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AG Balderas Sues Trump to Properly Compensate State for Coal Extraction & Its Climate Change Impact on New Mexico

Albuquerque, NM - Attorney General Hector Balderas joined with the Attorneys General of California, Washington, and New York to file a challenge late yesterday in federal district court in Montana to the Trump Administration's decision to resume federal coal leasing without completing the required environmental impact statement as required by the National Environmental Policy Act (NEPA).

"Yet again, President Trump is breaking the law and New Mexicans stand to pay the price for his illegal actions," said Attorney General Hector Balderas. "New Mexico taxpayers must be properly compensated for coal produced in our state, and a big part of that compensation should be for the environmental impact that directly affects our families, natural environment and unique culture."

In January of 2016, then-Secretary of Interior Sally Jewel put in place a moratorium on most new coal leasing in order to conduct a new programmatic environmental impact statement (PEIS). The PEIS was needed due to significant changes in the coal industry, and developments in the understanding of climate change, since the last PEIS was performed in the mid 1980's. Secretary Jewel pointed to the need to ensure conservation of the public lands, to protect their scientific, historic, and environmental values, and to Interior's statutory duty to ensure a fair return to the taxpayer. The January 2016 moratorium was preceded by extensive public outreach, including listening sessions around the country and the receipt of over 94,000 written comment. The first phase of the PEIS process was completed on January 11, 2017, when the Department released the "scoping report," informed by more than 214,000 public comments, which further defined the scope of the PEIS to be drafted by January 2018 and finalized by 2019.

On March 29, 2017, without any opportunity for public comment, President Trump's new Secretary of Interior Ryan Zinke issued an order restarting new coal leases and abruptly terminating the environmental review. Secretary Zinke's order provided no rationale for this action, other than objecting to the time and expense of complying with the law. New Mexico has a strong interest in the leasing program from both economic and environmental perspectives. New Mexico is a leading coal producing state, containing about 9% of the area subject to federal coal leases. It is also severely affected by climate change, including decreased water supplies due to drought, increased frequency and severity of fire and insect infestations, and direct mortality to evergreen forests. The whole purpose of NEPA – the nation's basic charter for protecting the environment – is to provide for full consideration of environmental impacts of federal actions, so that we as a society can make fully informed decisions. Attorney General Balderas is committed to holding the federal government to its responsibilities under federal law and resisting arbitrary decisions that benefit only the few.

See attached for a copy of yesterday's filing.

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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF MONTANA**
16 **GREAT FALLS DIVISION**

18 **STATE OF CALIFORNIA; STATE**
19 **OF NEW MEXICO; STATE OF**
20 **NEW YORK; and STATE OF**
WASHINGTON,

21 Plaintiffs,

22 v.

23 **RYAN ZINKE**, in his official capacity
as Secretary of the Interior; **UNITED**
24 **STATES BUREAU OF LAND**
MANAGEMENT; and UNITED
25 **STATES DEPARTMENT OF THE**
INTERIOR,

26 Defendants.

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

(Administrative Procedure Act, 5
U.S.C. § 551 *et seq.*; National
Environmental Policy Act, 42 U.S.C. §
4321 *et seq.*; Mineral Leasing Act, 30
U.S.C. § 181 *et seq.*; Federal Land
Policy and Management Act, 43
U.S.C. § 1701 *et seq.*)

INTRODUCTION

1
2 1. In this action, the State of California, by and through Xavier Becerra,
3 Attorney General; the State of New Mexico, by and through Hector Balderas,
4 Attorney General; the State of New York, by and through Eric T. Schneiderman,
5 Attorney General; and the State of Washington (“Plaintiffs”) challenge a decision
6 by Defendants Ryan Zinke, United States Bureau of Land Management (“BLM”),
7 and United States Department of the Interior (“Department”) (collectively,
8 “Defendants”) to restart the federal coal leasing program without conducting a new
9 environmental review or supplementing their outdated review of the program, in
10 violation of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et*
11 *seq.* Plaintiffs also challenge Defendants’ decision to restart the federal coal leasing
12 program without evaluating whether the program is in the public interest or
13 ensuring that it will provide fair market value to the public, in violation of the
14 Mineral Leasing Act (“MLA”), 30 U.S.C. § 181 *et seq.*, and the Federal Land
15 Policy and Management Act (“FLPMA”), 43 U.S.C. § 1701 *et seq.*

16 2. On January 15, 2016, then-Secretary of the Interior Sally Jewell, in
17 response to concerns raised by the Government Accountability Office, the
18 Department’s Inspector General, Members of Congress, and the public, issued a
19 Secretarial Order commencing a process to prepare a new programmatic
20 environmental impact statement (“programmatic EIS” or “PEIS”) that would
21 identify and evaluate potential reforms to the federal coal leasing program.
22 Defendants had not updated their environmental analysis for the program since
23 1985, despite significant new information and changed circumstances triggering the
24 need for supplemental review. In recognition of the importance of this new
25 information and circumstances, Defendants, consistent with their practice during
26 earlier reviews in the 1970s and 1980s, placed a moratorium on new coal leasing
27 until the review was complete, which was expected in early 2019.
28

1 3. Just a few months ago, on January 11, 2017, BLM completed a
2 comprehensive scoping process which determined that an updated review was
3 warranted to bring the Department into compliance with its statutory obligations to
4 fully consider the impacts of its coal leasing activities under NEPA, and to secure a
5 fair return from the sale of public resources as required by the MLA and FLPMA.

6 4. With no justification other than an objection to the time and cost of
7 complying with the law, Secretary of the Interior Ryan Zinke issued Secretarial
8 Order 3348 on March 29, 2017, which reversed Defendants' prior determination by
9 terminating this review and restarting the federal coal leasing program.

10 Defendants' failure to properly consider the environmental impacts of its leasing
11 program, or to ensure that the program is in the public interest and providing fair
12 market value to the public before restarting the program, violated the express
13 requirements of NEPA, the MLA, and FLPMA, and was arbitrary and capricious in
14 violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*
15 Accordingly, Plaintiffs seek a declaration that Defendants' issuance of Secretarial
16 Order 3348 violated NEPA, the MLA, FLPMA, and the APA, and also seek an
17 injunction requiring Defendants to vacate and set aside the Order and resume the
18 moratorium on new federal coal leasing unless and until Defendants comply with
19 applicable law.

20 **JURISDICTION AND VENUE**

21 5. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (action arising
22 under the laws of the United States), 28 U.S.C. § 1361 (action to compel officer or
23 agency to perform duty owed to Plaintiff), and 5 U.S.C. §§ 701-706 (APA). An
24 actual controversy exists between the parties within the meaning of 28 U.S.C. §
25 2201(a), and this Court may grant declaratory relief, injunctive relief, and other
26 relief pursuant to 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 705-706.

27 6. Defendants' issuance of Secretarial Order 3348 on March 29, 2017
28 restarting the federal coal leasing program and ending environmental review of the

1 program constitutes final agency action and is therefore judicially reviewable
2 within the meaning of the APA. 5 U.S.C. §§ 704, 706.

3 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because
4 Defendants are officers or employees of the United States or agencies thereof, and
5 federally-owned coal that is subject to the federal coal leasing program lies in this
6 District. This case is also related to a previously-filed action in this District,
7 *Citizens for Clean Energy, et al. v. U.S. Department of the Interior, et al.*, Case No.
8 4:17-cv-00030-BMM (D. Mont., complaint filed March 29, 2017).

9 **PARTIES**

10 8. Plaintiff State of California brings this action by and through Attorney
11 General Xavier Becerra. The Attorney General is the chief law officer of the State,
12 Cal. Const., art. V, § 13, and is authorized to seek judicial remedies to protect the
13 natural resources of the State of California from pollution, impairment, or
14 destruction. Cal. Gov. Code §§ 12600-12612. This challenge is brought pursuant
15 to the Attorney General's independent constitutional, statutory, and common law
16 authority to bring suit and obtain relief on behalf of the People of the State of
17 California.

18 9. Plaintiff State of New Mexico brings this action by and through Attorney
19 General Hector Balderas. The Attorney General of New Mexico is authorized to
20 prosecute in any court or tribunal all actions and proceedings, civil or criminal,
21 when, in his judgment, the interest of the state requires such action. N.M. Stat. Ann.
22 § 8-5-2.

23 10 Plaintiff State of New York is a sovereign entity and brings this action by
24 and through Eric T. Schneiderman, Attorney General, to protect its own sovereign
25 and proprietary rights, and as *parens patriae* on behalf of its affected citizens and
26 residents.

27 11. Plaintiff State of Washington is a sovereign entity and brings this action
28 to protect its own sovereign and proprietary rights, and as *parens patriae* on behalf

1 of its affected citizens and residents. The Attorney General is the chief legal
2 adviser to the State of Washington. The Attorney General's powers and duties
3 include acting in federal court on matters of public concern. This challenge is
4 brought pursuant to the Attorney General's independent constitutional, statutory,
5 and common law authority to bring suit and obtain relief on behalf of the State of
6 Washington.

7 12. Plaintiffs have an interest in the responsible use, management, and
8 conservation of our nation's public resources. That interest is particularly strong
9 where, as here, the use of such resources causes adverse environmental impacts that
10 the States are working diligently to address.

11 13. Plaintiffs have long been leaders in working to reduce greenhouse gas
12 ("GHG") emissions and slow the pace of climate change. Plaintiffs have a
13 significant interest in ensuring that the federal coal leasing program does not
14 undermine those efforts. GHG emissions from the production, transport, and
15 consumption of federal coal currently account for 11 percent of national GHG
16 emissions, and approximately 1.5 percent of global GHG emissions. Plaintiffs have
17 and will continue to be significantly affected by climate change through adverse
18 impacts such as increased heat waves and greater air pollution, more frequent and
19 intense storms and associated flooding, reduced snowpack and water supplies,
20 increased wildfires, and sea level rise.

21 14. For example, Washington experiences many negative effects of climate
22 change, including rising ambient temperatures, a diminished and unpredictable
23 snowpack that is necessary for water consumption and hydropower generation, and
24 ocean warming and acidification, which is harmful to Washington's shellfishery.
25 Washington has enacted statutes and expended significant financial resources in
26 reducing greenhouse gas emissions and slowing the pace of climate change.
27 According to the University of Washington, climate change adversely affects
28 Washington's water resources by decreasing snowpack, increasing stream

1 temperatures, decreasing summer minimum streamflows, and causing widespread
2 changes in streamflow timing and flood risk. These changes increase the potential
3 for more frequent summer water shortages in some basins (e.g., the Yakima basin)
4 and for some water uses (e.g., irrigated agriculture or instream flow management),
5 particularly in fully allocated watersheds with little management flexibility.
6 Washington's forests are likely to experience significant changes in the
7 establishment, growth, and distribution of tree species as a result of increasing
8 temperatures, declining snowpack, and changes in soil moisture. A rise in forest
9 mortality is also expected due to increasing wildfire, insect outbreaks, and diseases.
10 Sea level is projected to rise in most coastal and marine areas of the state,
11 increasing the likelihood for permanent inundation of low-lying areas, higher tidal
12 and storm surge reach, flooding, erosion, and changes and loss of habitat. Sea level
13 rise, rising coastal ocean temperatures, and ocean acidification will also affect the
14 geographical range, abundance, and diversity of Pacific Coast marine species.
15 Climate change is expected to affect both the physical and mental health of
16 Washington's residents by altering the frequency, duration, or intensity of climate-
17 related hazards to which individuals and communities are exposed. Health impacts
18 include higher rates of heat-related illnesses (e.g., heat exhaustion and stroke);
19 respiratory illnesses (e.g., allergies, asthma); vector-, water-, and food-borne
20 diseases; and mental health stress (e.g., depression, anxiety). These impacts can
21 lead to increased absences from schools and work, emergency room visits,
22 hospitalizations, and deaths.

23 15. As a state in the arid southwest, New Mexico is also experiencing the
24 adverse effects of climate change and will suffer additional impacts in the future.
25 Average temperatures in New Mexico have been increasing 50% faster than the
26 global average over the past century. According to the Third U.S. National Climate
27 Assessment, streamflow totals in the Rio Grande and other rivers in the Southwest
28 were 5% to 37% lower between 2001 and 2010 than the 20th century average flows.

1 Projections of further reduction of late-winter and spring snowpack and subsequent
2 reductions in runoff and soil moisture pose increased risks to water supplies needed
3 to maintain cities, agriculture, and ecosystems. Drought and increased temperatures
4 due to climate change have caused extensive tree death across the Southwest.

5 Winter warming due to climate change has exacerbated bark beetle outbreaks by
6 allowing more beetles, which normally die in cold weather, to survive and
7 reproduce. According to a 2015 study by scientists at Los Alamos National
8 Laboratories, greenhouse gas-driven warming may lead to the death of 72 percent
9 of the Southwest's evergreen forests by 2050, and nearly 100% mortality of these
10 forests by 2100.

11 16. Plaintiffs also have an interest in preventing adverse water quality, air
12 quality, environmental justice, and other impacts from fossil fuel development,
13 transport, and combustion. For example, millions of tons of coal have been
14 transported through California in open rail cars to ports in Los Angeles, Long
15 Beach, Stockton, and Richmond, areas that are surrounded by low-income and
16 minority communities that are already disproportionately impacted by
17 environmental pollution. A 2015 study published in the journal Atmospheric
18 Pollution Research found that the passage of a diesel-powered, open-top coal train
19 resulted in nearly twice as much particulate matter emissions as a diesel-powered
20 freight train. According to a 2017 report by the Bay Area Air Quality Management
21 District, particulate matter emissions from the storage and handling of significant
22 quantities of bulk materials such as coal present an environmental and public health
23 concern because small dust particles cause or contribute to a wide variety of serious
24 health problems, including asthma, bronchitis, cardio-vascular diseases, and cancer.

25 17. In addition, coal from federal leases affected by Secretarial Order 3348
26 is, and would be, transported by rail across Washington. In particular, coal from
27 the Powder River basin is shipped to or through the state. According to the
28 Washington Department of Transportation, the baseline number of trains in 2015

1 numbered 70 per day on some track segments; under some projections involving
2 increased coal transportation infrastructure, that baseline number could reach 122
3 per day on those track segments. Studies predict increases in both rail and
4 vehicular wait times from increased coal transport through the state, including in
5 major metropolitan areas.

6 18. A number of states in the east, such as New York, suffer injury from air
7 quality harms caused by conventional pollutants such as nitrogen oxides that power
8 plants east of the Mississippi River emit when they burn federal coal. These
9 emissions react in the atmosphere to form ozone that blows into New York and
10 other eastern states and provokes premature death and illness.

11 19. Plaintiffs have an interest in ensuring that the public receives appropriate
12 compensation when these fossil fuel resources are extracted and produced on public
13 lands. Defendants' decision to restart the federal coal leasing process without
14 addressing the outdated structure for management of federal coal will impact the
15 amount of royalties received by the States and the federal government from the
16 extraction of this public resource. As a result of the adverse impacts from the
17 combustion of federal coal, Plaintiffs and other states and local governments incur
18 costs for health care, water storage and flood control facilities, infrastructure
19 protection, and other responsive actions. Under the current system of determining
20 the "fair market value" of the leases, BLM does not recoup those costs.

21 20. Plaintiffs also rely on Defendants' compliance with the procedural and
22 substantive requirements of NEPA to obtain timely and accurate information about
23 activities that may have significant adverse impacts on public lands and impacts
24 within their States, and to meaningfully participate in decision-making processes.
25 Plaintiffs have suffered legally cognizable harm because of Defendants' actions, as
26 they have been aggrieved by the termination of the required environmental review
27 of the federal coal leasing program and the lifting of the leasing moratorium. For
28 example, Washingtonians have expressed acute interest in the federal coal program,

1 and in the environmental review process required by NEPA. During the
2 programmatic EIS scoping process halted by Secretarial Order 3348, BLM received
3 comments from more Washington residents than from any other state – 182 out of a
4 total 1239 individual commenters. This demonstrates a very high degree of concern
5 with the federal coal program among Washington residents, and a deep
6 involvement in the NEPA process terminated by the Secretary of the Interior.

7 21. Without the benefit of the hard look at the current environmental impacts
8 of the coal leasing program that a lawful, up-to-date environmental impact review
9 would provide, Defendants’ decision to restart the coal leasing program does not
10 even acknowledge, let alone address, the harms to Plaintiffs from the leasing
11 program. Preparation of an updated programmatic EIS that identifies and evaluates
12 those impacts will provide additional information that could result in a different
13 decision regarding the federal coal leasing program – a termination of the program,
14 modification of the program, or other restrictions that would redress Plaintiffs’
15 injuries. Accordingly, Plaintiffs have standing to bring this action.

16 22. Defendant Ryan Zinke is Secretary of the Interior and is sued in his
17 official capacity. Mr. Zinke has responsibility for implementing and fulfilling the
18 Department’s duties under NEPA and signed the Secretarial Order at issue.

19 23. Defendant United States Bureau of Land Management is an agency of the
20 United States government that is charged with managing the federal coal leasing
21 program and bears responsibility, in whole or in part, for the acts complained of in
22 this Complaint.

23 24. Defendant United States Department of the Interior is an agency of the
24 United States government which oversees the United States Bureau of Land
25 Management and bears responsibility, in whole or in part, for the acts complained
26 of in this Complaint.

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28

STATUTORY BACKGROUND

I. NATIONAL ENVIRONMENTAL POLICY ACT.

25. NEPA is the “basic national charter for the protection of the environment.” 40 C.F.R. § 1500.1. The fundamental purposes of NEPA are to ensure that “environmental information is available to public officials and citizens before decisions are made and before actions are taken,” and that “public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Id.* § 1500.1(b)-(c).

26. To achieve these purposes, NEPA requires the preparation of a detailed EIS for any “major federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). In addition to review of site-specific actions, the types of “major Federal action” subject to NEPA review include:

Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based ... and adoption of programs, such as a group of concerted actions to implement a specific policy or plan; [and] systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

40 C.F.R. § 1508.18(b)(2)-(3); *see also id.* § 1502.4(b) (“Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking”). The Supreme Court has found that a programmatic EIS for the federal coal program is required by NEPA because the program “is a coherent plan of national scope, and its adoption surely has significant environmental consequences.” *Kleppe v. Sierra Club*, 427 U.S. 390, 400 (1976).

27. In an EIS, a federal agency must analyze the direct, indirect, and cumulative impacts of its action. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1508.7,

1 1508.8. “Direct effects” are those “caused by the action and occur at the same time
2 and place.” 40 C.F.R. § 1508.8(a). Indirect impacts “are caused by the action and
3 are later in time or farther removed in distance, but are still reasonably foreseeable.”
4 *Id.* § 1508.8(b). A “cumulative impact” is “the impact on the environment which
5 results from the incremental impact of the action when added to other past, present,
6 and reasonably foreseeable future actions regardless of what agency (Federal or
7 non-Federal) or person undertakes such other actions. Cumulative impacts can
8 result from individually minor but collectively significant actions taking place over
9 a period of time.” *Id.* § 1508.7. As relevant here, the Ninth Circuit Court of
10 Appeals has found that “[t]he impact of greenhouse gas emissions on climate
11 change is precisely the kind of cumulative impacts analysis that NEPA requires
12 agencies to conduct.” *Center for Biological Diversity v. Nat’l Highway Traffic*
13 *Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008).

14 28. An agency cannot rest on the conclusions made in an EIS as issued on a
15 given date. Instead, NEPA requires an agency to supplement a past EIS when there
16 are “significant new circumstances or information relevant to environmental
17 concerns and bearing on the proposed action or its impacts.” 40 C.F.R. §
18 1502.9(c)(1)(ii); *see also Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374
19 (1989) (agency retains a continuing obligation to take a “hard look at the
20 environmental effects of its planned action, even after a proposal has received
21 initial approval”). In determining when a supplemental EIS is required, an agency
22 must “apply a rule of reason,” not supplementing “every time new information
23 comes to light,” but continuing to maintain a “hard look” at the impact of agency
24 action when the “new information is sufficient to show that the remaining action
25 will affect the quality of the human environment in a significant manner or to a
26 significant extent not already considered.” *Marsh*, 490 U.S. at 373–74.

27 29. The Council on Environmental Quality (“CEQ”), which was created to
28 administer NEPA and promulgated its implementing regulations, has stated that

1 “[a]s a rule of thumb ... if the EIS concerns an ongoing program, EISs that are more
2 than 5 years old should be carefully reexamined to determine if the criteria in
3 Section 1502.9 compel preparation of an EIS supplement.” 46 Fed. Reg. 18,026
4 (Mar. 23, 1981) (CEQ Memorandum to Agencies: Forty Most Asked Questions
5 Concerning CEQ’s NEPA Regulations, Question 32).

6 **II. FEDERAL LAND MANAGEMENT STATUTES.**

7 30. The MLA authorizes and governs the leasing of public lands for the
8 production of coal and other minerals. Pursuant to the MLA, the Secretary of the
9 Interior is authorized to lease coal on public lands “as he finds appropriate and in
10 the public interest,” provided that every sale is made by competitive bid and
11 provides the public with fair market value. *See* 30 U.S.C. § 201(a)(1). The MLA
12 further requires that the Secretary only lease coal in a manner that balances “long-
13 term benefits to the public against short-term benefits.” *Id.* § 201(a)(3). BLM is
14 the federal agency within the Department tasked with administering the federal coal
15 leasing program.

16 31. FLPMA establishes the broad framework under which BLM manages
17 public lands for multiple uses in a way “that will best meet the present and future
18 needs of the American people.” 43 U.S.C. § 1702(c); *see id.* § 1712(c)(7) (in
19 developing land use plans, BLM must “weigh long-term benefits to the public
20 against short-term benefits”). Under FLPMA, Congress declared that it is the
21 policy of the United States that “public lands be managed in a manner that will
22 protect the quality of scientific, scenic, historical, ecological, environmental, air and
23 atmospheric, water resource, and archeological values.” *Id.* § 1701(a)(8). FLPMA
24 also requires that BLM “receive fair market value of the use of the public lands and
25 their resources.” *Id.* § 1701(a)(9).

26 **III. ADMINISTRATIVE PROCEDURE ACT.**

27 32. Pursuant to the APA, a reviewing court shall “(1) compel agency action
28 unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside

1 agency action, findings, and conclusions found to be ... arbitrary, capricious, an
2 abuse of discretion, otherwise no in accordance with law; [or] without observance
3 of procedure required by law.” 5 U.S.C. § 706. The APA defines “agency action”
4 to include “the whole or a part of an *agency* rule, *order*, license, sanction, relief, or
5 the equivalent or denial thereof, or failure to act.” *Id.* § 551(13) (emphases added);
6 *see id.* § 551(6) (defining “order” to mean “the whole or a part of a final disposition,
7 whether affirmative, negative, injunctive, or declaratory in form, of an agency in a
8 matter other than rule making but including licensing”).

9 **FACTUAL AND PROCEDURAL BACKGROUND**

10 **I. THE FEDERAL COAL LEASING PROGRAM.**

11 33. The United States has the largest demonstrated coal reserves in the world,
12 with an estimated 477 billion tons of coal, 255 billion tons of which is deemed
13 recoverable. The United States is the second largest coal producer in the world
14 behind China. In 2015, 42 percent of all coal produced in the United States came
15 from public lands.

16 34. BLM is the federal agency charged with managing coal resources on 570
17 million acres of public lands where the mineral estate is owned by the federal
18 government. Currently, BLM oversees 306 coal leases encompassing over 475,000
19 acres in 10 states. Federal coal from the Powder River Basin in Montana and
20 Wyoming accounts for over 85 percent of this production. Over the past decade,
21 BLM-administered leases have produced over 4 billion tons of coal and resulted in
22 the collection of more than \$10 billion in federal revenue. The recoverable reserves
23 of federal coal currently under lease are estimated to be sufficient to continue
24 production at current levels for 20 years.

25 35. According to BLM data, in New Mexico there are 21 federal coal leases,
26 encompassing 42,756 acres. This is nearly 9% of the 482,691 acres under federal
27 coal leases nationwide. According to the New Mexico Bureau of Geology and
28 Mineral Resources, New Mexico ranks 12th in the nation in coal production.

1 36. The majority of federal coal is used to generate electricity domestically,
2 accounting for an estimated 14 percent of the Nation’s electricity in 2015 and 11
3 percent of total U.S. greenhouse gas emissions. Coal is also used for other
4 processes, including making steel (i.e., metallurgical coal). In 2015, about 8
5 percent of all U.S. coal was exported, and many coal companies are attempting to
6 expand exports in the face of decreasing domestic demand, including a proposal to
7 construct a new bulk export terminal at the former Oakland Army Base in Oakland,
8 California. The transport, storage, and handling of such coal results in particular
9 matter emissions that have been shown to cause numerous environmental and
10 public health concerns.

11 37. BLM manages federal coal pursuant to regulations and a programmatic
12 EIS that were originally adopted 38 years ago, at a time when the threat of climate
13 change was not fully appreciated and market conditions, infrastructure development,
14 scientific understanding, and national priorities were dramatically different. *See* 44
15 Fed. Reg. 42,584 (July 19, 1979) (Coal Management; Federally Owned Coal);
16 BLM, Final Programmatic Environmental Statement: Federal Coal Management
17 Program (“1979 PEIS”). The 1979 PEIS does not consider the climate impacts of
18 the federal coal program or adequately evaluate other potential environmental
19 effects, let alone reflect the conditions of the coal industry as it exists today.

20 38. The programmatic EIS was last revisited just six years after BLM
21 promulgated its coal leasing regulations, when BLM updated those regulations and
22 completed a limited supplement to the 1979 PEIS in response to recommendations
23 from the Commission on Fair Market Value Policy for Federal Coal Leasing that
24 addressed continued irregularities in the leasing process (“1985 Supplement”).
25 While the 1979 PEIS analyzed seven major alternative coal programs, the 1985
26 Supplement examined only the continuation of the federal coal management
27 program and three alternatives: (1) Leasing by Application, (2) Preference Right
28 and Emergency Leasing, and (3) No New Federal Leasing, *i.e.*, the no action

1 alternative. The 1985 Supplement fails to mention, let alone consider and evaluate,
2 climate change impacts. BLM’s revised regulations incorporated a two-tiered
3 leasing structure. First, in certified coal producing regions where exploration and
4 new mining were occurring, BLM would select tracts for lease sale. Second, in
5 areas outside of the coal producing regions, mining companies would apply for
6 specific tracts of lands to be leased, generally adjacent to their existing mines.

7 39. However, between 1987 and 1990, all six certified coal-producing
8 regions were “decertified” by BLM for various reasons, which had the effect of
9 making all federal coal leasing happen by industry application. Reliance on leasing
10 by application substantially impairs the efficacy of competitive lease auctions.
11 Existing lease holders have a financial incentive to submit applications that propose
12 tracts adjacent to their existing leases. Since coal mining operations are capital-
13 intensive and because mining equipment is logistically difficult to move, bidders
14 closest to a proposed lease can generally outbid all other parties. The result is that
15 leasing by application auctions frequently have only one bidder and are effectively
16 noncompetitive, a result that was not contemplated when the current program was
17 structured.

18 **II. RECENT REVIEW OF THE FEDERAL COAL PROGRAM.**

19 40. In recent years, Congress and government watchdogs have criticized
20 BLM’s outdated structure for management of federal coal. Addressing the statutory
21 “fair market value” leasing standard under the MLA, the Department’s Office of the
22 Inspector General in 2013 issued a report concluding that “BLM faces significant
23 challenges in the areas of coal leasing and mine inspection and enforcement” and
24 that its management resulted in millions of dollars in lost royalties to the federal
25 treasury because the agency was “not receiving the full, fair market value for the
26 leases.” Off. of the Inspector Gen., U.S. Dep’t of the Interior, Coal Management
27 Program, U.S. Department of the Interior (June 2013), *available at*:

28 <https://www.doioig.gov/sites/doioig.gov/files/CR-EV-BLM-0001-2012Public.pdf>.

1 The Inspector General made several recommendations necessary to “enhance
2 [BLM’s] coal management program significantly” and recover these lost revenues.

3 41. Also in 2013, the Government Accountability Office (“GAO”) concluded
4 that BLM had failed to ensure mining companies pay fair market value for leasing
5 federal coal. U.S. Gov’t Accountability Off., GAO-14-140, Coal Leasing: BLM
6 Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and
7 Provide More Public Information 15 (Dec. 2013), *available at*:

8 <http://www.gao.gov/products/GAO-14-140>. GAO determined that since 1990,
9 “most” federal coal leases were not sold competitively and had only a single bidder.
10 In particular, of the 107 tracts that were leased between 1990 and 2012, “sales for
11 96 (about 90 percent) involved a single bidder ... which was generally the company
12 that submitted the lease application. More than 90 percent of the lease applications
13 BLM received were for maintenance tracts used to extend the life of an existing
14 mine or to expand that mine’s annual production.”

15 **III. ACTIONS BY THE OBAMA ADMINISTRATION TO IMPROVE THE FEDERAL COAL** 16 **PROGRAM.**

17 42. On March 17, 2015, due to these concerns and others raised by members
18 of Congress, interested stakeholders, and the public, Secretary of the Interior Sally
19 Jewell called for “an honest and open conversation about modernizing the Federal
20 coal program.” The Department of the Interior subsequently held listening sessions
21 around the country that summer. The Department heard from 289 individuals
22 during the sessions and received over 94,000 written comments. The oral and
23 written comments reflected several recurring concerns, in particular, that American
24 taxpayers are not receiving a fair return for the leasing of public coal resources; that
25 the Federal coal program conflicts with the Administration’s climate policy and the
26 country’s national climate goals; and about the structure of the Federal coal
27 program in light of current market conditions, including how implementation of the
28

1 Federal leasing program affects current and future coal markets, coal-dependent
2 communities and companies, and the reclamation of mined lands.

3 43. On January 15, 2016, Secretary Jewell issued a Secretarial Order
4 commencing a process to prepare a new programmatic EIS of the federal coal
5 program and putting in place a moratorium on most new leasing activity until that
6 review was complete. *See* Secretarial Order No. 3338, Discretionary Programmatic
7 Environmental Impact Statement to Modernize the Federal Coal Program (Jan. 15,
8 2016) (“Secretarial Order 3338”), *available at*:
9 <http://elips.doi.gov/ELIPS/0/doc/4271/Page1.aspx>.

10 44. Secretarial Order 3338 cited the Defendants’ legal obligations “to ensure
11 conservation of the public lands, the protection of their scientific, historic, and
12 environmental values, and compliance with applicable environmental laws” as well
13 as Defendants’ “statutory duty to ensure a fair return to the taxpayer.” In
14 determining that it was appropriate to suspend the issuance of new federal coal
15 leases while BLM undertook a comprehensive review, the Secretary explained:

16 Lease sales and lease modifications result in lease terms of 20
17 years and for so long thereafter as coal is produced in
18 commercial quantities. Continuing to conduct lease sales or
19 approve lease modifications during this programmatic review
20 risks locking in for decades the future development of large
21 quantities of coal under current rates and terms that the PEIS
22 may ultimately determine to be less than optimal.

23 45. Under NEPA, early in the preparation of an EIS, an agency undertakes a
24 process known as scoping. 40 C.F.R. § 1501.7; 43 C.F.R. § 46.235. In the scoping
25 process, the agency describes a proposed agency action and possible alternatives,
26 and seeks input from States, tribes, local governments, and the public on the
27 affected resources and the environmental issues raised by the proposed action to
28 help evaluate what issues the agency should address in the EIS.

46. In March 2016, BLM began a scoping process by issuing a Notice of
Intent to Prepare a Programmatic Environmental Impact Statement to Review the
Federal Coal Program and to Conduct Public Scoping Meetings. 81 Fed. Reg.

1 17,720 (Mar. 30, 2016). During the spring and summer of 2016, BLM accepted
2 more than 214,000 public comments and held six public meetings in various cities
3 regarding its review of the federal coal program.

4 47. On January 11, 2017, BLM released its Scoping Report on the federal
5 coal program in which it found that “modernization of the Federal coal program is
6 warranted.” BLM stated that “[t]his modernization should focus on ensuring a fair
7 return to Americans for the sale of their public coal resources; addressing the coal
8 program’s impact on the challenge of climate change; and improving the structure
9 and efficiency of the coal program in light of current market conditions, including
10 impacts on communities.” BLM further found that “key areas of analysis for the
11 PEIS, many of which were identified as priorities by the Secretarial Order, include:
12 return to the taxpayer, climate impacts/greenhouse gas emissions, socioeconomic
13 considerations, energy needs (including coal production and exports, as well as
14 substitution effects), energy prices, other environmental impacts (e.g., water quality
15 and wildlife), and health impacts.”

16 48. In particular, with regard to climate change, BLM noted that U.S. federal
17 coal production and combustion were responsible for about 11 percent of U.S.
18 greenhouse gas emissions in 2014. The agency stated that climate change caused
19 by human emission of greenhouse gases threatens public health and welfare in
20 many ways, including increased heat waves, more frequent and intense storms,
21 reduced water supplies, increase wildfires, flooding, and sea level rise. BLM
22 acknowledged it thus has a legal obligation to consider these issues:
23 “Consideration of the implications of Federal coal leasing for climate change, as an
24 extensively documented threat to the health and welfare of the American people,
25 falls squarely within the factors to be considered in determining the public interest.”

26 49. In addition to addressing climate change, several other factors not
27 adequately considered in the 1979 PEIS or 1985 Supplement warrant supplemental
28 environmental review. These include harm to public lands and wildlife from coal

1 mining, air quality impacts from coal transport and combustion, and the disposal of
2 coal ash, which contains hazardous constituents. Moreover, the environmental
3 justice impacts related to coal mining and downstream activities such as coal
4 transport and export have never been adequately considered.

5 50. Furthermore, significant changes in the coal industry during the past few
6 decades must be addressed. For example, coal has fallen out of favor for electricity
7 production domestically and is no longer needed to secure American energy
8 independence. According to BLM, “there has been a consistent decline in coal-
9 fired electricity generation,” which made up 50% of U.S. generation in 2005 but
10 fell to 33% by 2015. Coal production fell from 1.13 billion tons to less than 0.9
11 billion tons during this same time period, and such decline was expected to
12 continue. BLM noted several reasons for this softening market and decrease in coal-
13 fired generating capacity, including the decrease in natural gas prices and the aging
14 coal fleet, among others. In addition, BLM found that “[r]enewable energy, such as
15 wind and solar, have also become more cost competitive and widely available over
16 the past 5 years.” As a result, U.S. coal resources are increasingly being shipped
17 and consumed abroad, and American citizens – while bearing the many external
18 costs of the program – do not enjoy the concomitant benefits.

19 51. Finally, as discussed above, the federal coal leasing program has failed to
20 fulfill legal mandates to ensure a fair economic return to American taxpayers due to
21 changes in the federal coal leasing process.

22 52. As BLM summarized in the Scoping Report, “[t]he last time the Federal
23 coal program received a comprehensive review was in the mid-1980s, and most of
24 the existing regulations were promulgated in the late 1970s and have been only
25 slightly modified since that time. The direct, indirect, and cumulative impacts of
26 the Federal coal program have not been fully analyzed under the National
27 Environmental Policy Act (NEPA) in over thirty years.”
28

1 53. Consequently, BLM stated that it would move forward with the
2 preparation of a draft programmatic EIS by January 2018 regarding the
3 modernization of the federal coal leasing program using the information received
4 during the scoping process, and issue a final PEIS by January 2019.

5 **IV. PRESIDENT TRUMP’S EXECUTIVE ORDER AND SECRETARIAL ORDER 3348.**

6 54. On March 28, 2017, President Donald Trump issued an Executive Order
7 entitled “Promoting Energy Independence and Economic Growth” (“Executive
8 Order”). 82 Fed. Reg. 16,093 (Mar. 31, 2017). Among other provisions, the
9 Executive Order stated: “The Secretary of the Interior shall take all steps necessary
10 and appropriate to amend or withdraw Secretary’s Order 3338 dated January 15,
11 2016 (Discretionary Programmatic Environmental Impact Statement (PEIS) to
12 Modernize the Federal Coal Program), and to lift any and all moratoria on Federal
13 land coal leasing activities related to Order 3338. The Secretary shall commence
14 Federal coal leasing activities consistent with all applicable laws and regulations.”
15 *Id.* at 16,096.

16 55. On March 29, 2017, Secretary of the Interior Ryan Zinke issued
17 Secretarial Order 3348, entitled “Concerning the Federal Coal Moratorium,” which
18 revoked Order 3338, restarted the federal coal leasing program, and terminated the
19 environmental review process. Specifically, Secretarial Order 3348 notes that the
20 PEIS “is estimated to cost many millions of dollars and would be completed no
21 sooner than 2019, even with robust funding.” Secretarial Order 3348 states that
22 “the public interest is not served by halting the Federal coal program for an
23 extended time, nor is a PEIS required to consider potential improvements to the
24 program.” Secretarial Order 3348 then directs BLM “to process coal lease
25 applications and modifications expeditiously in accordance with regulations and
26 guidance existing before the issuance of Secretary’s Order 3338,” and commands
27 that “[a]ll activities associated with the preparation of the Federal Coal Program
28 PEIS shall cease.” Secretarial Order 3348 states that it is “effective immediately.”

1 **FIRST CLAIM FOR RELIEF**
2 **(Failure to Conduct Environmental Review in Violation of NEPA and the APA;**
3 **42 U.S.C. § 4332(2)(C); 5 U.S.C. § 706)**

4 56. Paragraphs 1 through 55 are realleged and incorporated herein by
5 reference.

6 57. NEPA requires federal agencies to take a “hard look” at the
7 environmental consequences of a proposed activity before taking action. *See* 42
8 U.S.C. § 4332. To achieve this purpose, a federal agency must prepare an EIS for
9 all “major Federal actions significantly affecting the quality of the human
10 environment.” *Id.* § 4332(2)(C); 40 C.F.R. § 1502.3. In an EIS, a federal agency
11 must analyze the direct, indirect, and cumulative impacts of its action. *See* 42
12 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1508.7, 1508.8. NEPA’s requirements extend to
13 programs such as the federal coal leasing program. *Kleppe*, 427 U.S. at 400.

14 58. Defendants’ issuance of Secretarial Order 3348, which revoked
15 Secretarial Order 3338 and restarted the federal coal leasing process, constituted a
16 major federal action significantly affecting the quality of the human environment.
17 *See* 40 C.F.R. § 1508.18(b)(2)-(3) (“major federal action” subject to NEPA review
18 includes “adoption of programs, such as a group of concerted actions to implement
19 a specific policy or plan; [and] systematic and connected agency decisions
20 allocating agency resources to implement a specific statutory program or executive
21 directive”); *id.* § 1502.4(b) (“Environmental impact statements may be prepared,
22 and are sometimes required, for broad Federal actions such as the adoption of new
23 agency programs.”). These significant impacts include, but are not limited to,
24 climate change, harm to public lands and wildlife from coal mining, air quality
25 impacts from coal transport and combustion, the disposal of coal ash, and impacts
26 to environmental justice communities.

27 59. Defendants’ decision to issue Secretarial Order 3348 to restart the federal
28 coal leasing program without first preparing an EIS was arbitrary and capricious, an

1 abuse of discretion, and contrary to the requirements of NEPA and the APA, and
2 accordingly violated NEPA and the APA. 42 U.S.C. § 4332(2)(C); 5 U.S.C. §
3 706(2). Consequently, Secretarial Order 3348 should be held unlawful and set
4 aside.

5 **SECOND CLAIM FOR RELIEF**

6 **(Failure to Prepare a Supplemental PEIS in Violation of NEPA and the APA;** 7 **42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.9(c)(1)(ii); 5 U.S.C. § 706)**

8 60. Paragraphs 1 through 59 are realleged and incorporated herein by
9 reference.

10 61. Pursuant to NEPA, an agency cannot rest on the conclusions made in an
11 EIS. Instead, NEPA requires an agency to supplement a past EIS when there are
12 “significant new circumstances or information relevant to environmental concerns
13 and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii).

14 62. Here, there are significant new circumstances and information that
15 required Defendants to supplement its prior 1979 PEIS and 1985 Supplement prior
16 to taking action to restart the federal coal leasing program. These significant new
17 circumstances and information include, but are not limited to, the impact of the
18 program on climate change, air quality, environmental justice, and other
19 environmental issues; whether and to what extent there is a continued need for
20 federal coal leasing in light of current market conditions; and the need to ensure a
21 fair return to Americans for the sale of public coal resources due to significant new
22 circumstances in how federal leasing is conducted.

23 63. Defendants’ decision to issue Secretarial Order 3348 to restart the federal
24 coal leasing program while ceasing the ongoing environmental review that
25 Defendants’ themselves admitted was warranted just several months ago, without
26 any rational justification, was arbitrary and capricious, an abuse of discretion, and
27 contrary to the requirements of NEPA and the APA, and accordingly violated
28 NEPA and the APA. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.9(c)(1)(ii); 5 U.S.C.

1 § 706(2). Consequently, Secretarial Order 3348 should be held unlawful and set
2 aside.

3 **THIRD CLAIM FOR RELIEF**

4 **(Undertaking Federal Coal Leasing in Violation of the MLA and the APA;** 5 **30 U.S.C. § 201(a)(1), (3); 5 U.S.C. § 706)**

6 64. Paragraphs 1 through 63 are realleged and incorporated herein by
7 reference.

8 65. The MLA authorizes the Secretary of the Interior to lease the production
9 of coal on public lands if it is “in the public interest.” 30 U.S.C. § 201(a)(1). The
10 MLA further requires that every sale of such mineral be made by competitive bid
11 and provide the public with “fair market value.” *Id.* The Secretary may only lease
12 coal in a manner that balances “long-term benefits to the public against short-term
13 benefits.” *Id.* § 201(a)(3).

14 66. Prior to the issuance of Secretarial Order 3348, Defendants failed to
15 complete an environmental review that identified and evaluated the numerous
16 impacts of the federal coal leasing program or the public interest and long-term
17 benefits of ending or limiting the scope of the program. The public interest
18 includes consideration of environmental effects of a planned leasing program.
19 Moreover, there are significant long-term benefits to the public in addressing
20 climate change and other environmental impacts of coal leasing. These impacts
21 include, but are not limited to, avoiding, reducing, or mitigating the effect of the
22 coal leasing program on climate change, air quality, environmental justice, and
23 other environmental problems. There are also significant long-term benefits to the
24 public in ensuring a fair return to Americans for the sale of public coal resources.
25 Defendants’ current management of the federal coal leasing program fails to
26 provide the public with “fair market value” for the sale of these public resources.

27 67. Defendants’ decision to issue Secretarial Order 3348 to undertake federal
28 coal leasing was arbitrary and capricious, an abuse of discretion, and contrary to the

1 requirements of the MLA and the APA, and accordingly violated the MLA and the
2 APA. 30 U.S.C. § 201(a)(1), (3); 5 U.S.C. § 706(2). Consequently, Secretarial
3 Order 3348 should be held unlawful and set aside.

4 **FOURTH CLAIM FOR RELIEF**
5 **(Undertaking Federal Coal Leasing in Violation of FLPMA and the APA;**
6 **43 U.S.C. § 1701(a); 5 U.S.C. § 706)**

7 68. Paragraphs 1 through 67 are realleged and incorporated herein by
8 reference.

9 69. In managing public lands for multiple uses, FLPMA requires that
10 Defendants manage such lands “in a manner that will protect the quality of
11 scientific, scenic, historical, ecological, environmental, air and atmospheric, water
12 resource, and archeological values,” and that Defendants “receive fair market value
13 of the use of the public lands and their resources.” 43 U.S.C. § 1701(a)(8)-(9).

14 70. Prior to the issuance of Secretarial Order 3348, Defendants failed to
15 complete an environmental review that would evaluate whether public lands subject
16 to the federal coal leasing program are being managed in a manner that will protect
17 the quality of scientific, scenic, historical, ecological, environmental, air and
18 atmospheric, water resource, and archeological values. Defendants’ current
19 management of the federal coal leasing program also fails to provide the public
20 with “fair market value” for the sale of these public resources.

21 71. Defendants’ decision to issue Secretarial Order 3348 to undertake federal
22 coal leasing was arbitrary and capricious, an abuse of discretion, and contrary to the
23 requirements of FLPMA and the APA, and accordingly violated FLPMA and the
24 APA. 43 U.S.C. § 1701(a); 5 U.S.C. § 706(2). Consequently, Secretarial Order
25 3348 should be held unlawful and set aside.

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28

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiffs respectfully request that this Court:

3 1. Issue a declaratory judgment that Defendants acted arbitrarily,
4 capriciously, and contrary to law, abused their discretion, and failed to follow the
5 procedure required by law in their issuance of Secretarial Order 3348, in violation
6 of NEPA, the MLA, FLPMA, and the APA;

7 2. Issue a mandatory injunction compelling Defendants to set aside
8 Secretarial Order 3348 for failure to comply with NEPA, the MLA, FLPMA, and
9 the APA;

10 3. Issue a prohibitory injunction barring Defendants from taking any further
11 actions to process coal lease applications and modifications or otherwise
12 undertaking any federal coal leasing unless and until Defendants comply with
13 NEPA, the MLA, FLPMA, and the APA by preparing a comprehensive
14 environmental analysis in the form of a supplemental programmatic EIS for the
15 federal coal leasing program;

16 4. Award Plaintiffs their costs, expenses, and reasonable attorneys' fees;

17 5. Award such other relief as the Court deems just and proper.

18
19 Dated: May 9, 2017

Respectfully submitted,

20 /s/ Roger Sullivan
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