Nos. 22-35789, 22-35790

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Citizens for Clean Energy, et al.,
Plaintiffs-Appellees,

v.

United States Department of Interior, et al.,
Defendants

&

National Mining Association,
Intervenor-Defendant-Appellant,

&

State of Wyoming, et al.,
Intervenor-Defendants-Appellants,

Appeal from the United States District Court for the
District of Montana
No. CV 17-30-BMM (Hon. Brian Morris, Chief District judge)

JOINT RESPONSE TO MOTION TO DISMISS APPEALS FOR LACK OF JURISDICTION

AUSTIN KNUDSEN
Montana Attorney General

Christian B. Corrigan
Solicitor General

Kathleen L. Smithgall
Deputy Solicitor General
Montana Department of Justice
P.O. Box 201401
Helena, MT 59620-1401
406-444-2026
kathleen.smithgall@mt.gov
Attorney for Appellant
State of Montana

Travis Jordan
Senior Assistant Attorney General
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-7895
travis.jordan@wyo.gov
Attorney for Appellant
State of Wyoming

James M. Auslander
Peter J. Schaumberg
Beveridge & Diamond, P.C.
1900 N St., N.W., Suite 100
Washington, DC 20036
(202) 789-6009
jauslander@bdlaw.com
pschaumberg@bdlaw.com
Attorneys for Appellant National Mining Association

INTRODUCTION

Certain Appellee groups filed a motion to dismiss for lack of jurisdiction ("Motion") to evade appellate review of rulings for which the district court itself lacked jurisdiction, and to retain a novel nationwide injunction fashioned by that court.[1] The Motion is inextricably intertwined with these appeals' merits because it is premised on misportrayals of Appellees' challenged "agency action" and the rulings below. Accordingly, it should be referred to the merits panel for resolution.

The Motion also is meritless, and this Court has jurisdiction. No court, including this Court, has deemed the federal government's participation to be a *sine qua non* for appeal, or perceived a "remand" in a district court order as a magic word defeating finality. Even if this Court were to apply each of the *optional* factors Appellees identify, these appeals satisfy them. The district court conclusively disposed of Appellees' complaints, Appellees' challenged action already was irrevocably vacated before the district court's final judgment, and the government on remand is not compelled to take further action regarding its vacated action. Moreover, rather than merely "remand" or "reinstate" the prior status quo, the district court created an injunction that never before existed. As such, beyond these appeals, Appellants would be unable to obtain meaningful appellate review.

---

[1] The Appellee States (California, New Mexico, New York, and Washington) did not move to dismiss or join the Motion. "Appellees" herein refers to the groups.

Nor is there a timeliness issue regarding the appeals of the earlier judgment below, principally because the jurisdictional issues addressed therein are always timely. Accordingly, this Court should deny the Motion.

ARGUMENT

A. This Motion Should Be Referred to the Merits Panel.

Appellees' Motion rests on the same fictional construct as their filed complaints and the district court's decisions on appeal. This case presents no Department of the Interior ("Interior") "decision to rescind a moratorium on federal coal leasing," or mere "remand" of an agency action for further National Environmental Policy Act ("NEPA") review. *See* Motion at 2. This Court cannot decide the Motion without examining Appellees' mischaracterization of the agency action they purport to challenge and the ensuing district court rulings. These basic disputes support concurrent Motion and merits consideration by the merits panel.

In reality, Appellees challenged a discrete Interior Secretarial Order No. 3348 (the "Zinke Order") (Supplemental Administrative Record ("Suppl. AR") 4416-17)[2] that superseded another discrete Secretarial Order No. 3338 (the "Jewell

[2] Also available at https://www.doi.gov/sites/doi.gov/files/elips/documents/archived-3338_-discretionary_programmatic_environmental_impact_statement_to_modernize_the_federal_coal_program.pdf.

Order") (Suppl. AR 5419-28).[3] Tellingly, Appellees' Motion is silent on the details of the Jewell Order. The Jewell Order, entitled "*Discretionary* Programmatic Environmental Impact Statement ["PEIS"] to Modernize the Federal Coal Program" (emphasis added), had commenced a *wholly voluntary* programmatic NEPA review of federal coal leasing regulations and a *voluntary* "pause" on certain new leasing *while that voluntary NEPA review was underway*. *Id.* The Zinke Order merely ended this prior, voluntary NEPA review and attendant pause, and approved no new federal coal lease, each of which continues to require its own NEPA review. As a result, there was no final agency action that injured Appellees, no standing or ripeness to sue, and no major federal action triggering NEPA review. Moreover, the government—through a third Secretarial Order No. 3398 (the "Haaland Order")—vacated the Zinke Order, well before the district court could do so, thereby also mooting the case. Dkt. 199 at ¶ 2; Dkt. 212-1.[4]

Yet, despite lacking jurisdiction to rule on the now-superseded Zinke Order, the district court converted a voluntarily-commenced programmatic NEPA review and pause into mandatory legal obligations. And when Interior did perform NEPA review for the Zinke Order (prior to the superseding Haaland Order), the district court then deemed it insufficient because it did not speculate as to future changes

[3] Also available at https://www.doi.gov/sites/doi.gov/files/uploads/so_3348_coal_moratorium.pdf.
[4] "Dkt." citations herein refer to the district court lead case No. 4:17-cv-00030.

in federal coal leasing policy and regulations—in other words, it was not the Jewell Order's programmatic review. The district court thereby created a nonexistent standalone NEPA obligation, recast the Jewell Order it purported to "reinstate," and fashioned a novel injunction "until the completion of sufficient NEPA review." Dkt. 239 at 19. The finality of the decisions below is thus a function of the merits of Appellees' claims erroneously accepted by the district court.

Referral to the merits panel in these appeals would avoid premature adjudication without the benefit of merits briefing. That is the pathway the D.C. Circuit adopted just last year on a substantially similar motion to dismiss by some of these same Appellees. In that case, the district court vacated and remanded an Interior offshore oil and gas lease sale on NEPA grounds. State and industry intervenor-defendants appealed, and the government did not appeal. As here, the plaintiff-appellees moved to insulate their favorable ruling by seeking to dismiss the appeals for alleged lack of finality. But as argued there by the appellants, the D.C. Circuit ordered "that the motion to dismiss be referred to the merits panel to which this appeal is assigned," and the parties proceeded to merits briefing. *Friends of the Earth v. Haaland*, Nos. 22-5036 & 22-5037 (D.C. Cir. Mar. 8, 2022). Similarly, this Court has seen fit to decide motions to dismiss at the merits stage, even where, unlike here, the jurisdictional questions and claims on appeal are not intertwined. *See, e.g.*, *Richardson v. Koshiba*, 693 F.2d 911, 913 (9th Cir.

1982) (referral of motion to dismiss to merits panel, and then reversal of district court on discretionary abstention grounds); *Nat'l Indus. v. Republic Nat'l Life Ins. Co*., 677 F.2d 1258, 1262 (9th Cir. 1982) (motion panel's denial of motion to dismiss does not bind merits panel's "ultimate reconsideration and disposition of the issue" of jurisdiction). Here, parallel consideration of the Motion and merits ensures fully informed adjudication of these appeals and serves judicial economy.

B. The District Court's Decisions Are Final under 28 U.S.C. § 1291.

The district court's decisions on appeal are final and this Court thus has jurisdiction. Appellees misstate both the law and facts to urge an overly-restrictive "rule" precluding any review of the district court's decision to "remand" to Interior after the government declined to also appeal. Namely, Appellees incorrectly represent that *only* agency appellants can appeal a remand order; mechanically apply the optional considerations laid out by this Court's precedent regarding remands to agencies; and do not confront the facts in this case that go to the fundamental inquiry of that precedent—whether appeals are premature because appellants can vindicate their claims before the agency on remand or judicially following remand. Here, the answer is no, because the Zinke Order challenged by Appellees indisputably is gone forever and under no active remand.

1. <u>These Appeals Satisfy This Court's Practical Approach to Finality.</u>

The courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. The district court explicitly "enter[ed] final judgment," which granted summary judgment to Appellees and vacated the Zinke Order and its NEPA analysis. Dkt. 244, 247. This Court's jurisdictional inquiry may end there.

Appellees' insistence that "for the appellate court to have jurisdiction the administrative agency must appeal the district court's remand order" contradicts the case law of this Circuit and courts across the country. *See* Motion at 9. No law or case stands for this proposition. "Had Congress wished to allow appeal under the [Administrative Procedure Act] only when an agency prevails on all claims in the district court, it could have done so explicitly." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 699 (10th Cir. 2009). Indeed, in circumstances more akin to this case, this Court and other courts have permitted non-governmental parties to appeal district court decisions remanding to agencies.[5]

[5] *See, e.g., id.* ("On its face, this order has all requisite components of a final order: It resolved all issues and granted the plaintiffs relief, enjoining issuance of the HEYCO lease until such analysis is complete. As the State points out, BLM is not bound to conduct a new EIS in response to the court's order; it could opt to refrain from granting any leases and thus obviate the need for an EIS."); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1174 (9th Cir. 2011) (appellate jurisdiction over non-agency appellant's appeal of district court's remand to agency to prepare another supplemental environmental impact statement to correct defects in NEPA analysis); *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers*,

Moreover, it is well-established that parties granted intervention as of right have the same rights as the original parties, including the right to appeal. Fed. R. Civ. P. 24(a); *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) ("Intervenors under Fed. R. Civ. P. 24(a)(2) . . . enter the suit with the status of original parties"); *League of United Latin Am. Citizens v. Wilson,* 131 F.3d 1297, 1304 (9th Cir. 1997) ("[A]s a general rule, intervenors are permitted to litigate fully once admitted to a suit."). Here, the district court found each Appellant "meets the standard for intervention as of right" as an Intervenor-Defendant. Dkt. 30, 41, 42. Moreover, Appellants as parties are bound by the district court's decisions, which go beyond a simple remand. *See Marion v. Ortiz*, 484 U.S. 301, 304 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."). Nothing about the government's litigation strategy decisions here diminishes Appellants' appeal rights in this Court.

---

843 Fed. App'x 77, 79 (9th Cir. 2021) ("We have appellate jurisdiction under 28 U.S.C. § 1291, even though only Intervenors, and not the agency, have appealed."); *Crow Indian Tribe v. United States*, 965 F.3d 662, 670 (9th Cir. 2020) ("jurisdiction to consider the [non-agency] Intervenors' appeals" of order vacating and remanding agency rulemaking); *Am. Wild Horse Pres. Campaign v. Jewell*, 847 F.3d 1174, 1184-85 (10th Cir. 2016) (district court's remand to agency final and appealable by non-agency appellants); *Cotton Petroleum Corp. v. U.S. Dep't of Interior, Bureau of Indian Affairs*, 870 F.2d 1515, 1522 (10th Cir. 1989) (jurisdiction over non-agency appellant's appeal of order remanding to agency).

Appellees' Motion further claims that this Court's precedent categorically forecloses jurisdiction because the district court ordered a "remand" to Interior. That is incorrect. At the outset, no magic word or hard test exists, including under the two cases upon which Appellees chiefly rely. *Alsea Valley All. v. Dep't of Com.*, 358 F.3d 1181 (9th Cir. 2004); *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1075 (9th Cir. 2010) ("*Alsea* did not announce a hard-and-fast rule prohibiting a non-agency litigant from appealing a remand order."). Rather, this Court has made clear that these factors "*are considerations, rather than strict prerequisites*." *Sierra Forest Legacy*, 646 F.3d at 1175 (emphasis added). That is consistent with the Supreme Court's and this Court's instruction that "the requirement of finality is to be given a 'practical rather than a technical construction.'" *Id.* (quoting *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964) (internal quotation omitted)).

Accordingly, this Circuit "appl[ies] a practical construction to the finality requirement," considering appeals including where "as a practical matter, the work of both the district court and the agency is complete." *Sierra Forest Legacy*, 646 F.3d at 1175-76. More recently, this Court observed that "[b]eyond the [*Alsea*] test, remand orders are sufficiently 'final' under § 1291, where the relief sought by appellants cannot possibly be achieved through the district court's directions." *United States v. U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 595 (9th Cir. 2018)

(citing *Sierra Forest Legacy*, 646 F.3d at 1174). This is so because "[s]uch 'meaningless remand[s]' are anathema to judicial economy." *Id*. (citing *Skagit Cty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996)).

The readily distinguishable facts of *Alsea* and *Pit River*—which the Motion nowhere discusses—support, rather than defeat, jurisdiction over the present appeals. *See Alsea*, 358 F.3d at 1184; *Pit River*, 615 F.3d at 1076. In *Alsea*, the district court overturned and remanded an agency final rule listing certain coho salmon as threatened under the Endangered Species Act. The agency "informed the district court that it would comply" with the remand order and even went so far as to initiate a "four-step action plan" to incorporate the district court's rationale in a new listing action for the species. 358 F.3d at 1183-84. The private party intervenors on remand there had a clear path to participate "in any further listing decision concerning" the coho salmon. *Id*. By contrast, Interior here had already vacated the Zinke Order that formed the basis of this litigation and has demonstrated that Interior will not be taking action to resuscitate it on remand.

In *Pit River*, the district court remanded the agency action with an extensive and detailed list of instructions for the agency. *Pit River Tribe v. Bureau of Land Mgmt*., No. 2:02-cv-1314, 2008 WL 5381779, at *3-5 (E.D. Cal. Dec. 23, 2008). Those instructions explicitly laid out the ability of interested parties to participate in the remand proceedings. For example, the court specifically ordered the

agencies to prepare an environmental impact statement "involving plaintiffs and other interested stakeholders" and to provide for public comment. *Id*. at *4. Unsurprisingly, the Court held that the district court's order was not final because, "[s]imilar to the appellant in *Alsea*, Pit River will have an opportunity to participate in the agencies' processes on remand" and "any decision by this court may prove entirely unnecessary." 615 F.3d at 1076.[6] No such prematurity concern exists in the circumstances of the instant appeals.

Other Circuits follow the same practical construction of finality in the context of administrative remands. For example, the D.C. Circuit has held that where the agency has no obligation to act on the remand order and has actively taken steps to not act on the remand, a district court's remand order is final and appealable. *See In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig*., 751 F.3d 629, 633 (D.C. Cir. 2014). That court held that "treating the district court's remand order as unappealable would effectively preclude . . . plaintiffs from ever challenging the district court's decisions." *Id.* (internal quotation marks omitted); *see also American Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 515 (D.C. Cir. 2020) (remand order final where it "d[id] not instruct the Coast Guard to reopen the [agency action] and conduct further proceedings").

[6] The Court ultimately found that it did have jurisdiction based on the All Writs Act, 28 U.S.C. § 1651(a). *Id.* at 1078-79.

Similarly, the Tenth Circuit considers the "nature of the agency action as well as the nature of the district court's order," and views deferred appeals "as most appropriate in adjudicative contexts." *New Mexico ex rel. Richardson*, 565 F.3d at 697-98 (10th Cir. 2009). Specifically, that court has "often treated district court orders requiring further agency action under NEPA as final and reviewable in the past." *Id.* at 699. Remand does not affect finality where "[t]he court's order did not require [Interior] to recommence a proceeding, or indeed to take any action at all—it simply enjoined [Interior] from further NEPA violations." *Id*. at 698. The district court here did that too, except it also layered an injunction on future leasing. These appeals thus meet any practical view of finality.

2. <u>These Appeals Satisfy the *Alsea* Factors.</u>

If this Court elects to apply each of the *Alsea* factors, they are readily met. These finality factors include whether "(1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." *Pit River*, 615 F.3d at 1075 (quoting *Alsea*, 358 F.3d at 1184).

a. The District Court Conclusively Resolved Separable Legal Issues.

This Circuit has found a district court's order final where it fully resolved the substantive questions at issue, *U.S. Bd. of Water Commissioners*, 893 F.3d at

594 ("separable legal issue" prong satisfied where "the district court resolved both questions at issue" in that case), or where the "district court decided numerous legal issues distinct from those to be addressed in the agency remand." *Sierra Forest Legacy*, 646 F.3d at 1176. *See also Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 385 (D.C. Cir. 2017) (a remand order "that terminate[s] an action fall[s] within the core of Section 1291's requirement of finality") (internal quotations omitted); *Merit Energy Co. v. Haaland,* No. 21-8047, 2022 WL 17844513, at *4 (10th Cir. Dec. 22, 2022) (finality exists where "[t]he district court order effectively ends the litigation on the merits and its findings will not be changed on remand to the [agency]").

Appellees' lawsuits challenging Interior's alleged failure to conduct a NEPA review of the Zinke Order and the sufficiency of that NEPA review have been resolved below. The district court determined that it had jurisdiction over the Zinke Order, that the Zinke Order triggered NEPA review, and that Interior's NEPA review was insufficient. Dkt. 141 at 31; 239 at 3, 19. Accordingly, separable and numerous legal issues were decided by the district court that would not be addressed on remand. Contrary to the Motion, the district court ordered no "corrective" action. *See* Motion at 13. If Interior were to somehow act on the remand order, it would not be conducting a NEPA analysis to justify the Zinke Order, which has been permanently vacated.

b. The District Court Created Erroneous Precedent and Waste.

A district court order is considered final also when a remand "may result in a wasted proceeding" because the district court's order forces the agency to apply a potentially incorrect interpretation of governing law, *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990), or requires "adherence to rules" that appellants "continue to challenge," *Sierra Forest Legacy*, 646 F.3d at 1176. Here, Appellants challenge the district court's decisions practically enjoining federal coal leasing and creating new programmatic NEPA obligations prior to leasing. Beyond this case, Appellees have cited the district court's ruling as precedent in litigation efforts to even further expand NEPA beyond its breaking point.

Appellees' citation to *Gallatin Wildlife Association v. U.S. Forest Service* is inapposite. 743 Fed. App'x 753 (9th Cir. 2018). There, the district court directed the agency to "issue a supplemental EIS and conduct a review of five new issues," and "proceeded as if this case remains pending before it." *Id.* at 755-56 (internal quotations omitted). Here, the case below is concluded (other than claimed attorneys' fees), the district court has given no clear direction on remand to enable future federal coal leasing, and Interior need not to do anything on the defunct Zinke Order. Rather than remaining able to implement its duly promulgated regulations for federal coal leasing and conduct NEPA analyses for each lease, Interior now must contend with the district court's erroneous prohibitions. As a

result, Appellants will not "have every opportunity to provide input and, if necessary, seek judicial review" as Appellees contend. *See* Motion at 16. And regardless, a potentially erroneous rule on remand is not a prerequisite for finality; it suffices that the "relief sought [on appeal] could not be achieved" on remand. *Sierra Forest Legacy*, 646 F.3d at 1175.

c. Dismissal Will Practically Foreclose Appellate Review.

The Motion avers that Appellants "may obtain all the relief [they] seek[] on remand before the administrative agency" and may "obtain appellate review following remand." Motion at 2, 20. To the contrary, if Appellants cannot presently appeal the district court's decisions regarding the Zinke Order, review and relief before the agency and courts would be indefinitely foreclosed. That is because there will be no agency remand process on the defunct Zinke Order, and the errors in the district court's decisions will never be more ready for appellate review.

The Zinke Order was the only target of the complaints filed in this case. Dkt. 176, at ¶ 3 (Appellees' allegation that "[t]his case challenges Federal Defendants' decision to issue Secretarial Order 3348 (the 'Zinke Order'), issued on March 29, 2017 . . . ."). Interior explicitly revoked the Zinke Order before the district court did. Appellees have previously admitted that "vacatur of the Zinke Order is . . . sufficient to redress injury to Plaintiffs caused by Federal Defendants' NEPA

violation." Dkt. 230, at 28 n.9. Appellees nowhere specify "*when* Federal Defendants [will] revisit their analysis and render a decision," or *what* would be reviewable, so as to offer Appellants the "opportunity" foregone by dismissal of these appeals. Motion at 11 (emphasis added). *See also Coal. to Protect Puget Sound Habitat*, 843 Fed. App'x at 79 (distinguishing *Alsea* and *Pit River*, jurisdiction upheld because "[t]he district court's order finally resolved all claims and did not require the agency to take any action at all").

Appellees misrepresent that the government is "revisit[ing] their analysis" and has "begun the remand process." Motion at 1, 11. Similarly, Appellees misconstrue the government's statement that "the coal leasing program is under review with the opportunity for notice and comment." Motion at 11 (citing Dkt. 220 at 10). Though Interior commenced a new programmatic review of the federal coal leasing program in August 2021[7]—after the Haaland Order vacated the Zinke Order—that review does not "revisit" the Zinke Order or its NEPA analysis. In fact, Interior began the current programmatic review process *nearly one year prior* to the district court's final order and judgment.

Interior has indicated that it will not be "revisiting" the vacated Zinke Order and its associated NEPA review. In the same filing Appellees cite, the government

[7] Notice of Intent to Conduct a Review of the Federal Coal Leasing Program and to Seek Public Comment, 86 Fed. Reg. 46873 (Aug. 20, 2021), 86 Fed. Reg. 52174 (Sept. 20, 2021).

stated that "[a]s a result of the Haaland Order, BLM [Bureau of Land Management] is no longer subject to the Zinke Order's instruction to expedite the consideration of coal lease applications. Instead, BLM is reviewing the federal coal program and recently solicited public comments for BLM's consideration concerning the scope and content of its review." Dkt. 220 at 8. The Haaland order and the initiation of a separate programmatic review make clear that the government is not conducting a NEPA review to justify the Zinke Order's rescission of the Jewell Order, and that it does not intend to. Notwithstanding Appellees' speculation about programmatic reviews Interior may undertake going forward, or any policy outcomes of such reviews, they fail to afford Appellants the ability to obtain relief related to the district court's decisions in this litigation, which only challenges the Zinke Order.

C. Alternatively, the District Court Ordered an Appealable Injunction.

If this Court were to find the district court's decisions not final under 28 U.S.C. § 1291, this Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court effectively enjoined BLM from leasing federal coal. The latter provides jurisdiction over, among other things, "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1). This Court has observed that "a line of cases beginning with *Carson v. American Brands, Inc*., [450 U.S. 79 (1981)], . . .

permit[s] appellate jurisdiction over orders that have the 'practical effect' of granting, denying, or modifying injunctive relief." *Plata v. Davis*, 329 F.3d 1101, 1106 (9th Cir. 2003). Such a district court "ruling must (1) have the practical effect of entering an injunction, (2) have serious, perhaps irreparable, consequences, and (3) be such that an immediate appeal is the only effective way to challenge it." *Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 137 F.3d 1420, 1422 n.2 (9th Cir. 1998).

"Injunction" is defined as "a writ or order requiring a person to refrain from a particular act." Black's Law Dictionary, 2nd Ed.[8] The district court did not merely "remand" the Zinke Order and reinstate the Jewell Order's *discretionary* NEPA review and leasing pause. Rather, the district court mandated that Interior refrain from future federal coal leasing until it completes a "sufficient" NEPA analysis of its longstanding federal coal leasing program. Indeed, the district court expressly stated that "[t]he Court will require sufficient NEPA analysis before BLM resumes the Coal Leasing Program . . . ." Dkt. 239 at 17. And while the district court nominally disavowed "resumption of the PEIS ordered by Secretary Jewell," its very next sentence and the rest of its decision require exactly that. *Id.* At a minimum, this shows that the district court modified the Jewell Order by purporting to reinstate only part of it (*i.e.*, its discretionary pause but not its

[8] *See* https://thelawdictionary.org/injunction/.

discretionary PEIS upon which its pause wholly relied). This is exactly the type of court order that has the "practical effect" of preventing Interior from acting. Precluding Interior from exercising a core function encompassing federally-owned lands and billions of tons of coal nationwide is a "serious consequence" too.

D. These Appeals Are Timely.

For comprehensiveness, Appellants appealed both summary judgment orders and judgments issued by the district court during the litigation below. Appellees separately seek partial dismissal of the appeal of the first judgment for untimeliness. That argument, too, is unavailing. More importantly, it is immaterial to the jurisdictional and merits issues properly before this Court.

The district court's April 19, 2019 order was jurisdictional in nature. Dkt. 141. The district court (incorrectly) ruled that Appellees had demonstrated standing, ripeness, and agency action that was final and triggered NEPA obligations. *Id.* at 31. These jurisdictional defects continue to pervade the district court's second order and judgment, which Appellees do not dispute was timely appealed. Dkt. 247. Appellants can raise subject matter jurisdiction at *any* time in litigation. *Kontrick v. Ryan*, 540 U.S. 443, 455–56 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance."); *Herklotz v. Parkinson*, 848 F.3d 894, 897 (9th Cir. 2017) ("challenges to subject matter jurisdiction may

be raised at any point, including for the first time on appeal"). Thus, whether the appeals of the first order and judgment are deemed timely is irrelevant, because they ruled on jurisdictional issues that are never time-barred. That is, the district court in 2022 could not find that the Zinke Order violated NEPA because the district court never had subject matter jurisdiction over the Zinke Order.

Moreover, Appellees' Motion contravenes their own conduct in this case. This is not a case where parties waited too long to file their appeals. Rather, no reasonable party would have filed an appeal with this Court after the district court's first judgment, in a posture where (1) further district court litigation was expected and communicated, and (2) the completed NEPA review and judgment mooted any appellate relief beyond an advisory opinion.

Appellees and the Appellee States filed two lawsuits in 2017 in the district court. After the district court first granted summary judgment for Appellees on April 19, 2019, finding that it had subject matter jurisdiction and the government had to prepare a NEPA review for the Zinke Order, more than another year passed before the government completed its NEPA review and the parties concluded remedy briefing. On May 22, 2020, the district court denied Appellees further relief beyond the already-completed NEPA review. Dkt. 170 at 24. In so doing, the district court effectively mooted any meaningful appellate relief for Appellants or the government. The district court entered judgment that same day. Dkt. 171.

The district court's May 22, 2020 order additionally invited Appellees to file a new or supplemental complaint to challenge the Zinke Order's NEPA review. *E.g.*, Dkt. 170 at 21, 24. Less than 60 days later, Appellees filed "supplemental complaints" *in the same litigation*. Before doing so, counsel for Appellees advised counsel for the government and Appellants, who took no position. Dkt. 173 at 3. To preserve their favored forum, Appellees argued that:

> This case is still before the Court as the deadline to file appeals has not yet run and, even after it does, this Court continues to have jurisdiction after issuing judgment on the merits for the purposes of addressing attorneys' fees. . . . Thus, Plaintiffs are not seeking to reopen a stale, unrelated matter from years ago but an action that is still active. . . . In the interest of complete adjudication of this active controversy and judicial economy, supplementation is appropriate.

Dkt. 174 at 15-16. Three days later, the district court formally accepted the supplemental complaints. Dkt. 175. Had any appeals of the first judgment been filed a day earlier, they likely would have been dismissed rather than cluttering this Court's docket for years. No timeliness issue exists here.

CONCLUSION

For the foregoing reasons, the Court should refer the Motion to Dismiss to the merits panel when assigned, or alternatively the Court should deny the Motion.

Dated: February 17, 2023

Respectfully submitted,

AUSTIN KNUDSEN
Montana Attorney General

Christian B. Corrigan
Solicitor General

/s/ *Kathleen L. Smithgall*
KATHLEEN L. SMITHGALL
Deputy Solicitor General
Montana Department of Justice
P.O. Box 201401
Helena, MT 59620-1401
406-444-2026
kathleen.smithgall@mt.gov

Attorney for Appellant
State of Montana

/s/ *Travis Jordan*
TRAVIS JORDAN
Senior Assistant Attorney General
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-7895
travis.jordan@wyo.gov

Attorney for Appellant
State of Wyoming

/s/ *James M. Auslander*
Peter J. Schaumberg
James M. Auslander
BEVERIDGE & DIAMOND, P.C.
1900 N St., N.W., Suite 100
Washington, DC 20036
Phone: (202) 789-6009
pschaumberg@bdlaw.com
jauslander@bdlaw.com
Attorneys for Appellant
National Mining Association

CERTIFICATE OF COMPLIANCE

This document complies with Fed. R. App. P. 27(d)(2)(B) and 9th Cir. R. 27-1 because this response does not exceed 20 pages, excluding items listed at Fed. R. Civ. P. 27(a)(2)(B) and 32(f). This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point, Times New Roman font.