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

CITIZENS FOR CLEAN ENERGY, et al., Plaintiffs, and THE NORTHERN CHEYENNE TRIBE, Plaintiff, v. U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants,	Case No. 4:17-cv-30-BMM **PLAINTIFFS' BRIEF ON REMEDY**

and STATE OF WYOMING, et al., Defendant-Intervenors.	
STATE OF CALIFORNIA, et al., Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants, and STATE OF WYOMING, et al., Defendant-Intervenors.	Case No. 4:17-cv-42-BMM (consolidated case)

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INTRODUCTION

To remedy Federal Defendants' serious violation of the National Environmental Policy Act ("NEPA"), this Court should vacate Secretarial Order 3348 (the "Zinke Order"), which revoked the federal coal-leasing moratorium and thereby opened up tens of thousands of acres of public lands to new coal leasing and development. As a matter of law, vacatur would restore the status quo that predated Federal Defendants' arbitrary, capricious, and unlawful action, reinstating the pre-existing moratorium on federal coal leasing enacted by Secretarial Order 3338 (the "Jewell Order"). Vacatur is the standard remedy under the Administrative Procedure Act ("APA"), where, as here, a court determines that an agency action is unlawful. See 5 U.S.C. § 706(2)(A) ("The reviewing court shall ... set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

The fact that Federal Defendants rushed to commence a narrow Environmental Assessment ("EA") of three coal leases is of no consequence in determining the appropriate remedy for Federal Defendants' violation, for two reasons. First, Federal Defendants' belated attempts to justify a decision already they made, and which at all times remained in effect, turns the NEPA process on its head. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). Rather, to comply with NEPA for a decision whether to terminate the federal coal-

leasing moratorium, Federal Defendants must initiate and complete a decision-making process on a clean slate—following vacatur of the Zinke Order—that is not arbitrary and capricious. Second, even if Federal Defendants could remedy their NEPA violation through post-hoc environmental review, Federal Defendants' EA on its face does not constitute a lawful environmental review of the Zinke Order. Instead of taking the required hard look at whether the lifting of the federal coal-leasing moratorium, particularly on a going-forward basis, may cause significant environmental impacts, the EA reflects a narrow, backward-looking review that ignores most of the direct, indirect, and cumulative impacts of leasing.

Because the remedy of vacatur is sufficient, this Court need not reach the four-factor test for a permanent injunction. Nevertheless, if the Court does address the injunction test, circumstances here would warrant an injunction enjoining the Zinke Order and preventing new coal leasing that would otherwise be prohibited under the moratorium. Plaintiffs have and will continue to suffer irreparable environmental and procedural injuries absent an injunction, whereas Federal Defendants suffer no harm and Intervenor-Defendants cannot demonstrate substantial or irreparable harm. The public interest also weighs in favor of an injunction—for the same reasons given in the Jewell Order initiating the moratorium. As with vacatur, the injunction would restore the status quo before Federal Defendants' arbitrary and capricious action.

Absent vacatur of the unlawful Zinke Order, Federal Defendants will continue issuing coal leases, including new leases as soon as September, 2019, according to counsel for Federal Defendants. These leases will cause environmental harm that could otherwise have been avoided through a careful analysis of environmental consequences and alternatives, as NEPA requires.

FACTUAL DEVELOPMENTS

Certain factual developments are relevant to this Court's determination of an appropriate remedy for Federal Defendants' NEPA violation. Following the March 29, 2017 issuance of the Zinke Order, Federal Defendants issued a number of coal leases and lease modifications that, but for Federal Defendants' unlawful action, would have been prohibited by the federal coal-leasing moratorium. Specifically, the Bureau of Land Management ("BLM") issued three coal leases that it asserted "would not have qualified as excluded or exempt under the terms of the Jewell Order." Draft EA at 6 (attached hereto as Exh. 1). These leases represent approximately 40 million tons of coal. Id. at 13. In addition, BLM issued a number of leases that BLM deemed exempt under the Jewell Order. Id. at 16-17. Lease applications for more than a billion tons of federal coal—including 426 million tons adjacent to the Decker and Spring Creek mines near the Northern

Cheyenne Reservation in Montana—remain pending and may issue unless this Court vacates the Zinke Order. See id. at 17-18.[1]

On May 22, 2019, just five weeks after this Court's Order finding that the Zinke Order constituted a major federal action subject to NEPA, April 19, 2019 Order [Doc. 141], Federal Defendants released a 35-page Draft EA and filed a "Notice of Partial Compliance with April 19, 2019 Order," see Doc. 143.[2] Federal Defendants asserted that the Draft EA "examine[d], in accord with NEPA, the impacts of the Zinke Order." Id. However, the Draft EA considered only the three leases BLM issued between March 2017 and March 2019 that Federal Defendants claimed would not have been issued but for the Zinke Order, and did not consider

[1] To put these numbers in context, the United States in 2017 produced 774.6 million short tons of coal. *Annual Coal Report*, U.S. ENERGY INFO. ADMIN., (Nov. 26, 2018), https://www.eia.gov/coal/annual/. Because coal combustion is less efficient than that of oil and gas, its combustion adds more carbon dioxide to the atmosphere per unit of energy than the combustion of other fossil fuels. B.D. Hong & E. R. Slatick, *Carbon Dioxide Emission Factors for Coal*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/coal/production/quarterly/co2_article/co2.html (last visited Jul. 19, 2019).

[2] BLM simultaneously announced a 15-day public comment period on the Draft EA, which included two weekends and a federal holiday. Although BLM subsequently extended the public comment period by 4 days due to a technical glitch, see Fed. Defs.' Unopposed Mot. for Enlargement of Time, at 2-3 [Doc. 145], the agency failed to respond to numerous requests from members of the public, including Plaintiffs, for a lengthier extension necessary to afford a meaningful opportunity for public involvement. Moreover, BLM once again failed to respond to a written request from the Northern Cheyenne Tribe for government-to-government consultation and refused to engage in consultation with Native American Tribes on the Zinke Order. Draft EA, at 32.

any future leasing. Draft EA at 13. Federal Defendants limited their scope of analysis based on a number of erroneous assumptions. Federal Defendants assumed that the federal coal-leasing moratorium originally contemplated by the Jewell Order would have expired in March 2019 under the aspirational timeframe embodied in the Jewell Order for completion of a programmatic EIS. Id. at 11. Federal Defendants also assumed that the outcome of that process would have been to reinstate the federal coal-leasing program without any of the reforms that prompted the adoption of the moratorium in the first instance. See id.; see also Pls.' Op. Br. at 24-34 [Doc. 118].

Based on these facially unreasonable assumptions, BLM improperly constrained its environmental review to only past leases that it claims would have been otherwise subject to the moratorium, and failed to evaluate any of the programmatic impacts of the federal coal-leasing program going forward. Draft EA at 13. Even as to the leases BLM examined, it claimed that the impacts of those leases simply occurred sooner than they would have absent the Zinke Order, and as a result concluded that the only impact of the Jewell Order was to delay the issuance of three leases. Id. at 19. In addition to disregarding the vast majority of activities conducted under the program, the Draft EA also considers an extremely limited range of "issues" and alternatives, ignoring many of the impacts and

concerns that BLM itself recently found to warrant consideration in an updated programmatic environmental impact statement ("EIS") for the program. Id. at 8-9.

In particular, BLM previously indicated that the programmatic environmental review ordered by the Jewell Order would lead to broad-scale, programmatic reforms—including changes to whether and how leasing occurs. Specifically, BLM concluded in the 2017 Scoping Report that:

> The three general areas requiring modernization are: fair return to Americans for the sale of their public coal resources; impact of the program on the challenge of climate change and on other environmental issues; and efficient administration of the program in light of current market conditions including impacts on communities.

AR 1604 (emphasis added). In particular, BLM concluded that the federal coal program

> must ensure appropriate alignment with US climate goals and adequately reflect the impact of the program on climate change. Virtually every community in the US is being impacted by climate change, and Federal programs have an obligation to be administered in a way that will not worsen and help address these impacts.

AR 1605. Accordingly, before the Zinke Order, BLM had already determined that significant program reforms were necessary. In addition, BLM identified a number of alternatives for further consideration to address these reform needs. AR 1628-34. Among other things, BLM identified feasible alternatives that would enact programmatic-level royalty reforms, adjust the level of leasing based on a carbon

budget, and require the development of landscape-scale strategic leasing plans. AR 1608. BLM also stated that it would "fully analyze a no new leasing alternative as part of the PEIS as a means to reduce greenhouse gas emissions." AR 1621. Thus, the fundamental premise of Federal Defendants' post-hoc EA—that the Jewell Order would have simply expired in March 2019 without further action by Federal Defendants and without any of the reforms they previously determined were necessary—is erroneous on its face. Far from taking the required "hard look" under NEPA, Federal Defendants have instead turned a blind eye to their previously identified concerns.

Although Federal Defendants have not yet finalized their EA, they forecasted in their "Notice of Partial Compliance" their view that the EA would fully remedy the NEPA violation identified in this Court's April 19, 2019 Order. See Notice of Partial Compliance with April 19, 2019 Order [Doc. 143]. As described below, the EA does not—and could not—remedy Federal Defendants' NEPA violation, and vacatur of the Zinke Order is required to redress the harm to Plaintiffs.

ARGUMENT

This Court should vacate the Zinke Order. Federal Defendants failed altogether to undertake the environmental review required by NEPA before issuing the Zinke Order and terminating the moratorium on federal coal leasing. This

serious NEPA violation may be remedied only by vacating the challenged action, which would as a matter of law reinstate the federal coal-leasing moratorium to allow Federal Defendants to meaningfully consider the environmental consequences of, and alternatives to, restarting the federal coal-leasing program. Moreover, because Federal Defendants' recently commenced EA does not reflect such meaningful consideration—including consideration of the programmatic effects of opening tens of thousands of acres of public land to new coal leasing and mining—that EA does not redress the harm to Plaintiffs from Federal Defendants' NEPA violation. Although this Court directed parties to provide briefing regarding the four-factor test for a permanent injunction, April 19, 2019 Order at 32, the injunction test is not implicated where Plaintiffs do not request an injunction and the remedy of vacatur is sufficient. To the extent it is necessary to address the injunction test, the circumstances here warrant an injunction preventing new coal leasing that would otherwise be prohibited under the moratorium.

I. THIS COURT SHOULD VACATE THE ZINKE ORDER, WHICH ELIMINATED THE FEDERAL COAL-LEASING MORATORIUM.

This Court should vacate the Zinke Order and thus restore the moratorium on most new coal leasing. The APA provides that the "reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A),

(D). Thus, except in limited circumstances, "vacatur of an unlawful agency action normally accompanies a remand." All. for the Wild Rockies v. U.S. Forest Serv., 907 F.3d 1105, 1121 (9th Cir. 2018) (citation omitted); see also Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1095 (9th Cir. 2011) ("When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action."); Alsea Valley All. v. Dep't of Commerce, 358 F.3d 1181, 1185 (9th Cir. 2004) ("Although not without exception, vacatur of an unlawful agency rule normally accompanies a remand.") (citation omitted); Bitterroot Ridge Runners Snowmobile Club v. U.S. Forest Serv., 329 F. Supp. 3d 1191, 1207 (D. Mont. 2018) ("When an agency action is not promulgated in compliance with the APA, the action is deemed to be invalid.").

Courts decline to vacate an unlawful agency action "only in 'limited circumstances.'" Pollinator Stewardship Council v. U.S. E.P.A., 806 F.3d 520, 532 (9th Cir. 2015) (quoting Cal. Cmties. Against Toxics v. U.S. E.P.A., 688 F.3d 989, 994 (9th Cir. 2012)). None apply here. First, when determining whether vacatur is appropriate, courts "consider whether vacating a faulty rule could result in possible environmental harm, and [courts] have chosen to leave a rule in place when vacating would risk such harm." Id. (citing Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995)); see also Ctr. For Food Safety v. Vilsack, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) ("[T]he Ninth Circuit has only

found remand without vacatur warranted by equity concerns in limited circumstances, namely serious irreparable environmental injury."). Thus, courts have declined to vacate an illegal agency action when vacatur would increase risks to imperiled species, Idaho Farm Bureau Fed'n, 58 F.3d at 1405–06, or increase harmful pollution, Cal. Cmties. Against Toxics, 688 F.3d at 994. Such circumstances are not present here, where vacating the Zinke Order would prevent, rather than cause, environmental harm.[3]

Second, courts "weigh the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed" to determine whether a case presents the "limited circumstances" warranting remand without vacatur. See Pollinator Stewardship Council, 806 F.3d at 532 (citation and quotation omitted). Here, the seriousness of Federal Defendants' NEPA violation warrants vacatur of the Zinke Order. The errors identified by this Court "involve more than mere technical or procedural formalities that the [agency] can easily cure." Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.

[3] In addition to avoiding environmental harm, reinstating the moratorium would preserve exceptions to the leasing prohibition that are designed to prevent economic harms. See AR 11 (enumerating exceptions to the moratorium). Among other exceptions, BLM may issue leases on an emergency basis where such leasing is needed to maintain an existing mine operation. See id.; 43 C.F.R. § 3425.1-4 (defining conditions for emergency leasing). Further, the moratorium on new leasing does not inhibit continued mining of coal already under lease.

Nat'l Marine Fisheries Serv., 109 F. Supp. 3d 1238, 1244-45 (N.D. Cal. 2015) (finding that NEPA cumulative impacts analysis is "an integral part of fulfilling NEPA's purpose" and agency's failure to conduct such analysis warranted vacatur). Indeed, Federal Defendants failed altogether to consider the programmatic impacts of the Zinke Order under NEPA or alternatives to avoid or mitigate those impacts—failures not cured by Federal Defendants' constrained, post-hoc EA, as described below. Accordingly, the Zinke Order should be set aside as Federal Defendants take the requisite "hard look" at the consequences of that Order. Robertson, 490 U.S. at 349; see Bob Marshall All. v. Lujan, 804 F. Supp. 1292, 1297-98 (D. Mont. 1992) (rejecting federal defendants' argument that NEPA's substantive policies may be achieved without vacating challenged leases, finding that "consideration of alternatives is critical to the goals of NEPA," and vacating action based on agency's failure to do so); Pub. Employees for Envtl. Responsibility v. U.S. Fish & Wildlife Serv., 189 F. Supp. 3d 1, 2-3 (D.D.C. 2016) (finding that "[a] review of NEPA cases in this district bears out the primacy of vacatur to remedy NEPA violations" and citing cases).

Vacatur would also, as a matter of law, reinstate the moratorium on the federal coal-leasing program that was previously in effect under the Jewell Order. Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 970 (9th Cir. 2015) ("The effect of invalidating an agency rule is to reinstate the rule previously in

force.") (en banc) (quoting Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005)). Indeed, restoring the status quo that pre-dated Federal Defendants' unlawful actions follows as a matter of law from vacatur. Id.; see also Turtle Island Restoration Network v. U.S. Dep't of Commerce, 672 F.3d 1160, 1165 (9th Cir. 2012) ("reinstatement of the [prior rule] operates as a matter of law under the vacatur"); United Steel v. Mine Safety and Health Admin., 925 F.3d 1279, 1287 (D.C. Cir. 2019) (finding that "vacatur of the 2018 Amendment automatically resurrects the 2017 Standard"). Reinstating the moratorium has the effect of preventing coal leasing that would otherwise harm Plaintiffs' interests.

To vacate the challenged action and reinstate the federal coal-leasing moratorium, the Court need not evaluate the factors for injunctive relief. The remedy of vacatur is distinct from the remedy of an injunction. Both the Supreme Court and the D.C. Circuit Court have held that "remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA." Sierra Club v. Van Antwerp, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (citing Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165-66 (2010)); see also League of Wilderness Defs./Blue Mountains Biodiversity Project v. U.S. Forest Serv., No. 3:10-CV-01397-SI, 2012 WL 13042847, at *2 (D. Or. Dec. 10, 2012) ("Although the Supreme Court recently cautioned courts against granting injunctive relief as a

matter of course in NEPA cases, it did not question the use of vacatur as a standard remedy.") (citing Monsanto, 561 U.S. at 165-66).

Setting aside an unlawful agency decision through vacatur "prohibits, as a practical matter, the enforcement of" that decision, but is not "the practical equivalent of 'enjoining'" the agency. Alsea Valley All., 358 F.3d at 1186. As the Supreme Court observed in Monsanto, if vacatur of an agency's action is sufficient to redress the plaintiff's injury, "no recourse to the additional and extraordinary relief of an injunction [is] warranted." 561 U.S. at 166 (2010); see also, e.g., Reed v. Salazar, 744 F. Supp. 2d 98, 120 (D.D.C. 2010) (setting aside challenged agency action and declining to issue injunctive relief where it was unnecessary "to redress the NEPA violation found by the Court").

Such is the case here, where vacating the Zinke Order would effectively reinstate the coal-leasing moratorium. Accordingly, this Court need not evaluate the need for an injunction in order to vacate the challenged action. See Sierra Club v. Van Antwerp, 719 F. Supp. 2d at 78; Dine Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 859 (10th Cir. 2019) (vacating challenged oil and gas drilling decisions and finding that further injunction of drilling activity is not necessary).

II. BLM'S RUSHED ENVIRONMENTAL REVIEW DOES NOT REMEDY THE NEPA VIOLATION ADJUDICATED IN THE COURT'S APRIL 19, 2019 ORDER.

Vacatur is the appropriate remedy regardless of Federal Defendants' recent commencement of a rushed and constrained NEPA review, and this Court should reject Federal Defendants' suggestion that this review remedies their NEPA violation. Further, because as described below Federal Defendants' review could not possibly remedy the NEPA violation identified by this Court, there is no need to await BLM's completion of a Final EA before vacating the Zinke Order.

At the outset, Federal Defendants' suggestion in its "Notice of Partial Compliance" (Doc. 143) that commencement of an EA, without regard to its content, remedies their NEPA violation, is erroneous. See Pub. Serv. Co. of Colo. v. Batt, 67 F.3d 234, 237 (9th Cir. 1995) ("The government's [position] would permit the government to end the injunction by the publication of any EIS, however flawed, and the issuance of a record of decision based upon it. We reject a reading that would leave the injunction that toothless."). While Plaintiffs do not ask this Court to address the adequacy of Federal Defendants' EA under NEPA in this remedy brief, this Court may look to the EA for purposes of determining Federal Defendants' compliance with this Court's April 19, 2019 Order. Cf. Conservation Cong. v. U.S. Forest Serv., No. 2:13-CV-01977-JAM-DB, 2018 WL 1142199, at *1 (E.D. Cal. Mar. 2, 2018) (reviewing post-remand NEPA analysis

for compliance with remand instructions); Swan View Coal. v. Barbouletos, No. CV 06-73-M-DWM, 2010 WL 11530904, at *1 (D. Mont. Jan. 27, 2010) (reviewing post-remand biological opinion for compliance with remand instructions).

On its face, the scope of Federal Defendants' NEPA review is insufficient to address the legal violation identified by this Court, i.e., Federal Defendants' failure to thoroughly evaluate the impacts of terminating the federal coal-leasing moratorium. The EA purports to evaluate the environmental impacts of only the three individual leases that BLM has already issued under the Zinke Order, Draft EA at 3, and disclaims any programmatic evaluation of the federal coal-leasing program as a whole, id. at 9. In contrast to the constrained scope of the EA, this Court found that "[t]he moratorium … resulted in increased protection for nearly fifteen months of approximately 65,000 acres of public land that were subject to pending lease applications." April 19, 2019 Order at 22. In revoking the Jewell Order and lifting the coal-leasing moratorium, "[t]he Zinke Order served to re-open public land to coal leasing and to expedite lease applications." Id. In sum, if Federal Defendants had not adopted the Zinke Order, the coal-leasing moratorium would have remained in place. Instead, "[w]ith the Zinke Order's implementation, all BLM land became subject to lease applications with terms of twenty years." Id. at 26 (emphasis added).

Because the EA does not even purport to evaluate the full direct, indirect, and cumulative effects of the Zinke Order, as NEPA requires, it cannot remedy the NEPA violation identified by this Court. "The breadth and scope of the possible projects made possible by the Secretary's [lifting of the moratorium] require the type of comprehensive study that NEPA mandates adequately to inform the Secretary of the possible environmental consequences of his approval." Cady v. Morton, 527 F.2d 786, 795 (9th Cir. 1975). Thus, to remedy the NEPA violation identified by this Court, Federal Defendants must adequately consider all direct, indirect, and cumulative impacts of re-starting the federal coal-leasing program. See Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976) (recognizing need for programmatic EIS for federal coal program); State of Cal. v. Block, 690 F.2d 753, 762–63 (9th Cir. 1982) (holding that programmatic NEPA review is required where "[f]uture decisions … will be constrained by" the program's design).

In a similar case involving a programmatic challenge to the U.S. Forest Service's failure to consult with the U.S. Fish and Wildlife Service ("FWS") on the impact of a forest plan on the Canada lynx, the District of Montana found that the Forest Service could not remedy its violation of the Endangered Species Act by consulting with FWS on a single project. Native Ecosystems Council v. Krueger, 348 F. Supp. 3d 1065, 1070 (D. Mont. 2018). Because the Court had found a programmatic violation, the Forest Service was required to remedy that violation

through a programmatic evaluation of the forest plan's impacts on lynx. See id. at 1071 (declining to dissolve injunction). Similarly here, Federal Defendants' evaluation of the impacts of only three leases, rather than the federal coal-leasing program as a whole, cannot remedy Federal Defendants' programmatic NEPA violation.

Moreover, Federal Defendants, in their intentionally limited environmental review process, remain committed to precisely the same action—terminating the moratorium—that this Court already found Federal Defendants to have unlawfully taken. Thus, Federal Defendants are not engaged in a new decision-making process regarding the wisdom of that approach, nor have they evaluated an alternative that would leave the moratorium in place, as NEPA requires. See Lands Council v. Powell, 395 F.3d 1019, 1026 (9th Cir. 2004) (stating NEPA requires federal agencies to "carefully weigh environmental considerations and consider potential alternatives to [a] proposed action before the government launches any major federal action"). Instead, they are engaged in a meaningless paperwork exercise designed to justify a decision already made. Yet the purpose of NEPA "is not to generate paperwork—even excellent paperwork—but to foster excellent action." 40 C.F.R. § 1500.1(c). Federal Defendants' adherence to an action they have taken based on inadequate information defies the most fundamental requirements of NEPA. See High Sierra Hikers Ass'n v. Blackwell,

390 F.3d 630, 644 (9th Cir. 2004) ("EAs and EISs must be prepared early enough so that [they] can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.") (quoting Idaho Sporting Cong. v. Alexander, 222 F.3d 562, 567 (9th Cir. 2000)).

Rather than attempting to rationalize a decision already made, Federal Defendants must meaningfully consider whether restarting the federal coal-leasing program without reforms they previously deemed necessary—or some different approach—satisfies Federal Defendants' obligations. See Pls.' Op. Br. at 24-34 [Doc. 118] (describing previous findings on need for reforms). Among other things, Federal Defendants must consider the alternative of leaving the moratorium in place and ceasing to issue new coal leases. The moratorium must be reinstated while Federal Defendants engage in a new decisionmaking process, or else "the statutory mandate [to consider a no-leasing alternative] becomes ineffective." Bob Marshall All. v. Hodel, 852 F.2d 1223, 1229 n.4 (9th Cir. 1988).

Because Federal Defendants' EA concededly does not evaluate the full scope of impacts associated with re-opening public lands to coal leasing, it does not remedy the NEPA violation identified in this Court's April 19, 2019 Order. Once Federal Defendants finalize their EA and Plaintiffs have an opportunity to review it, Plaintiffs may seek leave to file a supplemental complaint challenging

the adequacy of Federal Defendants' EA. However, for purposes of evaluating the appropriate remedy for that NEPA violation, this Court need not evaluate Plaintiffs' new claims at this time. Regardless of how any future claims may be resolved, Federal Defendants' NEPA review to date is facially insufficient to redress the illegality of their 2017 decision to terminate the federal coal-leasing moratorium.

III. AN INJUNCTION OF THE ZINKE ORDER IS UNNECESSARY, BUT WOULD NONETHELESS BE WARRANTED FOR FEDERAL DEFENDANTS' VIOLATION OF NEPA.

This Court directed the parties to address the "Monsanto factors and remedies" in their briefs on remedies. April 19, 2019 Order at 32. As described above, Monsanto instructs that injunctive relief is not appropriate in circumstances, such as those present here, in which vacating an unlawful agency decision provides plaintiffs with sufficient redress. 561 U.S. at 166. However, in the event this Court were to determine that this case implicates the test for an injunctive remedy, the circumstances here warrant an injunction of the Zinke Order. In particular the environmental consequences resulting from the Federal Defendants' illegal action will cause irreparable harm, far outweighing any economic benefits, and reinstating the moratorium is in the public interest.

A plaintiff seeking a permanent injunction must demonstrate

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to

> compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Monsanto, 561 U.S. at 156-57 (quotation omitted).

Interpreting this test, the U.S. Supreme Court has stated that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987); see also Cal. ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1020 (9th Cir. 2009) (same). Moreover, "[i]n the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." High Sierra Hikers Ass'n, 390 F.3d at 642. "The harm is compounded by the 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." Sierra Club v. Bosworth, 510 F.3d 1016, 1034 (9th Cir. 2007) (internal quotations and citations omitted).

Here, expanding federal coal leasing will cause environmental harms to Plaintiffs in the form of increased air and water pollution, noise, and aesthetic injury. See, e.g., Walksalong Dec. ¶ 10 [Doc 117-6] (coal mining near Northern Cheyenne Reservation causes air and water pollution, destroys habitat for sensitive species, and "destroys important cultural sites, including sites used for Cheyenne

ceremonies"); see also Gilbert Dec. ¶¶ 5-11, 14-15 [Doc. 117-1]; Nichols Dec. ¶¶ 32-39 [Doc. 117-3]; Peterson Dec. ¶¶ 8-15 [Doc. 117-4]; Proctor Dec. ¶¶ 3-10, 12 [Doc. 117-5] (all documenting harm from the noise, air pollution, and visual impacts of mining allowed under the Zinke Order). Plaintiffs are already directly injured by the air pollution harms that result from the transport and export of federal coal in their sovereign territories, which harms will increase due to Federal Defendants' elimination of the moratorium. See Affidavit of Sally Toteff [Doc. 116-1] ("Toteff Dec."), ¶¶ 3-9; Declaration of Keita Ebisu [Doc. 116-2] ("Ebisu Dec."), ¶¶ 4-12, 18. For example, fine particular matter levels along rail lines and near ports that handle coal can be twice as high as those from freight trains, resulting in a number of adverse cardiovascular and respiratory health effects. Ebisu Dec., ¶¶ 6-12.[4] Plaintiffs are further harmed from climate change caused by

[4] Numerous courts have specifically held that increased air pollution from fossil fuel extraction, transportation, or combustion can constitute irreparable harm, as once the pollution is in the air the damage cannot be reversed. See, e.g., Beame v. Friends of the Earth, 434 U.S. 1310, 1314 (1977) (Marshall, J., in chambers) (recognizing "irreparable injury that air pollution may cause during [a two month] period, particularly for those with respiratory ailments"); State of Cal. v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054, 1074 (N.D. Cal. 2018) (finding irreparable harm caused by increased air pollution and climate impacts from fossil fuel development on federal lands); Sierra Club v. U.S. Dep't of Agric., 841 F. Supp. 2d 349, 358 (D.D.C. 2012) (finding that coal plant expansion would "emit substantial quantities of air pollutants that endanger human health and the environment and thereby cause irreparable harm") (quotation omitted); South Camden Citizens in Action v. N.J. Dept. of Envtl. Prot., 145 F. Supp. 2d 446, 499-500 (D.N.J. 2001) (holding that additional air pollution "impose[d] on an already environmentally burdened community" constituted irreparable harm).

greenhouse gas emissions from burning federal coal. See Ebisu Dec. ¶¶ 15-18; Toteff Dec. ¶ 15.

As described in Plaintiffs' opening brief, individual leasing decisions fail to consider programmatic reforms to avoid such impacts, which are inevitable effects of lifting the moratorium. See Pls.' Op. Br. at 29 [Doc. 118]. Indeed, the entire purpose of the moratorium was to avoid "locking in for decades the future development of large quantities of coal under current rates and terms that the PEIS may ultimately determine to be less than optimal." AR 10. Yet leaving in place the unlawful Zinke Order would potentially do just that, causing irreparable harm to Plaintiffs.

The remaining injunction factors are also satisfied here. Federal Defendants and Defendant Intervenors cannot demonstrate substantial harm, because, among other reasons, the moratorium includes an exception for emergency leases in circumstances in which a new federal coal lease is needed to maintain an existing mine operation. See AR 11 (providing exception for emergency leasing); 43 C.F.R. § 3425.1-4 (defining conditions for emergency leasing). Further, any alleged economic harms do not constitute irreparable harm or outweigh the significant environmental harms that will occur in the absence of an injunction. See, e.g., Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1177 (9th Cir. 2006), cert. denied 549 U.S. 1278 (2007) (economic losses suffered as a result of

enjoined timber sales do not outweigh potential irreparable environmental harm and the public's interest in preserving the environment) (overruled on other grounds by Winter v. Nat. Res. Def. Council, 555 U.S. 7, 21 (2008)); Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 738 (9th Cir 2001), cert. denied 534 U.S. 1104 (2002) ("loss of anticipated revenue…does not outweigh the potential irreparable damage to the environment"). And the public interest weighs heavily in favor of reinstating the moratorium, as Federal Defendants previously recognized when adopting the moratorium in the first instance: "Given the serious concerns raised about the federal coal program and the large reserves of undeveloped coal already under lease to coal companies, it would not be responsible to continue to issue new leases under outdated rules and processes." AR 15983 (BLM Q&A document). Federal Defendants offer no rationale for a different conclusion now.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court vacate the Zinke Order, thereby reinstating the federal coal-leasing moratorium that existed under the Jewell Order, unless and until Federal Defendants complete a decision making process that addresses the violations found by this Court in its April 19, 2019 Order.

Respectfully submitted this 22nd day of July, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, inclusive of everything from the caption to the certificate of service, contains 6,742 words, in compliance with the Court's April 19, 2019 Order.

/s Jenny K. Harbine
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was today served via the Court's CM/ECF system on all counsel of record.

/s/Jenny K. Harbine
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