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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., Defendants, and STATE OF WYOMING, et al., Defendant-Intervenors.	Case No. 4:17-cv-30-BMM **OPENING BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
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 violated the most fundamental requirement of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, when they rescinded a moratorium on federal coal leasing without first evaluating the environmental consequences in a programmatic environmental impact statement ("PEIS"). Just over a year before Secretary of the Interior Ryan Zinke signed Secretarial Order 3348, which ended the moratorium, Federal Defendants had determined that the moratorium was essential to ensure that future coal leasing is conducted, if at all, in a manner consistent with Federal Defendants' environmental obligations and mandate to obtain a fair economic return from publicly owned coal. In reversing that decision, Federal Defendants opened the door to new coal leasing and its massive environmental consequences, including its significant contribution to greenhouse gas emissions that cause climate change. Accordingly, Federal Defendants were required to first comply with NEPA's environmental review requirements, which they could do by preparing a comprehensive PEIS, 42 U.S.C. § 4332(2)(C), or by supplementing their PEIS from 1979 to evaluate "significant new circumstances or information relevant to environmental concerns" of the federal coal program, 40 C.F.R. § 1502.9(c)(1)(ii). Federal Defendants did neither.

In addition to violating NEPA, Federal Defendants flouted their trust obligation to the Northern Cheyenne Tribe, which at a minimum required the federal government to comply with NEPA, particularly because new coal leasing significantly affects the Tribe's interests.

To remedy these serious legal violations and prevent new coal leasing that will cause significant, unexamined environmental consequences, Secretarial Order 3348 should be set aside.

LEGAL BACKGROUND

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA has two fundamental purposes: first, to ensure that agencies take a "hard look" at the consequences of their actions; and second, to ensure meaningful public involvement "in both the decisionmaking process and the implementation of that decision." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-50 (1989) (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)). "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998) (citation omitted).

Pursuant to NEPA, "all agencies of the Federal Government shall … include in every recommendation or report on … major Federal actions significantly affecting the quality of the human environment, a detailed statement … on (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action," and other environmental implications of the action. 42 U.S.C. § 4332(2)(C). This environmental impact statement ("EIS") helps to ensure "that environmental concerns [will] be integrated into the very process of agency decision-making." Andrus v. Sierra Club, 442 U.S. 347, 350 (1979).

> [B]y requiring agencies to take a "hard look" at how the choices before them affect the environment, and then to place their data and conclusions before the public, NEPA relies upon democratic processes to ensure … that "the most intelligent optimally beneficial decision will ultimately be made."

Or. Nat. Desert Ass'n v. BLM, 625 F.3d 1092, 1099-1100 (9th Cir. 2008) (citation omitted).

NEPA recognizes the need for programmatic environmental review when the connected actions under a federal program "will have a compounded effect." Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n, 677 F.2d 883, 888 (D.C. Cir. 1981); see also Kleppe, 427 U.S. at 400 (recognizing need for PEIS for federal coal program); City of Tenakee Springs v. Block, 778 F.2d 1402, 1407 (9th Cir. 1985)

("Where there are large-scale plans for regional development, NEPA requires both a programmatic and a site-specific EIS. 40 C.F.R. § 1508.28, 1502.20[.]") (citations omitted). "In evaluating a comprehensive program design an agency administrator benefits from a programmatic EIS which indubitably promotes better decisionmaking." Nat'l Wildlife Fed'n, 677 F.2d at 888 (quotation and alteration omitted).

NEPA also 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). Under NEPA, when "there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] 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 v. Or. Nat. Res. Council, 490 U.S. 360, 374 (1989) (quoting 42 U.S.C. § 4332(2)(C); alteration original).

FACTUAL BACKGROUND

I. FEDERAL COAL-LEASING PROGRAM

The Bureau of Land Management ("BLM") is responsible for administering federal coal leasing on approximately 570 million acres where the coal mineral estate is owned by the Federal Government. AR 1477. Under the Mineral Leasing

Act of 1920, 30 U.S.C. § 181 et seq. (as amended by the Federal Coal Leasing Amendments Act of 1975 ("FCLAA"), Pub. L. No. 94-377, 90 Stat. 1083 (1976)), BLM has broad authority to lease—or not to lease—public lands for coal mining after conducting a competitive bidding process. See 30 U.S.C. § 201(a)(1). Key substantive limitations on that authority include the requirements under the Federal Lands Policy and Management Act ("FLPMA") to manage public lands "so that they are utilized in the combination that will best meet the present and future needs of the American people," 43 U.S.C. §§ 1701(a)(7), 1702(c), and "in a manner that will protect the quality of … air and atmospheric … values," id. § 1701(a)(8).

In addition, the Mineral Leasing Act of 1920, as amended, requires BLM to lease coal only in a manner that balances "long-term benefits to the public against short-term benefits." 30 U.S.C. § 201(a)(3) (requiring that lands subject to leasing be included in a land use plan); 43 U.S.C. § 1712(c)(7) (land use plan requirements). Both FLPMA and the Mineral Leasing Act require BLM to "receive fair market value of the use of the public lands and their resources," including coal. 43 U.S.C. § 1701(a)(9); see also 30 U.S.C. § 201(a)(1).

Under these authorities, BLM manages 306 active federal coal leases in 10 states, authorizing coal mining on more than 475,000 acres under both public and private ownership. AR 1477. Combined, these leased areas contain an estimated 7.4 billion tons of recoverable coal. Id. The vast majority of federal coal

production—nearly 90%—is in the Powder River Basin of Montana and Wyoming, primarily on federal public lands. AR 1549. The recoverable reserves of federal coal currently under lease are estimated to be sufficient to continue production from federal leases at current levels for 20 years. AR 1552.

In addition to these existing coal leases, as of February 2017, BLM reported that it had 44 lease and lease-modification applications pending. AR 92-94. Collectively, the pending applications request authorization to mine nearly 2.9 billion tons of federal coal, covering more than 86,000 acres. Id.

The last time that BLM undertook a comprehensive environmental review for the federal coal program was in 1979—39 years ago. AR 1544; see AR 87376-88693. This 1979 PEIS was prompted by concerns that the existing regulatory framework was allowing speculation by lessees, leading the Department of Interior to place a moratorium on Federal coal leasing. AR 1544. The 1979 PEIS analyzed "the environmental consequences of implementation of a Federal coal management program … on a national and inter-regional basis," with the expectation that local environmental impacts would be evaluated when particular coal tracts were leased. AR 87384-86. The 1979 PEIS examined the climate impacts of mining and burning coal in two short paragraphs, concluding, "there are uncertainties about the

carbon cycle, the net sources of carbon dioxide in the atmosphere, and the net effects of carbon dioxide on temperature and climate." AR 87765.[1]

Much has changed in the nearly four decades since 1979 concerning both the implementation of the federal coal program and our understanding of its impacts. Among other things, an overwhelming body of evidence has emerged demonstrating that continued reliance on coal-generated power will lead to dramatic climatic changes. AR 1585-90. BLM concedes that federal coal, when burned, accounts for 11 percent of total annual U.S. greenhouse gas emissions, which cause climate change. AR 1569. The damaging results of climate change include increasing levels of harmful air pollution that cause increased illness and mortality. AR 1586. Further, large areas of the U.S. and the world face reduced water supplies, increased water pollution, extreme weather events, severe wildfires, and flooding from rising sea levels among other devastating impacts. Id. In short, "[c]limate change impacts touch nearly every aspect of public welfare." Id.

Moreover, mounting evidence demonstrates that coal production, transport, and combustion have other significant health, environmental, and socio-economic impacts. See, e.g., AR 1584-90, 19044-60, 72135-45. Plaintiff Northern

[1] BLM supplemented this PEIS in 1985, following another moratorium, to address ongoing concerns about whether coal leases were garnering their full market value. AR 1544-45; 88727. The supplement did not reference climate change.

Cheyenne Tribe faces disproportionate impacts from coal leasing on federal land due to the proximity of the Tribe's reservation to mining areas and related pollution. AR 10360-61, 10467.

While the federal coal program generates significant environmental and social harm, it has failed to generate a fair return to American taxpayers. AR 1605; see also AR 28810 (noting that "[c]limate damages from [Powder River Basin] coal are 6 times greater than its market value"). Although BLM attempted to address some of those concerns through new guidance documents and training prior to 2017, analysts observe that sub-market leases persist in part because fundamental structural issues in the existing federal coal program have prevented competition in the leasing process and collection of revenues to account for the significant adverse impacts of coal. AR 1546, 1604-05.

II. SECRETARIAL ORDER 3338

On January 15, 2016, the Secretary of the Interior sought to address these changing circumstances and new information by issuing Secretarial Order 3338, announcing a moratorium on most new coal leasing. AR 3-12 (Secretarial Order 3338). Secretarial Order 3338 also directed BLM to prepare a PEIS to evaluate regulatory reforms to help the Interior Department meet its obligation "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 its "statutory duty to ensure a fair return to the taxpayer." AR 9. Secretarial Order 3338 states that the PEIS should address, at a minimum: (a) how, when, and where to lease coal; (b) fair return to the American public for federal coal; (c) the climate change impacts of the federal coal program, and how best to protect the public lands from climate change impacts; (d) the externalities related to federal coal production, including environmental and social impacts; (e) whether lease decisions should consider whether the coal would be for export; and (f) the degree to which federal coal fulfills the energy needs of the United States. AR 9-10.

The Secretary determined it was appropriate to suspend new coal leasing while the comprehensive review was underway to avoid "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. Although mining under existing leases would continue, the moratorium prevented BLM, subject to certain exceptions, from processing new lease applications. AR 15983 (BLM Q&A document). In explaining the need for the moratorium, the Secretary stated, "[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 would not be responsible to continue to issue new leases under outdated rules and processes." Id.

In March 2016, BLM invited public comments as part of the NEPA "scoping" process for the PEIS "to assist the BLM in identifying and refining the issues and policy proposals to be analyzed in depth and in eliminating from detailed study those policy proposals and issues that are not feasible or pertinent." Notice of Intent, 81 Fed. Reg. 17,720, 17,727 (Mar. 30, 2016); 40 C.F.R. § 1501.7 (scoping is "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action"). Federal Defendants also took the first step toward engaging tribal nations affected by federal coal leasing, including the Northern Cheyenne Tribe, by sending letters inviting government-to-government consultation. See AR 1501-02. During the spring and summer of 2016, BLM held public meetings and accepted more than 200,000 public comments on the impacts of and alternatives to federal coal leasing. AR 1511.

On January 11, 2017, BLM released a report detailing the agency's initial conclusions based on its review of the public comments and expert analyses. See AR 277-1654 ("2017 Scoping Report"). The 2017 Scoping Report concluded "that modernization of the Federal coal program is warranted." AR 1480. Specifically, "[t]he three general areas requiring modernization are: fair return to Americans for the sale of their public coal resources; impact of the program on the challenge of climate change and on other environmental issues; and efficient administration of

the program in light of current market conditions including impacts on communities." AR 1604. Consistent with Secretarial Order 3338, the 2017 Scoping Report identified a schedule for completing the PEIS by January 2019 and retained the moratorium on most new coal leasing during the review process. AR 10-11, 1654.

III. THE NORTHERN CHEYENNE TRIBE'S REQUEST FOR CONSULTATION

While the PEIS scoping process was underway, our nation had a presidential election. On the campaign trail, then-candidate Trump pledged to "rescind the coal mining lease moratorium" and take steps to expand our nation's reliance on fossil fuels. AR 15968_002. Concerned about these statements, the Northern Cheyenne Tribe on March 2, 2017 sent newly confirmed Secretary of the Interior Ryan Zinke a request for government-to-government consultation regarding the federal coal-leasing program, and specifically any action to terminate the moratorium. AR 15198-200. The Tribe's request observed that "[t]wo of the largest coal mines that are to be part of the programmatic review [under Secretarial Order 3338] are within a few miles of the Northern Cheyenne Reservation." AR 15199. These two mines together had four pending lease applications, encompassing 426 million tons of coal, that were suspended under the moratorium. Id.

Federal Defendants never acknowledged or responded to the Northern Cheyenne Tribe's consultation request.

IV. SECRETARIAL ORDER 3348

Rescinding the federal coal-leasing moratorium was a priority of the new administration. Immediately after the new administration took office, BLM was charged with identifying ways to "spur coal mining in the U.S." AR 14867; see also AR 10962 (January 24, 2017 request from transition team for briefing materials on options to "reinvigorate leasing"). On March 28, 2017, President Trump issued an executive order directing the Secretary of the Interior to "take all steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016 …, and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338." AR 15904. One day later, Interior Secretary Ryan Zinke issued Secretarial Order 3348, which revoked Secretarial Order 3338, thus ending the federal coal-leasing moratorium and the PEIS process. AR 1-2. The Order 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 2. Federal Defendants conducted no NEPA analysis of this action.

ARGUMENT

Federal Defendants' decision to open the door to new coal leasing on thousands of acres of public land, without first preparing a PEIS or supplemental PEIS to evaluate the impacts of and alternatives to that decision, violated Federal

Defendants' NEPA obligations and their trust responsibility to the Northern Cheyenne Tribe. This Court should remedy these violations by setting aside Secretarial Order 3348 and reinstating the moratorium unless and until Federal Defendants comply with NEPA.

I. PLAINTIFFS HAVE STANDING

Plaintiffs have standing to assert procedural injuries caused by Federal Defendants' NEPA violation. A plaintiff asserting NEPA claims satisfies the injury-in-fact prong of standing by establishing "a geographic nexus between the individual asserting the claim and the location suffering an environmental impact." Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1081 (9th Cir. 2015) (quoting W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 485 (9th Cir. 2011). Plaintiffs' standing declarations, attached to their summary judgment motion, meet this requirement by demonstrating that Secretarial Order 3348 authorizes new coal leasing that will cause environmental, social, and cultural harm in areas where Plaintiffs live, work, and recreate. See Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009) (stating organizational plaintiffs may satisfy injury prong by demonstrating recreational or aesthetic interests of their members). Plaintiffs also meet the causation and redressability prongs because preparation of a PEIS for federal coal leasing "may redress plaintiffs' alleged injuries." W. Watersheds Project, 632 F.3d at 485 (quotations omitted).

Plaintiffs further meet prudential standing requirements because their interests in requiring Federal Defendants to "adequately consider[] the environmental consequences of [federal coal leasing]" in order to protect "the well-being of the affected land," environment, and climate fall squarely within NEPA's purpose. Id. at 486.

II. STANDARD OF REVIEW

This challenge to Secretarial Order 3348 is reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. See W. Watersheds Project, 632 F.3d at 481. The APA directs a reviewing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). An action is arbitrary and capricious where the agency: has relied on factors which Congress has not intended it to consider; entirely failed to consider an important aspect of the problem; offered an explanation for its decision that runs counter to the evidence before the agency; or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Under these standards, "[c]ourts must carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy

underlying a statute." Friends of Yosemite Valley v. Norton, 348 F.3d 789, 793 (9th Cir. 2003) (quotation and alterations omitted).

While this "arbitrary and capricious" standard generally applies to an agency's implementation of NEPA, "[a]n agency's threshold decision that certain activities are not subject to NEPA is reviewed for reasonableness," a less deferential standard. Kern v. BLM, 284 F.3d 1062, 1070 (9th Cir. 2002) (citation omitted); see also Cal. ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1011-12 (9th Cir. 2009) (same). This Court "may conclude the agency acted unreasonably if substantial questions are raised concerning whether the project may significantly affect the quality of the human environment." Confederated Tribes & Bands of Yakima Indian Nation v. F.E.R.C., 746 F.2d 466, 475 (9th Cir. 1984) (citation omitted).

Under these standards, Federal Defendants' decision to terminate the federal coal-leasing moratorium without first preparing a PEIS or a supplemental PEIS was unlawful and should be set aside.

III. A PEIS IS NECESSARY TO EVALUATE ENVIRONMENTAL HARM FROM THE FEDERAL COAL PROGRAM

Federal Defendants' decision to rescind the federal coal-leasing moratorium violated NEPA. Because Secretarial Order 3348, which lifted the moratorium, was a "major federal action significantly affecting the quality of the human environment," Federal Defendants were required under NEPA to evaluate the

consequences of new coal leasing in a PEIS, 42 U.S.C. § 4332(2)(C), or at a minimum, in a supplement to the 1979 PEIS for the federal coal program, 40 C.F.R. § 1502.9(c)(1)(ii). In terminating the moratorium without such review, Federal Defendants not only flouted their NEPA obligations, they also arbitrarily reversed their prior determination that the moratorium was necessary to prevent environmental harm while they undertook programmatic environmental review to evaluate those harms and alternatives for minimizing or avoiding them. Finally, Federal Defendants violated NEPA by failing to consider the impacts of their action on the Northern Cheyenne Tribe, despite the Tribe's specific request for such consideration before the decision rescinding the moratorium.

A. Secretarial Order 3348 Was a Major Federal Action Necessitating Programmatic NEPA Review

Federal Defendants' decision to open thousands of acres of public land to coal leasing constituted a "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Thus, NEPA required Federal Defendants to first prepare a PEIS, id., or a supplemental PEIS to address circumstances that changed since their last comprehensive review in 1979, 40 C.F.R. § 1502.9(c)(1)(ii). Federal Defendants' failure to do so was unreasonable and unlawful. Cal. ex rel. Lockyer, 575 F.3d at 1011 (reasonableness standard applies to threshold question of NEPA applicability).

In 2016, the Interior Department imposed a moratorium on all new federal coal leasing to enable the Department and BLM to undertake a comprehensive review of the environmental and economic consequences of the program in a PEIS. AR 10. As 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. In other words, although mining under existing leases could continue, the Secretary determined that significant new coal leasing must cease to avoid long-term commitments to environmental and economic impacts until BLM and the Interior Department could identify and implement alternatives for mitigating and avoiding those impacts.

The moratorium increased protection of public lands targeted for mining. Subject to narrow exceptions, the moratorium prohibited BLM from approving "new applications for thermal (steam) coal leases or lease modifications." AR 11. BLM later reported that, "[w]hen the moratorium on leasing began in January 2016, there were 44 lease and lease modification applications pending with the BLM. … Pursuant to S.O. 3338, Section 5(a)(ii), the NEPA analysis on some of the applications have continued, but no leasing decisions can be made until the

moratorium is lifted." AR 25 (emphasis added). Thus, the moratorium had the immediate effect of halting new coal development on approximately 65,000 acres of primarily public land that were subject to pending lease applications. See AR 15995-96 (February 5, 2016 document listing "Projects Potentially Subject to the Temporary Pause"); AR 100 (stating that the moratorium "effectively stopped a number of leasing actions and has prevented new leasing applications from being accepted (with very limited exceptions)").

By repealing the moratorium and authorizing BLM to issue new coal leases, Secretarial Order 3348 opened the door to the large-scale environmental impacts that accompany federal coal leasing and mining nationwide. Coal leases may now be sought and granted for new mines. And the specific lease applications that were halted by the moratorium but may now be approved both expand the footprint and extend the lives of existing coal mines, thus causing impacts that would not occur had the moratorium remained. See AR 1597 (stating that mine operators apply for leases on adjacent tracts to extend life of mine). By authorizing new coal leasing and its significant environmental impacts without preparing a PEIS or a supplemental PEIS, BLM violated NEPA. See Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 784 (9th Cir. 2006) (holding EIS was required before extending expired oil and gas leases where, "[w]ithout the affirmative re-extension of the 1988 leases, Calpine would have retained no rights at all to the leased

property and would not have been able to go forward with the [development of a gas plant]").

In parallel circumstances, the Ninth Circuit found that an EIS was required before the government could eliminate a forest-management policy that, although short-lived, benefitted the environment by constraining the federal government's discretion to authorize harmful activities. In California ex rel. Lockyer, the Court vacated the U.S. Forest Service's action repealing the Roadless Area Conservation Rule, or "Roadless Rule," without first preparing an EIS. Cal. ex rel. Lockyer, 575 F.3d at 1020-21. Adopted in January 2001, the Roadless Rule prohibited most road construction and logging in national forest inventoried roadless areas. Id. at 1006. Although the Roadless Rule was in effect for only seven months, "the months of limited human intervention it facilitated [had] beneficial effect[s] on roadless areas and their complex ecosystems." Id. at 1014. Under a new presidential administration, however, the Forest Service eliminated the nationwide protections of the Roadless Rule. Id. at 1007-08. The Ninth Circuit affirmed the district court's determination that eliminating the Roadless Rule "would meet the relatively low threshold to trigger some level of environmental analysis under the National Environmental Policy Act." Id. at 1013 (citation omitted).

Similarly, here, eliminating the federal coal-leasing moratorium, under which "no leasing decisions c[ould] be made," AR 25, removed a management

constraint that had "beneficial effect" on lands targeted for coal mining and the climate, Cal. ex rel. Lockyer, 575 F.3d at 1014. Accordingly, this action met NEPA's "low threshold" for environmental review. Id. at 1013.[2]

Further, NEPA required a PEIS in this case because the repeal gives rise to a comprehensive program with widespread, cumulative environmental effects. Kleppe, 427 U.S. at 400 (recognizing need for PEIS for federal coal program). Site-specific environmental review at the leasing stage is insufficient to satisfy BLM's NEPA obligations to study the impacts of the federal coal-leasing program as a whole, because programmatic changes (including rulemaking) to address climate change and the level of economic return are unavailable at the lease level. See 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). Under these circumstances, the "critical decision" to commit resources at a programmatic level is "irreversible and irretrievable," and the impacts of that decision "must therefore be carefully

[2] Moreover, because Plaintiffs challenge Secretarial Order 3348—a final action by the Secretary of Interior—this case differs from W. Org. of Res. Councils v. Zinke, 892 F.3d 1234 (D.C. Cir. 2018), which commenced before Federal Defendants either imposed or lifted the moratorium. The D.C. Circuit affirmed the dismissal of the plaintiffs' claim that Federal Defendants must prepare a supplemental EIS for the ongoing federal coal program, because the plaintiffs "failed to identify any specific pending action … that qualifies as a 'major Federal action' under NEPA." Id. at 1243. Here, Secretarial Order 3348 triggered NEPA's environmental review requirement by opening the door to new coal leasing.

scrutinized now and not when specific development proposals are made." Id. at 763; see also Citizens for Better Forestry v. U.S. Dep't of Agric., 481 F. Supp. 2d 1059, 1067, 1089–90 (N.D. Cal. 2007) (change to programmatic forest-planning regulation triggered NEPA because it eliminated environmentally protective planning requirements that "in turn will likely result in less environmental safeguards at the site-specific plan level") (quotation and alteration omitted).

In sum, Federal Defendants violated NEPA by arbitrarily and unreasonably failing to examine the impacts of, and alternatives to, future coal leasing by preparing either a comprehensive PEIS, 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1508.28, 1502.20, or a supplement to the 1979 PEIS to evaluate "significant new circumstances or information" relevant to the federal coal program's environmental impacts, 40 C.F.R. § 1502.9(c)(1)(ii).

B. Federal Defendants Arbitrarily Reversed their Prior Determination that the Moratorium Was Necessary

NEPA's mandate that Federal Defendants prepare a PEIS before rescinding the federal coal-leasing moratorium is underscored by Federal Defendants' prior admissions—in the now-rescinded Secretarial Order 3338 and the 2017 Scoping Report—that a moratorium on new coal leasing was necessary to prevent irreversible and irretrievable commitments of resources before the impacts of federal coal leasing were examined in a PEIS. NEPA requires that agencies undertaking "major Federal actions significantly affecting" the human environment

prepare "a detailed statement" on, among other things, "any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C)(v).

In the Secretary's words in January 2016, a moratorium on significant new coal leasing was necessary to avoid "locking in" the impacts of new coal leasing. AR 10. Indeed, "[g]iven the serious concerns raised about the federal coal program …, it would not be responsible to continue to issue new leases under outdated rules and processes." AR 15983 (emphasis added); see also AR 15978 (stating, "it does not make sense to continue to issue new leases under outdated rules and processes"). The moratorium was the culmination of a months-long public process, during which the Interior Department "heard from hundreds of individuals and received over 90,000 written comments that represented a wide variety of views." AR 15980-81. Two primary areas Federal Defendants singled out as "requiring modernization" before the moratorium could be lifted were: 1) the "impact of the program on the challenge of climate change;" and 2) measures to ensure a "fair return to Americans for the sale of their public coal resources." AR 1604 (2017 Scoping Report).

While Federal Defendants in March 2017 attempted to walk back their prior findings, they failed to offer a "reasoned explanation" for their reversal. Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 968-69 (9th Cir. 2015) (en

banc), cert. denied sub nom. Alaska v. Organized Vill. of Kake, Alaska, 136 S. Ct. 1509 (2016). Federal Defendants' sole attempt to explain the decision to terminate the moratorium without first preparing a PEIS appeared in a March 28, 2017 memorandum from BLM Acting Director Michael Nedd. AR 13-26 ("Nedd Memorandum"); see also AR 27-30 (summarizing Nedd Memorandum). The memorandum asserted that a PEIS is not necessary because BLM currently evaluates the climate impacts of federal coal leasing through lease-specific environmental analyses. AR 18-19. The memorandum further asserted that BLM already rectified failures of the federal coal program to achieve a fair return or could hypothetically do so in the future through other processes. AR 15-18.[3] Because BLM determined that programmatic review of these issues was unnecessary, it also concluded that the coal-leasing moratorium served no purpose and should be terminated. AR 23-24.

As described below, Federal Defendants' proffered reasons for ending the federal coal-leasing moratorium that Federal Defendants' previously deemed necessary were arbitrary. Organized Vill. of Kake, 795 F.3d at 968-69. As a

[3] The Nedd Memorandum also stated that the PEIS could not be completed on the anticipated schedule and lacked adequate funding, but did not explain how these circumstances, even if true, would negate a legal obligation to comply with NEPA. AR 22-23. Further, the record does not indicate that the PEIS could not be completed on schedule, but rather that doing so "depend[s] on the priorities of the incoming administration." AR 10964.

result, Federal Defendants committed to the "irreversible and irretrievable" impacts of the federal coal program as a whole that they previously sought to avoid through the moratorium. State of Cal. v. Block, 690 F.2d at 763. Committing to such irreversible and irretrievable impacts in the absence of environmental analysis violated NEPA. See 42 U.S.C. § 4332(2)(C)(v).

1. Federal Defendants Offered No Legitimate Rationale for Reversing Their Decision that a PEIS is Necessary to Evaluate the Climate Impacts of New Coal Leasing

Federal Defendants arbitrarily rescinded the moratorium without first preparing a PEIS to evaluate the climate impacts of the federal coal program, as well as alternatives to mitigate or avoid those impacts, which they previously deemed necessary. Federal coal accounts for 11 percent of all U.S. greenhouse gas emissions each year. AR 1569. As Federal Defendants concluded as recently as January 2017, new assessments and evidence of changes already occurring "make it clear that reducing emissions of greenhouse gases across the globe is necessary in order to avoid the worst impacts of climate change, and underscore the urgency of reducing emissions now." AR 1590; see also supra, Factual Background, Pt. I. Addressing the need for federal coal program reforms, Federal Defendants stated, "the program must … adequately reflect the impact of the program on climate change. Virtually 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.

Federal Defendants' proffered rationale for reversing that position was that "BLM's current practice is to analyze the impacts of the leasing decision on climate change" in lease-specific analyses, and therefore "[t]he PEIS analysis on climate change would be largely duplicative and unnecessary." AR 18. This defense does not constitute a "reasoned explanation" justifying Federal Defendants' reversal, Organized Vill. of Kake, 795 F.3d at 968-69, for three reasons: 1) Federal Defendants never considered the lease-specific analyses on which they relied; 2) lease-specific analyses do not adequately assess the climate-change impacts of the federal coal program as a whole; and 3) lease-specific analyses do not address programmatic alternatives.

First, while Federal Defendants claimed their review of climate-change impacts in lease-specific analyses discharges their NEPA obligations, Federal Defendants emphasized in resisting the supplementation of the administrative record in this case that they never actually reviewed or considered those lease-specific analyses in reaching this conclusion. See Fed. Defs.' Br. in Opp. to Pls.' Mot. to Supp. the Admin. Record, at 3 [Doc. 78]; see also Order Denying Mot. for Reconsideration, at 4 [Doc. 102] (stating, "[t]he adequacy of those lease-level

environmental analyses should be considered in determining whether the agency considered all relevant factors"). Accordingly, Federal Defendants' conclusion regarding the adequacy of those documents could not have been "founded on a reasoned evaluation of the relevant factors," as the APA requires. Friends of Yosemite Valley, 348 F.3d at 793 (citation omitted).

Second, even if Federal Defendants had considered lease-specific environmental analyses, such analyses cannot legitimately replace programmatic review because they consistently disclaim or minimize climate impacts in ways a PEIS could not. Lease-specific analyses dismiss climate impacts primarily by stating that if BLM were to reject any particular coal-lease application, coal-fired power plants would simply buy the same amount of coal, at the same price, from other mines. Using this "perfect substitution" theory, BLM has regularly concluded that the climate impacts of any individual leasing decision are negligible or non-existent. See, e.g., AR 63435 (2010 Wright Area EIS, stating "[i]t is not likely that selection of the No Action alternatives would result in a decrease of U.S. [carbon dioxide (CO_2)] emissions … because there are multiple other sources of coal that … could supply the demand for coal"); AR 60938-39 (same re 2010 South Gillette Area EIS); AR 64652 (same re 2008 West Antelope II EIS); AR 57692 (same re 2011 Bull Mountains environmental assessment); see also

AR 2722-24 (comments discussing additional environmental analyses asserting perfect substitution).

BLM has additionally emphasized the minimal or unpredictable market reaction to individual coal leases to avoid analyzing the impact of such leases on coal consumption and climate. See, e.g., AR 54326 (2017 supplemental EIS for West Elk, citing "complexities involved with estimating the coal supply market responses to current demand" as a reason for not measuring climate impacts); AR 63429 (2010 Wright Area EIS, stating, "[c]oal production at any one mine is not tied in any predicable way over a period of time to any one power plant"); AR 60933-35 (same re 2010 South Gillette Area EIS); AR 64648-49 (same re 2008 West Antelope II EIS). BLM conceded that it has not conducted national or regional modeling of coal markets for lease-specific analyses, apparently because BLM believes it cannot recover the costs of such modeling from lessees. AR 101-02.

BLM also has relied on the relatively low contribution of individual leases to overall U.S. greenhouse gas emissions to dismiss their climate impacts. See, e.g., AR 55288 (2015 Twentymile Coal environmental assessment, labeling project's greenhouse gas emissions "negligible," with "no measurable impact on the climate"); AR 55492 (2012 Elk Creek environmental assessment, asserting that the climate impacts of a single lease are not measurable).

These rationales for dismissing the climate impacts of individual leasing decisions provide no reasoned basis for foregoing review of the climate pollution resulting from federal coal leasing overall.[4] Federal coal accounts for 42 percent of all U.S. coal production, and almost all federal coal is burned to make electricity. AR 1569. As documented in the record for the 2017 Scoping Report, BLM could not legitimately claim that that this volume of coal could simply be "substituted" by non-federal coal, nor could BLM dismiss the market impact of mining this volume of coal. See AR 28463-65, 28473 (modeling results predicting a range of substitution of non-federal coal for federal coal under different scenarios, but none showing 100 percent, or "perfect," substitution); AR 28806 (2016 presentation by Yale researcher stating that "[f]ederal [c]oal [d]ominates the [m]arket"). Further, with nearly 770 million metric tons of CO_2-equivalent emissions—amounting to 11 percent of total annual U.S. greenhouse gas emissions, AR 1569—Federal Defendants could not legitimately claim that the federal coal program's

[4] Even for analyses of individual mines, courts have found that the "perfect substitution" theory "contradicted basic economic principles" and was arbitrary. WildEarth Guardians v. BLM, 870 F.3d 1222, 1237–38 (10th Cir. 2017); see also Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining, 274 F. Supp. 3d 1074, 1104 (D. Mont. 2017), amended in part and adhered to in part, No. CV 15-106-M-DWM, 2017 WL 5047901 (D. Mont. Nov. 3, 2017) (stating perfect substitution assertion was "illogical").

contribution is de minimis.[5] In short, Federal Defendants' reliance on lease-specific analyses to describe program-level climate impacts of federal coal leasing was arbitrary.

Third, Federal Defendants' reliance on lease-specific analyses was arbitrary because such analyses cannot satisfy Federal Defendants' NEPA obligation to evaluate alternatives to mitigate or avoid the program's climate impacts, which is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14; see also Ctr. for Biological Diversity v. U.S. Dep't of Interior, 623 F.3d 633, 642 (9th Cir. 2010) (citation omitted). Lease-specific alternatives analyses generally evaluate modified tract configurations or timing of leases—see, e.g., AR 60479, 62871, 64327—but omit alternatives that would modify the federal coal-leasing program as a whole. By contrast, a program-level evaluation would reveal feasible alternatives—including potential regulatory changes—to avoid or reduce climate impacts or enhance economic return. Indeed, the 2017 Scoping Report identified numerous such alternatives, including: increasing the royalty rate to account for-

[5] BLM's lease-specific climate analyses also rely on potential future "regulations limiting CO_2 emissions" to negate the climate impacts of individual leases. AR 60938; see also, e.g., AR 63433 (citing "new CO_2 mitigation requirements … or an increased rate of voluntary CO_2 emissions reduction programs"); AR 64651 (same). Federal Defendants cannot continue to rely on this claim either in lease-specific or programmatic analyses since the federal government began dismantling such federal regulatory efforts, including the Clean Power Plan and Paris Agreement. See AR 15901-03 ("Energy Independence and Economic Growth" Executive Order).

carbon based externalities; requiring "compensatory mitigation" for greenhouse gas emissions, such as carbon offsets or carbon sequestration; leasing based on a "carbon budget"; and limiting any new leasing. AR 1608-22. Because BLM can evaluate and implement such alternatives only at the programmatic level, Federal Defendants' reliance on lease-specific environmental analyses to reverse their prior determination that a PEIS was necessary to evaluate the climate impacts of federal coal leasing was arbitrary.

2. Federal Defendants Offered No Legitimate Rationale for Reversing Their Decision that a Moratorium is Necessary to Ensure a Fair Return to U.S. Taxpayers

Federal Defendants also arbitrarily reversed their determination to suspend coal leasing pending programmatic review of options for ensuring a fair return to U.S. taxpayers from federal coal. When Federal Defendants issued the January 2016 Secretarial Order, they acknowledged their "responsibility to all Americans to ensure that the coal resources [the federal government] manages are administered in a responsible way to help meet our energy needs and that taxpayers receive a fair return for the sale of these public resources." AR 15977. In launching a comprehensive review to examine the federal coal program's failure to yield a fair return, Federal Defendants acknowledged that, "over the past few years, it has become clear that many of the decades-old regulations and procedures that govern the federal coal program are outdated and may not reflect the realities

of today's economy or current understanding of environmental and public health impacts from coal production." Id. Thus, while committing to review these failures, Federal Defendants also determined that the moratorium on new coal leasing was needed to ensure that future leases "incorporate lessons learned from the comprehensive review to ensure that taxpayers receive a fair return for the sale of these public resources." AR 15980. The 2017 Scoping Report reiterated the need for reforms to the federal coal program to "ensure that the public owners of this coal receive a full and fair return for this resource," and maintained the moratorium until such reforms could be analyzed. AR 1604.[6]

Less than three months later, Federal Defendants reversed themselves by recommending that the Secretary lift the moratorium because, among other things, "[a] PEIS is not needed to address these [fair return] issues." AR 15. Specifically, the Nedd Memorandum claimed that "the BLM has already addressed a number of these issues in response to OIG [Office of the Inspector General] and GAO [Governmental Accountability Office] recommendations" by revising its manuals and handbooks and issuing policy guidance. AR 15-16. However, these efforts

[6] Similarly, two other times in the history of the federal coal program, leasing was suspended specifically to address concerns that BLM was not receiving full market value for leases, and the moratoriums were not lifted until after BLM completed an EIS to examine the need for programmatic reforms. See AR 1544-45 (describing previous moratoriums).

were well known to Federal Defendants—and explicitly discussed—in advance of their decision to impose the moratorium. See AR 15981 (describing BLM actions to address OIG and GAO critiques). In the 2017 Scoping Report, Federal Defendants again acknowledged these prior reforms, but nonetheless determined that "[a] central objective of the BLM's reform effort for the Federal coal program is the level of return that it provides to the American public." AR 1609; see AR 1605 (stating that "BLM addressed these [GAO and OIG] recommendations through the development of new protocols and issuance of policy guidance, a manual, and a handbook" but that, nonetheless, "stakeholders have expressed additional concerns with what they believe are fundamental weaknesses in the program with respect to fair return"). In reaching their decision to rescind the coal-leasing moratorium, Federal Defendants offered no "reasoned explanation" for reversing their conclusion on the need for a PEIS to evaluate the fair-return issue before new coal leasing could commence based on the same underlying factual record. Organized Vill. of Kake, 795 F.3d at 968-69.

While Federal Defendants, in rescinding the moratorium, also purported to rely on "separate, more targeted processes" to address fair-return issues, they did not cite any existing or certain future processes to cure their previously acknowledged program flaws. AR 15. Indeed, the only such process that Federal Defendants described when they imposed the moratorium in 2016—the rulemaking

to "modernize existing valuation regulations" for federal coal, AR 15981—was suspended by the new administration in February 2017, before Federal Defendants rescinded the coal-leasing moratorium. Notice, Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Rule, 82 Fed. Reg. 11,823 (Feb. 27, 2017). Further, even if potential future processes could resolve fair return issues someday, absent any commitment to prevent new leasing in the meantime, such processes cannot rationally address Federal Defendants' previously stated concern about "locking in for decades" coal development under leases that may not generate a fair return. AR 10.[7]

Moreover, the Nedd Memorandum failed to provide a reasoned explanation for Federal Defendants' abandonment of their prior finding that analysis of the fair-return issue should incorporate consideration of the environmental and social costs of coal production. See AR 1605 (stating that PEIS would consider royalty reform options to "include compensation for externalities such as … environmental damage"); AR 1606 (stating that "[s]everal of the most promising reforms … are

[7] In any event, future processes cannot satisfy Federal Defendants' NEPA obligation to prepare a PEIS before it made the decision to lift the coal-leasing moratorium and authorize new leasing. See Confederated Tribes & Bands of Yakima Indian Nation, 746 F.2d at 477 (rejecting agency argument that EIS was not required before dam relicensing because fish protection issues were being addressed in a separate proceeding, stating "an EIS must be prepared before a project is approved, and the [separate proceeding] does not satisfy that obligation") (citation omitted)).

linked to fair return in that they would require an increase in the cost of this coal through price or royalty increases or compensatory mitigation to reflect and help to address its climate change impact"); AR 1615-18 (discussing options for accounting for environmental externalities in royalty rates). The Nedd Memorandum advanced two primary rationales for reversing this determination: first, "after further consideration," Federal Defendants decided that environmental externalities associated with carbon dioxide emissions should be accounted for at the source of combustion (i.e., power plants) rather than at the coal-lease stage; and second, "these types of externality costs are not ordinarily encompassed within the concept of 'return.'" AR 17-18. Because these considerations "were not new," however, they cannot justify discarding Federal Defendants' prior position that was based on the same underlying information. Organized Vill. of Kake, 795 F.3d at 967-69. Federal Defendants failed to provide any "reasoned explanation" for contradicting their prior finding that, before resuming federal coal leasing, programmatic NEPA review was necessary to evaluate the environmental costs of coal production. Id. at 968-69 (citation omitted). Accordingly, their decision to rescind the coal-leasing moratorium without first preparing a PEIS was arbitrary.

C. Federal Defendants Violated NEPA by Failing to Consider the Impacts of Federal Coal Leasing on the Northern Cheyenne Tribe

Federal Defendants also violated NEPA by rescinding the federal coal-leasing moratorium without considering impacts on the Northern Cheyenne Tribe.

The moratorium prevented BLM from issuing four pending leases for the expansion of the Decker and Spring Creek mines in southeastern Montana, adjacent to the Northern Cheyenne Reservation. See AR 92-94 (identifying lease applications suspended by the moratorium). Together, these leases encompass approximately 427 million tons of coal underlying more than 4,000 acres. Id. Additional federal coal leases were pending in Northern Cheyenne ancestral homelands, which include the entire Powder River Basin. AR 92-94; Walksalong Dec. ¶ 3. Mining this coal will generate air and water pollution, health impacts, and strain local infrastructure, AR 1574, 1584, all of which will affect the Northern Cheyenne Tribe acutely because of the Tribe's proximity to numerous mines. In addition to environmental and socioeconomic impacts from regional coal mining, the federal government's failure to obtain a fair return on leases reduces available funding to address these impacts on the Northern Cheyenne Reservation. See Mont. Code Ann. § 17-3-240 (providing for disbursement of federal royalties to local governments); AR 1535-36 (2017 Scoping Report recognizing impacts on tribal funding from federal coal leasing). By rescinding the coal-leasing moratorium, Federal Defendants opened the door to these impacts. Accordingly, NEPA required Federal Defendants to evaluate these impacts in an EIS. 42 U.S.C. § 4332(2)(C).

This District previously addressed a similar circumstance in which BLM violated NEPA by failing to consider impacts to the Northern Cheyenne Tribe from the sale of 11 Powder River Basin coal leases. N. Cheyenne Tribe v. Hodel, Case No. CV 82-116-BLG, 12 Indian Law Rep. 3065 (D. Mont. May 28, 1985), attached as Exhibit 1, injunction rev'd by, 851 F.2d 1152, 1158 (9th Cir. 1988), remanded to N. Cheyenne Tribe v. Lujan, 804 F. Supp. 1281, 1285 (D. Mont. 1991) (recognizing validity or prior merits ruling). The court recognized that "[t]he Northern Cheyenne Indian Reservation lies amidst the Powder River coal region." N. Cheyenne Tribe v. Hodel, 12 Indian Law Rep. at 3065. Although BLM prepared a regional EIS that looked generally at the environmental impacts of coal mining, the court held that BLM violated NEPA by failing "to disclose and consider the social, economic, and cultural impacts of the proposed coal development on the Northern Cheyenne Indian Tribe as an entity." Id. at 3069.

BLM's NEPA violation is more stark here. By failing even to take the first step of preparing an EIS, BLM repeated and exacerbated the NEPA violations identified in N. Cheyenne Tribe v. Hodel. Had Federal Defendants attempted to comply with NEPA, they would have been obligated to "[i]nvite the participation of … any affected Indian tribe" at the outset of environmental review. 40 C.F.R. § 1501.7(a)(1). Indeed, before Federal Defendants rescinded the coal-leasing moratorium, the Northern Cheyenne Tribe requested formal consultation.

AR 15199-200. The Tribe's request explained:

> Because coal mining on these federal lands could have significant socioeconomic and environmental impacts on the Tribe and its members, the Tribe requests government-to-government consultation regarding any proposed changes to Secretarial Order 3338 or the federal coal leasing moratorium. In fulfillment of the sacred trust responsibility your office owes to the Tribe, this government-to-government consultation must occur prior to any decision to lift or otherwise modify the moratorium.

Id. at 15200. Federal Defendants never acknowledged or responded to the Tribe's request or engaged in any analysis of impacts to the Tribe prior to rescinding the federal coal-leasing moratorium.

Federal Defendants' failure to consider the impacts of Secretarial Order 3348 on the Northern Cheyenne Tribe and its resources violated NEPA.

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

By issuing Secretarial Order 3348 in violation of NEPA, Defendants also violated their trust responsibility to the Northern Cheyenne Tribe. The U.S. Supreme Court has long recognized the "undisputed existence of a general trust relationship between the United States and the Indian people." United States v. Mitchell, 463 U.S. 206, 225 (1983). The trust duty commits the federal government to protect Indian tribes' rights, resources, and interests. Cherokee Nation v. State of Ga., 30 U.S. 1, 2 (1831). In discharging this responsibility,

federal agencies must observe "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

This District has expressly recognized the Secretary's fiduciary responsibility to the Northern Cheyenne Tribe in leasing federal coal on non-tribal lands. N. Cheyenne Tribe v. Lujan, 804 F. Supp. at 1285; N. Cheyenne Tribe v. Hodel, 12 Indian Law Rep. at 3071. Mineral Leasing Act and NEPA regulations implement Federal Defendants' obligations toward tribal governments affected by the decision to rescind the federal coal-leasing moratorium. BLM's regulations direct that federal coal is to be "developed in consultation, cooperation, and coordination with ... Indian tribes." 43 C.F.R. § 3420.0–2. Under NEPA, federal agencies are required to "[i]nvite the participation of … any affected Indian tribe" at the very outset of environmental review. 40 C.F.R. § 1501.7(a)(1). Further, to satisfy their trust obligations, "agencies must at least show 'compliance with general regulations and statutes not specifically aimed at protecting Indian tribes,'" including NEPA's requirement to prepare an EIS for major federal actions with potentially significant environmental effects. Pit River Tribe, 469 F.3d at 788 (quoting Morongo Band of Mission Indians v. F.A.A., 161 F.3d 569, 574 (9th Cir. 1998)); see also Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior, 755 F. Supp. 2d 1104, 1110 (S.D. Cal. 2010) (stating that "[v]iolation of

this fiduciary duty [to tribes] to comply with … NEPA requirements during the process of reviewing and approving projects vitiates the validity of that approval and may require that it be set aside").

Federal Defendants violated their "minimum fiduciary duty" to the Northern Cheyenne Tribe by failing to prepare an EIS before rescinding the federal coal-leasing moratorium that affects the Tribe's interests, and by failing to engage in consultation as requested by the Tribe and required by the Mineral Leasing Act and NEPA. Pit River Tribe, 469 F.3d at 788. Federal Defendants' trust violations provide another reason for setting aside Secretarial Order 3348.

V. REMEDY

To remedy Federal Defendants' serious NEPA and trust violations, this Court should set aside Secretarial Order 3348, thus restoring the federal coal-leasing moratorium. The APA provides that the "reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) & (D); see also Alsea Valley All. v. Dep't of Commerce, 358 F.3d 1181, 1185 (9th Cir. 2004) ("Although not without exception, vacatur of an unlawful agency rule normally accompanies a remand.") (citation omitted)); All. for Wild Rockies v. Marten, No. CV 17-21-M-DLC, 2018 WL 2943251, at *2 (D. Mont. June 12,

2018) (noting "courts in the Ninth Circuit decline vacatur only in rare circumstances") (quotation omitted)). The Court should also reinstate the moratorium unless and until Federal Defendants satisfy their NEPA obligation to examine the impacts of and alternatives to the federal coal program. Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force.") (citation omitted)).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for summary judgment, vacate Secretarial Order 3348, and reinstate the federal coal-leasing moratorium unless and until Federal Defendants have complied with NEPA.

Respectfully submitted this 27th day of July, 2018.

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