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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Federal Regulations

TABLE OF AUTHORITIES
(continued)

INTRODUCTION

In this action, the States of California, New Mexico, New York, and Washington ("State Plaintiffs") challenge Defendants' issuance of Secretarial Order 3348 ("Order") to restart the federal coal leasing program while failing to comply with certain statutory requirements of the National Environmental Policy Act ("NEPA"), the Mineral Leasing Act, and the Federal Land Policy and Management Act. Defendants and Intervenor-Defendants do not dispute that these requirements were ignored, but instead claim that State Plaintiffs had no right to challenge Secretarial Order 3348 because it simply ended a "pause" on new coal leasing and did not authorize any new leasing or otherwise have any impacts. However, these mischaracterizations of Secretarial Order 3348 and its legal consequences, and of the State Plaintiffs' claims generally, must be rejected.

As discussed below, State Plaintiffs have standing to challenge Defendants' failure to comply with the procedural requirements of NEPA, the Mineral Leasing Act, and the Federal Land Policy and Management Act, and these failures are ripe for review. Moreover, Defendants' issuance of Secretarial Order 3348 constitutes "final agency action" pursuant to the Administrative Procedure Act ("APA"), given that it marked the conclusion of Defendants' decisionmaking process regarding the federal coal moratorium and has legal consequences. The Order is also a "major federal action" under NEPA due to the significant environmental impacts that will result from restarting the federal coal program. Finally, the mandates of the Mineral Leasing Act and the Federal Land Policy and Management Act to consider whether the program is in the public interest and provides fair market value to the public apply to Defendants' issuance of the Order. Accordingly, this Court should grant State Plaintiffs' Motion for Summary Judgment and deny Defendants' and Intervenor-Defendants' Cross-Motions for Summary Judgment.

ARGUMENT

I. STATE PLAINTIFFS HAVE STANDING.

In their Motion for Summary Judgment (Dkt. No. 116[1]) ("Pls.' Br."), State Plaintiffs establish, as they must, that they have suffered an "injury in fact" that is fairly traceable to Defendants' challenged action and redressable by a favorable decision. *See* Pls.' Br. at 16-18; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000). Specifically, State Plaintiffs show that they are harmed by air pollution resulting from the transport and export of federal coal in their sovereign territories, and also by the adverse climate impacts caused by increased greenhouse gas emissions attributable to the mining, transport, and combustion of the coal. Pls.' Br. at 17.[2] State Plaintiffs have also demonstrated harm to their procedural interests based on federal management decisions being made without compliance with the requirements of NEPA, the Mineral Leasing Act, and the Federal Land Policy and Management Act. *Id.*

In challenging State Plaintiffs' standing, Defendants and Intervenor-Defendants do not refute that, should coal be mined under the federal program, State Plaintiffs will suffer a cognizable injury. Indeed, the Supreme Court has established that a state has standing to sue on the basis of harms to its sovereign territory resulting from climate change impacts attributable to greenhouse gas emissions. *Mass. v. EPA*, 549 U.S. 497, 517-19 (2007). Rather, they assert that State Plaintiffs fail to establish standing because the alleged harm is "conjectural, not imminent," and because the harm is not "fairly traceable" to the challenged action. *See* Federal Defendants' Memorandum in Support of their Cross-Motion for Summary Judgment and Opposing Plaintiffs' Motions for Summary Judgment (Dkt. No. 124) ("BLM Br.") at 18-19 (listing the four events that must occur before

[1] All citations to the docket are for Case No. CV-17-30-BMM, unless otherwise noted.

[2] *See* Affidavit of Sally Toteff ("Dkt. No. 116-1"); Declaration of Keita Ebisu ("Dkt. No. 116-2").

the alleged harm occurs); *see also* Intervenor-Defendant National Mining Association's Memorandum of Points and Authorities in Support of Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motions for Summary Judgment (Dkt. No. 128) ("NMA Br.") at 7 ("Plaintiffs cannot clearly show imminent injury.").

In supporting this assertion, Defendants and Intervenor-Defendants disclaim that coal leasing will occur as a direct result of the Order. *See, e.g.*, BLM Br. at 17-18 ("[the] potential impacts from *future* coal mining … [are] conjectural") (emphasis in original); NMA Br. at 10 ("the Zinke Order directs BLM only to 'process' certain lease applications" but "mandates no particular outcome or approval"). In doing so, Defendants and Intervenor-Defendants disregard the clear intent of the Order, which was to restart federal coal leasing, including completing the review of 30 applications for leases containing 1.8 billion tons of coal that were *already pending* when the moratorium was imposed. *See* AR 25[3]; AR 92-94; *see also* AR 2 (directing BLM to "process coal lease applications and modifications expeditiously"). Defendants and Intervenor-Defendants cannot reasonably assert that a directive to "process coal lease applications and modifications expeditiously" will not lead to actual leasing.[4]

Further, at least as to State Plaintiffs' standing under NEPA, Defendants misstate the applicable legal standard. In particular, citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013), Defendants assert that State Plaintiffs must establish that their alleged injury is "certainly impending" to suffice. *See* BLM Br. at 17 ("the supposed injury 'must be *certainly* impending to constitute injury in

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

[4] For example, on July 17, 2018, BLM issued a Final Environmental Impact Statement for the Alton Coal Tract Coal Lease by Application project, which had been on hold due to the moratorium and involves 44.9 million tons of recoverable coal in Utah. *See* 83 Fed. Reg. 32,683 (July 13, 2018); AR 92; AR 15996.

fact" (emphasis in original)). This is incorrect. For one, Defendants overstate the requirement set forth by the Supreme Court in *Clapper*, which acknowledged:

> Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a '*substantial risk*' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.

568 U.S. at 414, n.5 (emphasis added) (citations omitted).

More importantly, Defendants wholly disregard the unique nature of the injury at issue here and the body of caselaw addressing standing in such cases. It is well established that, where such action ultimately threatens a litigant's concrete interests, an agency's failure to follow NEPA's procedural mandates can create an injury sufficient for standing purposes. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1500 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 n.7, 8 (1992)). Put otherwise, "[t]he procedural injury implicit in agency failure to prepare an EIS"—namely, "the creation of a risk that serious environmental impacts will be overlooked"—"is itself a sufficient 'injury in fact' to support standing." *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975); *see also Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996) ("[A]n injury of alleged increased environmental risks due to an agency's uninformed decisionmaking may be the foundation for injury in fact under Article III.") (citing *Douglas County*, 48 F.3d at 1499-1501; *City of Davis*, 521 F.2d at 671). The Tenth Circuit in *Committee to Save the Rio Hondo* explained why this is so:

> An agency's failure to follow the National Environmental Policy Act's prescribed procedures creates a risk that serious environmental consequences of the agency action will not be brought to the agency decisionmaker's attention. The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury [NEPA] was designed to prevent.

Comm. to Save the Rio Hondo, 102 F.3d at 448-49; *see also Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) (finding that California had standing to allege NEPA violations in connection with the Forest Service's amendment of a national forest management plan, because the plan "permits the Forest Service to implement forest management projects in California, and there is no real possibility that the Forest Service will then decline to adopt *any* management projects under the [plan]").

To put a finer point on it—and expressly contrary to Defendants' assertions—"[t]he person who has been accorded a procedural right to protect his concrete interests can assert the right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7; *see also Douglas County*, 48 F.3d at 1501; *Sierra Club v. United States Dep't of Energy* ("*DOE*"), 287 F.3d 1256, 1265 (10th Cir. 2002) ("[T]he harm itself need not be immediate" in the NEPA context, as it is understood that the "federal project complained of may not affect the concrete interest for several years.") (internal quotations and citation omitted). Further, the litigant need not "show with certainty, or even with a substantial probability," that the agency's decision will surely harm the environment; rather, the litigant must show that the agency, in making its decision without following statutorily mandated procedures, created an increased risk of harm. *Sierra Club v. DOE*, 287 F.3d at 1265; *Comm. to Save the Rio Hondo*, 102 F.3d at 449; *Citizens for Better Forestry v. U.S. Dep't of Agric*., 341 F.3d 961, 970-71 (9th Cir. 2003) (for standing purposes, "harm consists of added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment") (internal quotations and citations omitted); *Methow Forest Watch v. U.S. Forest Serv*., 383 F. Supp. 2d 1263, 1268 (D. Or. 2005) ("an 'increased risk' to the environment is all that is needed to

establish the injury prong for standing in these environmental procedural claims") (quoting *Ecological Rights Found. v. Pacific Lumber, Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000)).

This does not excuse State Plaintiffs from the need to establish that they will be injured by the anticipated environmental harms should they come to pass, but State Plaintiffs have satisfied that requirement. As noted above, State Plaintiffs have shown—and neither Defendants nor Intervenor-Defendants refute—that they will be harmed by the air pollution, including increased greenhouse gas emissions, and other environmental harm that will result if coal is in fact mined, transported, and burned under the restarted lease program.

Finally, Defendants urge the Court to "consider the real nature of the pause" and suggest that, just as State Plaintiffs would lack standing to challenge an uptick in lease sales driven by an increase in employee productivity, so, too, do State Plaintiffs lack standing here. BLM Br. at 20. The intent of the moratorium that Secretary Jewell ordered was to facilitate a comprehensive review of, among other things, the environmental consequences of the coal leasing program and to determine whether continuation of the program in its current iteration was in the public interest, not to take a breather so that employees could focus on other tasks. The intent of Secretary Zinke's Order was intentionally to reverse Secretary's Jewell's order. To the extent it is relevant to the standing analysis (and it is not), *that* is the "real nature of the pause."

II. STATE PLAINTIFFS' CLAIMS ARE RIPE FOR REVIEW.

Defendants are also incorrect that State Plaintiffs' claims are unripe. *See* BLM Br. at 21-24. In deciding whether an agency decision is ripe for review, the court examines "both the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'" *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)); *see Navajo Nation v. U.S. Dep't of Interior*, 819 F.3d 1084, 1095 (9th

Cir. 2016). Under this standard, the Supreme Court has identified three factors for evaluating ripeness: "(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*, 523 U.S. at 733. Each of these factors demonstrates that State Plaintiffs' claims are ripe for review.

First, Defendants are incorrect that the issuance of Secretarial Order 3348 creates no "direct and immediate" hardship to Plaintiffs. BLM Br. at 22. As discussed in Plaintiffs States' opening brief and in Section I, *supra*, State Plaintiffs' are harmed in several ways, including by increased air pollution and adverse climate impacts, as well as procedural harms from Defendants' failure to comply with NEPA and other statutes. While Defendants cite *Ohio Forestry* regarding the hardship issue, the Supreme Court specifically distinguished that case from a situation such as this where plaintiffs allege procedural violations of NEPA, stating that "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry*, 523 U.S. at 737.

Following this logic, courts in the Ninth Circuit have repeatedly rejected ripeness arguments from defendants when plaintiffs allege procedural violations of environmental statutes. *See, e.g., Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009) (finding matter ripe for adjudication where it would be plaintiffs' only opportunity to challenge a rule on a nationwide, programmatic basis); *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1078 (9th Cir. 2002) (warning against the "tyranny of small decisions" by holding that "[a]n agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from [a program] merely by saying that the consequences are unclear or will be analyzed later when an EA is prepared for a site-specific

program"); *Citizens for Better Forestry*, 341 F.3d at 977 (finding that "the imminence or lack thereof of site-specific action … is irrelevant to the ripeness of an action raising a procedural injury"); *Friends of the River v. U.S. Army Corps of Engineers*, 870 F. Supp. 2d 966, 980-81 (E.D. Cal. 2012) (finding plaintiffs' allegations that defendants failed to comply with procedural requirements of NEPA, the Endangered Species Act, and APA to be ripe for review); *see also Gros Ventre Tribe v. U.S.*, 469 F.3d 801, 814 (9th Cir. 2006) (the Federal Land Policy and Management Act "is primarily procedural in nature"); *Western Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, 2018 WL 1475470, *13 (D. Mont. Mar. 26, 2018) (describing "additional procedures" for coal development under the Mineral Leasing Act).[5]

With regard to the second and third factors, Defendants assert that "judicial intervention would inappropriately interfere with likely future lease proceedings," and that the Court would benefit from reviewing "formal NEPA analysis" on future lease applications. BLM Br. at 22-23. However, future coal leasing is not being challenged in this matter and is simply not relevant in deciding the questions presented in this case. For example, adjudicating State Plaintiffs' NEPA claims now will not "inappropriately interfere with further administrative action" because "Defendants allegedly have already surpassed the stage in which they should have issued" an EIS. *See Friends of the River*, 870 F. Supp. 2d at 980-81 (citing *Kern*, 284 F.3d at 1071). Defendants do not claim that "further administrative proceedings are contemplated" with regard to Secretarial Order 3348 and, as

[5] For these reasons, the cases cited by Defendants involving substantive challenges to agency regulations are inapposite. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967) (facial challenge to agency regulations governing color additives to food, drugs, and cosmetics); *Nat'l Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (facial challenge to National Park Service regulation governing concession contracts); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007), *rev'd on other grounds*, 555 U.S. 488 (2009) (challenge to U.S. Forest Service regulations governing agency review of decisions implementing forest plans).

discussed below, the Order is a "final agency action." *See Abbott Labs.*, 387 U.S. at 149.

Moreover, this challenge is fit for judicial review because there is no further factual development that would "significantly advance [the Court's] ability to deal with the legal issues presented." *See Nat'l Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (internal quotations and citations omitted). This Court's review of a "formal NEPA analysis" on a future coal lease would be entirely unhelpful in determining whether a new programmatic NEPA review was triggered by the issuance of Secretarial Order 3348, which is the issue now before the Court. Defendants have not, and cannot, identify any further facts that the Court would need to decide State Plaintiffs' claims. "Because the alleged procedural violation … is complete, so too is the factual development necessary to adjudicate the case." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1084 (9th Cir. 2015) (finding that alleged procedural violation of Endangered Species Act was ripe for review prior to any project-specific implementation). Consequently, State Plaintiffs' claims are ripe for review.

III. SECRETARIAL ORDER 3348 IS A FINAL AGENCY ACTION.

There is no merit to Defendants' and Intervenor-Defendants' arguments that State Plaintiffs have failed to identify or challenge a final agency action in this matter. *See* BLM Br. at 24-26; 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 (Dkt. No. 126) ("WY Br.") at 14-16; NMA Br. at 9-13. In particular, Defendants and Intervenor-Defendants assert that Secretarial Order 3348 did not "mark the consummation of the agency's decision making process" because it made no decisions on any lease applications and is simply a statement of policy. BLM Br. at 25; WY Br. at 15; NMA Br. at 10. In addition, Defendants and Intervenor-Defendants contend that the Order did not affect any "legal rights or obligations"

and did not require "immediate compliance" with anything. *Id*. There is no merit to these assertions. The issuance of Secretarial Order 3348 clearly fulfills the test for final agency action set forth in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

As an initial matter, Defendants and Intervenor-Defendants ignore the fact that the APA specifically includes an agency "order" in the definition of "agency action," *see* 5 U.S.C. § 551(13), and courts have found Secretarial Orders to constitute final agency actions for purposes of judicial review under the APA. *See, e.g.*, *Bituminous Coal Operators' Ass'n v. Secretary of Interior*, 547 F.2d 240, 244 (4th Cir. 1977) (Secretarial Order citing coal mining companies for violations of federal health and safety standards was final agency action for purposes of APA); *see also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (noting "the strong presumption that Congress intends judicial review of administrative action").

Here, Defendants' issuance of Secretarial Order 3348 marked the conclusion of the agency's decisionmaking process with regard to the federal coal moratorium and the programmatic EIS. *See Bennett*, 520 U.S. at 177-78. Specifically, this Order revoked Secretarial Order 3338, directed BLM "to process coal lease applications and modifications expeditiously in accordance with regulations and guidance existing before the issuance of Secretary's Order 3338," and commanded that "[a]ll activities associated with the preparation of the Federal Coal Program PEIS shall cease." AR 1-2. The issuance of Secretarial Order 3348 also reflected Defendants' final determination that the Order was not subject to the requirements of NEPA, the Mineral Leasing Act, or the Federal Land Policy and Management Act as alleged by State Plaintiffs in this action. *See Malama Makua v. Rumsfeld*, 136 F. Supp. 2d 1155, 1161-62 (D. Haw. 2001) (final supplemental EA and FONSI "concluded the decisionmaking process regarding the proposed action's environmental impact").

Second, Defendants and Intervenor-Defendants are incorrect that "no rights or obligations have been determined" or "legal consequences will flow" from the issuance of Secretarial Order 3348. *See Bennett*, 520 U.S. at 77-78. As the Ninth Circuit has stated, "courts consider whether the practical effects of an agency's decision make it a final agency action, regardless of how it is labeled." *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014). The fact that Secretarial Order 3348 did not approve any particular lease application is of no consequence given that it "was a practical requirement to the continued operation" of mining activities affected by the moratorium, even if it is not the last step in the leasing process. *See Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1249-50 (9th Cir. 2017) (finding that Forest Service mining report was final agency action because it represented agency's final decision on validity of mineral rights, even though it did not allow for mining to occur).

Moreover, at issue in this case is whether Defendants were required to comply with the procedures specified by NEPA, the Mineral Leasing Act, and the Federal Land Policy and Management Act prior to revoking the federal coal moratorium established by Secretarial Order 3338 and restarting the federal coal leasing process. "The rights conferred by NEPA are procedural rather than substantive," and State Plaintiffs here allege procedural rather than substantive injury. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996) ("NEPA exists to ensure a process, not to ensure any result.") (emphasis in original). While Defendants argue that some future, site-specific coal lease must be approved before there is any "final agency action" for APA purposes, the legal consequences of BLM's failure to comply with these procedural requirements have already occurred. *See Forest Service Employees for Envtl.*

Ethics v. U.S. Forest Serv., 397 F. Supp. 2d 1241 (D. Mont. 2005) (agency failure to comply with NEPA regarding use of chemical fire retardant on national forests was "final agency action" for APA purposes).

The cases cited by Intervenor-Defendants on this issue do not support a different conclusion. *See* WY Br. at 15; NMA Br. at 11-13. In *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977 (9th Cir. 2006), plaintiffs challenged the U.S. Forest Service's issuance of annual operating instructions to permittees who graze livestock on national forest lands. *Id*. at 979. The Ninth Circuit found that the action was properly viewed as a license within the meaning of 5 U.S.C. § 551(13), and also met the *Bennett* test for finality. *Id*. at 983. In particular, the Ninth Circuit held that the action set parameters for site-specific grazing permits and imposed legal consequences on the permit holder, even though it did "not alter the legal regime to which the Forest Service is subject." *Id*. at 983-90.

In *Center for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11 (D.D.C. 2017), plaintiffs brought an action pursuant to 5 U.S.C. § 706(1) challenging the Department of the Interior's failure to complete a review of its internal NEPA procedures following the Deepwater Horizon oil spill. *Id*. at 15-16. Noting that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take," the court found no such discrete duty under the regulation at issue (40 C.F.R. § 1507.3(a)) and dismissed the case. *Id*. at 20-30. Given the absence of a claim under 5 U.S.C. § 706(1) or an alleged violation of 40 C.F.R. § 1507.3 in this action, the *CBD* case has no relevance here. *See Oregon Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1119 (9th Cir. 2010) (distinguishing caselaw involving claims under section 706(1) from actions brought pursuant to section 706(2)); *Public Lands for the People v. U.S. Dep't of Agric.*, 733 F. Supp. 2d 1172, 1182 (E.D. Cal. 2010)

(finding that case law regarding "failure to act" claims under section 706(1) "has no applicability to the claims at issue here, which challenge completed agency action under § 706(2)").

Finally, in *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132 (9th Cir. 1998), plaintiffs claimed that BLM's failure to impose a moratorium on certain activities on public lands in eastern Oregon and Washington violated NEPA and the Federal Land Policy and Management Act. *Id*. at 1134-35. Unlike the situation here, the Ninth Circuit found that "this case presents a situation where there is no identifiable agency order … that may be subject to challenge as a final agency action." *Id*. at 1136. Moreover, the court noted that "the fact that the challenge is not aimed at a site-specific project is not the reason [plaintiff's] argument fail. They fail because [plaintiff] cannot point to a deliberate decision by BLM to act or not to take action." *Id*. at 1137. Here, State Plaintiffs have challenged a specific, identifiable order and "a conscious decision arrived at by the agency," which constitutes a final agency action. *See id*.

Consequently, Defendants' issuance of Secretarial Order 3348 constitutes a final agency action and is reviewable under the APA.

IV. SECRETARIAL ORDER 3348 IS A MAJOR FEDERAL ACTION UNDER NEPA.

Defendants and Intervenor-Defendants' efforts to downplay the significance of Secretarial Order 3348 to avoid its characterization as a "major federal action" for purposes of NEPA are futile. Further, the D.C. Circuit's recent decision in *Western Organization of Resource Councils v. Zinke*, 892 F.3d 1234 (D.C. Cir. 2018) ("*Western Organization*") does not address the issue: the fact that *Western Organization* postdates and mentions Secretarial Order 3348 does not change the fact that the *Western Organization* court *did not analyze* whether the Order is a major federal action, as defendants themselves implicitly acknowledge. *See* BLM

Br. at 31 (recognizing that the distinctions between *Western Organization* and this case "may alter the analysis").

A. The Issuance of Secretarial Order 3348 Has Significant Environmental Consequences.

The scope of what constitutes a "major federal action" under NEPA is broad and expressly includes "new and continuing activities, including … programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals." 40 C.F.R. § 1508.18(a). Defendants concede the Order constitutes a "policy," BLM Br. at 27, but they dispute that it is sufficiently "major" for purposes of NEPA. *Id*. at 29.

To make their point, Defendants characterize the Secretarial Order that implemented the moratorium as nothing more than a reorganization of day-to-day priorities (*see* BLM Br. at 20, stating that the "pause" was nothing that could not have been accomplished more informally, as by "directing staff to work on other things") or a casual decision "deferring consideration of leasing applications." BLM Br. at 27. Defendants imply that the Order at issue here was an equally casual decision to reverse those directives. But elsewhere, Defendants acknowledge that Secretarial Order 3348 was anything but casual: As they themselves explain, the impetus for the Order was an Executive Order from the President of the United States directing the Secretary of the Interior to "take all steps necessary and appropriate to amend or withdraw [Secretarial Order] 3338 … and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338." BLM Br. at 14 (citing AR 15897) (Executive Order 13783, Mar. 28, 2017)). Defendants meanwhile, had been undertaking a "careful review of the Scoping Report," and on the basis of that review, submitted a 14-page memorandum recommending that the Secretary revoke Secretarial Order 3338 and lift the moratorium. *Id*.; *see* AR 13-26. Secretarial Order 3348 ensued. The fact

that these actions were pre-orchestrated and occurred in quick succession underscores that, as committed to revoking the prior order as this Administration was, there was a process to follow. To the extent that process reflects the gravitas of the Order, Secretarial Order 3348 was not, as Defendants would have this Court believe, inconsequential.

Further, Defendants assert that the Order itself has no real impact and that the alleged harm only results when a proposed lease is actually approved. *See* BLM Br. at 29 (emphasizing the distinction between "processing" lease applications—which, they assert, is inconsequential—and *approving* such applications, which they acknowledge constitutes a major action). Defendants do not dispute that the impacts of the coal lease program are "major," nor can they. *See* 40 C.F.R. § 1508.27(a) ("the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. … Both short- and long-term effects are relevant."); *Kleppe v. Sierra Club*, 427 U.S. 390, 400 (1976) (noting that the federal coal lease program "surely has significant environmental consequences"). Rather, Defendants appear to dispute there is sufficient nexus between the Order and those significant consequences. The connection is crystal clear: *But for* Secretarial Order 3348, there would remain a moratorium (effectively, a prohibition) on coal leases on federal lands, which (according to Defendants) was "unduly burdensome on coal operations." BLM Br. at 14 (citing AR 23). In lifting the moratorium and removing this purported "undue burden" on coal operations, Defendants will now process and likely approve lease applications, and coal will be mined, transported, and burned. In sum, Secretarial Order 3348 is, among other things, a "formal document[] establishing an agency's policies which will result in or substantially alter [an] agency program[]," 40 C.F.R. § 1508.18(b)(1), which program "surely

has significant environmental consequences." *Kleppe*, 427 U.S. at 400. As such, it is a "major federal action" under NEPA.

B. *Western Organization* is Inapplicable and Does Not Dispose of the Issue.

Defendants and Intervenor-Defendants assert that the D.C. Circuit's recent ruling in *Western Organization* disposes of State Plaintiffs' claim that Secretarial Order 3348 is a "major federal action" for purposes of NEPA. *See* BLM Br. at 30; WY Br. at 20; NMA Br. at 13-15. *Western Organization* does not apply here.

At issue in *Western Organization* was whether BLM's failure to supplement the federal coal program's 1979 Programmatic EIS constituted an agency action unlawfully withheld pursuant to 5 U.S.C. § 706(1). *Western Organization*, 892 F.3d at 1241. As discussed above in Section III, such "failure to act" claims brought pursuant to APA Section 706(1) are evaluated differently than claims challenging discrete final agency actions pursuant to Section 706(2). *See Oregon Natural Desert Ass'n*, 625 F.3d at 1119.

Second, the D.C. Circuit's analysis in *Western Organization* turned on whether NEPA required a supplemental environmental impact statement, which, in turn, depended on whether there was a proposed major federal action that was not yet completed. The appellants in that case asserted that the "federal action" at issue "should be viewed as encompassing the Program broadly, including the leases and orders that the Department issues on an ongoing basis." *Western Organization*, 892 F.3d at 1243. The court rejected this argument, stating, "Appellants have failed to identify any specific pending action, apart from the Program's continued existence, that qualifies as a 'major Federal action' under NEPA." *Id*. To be clear: the complaint in *Western Organization* predated Secretarial Order 3348, and the Order was not at issue.

Defendants assert that, because "the decision in *Western Organization* postdates (and in fact discusses) Secretary Zinke's decision to end the pause," it

extinguishes any argument that Secretarial Order 3348 is a major federal action under NEPA. BLM Br. at 3. This is not so. Defendants' mischaracterize *Western Organization*'s treatment of Secretarial Order 3348. The court did not "discuss" it. Rather, in explaining the circumstances under which an order holding the case in abeyance had been rescinded, the court cursorily mentioned Secretarial Order 3348 once in its procedural background. *See Western Organization*, 892 F.3d at 1240 (noting that "[o]n March 29, 2017, newly appointed Secretary Zinke ordered an immediate halt to "[a]ll activities associated with the preparation of the [new] PEIS" and lifted the moratorium on new leasing). The court ruled narrowly on whether the "Program's continued existence" was a "proposed … major federal action" for purposes of determining the need for supplemental environmental review. But nothing in *Western Organization* suggests that the court intended to decide whether Secretarial Order 3348 – which altered the status quo by restarting the federal coal leasing process – constituted a major federal action for purposes of NEPA review.

In an effort to stretch *Western Organization* beyond its bounds, Intervenor-Defendants assert that the Order is not a "'major federal action' because it does not propose or implement **any** agency action," and cite *Western Organization* for the proposition that "[i]n the context of the federal coal program, agency action occurs when the agency makes a specific leasing decision." WY Br. at 20 (emphasis in original). This argument misses the mark. *Western Organization* did not say leasing decisions were the *only* agency action that could occur in the context of the coal lease program; *Western Organization* only said that "the Program's continued existence," without more, was not a major federal action. *Western Organization*, 892 F.3d at 1243. In fact, the court acknowledged that "NEPA compels the Department to include a complete environmental analysis in its proposal for any new major Federal action—even actions taken pursuant to the Federal Coal

Management Program." *Id.* at 1244. Defendants, in fact, concede that the Order is a federal action, and only dispute, as noted above, that it is sufficiently "major." *See* BLM Br. at 31. For reasons discussed above, the Order is not only a federal action, but a major one, and NEPA review is required.

V. DEFENDANTS WERE REQUIRED TO CONSIDER THE REQUIREMENTS OF THE MINERAL LEASING ACT AND THE FEDERAL LAND POLICY AND MANAGEMENT ACT IN ISSUING SECRETARIAL ORDER 3348.

Defendants do not dispute that in issuing Secretarial Order 3348, they failed to consider their legal statutory mandates under the Mineral Leasing Act and the Federal Land Policy and Management Act to ensure that coal leasing is in the public interest and the public is receiving fair market value for the sale of these resources. *See* Pls.' Br. at 22-25. Instead, Defendants and Intervenor-Defendants claim that these requirements either do not apply to the Secretary's decision or are "hortatory in nature" and "do not rise to the level of statutory mandates." BLM Br. at 36-40; NMA Br. at 20-22. These arguments fail.

First, Defendants assert that Section 201 of the Mineral Leasing Act is inapplicable because it is "linked … to leasing" and Secretarial Order 3348 "is not a leasing decision and does not authorize leasing." BLM Br. at 37. While it is true that the Order does not authorize any site-specific coal leases, it is clearly "linked to leasing." In particular, in issuing Secretarial Order 3338, then-Secretary of the Interior Sally Jewell acted pursuant to 30 U.S.C. § 201 to place a moratorium on most new federal coal leases and lease modifications. AR 10-11 (placing limitations on new coal leasing "[p]ursuant to my discretionary authority under the Mineral Leasing Act (e.g., 30 U.S.C § 201)."); AR 92-94, 15994-96 (listing dozens of pending applications for coal leases and lease modifications affected by the moratorium). In doing so, Secretary Jewell specifically discussed concerns related to the public interest and providing a fair return to American taxpayers. AR 5-8. Secretarial Order 3348 was also issued pursuant to the Secretary's authority under

the Mineral Leasing Act, explicitly revoked Order 3338, and directed BLM "to process coal lease applications and modifications expeditiously in accordance with regulations and guidance existing before the issuance of Secretary's Order 3338." AR 1-2. Consequently, Section 201 is applicable to the Order.

With regard to the Federal Land Policy and Management Act, Defendants assert that the provisions in Section 1701 are not "statutory mandates" but simply "declarations of policy … intended to guide land-use planning." BLM Br. at 37-38. In support of this argument, Defendants cite two unpublished district court decisions which provide no authority for this position. First, in *Public Lands for the People v. U.S. Dep't of Agric.*, 2010 WL 5200944 (E.D. Cal. Dec. 15, 2000), plaintiff claimed that the U.S. Forest Service's travel management plan for the El Dorado National Forest violated its rights of access for mining and prospecting activities by limiting motorized vehicle use of Forest Service roads. *Id*. at *1. Although the plaintiff alleged violations of sections 1701 and 1732, the district court ruled that the Federal Land Policy and Management Act was "inapplicable to the Forest Service" (as opposed to the Secretary of the Interior) and contained no directives applicable to Forest Service lands. *Id*. at *11.

Second, in *State of Utah v. Norton*, 2006 WL 2711798 (D. Utah Sept. 20, 2006), conservation groups challenged a settlement between plaintiffs and federal defendants regarding the creation and maintenance of wilderness study areas on federal lands in Utah. *Id*. at *1. While the district court discussed section 1701 as part of the statutory background of the case, *id*. at *11, no violation of that section was alleged in the litigation. In addition, contrary to Defendants' claim that section 1701 contains only "declarations of policy," both the district court and the Tenth Circuit described these provisions as "statutory directives" that BLM "must" consider in its management of public lands. *See id*.; *State of Utah v. U.S. Dep't of Interior*, 535 F.3d 1184, 1186-87 (10th Cir. 2008).

Moreover, Defendants ignore the fact that courts have found violations of the Federal Land Policy and Management Act based on an agency's failure to consider the statutory provisions in Section 1701. *See, e.g., Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 49-51 (D.D.C. 2003) (remanding federal mining regulations that failed to consider duty to receive "fair market value" for use of public lands and rejecting federal defendants' argument that section 1701(a)(9) "sets forth only a policy goal"); *Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1269-71 (E.D. Cal. 2006) (federal defendants failed to consider requirements of section 1701(a)(8) in land management plan for the Redding Resource Area); *Oregon Natural Desert Ass'n*, 625 F.3d at 1109-12 (finding that the Federal Land Policy and Management Act and the Wilderness Act required BLM to consider wilderness characteristics in EIS for southeastern Oregon land use plan).[6]

As the U.S. Supreme Court has stated, "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (internal quotations and citation omitted). Contrary to their prior findings, Defendants failed to consider or provide any explanation regarding how restarting the federal coal program would fulfill their statutory mandates to ensure that leasing is in the public interest and that the public is receiving fair market value for the sale of these public resources. Therefore, Defendants' issuance of Secretarial Order 3348 was arbitrary and capricious, an abuse of discretion, and contrary to the

[6] The cases cited by NMA on this issue are inapposite. *See ONRC*, 150 F.3d at 1139-40 (finding that plaintiff failed to challenge a final agency action or identify a provision of the Federal Land and Policy Management Plan that "provide[d] a clear duty to update land management plans or cease actions during the updating process"); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004) (finding no basis to assert Federal Land Policy and Management Act or NEPA claims pursuant to 5 U.S.C. § 706(1) to challenge agency's alleged failure to manage off-road vehicle use in wilderness study areas).

requirements of the Mineral Leasing Act, the Federal Land Policy and Management Act, and the APA.

CONCLUSION

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

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Respectfully submitted,

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