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

CITIZENS FOR CLEAN ENERGY *et al.* and THE NORTHERN CHEYENNE TRIBE, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR *et al.* Federal Defendants, and STATE OF WYOMING *et al.*, Intervenor-Defendants.	CV 17-30-BMM (lead consolidated case) **FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSING PLAINTIFS' MOTIONS FOR SUMMARY JUDGMENT**
STATE OF CALIFORNIA *et al.* v.	CV 17-42-BMM (consolidated case)

UNITED STATES DEPARTMENT OF THE INTERIOR *et al*.

Federal Defendants,

and

STATE OF WYOMING *et al.*,

Intervenor-Defendants.

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Secretary of the Interior Ryan Zinke, the Department of the Interior, and the Bureau of Land Management ("BLM") (collectively, Federal Defendants) submit this memorandum in support of their cross-motion for summary judgment and in opposition to Plaintiffs' motions for summary judgment and supporting memoranda. ECF Nos. 115, 116 (motion and supporting memorandum, no. CV 17-42-BMM) ("State Plaintiffs"), and 117, 118 (motion and supporting memorandum, no. CV 17-30-BMM) ("Conservationists").

INTRODUCTION

Plaintiffs challenge Interior's March 2017 decision to end a "pause," as former Secretary Jewell designated it, on a single aspect of the federal coal program, that is, agency processing of most new coal lease applications. In 2015, the year immediately preceding the pause, BLM received two such applications. The former Secretary effected the pause by Secretarial Order ("SO") 3338 (Jan. 2016), directing BLM, during the period of pause, to prepare a "Discretionary Programmatic Environmental Impact Statement," or PEIS. *See* Administrative Record ("AR") 3.

Emphasizing that she was "not proposing any regulatory action at [the] time," Secretary Jewell explained in the order that the "purpose of the PEIS" was to "identify, evaluate, and potentially recommend reforms to the Federal coal program." AR 9. The order made clear this was a voluntary study, facilitated by

the pause and intended to promote consideration of possible reform, but as Plaintiffs acknowledge, no proposal for reform ever emerged. In 2017, Secretary Zinke opted not to continue Secretary Jewell's preliminary reform efforts, and chose instead to continue the policy of the United States for the past four decades – that is, to process lease applications received under the BLM's normal practice, consistent with the Mineral Leasing Act ("MLA"), 30 U.S.C. §§ 181-287 and its implementing regulations. Plaintiffs' motions treat the pause as if it established a new legal regimen, while at the same time avoiding any discussion of the discretionary nature of the study SO 3338 required. To do the latter would undercut their theory that a pause for voluntary study created a legal requirement that binds a future administration. The theory has no basis in law.

Just as they mischaracterize the study's nature, Plaintiffs also mischaracterize the decision to end the study, referring to SO 3348 as a "restart" of the "federal coal program," ECF No. 116 at 18, one that "open[s] the door to new coal leasing," ECF No. 118 at 12. In fact, the coal program never stopped. During the period of pause, almost all aspects of the program continued without interruption, including coal mining and reclamation of mining sites, as well as environmental study, leasing decisions for small mine expansions, fair market value determinations, enforcement of mining regulations and lease terms, collection of royalties, and approval of mining plans by the Secretary.

The Court should reject Plaintiffs' request for reinstatement of the pause because, as explained below, they fail to demonstrate standing under *Lujan v. Defenders of Wildlife* (*Defenders*), 504 U.S. 555, 560-61 (1992); their claims are unripe, *see Abbott Labs. v. Gardner (Abbott)*, 387 U.S. 136, 148-49 (1967); and they fail to identify "final agency action," that is, action which marks the "'consummation' of the agency's decision-making process," and "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

In addition to being non-justiciable, Plaintiffs' claims also lack merit because they fail to demonstrate violation of the three statutes they invoke: the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, the Federal Land Management and Policy Act ("FLPMA"), 43 U.S.C. §§ 1701-1787, and the MLA. Federal Defendants address all three below but, with respect to NEPA, they call to the Court's attention the recent decision of the D.C. Circuit in *Western Organization of Resource Councils v. Zinke* (*WORC*), 892 F.3d 1234 (D.C. Cir. 2018), in which various conservation groups similarly sought to compel preparation of a supplement to the 1979 programmatic EIS supporting the 1979 rules that established the modern coal program. The court rejected the challenge, finding that a programmatic EIS was not required because no "major Federal action," such as a change to the 1979 rules, had been proposed – a circumstance

that remains true today. *Id*. at 1237. The court likened promulgation of the 1979 rules, for which the 1979 PEIS was prepared, to the land use plan at issue in *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 64 (2004), which was deemed a completed action upon issuance, even though plan implementation decisions would follow. Importantly, the decision in *WORC* postdates (and in fact discusses) Secretary Zinke's decision to end the pause, a tacit recognition that a directive to resume application processing does not constitute major federal action.

For the reasons set out herein, the Court should dismiss Plaintiffs' claims, deny their motions for summary judgment, grant Defendants' cross-motions, and enter judgment in favor of all Defendants.

BACKGROUND

I. Legal Background

A. National Environmental Policy Act

NEPA serves the dual purpose of informing agency decision-makers of the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public so that they "may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA is procedural in nature. It is "well settled that NEPA itself does not

mandate particular results, but simply prescribes the necessary process." *Id.* at 350 (citing *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980)). "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action." *Robertson*, 490 U.S. at 351.

To meet these dual purposes, NEPA requires that an agency prepare a comprehensive environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.3. The Council on Environmental Quality's ("CEQ") regulations implementing NEPA provide guidance as to the nature and content of an EIS. *See* 40 C.F.R. § 1502. Those regulations direct the preparer to include an analysis of alternatives to the proposed action in an EIS, *see id.* § 1502.14, and further instruct that the document should include discussions of direct, indirect, and cumulative impacts, *id.* §§ 1502.16 (a)-(b), 1508.7, 1508.8. Not every federal action or proposal, however, requires an EIS. CEQ's regulations provide that an agency may prepare an environmental assessment ("EA") to determine whether the impacts of an action will be significant, and if not, the agency may prepare a finding of no significant impact ("FONSI") and forego preparation of an EIS. *See* 40 C.F.R. §§ 1501.3, 1501.4(c), (e), 1508.9, 1508.13.

B. The Federal Land Policy and Management Act of 1976

Under FLPMA, 43 U.S.C. § 1701-1787, BLM manages the public lands, including federal coal, 43 U.S.C. § 1702(e), through a multi-step planning and decision-making process. BLM first develops a Resource Management Plan ("RMP") for a planning area, setting forth long-term goals and objectives for management of public lands. *Id.* § 1712(a). The RMP establishes lands to be opened or closed to leasing of energy resources and the conditions under which development of the resources should occur, within a given planning area. 43 C.F.R. § 1601.0-5(n); *see also SUWA*, 542 U.S. at 71. An RMP is not a decision to undertake site-specific action. 43 C.F.R. § 1601.0-5. Rather, for purposes of the MLA, BLM manages the public lands through a series of separate project-specific decisions which must conform to the RMP. 43 U.S.C. § 1712(e); 43 C.F.R. § 1610.5-3; *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1178 (9th Cir. 1990). As relevant here, one project-specific land-use decision the agency is required to make is approval or disapproval of coal leasing applications submitted by industry and the subsequent conducting of lease sales, in accord with the MLA.

In addition to establishing a framework for managing the public lands, FLPMA also sets goals for their management. For example, in a hortatory declaration, FLPMA states it is the policy of the United States to manage the

public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8). The same declaration states that it is the policy of the United States to "receive fair market value of the use of the public lands and their resources." *Id*. § 1701(a)(9).

C. Mineral Leasing Act of 1920

The MLA, 30 U.S.C. §§ 181-287, authorizes the Secretary to lease federal coal deposits, *id*. § 181, a duty that implicates a "large number of overlapping statutory mandates," *Natural Resource Defense Council v. Jamison* (*NRDC*), 815 F. Supp. 454, 456 (D.D.C. 1992). The Act requires the Secretary, on request of a qualified applicant or his own initiative, to "offer [coal] lands for leasing," and "award leases thereon by competitive bidding." 30 U.S.C. § 201(a)(1). The act also requires Secretarial approval of a mining plan before the environment is disturbed. *Id*. § 207(c).

BLM has promulgated regulations implementing this process, which are codified at 43 C.F.R. Subpart 3400. As noted, the leasing process begins with land use planning, in which BLM (along with other surface management agencies) identifies lands suitable for coal leasing. *Id*. § 3420.1-4(e); *see also NRDC*, 815 F. Supp. at 456. Sales of new leases are conducted through the "lease-by-application" process, which is applicant-initiated. *See* 43 C.F.R. Subpart 3425.

For a federal coal lease to issue, the highest bid must meet or exceed fair market value ("FMV"), as determined by public input and BLM's own economic evaluation. 43 C.F.R. § 3425.4(a)(1); 43 C.F.R. § 3400.0-5. Before leasing, BLM must comply with NEPA, the Endangered Species Act ("ESA"), and the National Historic Preservation Act.

II. Factual and Procedural Background

The BLM manages federal coal on behalf of the American public across 570 million acres of mineral estate. AR 1477 (Jan. 2017 Scoping Report for the draft PEIS). In administering this program, the agency works with state and other federal regulators, *see* AR 1480, 1488, in an effort to comply with environmental laws and to conserve and protect the quality of environmental, historic, ecologic, and scientific values, among others, for the benefit of future generations. 43 U.S.C. § 1701(a)(8). BLM currently administers approximately 300 coal leases, in twelve states, encompassing an estimated 7.4 billion tons of recoverable coal. AR 1477. Coal-fired power plants use between eighty and ninety percent of the coal produced in the United States to generate electricity. *Id*. In the last ten years, federal coal leases have produced over four billion tons of coal and have garnered $10 billion in revenue, which the United States shares with the states in which the coal is mined. *Id*.

A. Early History of the Coal Program.

BLM has managed the leasing of federal coal under the MLA for nearly a century. In 1979, after Congress enacted FLPMA and amended the MLA, *see* Federal Coal Leasing Amendment Act, Pub. L. No. 94-377, 90 Stat. 1083 (Aug. 4, 1976), the Secretary exercised his broad authority by promulgating new regulations for the BLM's management of its coal leasing program. *See* 30 U.S.C. § 189; 43 C.F.R. Subpart 3400; Coal Management; Federally Owned Coal, 44 Fed. Reg. 42,584 (July 19, 1979).

Prior to 1979, BLM issued coal leases on a case-by-case basis, in a reactive fashion, and gave little consideration to the total acres under lease, the need for additional leasing, or the environmental impacts of coal leasing. *WORC*, 892 F.3d at 1238 (citing the 1979 PEIS, AR 87412). The Secretary used the 1979 rulemaking as an opportunity to develop a planning and management program to govern the leasing of federal coal. *Id.* The proposed rulemaking "allocated land for leasing based on analysis of national and regional coal demand," and included "a planning system to decide which areas would be listed for coal production, a system for evaluating the national demand for coal, and procedures for conducting sales, issuing and enforcing leases, and complying with the agency's NEPA duties." *WORC*, 892 F.3d at 1238 (citing to PEIS 3-2 to 3-3). The 1979 regulations featured two leasing mechanisms. Agency planning would drive the

first mechanism, that is, "regional leasing," under which the agency would make leasing decisions based on region-wide planning and environmental analysis, in broad geographic areas known as coal production regions ("CPRs") 43 C.F.R. Subpart 3400; *see also* Coal Management; Federally Owned Coal, 44 Fed. Reg. 42,584, 42,616 (Subpart 3420) (July 19, 1979). Industry demand would drive the second mechanism, "leasing on application," also referred to as "lease-by-application," which was similar to predecessor programs, and made coal located *outside* of the CPRs available for leasing. *Id*. at 42,625 (Subpart 3425).

The "regional leasing" program turned out to be ineffective and fell into disuse after only a decade. In 1990, BLM decertified the CPR that encompassed the Powder River Basin, thereby opening the area to lease-by-application. Decertification of the Powder River CPR, 55 Fed. Reg. 784 (Jan. 9, 1990); *see also WildEarth Guardians v. Salazar*, 783 F.Supp.2d 61, 65 (D.D.C. 2011) (discussing decertification). Over time, all other CPRs were eventually decertified. BLM has not used the regional leasing system in decades and currently leases all coal by application. AR 4 (SO 3348).

In support of the proposed rulemaking, BLM prepared a programmatic environmental impact statement ("1979 PEIS") to analyze the impacts of the new program and to support its decision to adopt it. The 1979 PEIS, and the proposed regulations, contemplated further site-specific environmental review for each and

every coal leasing decision made under the new regulatory regime. (1979 PEIS at 3-68). The BLM has consistently carried out site-specific environmental review for individual leasing decisions since issuing the PEIS in 1979.

In 1982, BLM adopted changes to streamline the coal regulations that would "eliminate burdensome, outdated and unneeded provisions" while "preserving the essential features of the existing Federal coal management program." *See* Coal Management; Federally Owned Coal; Amendments to Coal Management Program Regulations, 47 Fed. Reg. 33,114 (July 30, 1982). The agency prepared an EA, based on which the agency concluded that an EIS was not required because the impacts of the regulations "would not be significantly greater than those anticipated from the existing program." *Id*. at 33,115.

In 1985, the BLM proposed further changes to the program in response to changes in the energy market and prepared a supplement to the 1979 PEIS ("1985 supplemental PEIS"), to support its decision to amend the regulatory scheme. In 1986, in reliance on that supplemental PEIS, BLM promulgated further revised regulations. Coal Management—General; Competitive Leasing; and Environment, 51 Fed. Reg. 18,884 (May 23, 1986). Despite these changes, the 1979 regulations remain in effect largely unchanged. See *WOR*, 892 F.3d at 1239. There have been no new rulemaking efforts since 1985. *See W. Org. of Res. Councils*, 124 F. Supp. 3d at 11 (ordering dismissal of action seeking supplementation of the 1979 PEIS

based in part on the lack of an "underlying 'proposed action' . . . to trigger an obligation to supplement the 1979 [PEIS] because the federal coal management program has been implemented" (affirmed, *WORC*, 892 F.3d 1234)).

B. Secretarial Order 3338

In March 2015, based on a variety of concerns, including climate change and fair return to the American taxpayers, former Secretary Jewell announced her intent to consider reform of the coal program. AR 3 (SO3338) (calling for "an honest and open conversation about modernizing the Federal coal program"); AR 1479 (Scoping Report). In the summer of 2015, the agency held listening sessions around the country. *Id.* On January 15, 2016, following receipt of more than 90,000 comments during the sessions, Secretary Jewel issued SO 3338 for the purpose of considering a "wide range of reasonable reform alternatives, evaluat[ing] the impacts of those alternatives with a focus on cumulative effects, and provid[ing] meaningful opportunities for public engagement to inform future agency decision-making." *Id*. The order placed a "pause" on most new and pending coal leasing actions and directed BLM to prepare a programmatic EIS analyzing *potential* leasing and management reforms. AR 10. The order made clear that the PEIS was discretionary, and not prompted by any specific proposed action. AR 3, 7-8. The order also stated that it did not apply to the coal program on Indian lands. AR 3.

On March 30, 2016, BLM published a notice in the Federal Register, announcing its intent to prepare a PEIS and to conduct public scoping meetings. Notice of Intent to Prepare a Programmatic Environmental Impact Statement to Review the Federal Coal Program and to Conduct Public Scoping Meetings, 81 Fed. Reg. 17,720 (Mar. 30, 2016), available at https://www.gpo.gov/fdsys/pkg/FR-2016-03-30/pdf/2016-07138.pdf (last checked Sept. 7, 2018). The Notice of Intent initiated a public scoping and comment period and posed questions to the public concerning issues of how, when, and where to lease coal, fair return, climate impacts, socioeconomic considerations, exports, and energy needs. AR 1479. The notice also stated that BLM's scoping process would include coordination and consultation with tribal governments. 81 Fed. Reg. 17,727. BLM held scoping meetings across the country in the summer of 2016, invited federally recognized tribes to formally consult on the PEIS in December of 2016, and produced a scoping report in January 2017. AR 1479-80, 1465. The report proposed various "possible option combination packages" for potential reforms. AR 1630.

C. Executive Order 13783 and Secretarial Order 3348

In March of 2017, the new administration opted not to continue the pause on new coal leasing, citing the importance of the coal program to the national economy, job creation, energy security, and proper resource stewardship.

More specifically, on March 28, 2017, the President issued Executive Order 13783, "Promoting Energy Independence and Economic Growth." AR 15897. The executive order directed the Secretary of the Interior to "take all steps necessary and appropriate to amend or withdraw [SO] 3338 dated January 15, 2016 . . . and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338." AR 15904. On that same day, the Acting Director of the BLM submitted a Recommendation Memorandum for the Assistant Secretary for Land and Minerals Management, recommending that the Secretary revoke SO 3338 and lift the pause. AR 13. In the memorandum, the BLM explained that, after a careful review of the Scoping Report, the agency found the PEIS unnecessary and an inappropriate vehicle "to analyze the need for and potentially recommend reforms to BLM's coal leasing authorities and program." *Id.* at AR 14. BLM also stated its view that the pause was unduly burdensome on coal operations, as well as unnecessary to support possible reforms. AR 23.

Following that, on March 29, 2017, Secretary Zinke issued SO 3348 which revoked SO 3338. AR 1. The Zinke order cited the expense and lengthy schedule of the PEIS and found 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." *Id.* at AR 1. SO 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." AR 2. The order does not authorize any new coal leasing. Rather, it requires that when coal applicants submit leasing applications, BLM process them in accord with existing law. This includes a requirement that BLM conduct NEPA analysis before any new leases are offered for sale. See 43 C.F.R. § 3425.3(a) ("Before a lease sale may be held under this subpart, the authorized officer shall prepare an environmental assessment or environmental impact statement of the proposed lease area in accordance with 40 CFR parts 1500 through 1508."). It also includes a requirement that BLM consult with any Indian tribe which may be affected by the lease sale. *Id*. § 3425.4(a)(2).

STANDARD OF REVIEW

Challenges to agency actions are reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 872 (1990); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Review is "highly deferential" and presumes agency action is valid. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012). The APA standard is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.* (*Motor Vehicles*), 463 U.S. 29, 43 (1983).

Under the APA, a court may, if the equities so counsel, 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); *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9th Cir. 2013). When examining agency scientific findings made in an area of an agency's technical expertise, the court must be at its most deferential. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

ARGUMENT

I. Plaintiffs' Claims are Not Justiciable.

A. Plaintiffs Lack Standing.

Federal courts are courts of "limited jurisdiction" and are presumed to lack jurisdiction unless a plaintiff establishes its existence. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *accord Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The burden of demonstrating standing and other jurisdictional elements rests squarely on the plaintiff, who must meet the burden "affirmatively" and "clearly." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (noting plaintiff's burden).

These principles require a plaintiff or, in the case of an organization, one of its members, to demonstrate: (1) injury-in-fact, that is, injury which is "concrete

and particularized" and either "actual or imminent" and not "conjectural or hypothetical;" (2) a "causal connection" between the alleged injury and the conduct complained of; and (3) a likelihood that the injury will be "redressed by a favorable decision." *Defenders*, 504 U.S. 555, 560-61 (1992) (standing requirements generally); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493-94 (2009) (same); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (organizational standing).

Where, as here, a plaintiff relies on "imminent" rather than "actual" injury to support a claim of standing, the supposed injury "must be *certainly* impending to constitute injury in fact" – "'[a]llegations of *possible* future injury are not sufficient.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted). Further, to demonstrate the required "causal connection," a plaintiff must show that the supposed injury is "fairly traceable" to the challenged action. *Summers*, 555 U.S. at 493.

Plaintiffs' allegations fail to satisfy the injury-in-fact and causation prongs of the standing test. First, the supposed harm on which Plaintiffs rely that is actually related to the decision not to continue the pause (that is, potential impacts from *future* coal mining that will impair their aesthetic, recreational, or cultural

interests[1]) is conjectural, not imminent. Such harm can come about only if a series of four events occurs:

- first, an operator applies to lease land or to modify a lease on which, or sufficiently near which, Plaintiffs' members recreate or otherwise utilize or enjoy affected resources;

- second, a BLM state office, after completing either an EA or an EIS and determining the fair market value of the coal, decides to offer a lease for sale, then offers, sells, and issues such lease, or decides to approve the lease modification and offers the modification tract to the applicant;

- third, the relevant regulatory authority under the Surface Mining Conservation and Reclamation Act, 30 U.S.C. §§ 1201 *et seq*. ("SMCRA") (in almost all instances, a state government exercising delegated SMCRA authority) issues a surface mining permit or permit revision and a proposed mining plan or mining plan modification, if warranted; and

- finally, the Secretary or Assistant Secretary, on the required recommendation of the Office of Surface Mining Reclamation and Enforcement, also made in accordance with NEPA, approves that mining plan.

None of these events, at this time and on this record, can fairly be characterized as "certainly impending." *Clapper*, 568 U.S. at 409. Plaintiffs of course can

[1] *See* ECF No. 117-1, ¶¶ 14–17 (no. CV 17-30-BMM) (Gilbert Decl.), ECF No. 117-2, ¶¶ 5, 7–8 (no. CV 17-30-BMM) (Hayes Decl.), ECF No. 117-3, ¶¶ 23, 25–26, 33–35, 38–39 (no. CV 17-30-BMM) (Nichols Decl.), ECF No. 117-4, ¶¶ 9–10, 14–15 (no. CV 17-30-BMM) (Peterson Decl.), ECF No. 117-5, ¶¶ 12–14 (no. CV 17-30-BMM) (Proctor Decl.), ECF No. 117-6, ¶ 16 (no. CV 17-30-BMM) (Walksalong Decl.), ECF No. 116-2, ¶ 18 (no. CV 17-30-BMM) (Ebisu Decl.).

challenge the government's NEPA decisions at the leasing and mine plan approval stage.

Additionally, the broad-ranging harm that Plaintiffs allege does not satisfy the causation prong, which requires that harm be "fairly traceable" to the challenged governmental action "and not the result of the independent action of some third party not before the court." *Defenders*, 504 U.S. at 561. SO 3338 did not halt or otherwise affect ongoing mining operations with existing leases and permits. Similarly, when the Secretary opted not to continue the pause, as SO 3348 ordered, that action likewise did not affect ongoing coal operations.

By pursuing reinstatement of the pause, Plaintiffs seek to prevent or delay possible future mining operations that would be subject to the pause, some of which are identified and some of which are not. As to the unidentified operations, Plaintiffs cannot demonstrate prior use of – or geographic nexus to – these areas for the simple reason that they are unspecified. Nor can they demonstrate concrete plans to return to a given area, as *Summers* requires. Consequently, the Court has no basis for assessing whether any aesthetic, recreational or other interests are diminished by governmental conduct at the unidentified locations, so as to support standing.

Further, Plaintiffs have not demonstrated injury-in-fact as to the mines their declarations identify, for which leasing applications had been submitted at the time

of the pause, because at the time this litigation commenced, in March and May of 2017, BLM still had not completed the second step enumerated above.[2] In particular, the agency had approved no leasing decisions since discontinuing the pause, nor had it approved any lease modifications, or conducted any lease sales. For this reason, and also because the third and fourth steps were not complete (i.e., state SMCRA permitting and Secretarial approval of mining plans for the nominated tracts), the harms plaintiffs allege claim are both speculative and remote.

In assessing harm, the Court should consider the real nature of the pause. In its essence, the pause was a decision to defer lease processing, something BLM managers – who are not subject to regulatory time-tables for lease processing – could accomplish informally, as work conflicts demand, by directing staff to work on other tasks. Just as parties opposed to mining are not harmed when staffing conflicts causing delays in lease processing are resolved, neither are Plaintiffs in this case harmed, within the meaning of Article III, by the decision not to continue

[2] The complaint in case number 17-30-BMM was filed March 29, 2017, and the complaint in case number 17-42-BMM was filed May 9, 2017. Standing must exist on the date the complaint is filed. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732 (2008) (referring to standing as the requisite "personal interest that must exist at the commencement of the litigation") (quoting *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000).

the pause and to return to the regulatory regime established in accord with NEPA and other applicable law almost forty years ago.

B. Plaintiffs' Claims are Unripe

The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies," and also protects agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott*, 387 U.S. at 148-49. A case is not "'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Nat'l Wildlife Fed'n*, 497 U.S. at 891; *see also Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003).

In considering whether an agency action is ripe for review, the Supreme Court has directed that courts consider three factors: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."

Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998). All three considerations counsel dismissal of Plaintiffs' claims.

As discussed, the pause was implemented as a matter of policy, not because it was required by law, and it operated to defer processing of lease applications that the law would otherwise expect to be processed. In withdrawing the policy of deferred processing, Secretary Zinke restored the status quo ante, under which lease processing would proceed. How that will affect the interested public remains to be seen, but it presently causes no "direct and immediate" hardship to Plaintiffs. *Abbott*, 387 U.S. at 152; *see also Ohio Forestry*, 523 U.S. at 733–35. Moreover, the new policy "create[s] no legal rights or obligations." *Ohio Forestry*, 523 U.S. at 733. And it does not authorize any coal development. *See id.* (finding no hardship where a forest plan did "not give anyone a legal right to cut trees [or] abolish anyone's legal authority to object to trees being cut.").

As to the second factor, judicial intervention would inappropriately interfere with likely future lease proceedings by effectively concluding, in advance of agency consideration and the exercise of its statutory authority, that *all* potential lease proceedings must be curtailed, rather than allowing BLM to decide on its own, on a case-by-case basis, whether a lease should be offered for sale and, if so, what mitigation or other conditions would be appropriate. The Court would benefit from this further factual development, which would include formal NEPA

analysis (a prerequisite on all lease applications), as well as public comment, agency responses, and issuance of a formal decision in which the agency explains its reasoning. The Court could then review the decision based on the more fulsome record and on the agency's stated rationale. This is the process that the APA's limited waiver of sovereign immunity – *see Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of Mont.*, 792 F.2d 782, 792 (9th Cir. 1986) – contemplates in authorizing an individual, aggrieved within the meaning of a relevant statute, to seek review.

In sum, the administration has announced its policy of not deferring lease applications. Standing alone, this announcement has no on-the-ground impact, making Plaintiffs' challenge at present just an "abstract disagreement[] over administrative polic[y]." *Abbott*, 387 U.S. at 148-49. No "decision has been formalized" and no "concrete" effects have been felt "by the challenging parties." *Id*. Standing is lacking for this same reason, which illustrates the point that "the standing question" bears a "close affinity to questions of ripeness" – that is, "whether the harm asserted has matured sufficiently to warrant judicial intervention . . . ." *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975).

Given that Plaintiffs' stated harms flow from leasing (and not from issuance of SO 3348 itself, except in the most attenuated sense), their challenge is best considered "in the context of a specific application" of the policy instead of as a

"generalized challenge." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163-64 (1967); *see also Nat'l Park Hosp. Ass'n*, 538 U.S. at 812 (concluding that "judicial resolution of the question presented here should await a concrete dispute about a particular concession contract."); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 696 (9th Cir. 2007) (finding challenge to regulations not applied to any "specified project" are "not fit for judicial decision"), *aff'd in part, rev'd in part on other grounds*, 555 U.S. 488 (2009). Plaintiffs' claims should be dismissed as unripe.

C. Plaintiffs Fail to Identify Final Agency Action

The statutes Plaintiffs invoke to assert legal violations do not provide private rights of action and thus their claims must be brought under the APA. *Earth Island Inst. v. U.S. Forest Serv*., 351 F.3d 1291, 1300 (9th Cir. 2003). The APA requires that a plaintiff challenge final agency action. 5 U.S.C. § 704; *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). Agency action is "final" if (1) it "mark[s] the 'consummation' of the agency's decisionmaking process," and (2) is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 177–78 (citation omitted). In determining whether an action is a final agency action, courts are to consider "both the practical and legal effects of the agency action." *Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1249-50 (9th Cir. 2017) (quoting *Or. Nat. Desert Ass'n*, 465 F.3d at 982) (internal quotation marks omitted).

The challenged order is not a final agency action because it does not satisfy either prong of the *Bennett* test. First, it is not the "consummation" of the agency's decision-making process, *Bennett*, 520 U.S. at 177-78, but rather a step on the way to a final agency action. In order to meet this first prong, "the action 'must not be of a merely tentative or interlocutory nature.'" *Or. Nat. Desert Ass'n*, 465 F.3d at 984 (quoting *Bennett*, 520 U.S. at 178). This is why courts are to consider "whether the agency has rendered its last word on the matter to determine whether an action is final and is ripe for judicial review." *Id.* (citation and quotation marks omitted). SO 3348 merely establishes a policy that the agency will not defer proceedings on lease applications. *See* AR 2 (directing BLM to "process coal lease applications and modifications expeditiously in accordance with regulations and guidance existing before the issuance of [SO] 3338"). It makes no decision on any lease application. Accordingly, it is not the consummation of the agency's decision-making process, insofar as the harm alleged by Plaintiffs is concerned.

Nor is the challenged order one that determines any "rights or obligations" or from which "legal consequences will flow." *Bennett*, 520 U.S. at 177-78. The key inquiry, as to this prong, is whether the order has the force and effect of law. *See Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1095 (9th Cir. 2014). SO 3348 has no such legal effect. It does not affect the legal rights or obligations of either the regulated industry or Plaintiffs. Nor does it create legally

enforceable requirements for BLM. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 473-74 (9th Cir. 2010) (in order to create legally enforceable obligations with the force and effect of law, an agency must promulgate a substantive rule in accordance with applicable procedural requirements). Instead, the legally enforceable obligations regarding BLM's leasing process already exist, in the MLA, FLPMA, NEPA, the CEQ regulations, and the agency's MLA regulations.

For these reasons, Plaintiffs have not demonstrated that issuance of SO 3348 was a final agency action subject to judicial review under the APA, nor have they demonstrated standing or ripeness. The court should dismiss Plaintiffs' claims and, in so doing, may decline to reach the merits arguments which follow.

II. Plaintiffs' NEPA Claims Lack Merit.

Each plaintiff group asserts NEPA claims under APA section 706(2), seeking vacatur of SO 3348 and an affirmative injunction directing Federal Defendants to reinstate SO 3338, though neither group addresses the factors for permanent injunctive relief, *see Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010), nor does either seek briefing on remedy. In light of this, Federal Defendants respectfully request that the Court allow the parties a modest amount of time, in the event of a merits ruling favorable to Plaintiffs, to negotiate a proposed remedy briefing schedule and submit a joint proposal. No such briefing

should prove necessary here, however, because SO 3348 fully comports with applicable law, for the reasons explained more fully below.

A. SO 3348 is a Statement of Policy, not a Major Federal Action under NEPA.

NEPA requires inclusion of an EIS in "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1508.18 (defining major federal action). Plaintiffs contend that issuance of SO 3348 is a "major Federal action" demanding NEPA analysis, even though the order does not approve, finance, regulate, assist, or conduct anything. *Id*. § 1508.18(a) (citing the recognized major federal actions, none of which would encompass SO 3348). Plaintiffs' theory lacks merit because the order merely announces that the policy of deferring consideration of leasing applications to allow for study is replaced by a policy of processing such applications, as the law expects. When such applications are submitted, if BLM determines there is no insurmountable legal impediment (such as the unavoidable presence of endangered species or designated critical habitat or a request to lease lands not open to leasing under the governing RMP) and then decides to undertake formal consideration of the application, only then does a "proposal" for major federal action come into existence. *See* 40 C.F.R. § 1508.23 (defining at what "stage" a proposal "exists").

The Conservationists do not discuss these defining regulations, nor do they cite any case law supporting their legal view that SO 3348 constitutes a proposal for major federal action "significantly affecting the quality of the human environment." Rather, they cite just two legal authorities in support: the NEPA provision at 42 U.S.C. § 4332(2)(C) and the CEQ regulation on supplementation at 40 C.F.R. § 1502.9(c)(1), neither of which sheds light on what constitutes a major federal action.

The NEPA provision the Conservationists cite imposes the familiar requirement that EISs are required for proposals for major federal action "significantly affecting the quality of the human environment," a point not in dispute. The regulation that they rely on establishes *when* supplementation of prior NEPA analysis is required for ongoing projects, a matter discussed in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989). In particular, the regulation requires preparation of a supplemental EIS when an agency makes "substantial changes in [a] proposed action that are relevant to the environmental concerns," or when "[t]here are significant new circumstances or information relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1). But in this case, the regulation, by its plain language, has no discernible application because there is no proposed action, nor any "ongoing action" as the Supreme Court recognized in

Marsh. Plaintiffs' contention that a new EIS is required is not resolved by *Marsh* and the standard it sets for supplementation.

The State Plaintiffs also cite no case law supporting their view that SO 3348 is a proposed major federal action and rely on the same statutory provision as the Conservationists, which as just discussed is unavailing. In addition, they cite the definition of "major federal action" at 40 C.F.R. § 1508.18, and its reference to "new or revised agency rules, regulations, plans, policies, and procedures." *Id*. § 1508.18(a). But this snippet presents only half the picture because the opening sentence of the regulation expressly limits the examples that follow to circumstances involving "effects that may be major" (explaining that the term "major reinforces but does not have a meaning independent of significantly," as that term is defined in 40 C.F.R. § 1508.27). *Id*. § 1508.18. Further, NEPA itself makes clear that a proposal for major federal action "significantly affecting the quality of the human environment" must be on the table, but here there is none. Plaintiffs' legal conclusions are at odds with the plain language of the Act and its implementing regulations. Plaintiffs make no attempt to explain how a decision to resume processing of lease applications – as distinguished from a decision to *approve* a lease application (which courts have held constitutes an irreversible and irretrievable commitment of resources triggering responsibility under NEPA) – can have "effects that may be major." *Id*. Instead, they cite only the effects of lease

development and understandably identify no significant effects attributable to resumption of lease processing itself, because there are none.

Proceeding from the incorrect premise that SO 3348 constitutes a major federal action, plaintiffs next argue (as to the merits and remedy) that a programmatic EIS is required. They contend such an analysis could take the form of either a *new* programmatic EIS or a *supplement* to the 1979 programmatic EIS. Federal Defendants agree that, if a programmatic EIS were required by the Court (following a finding of a substantive NEPA violation and consideration of the *Monsanto* factors), either form of analysis would likely be adequate under NEPA's rule of reason, but the issue need not be resolved because no such analysis is required in the first place.

With respect to supplementing the 1979 PEIS, the D.C. Circuit in *WORC*, 892 F.3d at 1243, held that such further programmatic analysis was not required, relying on Supreme Court precedent. It explained that the federal coal program is "functionally identical" to the land use plan at issue in *SUWA*. *Id.* "In both cases," the court explained, "the agency established an approach for managing resources in the future." *Id*. And in both cases, the agency "continued to engage in activities governed by the overarching scheme for which the initial EIS was prepared." *Id*. Relevant to the case at bar, the court explained that the fact that "actions continue to occur in compliance with the [federal coal program] does not render the original

action incomplete" and thus subject to the requirements of NEPA's supplementation regulation (i.e., 40 C.F.R. § 1508.9). The court declared it was "bound by established law holding that NEPA requires an agency to update its EIS only when it has proposed major federal action that is not complete." *Id*. at 1244. The Court should follow *WORC's* reasoning and reject any contention that a supplement to the 1979 PEIS is required, regardless of whether scientific understanding of the impacts of carbon emissions on climate has improved over the past forty years. *Id.*

Plaintiffs contend that this case is different from *WORC* because Plaintiffs challenge a final agency action, SO 3348, and they do so under 5 U.S.C. § 706(2), whereas *WORC* involved an inaction claim under 5 U.S.C. § 706(1). This distinction may alter the analysis, but not the outcome, because Plaintiffs cannot identify any "effects [of SO 3348] that may be major," 42 C.F.R. § 1508.18, the hallmark of major federal action. All they can point to is harm from possible future leasing, which is remote in time and separated by considerable administrative process. This process in every instance includes further NEPA analysis pursuant to 43 C.F.R. § 3425.3 (requiring either an EA or an EIS on any lease approval). *See WORC*, 892 F.3d at 1240 (explaining that "[e]ach lease issued under the [Coal] Program represents a new 'federal action'"). The Conservationists emphasize that the plaintiffs in WORC commenced their civil

action before the pause was implemented, but what matters here is the fact that the panel in WORC issued its decision after Interior opted not to continue the pause in SO 3348, and was well aware of that decision. *Id*. at 1240. Despite the decision, the D.C. Circuit did not hesitate in concluding that no regulatory change had occurred.

B. No Arbitrary Reversal of Position Occurred.

Next the Conservationists argue that Defendants arbitrarily "reversed their prior determination that the moratorium was necessary." ECF No. 118 at 21. State Plaintiffs similarly contend that, "with no justification other than an objection to the time and cost of complying with the law," the Secretary terminated the PEIS. ECF No. 116 at 2. Both statements are inaccurate and misleading.

In an attempt to demonstrate an arbitrary departure from past practice, the Conservationists declare no less than ten times, as if repetition will make it so, that Federal Defendants determined that a moratorium or PEIS was "necessary," thus implying, incorrectly, that the moratorium and PEIS are legally required. ECF No. 118 at 15, 16, 21, 22, 23, 30, 34; *see also id*. at 21 (insisting that, in "the Secretary's own words in January 2016," a moratorium was "necessary to avoid 'locking in' the impacts of future new coal leasing."). However Secretary Jewell did not say that a moratorium or PEIS was necessary, and in fact never used the term "necessary" anywhere in her order. Secretary Jewell instead said that

preparation of a "discretionary [PEIS]" would "help determine whether and how the current system for developing Federal coal should be modernized." AR 3. Elsewhere she stated that, given a lack of any "recent analysis" of the "coal program as a whole, a [PEIS] is in order, building on the BLM's public listening sessions." AR 8. These appear to be the only instances where the Secretary explained why a PEIS would be pursued. And saying something would be "helpful" or that it is "in order" is a far cry from saying it is "necessary" and even farther from saying it is legally required.

The State Plaintiffs similarly mischaracterize events when they argue that the agency's sole justification for opting not to continue the pause was its "objection to the time and cost of complying with the law." ECF No. 116 at 2. For starters, this incorrectly implies that completing a PEIS was legally required – it was not, for the reasons explained above.

The argument also fails because, insofar as the State Plaintiffs contend that time and cost of compliance was Interior's sole motivating factor, the plain language of SO 3348 forecloses the argument. SO 3348 makes clear that the reasons for opting not to continue the pause include the coal program's "critical importance to the economy," as well as its "critical importance . . . to energy security, job creation, and proper conservation stewardship . . . ." AR 1. These are appropriate bases for a change in policy and they are not countermanded or

contradicted by Plaintiffs' irrelevant contentions that historic NEPA analyses, in an evolving area of the law, have not adequately considered climate change, ECF No. 118 at 25-26, or the Amicus's argument that the climactic and socio-economic impacts of future coal combustion demand preparation of a programmatic EIS. ECF No. 119 at 21-22.[3]

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[3] The Conservationists also fault Federal Defendants for their "conclusion" regarding the historical NEPA analyses that the Court allowed as a supplement to the record, and for not considering the historical materials that the Nedd memorandum suggests were relied on, ECF No. 118 at 25, but this mischaracterizes the record. The Nedd memorandum never stated the historical analyses were relied on. Rather, BLM said two things about its NEPA practice with respect to climate change:

> first, that "[c]urrently, the environmental analysis conducted to comply with NEPA for individual leasing actions appropriately analyzes impacts on climate change as required by existing guidance and judicial decisions," AR 18; and
>
> second, that "BLM's current practice is to analyze the impacts of [a given] leasing decision on climate change, including the cumulative impacts of the leasing decision associated with Greenhouse Gas (GHG) emissions related to coal mining, transport, and subsequent combustion." *Id*.

Plaintiffs have selected more than thirty historical analyses and argued to the Court they were needed to ensure that a relevant factor had not been overlooked and the Court agreed. However, BLM leadership and managers regularly oversee the work of resource specialists who are familiar with NEPA because they work day in and day out to comply with it. Leadership and management are also familiar with the agency's NEPA guidance and judicial rulings on NEPA, AR 18, which shape the content of agency NEPA analyses. They oversee the implementation of change in the agency's practice meant to address adverse or favorable NEPA rulings. Climate change is an evolving subject matter, in fields of both law and science. Plaintiffs unjustifiably treat these historic analyses as if they are the only possible source of proof as to what the agency's current practice is, when in fact the

In *Motor Vehicles*, a case both plaintiff groups cite, then-Justice Rehnquist defended the right of a new administration to assess its programs and evaluate its priorities in light of its philosophy. Observing that the agency's "changed view" on the automotive safety standards at issue in the case "seems to be related to the election of a new President of a different political party," 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part), he explained that "the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration." *Id*. In language that resonates here, Justice Rehnquist added:

> [a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

Id. (footnote omitted). In implementing and in ending the pause, neither Secretary exceeded his or her statutory bounds, neither denied any rights that the law

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agency's knowledge of its current practice is derived from many sources, including day-to-day operations. BLM did not need to conduct a historical review of its climate analyses to state in the Nedd memorandum that its current practice is to consider "impacts on climate change as required by existing guidance and judicial decision," and to "analyze the impacts" of a given leasing decision "on climate change." *Id*. Plaintiffs' attempt to portray these innocuous statements as irrational simply because Federal Defendants did not pursue the historical retrospective that Plaintiffs should be rejected.

protects, and neither acted arbitrarily. The lawful exercise of policy discretion at bar should be sustained.[4]

III. Plaintiffs' FLPMA and MLA Claims Lack Merit.

The State Plaintiffs further argue that the Secretary, in opting not to continue the pause, ignored "statutory mandates" that require the agency to ensure: (i) that leasing is in the "public interest," *see* 30 U.S.C. § 201(a)(1) (MLA); (ii) that land-use planning under FLPMA occurs in a manner that protects the quality of various resources, 43 U.S.C. § 1701(a)(8) (FLPMA); and (iii) that the United States "receive[s] fair market value of the use of the public lands and their resources." *Id*. § 1701(a)(9) (FLPMA). The language of these directives is highly subjective and reasonable minds could certainly disagree as to what each means in a given setting.

Plaintiffs' first contention concerning the MLA provision (which addresses coal leasing and is entitled "Leases and exploration") lacks merit because, by its plain language, the provision applies to leasing decisions and concerns the Secretary's authority to determine the size of tracts offered for leasing.

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[4] The Conservationists contend additionally that the agency violated NEPA by failing to consider impacts of future coal leasing on the Northern Cheyenne Tribe. However, the question before the Court is not what the elements of a proper EA or EIS should be, because neither form of analysis was undertaken. Rather, the question is whether an EA or an EIS is required at all. As discussed above, Plaintiffs' claims are not justiciable and they fail to demonstrate either final agency action, for purposes of the APA, or major federal action, for purposes of NEPA. Plaintiffs' additional argument concerning impacts to the tribes that were allegedly overlooked is immaterial to the question before the Court.

> The Secretary of the Interior is authorized to divide any lands subject to this chapter which have been classified for coal leasing into *leasing tracts of such size as he finds appropriate and in the public interest* and which will permit the mining of all coal which can be economically extracted in such tract and thereafter he shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands for leasing and shall award leases thereon by competitive bidding . . . .

30 U.S.C.A. § 201(a)(1) (emphasis added). More simply stated, in exercising his authority to lease coal under the MLA, the Secretary is empowered to "divide the [relevant] lands" into tracts of a size "he finds appropriate and in the public interest." *Id*. Thus the "public interest" language is linked, by its plain terms and structure, to *leasing*. Plaintiffs' contention fails because SO 3348 is not a leasing decision and does not authorize leasing. Further, adopting SO 3348 did not require a determination as to the size or dimensions of any leasing tract. In short, the MLA's "public interest" provision has no application to the present circumstances and Plaintiffs' claim should be rejected.

Turning to FLPMA, Federal Defendants note that the provisions Plaintiffs rely on are not "statutory mandates," despite Plaintiffs' label, but rather declarations of policy by Congress, hortatory in nature and intended to guide the agency in conducting the land-use planning processes that FLPMA requires. *See Pub. Lands for the People, Inc. v. U.S. Dep't of Agric*., No. CIV. S-09-1750LKKJFM, 2010 WL 5200944, at *11 (E.D. Cal. Dec. 15, 2010), *aff'd*, 697 F.3d 1192 (9th Cir. 2012); *accord Utah v. Norton*, No. 2:96-CV-0870, 2006 WL

2711798, at *7 (D. Utah Sept. 20, 2006), *aff'd sub nom. Utah v. U.S. Dep't of Interior*, 535 F.3d 1184 (10th Cir. 2008) (noting that section 1701 declares congressional policy for the management of the public lands).

Because the declarations in section 1701 are intended to guide land-use planning, and because the action challenged here does not involve such activity, but instead involves an expression of policy relative to implementation of the MLA, the Court should reject Plaintiffs' claim. Even if section 1701 were construed to have some bearing on the challenged action, the Act's declarations of policy still do not rise to the level of statutory mandates. In *Public Lands for the People*, the Eastern District of California rejected similar FLPMA claims. The court explained that plaintiffs, by "relying on section 1701, a 'Congressional declaration of policy,' . . . are once again attempting to transform a statement of policy into a command regarding the Forest Service's authority to regulate mining claim access on [forest] lands." *Pub. Lands for the People, Inc.*, 2010 WL 5200944, at *11. The court concluded that "the broad statements of policy in Section 1701 contain no directive . . . that would preclude the Forest Service from [taking particular regulatory actions]." *Id*. The same analysis applies here. The declaration in section 1701(a)(8), that it is the policy of the United States that the lands be managed in a certain protective manner, contains no specific direction on how that is to be accomplished and provides no standard to govern judicial review

of compliance. With respect to the declaration in section 1701(a)(9) (i.e., that it is the policy of the United States that fair market value be obtained), this too provides no standards to govern judicial review of compliance. Moreover, because it relates to what compensation the United States should obtain for the "use of the public lands," it would appear only to apply to leasing or other activities where an individual pays a monetary sum for "use" of public land. SO 3348 does not authorize any use of the public lands.

Finally, the State Plaintiffs contend again that Federal Defendants arbitrarily reversed their position, insofar as the previous administration had questioned whether the United States obtains fair market value for the use of the public lands. The State Plaintiffs also assert an arbitrary reversal since the agency concluded, in the scoping report, that climate change is an effect of coal development that impacts the health and welfare of the American people and thus "falls squarely within the factors to be considered in determining the public interest." AR 1478. This conclusion, however, is not consistent with the language of section 201 of the MLA which, as discussed above, has a narrow application. Plaintiffs' other contentions of an arbitrary reversal fail here for the same reasons stated above: a new administration is entitled to set its own priorities on questions of policy. Simply because one administration thought that preparation of a discretionary PEIS was a suitable way to study a given set of problems, does not mean that the

current administration must agree and continue that policy. Secretary Zinke explained that a PEIS is not "required to consider potential improvements to the program." AR 1. This is not disputable. Potential improvements most assuredly could be considered in any number of ways; there is no necessity that the agency do so under the rigors, procedural demands, and timetables of a formal, programmatic EIS. Plaintiffs fail to show arbitrary conduct.

IV. Federal Defendants have not Violated Any Trust Obligation to the Northern Cheyenne Tribe.

Plaintiffs contend the Secretary violated his trust obligation to the Northern Cheyenne Tribe "by issuing [SO 3348] in violation of NEPA." ECF No. 118 at 37. The argument fails on its own terms because there has been no NEPA violation, as discussed throughout this brief. But the argument fails for the additional reason that Plaintiffs do not identify any statute or regulation that creates a specific obligation that Federal Defendants have violated.

While it is certainly true that there exists "a general trust relationship between the United States and the Indian people," *United States v. Mitchell*, 463 U.S. 206, 225 (1983), that relationship does not, by itself, create legally-enforceable obligations in the United States. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011). In *Jicarilla Apache Nation*, which involved lands held in trust by the United States for the benefit of the Nation, the Supreme

Court explained that the trust relationship is different from a private trust because the Secretary's trust obligations are "established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law." *Id*. at 165. Thus, the United States "incurs specific fiduciary duties toward particular Indian tribes when it manages or operates Indian lands or resources" – for example, when it manages forest lands that are leased for harvest, or when it holds tribal monetary assets for investment. *Inter-Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (citing *Mitchell*, 463 U.S. at 225–26); *Jicarilla*, 564 U.S. at 178. In such circumstances, any fiduciary duties are created and defined by treaty, statute, or regulation. *Id*. at 174. There is no special statutory duty that applies simply because a tribe has expressed interest in a policy decision by the Secretary, particularly where the original order, SO 3338, was explicitly made *inapplicable* to coal on Indian lands, AR 3, and where neither order "manages or operates Indian lands or resources." *Inter-Tribal Council of Ariz., Inc.*, 51 F.3d at 203; *see also Gros Ventre v. United States*, 469 F.3d 801, 812-13 (9th Cir. 2006) (rejecting any duty to "manage resources that exist off of the Reservation"). In *Gros Ventre*, the Ninth Circuit stated it was "not aware of any circuit or Supreme Court authority that extends a specific *Mitchell*-like duty to non-tribal resources." *Id*. at 813.

Plaintiffs' reliance on MLA and NEPA regulations as supporting a trust obligation are unavailing. As an initial matter, Federal Defendants note that no provision of NEPA itself enhances the statute's requirements merely because a tribe is involved. *See Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (stating that "unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes"). Plaintiffs cite the MLA regulation at 43 C.F.R. § 3420.0-2, but this provision, by its very terms, applies at the competitive leasing stage, which follows the submission of lease applications, so it has no application to the Secretarial order challenged here. The NEPA regulation Plaintiffs rely on, 40 C.F.R. § 1501.7(a)(1), also is inapplicable. It requires federal agencies to "[i]nvite the participation of … any affected Indian tribe" at the outset of environmental review (i.e., during scoping). 40 C.F.R. § 1501.7(a)(1). BLM did so when it conducted scoping for the PEIS called for in SO 3338, *see* AR 1480, 1500-05, and will certainly do so again, as necessary, when processing lease applications. Tribal consultation is also required during the land use planning stage, *see* 43 C.F.R. §§ 3420.1-7, 3461.5, and at the lease sale stage: 43 C.F.R. § 3425.4. These requirements are routinely observed in agency proceedings.

In sum, Plaintiffs fail to identify any trust obligation applicable to the Secretarial policy pronouncement reflected in SO 3348. For this reason, and because they fail to show any NEPA violation, Plaintiffs' claim should be rejected.

CONCLUSION

For the foregoing reasons, Federal Defendants ask that the Court dismiss Plaintiffs' claims, deny their motions for summary judgment, grant Defendants' cross-motions, and enter judgment in favor of all Defendants.

Respectfully submitted this 7th day of September, 2018.

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