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

ROB BONTA
Attorney General of California
DAVID ZONANA
Supervising Deputy Attorney General
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 Plaintiffs

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.** **DEB HAALAND,** in her 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' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

In their cross-motions for summary judgment, Defendants fail to provide any coherent response to State Plaintiffs' claims that Federal Defendants' decision to restart the federal coal leasing program relied on an inadequate and overly narrow environmental review, and failed to consider their statutory duties to ensure that the program is in the public interest or will provide fair market value to the public. Federal Defendants make no attempt to defend their unlawful environmental assessment ("Final EA") or address State Plaintiffs' claims, asserting instead, incorrectly, that the case is now moot. *See* ECF 220 ("Feds' Br.").[1] Defendant-Intervenor National Mining Association ("NMA") also spends the bulk of its brief on mootness and other irrelevant issues, *see* ECF 226 ("NMA Br."), greatly mischaracterizing this case in the process. While Defendant-Intervenor States of Wyoming and Montana ("Wyoming") do respond to most of State Plaintiffs' claims, *see* ECF 224 ("WY Br."), their arguments similarly ignore this Court's prior rulings and cannot remedy the deficient environmental review conducted by Federal Defendants. Accordingly, the Court should grant State Plaintiffs' motion for summary judgment, deny Defendants' motions for summary judgment, and set aside Federal Defendants' decision to restart the federal coal leasing program unless and until they comply with applicable law.

ARGUMENT

I. DEFENDANTS OFFER NO JUSTIFICATION FOR FEDERAL DEFENDANTS' DEFICIENT ENVIRONMENTAL REVIEW OF THE FEDERAL COAL LEASING PROGRAM.

Rather than defend Federal Defendants' inadequate review under the National Environmental Policy Act ("NEPA"), Defendants raise a host of irrelevant issues and otherwise ignore the prior rulings of this Court, which held that Federal Defendants' decision to restart the federal coal leasing program constituted a

[1] State Plaintiffs previously briefed their response to Defendants' mootness arguments, *see* Joint Brief in Opposition to Defendant-Intervenor's Motion to Dismiss, ECF 227, and will not repeat those arguments here.

"major federal action" requiring compliance with NEPA. For example, Federal Defendants entirely fail to respond to State Plaintiffs' claims regarding the deficiencies in the Bureau of Land Management's ("BLM") analysis of the federal coal leasing program, contending only that the case is moot. Feds.' Br. at 2-10. NMA spends several pages contending that State Plaintiffs have brought an "impermissible programmatic challenge" that cannot be reviewed under the Administrative Procedure Act ("APA"). NMA Br. at 9-15, 24. Yet not only has this Court already rejected similar procedural arguments and required the very NEPA process now at issue, *see* ECF 141 at 7-27, but State Plaintiffs' right to challenge the outcome of that court-ordered process—the Final EA and Finding of No Significant Impact ("FONSI") —as a final agency action under the APA is well established. *See, e.g., Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of Interior,* 608 F.3d 592, 598 (9th Cir. 2010) ("Here, we review the modified DR/FONSI issued by [BLM] State Director, which is the final agency action"); *Hall v. Norton*, 266 F.3d 969, 975 n.5 (9th Cir. 2001) (BLM's issuance of FONSI and "decision not to prepare an EIS is a final agency action"); *see also Chilkat Indian Village of Klukwan v. BLM*, 399 F. Supp. 3d 888, 909 (D. Alaska 2019) ("it is undisputed that [the issuance of an EA and FONSI] constituted a final agency action within the meaning of the APA"). Moreover, NMA's claim that Federal Defendants' current "review" of the federal coal program precludes "further judicial relief" lacks merit, NMA Br. at 1, given that Federal Defendants have made no commitment to redo their environmental analysis. *See* ECF 217 at 2-3.

For its part, Wyoming at least attempts to address the claims at issue, but its responses mischaracterize both State Plaintiffs' arguments and the applicable legal standards. For example, Wyoming spends several pages discussing the reasonableness of the Final EA's purpose and need statement,[2] which State

[2] NEPA requires that an agency "briefly specify the underlying purpose and need to

Plaintiffs do not challenge. *See* WY Br. at 10-15. With regard to the limited scope of the Final EA, Wyoming attempts to portray this claim as one involving "prospective, yet to be proposed, leasing," *see* WY Br. at 16-19, even though State Plaintiffs' arguments address existing leases and pending lease applications that the Final EA failed to include in the analysis. Furthermore, as discussed below, Wyoming is simply wrong that the numerous impacts the Final EA failed to consider are "not relevant to the proposed action," *id*. at 24-26, or that the evaluation of two virtually identical alternatives somehow fulfilled the requirements of NEPA. *Id*. at 26-29.

A. Federal Defendants Impermissibly Limited the Scope of the Final EA by Failing to Consider Existing Leases and Pending Lease Applications.

As discussed in State Plaintiffs' opening brief, Federal Defendants violated NEPA by improperly limiting the scope of the Final EA to just the four leases issued between the date of the Zinke Order and the "anticipated date" two years later that the moratorium would have been lifted. State Plaintiffs' Brief in Support of Motion for Summary Judgment, ECF 201 ("Op. Br.") at 17-18. State Plaintiffs' argument is not focused on "prospective, yet to be proposed, leasing that might or might not occur" as Wyoming contends, *see* WY Br. at 18, but rather the hundreds of existing coal leases and pending lease applications now being administered by BLM that are part of the federal coal leasing program. *See* Op. Br. at 2, 18-19. The details of these leases and lease applications were well known to BLM at the time that it developed the Final EA. *See* AR 7-8[3] ("As of Fiscal Year 2018, the BLM administered 299 Federal coal leases, encompassing 458,636 acres in 12 states, with an estimated 6.5 billion tons of recoverable Federal coal reserves"); *see also*

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which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13.

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

AR 19270, 19347-48, 54917-60 (detailing federal coal leases). In other words, the fundamental flaw in the Final EA was not that failed to consider "prospective" leasing, but rather that it omitted consideration the vast majority of the known activities that make up the leasing program.

Wyoming also incorrectly contends that this Court should assess State Plaintiffs' arguments regarding the scope of NEPA review by evaluating the reasonableness of the Final EA's statement of purpose and need.[4] WY Br. at 11-15. However, this is a distinct argument with different legal standards not relevant to this case, since State Plaintiffs are not challenging the Final EA's statement of purpose and need pursuant to 40 C.F.R. § 1502.13.[5] *See, e.g.*, *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084-85 (9th Cir. 2013) (discussing standards for challenge to purpose and need statement).[6] Rather, State Plaintiffs claim that the Federal Defendants violated 40 C.F.R. § 1508.25 (governing the *scope* of the analysis) by failing to consider connected, cumulative, or similar actions in the Final EA and FONSI, as well as alternatives to and the impacts of such actions.

In evaluating whether actions violate § 1508.25, the Ninth Circuit applies a multi-step analysis to determine whether actions are connected, cumulative, or similar. An agency violates NEPA if it fails any step of the analysis. First, with

[4] The stated purpose of the Final EA is "to respond to the U.S. District Court of Montana's order issued on April 19, 2019 … indicating that the Zinke Order constituted final agency action and a major Federal action triggering compliance with NEPA and directing the BLM to prepare an appropriate NEPA analysis." AR 11.

[5] On July 16, 2020, the Council on Environmental Quality ("CEQ") finalized an update to its existing regulations implementing NEPA, which became effective on September 14, 2020. 85 Fed. Reg. 43,304 (July 16, 2020) (codified at 40 C.F.R. pt. 1500). CEQ's prior regulations, promulgated in 1978 with minor amendments in 1986 and 2005, govern the Final EA and FONSI and are cited here. *See* 85 Fed. Reg. at 43,372.

[6] Wyoming also cites *WildWest Institute v. Bull*, 547 F.3d 1162, 1173 (9th Cir. 2008) for the proposition that "Agencies have 'discretion to determine the physical scope used for measuring environmental impacts' so long as they do not act arbitrarily and their 'choice of analysis scale … represent[s] a reasoned decision,'" WY Br. at 14, but that case similarly did not involve a challenge to the scope of a NEPA review under 40 C.F.R. § 1508.25.

regard to whether actions are "cumulative," the Ninth Circuit considers whether a plaintiff raises "substantial questions" that such actions will result in cumulatively significant impacts. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir. 2002) (quoting *Blue Mountains Biodiversity Proj. v Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998)). Second, to determine whether actions are "similar," the Ninth Circuit considers whether such activities "have similarities that provide a basis for evaluating their environmental consequences together." *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 1001 (9th Cir. 2004) (quoting 40 C.F.R. § 1508.25(a)(3)). Finally, to evaluate whether actions are "connected," the Ninth Circuit applies "an 'independent utility' test to determine whether multiple actions are so connected as to mandate consideration in a single [EA]." *Sierra Club v. BLM*, 786 F.3d 1219, 1226 (9th Cir. 2015) (quoting *Cal. ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of Interior*, 767 F.3d 781, 795 (9th Cir. 2014)). Under each of these standards, Federal Defendants had no basis to limit the scope of the Final EA, which purports to evaluate the "resum[ption] [of] normal leasing procedures in March 2017" as the Proposed Action, to just four coal leases. *See* AR 17.

Cumulative Actions

There should be no dispute that hundreds of existing coal leases and lease applications that are part of federal coal leasing program will result in cumulatively significant impacts. *See* AR 19362 (BLM estimating in 2017 that the federal coal leasing program accounts for 11 percent of total U.S. greenhouse gas emissions); AR 19361-65, 19377-83 (BLM discussing significant contribution of coal to climate emissions and externalities of coal production, transportation, and consumption); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 400 (1976) (federal coal leasing program "is a coherent plan of national scope" and "surely has significant environmental consequences").

Wyoming's contention that BLM is not required to consider "potential leasing" under the federal coal program misses the point. *See* WY Br. at 17-18. State Plaintiffs have specifically argued that BLM must consider existing federal coal leases and pending lease applications, not actions that have yet to be proposed or are not otherwise reasonably foreseeable. *See* Op. Br. at 18-19; 40 C.F.R. § 1508.7 (defining "cumulative impact" as one that "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions"); 40 C.F.R. § 1508.27(b)(7) (agency must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts").

Similarly, Wyoming's suggestion that there are no cumulative actions at issue here because such actions must be "announced simultaneously" and must be "in the same watershed" or "within a particular geographic area" is baseless. WY Br. at 18 (citing *Blue Mountains*, 161 F.3d at 1214-15). While the Ninth Circuit found those particular factors to be significant with regard to the multiple salvage logging projects at issue in *Blue Mountains*, the Ninth Circuit has subsequently explained that the key question for analyzing cumulative actions is whether multiple actions "will result in significant environmental impacts." *Native Ecosystems Council*, 304 F.3d at 895 (quoting *Blue Mountains*, 161 F.3d at 1215).

That is exactly the situation here, given that BLM's leasing program, including existing and pending leases, will result in significant environmental impacts. *See* AR 19361-65, 19377-83. As the Ninth Circuit has found, "[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1214-17 (9th Cir. 2008) (federal agency acknowledging significance of fuel economy standards on U.S. greenhouse gas emissions and climate change); *see Indigenous*

Envtl. Network v. U.S. Dep't of State, 347 F. Supp. 3d 561, 578-79 (D. Mont. 2018) (finding that DOI failed to consider cumulative impacts of greenhouse gas emissions from proposed pipeline project in combination with other pipelines).

Similar Actions

With regard to similar actions, Wyoming's argument rests on a fallacy. Wyoming contends that the four leases considered in the Final EA do not "share common timing or geography with future leasing under the federal coal leasing program." WY Br. at 19. However, State Plaintiffs' argument is about existing leases and pending lease applications, not "future leasing" or "yet to be proposed leasing." Op. Br. at 18; *see* AR 7-8. These existing leases and pending lease applications fall firmly within the regulatory definition of "similar actions," which include "other reasonably foreseeable or proposed agency actions." 40 C.F.R. § 1508.25(a)(3). While the consideration of "similar actions" may be more discretionary than cumulative or connected actions, *see* WY Br. at 19 (citing *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 1001 (9th Cir. 2004)), the key issue remains whether these actions "have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." 40 C.F.R. § 1508.25(a)(3). With regard to existing leases and pending lease applications, Defendants offer no response regarding why such activities are not "similar actions" that should be considered in a single environmental review.

Connected Actions

Finally, with regard to "connected actions," Wyoming's assertion that "[t]he Zinke Order is not inextricably intertwined with how [BLM] will make future coal leasing decisions," or that BLM had no duty to consider future "unknown" activities, again misses the point. *See* WY Br. at 16 (citing *Chilkat Indian Village of Klukwan v. BLM*, 399 F. Supp. 3d 888, 919 (D. Alaska. 2019)). Nowhere does Wyoming address why other *existing* leases and pending lease applications, which

BLM is fully aware of, *see* AR 7-8, are not connected to the Proposed Action. Because BLM currently has "specific, quantifiable information" about the parameters of its leasing program, this case is nothing like the situation in *Chilkat*, which concerned issues of future mine development. *Chilkat*, 399 F. Supp. 3d at 922.

There is also no merit to Wyoming's contention that a review of the entire federal coal leasing program would result in "speculative NEPA analysis which threatens agency paralysis." WY Br. at 16. Not only is a comprehensive review precisely what was already ordered by the Court, ECF 141 at 24, but it is also typical of reviews that BLM has conducted in the past. *See* Op. Br. at 7-8 (describing prior programmatic NEPA reviews of federal coal leasing program). As this Court also found, this litigation may be State Plaintiffs "only opportunity to challenge [the coal-leasing program] on a *nationwide, programmatic* basis.'" ECF 141 at 14 (quoting *California ex rel. Lockyer v. U.S. Dep't of Agric*., 575 F.3d 999 (9th Cir. 2009)) (brackets in original) (emphasis added). Given that the entire purpose of the Final EA was to respond to this Court's decision, AR 11, there is no basis for limiting NEPA review to just four leases.

In sum, Federal Defendants' decision to restart the federal coal leasing program without preparing a NEPA document that evaluates the full scope of activities that are part of that action was arbitrary and capricious, an abuse of discretion, and contrary to the requirements of NEPA and the APA. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.25; 5 U.S.C. § 706(2).

B. Federal Defendants Failed to Take a "Hard Look" at the Environmental Impacts of Restarting the Federal Coal Leasing Program.

Defendants offer no coherent defense of the Final EA's truncated and insufficient analysis of the environmental impacts of the federal coal leasing program. For example, Wyoming contends that "NEPA only requires that the

agency take a "'hard look' at the environmental consequences of its proposed action." WY Br. at 24 (citing *Blue Mountains*, 161 F.3d at 1211). Yet nowhere does Wyoming explain how BLM meets this standard by considering just three impacts, from four coal leases, allegedly resulting from the "resum[ption of] normal leasing procedures in March 2017." AR 17 (defining Alternative 2, the Proposed Action); *see* ECF No. 141 at 24, 27, 31 (BLM's decision to restart federal coal leasing program constituted a "major federal action"); *Oregon Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1100 (9th Cir. 2011) (NEPA requires agency to "consider every significant aspect of the environmental impact of a proposed action").

Wyoming next makes the astonishing claim that the impacts BLM entirely failed to consider – such as harm from coal mining, air quality impacts from coal transport and combustion, the disposal of coal ash, impacts to environmental justice communities, and the cumulative climate change impacts from the leasing program – "are not relevant to the proposed action." WY Br. at 24. Wyoming's only basis for this statement is to point to State Plaintiffs' example of the impacts of coal shipments from mines in Montana and Wyoming, which it argues are not relevant "because the leasing decisions evaluated by the Zinke Order do not involve mining activity from either state" – only Utah and Oklahoma. WY Br. at 19, 25. This distinction makes little sense, not only because coal from the Powder River Basin in Montana and Wyoming makes up a significant percentage of federal coal leasing, AR 5420, but also because a significant percentage of federal coal from Utah is exported through west coast ports. *See, e.g.*, ECF 116-1, ¶ 3. In addition, climate impacts from the burning of federal coal will result regardless of which state it is mined from. And nowhere do Defendants even attempt to defend the faulty analyses in the Final EA with the three "issues" – greenhouse gas emissions; socioeconomic impacts; and impacts to water quality – that BLM supposedly did consider. *See* Op. Br. at 21-23.

In sum, Federal Defendants' failure to take a "hard look" at the environmental impacts of the federal coal leasing program was arbitrary and capricious, an abuse of discretion, and contrary to the requirements of NEPA and the APA. 42 U.S.C. § 4332(2)(C); 5 U.S.C. § 706(2).

C. Federal Defendants Failed to Consider Reasonable Alternatives to the Proposed Action.

There is also no merit to Defendants' attempt to justify BLM's consideration of only two, virtually identical alternatives, which failed to provide for informed decision making or public participation in evaluating the impacts of the federal coal leasing program. *See* Op. Br. at 23-25. Wyoming first asserts that this so-called "range" of alternatives was reasonable because it "met the stated purpose and need for the EA." WY Br. at 26-27. This argument is baseless. The purpose and need of the Final EA was to respond to this Court's ruling that BLM's decision to restart the federal coal leasing program was a "major federal action" subject to NEPA. AR 11. Nothing about the purpose and need statement, or this Court's order, excuses BLM from "rigorously explor[ing] and objectively evaluat[ing] all reasonable alternatives" to a proposed action. 40 C.F.R. § 1502.14(a). More importantly, as discussed above, the two alternatives that BLM did consider do not meet the purpose and need of responding to this Court's ruling, given that they do not evaluate the environmental impacts of restarting the federal coal leasing program.

Wyoming also notes that an agency's statutory objectives "serve as a guide" to the reasonableness of the environmental analysis, citing the MLA's "obligation … to make federal coal deposits subject to disposition." WY Br. at 26-27 (citing *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 866 (9th Cir. 2004)). There are several problems with this argument. First, the cited language from *Westlands* discussed the adequacy of the purpose and need statement, not the consideration of a reasonable range of alternatives. Second, to the extent Wyoming suggests that the MLA *requires* BLM to lease federal coal deposits, it is mistaken.

See 30 U.S.C. § 201 (Secretary "shall, *in his discretion*, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands for leasing) (emphasis added); *Boesche v. Udall*, 373 U.S. 472, 481 (1963) (MLA "was intended to expand, not contract, the Secretary's control over the mineral lands of the United States"); AR 5425 ("the Department has the statutory duty to ensure a fair return to the taxpayer and broad discretionary authority to decide where, when, and under what terms and conditions, mineral development should occur, including with regard to the issuance of Federal coal leases."). Third, nowhere does Wyoming explain how BLM considered other statutory obligations in its alternatives analysis, including the MLA's requirements that coal leasing be in the "public interest" and that every sale is made by competitive bid and provides the public with "fair market value," *see* 30 U.S.C. § 201(a)(1), or the requirements of FLPMA to manage public lands in an environmentally protective manner and to ensure it "receive fair market value of the use of the public lands and their resources," 43 U.S.C. § 1701(a).

Wyoming next claims that the alternatives analysis is sufficient for an EA, which requires less "rigor" than if the agency had prepared an EIS. WY Br. at 27-28. While it is true that an agency's obligation to consider alternatives in an EA "is a lesser one" than for an EIS, *Native Ecosystems*, 428 F.3d at 1246, an agency cannot satisfy NEPA by considering only two "virtually identical alternatives" and failing to provide any explanation regarding why did not consider any other reasonable alternatives. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.,* 177 F.3d 800, 813 (9th Cir. 1999) (federal agency violated NEPA by considering only "a no action alternative along with two virtually identical alternatives"); *Wildearth Guardians v. BLM*, 457 F. Supp. 3d 880, 891-92 (D. Mont. 2020) (finding that "BLM failed to provide an adequate explanation of why it failed to consider [plaintiff's] proposed alternative"). And while the two alternatives in the Final EA

are not completely identical with regard to timing, WY Br. at 28-29, the environmental impacts are exactly the same, thereby frustrating the fundamental purposes of NEPA to provide a broad evaluation of impacts and alternatives to allow for informed decision making and meaningful public participation. *See California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982).

In sum, Federal Defendants' failure to consider reasonable alternatives in the Final EA was arbitrary and capricious, an abuse of discretion, and contrary to the requirements of NEPA and the APA. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9; 5 U.S.C. § 706(2).

II. FEDERAL DEFENDANTS' DECISION TO RESTART THE FEDERAL COAL LEASING PROGRAM WITHOUT CONSIDERING THEIR STATUTORY MANDATES OR PROVIDING A REASONED EXPLANATION FOR THEIR REVERSAL IN POLICY VIOLATED THE MLA, FLPMA, AND THE APA.

As discussed in State Plaintiffs' opening brief, BLM - in restarting the federal coal leasing program – failed to consider its statutory mandates under the MLA and FLPMA to ensure that such leasing is in the "public interest" and that the public is receiving "fair market value" for the development of these resources. Op. Br. at 25-28; *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (when reversing course by changing a prior policy, an agency is required to provide a "reasoned explanation" for the change, and show that the new policy is "permissible under the statute" and that "there are good reasons for it").

Defendants offer no valid arguments to the contrary. NMA first suggests that State Plaintiffs have identified no particular duty with which BLM must comply, claiming that section 1701 of FLPMA is merely "hortatory" and provides no "enforceable standards." NMA Br. at 21-22. There are several problems with this assertion. First, several courts have found statutory violations of FLPMA 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 FLPMA and the Wilderness Act required BLM to consider wilderness characteristics in EIS for southeastern Oregon land use plan); *Bullock v. BLM*, 489 F. Supp. 3d 1112, 1123 (D. Mont. 2020) (finding that FLPMA section 1701 provided basis for procedural challenge to resource management plan approval by BLM Director); *California v. Bernhardt*, 472 F. Supp. 3d 573, 596-99 (N.D. Cal. 2020) (finding that BLM regulation regarding waste was unreasonable under APA in light of statutory mandates in section 1701 and other provisions).

Second, the cases cited by NMA are inapposite and provide no authority to the contrary. For example, in *ONRC Action v. BLM*, 150 F.3d 1132 (9th Cir. 1998), the court found plaintiff had failed to challenge a final agency action under the APA or identify a provision of FLPMA that "provide[d] a clear duty to update land management plans or cease actions during the updating process" – a planning process that is not at issue here. *See id*. at 1139-40. In *Public Lands for the People v. U.S. Dep't of Agric.*, 2010 WL 5200944 (E.D. Cal. Dec. 15, 2000), *aff'd*, 697 F.3d 1192 (9th Cir. 2012), 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 ultimately ruled that FLPMA 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. Furthermore, in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), the U.S. Supreme Court

addressed plaintiffs' claims that BLM failed to act to prevent harm to wilderness study areas from off-road vehicle use, but did not address any claims under Section 1701. *Id*. at 65-73.

NMA next claims that FLPMA's concept of "fair market value" applies only in the context of conveyances of interests in public lands. NMA Br. at 22 (citing 43 U.S.C. §§ 1713(d), 1721(b)(2), 1722(a) & (b), 1763(g)). However, this ignores a different requirement in FLPMA – the one cited by State Plaintiffs – that "the United States receive fair market value of the use of the public lands and their resources." 43 U.S.C. § 1701(a)(9); *Mineral Policy Ctr.*, 292 F. Supp. 2d at 49-51 (finding violation of section 1701(a)(9) in adoption of mining regulations).

With regard to the Mineral Leasing Act, NMA contends that the term "public interest" only addresses how lands are divided at the time of leasing, while "fair market value" is determined in relation to a "bid" for leasing, and the Zinke Order did not authorize any leases. NMA Br. at 22-23 (citing 30 U.S.C. § 201). However, NMA's reading is contrary to the plain language of Section 201, as well as BLM's own interpretation of that section. As BLM itself stated in 2017:

> The Secretary of the Interior is authorized to lease coal as she finds "appropriate and in the public interest" (30 United States Code [USC], Subsection 201[a][1]). Consideration of the implications of Federal coal leasing for climate change, as an extensively documented threat to the health and welfare of the American people, falls squarely within the factors to be considered in determining the public interest.
>
> …
>
> When resource extraction from public lands is determined to be appropriate, it is also incumbent upon the Department of the Interior to ensure that the public receives the appropriate compensation for the use of its resources. "No bid [on a coal lease tract] shall be accepted which is less than the fair market value, as determined by the Secretary, of the coal subject to the lease. Prior to his determination of the fair market value of the coal subject to the lease, the Secretary shall give opportunity for and consideration to public comments on the fair market value" (30 USC, Subsection 201[a][1]). This requirement to receive fair market value

> (FMV) places a floor on the monetary return the public must receive once the Secretary determines that it is appropriate and in the public interest to lease a coal tract.

AR 19271 (Scoping Report at ES-2). Given that Federal Defendants' decision to restart the coal leasing program is the key action being challenged in this litigation, the provisions of Section 201 are clearly at issue.

Rather than denying the need to comply with these statutory provisions, Wyoming contends that the fair return issue was already addressed in a March 28, 2017 memorandum from Acting BLM Director Michael Nedd. WY Br. at 29-30 (citing AR 4429-32). While this memorandum recognizes that fair return was a major focus of the Scoping Report, it does not identify any steps that Federal Defendants have taken since that time to address this statutory mandate, instead claiming that it could be "assessed through separate, more targeted processes." AR 4429. Wyoming identifies no further action or processes regarding the fair return issue since that time. Moreover, the Final EA and FONSI issued by BLM in February 2020 failed to provide any consideration of this issue. *See* AR 1-77.

In sum, Federal Defendants failed to consider its statutory mandates or provide any reasoned explanation for its reversal in policy when restarting the federal coal leasing program, contrary to the statutory requirements of the MLA, FLPMA, and the APA. 30 U.S.C. § 201(a)(1), (3); 43 U.S.C. § 1701(a); 5 U.S.C. § 706(2).

CONCLUSION

For the reasons stated above, State Plaintiffs respectfully request that this Court grant their motion for summary judgment, deny Defendants' cross-motions for summary judgment, declare that Federal Defendants' decision to restart the federal coal leasing program and issuance of the Final EA and FONSI were unlawful, vacate and set aside the Final EA and FONSI, and require Federal Defendants to resume the moratorium on new federal coal leases unless and until they comply with applicable law, including NEPA, the MLA, and FLPMA.

Dated: February 24, 2022

Respectfully submitted,

/s/ Roger Sullivan
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

ROB BONTA
Attorney General of California
DAVID ZONANA
Supervising Deputy Attorney General

/s/ George Torgun
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

/s/ Bill Grantham
BILL GRANTHAM (*pro hac vice*)
Assistant Attorney General
201 Third St. NW, Suite 300
Albuquerque, NM 87102
Telephone: (505) 717-3520
E-Mail: wgrantham@nmag.gov

Attorneys for Plaintiff State of New Mexico

LETITIA JAMES
Attorney General of the State of New York

/s/ Andrew G. Frank
YUEH-RU CHU (*pro hac vice*)
ANDREW G. FRANK (*pro hac vice*)
Assistant Attorneys General
New York State Office of the Attorney General
Environmental Protection Bureau
28 Liberty Street
New York, New York 10005
Telephone: 212-416-8271
Email: andrew.frank@ag.ny.gov

Attorneys for Plaintiff State of New York

ROBERT W. FERGUSON
Attorney General of Washington

/s/ Aurora Janke
WILLIAM R. SHERMAN (*pro hac vice*)
WA Bar No. 29365
AURORA JANKE
MT Bar No. 39522610
Assistant Attorneys General
800 5th Ave Suite 2000, TB-14
Seattle, WA 98104-3188
Telephone: (206) 233-3391
Email: Aurora.Janke@atg.wa.gov

Attorneys for Plaintiff State of Washington

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Local Rule 7.1(d)(2)(E) and the Orders of this Court (ECF Nos. 193, 198, and 214), I certify that this brief contains 5,043 words, excluding the parts of the brief exempted under the Local Rule, according to the count of Microsoft Word.

Respectfully submitted on February 24, 2022.

/s/ George Torgun
George Torgun

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2022, a copy of the foregoing STATE PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was served via the Court's CM/ECF system on all counsel of record.

/s/ George Torgun
George Torgun