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IN THE 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. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants,	Case No. 4:17-cv-00030-BMM (Lead) **INTERVENOR-DEFENDANTS STATE OF WYOMING AND STATE OF MONTANA'S JOINT MEMORANDUM IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

and STATE OF WYOMING, *et al*., Intervenor – Defendants.	
STATE OF CALIFORNIA, *et al*., Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the Interior, *et al*., Defendants, and STATE OF WYOMING, *et al*., Intervenor – Defendants.	Case No. 4:17-cv-00042-BMM (Consolidated Case)

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INTRODUCTION

In these consolidated cases,[1] seven environmental groups, the Northern Cheyenne Tribe, and four states (collectively the Interest Groups), challenge a decision by the Secretary of the United States Department of the Interior to rescind a pause on coal leasing on federal lands. The Obama administration adopted that pause pending preparation of a programmatic environmental impact statement (programmatic EIS) analyzing the environmental effects of the federal coal program. The Interest Groups allege the Secretary's decision constituted a "major federal action" requiring an environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 through 4370h. The Interest Groups mischaracterize the nature of the decision to cease preparation of the programmatic EIS and rescind the pause on coal leasing. The Secretary's order is not a final agency action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 through 559, or a "major federal action" under NEPA because it is a statement of policy, not an agency action.

Ultimately, what this case is about is the Interest Groups' desire to substitute their policy preference – a complete ban on all coal mining on federal land – for

[1] In case no. 4:17-cv-30, the plaintiffs are the Citizens for Clean Energy, Ecocheyenne, Montana Environmental Information Center, Center for Biological Diversity, Defenders of Wildlife, Sierra Club, Wildearth Guardians, and the Northern Cheyenne Tribe (brief cited as Docket No. 118 at [pg]). In case no. 4:17-cv-42, the plaintiffs are the states of California, New Mexico, New York, and Washington (brief cited as Docket No. 116 at [pg]).

Congress' express policy, as set forth in the Mineral Leasing Act (MLA), 30 U.S.C. §§ 181 through 196, to "offer [coal] lands for leasing and … award leases thereon by competitive bidding." 30 U.S.C. § 201(a). The question in this case is what the law requires, not what the Interest Groups wish it would require. Here the law does not require an EIS of the federal coal program under the APA or NEPA. *W. Org. of Res. Councils v. Zinke (WORC)*, 892 F.3d 1234, 1244-45 (D.C. Cir. 2018). Accordingly, the Court should deny the Interest Groups' motion for summary judgment and grant the States of Wyoming and Montana's cross-motion for summary judgment and affirm the BLM's leasing sales.

BACKGROUND

I. Statutory Framework

NEPA ensures that an "agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and that information is available to the public so that it "may also play a role in both the decisionmaking process and implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). It requires federal agencies to take a hard look at the environmental consequences of "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1133, 1144 (D. Mont. 2014). Federal agencies must prepare a detailed environmental impact

statement for "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(C). "[A]n EIS is not necessary" when a federal program's status quo does not change. *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (quoting *Upper Snake River v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990)).

Broad federal actions, "such as the adoption of new agency programs or regulations" require an EIS "relevant to [the] policy" and "timed to coincide with meaningful points in agency planning and decisionmaking." 40 C.F.R. § 1502.4. Whenever an agency prepares a broad programmatic EIS, it may, later, prepare an environmental assessment for individual actions within the program. 40 C.F.R. § 1502.20. This practice, called "tiering," provides that when a broad EIS has been prepared, a later statement on a site specific action only needs to "summarize the issues discussed in the broader statement … and shall concentrate on the issues specific to the subsequent action," so that the agency may "focus on the actual issues ripe for decision at each level of environmental review." *Id*. In the context of the federal coal mining program, each lease is tiered to a programmatic EIS. *WORC*, 892 F.3d at 1240.

II. Procedural History

A. The Basics of Federal Coal Mining

The BLM manages coal leases on approximately 570 million acres of land on which the federal government owns the coal mineral estate. (AR 1477). Currently, it administers 306 leases encompassing over 475,000 acres spread over ten states with an estimated 7.4 billion tons of recoverable coal. (*Id*). Coal mining occurs on roughly 0.00083% of BLM managed land.

Nearly 90% of all coal mined on federal lands occurs in the Powder River Basin of Wyoming and Montana. (AR 1549). In 2017, the States of Wyoming and Montana received approximately $440 million and $60 million in revenues from federal coal mining,[2] respectively.[3] These revenues fund programs that provide basic services, including education, infrastructure, job development, and economic growth. *See* Wyo. Stat. Ann. §§ 39-13-111, 39-14-801; Montana Const. art. IX, § 5, Mont. Code Ann. § 90-6-702 (providing that coal severance tax is to be used to "enhance the quality of life and protect the health, safety, and welfare of Montana

[2] When ruling on summary judgment motions, a court may take judicial notice of adjudicative facts not subject to reasonable dispute, including documents obtained on a government website. *Nat'l Ass'n for Gun Rights, Inc. v. Murry*, 969 F. Supp. 2d 1262, 1266 (D. Mont. 2013). The facts derived from government websites cited in this brief are not subject to reasonable dispute.

[3] *Available at*: https://revenuedata.doi.gov/downloads/federal_revenue_onshore_acct-year_FY06-17_2017-11-30.xlsx (Excel download from the Department of the Interior).

citizens."), and Mont. Code Ann. § 17-3-240 (federal mining leasing funds are distributed twenty-five percent to counties impacted by mineral development and seventy-five percent to the State's general fund).

B. The Federal Coal Mining Program

As part of an effort to end lease speculation and increase coal production on federal lands, the BLM issued a programmatic EIS for coal leasing on federal lands in April 1979. AR 87376. The Department of the Interior subsequently adopted a comprehensive coal leasing regulation in July 1979, establishing a federal coal program. *See* Coal Management; Federally Owned Coal, 44 Fed. Reg. 42615 (July 19, 1979). The 1979 regulations set forth two distinct processes for coal leasing. Initially, the preferred process was competitive regional leasing which used periodic regional sales and production targets for geographical regions to satisfy national coal demand. 43 C.F.R. §§ 3420.2(c)(7), 3420.3-4(g); *Wildearth Guardians v. Salazar*, 783 F. Supp. 2d 61, 63-64 (D.D.C. 2011). The 1979 regulations also established a separate leasing process, known as leasing-by-application. 43 C.F.R. § 3425.0 through 3425.5; *Wildearth Guardians*, 783 F. Supp. 2d at 64. Leasing-by-application is an applicant driven process for reviewing individual industry applications to lease coal on an *ad hoc* basis. 43 C.F.R. § 3425.0-2; *Wildearth Guardians*, 783 F. Supp. 2d at 64.

The regional approach proved unworkable because it was not feasible for the agency to predict "future coal demands and supplies with the precision" necessary to maintain a stable coal supply and demand. *Report of the Commission on Fair Market Value Policy for Federal Coal Leasing* (Feb. 1986).[4] Accordingly, the Department of Interior adopted changes to the program and issued a supplemental EIS in 1985. (AR 88694).

All coal leasing on federal lands now uses the lease-by-application process. *Wildearth Guardians*, 783 F. Supp. 2d at 65 (explaining that decertification of the various coal regions "replace[d] the competitive regional leasing process with the leasing-by-application process"). The BLM decertified the Powder River Coal Basin Region in 1990. Decertification of the Powder River Coal Production Region, 55 Fed. Reg. 784 (Jan. 9, 1990). Since decertification and implementation of the lease-by-application process, "coal production in the Powder River Basin has increased nearly 242%, from 184 million tons in 1990 to 444.9 million tons in 2006" … and by 2008 "42% of all coal produced in the United States came from the Powder River Basin." *Wildearth Guardians*, 783 F. Supp. 2d at 65.

[4] *Available at*: http://babel.hathitrust.org/cgi/pt?id=mdp.39015055347564;view=1up;seq=7 (see footnote 2 above).

C. Secretarial Order No. 3338

On January 15, 2016, the Secretary of the Interior, Sally Jewell, issued Order No. 3338 (Jewel Order), *Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program* (Order 3338). (AR 3). The purpose of the Jewell Order was to "determine whether and how the current system for developing Federal coal should be modernized[.]" (*Id*). Accordingly, Secretary Jewell ordered the preparation of a "discretionary Programmatic Environmental Impact Statement … that analyzes potential leasing and management reforms to the current Federal coal program." (*Id*). The Secretary did not propose "any regulatory action at this time" explaining that "the purpose of the [programmatic EIS] is to identify, evaluate, and potentially recommend reforms to the Federal coal program." (AR 9).

With the issuance of her order, Secretary Jewell paused coal leasing under the federal coal program pending completion of the programmatic EIS. (AR 10). The BLM did not process new applications for coal leases or modifications for existing ones or, for pending applications, lease sales, issuances or modifications. (AR 10-11). The Jewell Order provided for a handful of exceptions under the pause for thermal coal leasing, emergency leasing and other minor activities. (AR 11-12). Secretary Jewell justified the pause on the basis that coal lease sales and lease modifications result in lengthy lease terms and thus a pause during the programmatic

review would avoid "locking in" leases when lease terms may change based on the findings of the programmatic EIS. (AR 10).

D. Secretarial Order No. 3348

On March 28, 2017, President Trump issued Executive Order 13783 (EO 13783), Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16093 (March 31, 2017). EO 13783 declared that it was "in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." *Id*. at § 1(a). It directs executive departments and agencies to review existing regulations and revise or rescind those that "unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest[.]" *Id*. at § 1(c).

EO 13783 directed the Secretary of the Interior to "take all steps necessary and appropriate to amend or withdraw" the Jewell Order and "to lift any and all moratoria on Federal land coal leasing activities[.]" *Id*. at § 6. The EO directed the Secretary to "commence Federal coal leasing activities consistent with all applicable laws and regulations." *Id*.

On March 29, 2017, Secretary of the Interior Ryan Zinke issued Order No. 3348 (Zinke Order), *Concerning the Federal Coal Moratorium* (March 29, 2017). The Zinke Order required "efforts to enhance and improve the Federal coal leasing

program" given the program's "critical importance to the economy of the United States[.]" (AR 1). The basis for revoking the Jewell Order was "that the public interest is not served by halting the Federal coal program for an extended time, nor is a [programmatic EIS] required to consider potential improvements to the program." (*Id*). All preparation associated with the programmatic EIS was halted and the pause on processing coal leases applications and modifications was lifted. (AR 2).

The day before the issuance of the Zinke Order, the acting Director of the BLM issued a memorandum detailing the reasons a programmatic EIS for the federal coal program was unnecessary. (AR 13). He recognized that the main areas of concern identified in the Jewell Order, among which included obtaining fair market value for federal coal, were the subject of "reforms the BLM has already put in place to address concerns raised by the U.S. Department of the Interior Office of Inspector General (OIG), the U.S. Government Accountability Office (GAO), Congress, stakeholders, [and] the public[.]" (AR 15). "The BLM was able to address all 21 recommendations [by the OIG and GAO] and the audits were closed out while the coal program continued to issue new leases and undergo review." (AR 26).

The Director concluded that guidance documents will sufficiently address the concerns identified by the Scoping Report prepared in an anticipation of the programmatic EIS and that other "areas identified in the Scoping Report would more

appropriately be analyzed and potentially reformed outside of the [programmatic EIS], and the Department [of Interior] has already taken steps to make this happen." (AR 16, 22).

The Director noted that the economic hardships the pause places on current and future operations are considerable. (AR 24). The Jewell Order did not consider any adverse impacts the pause would have when evaluating whether to implement it. (AR 25). The leases subject to the pause contain over 1.8 billion tons of potential coal production from twenty-eight mines in nine states. (*Id*). As of 2015, these mines combined employed 25,348 people. (*Id*). Accordingly, the Director concluded that the costs associated with the pause outweigh any benefit of the EIS. (*Id*).

E. *WORC v. Zinke*

In 2014, Western Organization of Resource Councils and Friends of the Earth (WORC) brought suit in the United States District Court in the District of Columbia seeking an order to compel the Secretary of the Interior to supplement the 1979 programmatic EIS covering the federal coal program. *WORC*, 892 F.3d at 1236. WORC argued that a supplemental EIS was necessary because the body of scientific knowledge of climate change had developed significantly since 1979. *Id*. at 1236-37. The district court granted the Secretary's motion to dismiss, finding there was no duty to supplement the 1979 EIS because there was no remaining or ongoing major federal action that conferred a duty to do so. *Id*.

On appeal, WORC reiterated its argument that a supplemental EIS was necessary to analyze the climate impacts of federal coal leasing because agencies must "supplement their environmental impact statements to take account of significant new information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id*. at 1241 (quotation marks and ellipses omitted) (citing 40 C.F.R. § 1502.9(c)(1)(ii)). The Secretary responded there were no NEPA obligations related to the federal coal program because the BLM was not proposing any new action relying on the 1979 programmatic EIS. *Id.* at 1242.

The Court agreed with the Secretary based on *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 62-64 (2004), which held that "the only action a court may compel an agency to take under § 706(1) [of the APA] is discrete action that the agency has a duty to perform," which "must be 'ministerial or nondiscretionary' and must amount to 'a specific unequivocal command.'" *WORC*, 892 F.3d at 1241. The Court noted that the program evaluated in *SUWA* and the federal coal program were functionally identical. *Id*. at 1243. In both, "the agency established an approach for managing resources in the future … [and] the agency continued to engage in activities governed by the overarching scheme for which the initial EIS was prepared." *Id*. Therefore, the Court concluded, the Department of Interior's NEPA obligation for the federal coal program terminated with the adoption of the 1979 programmatic EIS. *Id*. at 1243, 1245.

STANDARD OF REVIEW

The Court reviews challenges to agency actions under the Administrative Procedure Act (APA), 5 U.S.C. § 706, which requires courts to uphold agency actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013) (quoting 5 U.S.C. § 706(2)(A)). An agency decision is arbitrary and capricious if it "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." *Managed Pharm. Care v. Sebelius*, 716 F.3d 1235, 1244 (9th Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

"This standard of review is 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 866 (9th Cir. 2017) (quoting *Nw. Ecosystem All. v. U. S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)). "Because agency action is presumed to be valid, the challenging party bears the burden of proving that the action violates 706(2)(A)." *Wildwest Inst. v. Bull*, 468 F. Supp. 2d 1234, 1242 (D. Mont. 2006).

ARGUMENT

Wyoming and Montana concur with the Federal Defendants and the National Mining Association and adopt and incorporate their briefs into this brief. Wyoming and Montana will initially show that the Interest Groups' challenge to the Zinke Order is not justiciable because it is not a final agency action under the APA. Secretary Jewell ordered a comprehensive review of the Federal coal program and paused the issuance of new leases and modifications of existing leases. Secretary Zinke determined that the review had developed sufficient information to make the need for a programmatic EIS unnecessary. Neither Order is a final agency action. Neither determined any rights or obligations nor constituted a decision from which legal consequences flowed. The federal coal program remained in operation the entire time and, therefore, the "consummation of the decisionmaking process" under that program is the same as it has been since the program's inception. Thus, there was no new final agency action.

Similarly, there is no "major federal action[] significantly affecting the quality of the human environment" under NEPA. The Jewell Order simply deferred consideration of any leasing decisions until the programmatic EIS was completed. The Zinke Order declined to proceed with the programmatic EIS and lifted the pause. Neither Order altered the federal coal program in any way. The Orders were not a "major federal action" that affected "the quality of the human environment."

Accordingly, even if the orders were final agency actions, NEPA does not command the agency to prepare an EIS.

I. The Zinke Order is not a final agency action under the APA.

In their complaints, the Interest Groups alleged the Zinke Order was a final agency action because the Zinke Order "restart[ed] the federal coal leasing program and end[ed] environmental review of the program[.]"[5] The Jewell Order did not terminate the federal coal program; it was, and is, an ongoing program. Therefore, the Zinke Order was not a "restart" of the program; it is a document adopting a policy preference and, accordingly, is not a final agency action.

There are two conditions that must be satisfied for an agency action to be final under 5 U.S.C. § 704. "First, the action must mark the consummation of the agency's decisionmaking process … it must not be of a merely tentative or interlocutory nature. And second, the action must be one 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) (internal citations and quotation marks omitted).

The Zinke Order does not satisfy either condition. For an agency action to be final, the first condition is that the agency action "must mark the consummation of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177-78. This prong asks

[5] Consolidation occurred after the filing of the complaints. The citations are for Case No. 17-cv-30, Docket No. 1 at 5 (environmental and tribal plaintiffs), and Case No. 17-cv-42, Docket No. 1 at 3-4 (state plaintiffs).

"whether the agency has completed its decisionmaking process … [by determining if] the action amounts to a definitive statement of the agency's position[.]" *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (citing *Bennett*, 520 U.S. at 64). The Zinke Order is a declaration of the administration's policy, not a final agency action. That is, the Order lifts the pause on consideration of new lease applications and requests to modify existing leases. The Order does not alter the federal coal program. Instead, the "BLM is directed to process lease applications and modifications expeditiously in accordance with regulations and guidance existing before the issuance of [the Jewell Order]." (AR 2). The Zinke Order is not a definitive statement on any lease application. Rather, it lifts the pause and allows for consideration of leasing decisions, which, when made, the Interest Groups will be able to challenge as they deem appropriate.

Second, the Zinke Order is not an agency action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. at 177-78. Courts analyze this condition to determine whether the agency action "has a direct and immediate effect on the day-to-day operations of the subject party or if immediate compliance [with the terms] is expected." *Or. Nat. Desert Ass'n*, 465 F.3d at 982 (quotations and citations omitted) (brackets in original). The Zinke Order had no "direct and immediate effect" on anyone and does not require "immediate compliance" with anything.

The Zinke Order does not command anyone to do anything or to refrain from doing anything; it does not subject anyone to any civil or criminal liability; it does not grant any new leases or modify any existing ones; and it does not abolish anyone's legal right to object to the issuance of any such leases or modifications. The Interest Groups may, for example, challenge any leasing decisions on the grounds that the EIS in support of the lease does not adequately account for a fair return or properly assess the impact of climate change. *See, e.g., Wildearth Guardians v. Jewell*, 738 F.3d 298, 308-11 (D.C. Cir. 2013); *Wildearth Guardians v. BLM*, 8 F. Supp. 3d 17, 36-37 (D. D.C. 2014) (determining that the BLM sufficiently considered a full range of alternatives to address GHG emissions and climate change). In short, the Zinke Order does not create or determine any legal rights or obligations and no legal consequences flow from the Order.

Accordingly, because the Zinke Order is not a final agency action under 5 U.S.C. § 704, the Interest Groups' claim is not reviewable.

II. Lifting the pause implemented by the Jewell Order is not a major federal action that significantly affects the quality of the human environment.

The Interest Groups argue that the Zinke Order, by ending the pause on new coal lease applications and modifications of existing leases, constitutes a "major federal action" requiring the preparation of an EIS under NEPA. (Docket No. 118 at 16-21; Docket No. 116 at 18-22). They contend that the decision to revoke the Jewell

Order and remove the pause on the federal coal program was a "decision to open thousands of acres of public land to coal leasing" and "constituted a new or revised agency plan or policy" requiring an EIS under NEPA. (Docket No. 118 at 16; Docket No. 116 at 19).

NEPA requires a federal agency to prepare a detailed EIS for all major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C). "Thus, NEPA places three requirements of actions subject to its procedures. The action must (1) be federal, (2) "major[,]" and (3) have a significant environmental impact." *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 668 (9th Cir. 1998). "An EIS is not necessary where a proposed federal action would not change the status quo." *Id*. (citations omitted).

The Interest Groups' claims in this case are unusual, but *Glickman* is an analogous case because it shows that when an agency document simply studies a program and does not make any change to the status quo of the program there is no "major federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

In *Glickman*, the United States Forest Service adopted a management plan (Action Plan) to address the spread of a tree root fungus attacking Port-Orford cedar in forest ecosystems in southwest Oregon and northwest California. 136 F.3d at 662-63. The Action Plan adopted an integrated approach to addressing the fungus

disease, including inventory and monitoring, research and administrative study, public involvement and education, and management. *Id*. at 663. The management section of the Action Plan set forth the following tasks:

> (1) Continue to refine and update risk assessment model used in evaluating projects[;] (2) Develop strategies for the management of the following activities: Timber sales[,] Road construction and management[,] Reforestation and stand management[,] Other potentially earth moving activities in stands where a significant component is Port-Orford cedar[, and] (3) Develop a system or method for sharing information.

Id.

Alleging that the Action Plan was a major federal action, several environmental groups challenged the Forest Service's failure to prepare an EIS prior to adoption and implementation of the Plan. *Id*. In response, the federal government argued the Action Plan was not reviewable as a major federal action significantly affecting the environment under NEPA because the Action Plan was merely "research, development, and information-gathering tools intended to lay the groundwork for later decisionmaking." *Id*. at 667. Further, the Action Plan was "circulated for informational purposes only and neither require[d] nor call[ed] for any specific actions" and therefore, since "the individual activities comprising the [Port-Orford cedar Action Plan did] not call for the commitment of resources, NEPA's EIS requirement [was] not triggered." *Id*.

The court found that "none of the activities allegedly comprising the [Action Plan] had an 'actual or immediately threatened effect[.]'" 136 F.3d at 669-70 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990)). Further, the court noted that neither the Action Plan nor the management guidelines "significantly affect the quality of the human environment" because the Action Plan's "Action Items/Objectives section does not create activities which impact the physical environment." *Id*. at 670. "Rather, the Action Items/Objectives set forth guidelines and goals for [Port-Orford cedar] research, management strategies and information sharing. They do not provide for specific activities with a direct impact on [Port-Orford cedar]." *Id*. The Action Plan and BLM guidelines did not "**propose any site-specific activity [or] call for specific actions directly impacting the physical environment**." *Id*. (emphasis added). Since "there is no reason plaintiffs cannot challenge the sufficiency of an agency EIS when a discrete agency action is called for" … the government's decision not to prepare an EIS is reasonable. *Id*.

The *Glickman* case is instructive here. The basic essence of the Interest Groups' argument is that once an agency decides to study an issue, the agency cannot stop the study without conducting an EIS. That is not correct and the Interest Groups cite no authority for this novel argument. The Jewell Order only provided for a "comprehensive review of the Federal coal program" but did not "propose any regulatory action." (AR 9, 12). After reviewing the results of that study – the scoping

report and other information – the BLM determined that it was not necessary to take any action outside the federal coal program to address issues in the program raised by the public and the federal audits by the GAO and OIG.

Like the document at issue in *Glickman*, the Zinke Order is not a "major federal action" because it does not propose or implement **any** agency action. The Zinke Order directs the BLM to process applications for new leases and modifications of existing leases. The Order does not "propose any site-specific activity [or] call for specific actions directly impacting the physical environment." *Glickman*, 136 F.3d at 670. In the context of the federal coal program, agency action occurs when the agency makes a specific leasing decision. *WORC*, 892 F.3d at 1244-45. The Interest Groups' remedy for any alleged harm from an agency action made under the federal coal program is to challenge individual leasing decisions as they deem necessary.

History also supports the conclusion that the Zinke Order is not a major federal action. Twice the BLM has imposed pauses prohibiting new and modified coal lease sales. (AR 1544-45). In 1973, the Secretary of the Interior, through Order No. 2952, expressly exercised his discretion, to impose a pause "to allow the preparation of a program for the more 'orderly' development of coal resources upon the public lands[.]" *Krueger v. Morton*, 539 F.2d 235, 237 (D.C. Cir. 1976). In

January 1981, the Secretary lifted the pause after the current federal coal program was established. (AR 1544).

Subsequently, Congress imposed another pause in response to charges that the Interior Department was receiving far less than fair market value for coal leases. (AR 1544-45); Pub. L. No. 98-146, § 112, 97 Stat. 919, 937 (1983). The pause was supposed to expire upon the issuance of a report on the state of the federal coal program. (AR 1545). However, the Secretary of the Interior maintained the pause on leasing until completion of additional program reviews and revisions. (*Id*). The Secretary lifted that leasing pause in 1987. (*Id*).

The BLM did not prepare an EIS before lifting the pauses in 1981 and 1987. Here, there is exactly the same scenario – the Secretary of the Interior, in his discretion, decided it was appropriate to lift the pause on coal leasing. The lifting of that pause did not reopen land for coal leasing or implement a new agency program. A pause is, by definition, not a "permanent termination of coal prospecting on public lands[.]" *Krueger*, 539 F.2d at 240. A pause is a temporary respite pending resolution of some concern or issue; it is a "pause on leasing[.]" (AR 10) (quoting the Jewell Order). Lifting this moratorium or pause on leasing is not a "major federal action" because it merely continues the operation of an existing program already supported by an outstanding programmatic EIS.

CONCLUSION

The Interest Groups' motivation for challenging the Zinke Order is their express desire to end all coal mining on federal public lands. Their challenge is not justiciable under the APA or NEPA. The Zinke Order is a valid exercise of administrative discretion to implement the executive branch's policy goals. The Zinke Order is not a final agency action because it is not the consummation of a decision making process and no rights, obligations or legal consequences flow from it. Thus the Interest Groups cannot challenge this Order under the APA. But even if they could, the Zinke Order is not a major federal action under NEPA because it has no effect on the physical environment or any site-specific impact. Accordingly, the BLM has no duty to prepare an EIS.

For these reasons, the Court should dismiss the Interest Groups' claims, deny their motions for summary judgment, and grant the Intervenor-Defendants States of Wyoming and Montana's cross-motion for summary judgment.

Dated this 19th day of September, 2018.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing is being filed with the Clerk of the Court using the CM/ECF system, thereby serving it on all parties of record on this 19th day of September, 2018.

/s/ David C. Dalthorp
David C. Dalthorp
JACKSON, MURDO & GRANT, P.C.