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)

APPELLANTS' JOINT REPLY BRIEF

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INTRODUCTION

At bottom, this contrived case does not involve a "moratorium" or National Environmental Policy Act ("NEPA") compliance. Even a cursory read of Secretarial Order 3338 ("Jewell Order")—the genesis of this litigation and the order that the district court purported to "reinstate"—dispels this fiction upon which Plaintiffs' complaints wholly rely. Plaintiffs' real aim was to conscript the district court into using NEPA, not as the procedural safeguard it is, but as a tool to impermissibly enjoin federal coal leasing through judicial policymaking. And the district court inexplicably obliged this gambit. This Court should reverse.

The *only* "action" Interior took here was to begin and end a "*Discretionary* Programmatic Environmental Impact Statement" ("PEIS") and accompanying partial leasing pause *only* "during that review." 3-ER-535, 542 (emphasis added). Yet Plaintiffs' more than 140 pages of appellate briefing omit the central fact that their claims stem from the Jewell Order's *wholly voluntary* PEIS. Nor do Plaintiffs grapple with the Jewell Order's plain terms, including the Jewell Order's efficacy only "until its provisions are amended, superseded, or revoked,

whichever occurs first"—which Secretarial Order 3348 ("Zinke Order") did. 3-ER-544.

Plaintiffs do not contend that Interior, absent the Jewell Order, had an independent programmatic NEPA obligation to continue administering its longstanding federal coal leasing program. Nor can they, as the D.C. Circuit already ruled that no Interior action to date, including the Jewell and Zinke Orders, creates such a NEPA obligation. *W. Org. of Res. Councils v. Zinke ("WORC")*, 892 F.3d 1234, 1238 (D.C. Cir. 2018). Plaintiffs also do not contend that Interior must pause federal coal leasing while preparing a new or updated PEIS to evaluate potential policy reforms. Again, nor can they, given Interior's contrary regulations. 43 C.F.R. § 46.160.[1] Plaintiffs also cannot deny that Interior is now undertaking a programmatic review of federal coal leasing under the presently effective Secretarial Order 3398 ("Haaland Order"), and that

[1] "During the preparation of a program or plan NEPA document, the Responsible Official may undertake any major Federal action in accordance with 40 CFR 1506.1 when that action is within the scope of, and analyzed in, an existing NEPA document supporting the current plan or program, so long as there is adequate NEPA documentation to support the individual action." *Id.*

Interior must conduct NEPA review for any future proposed federal coal lease before its issuance.

Instead, Plaintiffs posit that Interior's mere initiation of the Jewell Order's PEIS and pause transformed them from *voluntary* to *mandatory*. Plaintiffs cite no authority for this novel view and have no answer to contrary case law. *See, e.g.*, Dkt. 25-1, Appellants' Joint Opening Br. ("AJO.Br.") 38-39. Instead, Plaintiffs plainly mischaracterize the Jewell Order and its full rescission by the Zinke Order, and flail at perpetuating NEPA generalisms inapplicable here. They point to no live controversy, no final agency action, and no concrete harm they have suffered. They cite no other Secretarial Order ever found justiciable in a court. They also fail to square the disconnect between the Jewell Order's voluntary PEIS and pause—which could have ended even without the Zinke Order—and the district court's remedy compelling the same scope of NEPA review and indefinitely prohibiting new coal leasing.

Plaintiffs abandon their prior motion to dismiss this entire (consolidated) appeal, which the Court's motions panel denied. Yet Plaintiffs recycle their timeliness argument to evade appellate review of the jurisdictional defects in their claims, including mootness and lack of

final agency action, standing, and ripeness. This Court can, and should, grant this appeal on any of these threshold grounds that are always subject to appellate review. Plaintiffs also supplemented their complaints and extended *this* litigation within sixty days of the district court's first judgment after Interior had completed its NEPA review on remand, thereby defeating any "judicial economy" argument for a futile interlocutory appeal before this appeal.

The Zinke Order was not unique. Plaintiffs do not dispute that agencies routinely abandon unfinished NEPA reviews or policy proposals based on other policies or priorities. *See* AJO.Br.3-4. The administrative system would grind to a halt if an agency's mere contemplation of such policies or start of an exploratory programmatic NEPA review were to create new legal obligations to finish NEPA or suspend active regulatory programs. Indeed, policy then could be made *de facto* under the guise of doing NEPA review indefinitely. Reversal of the district court is necessary not only to preserve Interior's statutory and regulatory coal leasing authority, but also to deter abuse of NEPA as a vehicle to impermissibly challenge other longstanding federal agency programs that Plaintiffs or other litigants may dislike. Plaintiffs offer no response.

NEPA provides no valid avenue to enjoin all future federal coal leasing under longstanding regulations. The legislative and executive branches are the proper audiences for federal policy advocacy, and Plaintiffs remain free to judicially challenge NEPA compliance for issuance of any future federal coal leases. This Court should reverse either for lack of subject matter jurisdiction, lack of a NEPA violation, or remedy overreach.

ARGUMENT

I. This Appeal Is Timely.

Plaintiff Groups no longer move to dismiss this appeal.[2] Yet, now joined by Plaintiff States, they again seek to artificially truncate on timeliness grounds this Court's review of the district court's rulings in this continuous multi-year litigation.[3] Dkt. 39, Response Br. of Plaintiff Groups ("Pls.Groups.Br.") 31-32; Dkt. 37, Answering Br. of Plaintiff States ("Pls.States.Br.") 20-24. For the reasons discussed below, and in briefing on Plaintiff Groups' prior motion to dismiss, Intervenors' appeal

[2] This brief refers to the Plaintiff-Appellee organizations and Northern Cheyenne Tribe as "Plaintiff Groups."

[3] This brief refers to the Plaintiff-Appellee States as "Plaintiff States."

of the district court's April 19, 2019 and May 22, 2020 orders is timely.[4] That is because (1) those orders involved jurisdictional issues always subject to appellate review, and (2) neither order was final.

First, this Court "has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Chapman v. Pier 1 Imps. (U.S.), Inc.*, 631 F.3d 939, 954 (9th Cir. 2011) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, (1986)). And federal appellate courts have appellate jurisdiction to review and correct jurisdictional errors. *Cal. ex rel. Sacramento Metro. Air Qual. Mgmt. Dist. v. United States*, 215 F.3d 1005, 1009 (9th Cir. 2000) ("If the district court lacked jurisdiction, we have jurisdiction on appeal to correct the jurisdictional error, but not to entertain the merits of the dispute."); *see also 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"). The district court's April 19, 2019 order made several incorrect jurisdictional rulings despite Defendants' showings otherwise, including on standing, ripeness, and the

[4] *See* Dkt. 16, Joint Resp. to Mot. to Dismiss Appeals for Lack of Jurisdiction, at 18-20.

existence of final agency action that triggered NEPA obligations.[5] 1-ER-58. These jurisdictional defects likewise pervade the district court's 2022 summary judgment order and judgment. That is, because the district court never had subject matter jurisdiction over the Zinke Order to begin with, its 2022 order improperly found that the Zinke Order violated NEPA.[6]

Second, to be final, a judgment must "end[] the litigation on the merits and *leave[] nothing for the court to do* but execute the judgment." *Riley v. Kennedy*, 553 U.S. 406, 419 (2008) (emphasis added) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). When a court's dismissal signals that "there is still some work for the court to do before

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[5] Plaintiff States' suggestion that the absence of final agency action is not jurisdictional conflicts with the Administrative Procedure Act and their own cited case law. *See* Pls.States.Br.25; 5 U.S.C. § 704 ("Agency action made reviewable by statute and *final* agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the *final* agency action.") (emphasis added); *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.* ("*EDC*"), 36 F.4th 850, 867 (9th Cir. 2022) ("jurisdiction" includes "final agency action").

[6] Plaintiff States' assertion that appellate review of the district court's earlier orders would prompt appeals of rulings "decades ago" is absurd—particularly as they concede this appeal is timely filed. *See* Pls.States.Br.17, 23.

the litigation is over"—such as by inviting plaintiffs to supplement their complaints—that order is non-final. *Attias v. CareFirst, Inc.*, 865 F.3d 620, 624 (D.C. Cir. 2017); *see, e.g.*, *Jung v. K. & D. Mining Co.*, 356 U.S. 335, 336-37 (1958) (denying all relief but granting leave to amend). Plaintiffs' "argument incorrectly assumes that every judgment labeled 'Rule 58' is necessarily final for the purposes of Fed. R.App. P. 4(a)(1)." *Certain Underwriters at Lloyd's v. Milberg LLP*, No. 08-cv-7522-LAP, 2010 WL 1838886, at *3 (S.D.N.Y. May 4, 2010) (citing *Riley*, 553 U.S. at 419 ("label used by the District Court"—even Rule 58 judgment—"cannot control the order's appealability") (quoting *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.7 (1990)).

The district court's May 22, 2020 order invited Plaintiffs to supplement their complaints against the Zinke Order. *See* 2-ER-262–65. Plaintiffs accepted the district court's invitation, filing their Fed. R. Civ. P. 15(d) motion to supplement their complaints just before the sixtieth day after that order. This was no accident. Plaintiffs advised the district court that their supplemental complaints were a *continuation* of the existing cases and they challenged only the Zinke Order. Dist. Ct. Dkt. 174 at 15-16 ("This case is still before the Court as the deadline to file

appeals has not yet run…. 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.") (emphasis added, citation omitted); *see also* 2-ER-168 (Plaintiff Groups "file this supplemental complaint as a continuation of their challenge to [the 2017 Zinke Order]."). Plaintiffs' *ad hoc* suggestion that they "initiated a separate proceeding—the equivalent of a new lawsuit" is revisionist history. Pls.States.Br.17. And if, as Plaintiffs now claim, Rule 15(d) motions to supplement merely "'keep[] [a] proceeding before the same district judge who had presided over earlier phases' of the litigation," *see* Pls.States.Br.22 (quoting *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988)), it follows that "there [wa]s still some work for the court to do before the litigation [wa]s over." *See Attias*, 865 F.3d at 624.

Thus, this Court may at a minimum review the district court's April 19, 2019 and May 22, 2020 orders to determine "its own jurisdiction" and "that of the [district] court[]." *Chapman*, 631 F.3d at 954. Those orders are also non-final and merge into the district court's October 11, 2022

final judgment, *see PLS.COM, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 841 n.8 (9th Cir. 2022), so they are not immune from review.

II. Plaintiffs' Complaints Are Not Justiciable.

A. The Zinke Order Is Moot.

Plaintiffs' complaints challenged *only* the Zinke Order. AJO.Br.27. But the Zinke Order is now a relic. The Haaland Order unequivocally vacated the Zinke Order and resumed a programmatic review of potential policy reforms. AJO.Br.27-28. The Zinke Order, along with its Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"), are thus defunct, and remanding for another programmatic review of the Zinke Order is pointless. What is more, Interior has issued *zero* federal coal leases since the Haaland Order, and Plaintiffs do not dispute that they may challenge any such future lease, including under NEPA, if and when it is issued. This is textbook and dispositive mootness.[7] Plaintiffs also ignore Intervenors' cited authority further supporting mootness. AJO.Br.27-34.

[7] Plaintiffs also urge that Presidential Executive Order 13990 underlying the Zinke Order is of no moment because it "has since been rescinded"—but they somehow fail to appreciate the same consequences for the similarly rescinded Zinke Order itself. Pls.States.Br.55.

Plaintiffs' retort that Interior has not ordered a moratorium on all federal coal leasing does not defeat mootness. Pls.States.Br.43; Pls.Groups.Br.26-30. Plaintiffs fail to support their assumption that rescinding the rescission of the Jewell Order necessarily revives the Jewell Order.[8] More importantly, even the Jewell Order did not impose a standalone moratorium on federal coal leasing. The Jewell Order's PEIS and pause were coexistent, wholly voluntary, and terminable even without the Zinke Order. Indeed, Plaintiffs' actual disagreement is with the terms of the present Haaland Order, which Plaintiffs have not challenged.[9] Plaintiffs' lingering desire for an indefinite stoppage of

[8] Plaintiffs cite cases on the effect of vacatur involving *rules*, and none involving a challenge to a Secretarial Order. For example, Plaintiff States misleadingly insert "[action]" instead of "rule" in misquoting *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). Pls.States.Br.57.

[9] Plaintiff States misrepresent that Interior conceded its own vacatur of the Zinke Order was only "partial"; they cite only the *district court's* conclusion, which was erroneous. Pls.States.Br.13, 43 (citing 1-ER-15).

federal coal leasing cannot save their challenge to the Zinke Order—the *only* thing they challenged—from mootness.[10]

Also unavailing is Plaintiffs' new argument on appeal about the "voluntary cessation" exception to mootness. Pls.States.Br.18, 44-45, 58; Pls.Groups.Br.30 n.4. Again, their depiction of the "challenged conduct" as "the moratorium rescission" is a false depiction of the Jewell and Zinke Orders. Pls.States.Br.17-18. Plaintiffs also fail to show another Zinke Order is likely to recur. And Plaintiffs ignore the narrow criteria for this exception, including that "defendant's voluntary cessation must have arisen because of the litigation," and where defendant has "expressly announced its intention" that it will return to prior conduct alleged to be illegal in the mooted litigation. *See, e.g.*, *Pub. Utilities Comm'n of State of Cal. v. FERC*, 100 F.3d 1451, 1460 (9th Cir. 1996); *Barilla v. Ervin*, 886 F.2d 1514, 1521 (9th Cir. 1989), *overruled on other grounds, Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996). Courts also

[10] This case bears no semblance to *350 Montana v. Haaland*, where a challenge to a 2018 NEPA review for a specific coal mine expansion approval was not mooted by a 2020 NEPA review that approved the same action and "expressly incorporated" the 2018 review. Pls.States.Br.44, 51-52 (citing 50 F.4th 1254, 1264 (9th Cir. 2022)). Nor is the colossal and unneeded scope of the additional programmatic NEPA review Plaintiffs seek here akin to NEPA review of a single mine project.

"presume the government is acting in good faith" and provide "more solicitude" than to private parties. *Bd. of Trs. of Glazing Health and Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (citation omitted). And to the extent that Plaintiffs' real objection is to potential issuance of federal coal leases under the existing program, that conduct has nowhere been challenged or adjudicated as illegal.

Accordingly, this case is moot, and this Court should reverse the district court on that threshold ground alone.

B. Plaintiffs Challenge No Final Agency Action.

The Zinke Order did not meet the well-established test for a reviewable final agency action. *See* AJO.Br.33-39. It culminated nothing—like the Jewell Order, it did not even propose to alter the governing federal coal leasing regulations, and it did not authorize any federal coal lease or production. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Nor did it create or determine any legal rights or consequences. *See id.* Interior simply began and ended an inchoate and exploratory policymaking exercise, as federal agencies routinely do. Interior's mere embarkation on a voluntary PEIS and accompanying temporary pause does not render its abandonment thereof justiciable.

See Ctr. for Biological Diversity v. Zinke, 260 F. Supp. 3d 11, 24 (D.D.C. 2017) ("The bottom line is this: [plaintiffs] identified no authority suggesting that agencies have either a general, freestanding obligation to finish any and all tasks that they undertake, or a specific obligation to complete a review of their NEPA procedures and decide if revisions are warranted, and this Court is not aware of any.").

Plaintiffs respond only with misdirection and straw men. They proffer ad nauseam the fiction of a distinct nonexistent "decision" to rescind a nonexistent standalone moratorium—when in fact Interior rescinded a voluntary PEIS and by necessary implication the voluntary pause reliant on that PEIS. They also argue generally that programmatic actions can be reviewable final agency actions. *E.g.*, Pls.States.Br.31-33. Intervenors never argued otherwise. Yet here, and consistent with *WORC*'s holding, Interior has no duty to undertake further programmatic review of its federal coal leasing program until it proposes amendments to the existing program. 892 F.3d at 1237, 1243. Neither the Jewell Order nor the Zinke Order did so. Plaintiffs fail to distinguish this case from those "where *no* identifiable agency actions existed." Pls.States.Br.32; *see also* Pls.Groups.Br.35.

Plaintiffs claim that this Court's decision in *EDC* is "materially indistinguishable" or "nearly identical" to this case, but it actually *undercuts* the existence of any final agency action here. *See* Pls.States.Br.28, 31; Pls.Groups.Br.38. In *EDC*, Interior was *obligated* to prepare a programmatic NEPA analysis and adopt a "temporary moratorium" in the interim pursuant to a settlement agreement of prior litigation, which challenged *approvals* of novel stimulation treatments for offshore oil and gas wells that had undergone *no* NEPA review. 36 F.4th at 866. By contrast, Interior here faced no legal obligations; it just unilaterally and voluntarily began and ended a PEIS and pause. And Interior *did* prepare a PEIS for its longstanding federal coal leasing program, which is undisputed and unchallenged here. Plaintiffs cite *no* case, including *EDC*, requiring supplementation or replacement of an existing PEIS. Nor are Plaintiffs here challenging any actual leases or permits as in *EDC*, and individual federal coal leasing decisions would still require NEPA review.

While *EDC* observed that "the NEPA review process concludes in one of two ways" (an EA/FONSI or an Environmental Impact Statement/Record of Decision), *id.* at 868, it also may end in a third way—

abandonment of the proposed action or NEPA analysis—where no action or NEPA process is compelled in the first place. Nothing compelled the Jewell Order PEIS, and Interior completed its EA for the Zinke Order only to indulge the district court's erroneous 2019 order in lieu of an immediate appeal. Unlike in *EDC*, the Jewell Order PEIS and the Zinke Order EA indeed *are* "bare NEPA analysis document[s] divorced from any agency action." *Id.* at 887. Because Plaintiffs challenge no final agency action, this Court should reverse.

C. Plaintiffs Have Suffered No Injury in Fact for Standing or Ripeness.

Plaintiffs also fail to demonstrate constitutional standing and ripeness to challenge the Zinke Order. AJO.Br.39-43. The Zinke Order visited no concrete injury upon Plaintiffs—indeed, it made no federal coal regulatory or leasing decisions. Complaints about future leasing decisions are speculative and premature. This is borne out by actual "real world effects," as Plaintiffs' feared flood of new federal coal leases has not materialized since the Zinke Order, including *zero* leases issued since early 2021. *See* Pls.States.Br.37. Indeed, Plaintiffs' only claimed "injury" is their inability to secure their preferred federal coal leasing policy—no

leasing—from the branches of government empowered to make such policy.

Plaintiffs maintain that simply alleging a NEPA "procedural" injury suffices for standing and ripeness. That erroneous view would eviscerate those requirements, allowing any plaintiff to challenge any nationwide program based only on a speculative concern that it may be implemented somewhere. It also ignores binding case law that an alleged NEPA procedural violation alone is insufficient, particularly as NEPA compels no substantive outcomes. *E.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998). "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. A claimed procedural violation still must "impair a separate concrete interest." *Id.* at 501 (Kennedy, J., concurring) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992)); *Lujan*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits

him than it does the public at large—does not state an Article III case or controversy."). Plaintiffs' allegations of climate and other impacts of "federal coal leasing and mining nationwide," particularly where Interior has already completed a PEIS for its program, falls squarely within this prohibition. *See, e.g.*, Pls.Groups.Br.53; *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, No. 22-cv-01716-TSC, 2023 WL 7182041, at *4-5 (D.D.C. Nov. 1, 2023) (finding plaintiffs failed to allege a cognizable injury in fact from thousands of individual oil and gas approvals and dismissing the case); *id.* at *3 ("But allowing plaintiffs to aggregate agency actions and assert a geographic nexus with the general areas those actions affect would jeopardize the fundamental principle that '[f]ederal courts do not exercise general legal oversight of the ... Executive Branch[ ].'") (internal quotation omitted).

Plaintiffs' retort that NEPA is not limited to site-specific decisions is yet another straw man. Pls.States.Br.29-30. What Plaintiffs cannot do is misuse NEPA as a means to compel reassessment or amendment of the entire existing federal coal leasing regulatory program that has *already* undergone programmatic NEPA review. As described above, Plaintiffs cannot rely on *EDC* to establish that an alleged NEPA

procedural violation automatically confers standing or ripeness. Unlike in *EDC*, Interior prepared a PEIS, the challenged Zinke Order approved no leases or permits, and NEPA compliance is undisputedly necessary and challengeable for each federal coal leasing decision.

D. Federal Coal Leasing Policy Is the Province of Congress and Interior, Not the District Court.

Intervenors also demonstrated that Plaintiffs' styled NEPA claims actually are a collateral and impermissible programmatic challenge to Interior's federal coal leasing regime in existence since 1979. AJO.Br.43-46. Like the district court, Plaintiffs offer next to no response to this argument or supporting authority. Though binding case law "precludes 'broad programmatic attack[s],' whether couched as a challenge to an agency's action or 'failure to act,'" Plaintiffs here have done exactly that, and based solely on Interior initiating preliminary consideration of possible policy reforms. *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1011 (9th Cir. 2021).

Plaintiffs' posturing that they only seek "compliance with NEPA" is misleading semantics. *See* Pls.States.Br.58; Pls.Groups.Br.50. Again, their central presumption that the Zinke Order's end to the Jewell Order's voluntary PEIS—the condition precedent for the Jewell Order's

temporary pause—triggered its own NEPA compliance is facially absurd and legally baseless. They continue to fundamentally misconstrue the Zinke Order as "concrete action" that "ended the coal-leasing moratorium" and "will spawn expected adverse environmental consequences." Pls.Groups.Br.49. Moreover, Plaintiffs' briefs again underscore their preoccupation with a "policy of no leasing" and the very same PEIS as in the Jewell Order. *E.g.*, Pls.Groups.Br.11, 26; Pls.States.Br.10-11, 53. That is, Plaintiffs desire to eviscerate federal coal leasing via an indefinite court-ordered "moratorium" until Interior ultimately adopts their preferred no leasing policy via wholesale regulatory changes developed through a new PEIS. This Court should not entertain such blatant judicial policy-making.

III. The Zinke Order Did Not Itself Trigger NEPA Review.

In *WORC*, the D.C. Circuit rejected NEPA claims functionally identical to Plaintiffs' NEPA claims here. AJO.Br.47-54. The plaintiffs in *WORC*, like Plaintiffs here, claimed that Interior could not legally administer its existing federal coal leasing program without undertaking more programmatic NEPA review to update or replace the existing PEIS supporting those regulations. In trying to distinguish *WORC* (and other

adverse case law), Plaintiffs (like the district court) cling solely to the fact that Interior's Secretarial Orders voluntarily began and then terminated a new PEIS and attendant temporary leasing pause. But that in fact *did not* "provide[] the agency action that proved missing from *WORC*." *See* 1-ER-45. Interior did *not* create or violate any legal obligation to conduct a NEPA review or to pause processing of coal leasing applications simply by starting and ending a voluntary NEPA review and pause. The absence of any such legal obligation dooms Plaintiffs' claims.

NEPA requires federal agencies to prepare an EIS for "every recommendation or report on *proposals* for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (emphasis added); 40 C.F.R.

§§ 1508.18 (defining "major [f]ederal action").[11] That requirement only applies to proposed agency actions that are (1) "federal," (2) "major," and (3) "have a significant environmental impact." *Glickman*, 136 F.3d at 668. But the Zinke Order merely ended the Jewell Order's *discretionary*

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[11] This Court should reject Plaintiff States' invitation to apply NEPA's recently amended definition of "major" actions. *See* Pls.States.Br.36 & n.12; *see also id.* at 5 (citing Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-46). An amendment to the definition of NEPA's scope does not avoid the "presumption against statutory retroactivity," *see Landgraf v. USI Film Prod.*, 511 U.S. 244, 270-71 (1994), simply by asserting that the change in the law only affected the agency's procedures. *See* Pls.States.Br.36 n.12 (quoting *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 291 (1969)). And the statutory amendments include no clear statement of congressional intent to apply the statute retroactively. *See* Pub. L. No. 118-5, § 321. So this Court should apply the statute in effect when Interior completed its NEPA analysis. *See Landgraf*, 511 U.S. at 270; Pls.Groups.Br.4 n.1 (same).

Even so, the recent statutory changes do not help Plaintiffs. They do not render everything a federal agency does—like a secretarial order or cancellation of a voluntary PEIS—a major federal action for NEPA purposes. And the statute adds a definition of "proposal" clarifying that Interior's mere contemplation of potential regulatory reforms, or cessation of them, does not trigger NEPA. 42 U.S.C. § 4336e(10) ("The term 'proposal' means a proposed action at a stage when an agency has a goal, is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and can meaningfully evaluate its effects."). The statute also clarifies that an "agency is not required to prepare an environmental document with respect to a proposed agency action if- (1) the proposed agency action is not a final agency action within the meaning of such term in chapter 5 of title 5, United States Code[.]" 42 U.S.C. § 4336(a); *see supra* Argument Section II.B.

PEIS (and associated temporary leasing pause) and resumed "processing" coal leasing applications under existing regulations. *See* AJO.Br.47 (citing 40 C.F.R. §§ 1508.18(a), (b)(1)–(4)); 3-ER 501-02. Interior *did not propose any changes* to the federal coal leasing program before, during, or after the Jewell Order.[12] And if a federal program's status quo doesn't change, "[a]n EIS is not necessary." *Glickman*, 136 F.3d at 668.

Plaintiffs argue (and the district court agreed) that the Zinke Order was a "major [f]ederal action" because it lifted the Jewell Order's pause "without any environmental review." 1-ER-49. The Jewell Order began a "comprehensive review of the Federal coal program" but expressly did "*not propos[e] any regulatory action*." 3-ER-541, -544 (emphasis added). And its leasing pause was a complement to and reliant upon Interior's discretionary review of the federal coal program. *See* 3-ER-542–43 (pausing issuance of most new federal coal leases "until the completion of the PEIS"). After Interior reviewed the preliminary steps of the

[12] Because Interior never *proposed* any changes—*at all*—to the federal coal leasing program, but only halted the Jewell Order's discretionary PEIS and associated temporary pause, the Zinke Order falls short of even a "'relatively low' threshold standard for a NEPA triggering event." *See* Pls.States.Br.36-37 (quoting 1-ER-50).

discretionary PEIS—including the January 2017 scoping report—it determined that it was unnecessary to complete the PEIS to consider possible changes to its federal coal leasing regulations. *See* 3-ER-513–14 ("[C]ompletion of the PEIS is not necessary to implement any reforms that [Interior] may determine to be appropriate"). So Interior issued the Zinke Order, halting the discretionary PEIS, and with it, the temporary leasing pause. Without proposed regulatory reforms to the federal coal leasing program, Interior had no independent duty to complete the programmatic review of the existing coal leasing program or to continue the associated leasing pause in perpetuity. *See* Opening Br.48-54.

Plaintiffs' attempts to sidestep *WORC* and *Glickman* (and other case law) mirror the district court's failed attempts already rebutted by Intervenors. *See* Pls.States.Br.39-40; Pls.Groups.Br.55; AJO.Br.47-54. At the district court and on appeal, *WORC* unanimously rejected the plaintiffs' argument that Interior had to supplement the 1979 PEIS—even without a pending or proposed federal action creating a duty to do so—because scientific evidence of climate change had developed since 1979. 892 F.3d at 1236-37. Because the *WORC* plaintiffs "failed to identify any specific pending action, apart from the Program's continued

existence, that qualifies as a 'major Federal action' under NEPA," the D.C. Circuit held that it "lack[ed the] authority to compel the Secretary" to supplement the 1979 PEIS. *Id.* at 1237, 1243. The D.C. Circuit held the *WORC* litigation in abeyance specifically during the Jewell Order, and specifically after the Zinke Order the D.C. Circuit lifted its order and set a briefing schedule. 892 F.3d at 1240-41. So when it found no major federal action triggering NEPA review, the D.C. Circuit understood that conclusion was unaltered by the Jewell or Zinke Orders. *See id.*

Plaintiffs "action"/"inaction" dichotomy also fails. Pls.States.Br.39-40; Pls.Groups.Br.55. Without a legal duty to supplement (or complete) a PEIS, there is no "major federal action" that triggers any NEPA obligations. As in *WORC*, because Interior has no independent duty to periodically revisit its coal leasing program, and there is no current Interior proposal to do so, no legal trigger obligates Interior to complete the Jewell Order's discretionary PEIS (or to continue the associated temporary leasing pause). *See WORC*, 892 F.3d at 1237, 1243; *cf. Whitewater*, 5 F.4th at 1011 (impermissible challenge whether against alleged "agency's action or 'failure to act'"). Semantics aside, Plaintiffs'

real complaint is with Interior's "inaction"—i.e., Interior *not* completing the Jewell Order's PEIS and thus not continuing its attendant pause.

Similarly unavailing is Plaintiffs' (and the district court's) claim that the Zinke Order "changed the status quo" and was thus the major federal action missing in *WORC*. *See* Pls.States.Br.38-40; Pls.Groups.Br.55; 1-ER-45. Neither the Jewell Order nor the Zinke Order ever altered the existing legal or regulatory landscape of the federal coal leasing program, so they did not—indeed, *could not*—alter the relevant status quo. *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982) (enforceable agency action must "prescribe substantive rules" and "conform to certain procedural requirements") (internal citation omitted); *see also Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003) (same). Both the Jewell Order and Zinke Order *expressly* disclaim any legal effect. AJO.Br.39. That Interior Secretarial Orders commonly feature such disclaimers only reinforces the point that they do not alter the legal or regulatory landscape. *See* Pls.States.Br.34. And Plaintiffs fail to point to anything showing that Interior's Secretary can unilaterally amend existing regulations via Secretarial Order, nor have they cited any case holding that a Secretarial

Order triggers NEPA obligations. *See* Interior Departmental Manual, 12 DM 1 ("Secretary's Orders are limited to temporary delegations of authority, emergency directives, special assignments of functions, and initial policy and functional statements on the establishment of new units.").[13]

Nor does this Court's decision in *Lockyer* help Plaintiffs. *See* 1-ER-45–48; AJO.Br.51-52. *Lockyer* involved the repeal of the so-called "Roadless Rule," and its replacement with the "State Petitions Rule." *See* 575 F.3d at 1006-07. The Roadless Rule was adopted from a Final EIS issued in November 2000, promulgated under administrative rulemaking procedures, and implemented in early 2003. But the Jewell and Zinke Orders are not "rules," and thus do not require the programmatic NEPA

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https://www.doi.gov/sites/doi.gov/files/elips/documents/012-dm-1.pdf. By contrast, Plaintiffs mis-rely on *Biden v. Texas* involving "express congressional authorization" for enactment and rescission of a new agency program to return certain U.S. immigrants to Mexico pending completion of removal proceedings. 142 S. Ct. 2528, 2535 (2022). Also inapposite is their citation to *U.S. v. Hawkes*, 578 U.S. 594, 594-96 (2016), involving "jurisdictional determinations" that "definitively state whether the Clean Water Act applies to a property and bind the Corps and the Environmental Protection Agency for five years." *Arizona v. Biden*, 40 F.4th 375, 388-89 (6th Cir. 2022) (Secretarial memorandum not final agency action, observing "that it is difficult to see how any noncitizen—or any person at all—could invoke it to establish legal protection," and distinguishing *Biden v. Texas* and *U.S. v. Hawkes*).

review for rule adoption. *See* 5 U.S.C. § 551(4). Plaintiff States' partial statutory citation omits that any "rule" must come from "rule making," i.e., an "agency process for formulating, amending, or repealing a rule." *See id.* § 551(5); Pls.States.Br.35. And neither Plaintiffs nor the district court identifies any authority suggesting that an agency rule and a Secretarial Order trigger the same NEPA obligations.[14] Short answer: they do not.

Glickman also supports reversal here. AJO.Br.52-54. Like the regional forest management plan there, the Zinke Order is not a "major federal action" because it does not propose or implement *any* agency action, let alone "specific actions directly impacting the physical

[14] Each of the cases on which Plaintiffs rely involves either new or amended agency rules or agency individual permit decisions that grant or extend the legal rights and obligations of affected parties. *See* Pls.States.Br.40 (citing *Solar Energy Indus. Ass'n v. FERC*, 80 F.4th 956, 994 (9th Cir. 2023) ("FERC's overhaul of its longstanding PURPA regulations"—via Order 872—"change[d] the status quo.")); Pls.Groups.Br.52-53 (citing *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006) (lease extensions altered the status quo because the extensions were necessary to proceed with a geothermal development project)); Pls.Groups.Br.56 (citing *Cal. Wilderness Coal. v. U.S. DOE*, 631 F.3d 1072, 1011 (9th Cir. 2011) ("NIETCs … constitute[d] major Federal action" because "they create[d] new federal rights.")). No case holds that ending a voluntary NEPA review and concomitant leasing pause creates a NEPA obligation.

environment." *See Glickman*, 136 F.3d at 662-63, 670. Nor did the Zinke Order change the regulatory status quo. *See id.* at 668. Yet the unavoidable consequence of the district court's conclusion here is that once an agency undertakes a voluntary task—like the Jewell Order's discretionary PEIS and pause—it has a legal obligation to maintain and complete it. But that is not the law, and the district court and Plaintiffs cite no authority to suggest otherwise. *See* AJO.Br.53 (collecting cases).

Therefore, to reverse, this Court need not even reach the sufficiency of the Zinke Order's EA and FONSI, because the Zinke Order was not a "major federal action" that triggered NEPA in the first instance.

IV. Interior Satisfied Any NEPA Obligation for the Zinke Order.

The district court held that Interior's NEPA analysis of the Zinke Order "prove[d] arbitrary and capricious" because it disregarded the environmental effects of "re-starting the coal leasing program" using "a baseline of an indefinite moratorium," 1-ER-18, and failed to evaluate "the Zinke Order's effect on all then-pending lease applications, and other connected, cumulative, or similar actions," 1-ER-22. But as Intervenors have explained, Interior's NEPA analysis on remand was appropriately

tailored to the Zinke Order, and NEPA—even if it applied to the Zinke Order (it does not)—requires nothing more. AJO.Br.54-71.

Plaintiffs' arguments in response rest on the erroneous assumption that Interior's task in its NEPA review of the Zinke Order on remand was to re-create a federal coal leasing program from scratch, like it did in 1979, despite no proposal or obligation to do so. Plaintiffs re-make essentially this same argument using various NEPA-specific headings like "purpose and need," "baseline," "alternatives," and "scope." All similarly miss the mark.

NEPA's starting point is the purpose and need for the proposed action. *Wild Wilderness v. Allen*, 871 F.3d 719, 728-29 (9th Cir. 2017). The sole purpose and need of the NEPA review for the Zinke Order was to respond to the district court's 2022 ruling, which *refuted* any need to prepare a new or updated PEIS for the entire program. 1-ER-21; 3-ER-342. The Zinke Order's early ending of the Jewell Order's voluntary PEIS and temporary pause on normal consideration of coal lease applications was the proposed action. 3-ER-385. The EA explained that the need for the Zinke Order was driven also by congressional and executive branch

directives, including denial of funding to continue the Jewell Order's discretionary PEIS.[15] *See* 3-ER-335-36, 342, 380.

This falls comfortably within this Circuit's precedent of heavy deference to NEPA purpose and need statements. *High Sierra Hikers Ass'n v. DOI*, 848 F. Supp. 2d 1036, 1052 (N.D. Cal. 2012) (collecting cases). The district court did not impugn the EA's purpose and need; the district court simply ignored its salience to the NEPA analysis.

Given its reasonably articulated purpose and need, Interior also set a reasonable baseline for analyzing the Zinke Order's effects. Interior showed that its three-year timeframe to complete the Jewell Order PEIS underlying the temporary pause was the only estimate supported by the record. 3-ER-347; *see also* 3-ER-381, 3-ER-528. Thus, Interior's baseline relied on an accurate understanding of the status quo under the Jewell Order and was supported by "defensible reasoning." *See Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2016). Had Interior instead assumed a "baseline of an indefinite moratorium"—a baseline that never

[15] Plaintiff States' straw man that a "funding shortfall" does not excuse Interior from NEPA compliance misses the mark. *See* Pls.States.Br.56. The relevant point is Congress did not fund the *Jewell Order's voluntary PEIS*, which Plaintiffs argue *must* be replicated for the Zinke Order.

existed—*that* baseline *would* have been arbitrary and capricious. *See* 1-ER-18–19. And the Jewell Order's language—describing the "pause" on coal leasing as enabling PEIS recommendations to inform "future leasing decisions," *see* 3-ER-542—strongly conveyed that the pause in processing coal leasing application was temporary. Plaintiffs point to nothing in the Jewell Order even compelling completion of the voluntary PEIS, let alone over an indefinite time period.

The EA's record-supported baseline was reasonable, and so were the alternatives it considered. Plaintiffs complain that Interior "assumed" no "adoption of any reforms to federal leasing practices." Pls.States.Br.11-12; *see* Pls.Groups.Br.73-74 (demanding "alternatives that reflect a change in BLM leasing practices"). But NEPA requires no minimum number of alternatives beyond the proposed action and no-action alternative. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005). The agency's "stated goal … necessarily dictates the range of 'reasonable' alternatives." *City of Carmel-by-The-Sea v. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Consistent with the district court's 2019 order, the proposed action for NEPA review on remand was ending the Jewell Order's PEIS and concomitant pause

twenty-four months early. 2-ER-322. Interior also considered the no-action alternative of the Jewell Order ending as originally planned. 2-ER-347–49, 3-ER-347. Interior had no NEPA duty to speculate about supposed "alternatives" involving an indefinite leasing pause or endless permutations of its existing federal coal leasing regulations, as Interior might have voluntarily done under the Jewell Order PEIS which set out to "help determine whether and how the current system for developing Federal coal should be modernized." 3-ER-535; *see Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986). Such alternatives were unsubstantiated and unresponsive to the EA's purpose and need. For this Court to hold otherwise and equate the EA on remand with the Jewell Order PEIS would impermissibly convert the voluntary Jewell Order PEIS and pause into a mandatory PEIS and pause. And in any event, "other applications pending when the Zinke Order was issued" each remain subject to NEPA review before any lease is approved and issued.[16] *See* Pls.States.Br.12.

[16] Plaintiff Groups again misquote *EDC* to say "[ending the moratorium] without environmental review," when it says "allowing well stimulation treatments without environmental review." *See* Pls.Groups.Br.76-77; 36 F.4th 882. *EDC* thereby highlights that its specific challenged drilling approvals never received NEPA review, whereas federal coal leasing proceeds from an existing PEIS and future individual NEPA reviews.

Nor is Interior's "no action" alternative flawed, as Plaintiff Groups claim, because it assumed that Interior would not have adopted any policy "reforms." *See* Pls.Groups.Br.66-67. At the outset, any menu of possible reforms had only been "studied" preliminarily, and never were "deemed necessary" by Interior. *See* Pls.Groups.Br.66, 76. Even the 2017 "scoping report" prepared under Secretary Jewell recognized that the "various [possible] policy reform packages [it identified] had not been sufficiently developed or analyzed, either individually or in combination, to serve as valid alternatives in a NEPA analysis." 3-ER-377. And each of the other alternatives that Plaintiff States argue that Interior could have considered—like the "carbon budget alternative," the "no [new] leasing alternative, the "conditional moratorium rescission, and others, *see* Pls.States.Br.53—were considered but rejected because they were either based on the outcome of an incomplete PEIS or nonresponsive to the purpose and need of the proposed action. 3-ER-350; *see also* 3-ER-385–86; *Angoon*, 803 F.2d at 1021 ("When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved."). This Court should reject Plaintiffs' attempt to shoehorn their preferred policy alternatives for the entire

federal coal leasing program into reasonable "alternatives" to the Zinke Order in Interior's EA. *See, e.g.*, Pls.States.Br.53 n.24.

Finally, like the district court, Plaintiffs point to no gap in the scope of the EA.[17] NEPA only requires that the agency take a "'hard look' at the environmental consequences of its *proposed action*," evaluated under a "rule of reason." *E.g.*, *Blue Mountains Biodiversity*, 161 F.3d at 1211 (emphasis added); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 992-93 (9th Cir. 2004); *see also Kleppe*, 427 U.S. at 414 ("practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements"). Interior provided a reasoned explanation of the environmental effects attributable to the proposed action—ending the Jewell Order twenty-four months early, 2-ER-322—including the effects on greenhouse gas emissions, socioeconomic impacts, and water quality. 3-ER-351–70. *See, e.g.*, *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003) (no obligation to "analyze impacts for any particular length of time"); *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 944 (9th Cir. 2014) (courts need only consider whether the

[17] Plaintiffs distort reality by labeling the remand "rushed" or "hasty," as Interior took ten months to complete it and considered all public comments received. *See* Pls.States.Br.2, 18; Pls.Groups.Br.15-17.

agency "offered a reasonable justification for why it drew the line where it did").

Though careful not to say so out loud, Plaintiffs insist on the expansive scope of the Jewell Order's PEIS to fashion a wholly new federal coal leasing program, or to rescind the program altogether. The district court, at first, correctly refused to grant Plaintiffs' desired remedy. *See* 1-ER-21 ("reinstating the PEIS is not a potential remedy in this litigation"). But it ultimately relented, ordering Interior to complete "sufficient NEPA analysis before [it] resumes the Coal Leasing Program," including consideration of "other connected, cumulative, or similar actions." 1-ER-21–22. This directive, given the history of this matter, is indistinguishable from the scope of the Jewell Order PEIS.

V. The District Court Transformed the Voluntary Jewell Order into a Mandatory PEIS and Prohibitory Injunction.

The district court's remedy did not "reinstate" the Jewell Order. AJO.Br.71-76. Plaintiffs' contentions otherwise are specious. Prior to the Jewell Order, Interior faced no new PEIS or temporary leasing pause. Even after the Jewell Order, Interior faced a wholly voluntary PEIS and attendant leasing pause that could be "amended, superseded, or revoked" at any time. That is, the Jewell Order's temporary pause existed *only for*

its discretionary PEIS, *not* the other way around. The temporary pause was solely a means of enabling the primary end of the PEIS to explore new policy options. Once the voluntary PEIS ended, the associated pause necessarily ended as well. But following the district court's order, Interior now *must* prepare the equivalent of the Jewell Order PEIS and *cannot even consider* any lease application indefinitely—for "more than a decade" by Plaintiffs' account. *See* Pls.States.Br.39.

That new state of affairs with novel legal mandates on Interior plainly is not, and never has been, the "status quo." *See, e.g.*, Pls.States.Br.47, 56; Pls.Groups.Br.80. The district court had no legal basis to sever "[t]he coal leasing program moratorium established by the Jewell Order" from the Jewell Order's *condition precedent* for any leasing pause—its "Discretionary [PEIS]." 1-ER-24; 3-ER-535. Indeed, the district court had already found in its 2019 order that "the Jewell Order imposed a moratorium on new coal leasing *until completion of the PEIS*." 1-ER-30 (emphasis added). Yet its 2022 order then erroneously moved the goalposts to suggest "[t]he 'status quo' that existed before the Zinke Order was a moratorium on coal leasing." 1-ER-19. Because the district court cannot compel completion of the voluntary Jewell Order PEIS, it

likewise cannot compel a leasing pause. In doing so anyway, the district court *rewrote* the Jewell Order. Even Plaintiffs argue that "the effect of vacatur is to reinstate the agency action previously in force"—not something novel. Pls.States.Br.20.

And the district court fashioned a new and indefinite prohibitory injunction against Interior's consideration of federal coal leasing applications, without even undertaking the Supreme Court's requisite analysis for such relief. *See* AJO.Br.76-77; *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). Indeed, the district court expressly dodged that inquiry, contrary to purported "precedent." 1-ER-23–24; *see* AJO.Br.76 n.12.[18] Thus, at a minimum, the district court's draconian and improper "moratorium" remedy warrants reversal.

CONCLUSION

For the reasons stated in Appellants' opening brief and above, this Court should reverse the district court's grants of summary judgment to

[18] Plaintiff States' bald claim that the district court's purported vacatur of the Zinke Order already vacated by Interior is "harmless" ignores the bar on advisory opinions. *See* Pls.States.Br.57-58; *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

Plaintiffs. At a minimum, this Court should reverse the district court's remedy prohibiting future federal coal leasing.

DATED this 13th day of November, 2023.

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