasing, their environmental analysis should have considered the expansive direct and indirect effects of future coal leasing, not just of four leases BLM already issued.[1]

Future coal leasing is a direct effect—or at a minimum an indirect effect—of the decision to end the moratorium embodied by the Jewell Order, and thus must have been included in Federal Defendants' NEPA analysis. 40 C.F.R. § 1502.16

[1] The Tribe and Conservation Plaintiffs also concur with the State Plaintiffs' additional arguments that the EA's scope violated NEPA by omitted consideration of connected, cumulative, and similar actions.

(2019); id. § 1508.9(b) (2019) (requirements for environmental assessments).[2] Whether direct or indirect, Federal Defendants were required to analyze these effects in the EA and, to that analysis raises "substantial questions" regarding the significance of those impacts, prepare an EIS. Blue Mountains Biodiversity Project, 161 F.3d at 1216. Wyoming's primary response to this argument is to deny the broad consequences of Federal Defendants' decision. See Wyoming Br. 24 ("The Bureau's proposed action in the EA was to rescind the Jewell Order early."). But this ignores the practical impact—and indeed the primary goal—of Federal Defendants' challenged action, which was to make "all BLM land … subject to lease applications with terms of twenty years." Citizens for Clean Energy, 384 F. Supp. 3d at 1280. Absent Federal Defendants' affirmative decision to end the moratorium, such lands would be protected against future leasing. Id. at 1279; see also 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

[2] "Indirect and direct effects are both 'caused by the action,' but direct effects occur 'at the same time and place' as the proposed project, while indirect effects occur 'later in time or [are] farther removed in distance.'" Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723, 737 (9th Cir. 2020) (quoting 40 C.F.R. § 1508.8(a), (b)).

to go forward with the [development of a gas plant]"). Thus, Federal Defendants were required to evaluate the impacts of future leasing decisions that are allowed by the challenged decision.

The EA unlawfully sidestepped consideration of the direct and indirect future effects of reopening federal public lands to coal leasing. 40 C.F.R. §§ 1502.16, 1508.9(b) (2019). Instead, BLM evaluated the environmental effects only of four leases already issued, and even as to those leases, the EA examined the impacts 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, 18.

The EA's oversight was significant. The EA disclosed that BLM had before it pending applications to lease more than one billion tons of coal. Supp_AR-26. BLM received more than 47,900 public comments on the draft EA expressing concern about the direct effects of the decision to open public land to coal leasing, including harm to public lands, air, water, climate, and cultural resources. Supp_AR-45, 48-66.[3] Among other things, the record includes technical analyses regarding the necessity of reducing greenhouse gas emissions from coal mining and combustion to meet national and international climate commitments,

[3] The Conservation Plaintiffs, alone, submitted an 80-page comment letter, together with 1,400 pages of expert reports and other technical information documenting these impacts. Supp_AR-17251-18740. The Northern Cheyenne Tribe submitted another 500 pages of analysis. Supp_AR-18741-19239.

Supp_AR-17293-99, 17658-71, harm from coal leasing to sensitive wildlife species, Supp_AR-17283-85, and significant socioeconomic consequences, Supp_AR-17490-546. While NMA and Wyoming do not deny the impacts from coal leasing, the EA did not grapple with any of this information.

Wyoming's claim that it would be "impractical" for Federal Defendants to evaluate these future impacts is contrary to NEPA. See Wyoming Br. 25; see also id. at 18 (claiming "the Bureau has no meaningful way to evaluate future coal leasing that does not yet exist"). Even where "evaluating the environmental effects of programmatic actions is difficult … such evaluation appears to be envisioned by NEPA and by Ninth Circuit case law." Citizens for Better Forestry v. U.S. Dep't of Agric., 481 F. Supp. 2d 1059, 1089 (N.D. Cal. 2007). "If it is reasonably possible to analyze the environmental consequences in an EIS for [a programmatic decision], the agency is required to perform that analysis." Kern, 284 F.3d at 1072. Such programmatic review "may be more general than a subsequent EA analysis, and it may turn out that a particular environmental consequence must be analyzed in both the EIS and the EA. But an earlier EIS analysis will not have been wasted effort, for it will guide the EA analysis and, to the extent appropriate, permit 'tiering' by the EA to the EIS in order to avoid wasteful duplication." Id.; see also Save Our Ecosystems v. Clark, 747 F.2d 1240, 1246 n.9 (9th Cir.1984) ("Reasonable forecasting and speculation is ... implicit in NEPA, and we must

reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry.") (quotation omitted). With respect to greenhouse gas emissions caused by future coal leasing, specifically, "[e]ven if the extent of the emissions … is not foreseeable, the nature of the effect is. This is sufficient to require estimation or explanation under NEPA." Ctr. for Biological Diversity, 982 F.3d at 738 (citing Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 549 (8th Cir. 2003)).[4]

Wyoming's argument also ignores NEPA's purposes. NEPA requires agencies to perform "coherent and comprehensive up-front environmental analysis" precisely to avoid the situation present here, 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). As the Ninth Circuit Court of Appeals explained, the "critical decision" to commit resources at a programmatic level is "irreversible and irretrievable," and the impacts of that decision "must therefore be carefully scrutinized now and not when specific development proposals are made." State of Cal. v. Block, 690 F.2d

[4] Moreover, BLM did not need to rely on speculation about reasonably foreseeable leasing activity; the EA identified pending lease applications and may forecast any future leasing. Supp_AR-18-19, 26.

at 763; see also 40 C.F.R. § 1502.4(b) (2019) (programmatic review "should be timed to coincide with meaningful points in agency planning and decisionmaking"). Indeed, had Federal Defendants conducted an environmental analysis that properly disclosed the full scope of the coal program's consequences for the climate, air, water, and public health, they may not have decided to lift the moratorium without first adopting mitigation and reforms to alleviate those harmful impacts. Now, Federal Defendants no longer defend their analysis or the decision to end the moratorium, suggesting they may well "regret" that decision. Blue Mountains Biodiversity Project, 161 F.3d at 1216. But having made the decision to end the moratorium without analyzing the full scope of its environmental impacts or alternatives, they lost the opportunity for such analysis to inform their decisions about future coal leasing. Because the EA does not evaluate the full direct and indirect effects of reopening federal public lands to coal leasing, it violates NEPA. 40 C.F.R. §§ 1502.16, 1508.9(b) (2019).

In addition, because of its unlawfully constrained scope, the EA failed to "supply a 'convincing statement of reasons'" to explain why the impacts of Federal Defendants' decision to end the coal-leasing moratorium were insignificant such that an EIS was not required. Citizens for Clean Energy, 384 F. Supp. 3d at 1282 (quoting Blue Mountains Biodiversity Project, 161 F.3d at 1212). For this reason, too, the EA violates NEPA.

B. Defendants Do Not Justify the EA's Illegitimate Baseline of "No Action."

NMA and Wyoming also do not justify the EA's arbitrary "no action" alternative, which formed an illegitimate basis for the EA's conclusion that the challenged decision to re-open federal public lands to coal leasing carried no significant environmental impacts. See 40 C.F.R. § 1502.14(d) (2019) (requirement to study no action alternative); id. § 1508.9(b) (2019) (requirements for EAs). In developing the no action alternative, Federal Defendants unreasonably assumed that, absent their affirmative decision to resume coal leasing in 2017, the coal-leasing moratorium would have been lifted or expired in 2019 with no changes to the coal-leasing program. Supp_AR-16 (Final EA); see also Supp_AR-14 (describing effect of Zinke Order as "[t]erminating the pause 24 months earlier than initially planned"). This no action alternative was unreasonable, and as a result, formed an invalid baseline against which Federal Defendants evaluated the impacts of their 2017 decision. See Ctr. for Biological Diversity v. U.S. Dep't of Interior, 623 F.3d 633, 642 (9th Cir. 2010) (explaining that baseline conditions described in the "no action" alternative reflect the "status quo" against which the impacts of the proposed action and its alternatives are to be measured); Great Basin Res. Watch v. Bureau of Land Mgmt., 844 F.3d 1095, 1101 (9th Cir. 2016) ("'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.'") (quoting Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988)).

Contrary to Wyoming's claim, the EA's no action alternative does not "rel[y] on an accurate understanding of the status quo." Wyoming Br. 21. "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). NMA and Wyoming do not contest that the "present course of action" as of March 2017, when Federal Defendants made the challenged decision to resume coal leasing, was the Jewell Order's moratorium on most new leasing. Supp_AR-4439. Under the Jewell Order, "no leasing decisions [could] be made until the moratorium is lifted." Id. While Wyoming is correct that the moratorium was not intended to be indefinite, Wyoming Br. 21, Wyoming is wrong in suggesting the moratorium would simply have ended in 2019 if Federal Defendants had taken "no action" on the moratorium, as required to justify the EA's analysis of this alternative. The moratorium contained no expiration date and its protections were to "remain in effect until its provisions are amended, superseded, or revoked, whichever occurs first." Supp_AR-5428. In other words, the moratorium was to remain in place until the Secretary ended it—the very action embodied by the Zinke Order. By

assuming for the no action alternative that the moratorium would end in 2019, the EA's baseline 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).[5]

NMA and Wyoming also fail to defend the EA's arbitrary and unreasonable assumption that coal leasing would simply resume under conditions 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 pause would have been lifted upon the issuance of the [Programmatic EIS ("PEIS") Record of Decision], and leasing activities for non-exempt leases would have resumed at some level in March of 2019"). Indeed, the entire purpose of the moratorium was to "allow future leasing decisions to benefit from the recommendations that result from the PEIS." Supp_AR-5426 (Jewell Order). As the Jewell Order explained, "[c]ontinuing to conduct lease sales or approve lease modifications during th[e] programmatic review risks locking in for decades the future development of large quantities of coal under current rates and terms that the

[5] Further, Wyoming's claim that the baseline used "the best available information on when the PEIS was expected to be completed," Wyoming Br. 22, overlooks Federal Defendants' acknowledgements that "it is highly unlikely that the PEIS could have been completed in the allotted timeframe" and thus, "a greater number of leases [we]re likely to be affected" by the Jewell Order than the four leases evaluated in the baseline. Supp_AR-4436-37, 4439.

PEIS may ultimately determine to be less than optimal." Id. Thus, if the EA's baseline had truly reflected "what would occur had Secretary Jewell been allowed to complete the PEIS on her own terms," as Wyoming claims, Wyoming Br. 22, the EA's no action alternative would have encompassed regulatory reforms to "where, when, and under what terms and conditions" coal leasing may occur, Supp_AR-5425.

The result of the EA's approach was to obscure the significant environmental consequences of lifting the moratorium. For example, 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. Issuing these leases would single-handedly exceed the entire U.S. carbon budget for limiting climate warming to 1.5°C. See Supp_AR-17377, 18372-73, 18394.

Although these climate-harming emissions were allowed by lifting the moratorium but would be prevented by continuation of the Jewell Order, the EA irrationally concluded that "the total quantity of [greenhouse gas] emissions would be the same under both alternatives." Id. Adding to this counter-intuitive conclusion regarding greenhouse gas emissions, BLM's unsupported assumption

that without the Zinke Order it would have resumed the federal coal-leasing program entirely unchanged within two years led to the EA's unreasonable conclusions that reopening federal public lands to new coal leasing would cause no "appreciable market effects impacting [coal] usage or emissions over any period," Supp_AR-32; no socioeconomic impacts, id.; and no impact on water resources, Supp_AR-33.

NEPA does not permit Federal Defendants to adopt an unrealistic no action alternative that obscures the environmental consequences of a proposed action. For example, in Center for Biological Diversity, the Ninth Circuit Court of Appeals reviewed BLM's NEPA analysis for a proposed transfer of land on which mining was proposed from public to private ownership. 623 F.3d at 642-43. BLM assumed that the impacts of the no action alternative (public ownership) and the proposed action (private ownership) would be similar because mining could occur under either alternative. Id. But the court held that BLM arbitrarily failed to recognize that "the manner and extent of that mining is likely to differ" if the lands are transferred to private ownership. Id. at 643. Similarly, here, "the manner and extent" of coal leasing that might be have been authorized if the Jewell Order had remained in effect would almost certainly differ from the coal leasing authorized by the Zinke Order. Id. Because the no action baseline did not reflect the coal program reforms that would have resulted from "continuing with the present

course of action"—i.e., the Jewell Order—it was arbitrary. Forty Questions, 46 Fed. Reg. at 18,027; 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)).

In addressing this issue, NMA and Wyoming do not attempt to justify the "[u]nexplained inconsistency" between Federal Defendants' position in the EA that the moratorium would have ended in 2019 with no leasing reforms and their prior position announced in the Jewell Order and affirmed in the January 2017 Scoping Report that reforms to mitigate environmental harm from coal leasing were necessary before the moratorium would be lifted. 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, 577 U.S. 1234 (2016). In the Secretary's words in January 2016, a moratorium was essential to avoid "locking in" the harmful impacts of new coal leasing that could be avoided through program reforms. Supp_AR-5426. 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).

Federal Defendants' prior commitment to coal-leasing reforms was not theoretical. In a thorough scoping report issued in January 2017—just two months before Federal Defendants' decision to eliminate the moratorium and abandon reform efforts—BLM identified specific measures that could lessen the coal program's climate impacts and to ensure a "fair return to Americans for the sale of their public coal resources," as Federal Defendants deemed necessary. AR-1604 (2017 Scoping Report). Most of the potential reforms BLM identified would have reduced the level of federal coal leasing and production. AR-1601, 1616-17 (stating that increasing royalty rates would decrease production); AR-1620 (adopting carbon budget to guide leasing decisions would result in fewer leases); AR-1621-22 (evaluating no-leasing option). Federal Defendants arbitrarily failed to provide a reasoned explanation for their contrary position in the EA that continuation of the Jewell Order—i.e., the no action alternative—would have resulted in the resumption of coal leasing "under outdated rules and processes"

Federal Defendants previously deemed unacceptable. Supp_AR-17429; see Organized Vill. of Kake, 795 F.3d at 966.[6]

Federal Defendants' implicit assumption that leasing under the Jewell Order would proceed without any change from historical practices is not "based on accurate information and defensible reasoning." See Great Basin Res. Watch, 844 F.3d. at 1101 (quoting Or. Nat. Desert Ass'n, 840 F.3d at 570). This standard did not require Federal Defendants to identify with precision the likely outcome of continuing with the Jewell Order. To the extent there was uncertainty regarding the manner and extent of leasing under the Jewell Order status quo, Federal Defendants could have evaluated multiple no action alternatives to encompass a range of plausible future conditions. See Indigenous Env't Network v. U.S. Dep't of State, 347 F. Supp. 3d 561, 575 (D. Mont.), order amended and supplemented, 369 F. Supp. 3d 1045 (D. Mont. 2018), and appeal dismissed and remanded sub nom. Indigenous Env't Network v. U.S. Dep't of State, No. 18-36068, 2019 WL 2542756 (9th Cir. June 6, 2019) ("Uncertainty regarding what would happen in the

[6] A reasoned explanation for Federal Defendants' changed position "is especially crucial where, as here, the agency has varied so dramatically in its approach over the past year." Friends of the Earth v. Haaland, No. CV 21-2317 (RC), 2022 WL 254526, at *17 (D.D.C. Jan. 27, 2022). As reflected in the recent Haaland Order, Federal Defendants' new policy requires BLM to "reverse, amend, or update" its approach to coal leasing to ensure consistency with federal climate policy, ECF No. 212-1, and they have abandoned their defense of the EA and the challenged decision.

absence of [construction of the proposed Keystone pipeline] supported the discussion of three no action alternatives in the [agency's NEPA analysis]."). But they could not adopt, as they did here, a single no action alternative that reflected the least likely of potential future conditions.

Because the EA's baseline of "no action" was not based on accurate information regarding the status quo that preceded Federal Defendants' decision to end the coal-leasing moratorium—that is, the reasonably expected conditions had the Jewell Order remained in place—the EA failed to adequately analyze or disclose the consequences of that decision. See Or. Nat. Desert Ass'n, 840 F.3d at 571 (finding that, "with baseline conditions inadequately established, the public was not able to tailor its comments to address concerns regarding the potential [impacts of the challenged decision]. Nor was the BLM's explanation of the [impacts of its decision] adequately informed."). The EA's arbitrary baseline thus violated NEPA.

C. NMA and Wyoming Do Not Justify the EA's Arbitrarily Constrained Alternatives Analysis

The EA also violated NEPA's requirement to consider a reasonable range of alternatives to the proposed action that differed in whether, how, and to what extent future leasing would occur. 42 U.S.C. § 4332(2)(C); see 40 C.F.R. § 1508.9(b) (2019) (requirements for environmental assessments). The EA evaluated only one alternative to the action BLM already undertook when it lifted

the moratorium, and that purported no action alternative "hardly differ[ed] from the option [the agency] ultimately adopted." Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1218 (9th Cir. 2008) (invalidating EA based on flawed alternatives analysis). The EA concluded 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. Because the EA's "alternatives were not varied enough to allow for a real, informed choice," it violated NEPA. Friends of Yosemite Valley, 520 F.3d at 1039; see also 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").

Contrary to Wyoming's suggestion that an EA need not thoroughly consider alternatives, Wyoming Br. 27-28, "'NEPA requires that alternatives ... be given full and meaningful consideration,' whether the agency prepares an EA or an EIS." Ctr. for Biological Diversity, 538 F.3d at 1217 (quoting Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1246, 1245 (9th Cir. 2005)) (alteration in original); N. Idaho Cmty. Action Network v. U.S. Dep't of Transp., 545 F.3d 1147, 1153 (9th Cir. 2008). Even if less rigor is required of an EA, "[a]n EA must discuss those alternatives necessary to permit a reasoned choice." Mont. Wilderness Ass'n, 310 F. Supp. 2d at 1146 (quotation omitted). The challenged EA did not meet this standard.

Federal Defendants' constrained alternatives analysis is not justified by BLM's statutory obligations or President Trump's Executive Order directing the Interior Secretary to lift the moratorium. See Wyoming Br. 26-27 (arguing the range of alternatives was reasonable "because the proposed action was consistent with [BLM's] obligation under the [Mineral Leasing Act] to make federal coal deposits subject to disposition" and Executive Order mandate to commence federal coal leasing); see Supp_AR-11 (EA purpose and need statement). Wyoming's contrary position is premised first on an erroneous interpretation of BLM's statutory coal-leasing obligations. "With specific regard to coal development, the multiple use mandate allows BLM to 'eliminate' coal deposits from eligibility for

leasing. These coal deposits may be removed 'to protect other resource values and land uses that are locally, regionally, or nationally important or unique.'" W. Org. of Res. Councils, 2018 WL 1475470, at *7 (quoting 43 C.F.R. § 3420.1–4(e)(3)).[7] Second, Wyoming ignores the discretion BLM retained to modify leasing practices even under the Trump Executive Order, which directed BLM to "commence Federal coal leasing activities consistent with all applicable laws and regulations." Supp_AR-4414 (emphasis added).

Further, even if BLM's authority to continue the coal-leasing moratorium indefinitely was somehow constrained, this would not eliminate the agency's obligation to consider reasonable alternatives to implement its authority—affirmed by statute and unaffected by the Executive Order—to limit where, how, and when leasing may occur. See Pls.' Opening Br. 30-31 (ECF No. 203) (explaining BLM's statutory obligation to reduce environmental harm from coal leasing); Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 866 (9th Cir. 2004)

[7] The Federal Coal Leasing Amendments Act ("FCLAA") provides that the Secretary "is authorized" to identify tracts for leasing and thereafter "shall, in his discretion … from time to time, offer such lands for leasing …." 30 U.S.C. § 201; see also WildEarth Guardians v. Salazar, 859 F. Supp. 2d 83, 87 (D.D.C. 2012) ("Under the [FCLAA], the Secretary is permitted to lease public lands for coal mining operations after conducting a competitive bidding process" (emphasis added)). Further, the Secretary has discretion to reject lease applications on the grounds that "leasing of the lands covered by the application, for environmental or other sufficient reasons, would be contrary to the public interest." 43 C.F.R. § 3425.1-8(a)(3).

("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."). As the D.C. District Court recently explained in rejecting the federal government's NEPA analysis for a large oil and gas lease sale in the Gulf of Mexico, an agency is not obligated to gather environmental information if it has no statutory authority to act on that information, but "the relevant question is … what factors can the agency consider when regulating in its proper sphere?" Friends of the Earth, 2022 WL 254526, at *13 (citations and quotations omitted); see also Ctr. for Biological Diversity, 982 F.3d at 740 (holding that where an agency "has the statutory authority to act" on information about environmental consequences, it must include this information in its alternatives analysis to enable it to make an informed decision). Thus, even if Wyoming were correct that Federal Defendants could only examine alternatives that allowed for some coal leasing, that would not absolve BLM of its obligation to consider alternatives to mitigate the impacts of such leasing.[8]

[8] Further, the Executive Order provided that it "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.

In sum, Wyoming is wrong that the EA's alternatives analysis met NEPA's requirement to foster informed decisionmaking. Wyoming Br. 28-29. By evaluating only one outcome—termination of the coal-leasing moratorium without implementing any reforms BLM previously deemed necessary—the EA's alternatives analysis failed to present a reasonable range of options and violated NEPA. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.14, 1508.9(b) (2019).

D. NMA's Continued Insistence that this Court Lacks Jurisdiction to Enforce NEPA in this Case is Meritless.

NMA persists in its well-worn argument, already rejected by this Court, that Plaintiffs impermissibly seek to force Federal Defendants to conduct a programmatic review of the federal coal-leasing program divorced from any final action subject to this Court's jurisdiction. As this Court previously held, Federal Defendants' decision to end the coal-leasing moratorium was a final agency action under the Administrative Procedure Act and a major federal action under NEPA necessitating environmental review. Citizens for Clean Energy, 384 F. Supp. 3d at 1279. For the reasons explained in Plaintiffs' opposition to NMA's motion to dismiss, and not repeated here, that action continues to have practical and legal consequences. ECF No. 227, at 6-11; see also Order Denying Mot. for Stay 5 (ECF No. 206) (recognizing that, even after the Haaland Order, "BLM remains capable of issuing coal leases—as it has for more than 4,000 acres of public land since the Zinke Order's publication" and "[l]ease applications remain pending for

thousands of acres encompassing at least one billion tons of coal"). Through this litigation, the Tribe and Conservation Plaintiffs properly seek NEPA compliance for the decision to lift the moratorium. They do not ask this Court to order Federal Defendants to resurrect their prior PEIS process. NMA's meritless attempts to evade judicial review of Federal Defendants' moratorium decision and EA should be rejected.

II. IN VIOLATING NEPA, FEDERAL DEFENDANTS ALSO VIOLATED THEIR TRUST OBLIGATION TO THE NORTHERN CHEYENNE TRIBE

By reopening coal leasing on federal public lands—including lands near the Northern Cheyenne Reservation—in violation of NEPA, Federal Defendants also violated their "minimum fiduciary duty" to the Northern Cheyenne Tribe. Pit River Tribe, 469 F.3d at 788. While failing to comply with NEPA, alone, violates Federal Defendants' trust obligations, this violation is compounded by Federal Defendants' repeated failures to respond to the Northern Cheyenne Tribe's consultation requests, let alone consult with other affected tribes, before lifting the moratorium or subsequently finalizing the EA. Supp_AR-39 (EA's claim that Tribal consultation was unnecessary).

NMA's assertions that the Northern Cheyenne Tribe's trust claim requires a specific statutory trust obligation or mismanagement of Tribal resources, NMA Br. 23, are definitively contrary to controlling precedent. In Pit River Tribe, the Ninth

Circuit held that procedural violations of NEPA that adversely impact a Tribe's interest in off-reservation resources necessarily constitute violations of the United States' fiduciary duty to the Tribe: "Because we conclude that the agencies violated both NEPA and the [National Historic Preservation Act] during the leasing and approval process, it follows that the agencies violated their minimum fiduciary duty to the Pit River Tribe when they violated the statutes." 469 F.3d at 788. Moreover, this District has twice expressly recognized the Secretary of the Interior's fiduciary responsibility to the Northern Cheyenne Tribe when regulating off-reservation coal on Federal lands. See N. Cheyenne Tribe v. Lujan, 804 F. Supp. 1281, 1285 (D. Mont. 1991); N. Cheyenne Tribe v. Hodel, Case No. CV 82-116-BLG, 12 Indian Law Rep. 3065, 3070 (D. Mont. May 28, 1985) (attached to the Tribe and Conservation Organizations' July 27, 2018 Opening Brief at ECF No. 118-1) ("The trust responsibility applies not only to on-reservation dealings with tribal property and funds but also extends to other federal action outside the reservation which impacts a tribe."). Here, Federal Defendants' NEPA violations breached that fiduciary duty.

In sum, NMA and Wyoming offer no legitimate defense to the Northern Cheyenne Tribe's trust claim. For this reason, too, the challenged decision and EA should be vacated.

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

As the Tribe and Conservation Plaintiffs argued in their opening brief, this Court should set aside the challenged EA and associated decision to end the coal-leasing moratorium to remedy Federal Defendants' serious NEPA and trust violations. 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."); see Pls.' Opening Br. 35-40 (ECF No. 203). Although the decision to reopen federal public lands to coal leasing continues to threaten significant harm to Plaintiffs' interests and the environment, Federal Defendants no longer defend these actions. Indeed, Federal Defendants have signaled that they are reviewing the coal-leasing policy embodied by the challenged decision, though the review is proceeding slowly and Federal Defendants have not committed to completing the review in any particular timeframe. See Fed. Defs.' Mem. in Supp. of Cross-Mot. for Summ. J. 3-4 (ECF No. 220); Joint Status Report 3 (ECF No. 217). In the meantime, vacating Federal Defendants' unlawful decision and EA and reinstating the moratorium is crucial to avoid "locking in for decades the future development of

large quantities of coal under current rates and terms that the [coal leasing review] may ultimately determine to be less than optimal." Supp_AR-5426.[9]

Critically, NMA and Wyoming (and Federal Defendants, who have not responded to Plaintiffs' summary judgment briefs at all) have waived argument regarding the appropriate remedy in this case by failing to address remedy in their principal briefs. See Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001) (affirming that "issues which are not specifically and distinctly argued and raised in a party's opening brief are waived") (citation omitted). In particular, NMA and Wyoming have not argued that this case presents the sort of "limited circumstances" that would justify a decision not to issue the normal

[9] Although vacatur of the Zinke Order is both necessary and sufficient to redress injury to Plaintiffs caused by Federal Defendants' NEPA violation, should this Court find vacatur alone does not remedy that violation, an injunction would be appropriate. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156-57 (2010) (affirming four factors for obtaining a permanent injunction). The Tribe and Conservation Plaintiffs demonstrated the harm they would experience from the issuance of new coal leases without programmatic review that could identify reforms to the coal-leasing program, and that harm cannot be remedied by money damages. See Standing Declarations (ECF Nos. 117-1 through 117-6) (documenting cultural, environmental, and aesthetic harm). Further, the moratorium's exceptions for emergency leasing prevents any potential harm to Defendants. See Supp_AR-5427. And the public interest weighs heavily in favor of reinstating the moratorium, as Federal Defendants previously recognized when adopting the moratorium in the first instance: "Given the serious concerns raised about the federal coal program and the large reserves of undeveloped coal already under lease to coal companies, it would not be responsible to continue to issue new leases under outdated rules and processes." AR 15983 (BLM Q&A document).

remedy of vacatur. Pollinator Stewardship Council v. U.S. Env't. Prot. Agency, 806 F.3d 520, 532 (9th Cir. 2015) (quotation omitted).

Because vacating the challenged decision and restoring the status quo that preceded that decision—i.e., the federal coal-leasing moratorium—would sufficiently redress Plaintiffs' injuries, it is an appropriate remedy for Federal Defendants' legal violations. Monsanto, 561 U.S. at 165-66; see also Pls.' Opening Br. 38-39 & n.10 (ECF No. 203) (discussing the effect of vacatur).

CONCLUSION

For the foregoing reasons, Federal Defendants' EA and associated decision to rescind the federal coal-leasing moratorium violated NEPA and Federal Defendants' trust obligations to the Northern Cheyenne Tribe. Accordingly, the EA and challenged decision should be set aside, thereby reinstating the coal-leasing moratorium, as Federal Defendants take the requisite "hard look" at the consequences of their decision. Robertson, 490 U.S. at 350.

Respectfully submitted this 24th day of February, 2022.

/s/ Jenny K. Harbine

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains fewer than 8,000 words, in compliance with the Court's October 19, 2020 Scheduling Order (ECF No. 193).

/s Jenny K. Harbine
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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.

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