ROGER SULLIVAN
DUSTIN LEFTRIDGE
McGarvey, Heberling, Sullivan & Lacey, P.C.
345 1st Ave. E.
Kalispell, Montana 59901-5341
(406) 752-5566
RSullivan@McGarveyLaw.com

XAVIER BECERRA
Attorney General of California
DAVID ZONANA
Supervising Deputy Attorney General
GEORGE TORGUN (*pro hac vice*)
CA Bar No. 222085
ELIZABETH B. RUMSEY (*pro hac vice*)
CA Bar No. 257908
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
Telephone: (510) 879-1002
E-mail: George.Torgun@doj.ca.gov

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

STATE OF CALIFORNIA; STATE OF NEW MEXICO; STATE OF NEW YORK; and **STATE OF WASHINGTON,** Plaintiffs, **v.** **RYAN ZINKE,** in his official capacity as Secretary of the Interior; **UNITED STATES BUREAU OF LAND MANAGEMENT**; and **UNITED STATES DEPARTMENT OF THE INTERIOR,** Defendants.	Case No. CV 17-30-BMM [Lead] Consolidated with: Case No. CV 17-42-BMM **STATE PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Federal Regulations

TABLE OF AUTHORITIES
(continued)

INTRODUCTION

In this action, the States of California, New Mexico, New York, and Washington ("State Plaintiffs") challenge a decision by Defendants Ryan Zinke, in his capacity as Secretary of the Interior, the United States Bureau of Land Management ("BLM"), and the United States Department of the Interior ("DOI") (collectively, "Defendants") to restart the coal leasing program on federal lands ("federal coal program" or "program") while terminating a much needed environmental review of the program, in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. State Plaintiffs also challenge Defendants' decision to restart the program without considering whether the program is in the public interest or if it will provide fair market value to the public, in violation of the Mineral Leasing Act, 30 U.S.C. § 181 *et seq*., and the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq*.

In January 2016, then-Secretary of the Interior Sally Jewell issued a Secretarial Order commencing a process to prepare a new programmatic environmental impact statement ("programmatic EIS" or "PEIS") that would identify and assess potential reforms to the federal coal program, which had not been reevaluated in over three decades. Secretary Jewell also placed a moratorium on new coal leases under the program until the review was complete to avoid locking in the future development of large quantities of coal on unfavorable terms. A year later, Defendants released a comprehensive scoping report which determined that an updated review of the program was "warranted" to bring Defendants into compliance with their statutory obligations to fully consider the environmental impacts of their coal leasing activities under NEPA, including climate change, and to secure a fair return from the sale of public resources as required by the Mineral Leasing Act and the Federal Land Policy and Management Act.

Yet with no justification other than an objection to the time and cost of complying with the law, Secretary Zinke issued Secretarial Order 3348 on March 29, 2017, which terminated this review and resumed the federal coal program. Defendants' failure to consider the environmental impacts of restarting coal leasing, or whether the program is in the public interest or providing fair market value to the public before taking this action, violated the express requirements of NEPA, the Mineral Leasing Act, and the Federal Land Policy and Management Act, and was arbitrary and capricious in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*. Accordingly, State Plaintiffs seek a declaration that Defendants' issuance of Secretarial Order 3348 violated NEPA, the Mineral Leasing Act, the Federal Land Policy and Management Act, and the APA, and also seek an injunction requiring Defendants to vacate and set aside the Order and resume the moratorium on new federal coal leases unless and until Defendants comply with applicable law.

STATUTORY BACKGROUND

I. NATIONAL ENVIRONMENTAL POLICY ACT.

NEPA is the "basic national charter for the protection of the environment." 40 C.F.R. § 1500.1. The fundamental purposes of NEPA are to ensure that "environmental information is available to public officials and citizens before decisions are made and before actions are taken," and that "public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id*. § 1500.1(b)-(c).

To achieve these purposes, NEPA requires the preparation of a detailed environmental impact statement ("EIS") for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In addition to review of site-specific actions, "major Federal action" is defined by NEPA to include "new and continuing activities," such as "new or revised agency rules, regulations, plans, policies, or procedures," and "official documents prepared

or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based." 40 C.F.R. § 1508.18; *see also id*. § 1502.4(b) ("Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs ... . Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.").

An EIS must provide a "full and fair discussion of significant environmental impacts," 40 C.F.R. § 1502.1, and analyze the direct, indirect, and cumulative impacts of the agency's action. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1508.7, 1508.8. An agency cannot rest on the conclusions made in an EIS, but maintains a continuing obligation to take a "hard look at the environmental effects of its planned action, even after a proposal has received initial approval." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989). Specifically, NEPA requires an agency to supplement a past EIS when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). As the U.S. Supreme Court has stated, "[i]f there remains 'major Federal action' to occur, and if the new information is sufficient to show that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh*, 490 U.S. at 372-74 (quoting 42 U.S.C. § 4332(2)(C)). The Council on Environmental Quality ("CEQ"), which was created to administer NEPA and which promulgated its implementing regulations, has stated that "[a]s a rule of thumb ... if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement." 46 Fed. Reg. 18,026, 18,036 (Mar. 23, 1981)

("Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations").

II. MINERAL LEASING ACT.

The Mineral Leasing Act, 30 U.S.C. § 181 *et seq*., authorizes and governs the leasing of public lands for the production of coal and other minerals. Pursuant to the Mineral Leasing Act, the Secretary of the Interior is authorized to lease coal on public lands "as he finds appropriate and in the public interest," provided that every sale is made by competitive bid and provides the public with fair market value. *See* 30 U.S.C. § 201(a)(1). The Mineral Leasing Act further requires that the Secretary only lease coal in a manner that balances "long-term benefits to the public against short-term benefits." *Id.* § 201(a)(3). Defendant BLM is the federal agency within DOI tasked with administering the federal coal program.

III. FEDERAL LAND POLICY AND MANAGEMENT ACT.

The Federal Land Policy and Management Act establishes the broad framework under which BLM manages public lands for multiple uses in a way "that will best meet the present and future needs of the American people." 43 U.S.C. § 1702(c). Under this statute, Congress declared that it is the policy of the United States that "public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." *Id*. § 1701(a)(8). The Federal Land Policy and Management Act further requires that BLM "receive fair market value of the use of the public lands and their resources." *Id*. § 1701(a)(9).

FACTUAL AND PROCEDURAL BACKGROUND

I. THE FEDERAL GOVERNMENT'S COAL PROGRAM IMPACTS PUBLIC LANDS IN A DOZEN STATES.

BLM manages coal resources on 570 million acres of public lands across the United States where the mineral estate is owned by the federal government.

Federal Defendants' Answer to the Complaint in CV 17-42-BMM, Dkt. No. 36[1] ("Answer") ¶ 34; AR 3[2]; AR 1477 (BLM, "Federal Coal Program: Programmatic Environmental Impact Statement – Scoping Report (Jan. 2017) ("Scoping Report") at ES-1). In fiscal year 2016, BLM administered 303 coal leases encompassing 467,186 acres in 12 states. Answer ¶ 34. Federal coal from the Powder River Basin in Montana and Wyoming accounts for over 85 percent of this production. Answer ¶ 34; AR 1477 (Scoping Report at ES-1). In fiscal year 2016, there were twelve federal coal leases in New Mexico encompassing 26,072 acres, approximately 5.5% of the total federal acres leased nationwide. Answer ¶ 35. In addition, BLM has stated that it has dozens of pending applications for coal leases and lease modifications, at least 30 of which were affected by the moratorium. AR 25, 92-94, 15994-96.

The majority of federal coal is used to generate electricity domestically, accounting for an estimated 17 percent of the Nation's electricity-generating capacity. Answer ¶ 36; AR 1477 (Scoping Report at ES-1). Coal is also used for other processes, including making steel (i.e., metallurgical coal). AR 1550 (Scoping Report at 5-12). In 2015, about 8 percent of all U.S. coal was exported. Answer ¶ 36.

II. BLM'S ENVIRONMENTAL REVIEW OF THE FEDERAL COAL PROGRAM IS DECADES OLD.

BLM manages federal coal pursuant to regulations and a programmatic EIS that were originally adopted 39 years ago, at a time when the threat of climate change was not fully understood and market conditions, infrastructure development, scientific understanding, and national priorities were dramatically different. The first PEIS for the federal coal program, adopted in 1975, was found to be unlawful

[1] All citations to the docket are for Case No. 17-cv-42-BMM, unless otherwise noted.

[2] The administrative record in this matter is cited as "AR [page number]," excluding leading zeros.

because it failed to adequately discuss, or allow comment on, a new coal leasing system and did not sufficiently consider alternatives. *See Nat. Res. Def. Council v. Hughes*, 437 F. Supp. 981, 989-91 (D.D.C. 1977). Separately, the U.S. Supreme Court recognized, in a case challenging the lack of NEPA review for the development of coal in the Northern Great Plains Region, that the federal coal program required a national-level programmatic EIS because it "is a coherent plan of national scope" with "significant environmental consequences." *See Kleppe v. Sierra Club*, 427 U.S. 390, 400 (1976). Around the same time, Congress passed the Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083 (1976), which updated sections of the Mineral Leasing Act related to fair market value and speculation. AR 1540 (Scoping Report at 5-2).

Citing "significant changes in statutory and Presidential policy and in available data," Defendants prepared a new PEIS in 1979. AR 87416 (1979 PEIS at 1-13); *see* 44 Fed. Reg. 42,584 (July 19, 1979). The 1979 PEIS analyzed the environmental impacts of seven alternatives for the federal coal program, including the preferred alternative that was ultimately chosen and largely remains in place today. AR 87405 (1979 PEIS at 1-2). This program sets forth two primary leasing procedures. First, under the "regional" leasing program, Defendants lease tracts based on recommendations from the ten DOI regional coal teams. AR 4; AR 1545 (Scoping Report at 5-7). Second, under the "leasing by application" program, the process is initiated by industry, which identifies where and how much coal it wants to lease. AR 4; AR 1545 (Scoping Report at 5-7).

The 1979 PEIS was approximately 1,300 pages long but contained almost no discussion of climate change; in the few instances where the PEIS does mention the issue, the analysis is vague and outdated. AR 87765, 87774, 87784 (1979 PEIS at 5-88, 5-97, 5-107). For example, while the PEIS noted that "there are indications that the rising CO_2 levels in the atmosphere could pose a serious problem, commonly referred to as the greenhouse effect," it treated such effects as uncertain.

See AR 87765 (1979 PEIS at 5-88) (citing "uncertainty" regarding the "fate … of carbon dioxide released to the atmosphere" and "the extent to which greater utilization of fossil fuels, especially coal, will contribute to atmospheric carbon dioxide levels"); AR 87784 (1979 PEIS at 5-107). Defendants stated that the 1979 PEIS "would be updated when conditions change sufficiently to require new analyses of [national and interregional] impacts." AR 87544 (1979 PEIS at 3-9); *see id*. AR 87542, 87603 (1979 PEIS at 3-7, 3-68).[3]

The 1979 PEIS was last revisited in 1985, when BLM updated its coal leasing regulations and completed a limited supplement to the 1979 PEIS in response to recommendations from the Commission on Fair Market Value Policy for Federal Coal Leasing, which addressed continued irregularities in the leasing process (the "1985 Supplement"). Answer ¶ 38; AR 1544-45 (Scoping Report at 5-6 through 5-7); AR 88964 (1985 Supplement). The 1985 Supplement examined the continuation of the federal coal management program and three alternatives: (1) Leasing by Application, (2) Preference Right and Emergency Leasing, and (3) No New Federal Leasing, *i.e*., the no action alternative. AR 88715. The 1985 Supplement did not consider or evaluate climate change impacts.

Between 1987 and 1990, all six certified coal-producing regions were "decertified" by BLM, such that all federal coal leasing since 1990 has been initiated by industry application. Answer ¶ 39; AR 1545 (Scoping Report at 5-7). During the 1990s and 2000s, the Powder River Basin became the primary area of Federal coal leasing and production, up to 90 percent in recent years, and Federal coal commanded a much larger share of national coal production. AR 1546, 1549 (Scoping Report at 5-8, 5-11).

[3] In 1982, Defendants issued a final rule which amended certain implementing regulations governing the federal coal program while preserving the program's "essential features." 47 Fed. Reg. 33,114 (July 30, 1982). While Defendants did not prepare any new NEPA document for this rule making, they reiterated that they "must revise or update the [1979 PEIS] when its assumptions, analyses and conclusions are no longer valid." *Id*. at 33,115.

III. MULTIPLE GOVERNMENT REVIEWS OF THE FEDERAL COAL PROGRAM IDENTIFIED MAJOR CONCERNS.

Defendants' outdated structure for management of federal coal has not gone unnoticed. AR 1603-05 (Scoping Report at 6-1 through 6-3). In 2013, DOI's Office of the Inspector General issued a report concluding that "BLM faces significant challenges in the areas of coal leasing and mine inspection and enforcement" and that the BLM's management of the program resulted in millions of dollars in lost royalties to the federal treasury because the agency was "not receiving the full, fair market value for the leases." AR 1689, 1692, 1710 (Off. of the Inspector Gen., DOI, Coal Management Program, (June 2013)). The Inspector General made several recommendations necessary to "enhance [BLM's] coal management program significantly" and recover these lost revenues. AR 1710-1714.

Also in 2013, the Government Accountability Office ("GAO") concluded that BLM had failed to ensure mining companies pay fair market value for leasing federal coal. AR 1737 (GAO, GAO-14-140, Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public Information 15 (Dec. 2013)). The GAO determined that since 1990, "most" federal coal leases were not sold competitively and had only a single bidder. AR 1738. In particular, of the 107 tracts that were leased between 1990 and 2012, "sales for 96 (about 90 percent) involved a single bidder … which was generally the company that submitted the lease application. More than 90 percent of the lease applications BLM received were for maintenance tracts used to extend the life of an existing mine or to expand that mine's annual production." AR 1757.

Moreover, since the issuance of the 1979 PEIS, scientific understanding of "the greenhouse effect" and climate change has grown dramatically, and Defendants have recognized the need to address the problem. For example, the Intergovernmental Panel on Climate Change has now issued five reports, each

demonstrating with greater certainty that man-made greenhouse gas ("GHG") emissions are causing unprecedented warming of the planet. *See, e.g.*, AR 40181-84. In 2009, the U.S. Environmental Protection Agency determined that carbon dioxide and five other greenhouse gases constituted pollutants under the federal Clean Air Act because they endanger the public health and welfare of Americans in many ways, such as by increasing the likelihood of heat waves, ozone pollution, storm intensity, reduced water supplies, and rising sea levels. 74 Fed. Reg. 66,496, 66,498 (Dec. 15, 2009); AR 1586-90 (Scoping Report at 5-48 – 5-52). In 2015, the United States pledged to the United Nations Framework Convention on Climate Change to reduce its greenhouse gas emissions by 26-28 percent below 2005 levels by 2025. AR 4.

More specifically, Defendants have recognized the need to address the federal coal program's contribution to climate change. For one, as Defendants have acknowledged, "[n]umerous scientific studies indicate that reducing GHG emission from coal use worldwide is critical to addressing climate change." AR 6; *see* AR 1606 (Scoping Report at 6-4). Defendants have also found that "[v]irtually every community in the US is being impacted by climate change, and Federal programs have an obligation to be administered in a way that will not worsen and help address these impacts." AR 1605 (Scoping Report at 6-3).[4]

On March 17, 2015, due to these concerns and others raised by members of Congress, interested stakeholders, and the public, then-Secretary of the Interior Sally Jewell called for "an honest and open conversation about modernizing the Federal coal program." Answer ¶ 42; AR 4; AR 1479 (Scoping Report at ES-3). Defendants subsequently held listening sessions around the country that summer, heard from 289 individuals during the sessions, and received over 94,000 written

[4] In 2010, a federal interagency working group established a measure for the "social cost of carbon" for use in rule making and NEPA reviews, allowing federal agencies to quantify the negative externalities that their actions impose on U.S. citizens and the global community from greenhouse gas emissions. *See* AR 29161.

comments. Answer ¶ 42; AR 1479 (Scoping Report at ES-3). The oral and written comments reflected several recurring concerns, in particular: that American taxpayers are not receiving a fair return for the leasing of public coal resources; that the Federal coal program conflicts with the country's national climate goals; and about the structure of the Federal coal program in light of current market conditions, including how implementation of the Federal leasing program affects current and future coal markets, coal-dependent communities and companies, and the reclamation of mined lands. AR 5.

IV. SECRETARIAL ORDER 3338 PLACES A MORATORIUM ON NEW COAL LEASING AND INITIATES A NEW NEPA PROCESS.

On January 15, 2016, Secretary Jewell issued Secretarial Order 3338, commencing a process to prepare a new programmatic EIS of the federal coal program and putting in place a moratorium on most new leasing activity until that review was complete. *See* AR 3 (Secretarial Order No. 3338, Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program (Jan. 15, 2016) ("Secretarial Order 3338")); Answer ¶¶ 2-3, 43.

Secretarial Order 3338 cited Defendants' legal obligations "to ensure conservation of the public lands, the protection of their scientific, historic, and environmental values, and compliance with applicable environmental laws" as well as Defendants' "statutory duty to ensure a fair return to the taxpayer." AR 9. In determining that it was appropriate to suspend the issuance of new federal coal leases while BLM undertook a comprehensive review, the Secretary explained:

> Lease sales and lease modifications result in lease terms of 20 years and for so long thereafter as coal is produced in commercial quantities. Continuing to conduct lease sales or approve lease modifications during this programmatic review risks locking in for decades the future development of large quantities of coal under current rates and terms that the PEIS may ultimately determine to be less than optimal.

AR 10.

The Secretary also stated that "[n]umerous scientific studies" since the program's PEIS was last updated "indicate that reducing [greenhouse] emissions from coal use worldwide is critical to addressing climate change." AR 6. Thus, the Secretary determined that "a more comprehensive, programmatic review [was] in order," which "should examine how best to assess the climate impacts of continued Federal coal production and combustion and how to address those impacts in the management of the program to meet both the Nation's energy needs and its climate goals." AR 8, 10-11.

In March 2016, BLM began a scoping process under NEPA[5] by issuing a Notice of Intent to Prepare a Programmatic Environmental Impact Statement to Review the Federal Coal Program and to Conduct Public Scoping Meetings. Answer ¶ 46; 81 Fed. Reg. 17,720 (Mar. 30, 2016). During the spring and summer of 2016, BLM accepted more than 214,000 public comments and held six public meetings in various cities regarding its review of the federal coal program. Answer ¶ 46; AR 1479 (Scoping Report at ES-3).

On January 11, 2017, BLM released its Scoping Report, which found that "modernization of the Federal coal program is warranted." Answer ¶ 47; AR 1480 (Scoping Report at ES-4). BLM stated that "[t]his modernization should focus on ensuring a fair return to Americans for the sale of their public coal resources; addressing the coal program's impact on the challenge of climate change; and improving the structure and efficiency of the coal program in light of current market conditions, including impacts on communities." AR 1480 (Scoping Report at ES-4; *see* AR 1603 (Scoping Report at 6-1) ("The need for this action is to

[5] In a scoping process, the agency describes a proposed agency action and possible alternatives, and seeks input from States, tribes, local governments, and the public on the affected resources and the environmental issues raised by the proposed action to help evaluate what issues the agency should address in the EIS. 40 C.F.R. § 1501.7; 43 C.F.R. § 46.235.

undertake a comprehensive review of the Federal coal program and to consider how the program can be improved and modernized in the areas of fair return, climate change, resource management and protection, and program administration.").

In particular, with regard to climate change, BLM noted that U.S. federal coal production and combustion were responsible for about 11 percent of U.S. greenhouse gas emissions in 2014. AR 1569 (Scoping Report at 5-31). The agency stated that climate change caused by human emission of greenhouse gases threatens public health and welfare in many ways, including increased heat waves, more frequent and intense storms, reduced water supplies, increase wildfires, flooding, and sea level rise. AR 1596 (Scoping Report at 5-48). BLM acknowledged that it thus has a legal obligation to consider these issues: "Consideration of the implications of Federal coal leasing for climate change, as an extensively documented threat to the health and welfare of the American people, falls squarely within the factors to be considered in determining the public interest." AR 1478 (Scoping Report at ES-2); *see also* AR 1606 (Scoping Report at 6-4) ("the current leasing system does not provide a way to systematically consider the climate impacts and costs to the public of Federal coal development, either as a whole or in the context of particular projects").

In addition to climate change, Defendants found that several other factors not adequately considered in the 1979 PEIS or 1985 Supplement warranted supplemental environmental review. These include harm to public lands and wildlife from coal mining, air quality impacts from coal transport and combustion, and the disposal of coal ash, which contains hazardous constituents. AR 1584-90 (Scoping Report at 5-46 – 5-52); *see also* AR 1606 (Scoping Report at 6-4) ("there is a need for program reform to better protect the nation's other natural resources (e.g., air, water, and wildlife)"). Moreover, Defendants found that the environmental justice impacts related to coal mining and downstream activities

such as coal transport and export have never been adequately considered. AR 1653 (Scoping Report at 6-51).

Finally, Defendants found that the federal coal program had failed to fulfill legal mandates to ensure a fair economic return to American taxpayers due to reliance of the leasing-by-application process and other changes in the program. As Defendants stated:

> [T]here is currently very little competition for Federal coal leases. About 90 percent of lease sales receive bids from only one bidder, typically the operator of a mine adjacent to the new lease, given the investment required to open a new mine. While the BLM conducts a peer-reviewed analysis to estimate a pre-sale fair market value of the coal and will not sell a lease unless the bid meets or exceeds that value, commenters have questioned whether an accurate fair market value can be identified in the absence of a truly competitive marketplace.

AR 1605 (Scoping Report at 6-3). Defendants also identified concerns about the royalty rates in Federal leases, and that the large volumes and relatively low costs of Federal coal, which currently represents approximately 42 percent of total domestic production, may be artificially lowering market prices for coal, further reducing the amount of royalties received. AR 1605 (Scoping Report at 6-3); *see also* Answer ¶ 39; AR 1546 (Scoping Report at 5-8). The DOI Office of the Inspector General had previously found "a potential $60 million in lost revenues" from 45 lease modifications since 2000, and noted "even a 1-cent-per-ton undervaluation in the fair market value calculation for a sale can result in millions of dollars in lost revenues." AR 1605, 1692, 1704, 1719

As BLM summarized in the Scoping Report, "[t]he last time the Federal coal program received a comprehensive review was in the mid-1980s, and most of the existing regulations were promulgated in the late 1970s and have been only slightly modified since that time. The direct, indirect, and cumulative impacts of the Federal coal program have not been fully analyzed under the National Environmental Policy Act (NEPA) in over thirty years." AR 1478 (Scoping Report

at ES-2). Consequently, in the January 11, 2017 Scoping Report, Defendants stated that they would move forward with the preparation of a draft programmatic EIS by January 2018 regarding the modernization of the federal coal program using the information received during the scoping process, and issue a final PEIS by January 2019. AR 1479 (Scoping Report at ES-3).

V. EXECUTIVE ORDER 13783 AND DEFENDANT ZINKE'S SECRETARIAL ORDER 3348 REVERSE THE GOVERNMENT'S COURSE – DISSOLVING THE MORATORIUM AND TERMINATING THE NEPA PROCESS.

However, less than three months later, on March 28, 2017, President Donald Trump reversed course and issued Executive Order 13783 entitled "Promoting Energy Independence and Economic Growth" ("Executive Order"). Answer ¶ 54; 82 Fed. Reg. 16,093 (Mar. 31, 2017). Among other provisions, the Executive Order stated: "The Secretary of the Interior shall take all steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016 (Discretionary Programmatic Environmental Impact Statement (PEIS) to Modernize the Federal Coal Program), and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338. The Secretary shall commence Federal coal leasing activities consistent with all applicable laws and regulations." *Id*. at 16,096.

The next day, on March 29, 2017, Secretary of the Interior Ryan Zinke issued Secretarial Order 3348, entitled "Concerning the Federal Coal Moratorium," which revoked Order 3338, restarted the federal coal program, and terminated the environmental review process. AR 1. Secretarial Order 3348 stated that the PEIS "is estimated to cost many millions of dollars and would be completed no sooner than 2019, even with robust funding," and that "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." AR 1. Secretarial Order 3348 directed BLM "to process coal lease applications and modifications expeditiously in accordance with regulations and guidance existing before the issuance of

Secretary's Order 3338," and commanded that "[a]ll activities associated with the preparation of the Federal Coal Program PEIS shall cease." AR 2.

STANDARD OF REVIEW

Summary judgment is appropriate when the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Judicial review of agency compliance with NEPA, the Mineral Leasing Act, and the Federal Land Policy and Management Act is governed by Section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *See, e.g.*, *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 554 (9th Cir. 2006) ("*Boody*"); *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989). Under this standard, agency actions are subject to judicial reversal where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations;" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). An agency action is arbitrary and capricious where the agency (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

When an agency reverses course by changing a prior policy, the agency must provide a "reasoned explanation" and "display awareness that it is changing position." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"). The agency must show that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *Id.* Moreover, when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," it must "provide a more detailed justification

than what would suffice for a new policy created on a blank slate." *Id.* "[E]ven when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation." *Organized Village of Kake v. U.S. Dept. of Agric*., 795 F.3d 956, 968 (9th Cir. 2015).

The APA defines "agency action" to include "the whole or a part of an agency rule, *order*, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (emphasis added); *see id*. § 551(6) (defining "order" to mean "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing"). Secretarial Order 3348 is a final agency action for purposes of judicial review under the APA. *See, e.g., Bituminous Coal Operators' Ass'n v. Secretary of Interior*, 547 F.2d 240, 244 (4th Cir. 1977) (Secretarial Order was final agency action for purposes of APA); *Quinn v. Gates*, 575 F.3d 651, 654 (7th Cir. 2009) (same); *see also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (noting "the strong presumption that Congress intends judicial review of administrative action").[6]

STANDING

To establish standing, a plaintiff must show that it: (1) has suffered an "injury in fact" that is (2) fairly traceable to the challenged action of the defendants and (3) is likely redressable by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*., 528 U.S. 167, 180–81 (2000). As the U.S. Supreme Court has found, "States are not normal litigants" and are entitled to "special solicitude" for purposes of standing, and a state's "well-founded desire to preserve its sovereign territory"

[6] In *Western Org. of Res. Councils v. Zinke*, 892 F.3d 1234 (D.C. Cir. 2018), the D.C. Circuit found that there was no "major federal action" to trigger Defendants' duty to supplement its NEPA analysis for the federal coal program. *Id*. at 1245. However, that case did not involve Secretarial Order 3348 and was based "solely on" plaintiffs' "failure to act" claim pursuant to APA section 706(1), 5 U.S.C. § 706(1). *Id*. at 1241. Consequently, that decision is inapplicable here. *See Oregon Natural Desert Ass'n v. Bureau of Land Mgmt*., 625 F.3d 1092, 1119 (9th Cir. 2010) (distinguishing caselaw involving claims under section 706(1) from actions brought pursuant to section 706(2)).

supports standing in cases implicating environmental harms. *Mass. v. EPA*, 549 U.S. 497, 517-19 (2007). To demonstrate standing to bring a procedural claim, such as a NEPA violation, a plaintiff "must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *WildEarth Guardians v. U.S. Dep't of Agric*., 795 F.3d 1148, 1154 (9th Cir. 2015) (internal quotations and citation omitted). Once established, "the causation and redressability requirements are relaxed." *Id*. (internal quotations and citation omitted).

State Plaintiffs have standing to bring this action. As Defendants have acknowledged, the federal coal program results in significant air quality harms and is responsible for about 11 percent of U.S. greenhouse gas emissions, among other impacts which have never been adequately considered. AR 1569, 1584-90. State Plaintiffs are directly injured by air pollution harms that result from the transport and export of federal coal in their sovereign territories, harms that will likely increase due to Defendants' decision to restart the program. *See* Affidavit of Sally Toteff ("Toteff Decl."), filed herewith as Exhibit 1, ¶¶ 3-9; Declaration of Keita Ebisu ("Ebisu Decl."), filed herewith as Exhibit 2, ¶¶ 4-12, 18. State Plaintiffs are also injured by the climate impacts of restarting the program. Toteff Decl., ¶ 15; Ebisu Decl., ¶¶ 13-18; *see, e.g., Mass. v. EPA*, 549 U.S. at 521-26 (finding that state had standing to challenge agency failure to regulate greenhouse gas emissions based on risk of harm from sea level rise). Further, State Plaintiffs have suffered harm to their procedural interests in federal management decisions being made without compliance with the requirements of NEPA, the Mineral Leasing Act, the Federal Land Policy and Management Act, and the APA. *See, e.g., Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1179 (9th Cir. 2011) (finding that California had standing based on "asserted harm to is procedural interest in federal management decision made under the deliberation-forcing requirements of NEPA"). These injuries are traceable to Defendants' decision to restart the federal

coal program and terminate environmental review of the program, and would be redressed by vacatur of that action.

ARGUMENT

The Secretary's issuance of Secretarial Order 3348 to restart the federal coal program without considering the potential environmental consequences of this action, or the statutory requirements for managing the program, violated NEPA, the Mineral Leasing Act, the Federal Land Policy and Management Act, and the APA's requirement for rational, rather than arbitrary, decisionmaking. 5 U.S.C. § 706(2)(A). Just weeks before the issuance of the Order, Defendants had found that an updated environmental review of the program was warranted to consider the implications of federal coal leasing for climate change, and whether the program was in the public interest and achieving a fair economic return for the public. Defendants' complete reversal in policy without any reasoned explanation or consideration of these earlier findings should be held unlawful and set aside by this Court.

I. DEFENDANTS ISSUANCE OF SECRETARIAL ORDER 3348 WITHOUT TAKING A "HARD LOOK" AT THE ENVIRONMENTAL CONSEQUENCES VIOLATED NEPA AND THE APA.

NEPA requires federal agencies to take a "hard look" at the environmental consequences of a proposed activity before taking action. *See Boody*, 468 F.3d at 560; 42 U.S.C. § 4332. To achieve this purpose, a federal agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3. As the Ninth Circuit has found, "the bar for whether 'significant effects' may occur is a low standard." *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014). "If the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared." *Boody*, 468 F.3d at 562 (finding that "substantial questions" required a supplemental EIS where agencies had taken a

course of action they had previously advised against without "extensive additional research").

Defendants' issuance of Secretarial Order 3348, which revoked Secretarial Order 3338 and restarted the federal coal leasing process, was a major federal action significantly affecting the quality of the human environment. *See* 40 C.F.R. § 1508.18 ("major federal action" subject to NEPA review includes "new and continuing activities," such as "new or revised agency rules, regulations, plans, policies, or procedures," "official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based"). Here, Secretarial Order 3348 revoked Secretarial Order 3338, which established a moratorium on federal coal leasing, and directed BLM "to process coal lease applications and modifications expeditiously in accordance with regulations and guidance existing before the issuance of Secretary's Order 3338." AR 1-2. Secretarial Order 3348 also commanded that "[a]ll activities associated with the preparation of the Federal Coal Program PEIS shall cease." AR 2. Consequently, Secretarial Order 3348 authorized "new and continuing activities" and constituted a "new or revised agency" plan or policy, which will guide "guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based." *See* 40 C.F.R. § 1508.18.

By restarting the federal coal program, Secretarial Order 3348 not only "may" have significant environmental impacts on the quality of the human environment, *Boody*, *id*., it likely *will* have such impacts. *See Kleppe v. Sierra Club*, 427 U.S. at 400 (finding that federal coal program "surely has significant environmental consequences"). These significant impacts include, but are not limited to, climate change impacts, harm to public lands and wildlife from coal mining, air quality impacts from coal transport and combustion, the disposal of coal ash, and impacts to environmental justice communities. AR 1584-90 (Scoping Report at 5-46 through 5-52). In *Cady v. Morton*, 527 F.2d 786, 793 (9th Cir. 1975), the Ninth

Circuit held that approval by the Secretary of the Interior of coal leases covering 30,876 acres constituted "major federal action" and required preparation of an EIS. Here, in fiscal year 2016, BLM administered 303 coal leases encompassing *467,186* acres in 12 states. Answer ¶ 34. And at least 30 additional applications for coal leases and lease modifications covering thousands of acres can now move forward as a result of Secretarial Order 3348. AR 25, 92-94, 15994-96.

Courts have made it clear that climate considerations must be included in NEPA reviews, especially at the programmatic level. As the Ninth Circuit Court of Appeals has found, "[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1217 (9th Cir. 2008); *see also Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003) (agency approval of rail line project that would increase coal consumption violated NEPA by failing to consider impacts of increased coal use); *High County Conservation Advocates v. U.S. Forest Serv*., 52 F. Supp. 3d 1174, 1189-90 (D. Colo. 2014) (BLM violated NEPA by failing to assess social cost of carbon associated with new coal leases); *Western Org. of Res. Councils v. U.S. Bureau of Land Mgmt*., 2018 WL 1475470, *13 (D. Mont. Mar. 26, 2018) (BLM violated NEPA by failing to consider indirect effects of downstream combustion of fossil fuel resources that would be developed pursuant to the resource management plans); *San Juan Citizens Alliance v. U.S. Bureau of Land Mgmt.*, 2018 WL 2994406, *11 (D. N.M. June 14, 2018) (BLM violated NEPA by failing to estimate greenhouse gas emissions and climate impacts from downstream combustion resulting from oil and gas development on leased areas).

Defendants' existing NEPA review for the federal coal program, completed in 1979 and last updated in 1985, is clearly insufficient for these purposes. Pursuant to NEPA, an agency cannot rest on the conclusions made in an EIS, but is required

to supplement a past EIS when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii).[7] As the U.S. Supreme Court has explained, "[i]f there remains 'major Federal action" to occur, and if the new information is sufficient to show that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh*, 490 U.S. at 374 (quoting 42 U.S.C. § 4332(2)(C)).

In *Marsh*, plaintiffs challenged a federal agency's failure to supplement a five-year old EIS for a dam project, which "present[ed] the question of whether information developed after the completion of the EIS requires that a supplemental EIS be prepared." 490 U.S. at 363. As the Supreme Court noted, "postdecision supplemental environmental impact statements" are "at times necessary to satisfy [NEPA's] 'action forcing' purpose," ensuring "that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Id*. at 370-71. In that case, the Court found that the federal agency "had a duty to take a hard look at the proffered evidence," but having "conducted a reasoned evaluation of the relevant information," it was not arbitrary and capricious for the agency to determine that a supplemental EIS was not required. *Id*. at 385.

Here, Defendants have failed to take a "hard look" at whether the potential environmental consequences of restarting the federal coal program required the preparation of an EIS. And unlike the situation in *Marsh*, there is no evidence that Defendants ever considered whether "significant new circumstances or information" required the preparation of a supplemental EIS. In sum, Defendants' decision to issue Secretarial Order 3348 to restart the federal coal program, without

[7] Given the wholesale changes needed to the federal coal program, State Plaintiffs agree with Defendants' prior decision to proceed with a new PEIS, rather than a supplemental PEIS, for the program. AR 8-9.

considering the environmental impacts of the program or the need to update the 1979 PEIS, was arbitrary and capricious, an abuse of discretion, and contrary to the requirements of NEPA and the APA. 42 U.S.C. § 4332(2)(C); 5 U.S.C. § 706(2). Consequently, Secretarial Order 3348 should be held unlawful and set aside.

II. DEFENDANTS' ISSUANCE OF SECRETARIAL ORDER 3348 WITHOUT CONSIDERING THEIR STATUTORY MANDATES OR PROVIDING A REASONED EXPLANATION FOR THE REVERSAL VIOLATED THE MINERAL LEASING ACT, THE FEDERAL LAND POLICY AND MANAGEMENT ACT, AND THE APA.

When reversing course by changing a prior policy, an agency is required to provide a "reasoned explanation" for the change, and show that the new policy is "permissible under the statute" and that "there are good reasons for it." *Fox*, 556 U.S. at 515; *see Kake*, 795 F.3d at 968 ("*State Farm* teaches that even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation"). Simply reversing course without offering a "rational connection between the facts found and the choice made" does not pass muster under the arbitrary and capricious standard. *State Farm*, 463 U.S. at 43. Without providing any reasoned explanation, a court "cannot ascertain whether [the agency] has complied with its statutory mandate." *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1052 (9th Cir. 2010). Here, in issuing Secretarial Order 3348 and restarting the federal coal leasing program without undertaking the programmatic review they themselves deemed necessary, Defendants disregarded their statutory mandates under the Mineral Leasing Act and the Federal Land Policy and Management Act to ensure that leasing is in the "public interest" and that the public is receiving "fair market value" for the development of these resources.

As discussed above, the Mineral Leasing Act authorizes the Secretary of the Interior to lease the production of coal on public lands if it is "in the public interest." 30 U.S.C. § 201(a)(1); *see id*. § 201(a)(3) (Secretary may only lease coal in a manner that balances "long-term benefits to the public against short-term benefits."). The Mineral Leasing Act further requires that every sale of such

mineral be made by competitive bid and provide the public with "fair market value." *Id*. Similarly, in managing public lands for multiple uses, the Federal Land Policy and Management Act requires that Defendants manage such lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values," and that Defendants "receive fair market value of the use of the public lands and their resources." 43 U.S.C. § 1701(a)(8)-(9).

In completing the scoping process for the federal coal program, Defendants expressed serious concerns regarding whether these statutory mandates were being fulfilled. For example, Defendants stated that:

> Consideration of the implications of Federal coal leasing for climate change, as an extensively documented threat to the health and welfare of the American people, falls squarely within the factors to be considered in determining the public interest. Moreover, this consideration is critical in the development of land use plans where the Secretary must "weigh long-term benefits to the public against short-term benefits" (43 USC, Subsection 1712[c][7]). Such consideration is an important part of the Secretary's responsibility under the Federal Land Policy and Management Act (FLPMA) to manage "the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people" (43 USC, Subsections 1701[a][7]; 1702[c]).

AR 1478 (Scoping Report at ES-2).

Defendants also acknowledged the likelihood that the public was not receiving fair market value from the sale of federal coal resources. For example, Secretary Jewell noted that "there is currently very little competition for Federal coal leases," since "[a]bout 90 percent of lease sales receive bids from only one bidder, typically the operator of a mine adjacent to the new lease." AR 6. In addition, the Secretary stated that the royalty rates set in Federal leases "do not adequately compensate the public for the removal of the coal and the externalities associated with its use." AR 6. The Secretary expressed further concern regarding lower returns from certain

types of leasing actions such as lease modifications, as well as royalty rate reductions, "which may result in royalty rates as low as 2 percent." AR 6 (noting that royalty rates for federal leases are set by regulation at a fixed 8 percent for underground mines and not less than 12.5 percent for surface mines).

In the Scoping Report, Defendants found that modernization of the federal coal program was warranted with respect to "ensur[ing] that the public owners of this coal receive a full and fair return for this resource." AR 1604 (Scoping Report at 6-2). Thus, to the end of complying with their statutory mandates to ensure that federal coal leasing is in the public interest and that the public is receiving fair market value for the sale of these resources, Defendants stated their intent to consider the climate impacts of the federal coal program and determine whether the program undermines national climate goals; to address the lack of competitive bidding for leases; to determine appropriate royalty rates; and to determine whether "large volumes and relatively low costs of Federal coal" are "artificially lowering market prices for coal." AR 1605 (Scoping Report at 6-3).

In issuing Secretarial Order 3348, Defendants did an about-face with respect to these previously identified deficiencies in the program without providing a reasoned explanation regarding their reversals of position on these issues, or how restarting the federal coal program without careful consideration of these issues would fulfill the Defendants' statutory mandates to ensure that leasing is in the public interest and the public is receiving fair market value for the sale of these resources. Therefore, Defendants' decision to issue Secretarial Order 3348 to restart federal coal leasing was arbitrary and capricious, an abuse of discretion, and contrary to the requirements of the Mineral Leasing Act, the Federal Land Policy and Management Act, and the APA. 30 U.S.C. § 201(a)(1), (3); 43 U.S.C. § 1701(a); 5 U.S.C. § 706(2); *see also Humane Soc'y*, 636 F.3d at 1051-53 (finding that agency failed to provide "satisfactory explanation" for its decision "in light of seemingly inconsistent factual determinations in earlier" assessment, and that court

"cannot ascertain whether [the agency] had complied with its statutory mandate"); *Oregon Natural Desert Ass'n*, 625 F.3d at 1109-12 (finding that the Federal Land Policy and Management Act and the Wilderness Act required BLM to consider wilderness characteristics in EIS for southeastern Oregon land use plan); *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 49-51 (D.D.C. 2003) (remanding federal mining regulations that failed to consider duty to receive "fair market value" for use of public lands). Consequently, Secretarial Order 3348 should be held unlawful and set aside.

CONCLUSION

For the reasons given above, State Plaintiffs respectfully request that this Court grant their motion for summary judgment, declare that Defendants' issuance of Secretarial Order 3348 was unlawful, and require Defendants to vacate and set aside the Order and resume the moratorium on new federal coal leases unless and until Defendants comply with applicable law.

Dated: July 27, 2018

Respectfully submitted,

/s/ Roger Sullivan
ROGER SULLIVAN
DUSTIN LEFTRIDGE
McGarvey, Heberling, Sullivan & Lacey, P.C.
345 1st Ave. E.
Kalispell, Montana 59901-5341
(406) 752-5566
RSullivan@McGarveyLaw.com
Attorneys for Plaintiffs

XAVIER BECERRA
Attorney General of California
DAVID ZONANA
Supervising Deputy Attorney General

/s/ George Torgun
GEORGE TORGUN (*pro hac vice*)
CA Bar No. 222085
ELIZABETH B. RUMSEY (*pro hac vice*)
CA Bar No. 257908
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
Telephone: (510) 879-1002
E-mail: George.Torgun@doj.ca.gov

HECTOR BALDERAS
Attorney General of New Mexico

/s/ Bill Grantham
BILL GRANTHAM (*pro hac vice*)
Assistant Attorney General
201 Third St. NW, Suite 300
Albuquerque, NM 87102
Telephone: (505) 717-3520
E-Mail: wgrantham@nmag.gov

Attorneys for Plaintiff State of New Mexico

BARBARA D. UNDERWOOD
Attorney General of the State of New York

/s/ Andrew G. Frank
YUEH-RU CHU (*pro hac vice*)
ANDREW G. FRANK (*pro hac vice*)
Assistant Attorneys General
New York State Office of the Attorney General
Environmental Protection Bureau
28 Liberty Street
New York, New York 10005
Telephone: 212-416-8271
Email: andrew.frank@ag.ny.gov

Attorneys for Plaintiff State of New York

ROBERT W. FERGUSON
Attorney General of Washington

/s/ William R. Sherman
WILLIAM R. SHERMAN (*pro hac vice*)
WA Bar No. 29365
Assistant Attorney General
800 5th Ave Suite 2000, TB-14
Seattle, WA 98104-3188
Telephone: (206) 442-4485
Email: bill.sherman@atg.wa.gov

Attorneys for Plaintiff State of Washington