

PROPOSED ACTION
MEMORANDUM

Reforming the Federal Coal Leasing Program

Department of Interior, Bureau of Land Management
January 2021

I. Summary

Rollbacks

- SECRETARIAL ORDER NO. 3348, *Concerning the Federal Coal Moratorium* (March 29, 2017)
- DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, *Finding of No Significant Impact (FONSI): Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal*, DOI-BLM-WO-WO2100-2019-0001-EA (February 25, 2020)
- DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, *Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal*, (Final Environmental Assessment) DOI-BLM-WO-WO2100-2019-0001-EA (February 25, 2020)

Agency

- Department of the Interior, Office of the Secretary
- Bureau of Land Management (BLM)

Impact

- Secretarial Order No. 3348 lifted a pause on federal coal leasing without enacting broader reforms to a failing program. As it is currently constituted, the coal leasing program fails to achieve a reasonable return for taxpayers. The Council of Economic Advisors has concluded that it “misaligns incentives going back decades, resulting in a distorted coal market with an artificially low price for most federal coal and unnecessarily low government revenue from the leasing process.” Additionally, federal coal leases account for 40% of total U.S. coal production. Despite recent declines in coal-fired generation, this sector continues to account for 21% of total U.S. energy-related CO₂ emissions. Continuing to operate the federal coal leasing program without enacting appropriate is an abdication of the federal government’s responsibility to protect public lands, maximize taxpayer revenue, and address the climate crisis.

Proposed Action

- Settle pending litigation with states and environmental groups by agreeing to conduct a Programmatic Environmental Impact Statement (PEIS) to re-evaluate the federal coal leasing program.
- Direct BLM and DOI to evaluate how the federal coal leasing program can be reformed to phase out coal-fired electricity generation by 2030 (in line with the targets set by Paris Climate Agreement). Additionally, BLM and DOI should explore ways to maximize taxpayer returns from federal leasing (such as increasing royalty rates).
- As the Interior Department has done during prior programmatic reviews of the federal coal program, any new significant leasing decisions on public lands should be paused so that those decisions and leases will have the benefit of this comprehensive review.

II. Justification

The federal government has a responsibility to all Americans to ensure that the coal resources it manages are administered in a responsible way. This includes meeting our energy needs and ensuring taxpayers receive a fair return for the sale of public resources. Yet, over the past few years, it has become clear that many of the decades-old regulations and procedures that govern the federal coal program are outdated. These regulations

do not reflect modern trends in the coal industry, realities of today's economy, or current understandings of environmental and public health impacts from coal production. Because the last programmatic review of the coal program occurred over 30 years ago, a new review is necessary to modernize the federal coal leasing program. Consistent with the practice of the Interior Department during past programmatic environmental reviews, BLM should pause any new significant leasing decisions so those decisions benefit from this reform.

As an initial matter, many stakeholders have raised concerns that taxpayers are not appropriately compensated for the sale of coal. Addressing the statutory “fair market value” leasing standard under the MLA, the Interior Department’s Office of Inspector General issued a 2013 report concluding that “BLM faces significant challenges in the areas of coal leasing and mine inspection and enforcement” and that its management resulted in millions of dollars in lost royalties to the federal treasury because the agency was “not receiving the full, fair market value for the leases.”¹ Also in 2013, the Government Accountability Office (“GAO”) concluded that BLM failed to ensure mining companies pay fair market value for leasing federal coal.² GAO determined that since 1990 most federal coal leases were not sold competitively and had only a single bidder. In particular, of the 107 tracts that were leased between 1990 and 2012, “sales for 96 (about 90 percent) involved a single bidder . . . which was generally the company that submitted the lease application. More than 90 percent of the lease applications BLM received were for maintenance tracts used to extend the life of an existing mine or to expand that mine’s annual production.”³ As recently as 2016, the Council of Economic Advisors concluded that the coal leasing program has been “structured in a way that misaligns incentives going back decades, resulting in a distorted coal market with an artificially low price for most federal coal and unnecessarily low government revenue from the leasing process.”⁴ The Interior Department should undertake a programmatic review and make consequent reforms to the federal coal leasing program in order to ensure that taxpayers receive a fair return for the exploitation of public lands.

Apart from not offering a fair return to taxpayers and distorting the coal market, the federal coal leasing programs unduly contributes to climate change. Coal-fired power generation fell to a 42-year low in 2019, driven in part by the increased competitiveness of natural gas-fired plants and wind energy.⁵ The decline in U.S. coal-fired power generation over the last decade accounted for 75% of the total reduction in U.S. energy-related dioxide (CO₂) emissions between 2005 and 2017.⁶ Despite this sharp decline, coal-fired generations still accounted for 21% of total U.S. energy-related CO₂ emissions in 2019 and 60% of U.S. emissions from the electric power sector.⁷ Coal production on federal lands accounts for nearly all coal production in the western United States and about 40% of total U.S. coal production.⁸ In order to keep global warming within the 1.5°C target set by the Intergovernmental Panel on Climate Change (IPCC), the United States (and other OECD countries) must phase out all coal-combustion in the power sector by 2030.⁹ By continuing to promote and subsidize this carbon-intensive fuel, the federal coal leasing program undermines the energy policy goals of

¹ OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF THE INTERIOR, *Coal Management Program*, U.S. Department of the Interior (June 2013) <https://www.doi.gov/sites/doi.gov/files/CR-EV-BLM-0001-2012Public.pdf>.

² GOV’T ACCOUNTABILITY OFF., GAO-14-140, Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public Information 15 (Dec. 2013) <http://www.gao.gov/products/GAO-14-140>.

³ *Id.*

⁴ EXECUTIVE OFFICE OF THE PRESIDENT - COUNCIL OF ECONOMIC ADVISORS, *The Economics of Coal Leasing on Federal Lands: Ensuring a Fair Return to Taxpayers* at 7 (June 2016).

⁵ See U.S. Energy Information Agency (EIA), *U.S. Coal-fired electricity generation in 2019 falls to 42-year low* (May 11, 2020) <https://www.eia.gov/todayinenergy/detail.php?id=43675>.

⁶ Howard Greunspacht, *The U.S. Coal Sector: recent and continuing challenges*, BROOKINGS INSTITUTION at 1 (January 2019).

⁷ U.S. Energy Information Agency (EIA), *Energy and the environment explained: where greenhouse gases come from* (Aug. 11, 2020) <https://www.eia.gov/energyexplained/energy-and-the-environment/where-greenhouse-gases-come-from.php>.

⁸ Howard Greunspacht, *The U.S. Coal Sector: recent and continuing challenges*, BROOKINGS INSTITUTION at 8 (January 2019).

⁹ Paola A. Yanguas Parra et al., *Global and regional coal phase-out requirements of the Paris Agreement: Insights from the IPCC Special Report on 1.5°C*, Climate Analytics (September 2019) https://climateanalytics.org/media/report_coal_phase_out_2019.pdf.

President-elect Biden, who pledged to rejoin the Paris Climate Agreement¹⁰ and decarbonize the U.S. electric power sector by 2035.¹¹

Phasing out coal production is not only a vital domestic goal but also critical for American global leadership. While OECD countries should phase out coal-fired power generation by 2030, no country should exceed 13% of coal-fired electricity generation by the same date.¹² Coal should be phased out globally by 2040 in order to maintain a viable pathway towards achieving the goals of the Paris Climate Agreement.¹³ Recognizing this reality, U.N. Secretary-General Antonio Guterres recently urged countries to stop financing coal and to refrain from building new coal-fired power plants.¹⁴ Despite this call to action there are 400 new coal plants under construction and proposals to build another 700.¹⁵ China is leading efforts to revive coal across the globe. It has built more new coal plants domestically through May of 2020 than it did in all of 2019.¹⁶ Additionally, more than 40% of the projects financed through its Belt and Road Initiative in 2018 involved coal.¹⁷ President-elect Biden has pledged to “[s]top China from subsidizing coal exports and outsourcing carbon pollution” and promised to “rally a united front of nations to hold China accountable to high environmental standards in Belt and Road Initiatives.”¹⁸ However, the Biden Administration will have little international credibility in pursuing these goals if it continues to encourage domestic coal production on federal lands by offering low royalty rates. Reforming the federal coal program is a necessary precondition for the United States resuming a global climate leadership role.

III. The Federal Coal Program: Background & Recent Action

Federal Coal Leasing: Statutory Authority & Structure

Under the Mineral Leasing Act (MLA),¹⁹ BLM has broad authority to lease (or not to lease) public lands for coal mining operations after conducting a competitive bidding process.²⁰ The MLA authorizes the Secretary of the Interior (“the Secretary”) to divide lands that “have been classified for coal leasing into leasing tracts of such a size as [the Secretary] finds appropriate and in the public interest and which will permit the mining of coal.”²¹ The MLA requires the Secretary, “in his discretion, upon the request of any qualified application or his own motion” to “offer such lands for leasing.”²² These leases must be awarded through “competitive bidding”

¹⁰ BIDEN FOR PRESIDENT, *The Biden Plan For A Clean Energy Revolution And Environmental Justice* (“A Biden Administration will . . . [r]e-enter the Paris Agreement on day one of the Biden administration and lead a major diplomatic push to raise the ambitious of countries’ climate targets.”) <https://joebiden.com/climate-plan/>.

¹¹ BIDEN FOR PRESIDENT, *The Biden Plan To Build A Modern, Sustainable Infrastructure And An Equitable Clean Energy Future* (“Biden will . . . [m]ove ambitiously to generate clean, American-made electricity to achieve a carbon pollution-free power sector by 2035.”) <https://joebiden.com/clean-energy/>.

¹² Paola A. Yanguas Parra et al., *Global and regional coal phase-out requirements of the Paris Agreement: Insights from the IPCC Special Report on 1.5°C*, Climate Analytics (September 2019) https://climateanalytics.org/media/report_coal_phase_out_2019.pdf.

¹³ *Id.*

¹⁴ Nina Chestney & Matthew Green, U.N. *Chief urges end to coal financing to spur clean energy shift*, REUTERS (July 9, 2020) <https://www.reuters.com/article/us-climate-change/u-n-chief-urges-end-to-coal-financing-to-spur-clean-energy-shift-idUSKBN24A1FI>.

¹⁵ Jason Bordoff, *Yes, We Can Get Rid of the World’s Dirtiest Fuel*, FOREIGN POLICY (Aug. 26, 2020)

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ BIDEN FOR PRESIDENT, *The Biden Plan For A Clean Energy Revolution And Environmental Justice* <https://joebiden.com/climate-plan/>.

¹⁹ 30 U.S.C. § 181 et seq. (as amended by the Federal Coal Leasing Amendments Act of 1975 (“FCLAA”), Pub. L. No. 94-377, 90 Stat. 1083 (Aug. 4, 1976)).

²⁰ See 30 U.S.C. § 201(a)(1).

²¹ 30 U.S.C. § 201(a)(1).

²² *Id.*

and no lease can be sold below fair market value.²³ “No lease shall be held unless the lands containing the coal deposits have been included in a comprehensive land-use plan and such sale is compatible with such plan.”²⁴ BLM can only lease coal in a manner that balances “long-term benefits to the public against short-term benefits.”²⁵

Apart from the MLA, the Federal Lands Policy and Management Act (“FLPMA”) requires BLM to manage public lands for multiple uses,²⁶ which is defined as “the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people.”²⁷ Pursuant to FLPMA, “the public lands [must] be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values.”²⁸ FLPMA further states that federal policy requires that the “United States receive fair market value of the use of the public lands and their resources.”²⁹

BLM manages federal coal pursuant to regulations and a programmatic EIS that were originally adopted 41 years ago, at a time when the threat of climate change was not fully appreciated and market conditions, infrastructure development, scientific understanding, and national priorities were dramatically different.³⁰ These regulations did not consider the climate impacts of the federal coal program or adequately evaluate other potential environmental effects. Additionally, they did not reflect the conditions of the coal industry as it exists today.

The 1979 regulations contemplated two separate coal leasing processes: regional leasing, whereby the BLM selects tracts within a region for competitive sale, and leasing by application, whereby mining companies submit an application to lease certain tracts.³¹ The regional leasing system has not been used since the 1980s and nearly all BLM coal leasing is done by application.³² Leasing by application begins with BLM review of an application to ensure that it is complete, that it conforms to existing land use plans, and that it contains sufficient geologic data to determine the fair market value of the coal.

BLM then prepares an environmental analysis in compliance with the National Environmental Policy Act (NEPA).³³ At the same time, BLM will also consult with tribal governments and appropriate Federal and state agencies and will determine whether the surface owner consents to leasing in situations where the surface is not administered by the BLM. BLM will then reward the lease to the highest bid that meets or exceeds the coal tract’s presale estimated fair market value.³⁴

²³ *Id.*

²⁴ 30 U.S.C. § 2011(3)(A)(i).

²⁵ 30 U.S.C. § 201(a)(3) (requiring that lands subject to leasing be included in a land use plan); 43 U.S.C. § 1712(c)(7) (land use plans must “weigh long-term benefits to the public against short-term benefits” of proposed land uses).

²⁶ 43 U.S.C. §§ 1701(a)(7).

²⁷ *Id.* at § 1702(c).

²⁸ 43 U.S.C. § 1701(a)(8).

²⁹ *Id.*

³⁰ See 44 FED. REG. 42,584 (July 19, 1979) (Coal Management; Federally Owned Coal); BUREAU OF LAND MANAGEMENT, *Final Programmatic Environmental Statement: Federal Coal Management Program*.

³¹ *Id.*

³² See Sally Jewell, *Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Leasing Program*, DEPARTMENT OF THE INTERIOR: SECRETARIAL ORDER NO. 3338 (Jan. 15, 2016).

³³ Whenever the federal government takes a “major federal action significantly affecting the quality of the human environment,” NEPA requires a “detailed statement” of that action’s environmental effects. This “detailed statement” has become known as an “environmental impact statement” (“EIS”) and must include: 1) the proposed action’s environmental impact; 2) unavoidable adverse effects of the proposed action; 3) alternatives to the proposed action; 4) the relationship between local short-term environmental uses and long-term productivity; and 5) any irreversible resource commitment the proposed action entails. Because NEPA only requires an EIS for “major federal actions significantly affecting” the environment, agencies often complete an “environmental assessment” (“EA”) to determine whether an EIS is necessary. See 40 C.F.R. § 1501.4 (1978) (explaining that an agency must make its decision to regulate based on an environmental assessment if the proposed action does not categorically require or avoid environmental impact statements). An EA examines the “context” and intensity” of a proposed action; it is typically shorter and less resource intensive than an EIS. 40 C.F.R. § 1508.27 (1978). If BLM determines their lease sale will not significantly affect the environment, it will issue a “Finding of No Significant Impact” (“FONSI”) and no EIS is required. 40 C.F.R. § 1508.13 (1978). Otherwise, the agency prepares a full EIS.

³⁴ See U.S. DEPARTMENT OF THE INTERIOR (DOI), BUREAU OF LAND MANAGEMENT, *Coal: Lease by application (LBA) Process* <https://www.blm.gov/programs/energy-and-minerals/coal/lease-by-application-process>.

BLM receives revenue from coal leasing in three ways: (1) a bonus that is paid at the time BLM issues a lease; (2) rental fees; and (3) production royalties.³⁵ The MLA directs the Secretary to set surface coal royalties at a minimum of 12.5 percent “of the value of coal as defined by regulation” and provides that the Secretary may establish a lesser royalty for coal recovered by underground mining operations.³⁶ In 1990, the underground mining rate was set at 8 percent by regulation. The MLA also provides the Secretary discretion to suspend, waiver, or reduce royalty fees “whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the lease cannot be successfully operated under the terms provided therein.”³⁷ All receipts from a lease are shared equally with the state in which the lease is located.

The United States has the largest demonstrated coal reserves in the world, with an estimated 473 billion tons of coal, 252 billion tons of which are recoverable.³⁸ BLM is responsible for coal leasing on approximately 570 million acres where the coal mineral estate is owned by the federal government.³⁹ Surface ownership of these lands belongs to either the BLM, the U.S. Forest Service, private land owners, state land owners, or other Federal agencies.

Coal production on federal lands accounts for nearly all coal production in the western United States and about 40% of total U.S. coal production.⁴⁰ BLM currently manages over 300 active federal coal leases in ten states.⁴¹ These BLM managed leases account for an estimated 7.4 billion tons of recoverable coal.⁴² Nearly all federal leases are on western lands; eastern state leases accounted for only 6 of the 298 outstanding federal leases in 2017.⁴³ More specifically, over 85% of all Federal coal production occurs in the Powder River Basin of Wyoming and Montana.⁴⁴ In 2019, the federal government produced over 291 million tons of coal on federal lands, 259 million of which were located in Wyoming and Montana alone.⁴⁵

The Obama Administration’s Response: Moratorium on Coal Leasing

In order to seek a better return on public lands for taxpayers and to account for the threat of climate change, Interior Secretary Sally Jewell issued a Secretarial Order (“Jewell Order”) in 2016 that directed BLM to undertake a broad, comprehensive review of the federal coal program.⁴⁶ As part of this review, Interior would prepare a programmatic environmental impact statement (PEIS) under NEPA.⁴⁷ As support for taking this action, Jewell noted that Interior is charged by Congress “with managing and overseeing mineral development on the public lands, not only for the purpose of ensuring safe and responsible development of mineral resources, but also to ensure conservation of the public lands, the protection of their scientific, historic, and environmental values, and compliance with applicable environmental laws.”⁴⁸ Additionally, Jewell noted that

³⁵ See EXECUTIVE OFFICE OF THE PRESIDENT - COUNCIL OF ECONOMIC ADVISORS, *The Economics of Coal Leasing on Federal Lands: Ensuring a Fair Return to Taxpayers* at 7 (June 2016).

³⁶ 30 U.S.C. § 207(a).

³⁷ 30 U.S.C. § 209

³⁸ U.S. ENERGY INFORMATION AGENCY (EIA), *U.S. Coal Reserves* (Oct. 5, 2020) <https://www.eia.gov/coal/reserves/>.

³⁹ U.S. DEPARTMENT OF THE INTERIOR (DOI), BUREAU OF LAND MANAGEMENT, *National Coal Statistics Table* <https://www.blm.gov/programs/energy-and-minerals/coal/coal-data> (last visited Dec. 12, 2020).

⁴⁰ Howard Greunspecht, *The U.S. Coal Sector: recent and continuing challenges*, BROOKINGS INSTITUTION at 8 (January 2019).

⁴¹ *Citizens for Clean Energy v. United States DOI*, 384 F. Supp. 3d 1264, 1271 (D. Mont. 2019).

⁴² *Id.*

⁴³ Howard Greunspecht, *The U.S. Coal Sector: recent and continuing challenges*, BROOKINGS INSTITUTION at 8 (January 2019).

⁴⁴ See U.S. DEPARTMENT OF THE INTERIOR (DOI), BUREAU OF LAND MANAGEMENT, *Coal: Background* <https://www.blm.gov/programs/energy-and-minerals/coal/background>.

⁴⁵ Between Wyoming and Montana Wyoming produced 244,041,373 tons in 2019 while Montana produced 15, 631,137 tons. See U.S. DEPARTMENT OF THE INTERIOR, OFFICE OF NATURAL RESOURCES REVENUE, *Natural Resources Revenue Data: Coal (2019)* <https://revenuedata.doi.gov/explore/?commodity=Coal%20%28tons%29&dataType=Production&location=NF&mapLevel=State&offshoreRegions=false&period=Calendar%20Year&year=2019> (last visited Dec. 7, 2020).

⁴⁶ Sally Jewell, *Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Leasing Program*, DEPARTMENT OF THE INTERIOR: SECRETARIAL ORDER NO. 3338 (Jan. 15, 2016).

⁴⁷ *Id.*

⁴⁸ *Id.*

Interior has a “statutory duty to ensure a fair return to the taxpayer and broad discretionary authority to decide where, when and under what terms and conditions, mineral development should occur.”⁴⁹

The Jewell Order required BLM to “take a careful look at issues such as how, when, and where to lease; how to account for the environmental and public health impacts of federal coal production; and how to ensure American taxpayers are earning a fair return for the use of their public resources.”⁵⁰ Additionally, the Jewell Order sought to account for the job impacts of federal coal leasing, its export potential, and domestic energy needs.⁵¹

While DOI conducted the PEIS, Interior Secretary Sally Jewell ordered BLM to cease conducting lease sales. The purpose of this moratorium was to ensure that BLM did not “lock[] in for decades the future development of large quantities of coal under current rate and terms that the PEIS may ultimately determine to be less than optimal.”⁵² In support of this action, Jewell cited the past practices of DOI, which previously halted lease sales during two past programmatic reviews, and her discretionary authority under the Mineral Leasing Act.⁵³ The Jewell Order directed BLM not to process any new applications for coal leasing and to defer making a decision on any pending applications, subject to a few exceptions.⁵⁴

NEPA requires that an agency engage in a process known as “scoping” early in the preparation of an EIS.⁵⁵ In the scoping process, the agency describes a proposed agency action and possible alternatives, and seeks input from States, tribes, local governments, and the public on the affected resources and the environmental issues raised by the proposed action to help evaluate what issues the agency should address in the EIS. 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”.⁵⁶

During the spring and summer of 2016, BLM accepted more than 214,000 public comments and held six public meetings in various cities regarding its review of the federal coal program. On January 11, 2017, BLM released its Scoping Report on the federal coal program in which it found that “modernization of the Federal coal program is warranted.” BLM stated that “[t]his modernization should focus on ensuring a fair return to Americans for the sale of their public coal resources; addressing the coal program’s impact on the challenge of climate change; and improving the structure and efficiency of the coal program in light of current market conditions, including impacts on communities.” BLM said it would move forward with the preparation of a draft programmatic EIS by January 2018 and would issue a final PEIS by January 2019.

The Trump Administration’s Reversal

In the first few months of the Trump Administration, the Interior Department reversed the Jewell Order. On March 28, 2017, President Trump issued an executive order commanding Secretary of the Interior Ryan Zinke to “take all steps necessary and appropriate to amend or withdraw” the Jewell Order and to “lift any and all moratoria on Federal land coal leasing activities related to [the Jewell Order].”⁵⁷ On March 29, Interior Secretary Ryan Zinke reversed the coal leasing moratorium and halted the PEIS in his own Secretarial Order (the “Zinke

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* (Citing 30 U.S.C. §201.)

⁵⁴ *See Id.*

⁵⁵ 40 C.F.R. § 1501.7; 43 C.F.R. § 46.235.

⁵⁶ 81 Fed. Reg. 17,720 (Mar. 30, 2016).

⁵⁷ EXECUTIVE ORDER 137893, *Promoting Energy Independence and Economic Growth* (March 28, 2017)

<https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-energy-independence-economic-growth/>.

Order”).⁵⁸ As justification for this action, Zinke noted that the PEIS would cost millions of dollars and would not be completed before 2019. He also cited the need to “enhance and improve” the federal coal leasing program given its critical importance to “energy security, job creation, and proper conservation stewardship.”⁵⁹ The Zinke Order directed BLM to “process coal lease applications and modifications expeditiously in accordance with regulations and guidance existing before the issuance of [the Jewell Order].”⁶⁰

As soon as Secretary Zinke halted the PEIS and reversed the coal leasing moratorium, both states and environmental organizations challenged his decision.⁶¹ In April of 2019, a federal district court held that the Zinke Order was a “major federal action” sufficient to trigger a mandatory environmental review under NEPA.⁶² The court noted that DOI could comply with NEPA by either preparing a full EIS or preparing an EA and providing a “convincing statement of reasons” to explain why the impact of the Zinke Order did not merit a full EIS.⁶³ The court took no position on which level of analysis would be sufficient and refused to require DOI to undertake the full PEIS envisioned by the Jewell Order.⁶⁴

In order to comply with the court’s directive, BLM and DOI published a draft Environmental Assessment lifting the moratorium on new coal leases in May of 2019.⁶⁵ After this NEPA review began, the district court ordered a delay in the pending litigation over the Zinke Order so that BLM could complete its environmental analysis.⁶⁶ In February of 2020, BLM published a final EA and a Finding of No Significant Impact (FONSI) that supported a resumption in coal leasing.⁶⁷ After the publication of this study, the case challenging the Zinke Order was closed, but Chief Judge Morris noted that “[p]laintiffs remain free to file a complaint to challenge the sufficiency of the EA and FONSI and the issuance of any individual coal leases.”⁶⁸ The district court concluded that the federal government had remedied the violation specified in the court’s prior order (failure to initiate NEPA analysis) and any challenge to the EA and the FONSI were not appropriately before the court.⁶⁹

On July 20, 2020, New York, California, New Mexico, and Washington filed a supplemental complaint renewing their lawsuit from May 2017 with new claims that BLM arbitrarily limited the scope of its analysis in its February 2020 EA, in violation of the National Environmental Policy Act and Administrative Procedure Act (APA). The complaint also alleged continued violations of the Federal Land Policy Management Act, and the Mineral Leasing Act.⁷⁰ On the same day, the Northern Cheyenne Tribe and multiple environmental groups filed a supplemental complaint similar to the one filed by the states.⁷¹ These challenges allege that DOI’s EA was unduly restrictive because it did not evaluate the environmental impacts of the entire federal coal leasing program. Instead, it restricted the scope of its analysis to just four federal coal leases that were issued between the date of the Zinke Order and the “anticipated date” that the moratorium would have been lifted.⁷²

⁵⁸ SECRETARIAL ORDER NO. 3348, *Concerning the Federal Coal Moratorium* (March 29, 2017).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *Citizens for Clean Energy et al. v. DOI*, No. 4:17-cv-00030-BMM (D. Mont.) (coalition of environmental groups and Northern Cheyenne tribe); see also *State of California et al. v. DOI*, No. 4:17-cv-00042-BMM (D. Mont.) (Suit filed by New York, California, New Mexico, and Washington, later consolidated with the *Citizens for Clean Energy* case).

⁶² *Citizens for Clean Energy v. DOI*, No. 4:17-cv-00030-BMM, Order (D. Mont.) (April 19, 2019).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT (LEAD AGENCY), *Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal, Environmental Assessment* https://eplanning.blm.gov/public_projects/nepa/122429/173355/210563/Lifting_BLM_Coal_Leasing_Pause_EA.pdf.

⁶⁶ *Citizens for Clean Energy v. DOI*, No. 4:17-cv-00030-BMM, Order (D. Mont.) (July 31, 2019).

⁶⁷ DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, *Finding of No Significant Impact (FONSI): Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal*, DOI-BLM-WO-WO2100-2019-0001-EA (February 25, 2020); DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, *Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal*, (Final Environmental Assessment) DOI-BLM-WO-WO2100-2019-0001-EA (February 25, 2020).

⁶⁸ *Citizens for Clean Energy v. DOI*, No. 4:17-cv-00030-BMM, Order (D. Mont.) (May 22, 2020).

⁶⁹ *Id.*

⁷⁰ *State of California v. DOI*, No. 4:17-cv-00030-BMM, First Supplemental Complaint For Declaratory and Injunction Relief (D. Mont.) (July 20, 2020).

⁷¹ *Citizens for Clean Energy v. DOI*, No. 4:17-cv-30-BMM, Document 173-1 (July 20, 2020).

⁷² See, e.g., *State of California et al. v. DOI*, No. 4:17-cv-30-BMM, Document 173-2 (July 20, 2020) at page 27-30.

Additionally, the complaints allege that the BLM should have considered a broader range of alternatives actions and that the agency failed to consider the environmental impacts of reinstating federal coal leasing.⁷³ Since the issuance of the Zinke Order, BLM has issued only four leases that would have fallen within the scope of the Jewell Order.⁷⁴ From the Jewell Order to the present, eleven other leases have been issued that would have fallen within exemptions found within the Jewell Order.⁷⁵

IV. Proposed Actions

Settle pending NEPA litigation

The first step toward reforming the federal coal leasing program should be to settle pending litigation with the states, tribes, and environmental non-profits. In their complaints, challengers to the Zinke Order ask the federal government to prepare a NEPA document that evaluates the full scope of the activities encompassed by the federal coal leasing program.⁷⁶ In their final EA, DOI and BLM only analyze the four leases issued since 2017 that would have been barred by the Jewell Order, evaluating the specific impact these leases have on greenhouse gas emissions, socioeconomic conditions, and water quality and quantity.⁷⁷ BLM could have also considered the harm to public lands and wildlife from coal mining, air quality impacts from coal transport and combustion, the disposal of coal ash, impacts to environmental justice communities and the cumulative climate change impacts from the entire federal coal leasing program.⁷⁸

Additionally, challengers to the Zinke Order and the subsequent NEPA review of that order ask that the federal government consider a broader range of alternatives in their NEPA analysis. In their final EA, DOI considered two scenarios. The first scenario was a “no action” alternative that assumes the Jewell Order would have remained in the effect, BLM would have completed a PEIS, and federal coal leasing would resume once the PEIS was completed in March 2019.⁷⁹ BLM did not address hypothetical alternative leasing regimes that would have followed from a PEIS, such as a permanent “no leasing” option.⁸⁰ The second scenario evaluated was the Zinke Order’s rescission of the Jewell Order and the four leases that were issued during the Trump Administration but would not have been barred under the moratorium.⁸¹

In addition to these two scenarios, BLM and DOI could have considered: (1) accounting for carbon-based externalities through a royalty rate increase or royalty adder; (2) adopting requirements for the use of compensatory mitigation; (3) establishing a carbon budget to guide federal coal leasing in an effort to limit the amount of greenhouse gas emissions associated with federal coal production; (4) considering opportunities to address methane emissions associated with coal mining operations; and (5) fully analyzing a no new leasing alternative.⁸² Each of these alternatives was identified in the 2017 scoping report issued at the end of the Obama Administration.

⁷³ *Id.* at 30-37.

⁷⁴ DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, *Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal*, (Final Environmental Assessment) DOI-BLM-WO-WO2100-2019-0001-EA (February 25, 2020).

⁷⁵ *Id.*

⁷⁶ *State of California et al. v. DOI*, No. 4:17-cv-30-BMM, Document 173-2 (July 20, 2020); *Citizens for Clean Energy v. DOI*, No. 4:17-cv-30-BMM, Document 173-1 (July 20, 2020).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, *Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal*, (Final Environmental Assessment) DOI-BLM-WO-WO2100-2019-0001-EA (February 25, 2020).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

Just as the Obama Administration sought to undertake a comprehensive review of the federal coal leasing program before enacting more permanent reforms, so too will the Biden-Harris Administration need to undertake a programmatic study. The requests of the states, tribes, and environmental groups challenging the Zinke Order and the goals of President-elect Biden are therefore aligned. The administration should agree to undertake a programmatic study of the federal coal leasing program, while also agreeing to study the range of alternative options identified in the Obama-era scoping report.

Begin programmatic review of the federal coal leasing program

After resolving outstanding litigation, the BLM should begin their programmatic review of the federal coal leasing program. In particular, this programmatic impact analysis should consider ways to improve the economic returns for taxpayers and address concerns about climate change.

As noted earlier, several commentators have lamented that the federal coal leasing program does not provide taxpayers with a fair return on the value of public lands. To address these concerns, BLM should study ways to improve the economics of the coal program. As suggested by the Secretary Jewell's initial order for a programmatic review, these improvements could include (1) improving the competitiveness of the bidding process, (2) increasing coal royalty rates, or (3) addressing concerns that federal coal artificially lower market prices (further reducing federal royalties).⁸³

The programmatic review should also address how the federal coal program could be aligned with the nation's climate change goals. President-elect Biden pledged to rejoin the Paris Climate Agreement⁸⁴ and decarbonize the U.S. electric power sector by 2035.⁸⁵ In order to meet keep global warming within 1.5°C target set by the IPCC, the United States (and other OECD countries) must should out all coal-combustion in the power sector by 2030.⁸⁶ Coal-fired generation still accounts for 21% of total U.S. energy-related CO₂ emissions in 2019 and 60% of U.S. emissions from the electric power sector.⁸⁷ Though coal-fired power generation fell to a 42-year low in 2019, driven primarily by lower natural gas prices,⁸⁸ coal production on federal lands still accounts for about 40% of total U.S. coal production.⁸⁹ There is an inherent tensions between the amount of coal produced on federal lands (and its resulting carbon footprint) and the pressing need to address climate change. The programmatic review of the federal coal program should consider ways to mitigate its climate impacts, such as not issuing any more leases in the future.

Reinstate moratorium on new leases

During each past programmatic review of the federal coal leasing program, the Interior Department has halted any new lease sales. In 1973, President Nixon's Interior Department launched a PEIS in response to concerns

⁸³ Sally Jewell, *Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Leasing Program*, DEPARTMENT OF THE INTERIOR: SECRETARIAL ORDER NO. 3338 (Jan. 15, 2016).

⁸⁴ BIDEN FOR PRESIDENT, *The Biden Plan For A Clean Energy Revolution And Environmental Justice* ("A Biden Administration will . . . [r]e-enter the Paris Agreement on day one of the Biden administration and lead a major diplomatic push to raise the ambitious of countries' climate targets.") <https://joebiden.com/climate-plan/>.

⁸⁵ BIDEN FOR PRESIDENT, *The Biden Plan To Build A Modern, Sustainable Infrastructure And An Equitable Clean Energy Future* ("Biden will . . . [m]ove ambitiously to generate clean, American-made electricity to achieve a carbon pollution-free power sector by 2035.") <https://joebiden.com/clean-energy/>.

⁸⁶ Paola A. Yanguas Parra et al., *Global and regional coal phase-out requirements of the Paris Agreement: Insights from the IPCC Special Report on 1.5°C*, Climate Analytics (September 2019) https://climateanalytics.org/media/report_coal_phase_out_2019.pdf.

⁸⁷ U.S. Energy Information Agency (EIA), *Energy and the environment explained: where greenhouse gases come from* (Aug. 11, 2020) <https://www.eia.gov/energyexplained/energy-and-the-environment/where-greenhouse-gases-come-from.php>.

⁸⁸ See U.S. Energy Information Agency (EIA), *U.S. Coal-fired electricity generation in 2019 falls to 42-year low* (May 11, 2020) <https://www.eia.gov/todayinenergy/detail.php?id=43675>.

⁸⁹ Howard Greunspacht, *The U.S. Coal Sector: recent and continuing challenges*, BROOKINGS INSTITUTION at 8 (January 2019)

about speculation in the coal leasing program.⁹⁰ Similarly, in 1986, the Interior Department issued a supplemental PEIS to investigate fair market values policies for coal leasing and to study whether the coal leasing program was compatible with national environmental protection goals.⁹¹ In both circumstances, the Interior Department paused all new leases. Similarly, when the Obama Administration began a programmatic review of the federal coal leasing program in 2016, they paused all new and significant lease sales.⁹²

As with 2016 leasing moratorium, BLM should exempt certain leases from a future moratorium. The prior moratorium excluded the following items:

- emergency leasing as defined in 43 C.F.R. § 3425.1-4;
- lease modifications, as defined in 43 C.F.R. § 3432.1, that do not exceed 160 acres or the number of acres in the original lease, whichever is less;
- lease exchanges as defined in 43 C.F.R. §§ 3435.1, 3436.1, and 3436.2;
- the rights of preference right lease applicants based on prospecting permits issued prior to August 4, 1976; and
- the sale and issuance of new thermal coal leases by application, 43 C.F.R. Subpart 3425, or the issuance of thermal coal lease modifications, 43 CFR Subpart 3432, under pending applications for which the environmental analysis under NEPA has been completed and a Record of Decision or Decision Record has been issued by the BLM or the applicable Federal surface management agency as of the date of this Order.

When imposing the coal leasing moratorium, the Obama Administration concluded that “[g]iven the abundance of coal reserves under lease, the declining demand for coal, and the accommodations that will be made for emergency circumstances, the pause should have no material impact on the nation’s ability to meet its power generation needs.”⁹³ Even after Secretary Zinke reversed the coal leasing moratorium, there was no significant demand for federal coal leasing. Since 2017, BLM has sold only 83 million tons of minable reserves (half of which were exempt from the Jewell Order) and received new requests for another 80 millions.⁹⁴ For context, in 2019 total U.S. coal production was over 700 million tons.⁹⁵ Meanwhile, coal companies have withdrawn applications for 930 million tons.⁹⁶ BLM’s final environmental assessment on lifting the ban itself concluded that the Zinke Order “did not alter coal production levels or rates or cause any changes to associated socioeconomic impacts.”⁹⁷ Additionally, the broader demand for coal continues to decline, with several American coal companies going bankrupt in recent years.⁹⁸ Because of the limited impact of the Zinke Order, the unfavorable state of the current coal market, and the ability of BLM to accommodate emergency circumstances, a moratorium will impose no additional economic harms on the industry.

⁹⁰ U.S. DEPARTMENT OF INTERIOR, *Fact Sheet: Modernizing the Federal Coal Program* (Jan. 16, 2016)

⁹¹ *Id.*

⁹² *Id.*

⁹³ U.S. DEPARTMENT OF INTERIOR, *Fact Sheet: Modernizing the Federal Coal Program* (Jan. 16, 2016)

⁹⁴ Dylan Brown, *Coal leasing sputters despite Trump’s promises*, E&E NEWS (Mar. 3, 2020)

<https://www.eenews.net/greenwire/2020/03/03/stories/1062507113>

⁹⁵ ENERGY INFORMATION AGENCY (EIA), *Coal Production, 1949-2019*, <https://www.eia.gov/coal/annual/pdf/tableES1.pdf>.

⁹⁶ *Id.*

⁹⁷ U.S. DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, *Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal* (Final Environmental Assessment) (Feb. 25, 2020)

⁹⁸ Chuck Jones, *Even Trump Can’t Keep Coal Companies From Declaring Bankruptcy*, FORBES (Nov. 9, 2019)

<https://www.forbes.com/sites/chuckjones/2019/11/09/even-trump-cant-keep-coal-companies-from-declaring-bankruptcy/?sh=2038b60b10c4>.

VI. Conclusion

The Biden-Harris Administration has pledged to protect the nation's public lands and to lead an international campaign against the climate crisis. In order to accomplish these goals, the federal government must reform the federal coal program. By settling pending litigation, imposing a moratorium on new federal leases, and beginning a comprehensive study of the program's shortfalls, the Biden-Harris Administration can begin delivering on its promise to make the United States a global climate leader.

