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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,
and
STATE OF WYOMING, *et al.*,
Intervenor – Defendants.

STATE OF CALIFORNIA, *et al.*,
Plaintiffs,
v.
U.S. DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants,
and
STATE OF WYOMING, *et al.*,
Intervenor – Defendants.

Case No. 4:17-cv-00030-BMM (lead)

Case No. 4:17-cv-00042-BMM
[Consolidated Case]

INTERVENOR-DEFENDANTS STATE OF WYOMING AND STATE OF MONTANA'S BRIEF IN SUPPORT OF NATIONAL MINING ASSOCIATION'S MOTION TO DISMISS

INTRODUCTION

Plaintiffs' lawsuit challenges the adequacy of the environmental assessment (EA) analyzing the Zinke Order. But the Zinke Order was revoked on April 16, 2021. Therefore, this case is moot and this Court lacks jurisdiction to adjudicate it. To avoid repetition, Wyoming and Montana join, incorporate, and adopt the well-founded arguments presented in National Mining Association's Memorandum in Support of its Motion to Dismiss for Mootness. (ECF No. 212).

In addition, Wyoming and Montana argue that this Court should grant National Mining Association's Motion to Dismiss because it lacks jurisdiction to provide Plaintiffs with meaningful relief. Plaintiffs' amended complaints ask this Court to vacate the Zinke Order, declare that the EA supporting the Zinke Order violated NEPA, and reinstate a federal coal-leasing moratorium. (*See* ECF No. 176 at 27; ECF No. 173-2 at 37). The harms alleged by Plaintiffs are not redressable because the Zinke Order is no longer in effect. Accordingly, this Court should grant Intervenor-Defendant National Mining Association's Motion to Dismiss for Mootness (ECF No. 210).

ARGUMENT

"The central question for mootness is 'whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.'" *Meland v. Weber*, 2 F.4th 838, 849 (9th Cir. 2021). A number

of circumstances preclude Plaintiffs from obtaining the relief they request in this case.

First, a presidential election and the confirmation of a new Secretary of Interior resulted in a new administration managing the federal coal leasing program. Second, Secretary Deb Haaland expressly revoked the Zinke Order. U.S. Dep't of Interior, Secretarial Order 3398, *Revocation of Secretary's Orders Inconsistent with Protecting Public Health and the Environment* (Apr. 16, 2021).[1] Third, Secretary Haaland initiated and is conducting her own review of the federal coal leasing program. (*See* ECF No. 217 at 4-5).

These dramatic circumstances are the type of actions that render previously justiciable claims moot. *See, e.g.*, *Wise v. City of Portland*, 539 F. Supp. 3d 1132, 1145-48 (D. Ore 2021) (revoked executive order rendered case moot); *W. States Ctr., Inc. v. Dep't of Homeland Sec.*, Case No. 3:20-CV-01175-JR, 2021 WL 1896965, slip op. at *1-2 (D. Ore. May 11, 2021) (new administration rendered case moot); *and Nat. Res. Def. Council v. Pruitt*, Case No. 16-CV-02184-JST, 2017 WL 5900127, at *3-5 (N.D. Cal. Nov. 30, 2017) (executive action and agency review rendered case moot). Additionally, Secretary Haaland's initiation of a new review of the existing federal coal leasing program undermines any credible threat of future injury to the Plaintiffs resulting from the Zinke Order. *See generally Bayer v. Neiman*

[1] https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3398-508_0.pdf

Marcus Grp., Inc., 861 F.3d 853, 864 (9th Cir. 2017); *and Wise*, 539 F. Supp. 3d at 1146.

The changed circumstances in this case preclude the Court from granting any meaningful relief for the Plaintiffs. This Court cannot vacate a secretarial order that is already revoked. Moreover, Plaintiffs' request for declaratory relief serves no purpose and would only result in an impermissible advisory opinion.

I. Plaintiffs cannot obtain meaningful relief.

A prerequisite of justiciability is that judicial relief will prevent or redress the claimed injury. *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). Plaintiffs request that this court: (1) set aside and vacate the Zinke Order; (2) issue declaratory relief against the Zinke Order and its accompanying EA; and (3) reinstate the federal coal leasing moratorium. (*See* ECF No. 176 at 27, ¶¶1-4; *and* ECF No. 173-2 at 37, ¶¶ 1-2). None of these paths will result in relief that redresses Plaintiffs' alleged injury.

A. This Court lacks jurisdiction to vacate a revoked secretarial order.

There is no "case or controversy" for this Court to resolve because the Zinke Order is not in effect. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("A case becomes moot — and therefore no longer a 'Case' or 'Controversy' for purposes of Article III — 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'"). In similar instances, courts have held that the revocation or expiration of an executive order renders a

case challenging the order as moot. *See League of Conservation Voters v. Biden*, 843 Fed. Appx. 937, 938-39 (9th Cir. Apr. 13, 2021); *see also Trump v. Hawaii*, 138 S.Ct. 377 (2017). Therefore, this Court lacks jurisdiction to vacate the rescinded Zinke Order. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992).

B. This Court lacks jurisdiction to award declaratory relief.

Both Plaintiffs seek declaratory relief related to the revoked Zinke Order. (*See* ECF No. 176 at 27; ECF No. 173-2 at 37). But declaratory judgment adjudicating past violations of federal law – as opposed to continuing or future violations of federal law – is not an appropriate exercise of federal jurisdiction. *See Bayer,* 861 F.3d at 868 (citing *Green v. Mansour*, 474 U.S. 64, 74 (1985)).

By requesting a declaratory judgment against the defunct Zinke Order or its EA, Plaintiffs are asking this Court for an impermissible advisory opinion. It is well settled that federal courts do not render advisory opinions. *See Hillblom v. United States*, 896 F.2d 426, 430 (9th Cir. 1990). Although Plaintiffs may feel vindicated by declaratory judgment, any relief awarded against the revoked Zinke Order would have no effect on the Secretary's future conduct. *See Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007) (concluding request for declaratory relief was moot where it would "serve no purpose" because the plaintiff's "ultimate objective" was met); *see also Calvary Chapel of Bangor v. Mills*, — F. Supp. 3d — , 2021 WL 2292795, at *8-10 (D. Me. June 4, 2021), *appeal docketed*, No. 21-1453

(1st Cir. June, 14, 2021) (concluding claim for declaratory judgment was moot when the challenged executive order was no longer in effect).

Moreover, Plaintiffs no longer have a legal interest to protect. "A case or controversy exists justifying declaratory relief only when 'the challenged government activity . . . is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be **a substantial adverse effect on the interests of the petitioning parties**.'" *Headwaters, Inc. v. BLM*, 893 F.2d 1012, 1015 (9th Cir. 1989) (citing *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974)) (emphasis added). Secretary Haaland's express revocation of the Zinke Order and her action initiating a new review of the federal coal leasing program demonstrate a clear departure from the Zinke-era policy. *See, e.g.*, 86 Fed. Reg. 46873, 46874 (Aug. 20, 2021). In light of Secretary Haaland's unequivocal rescission of the Zinke Order, there is no "tangible prejudice" to Plaintiffs' existing interests for this Court to adjudicate. *See Headwaters, Inc.*, 893 F.2d at 1015. Therefore, Plaintiffs' claim for declaratory relief against the Zinke Order and its EA is moot.

Plaintiffs will predictably attempt to expand the scope of their respective complaints and argue that this case is not moot because the Zinke Order purportedly "restarted" the federal coal leasing program and will result in environmental impacts from future coal leasing that ties back to the defunct Zinke Order. (*See, e.g.* ECF No. 201 at 19-21) (discussing future environmental harms associated with restarting the

federal coal leasing program). But this argument suffers from a significant defect. The Haaland Order is governing federal coal leasing because the Zinke Order is not in effect. (*See* AR004417) (stating the Zinke Order "will remain in effect until it is amended, suspended, or revoked."). Therefore, declaratory relief still is not justified because there is not a "substantial adverse effect" looming over Plaintiffs from the Zinke Order. *See, e.g.*, *Headwaters,* 893 F.2d at 1015.

Even if Plaintiffs can demonstrate the existence of an ongoing policy from the Zinke Order, they still cannot meet their burden to secure declaratory relief. In the Ninth Circuit "[t]he mere existence of an ongoing policy is insufficient to establish that a plaintiff challenging that policy has standing to attack all its future applications." *Bayer*, 861 F.3d at 868 (concluding that plaintiff's claim for declaratory relief related to an ongoing policy was moot). Plaintiffs must demonstrate that conduct from the Zinke Order affects their interests now or in the future. *See id.* at 868. But any coal leasing in the foreseeable future will occur under the Haaland Order and Plaintiffs did not challenge that action.

This Court should reject any effort by the Plaintiffs to seek prospective remedies beyond "the narrow relief sought" in their complaints. *See All. for Wild Rockies v. Burman*, 499 F. Supp. 3d 786, 793 (D. Mont. 2020). Because this Court lacks jurisdiction to issue declaratory relief from the Zinke Order, it should grant National Mining Association's motion to dismiss for mootness.

C. Plaintiffs are not entitled to reinstatement of a federal coal leasing moratorium.

National Mining Association has addressed the reasons why this Court cannot grant Plaintiffs' request for a reinstated federal coal leasing moratorium. (*See* ECF No. 211 at 10-14). But even if this Court could grant Plaintiffs' request to reinstate a coal leasing moratorium from two presidential administrations ago, there are prudential reasons that weigh against doing so.

The Ninth Circuit makes clear "it is not [the court's] role to try, in effect, to rewrite" an executive order. *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017). Resurrecting a policy decision after two presidential elections, three secretarial orders, and four confirmed Secretaries of Interior does just that. Additionally, the imposition of a leasing moratorium in the midst of Secretary Haaland's review of the federal coal leasing program is an act of policymaking that goes well beyond the role of courts in our Federal system. *See Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013) ("This is an essential limit on [judicial] power: It ensures that [courts] act *as judges*, and do not engage in policymaking properly left to elected representatives.") (emphasis original).

Plaintiffs' request for this Court to impose a federal coal leasing moratorium after the political process has spoken presents significant redressability questions. *See Rucho v. Common Cause*, 139 S.Ct. 2484, 2508 (2019) (holding courts have no commission to allocate political power absent a clear constitutional directive or legal

standards). Here, Plaintiffs cannot establish that their requested relief is within the power of an Article III court because there is no statutory or regulatory framework that requires, or expressly authorizes, the Secretary to halt all federal coal leasing. (*See* AR000005). Furthermore, the Ninth Circuit has rejected equitable relief calling for the government to broadly cease its fossil fuel activities. *See Juliana v. United States*, 947 F.3d 1159, 1170-73 (9th Cir. 2020) ("it is beyond the power of an Article III court to order, design, supervise, or implement" a climate change plan). As *Juliana* reiterates, "the Constitution contemplates that democracy is the appropriate process for change" and some questions are best left to "the province of the political branches." *Juliana*, 947 F.3d at 1173.

In this case, the political process has resulted in the current administration conducting its own review of the federal coal leasing program. (*See* ECF No. 217 at 4-5). This Court should similarly reject Plaintiffs' request for injunctive relief because imposing a federal coal leasing moratorium is beyond the authority of this Court.

CONCLUSION

For the foregoing reasons, and those articulated by the National Mining Association (ECF No. 212), the Court should dismiss Plaintiffs' complaints as moot.

Dated this 20th day of January 2022.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing is being filed with the Clerk of the Court using the CM/ECF system, thereby serving it on all parties of record on this 20th day of January, 2022.

/s/ Travis Jordan
Travis Jordan

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Wyoming and Montana's Brief in Support of National Mining Association's Motion to Dismiss complies with the requirements of Rule 7.1(d)(2). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 1,885, excluding caption, certificate of compliance, and certificate of service. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Travis Jordan
Travis Jordan