

Todd Kim
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

Joseph H. Kim, Trial Attorney
Natural Resources Section
P.O. Box 7611 Washington, D.C. 20044
202-305-0207
joseph.kim@usdoj.gov

Counsel for Federal Defendants

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

CITIZENS FOR CLEAN ENERGY *et al.*

and

THE NORTHERN CHEYENNE TRIBE,

Plaintiffs,

V.

UNITED STATES DEPARTMENT OF THE
INTERIOR *et al.*

Federal Defendants,

and

STATE OF WYOMING *et al.*,

Intervenor-Defendants.

STATE OF CALIFORNIA *et al.*

V.

Case No. 17-cv-30-BMM
(lead consolidated case)

JOINT STATUS REPORT

17-cv-42-BMM
(consolidated case)

UNITED STATES DEPARTMENT OF THE)
INTERIOR *et al.*)
)
Federal Defendants.)
_____)

Pursuant to this Court’s Order dated November 18, 2021 [ECF No. 216], the parties hereby submit this joint status report.

Background

This case involves challenges to Secretarial Order 3348 (sometimes called the “Zinke Order”). *See, e.g.*, ECF No. 216 at 2. Specifically, this phase of the case challenges the adequacy of NEPA analysis this Court ordered for the Zinke Order. *See, e.g., id.* at 3.

On May 18, 2021, Plaintiffs filed motions for summary judgment that remain pending. *See* ECF Nos. 200-03. On July 7, 2021, Intervenor-Defendant National Mining Association (“NMA”) filed a motion to dismiss for mootness that remains pending. *See* ECF Nos. 210, 212.

One of the reasons for the current stay was that Federal Defendants have been working on a review of the federal coal leasing program, the results of which could potentially bear on Plaintiffs’ NEPA claims. *See* ECF No. 213. To date, this process has included publishing a *Federal Register* notice announcing that the Bureau of Land Management (BLM) was accepting public comments on the coal

program. 86 Fed. Reg. 46873 (August 20, 2021); *see also* 86 Fed. Reg. 52174 (September 20, 2021). The BLM received almost 80,000 comments and hired a contractor to categorize and summarize the comments into a report. BLM intends to post the comment summary report on its eplanning website in mid-December. The BLM and the Department have also engaged in Tribal consultation on the program. However, Federal Defendants' review of the federal coal leasing program has been progressing more slowly than initially anticipated.

In light of the above, the parties report the following:

Plaintiffs' Status Report: Plaintiffs wish to proceed with briefing on the merits in accordance with the schedule set forth in the Court's July 13, 2021 Order.

Plaintiffs' consent to the Federal Defendants' request for a six-month abeyance was conditioned on Federal Defendants' commitment to a process for initiating reforms to the federal coal program. However, that process for initiating reforms has stalled. Federal Defendants have not committed to a timeframe for a report identifying potential reforms to the federal coal program that they have repeatedly delayed, despite contrary direction in Executive Order 13990 and Secretarial Order 3398 and their commitments to Plaintiffs in obtaining their consent to abeyance. Thus, Plaintiffs believe it is necessary to proceed expeditiously to judicial resolution of this matter by abiding by the briefing schedule established in this Court's July 13, 2021 Order. Additionally, to avoid

further unnecessary delay in this case, briefing of the Defendant-Intervenors' motions to dismiss should proceed concurrently with merits briefing, with Plaintiffs' responses to those motions due January 13, 2022.

The Tribe and Conservation Plaintiffs believe it is appropriate to continue the stay of briefing on their fee motion until this matter is resolved on the merits.

Federal Defendants' Status Report

The Zinke Order has been revoked. *See, e.g.*, ECF No. 216 at 3. Federal Defendants continue to honor their commitment to review the coal program, amid many other pressing administration priorities, and the process has not stalled. While they acknowledge it is progressing more slowly than expected, it is not because Federal Defendants have delayed it. It is because of great public interest in the federal coal program, as reflected in the almost 80,000 comments received by BLM in response to the August 20, 2021 *Federal Register* notice. The volume prompted the hiring of a contractor, a task which takes some time and necessitates compliance with various procedural requirements applicable to federal agencies. The process has also progressed more slowly than expected because there were multiple requests from the public that the comment period be extended, which BLM formally authorized, through the publishing of a federal register notice announcing a 15-day extension (*see* 86 Fed. Reg. 52174 (Sept. 20, 2021)), a task which also necessitated compliance with a variety of procedural requirements.

Federal Defendants remain fully committed to their review of the federal coal program and consideration of public input. For these reasons, they continue to suggest that the case remain stayed while the agency capitalizes on the considerable effort invested in this undertaking to date and brings the review to a conclusion. Under the circumstances, proceeding with litigation risks wasting both the parties' and the court's resources. Furthermore, this drain on federal resources risks interfering with Defendants' ongoing review of the program. *See* ECF No. 213 at 3-4.

However, to the extent that this case returns to litigation, Federal Defendants suggest that Intervenor-Defendants' motion to dismiss [ECF No. 212] be briefed and decided first. If the motion to dismiss is denied, then summary judgment briefing should be completed. If this path is chosen, responses to the motion to dismiss could be made to be due by **January 13, 2022**.

Intervenor-Defendant NMA's Status Report

NMA requests that briefing proceed on the motion to dismiss because this litigation challenging the now-revoked Zinke Order, and its correspondingly now-defunct NEPA analysis, is moot following Secretarial Order 3398's revocation of the Zinke Order, regardless of any further action that Federal Defendants elect or decline to take regarding federal coal leasing. Plaintiffs' filed complaints and this litigation are not about any potential reforms to the federal coal leasing program,

and in any event binding precedent precludes this Court from considering such a programmatic challenge. NMA concurs with Federal Defendants that the motion to dismiss should be briefed and decided prior to any summary judgment briefing.

Intervenor-Defendants States of Wyoming and Montana's Status Report

Wyoming and Montana take the position that this Court should proceed with briefing Intervenor-Defendant NMA's motion to dismiss because the Zinke Order at issue in this case was revoked. Wyoming and Montana concur with NMA and the Federal Defendants that should this case return to litigation, the motion to dismiss should be briefed, and decided, prior to any summary judgment briefing.

Respectfully submitted this 10th day of December, 2021.

/s/ Jenny K. Harbine (w/ permission)

Jenny K. Harbine
Amanda D. Galvan
Earthjustice
313 East Main Street
Bozeman, MT 59715
jharbine@earthjustice.org
agalvan@earthjustice.org
(406) 586-9699

*Counsel for Plaintiffs
in Case No. 4:17-cv-00030-BMM*

Wyatt F. Golding (*pro hac vice*)
Ziontz Chestnut
2101 Fourth Avenue, Suite 1230

Todd Kim
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources
Division

/s/ Joseph H. Kim

Joseph H. KIM, Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044
202-305-0207

Counsel for Defendants

Of Counsel:
Kristen C. Guerriero

Seattle, WA 98121
wgolding@ziontzchestnut.com
(206) 448-1230

John S. Most
Office of the Solicitor
U.S. Department of the Interior

*Counsel for Plaintiff Northern
Cheyenne Tribe*

Michael Saul (*pro hac vice*)
Center for Biological Diversity
1536 Wynkoop Street, Suite 421
Denver, CO 80202
MSaul@biologicaldiversity.org
(303) 915-8308

Anchun Jean Su (*pro hac vice*)
Center for Biological Diversity
1411 K St. NW, Suite 1300
Washington, D.C. 20005
jsu@biologicaldiversity.org
(202) 849-8401

*Counsel for Plaintiff
Center for Biological Diversity*

Roger Sullivan
Dustin Leftridge
McGarvey, Heberling, Sullivan & Lacey, P.C.
345 1st Ave. E.
Kalispell, Montana 59901-5341
(406) 752-5566
RSullivan@McGarveyLaw.com

*Attorneys for Plaintiffs
in Case No. 4:17-cv-00042-BMM*

Rob Bonta
Attorney General of California
David Zonana
Supervising Deputy Attorney General
/s/ George Torgun (w/ permission)
George Torgun (*pro hac vice*)
CA Bar No. 222085
Elizabeth B. Rumsey (*pro hac vice*)
CA Bar No. 257908
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
Telephone: (510) 879-1002
E-mail: George.Torgun@doj.ca.gov

Attorneys for Plaintiff State of California

Hector Balderas
Attorney General of New Mexico
Bill Grantham (*pro hac vice*)
Assistant Attorney General
201 Third St. NW, Suite 300
Albuquerque, NM 87102
(505) 717-3520
wgrantham@nmag.gov

Attorneys for Plaintiff State of New Mexico

Letitia James
Attorney General of New York
/s/ Andrew G. Frank (w/ permission)
Andrew G. Frank (*pro hac vice*)
Assistant Attorney General
New York Attorney General's Office
28 Liberty Street
New York, NY 10005
212-416-8271

andrew.frank@ag.ny.gov

Attorneys for Plaintiff State of New York

Robert W. Ferguson
Attorney General of Washington
/s/ William R. Sherman (w/ permission)
William R. Sherman (*pro hac vice*)
Assistant Attorney General
Aurora Janke, MT Bar No. 39522610
Assistant Attorney General
800 5th Ave Suite 2000, TB-14
Seattle, WA 98104-3188
(206) 442-4485
bill.sherman@atg.wa.gov
aurora.janke@atg.wa.gov

Attorneys for Plaintiff State of Washington

/s/ Mark L. Stermitz (w/ permission)
Mark L. Stermitz
CROWLEY FLECK PLLP
305 S. 4th Street E., Suite 100
P.O. Box 7099
Missoula, MT 59807-7099
Telephone: (406) 523-3600
Fax: (406) 523-3636
mstermitz@crowleyfleck.com

Peter J. Schaumberg, *pro hac vice*
James M. Auslander, *pro hac vice*
BEVERIDGE & DIAMOND, P.C.
1900 N St., N.W., Suite 100
Washington, DC 20036
Phone: (202) 789-6043
pschaumberg@bdlaw.com
jauslander@bdlaw.com

Attorneys for Intervenor-Defendant National Mining Association

/s/ Travis Jordan (w/ permission)

Travis Jordan, MT Bar No. 53199056
Senior Assistant Attorney General
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
Telephone: (307) 777-7895
Facsimile: (307) 777-3542
travis.jordan@wyo.gov

Attorney for Intervenor-Defendant Wyoming

/s/ Kathleen L. Smithgall (w/ permission)

Kathleen L. Smithgall
Assistant Solicitor General
Montana Attorney General's Office
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Kathleen.Smithgall@mt.gov
406-444-4376

CERTIFICATE OF SERVICE

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

/s/ Joseph H. Kim
Joseph H. Kim
Counsel for Defendants