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

CITIZENS FOR CLEAN ENERGY, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Case No. 4:17-cv-00030-BMM (lead) Case No. 4:17-cv-00042-BMM [Consolidated]
STATE OF CALIFORNIA, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	**INTERVENOR-DEFENDANTS STATE OF WYOMING, STATE OF MONTANA, AND NATIONAL MINING ASSOCIATION'S JOINT BRIEF ON REMEDY**

INTRODUCTION

On April 19, 2019, this Court found that the Department of the Interior ("DOI") violated the Administrative Procedure Act ("APA") by not conducting a National Environmental Policy Act ("NEPA") analysis before issuing Secretarial Order 3348 ("Zinke Order"). (ECF No. 141). Consistent with this Court's direction, the parties met and conferred but were unable to formulate a joint proposal on potential remedies. Accordingly, as the Court directed, Intervenor-Defendants respectfully submit this joint brief on the issue of remedy.

Here, the appropriate remedy is to remand the Zinke Order to DOI for a NEPA analysis. No other remedy is necessary or appropriate, based on a balance of the equities and the serious possibility that DOI will be able to substantiate its decision on remand in short order. Specifically, the Court should deny Plaintiffs' expected requests to vacate the Zinke Order and to judicially create a novel "moratorium" divorced from the voluntary programmatic NEPA review under prior Secretarial Order 3338 entitled "Discretionary Programmatic Environmental Impact Statement" ("Jewell Order").[1]

[1] Due to the nature of simultaneous briefing, the Intervenor-Defendants do not presently know the full scope of Plaintiffs' requested remedies. Intervenor-Defendants thus reserve the right to request supplemental briefing on remedy if warranted. This brief regarding remedy also does not constitute an acknowledgement of any underlying NEPA violation or a waiver of appeal rights.

ARGUMENT

I. THE COURT SHOULD REMAND THE ZINKE ORDER FOR NEPA REVIEW.

The only issue raised by Plaintiffs' complaints and adjudicated by the Court is whether the Zinke Order—which ended the Jewell Order's voluntary programmatic NEPA review and "pause" (sometimes called a "moratorium") on certain federal coal leasing decisions during that review—itself triggered NEPA. The Court held that it did, and that "Federal Defendants' decision not to initiate the NEPA process was arbitrary and capricious" under the APA. (ECF No. 141 at 27, 31.) The Court found that Plaintiffs' alternatively-stated APA arguments likewise all stem from the absence of a NEPA review accompanying the Zinke Order. *Id*. at 30-31. In such circumstances, remand is the appropriate remedy. *See, e.g., Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993); *see also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995).

DOI is already conducting a NEPA review to address the Court's Order. The Court "left to the agency to determine in the first instance" how to comply with NEPA for the Zinke Order. (ECF No. 141 at 29). On May 22, 2019, DOI published an Environmental Assessment ("EA") for public comment, which closed on June 10, 2019. The EA examines the effects of the Zinke Order's termination of the Jewell Order's voluntary programmatic EIS and its concomitant "pause" on limited types

of federal coal leasing decisions. A remand will allow DOI to complete its analysis and comply with this Court's order. Accordingly, remand is the appropriate remedy.

II. A REMEDY BEYOND REMAND IS NOT JUSTIFIED.

Any remedy beyond remand to finish the ongoing NEPA process would be unnecessary and unjustified in these circumstances. Nevertheless, the Defendant-Intervenors believe that Plaintiffs intend to seek at least two remedies from the Court beyond a remand. First, Plaintiffs are likely to insist on vacatur of the Zinke Order and a revival of the Jewell Order. Second, Plaintiffs desire a "reinstatement" of the "moratorium," yet purport to disassociate it from the Jewell Order's programmatic environmental impact statement ("PEIS"). Plaintiffs are not entitled to such relief.

A. PLAINTIFFS ARE NOT ENTITLED TO VACATUR.

"An inadequately supported [agency decision] . . . need not necessarily be vacated." *Allied-Signal*, 988 F.2d at 150 (citation omitted); *Idaho Farm Bureau*, 58 F.3d at 1405. This Court possesses the equitable power necessary to fashion relief appropriate to the case. 5 U.S.C. § 702. "The decision whether to vacate depends on 'the seriousness of the [decision's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal*, 988 F.2d at 150-51 (citation omitted); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). As this Court has recognized, "[t]he APA does not 'mechanically obligate[]' Courts [] 'to vacate

agency decisions that they find invalid.'" *W. Org. of Res. Councils (WORC*) *v. U.S. Bureau of Land Mgmt.*, No. 16-21-GF-BMM, ECF No. 124, slip op. at 4 (internal citations omitted). Rather "'[w]hen equity demands,'" the Court may leave the agency action in place while the agency completes appropriate remedial measures." *Id.* (internal citations omitted).

Courts in this Circuit have "debunked" the theory that vacatur is the "presumptive remedy" for a NEPA violation. *See, e.g, Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, No. 12-9861 (consolidated), 2016 WL 4445770, at *12 (C.D. Cal. Aug. 12, 2016). Specifically in NEPA cases, courts have refrained from vacatur where there is "at least a serious possibility that the [agency would] be able to substantiate its decision on remand." *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (internal citation omitted). That is demonstrably the situation here. Accordingly, the appropriate remedy is remand without vacatur.

The only violation in the Court's Order is that DOI did not initiate NEPA review in conjunction with the Zinke Order. Now, DOI has initiated NEPA. What is more, DOI has prepared an EA for public review and comment. The comment period closed on June 10. Thus, it is reasonable to expect further action by DOI soon, perhaps in July. Once final, the EA will yield either a Finding of No Significant Impact ("FONSI") and a related Record of Decision or the preparation of an Environmental Impact Statement ("EIS"). In short, the imminence of a final EA and

possibly further substantiation of the same Zinke Order undercuts any alleged necessity of vacatur. *Pollinator Stewardship Council*, 806 F.3d at 532; *Becerra v. U.S. Dep't of Interior*, 276 F. Supp. 3d 953, 967 (N.D. Cal. 2017) (denying vacatur for APA violation given imminent superseding agency action).

Plaintiffs subsequently may attempt to challenge the decision that follows DOI's current EA or an actual leasing decision. But the adequacy of those decisions is not before the Court in this case. For present purposes, the Court should leave the Zinke Order in place and permit the current NEPA process to complete its course.

Plaintiffs would experience no disruptive consequences absent vacatur of the Zinke Order, which disposed of no coal. *See Beverley Hills*, 2016 WL 4445770, at *19-21. The Zinke Order is even further removed from actual agency action than cases involving planning actions, like *WORC*, *supra*, where the Court denied vacatur. Consistent with the EA, the Intervenor-Defendants know of no new federal coal lease application with an anticipated decision date prior to September 2019, at the earliest. Moreover, each DOI federal coal decision of which Plaintiffs may complain requires separate agency action and undergoes extensive NEPA review, including cumulative impacts, and is subject to public notice and comment.

Disruptive consequences of vacatur, if any, would instead fall on the recipients of three issued coal decisions identified in the EA that would have been subject to the Jewell Order. Each of those decisions are products of separate agency

actions and NEPA reviews. Plaintiffs can elect to challenge those decisions, but those lessees should not be threatened with potential disruption and uncertainty created by wholesale vacatur of the Zinke Order. DOI's continued work in processing and conducting NEPA reviews for other pending applications likewise neither harms Plaintiffs nor results in any irreversible and irretrievable commitment of resources absent issuance of new leases. Accordingly, a remand without vacatur is appropriate.

B. THIS COURT SHOULD NOT IMPOSE ANY "MORATORIUM."

Plaintiffs are likely to ask this Court to "enjoin further federal coal leasing pending completion of the requisite NEPA analysis." (*See* ECF No. 1). Despite now purporting to disclaim a further remedy to compel a PEIS, Plaintiffs simultaneously advocate a PEIS as the requisite NEPA analysis to end their "moratorium." Indeed, a PEIS is what Plaintiffs have repeatedly sought in this litigation and continue to pursue in their submitted comments on DOI's EA. (*See, e.g.*, Exhibit 1 (Jenny Harbine signed letter to DOI, demanding analysis of "program")). But this Court has already made clear that it "cannot compel Federal Defendants at this time to prepare a PEIS, or supplemental PEIS, as Plaintiffs request." (ECF No. 141 at 29). As the

Court explained, this is because the "Federal Defendants may comply with their NEPA obligation in a manner of ways." *Id*. (citing 40 C.F.R. § 1508.4).

As discussed above, DOI is close to finalizing its EA. Vacatur of the Zinke Order is inappropriate as a result. The same logic applies to any injunctive relief.[2] An injunction until the agency finalizes its EA will not provide Plaintiffs with a meaningful benefit, because no coal lease will issue in that time frame in any event. Accordingly, this Court should not impose any injunctive relief.

With that said, if this Court *were* to impose injunctive relief, the injunction should expire at the issuance of the final EA, unless DOI determines in that EA that NEPA *requires* a PEIS. If this Court cannot force DOI to prepare a PEIS, as this Court has recognized, it follows that any injunctive relief should not extend past the issuance of a FONSI and a related decision. If DOI does issue a FONSI and a decision, basic tenets of administrative law and judicial review demand that, if Plaintiffs wish to challenge that new, final agency action, that they do so in a new, separate action. 5 U.S.C. § 704. They can then seek whatever injunctive relief they believe is required. *Id.* at § 705. Any injunctive relief ordered should recognize that it is not the role of the courts to, in effect, become a quasi-permanent overseer of successive agency actions.

[2] "[A] more onerous standard [may apply] to a request for vacatur that would have the same operative effect as an injunction." *N. Coast Rivers All. v. U.S. Dep't of the Interior*, No. 16-307, 2016 WL 11372492, at *3 n.1 (E.D. Cal. Sept. 23, 2016).

Also, any injunctive relief that this Court chooses to impose should not be characterized as a "reinstatement" of the "moratorium." The prior pause was tied to a prior PEIS. (ECF No. 141 at 4 ("[T]he Jewell Order imposed a moratorium on new coal leasing until completion of the PEIS.") (emphasis added))). That PEIS was a *discretionary* PEIS that the prior administration decided to voluntarily prepare. The current administration decided to terminate that discretionary effort. As a necessary consequence, the pause dependent on the PEIS terminated as well. While Plaintiffs may be frustrated with that result, the reality is that elections have consequences, and oftentimes those consequences are most readily felt through discretionary, executive action.

The "moratorium" was tied to the discretionary PEIS. This administration does not intend to prepare a discretionary PEIS.[3] Therefore, there will be no moratorium as envisioned in the Jewell Order. If this Court decides to impose injunctive relief, it will be just that – judicially-created and judicially-imposed, not a "reinstated" discretionary "moratorium" by the Executive Branch, as that would not make any sense.

No one should doubt that Plaintiffs' actual end goal is a freestanding, indefinite moratorium for its own sake. Under the guise of NEPA claims, Plaintiffs

[3] This is wholly separate from whether DOI determines that NEPA *requires* a PEIS, which is the purpose of the EA currently underway.

are using this litigation as a backdoor vehicle to judicially end federal coal leasing in the absence of such action by the other branches of government. This is improper. *Found. on Econ. Trends v. Lyng*, 817 F.2d 882, 886 (D.C. Cir. 1987) (where "[a] policy disagreement, at bottom, is the gravamen of appellants' complaint," courts should decline to "extend NEPA as far as [[Plaintiffs] would take] it"); *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015) ("NEPA is 'not a suitable vehicle' for airing grievances about the substantive policies adopted by any agency, as 'NEPA was not intended to resolve fundamental policy disputes.'") (citation omitted). And this Court should not endorse such efforts.

C. REMEDY BEYOND REMAND IS NOT JUSTIFIED UNDER THE *MONSANTO* FACTORS.

If the Court finds it necessary to consider the *Monsanto* factors, the result is the same—Plaintiffs cannot carry their burden for injunctive relief. *See Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011) ("[T]hose seeking injunctive relief, not those opposing that relief, are responsible for showing irreparable injury."). "[A]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) (citation omitted). Plaintiffs must show: "(1) that [they have] 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; (4) that the public interest would not be disserved by a permanent injunction." *Id.* at 141.

Moreover, granting Plaintiffs a new moratorium would conflict with the principle of balanced remedies, including in NEPA cases. *See, e.g.*, *Monsanto,* at 157-58 (rejecting "erroneous assumption that an injunction is generally the appropriate remedy for a NEPA violation"); *Park Vill.,* 636 F.3d at 1160 ("[I]njunctive relief must be "tailored to remedy the *specific harm alleged*. An overb[roa]d injunction is an abuse of discretion.") (emphasis in original, internal citations omitted); *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012) (reversing "overbroad" injunction). Here, the Court has already ordered Federal Defendants to initiate NEPA. While the Court found "procedural injury" under NEPA for standing purposes, that does not amount to irreparable injury for an injunction. *Friends of the Earth v. Laidlaw Envt'l Servs. Inc*., 528 U.S. 167, 185 (2000) (holding a separate showing is necessary for injunctive relief). Again, the current NEPA process likely will conclude before issuance of any federal coal lease would otherwise occur. And future final agency actions are fully subject to NEPA

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and challenge.[4] The Court need not proceed further under *Monsanto* to deny a remedy beyond remand.

CONCLUSION

The appropriate remedy in this case is remand without vacatur. Additional remedies are not necessary or appropriate.

Dated: July 22, 2019

Respectfully submitted,

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[4] To support a broader remedy, Plaintiffs may invoke the Court's statement that "Plaintiffs' challenge to the Zinke Order 'may be their only opportunity to challenge [the coal-leasing program] on a nationwide, programmatic basis'" and citation to the Roadless Rule litigation. (ECF No. 141 at 14) (quoting *Cal. ex rel. Lockyer v. U.S. Dept. of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009)). But that was a finding on ripeness, not remedy. *Id*. More importantly, Plaintiffs are entitled to no such programmatic challenge opportunity unless DOI proposes to change "the Federal Coal Management Program." *See W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1245 (D.C. Cir. 2018). By contrast, continued implementation of the unchanged "coal-leasing program" does *not* trigger NEPA, much less support the drastic remedy of a new moratorium. *Id*.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations pursuant to Local Rule 7.1(d)(2)(E) and the Court's Order (ECF No. 141) because this brief contains 2679 words.

/s/ Mark L. Stermitz
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2019, I electronically filed the foregoing Intervenor-Defendants' Joint Brief on Remedy with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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