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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

WILDEARTH GUARDIANS, MONTANA ENVIRONMENTAL INFORMATION CENTER, CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, and WATERKEEPER ALLIANCE, INC.,

Plaintiffs,

vs.

U.S. BUREAU OF LAND MANAGEMENT, an agency within the U.S. Department of the Interior; DAVID BERNHARDT, in his official capacity as Secretary of the United States Department of the Interior; and DONATO JUDICE, in his official capacity as Montana Bureau of Land Management Deputy State Director,

Defendants.

No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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INTRODUCTION

1. This case challenges the United States Bureau of Land Management's (BLM's) decision to continue to sell oil and gas leases on public lands in Montana and North Dakota while turning a blind eye to the groundwater contamination and climate pollution the leases will cause—an omission this Court recently found to violate the BLM's statutory duty to analyze such impacts.

2. Plaintiffs, a group of public interest organizations, landowners, and Montana residents whose lives and livelihoods depend on clean air and water and a stable climate—challenged two BLM oil and gas lease sales in Montana in 2017 and 2018. On May 1, 2020, this Court found that BLM violated the National Environmental Policy Act (NEPA) by failing to take a hard look at the impacts of the leases on groundwater, failing to consider alternatives that would better protect groundwater, and failing to conduct a cumulative impact analysis discussing how the lease sales, along with other past, present, and future lease sales, would impact the climate. *Wildearth Guardians v. U.S. Bureau of Land Mgmt.*, 457 F. Supp. 3d 880 (D. Mont. 2020). The Court granted summary judgment in Plaintiffs' favor, vacated the challenged leases, and remanded the matter to BLM. *Id.* at 896–97.

3. Following the two lease sales that Plaintiffs successfully challenged, BLM continued to hold lease sales, including sales in July 2019, September 2019, December 2019, March 2020, and September 2020. BLM's analyses of the subsequent sales' environmental impacts suffer from similar defects to those that characterized the two prior sales. Consequently, these sales are likewise unlawful and should be vacated.

4. First, the agency did not address the reasonably foreseeable impacts of oil and gas drilling on groundwater aquifers or consider measures to ensure that underground sources of drinking water are protected from contamination. This

failure disregarded evidence in the record showing that oil and gas companies routinely fail to protect groundwater.

5. Second, BLM did not adequately evaluate the effect of the challenged lease sales on greenhouse gas emissions and resulting climate change impacts, and consequently violated NEPA by not taking a hard look at the cumulative impacts of such sales on the climate crisis.

6. On May 21, 2020, Plaintiffs sent a letter to BLM and the entities that purchased leases in the sales that had occurred between July 2019 and March 2020, alerting them to the infirmities in the subsequent sales' NEPA analyses and requesting that any issued leases be cancelled. BLM did not respond to Plaintiffs' letter or take any action on the leases.

7. BLM cannot act in an environmentally responsible manner if it continues to ignore NEPA's procedural requirement of informed decision-making. Plaintiffs therefore ask the court to again determine that BLM's analysis failed to comply with NEPA and to void any and all oil and gas leases that were, as a result, unlawfully issued. Doing so will ensure that BLM takes the requisite hard look at water and climate impacts and considers reasonable alternatives to the proposed oil and gas development, as NEPA requires.

JURISDICTION AND VENUE

8. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331 (federal question) and under the Administrative Procedure Act (APA), 5 U.S.C. §701 *et seq.*, which waives the Defendants' sovereign immunity. The Court may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201–2202 and 5 U.S.C. §§ 705–706. There exists an actual controversy between the parties within the meaning of 28 U.S.C. § 2201.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the property that is the subject of the action is located in Montana. Venue is also proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because officers of the United States are named defendants in their official capacities, a substantial part of the events and omissions giving rise to this case occurred in BLM offices located in Montana, and this case involves Montana public lands, resources, and environmental interests. Venue is also proper in this Court because Plaintiffs WildEarth Guardians, Montana Environmental Information Center, Center for Biological Diversity, Sierra Club, and Waterkeeper Alliance are located, have offices, and/or have members who reside in Montana. Defendant Donato Judice also resides in this district, and Defendants BLM and the U.S. Department of the Interior maintain offices in this district.

10. This case should be assigned to the Great Falls Division of this Court because it challenges oil and gas lease sales that include parcels located in Blaine County, which is covered by the Great Falls Division. L.R. 1.2(c)(3). BLM's North Central Montana District, Malta, Glasgow, Lewistown, and Havre Field offices are also located in this Division.

PARTIES

11. Plaintiff WILDEARTH GUARDIANS (Guardians) is a non-profit conservation organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West. Guardians has offices in Colorado, Montana, New Mexico, Arizona, Washington, and Oregon. With more than 200,000 members and supporters, Guardians works to sustain a transition from fossil fuels to clean energy in order to safeguard the West. Guardians members live, work, and recreate in areas that will be adversely impacted by

approval of the lease sales challenged herein. Guardians brings this action on its own behalf and on behalf of its adversely affected members.

12. Plaintiff MONTANA ENVIRONMENTAL INFORMATION CENTER (MEIC) is a nonprofit organization founded in 1973 with approximately 5,000 members and supporters throughout the United States and the State of Montana. MEIC is dedicated to the preservation and enhancement of the natural resources and natural environment of Montana and to the gathering and disseminating of information concerning the protection and preservation of the human environment through education of its members and the general public concerning their rights and obligations under local, state, and federal environmental protection laws and regulations. MEIC is also dedicated to assuring that federal officials comply with and fully uphold the laws of the United States that are designed to protect the environment from pollution. MEIC and its members have intensive, long-standing recreational, aesthetic, spiritual, scientific, and professional interests in the responsible production and use of energy; the reduction of greenhouse gas (GHG) pollution as a means to ameliorate the climate crisis; and the land, air, water, and communities impacted by fossil fuel development. MEIC members live, work, and recreate in areas that will be adversely impacted by approval of the lease sales challenged herein. MEIC brings this action on its own behalf and on behalf of its adversely affected members.

13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the Center) is a national non-profit organization, with offices across the country and in La Paz, Mexico. The Center's mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands, and public health. The Center has more than 81,800 members. The Center is actively involved in species and habitat protection issues throughout the United States. The Center,

its members, and staff members use public lands in Montana for recreational, scientific, and aesthetic purposes. They also derive recreational, scientific and aesthetic benefits from these lands through wildlife observation, study, and photography. The Center and its members have an interest in preserving their ability to enjoy such activities in the future. As such, the Center and its members have an interest in helping to ensure their continued use and enjoyment of the activities on these lands. The Center brings this action on its own behalf and on behalf of its adversely affected members.

14. Plaintiff SIERRA CLUB is a national nonprofit organization with 64 chapters and over 800,000 members nationwide, including more than 2,900 in Montana, dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Sierra Club's concerns encompass the exploration, enjoyment and protection of the lands and waters of Montana. The Sierra Club's particular interest in this case and the issues which the case concerns stem from the impacts to groundwater resources and the climate crisis from the challenged lease sales. Sierra Club members live, work, and recreate in areas that will be adversely impacted by approval of the lease sales challenged herein. The Sierra Club brings this action on its own behalf and on behalf of its adversely affected members.

15. Plaintiff WATERKEEPER ALLIANCE, INC. (Waterkeeper) is a global not-for-profit environmental organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable, and swimmable. Waterkeeper comprises more than 350 Waterkeeper Member Organizations and Affiliates working in 48 countries on 6 continents. In the United

States, Waterkeeper represents the interests of its 175 U.S. Waterkeeper Member Organizations and Affiliates, including 3 in the state of Montana, as well as the collective interests of thousands of individual supporting members that live, work, and recreate in and near waterways across the country. Over the past several years, Waterkeeper, through its Clean and Safe Energy campaign, has increasingly engaged in public advocacy, administrative proceedings and litigation aimed at reducing the water quality, quantity and climate change impacts of fossil fuel extraction, transport and combustion, including from BLM-controlled lands, throughout the United States. Waterkeeper has members, supporters and staff who have visited public lands in Montana, including lands and waters that would be affected by the challenged lease sales, for recreational, scientific, educational, and other pursuits and intend to continue to do so in the future, and are particularly interested in protecting them from water-intensive energy development. Waterkeeper brings this action on its own behalf and on behalf of its adversely affected members.

16. Plaintiffs participated extensively in BLM's administrative process, including commenting on the NEPA analyses for the lease sales and filing administrative appeals (known as "protests") of the lease sales. Plaintiffs have exhausted their administrative remedies.

17. Individual plaintiffs and plaintiff groups' members live, work, and recreate in and around the federal lands at issue in this case. They will be adversely affected and irreparably harmed by the BLM's issuance of the oil and gas leases. Oil and gas development pursuant to the leases will degrade air quality and pollute and consume water resources used and enjoyed by plaintiffs and their members. Oil and gas development will also harm plaintiffs and their members by increasing heavy truck traffic, noise, and light pollution. Plaintiffs and their members also

have a substantial interest in ensuring that BLM complies with federal law, including the procedural requirements of NEPA. Plaintiffs' injuries are actual and concrete and would be remedied by the relief sought in this case.

18. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT is an agency within the United States Department of the Interior and is responsible for managing federal public lands and resources, including onshore oil and gas leasing in Montana, and in that capacity is responsible for implementing and complying with federal law.

19. Defendant DAVID BERNHARDT is sued in his official capacity as the Secretary of the U.S. Department of the Interior. As Secretary, Mr. Bernhardt is responsible for managing federal public lands and resources, including onshore oil and gas leasing in Montana, and in that capacity is responsible for implementing and complying with federal law.

20. Defendant DONATO JUDICE is sued in his official capacity as the Montana BLM Deputy State Director for Energy, Minerals and Realty. Deputy Director Judice signed the decision records approving the oil and gas lease sale challenged here.

STATUTORY BACKGROUND

I. National Environmental Policy Act

21. The National Environmental Policy Act is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).[1]

[1] The Council on Environmental Quality (CEQ) amended NEPA's regulations, effective September 14, 2020. CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020). The new regulations do not apply to the agency actions challenged here because the actions were initiated prior to September 14, 2020. Thus, unless noted, all citations to 40 C.F.R. chapter V, subchapter A refer to the version in effect prior to the September 14, 2020 amendments.

22. NEPA's goals are to (1) "prevent or eliminate damage to the environment and biosphere," (2) "stimulate the health and welfare of" all people, and (3) "encourage productive and enjoyable harmony between [hu]man [kind] and [the] environment." 42 U.S.C. § 4321. NEPA recognizes that "each person should enjoy a healthful environment" and ensures that the federal government uses all practicable means to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations" and "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings." *Id.* § 4331(b)–(c).

23. To fulfill these purposes, NEPA requires that: (1) agencies take a "hard look" at the environmental impacts of their actions before the actions occur, thereby ensuring "that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and (2) "the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

24. NEPA requires federal agencies to prepare an environmental impact statement (EIS) for "all major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS process is intended "to help public officials make decisions that are based on understanding of environmental consequences" and to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b)–(c). "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information,

only to regret its decision after it is too late to correct." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (internal quotation marks omitted).

25. All environmental analyses required by NEPA must be conducted at "the earliest possible time." 40 C.F.R. § 1501.2; *see also Kern v. U.S. Bureau of Land Mgmt.,* 284 F.3d 1062, 1072 (9th Cir. 2002) ("NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done.").

26. To help determine whether an EIS is necessary, an agency may first prepare an environmental assessment (EA). 40 C.F.R. §§ 1501.3, 1501.4(b)–(c). If the agency determines, after preparing the EA, that the proposed action does not require preparation of an EIS, it must then prepare a finding of no significant impact (FONSI) detailing why the action "will not have a significant effect on the human environment." 40 C.F.R. §§ 1501.4(e), 1508.13; *see Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (describing procedure). NEPA's regulations list ten factors that must be considered in determining the significance of an action's environmental effects. 40 C.F.R. § 1508.27(b). These include the degree to which the effects on the environment are "highly controversial," or "highly uncertain or involve unique or unknown risks," and "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." *Id.* § 1508.27(b)(4)–(5), (7). If the EA indicates that the federal action "may" significantly affect the quality of the human environment, the agency must prepare an EIS. *See, e.g.*, *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004). In making this determination, BLM must "consider every significant aspect of the

environmental impact of a proposed action." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). "A determination that significant effects on the human environment will in fact occur is not essential. If substantial questions are raised whether a project may have a significant effect upon the human environment, an EIS must be prepared." *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982) (internal citation omitted).

27. Under the regulations applicable to the challenged lease sales, as part of its environmental review under NEPA, an agency is required to evaluate the indirect impacts of the proposed action. 40 C.F.R. § 1508.8(b). "Indirect effects" are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* § 1508.8(b).

28. The agency's NEPA analysis also must assess the cumulative impacts of the action "result[ing] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. §§ 1508.7, 1508.27(b)(7). The cumulative impact analysis "must be more than perfunctory"; it must provide a "useful analysis of the cumulative impacts of past, present, and future projects." *Kern*, 284 F.3d at 1075. Proper consideration of cumulative impacts requires "some quantified or detailed information," and general statements about possible effects "do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 387 F.3d 989, 993–94 (9th Cir. 2004).

29. The agency must also describe "connected" or "cumulative" actions in a single environmental review. 40 C.F.R. § 1508.25(a)(1)–(2); *Klamath-Siskiyou*, 387 F.3d at 998–99. "The purpose of this requirement is to prevent an agency from dividing a project into multiple 'actions,' each of which individually has an

insignificant environmental impact, but which collectively have a substantial impact." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006) (internal quotation marks omitted). Where the proposed actions are "similar," the agency also should assess them in the same document when doing so provides "the best way to assess adequately the combined impacts of similar actions." *Klamath-Siskiyou*, 387 F.3d at 999 (quoting 40 C.F.R. § 1508.25(a)(3)).

30. As part of its NEPA review, an agency is also required to prepare a detailed statement regarding the alternatives to a proposed action. *See* 42 U.S.C. § 4332(2)(C)(iii), (E). This analysis of alternatives to the proposed action is the "heart" of NEPA review. 40 C.F.R. § 1502.14; *see also id.* § 1508.9(b). Consideration of reasonable alternatives is necessary to ensure that the agency has considered all possible approaches to, and potential environmental impacts of, a particular project. *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). "NEPA's alternatives requirement, therefore, ensures that the most intelligent, optimally beneficial decision will ultimately be made." *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (internal quotation marks omitted). An agency must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985).

II. Administrative Procedure Act

31. The APA provides a right to judicial review for any "person suffering legal wrong because of agency action." 5 U.S.C. § 702. Actions that are reviewable under the APA include final agency actions "for which there is no other adequate remedy in a court." *Id.* § 704.

32. Under the APA, a reviewing court shall, *inter alia*, "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). Agency actions may also be set aside in other circumstances, such as where the action is "without observance of procedure required by law." *Id.* § 706(2)(B)–(F).

FACTUAL ALLEGATIONS

I. The Impact of Oil and Gas Drilling on Underground Drinking Water

33. Groundwater contained in subsurface aquifers is a critically important resource that provides water for drinking, agriculture and other uses, particularly in the Western United States. Groundwater aquifers with usable water can occur at great depths, including many thousands of feet below the surface.

34. Climate change makes it even more important to protect potentially usable sources of groundwater, even if those groundwater reserves are not currently in use. The warming climate is expected to increase demand for groundwater in coming years, putting greater pressure on current sources and requiring water from previously untapped groundwater sources. The U.S. Environmental Protection Agency ("EPA") has noted that the "existing distribution and abundance of the drinking water resources in the United States may not be sufficient in some locations to meet future demand. The future availability of sources of drinking water that are considered fresh will likely be affected by changes in climate and water use." U.S. Environmental Protection Agency, Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing

Water Cycle on Drinking Water Resources in the United States, EPA/600/R-16/236F, at 2–18 (Dec. 2016) ("EPA 2016 Report").[2]

35. As a result, deeper and higher-salinity groundwater will likely be needed in coming decades. In fact, Congress passed the federal Safe Drinking Water Act (SDWA) with this purpose. The Act is intended to "protect not only currently-used sources of drinking water, but also potential drinking water sources for the future. This may include water sources which presently exceed . . . water quality requirements . . . or which are not presently accessible for use as . . . drinking water." H.R. Rep. No. 93-1185 (1974), 1974 U.S.C.C.A.N. 6454, 6484.

36. Oil and gas drilling involves boring wells to depths thousands of feet below the surface, often through groundwater aquifers. Without proper well construction, drilling can contaminate underground sources of water. In a comprehensive study, EPA concluded that without proper well construction, drilling can contaminate groundwater because drilling fluids, gases, and chemicals can seep out of the wellbore into groundwater aquifers. EPA 2016 Report, *supra*. For this reason, proper installation and cementing of metal well casing below the deepest protected water source is critical.

37. In its Onshore Oil and Gas Order No. 2, BLM directs that oil and gas wells drilled on public lands shall "protect and/or isolate all usable water zones." 53 Fed. Reg. 46,798, 46,808 (Nov. 18, 1988). Onshore Order No. 2 defines "usable water" that must be protected as groundwater containing less than 10,000 parts per million (ppm) of total dissolved solids. *Id.* at 46,805. This standard is based on the Safe Drinking Water Act definition of an "underground source of drinking water"

[2] Available at www.epa.gov/hfstudy.

as an aquifer with water that contains less than 10,000 mg/L (10,000 ppm) of total dissolved solids. 40 C.F.R. §§ 144.3, 146.3.

38. However, neither Onshore Oil and Gas Order No. 2 nor other BLM regulations provide specific direction as to how the agency and companies will ensure that well casing and cementing extend deep enough to protect all usable water. Nor do Onshore Order No. 2 or other BLM regulations specifically require testing of underground sources of water to identify all usable water zones before drilling may commence.

39. Furthermore, Onshore Order No. 2's requirement to "protect and/or isolate all usable water zones" is inconsistently applied and often disregarded in practice. BLM itself has admitted that there is "continued confusion over which standard of water needs to be isolated and/or protected" under Onshore Order No. 2. BLM, Regulatory Impact Analysis for the Final Rule to Rescind the 2015 Hydraulic Fracturing Rule, at 44–45 (Dec. 2017).[3]

40. To address this regulatory void, in 2015, BLM adopted new standards to ensure that wells are properly constructed and protect all usable water zones. BLM, Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128, 16,128 (Mar. 26, 2015) ("the 2015 Rule") (explaining that the Rule's purpose is to "ensure that wells are properly constructed to protect water supplies" from oil and gas drilling). The 2015 Rule required operators to demonstrate to BLM that they would protect usable water as they drilled their wells. *Id.* at 16,218–20 (43 C.F.R. §§ 3162.3-3(b), (d)(1)(iii), (d)(6)(ii), (e)–(g) (2015)). Like Onshore Order 2, the 2015 Rule defined usable water as groundwater containing less than 10,000 ppm of total dissolved solids. *Id.* at 16,217 (43 C.F.R. § 3160.0-5 (2015)).

[3] Available at https://beta.regulations.gov/document/BLM-2017-0001-0464.

But two years later, in 2017, BLM abruptly reversed course and rescinded the 2015 Rule. BLM, Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61,924 (Dec. 29, 2017). As a result, BLM's 2015 Rule does not currently protect groundwater from contamination (though Onshore Order 2 remains in effect).

41. State regulations are similarly inadequate to ensure protection of groundwater. Montana state regulations are vague and lack specific measures to ensure that all usable aquifers are protected. *See* Mont. Admin. R. 36.22.1001 (requiring surface casing to a depth necessary to protect water that is "reasonably accessible for agricultural and domestic use," but not defining what "reasonably accessible" means); *see also id.* 36.22.302 (defining freshwater as containing less than 10,000 ppm total dissolved solids, but not requiring operators to take specific steps to protect this water). North Dakota regulations are also vague and do not specifically require wells to have cemented surface casing that extends below all sources of usable water. *See generally* N.D. Admin. Code § 43-02-03-21.

42. Moreover, industry has admitted that, despite existing regulations, it often does not protect usable water in practice. Western Energy Alliance and the Independent Petroleum Association of America have told BLM that the "existing practice for locating and protecting usable water" does not measure the numerical quality of water underlying drilling locations, and therefore does not consider whether water containing less than 10,000 ppm TDS would be protected during drilling. Western Energy Alliance and the Independent Petroleum Association of America Sept. 25, 2017 comments Re: RIN 1004-AE52, Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule (82 Fed. Reg.

34,464) ("2017 WEA comments"), at 59.[4] Instead, companies in North Dakota and Montana say they only install protective casing to a depth below the Pierre Shale formation, even if additional well casing would be needed to protect usable water located deeper than that formation. *Id*. at 84. Nothing in Montana's or North Dakota's oil and gas regulations explicitly requires protective casing below the Pierre Shale formation. *See generally* Mont. Admin. R. Ch. 22; N.D. Admin. Code Ch. 43-02-03.

43. These industry trade groups have explained that requiring companies to protect all underground sources of drinking water would result in substantial additional costs for "casing and cementing associated with isolating formations that meet the numerical definition of usable water under the [Onshore Order No. 2 standard], but which are located at depths deeper than the zones that state agencies and BLM field offices have previously designated as requiring isolation." 2017 WEA comments, *supra*, at 84. WEA predicted that complying with the 10,000 ppm TDS usable water standard would cost industry nearly $174 million per year in additional well casing expenses. *Id*. Based on the trade groups' statements, BLM and energy companies have, in practice, been putting numerous underground sources of drinking water at risk by drilling and operating wellbores with inadequate surface casing and cement.

44. A recent report studying a sample of existing oil and gas well records in Montana confirms industry admissions that well casing and cementing practices do not always protect underground sources of drinking water. Dominic Digiulio, *Examination of Selected Production Files in Southcentral Montana to Support*

[4] Available at https://www.regulations.gov/document?D=BLM-2017-0001-0412.

Assessment of the March 2018 BLM Lease Sale (December 22, 2017).[5] Surface casing for wells was generally shallow, extending only 288–617 feet below ground, even though the oil and gas wells themselves extended thousands of feet below ground and through deeper aquifers containing usable water. *Id.* The report therefore concluded that "[b]ased on the shallow depth of surface casing and apparent lack of cement outside intermediate or production casing at depths in contact with usable water, it does not appear that usable water was protected during production at these wells as required by Onshore Rule #2." *Id.*

45. In addition to problems with well casing not extending below all sources of drinking water, oil and gas drilling practices in Montana and North Dakota also may contaminate usable water through a different pathway: by allowing hydraulic fracturing operations to inject toxic chemicals into oil and gas formations that flow into groundwater. Hydraulic fracturing, or fracking, is an oil and gas stimulation technique in which large volumes of hydraulic fracturing fluid—a mix of water, sand, and often-toxic chemicals—are injected into an oil or gas well bore under sufficient pressure to break apart the targeted oil- and gas-bearing rock formation. After the fracturing, oil, gas, and other fluids flow through the fractures and up the well to the surface for collection. Fracking is used on about 90% of new wells on federal lands. 80 Fed. Reg. at 16, 131.

46. Usable groundwater aquifers are often separated from the oil and gas formation being fractured by thousands of vertical feet of subsurface rock. In other cases, however, usable aquifers occur at great depths, and the formation being fractured is very close to the drinking water aquifer—sometimes even within the

[5] Available at https://eplanning.blm.gov/public_projects/nepa/87551/136880/167234/Earthjustice_Protest_1-12-2018.pdf. (Exhibit D to David Katz and Jack and Bonnie Martinell's protest of the March 13, 2018 BLM Montana-Dakotas oil and gas lease sales).

same formation. In general, the less separation distance between an oil and gas production zone and a drinking water aquifer, the more likely hydraulic fracturing is to contaminate drinking water. EPA 2016 Report, *supra*, at 6-44.

47. EPA has found that in some cases, including in Montana, there is no vertical separation between the hydraulically fractured rock formation and the underground drinking water resource. *See id.* at 6-49. In other words, hydraulic fracturing is occurring directly into underground drinking water, or immediately adjacent to it. In such cases, EPA concluded that hydraulic fracturing may introduce toxic fracturing fluid into formations that may currently serve, or in the future could serve, as a drinking water source for public or private use. *Id.* at 6-44 to 6-50.

48. A recent study of hydraulic fracturing in Pavillion, Wyoming, confirmed that oil and gas drilling had contaminated underground sources of drinking water in that area due to lack of vertical separation between the aquifer and target formation. Dominic C. DiGiulio & Robert A. Jackson, *Impact to Underground Sources of Drinking Water and Domestic Wells from Production Well Stimulation and Completion Practices in the Pavillion, Wyoming Field*, 50 Am. Chem. Society, Envtl. Sci. & Tech. 4524, 4532 (Mar. 29, 2016).[6] The study's authors concluded that given how frequently hydraulic fracturing is employed, contamination of underground sources of drinking water from oil and gas drilling was unlikely to be limited to the Pavillion area. *Id.*; *see also* Gayathri Vaidyanathan, *Fracking Can Contaminate Drinking Water*, Sci. Am. at 8 (Apr. 4, 2016).[7]

[6] Available at https://pubs.acs.org/doi/10.1021/acs.est.5b04970.
[7] Available at https://www.scientificamerican.com/article/fracking-can-contaminate-drinking-water/.

49. In addition to the risks outlined above, hydraulic fracturing can contaminate groundwater through a process known as "frack hits." When newly-created fractures propagate into existing fractures, drilling fluids can migrate between the wells. EPA has noted that, "[r]egardless of the vertical separation between the targeted rock formation and the underground drinking water resource, the presence of other wells near hydraulic fracturing operations can increase the potential for hydraulic fracturing fluids or other subsurface fluids to move to drinking water resources." EPA 2016 Report, *supra*, at ES-32.

50. Frack hits are more likely when cement outside production casing does not extend far enough above production intervals, and when wells are spaced closely together. This concern is particularly salient in Montana and North Dakota, because neither state requires an amount of cement outside production casing and above the uppermost interval of production that is sufficient to protect aquifers. Additionally, neither Montana nor North Dakota requires monitoring or a minimum separation distance to avoid frack hits. *See* Mont. Admin. R. sub-Ch. 36.22.10; N.D. Admin. Code Ch. 43-02-03.

II. Federal Requirements to Consider The Impact of Oil and Gas Drilling on Climate Change

51. Climate change is scientifically established as a real and significant threat to the environment and humanity. The Intergovernmental Panel on Climate Change warned in the *Climate Change 2014 Synthesis Report* (2014),[8] that "[c]ontinued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, including the likelihood of severe, pervasive, and irreversible impacts for people and ecosystems." The U.S.

[8] Available at https://www.ipcc.ch/report/ar5/syr/.

Global Change Research Program repeated this warning in 2017 in its report *Climate Science Special Report: Fourth National Climate Assessment, Volume I* (2017)[9]: "There is broad consensus that the further and the faster the Earth system is pushed towards warming, the greater the risk of unanticipated changes and impacts, some of which are potentially large and irreversible."

52. The Secretary of the Interior stated, in Secretarial Order 3226, *Evaluating Climate Change Impacts in Management Planning* (January 19, 2001),[10] that "[t]here is a consensus in the international community that global climate change is occurring and that it should be addressed in governmental decision making." Order 3226 established the responsibility of agencies to "consider and analyze potential climate change impacts when undertaking long-range planning exercises, when setting priorities for scientific research and investigations, when developing multi-year management plans, and/or *when making major decisions regarding potential utilization of resources under the Department's purview*." (emphasis added).

53. The U.S. Government Accountability Office, in a 2007 report entitled *Climate Change: Agencies Should Develop Guidance for Addressing the Effects on Federal Land and Water Resources*,[11] concluded that the Department of the Interior had not provided specific guidance to implement Secretarial Order 3226, that officials were not even aware of Secretarial Order 3226, and that Secretarial Order 3226 had effectively been ignored.

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[9] Available at https://science2017.globalchange.gov/.
[10] Available at https://www.doi.gov/sites/doi.gov/files/elips/documents/archived-3226_-evaluating_climate_change_impacts_in_management_planning.pdf, (amended January 16, 2009, reinstated by Secretarial Order 3289 (September 14, 2009)).
[11] Available at https://www.gao.gov/products/GAO-07-863.

54. Secretarial Order 3289, *Addressing the Impacts of Climate Change on America's Water, Land, and Other Natural and Cultural Resources* (September 14, 2009), reinstated the provisions of Order 3226[12]; recognized that "the realities of climate change require us to change how we manage land, water, fish and wildlife, and cultural heritage and tribal lands and resources we oversee"; and acknowledged that the Department of the Interior is "responsible for helping protect the nation from the impacts of climate change."

55. There remains a fundamental disconnect with regard to climate change and its resulting impacts and how our public lands are managed for energy production, particularly in the West. BLM cannot take informed action to address climate change, as required by Order 3226 and Order 3289, without taking a hard look at the climate impacts of oil and gas development on our public lands. As stated in Order 3289, BLM must "appl[y] scientific tools to increase understanding of climate change and to coordinate an effective response to its impacts," and "[m]anagement decisions made in response to climate change impacts must be informed by [this] science."

III. The Process of Oil and Gas Leasing on Public Land

56. Under the Mineral Leasing Act and Federal Land Policy and Management Act, BLM manages oil and gas drilling on public lands using a three-stage process. *New Mexico ex rel. Richardson v. U.S. Bureau of Land Mgmt.*, 565 F.3d 683, 689 n.1 (10th Cir. 2009).

57. In the first phase, BLM prepares a Resource Management Plan (RMP) pursuant to 43 U.S.C. § 1712 and 43 C.F.R. Part 1600. RMPs operate like zoning plans that generally define the allowable uses of the public lands in the planning

[12] Available at https://www.fws.gov/home/climatechange/pdf/SecOrder3289.pdf.

area. At the RMP stage, BLM determines generally what areas to make available for oil and gas leasing and under what conditions. An RMP does not require leasing any specific lands. BLM typically prepares an EIS evaluating, in general terms, the expected environmental impact of potential land management decisions made in RMPs, including oil and gas development.

58. In the second phase, companies typically nominate oil and gas leaseholds for sale through submission of "expressions of interest." BLM then decides whether to offer those lands for sale and proceeds to sell leases for those lands, in accordance with 43 C.F.R. Part 3120. Prior to sale, BLM typically prepares an environmental review evaluating the environmental impact of the lease sale. BLM may also subject leases to terms and conditions—"stipulations" or "lease notices"—to protect the environment.

59. In the third and final phase, which occurs after lease sale and issuance, the lessee applies for a permit to drill (APD) to BLM prior to drilling. 43 C.F.R. § 3162.3-1(c).

60. The leasing stage represents a critical step because issuance of a lease generally gives the lessee a right to use some of the land for oil and gas development. *Conner v. Burford*, 848 F.2d 1441, 1449–50 (9th Cir. 1988); *Sierra Club v. Peterson,* 717 F.2d 1409, 1414–15 (D.C. Cir. 1983). Typically, a lease represents an irreversible commitment of resources by conveying a right to develop the leased land and/or federally owned minerals. *Conner*, 848 F.2d at 1446, 1449–50. Issuing such leases limits BLM's ability to require additional protective measures in the future, or to forego oil and gas development altogether on the leased land. *Id.* at 1449–50. For that reason, a full NEPA analysis is necessary prior to issuing a lease in order to address reasonably foreseeable impacts from development of that lease. *Id.* at 1449–51.

61. Leases are issued for a primary term of 10 years for a minimum rental bid of $2 per acre. 43 C.F.R. §§ 3120.1-2(c), 3120.2-1. Once a lease is producing oil or gas, the operator may hold it indefinitely, until it is abandoned.

62. Some lease parcels never see development. According to BLM, at the end of Fiscal Year 2018, of the 2,100,155 million acres of federal oil and gas under lease in Montana, only 692,880 acres—about 33 percent—were in production. BLM, Oil and Gas Statistics.[13]

PROCEDURAL HISTORY

I. Prior Litigation

63. On May 15, 2018, Plaintiffs initiated a challenge in this Court to BLM's December 2017 and March 2018 oil and gas lease sales, which offered 287 oil and gas leases covering 145,063 acres. *Wildearth Guardians*, 457 F. Supp. 3d at 883. The heart of Plaintiffs' challenge was that BLM failed to take a hard look at the lease sales' likely impacts to groundwater and climate change, and because of that failure wrongly concluded the lease sales would have no significant impact on the environment. The complaint specifically alleged four NEPA violations: (1) failure to take a "hard look" at the lease sales' impacts to groundwater and climate change; (2) failure to analyze the lease sales' cumulative impacts; (3) failure to prepare an environmental impact statement (EIS); and (4) failure to consider reasonable alternatives. *Id.*

64. Plaintiffs raised three concerns related to groundwater. First, Plaintiffs argued that BLM failed to assess whether and to what extent future development would include adequate surface casing and cementing, and did not assess what the

[13] Available at https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics.

resulting impacts would be. Second, Plaintiffs argued that BLM did not fully assess the risks of groundwater contamination due to lack of vertical separation between fractured formations and usable groundwater. Finally, Plaintiffs argued that BLM violated NEPA by declining to consider an alternative that would lessen the impacts to groundwater.

65. Regarding cumulative climate change impacts, Plaintiffs argued that BLM considered each lease sale's potential emissions in isolation, without discussing other past, present, and reasonably foreseeable greenhouse gas emissions, including those of contemporaneously sold parcels. On that basis, Plaintiffs argued that BLM failed to fully consider how oil and gas development enabled by the lease sales would contribute to climate change.

66. On May 1, 2020, after full merits briefing, this Court granted summary judgment in Plaintiffs' favor. *Id.* at 895–97.

67. The summary judgment opinion explained that BLM had not provided a sufficiently specific analysis of impacts to groundwater. The Court noted that the EAs discussed in vague terms some general risks to groundwater from hydraulic fracturing, but did not provide "specific responses" to concerns about the potential role of vertical separation and surface casing depth in fracturing spills. *Id.* at 885–87. The Court found that BLM had not taken the requisite "hard look" because the "[t]he EAs . . . fail[ed] to inform the reader whether groundwater would be unchanged, improved, or degraded and . . . fail[ed] to explain what data would lead to these conclusions." *Id.* at 887. The Court also held that these concerns needed to be addressed at the lease sale stage, rather than deferred to the drilling permit stage. *Id.* at 888.

68. The Court also found for Plaintiffs on their NEPA alternatives claim, holding that "BLM failed to consider an alternative that would have protected groundwater." *Id.* at 889.

69. The Court also found that BLM violated NEPA by failing to assess cumulative climate impacts. Specifically, the Court found that BLM provided "no catalogue" of past, present, and reasonably foreseeable projects and provided "little analysis" of the combined impacts on GHGs and the climate. *Id.* at 892. The Court noted that the individual EAs included "no discussion of each other, even though [they] covered land sold *in the same lease sale*." *Id.* (emphasis in original). The Court rejected BLM's argument that it had complied with NEPA "simply by quantifying anticipated new emissions from the [lease sales] and then calculating what percentage of national-level and state-level emissions the new emissions would comprise" and by tiering to other NEPA analyses. *Id.* at 895.

70. Finding BLM's actions violated NEPA and the APA, the Court vacated BLM's findings of no significant impacts, vacated the challenged leases, and remanded to the agency for further analysis. *Id.* at 897.

II. The Lease Sales Challenged Here

71. Since its March 2018 lease sale, BLM has held seven additional lease sales. Plaintiffs here challenge five of those sales, which include a total of 112 lease parcels covering 58,297 acres of public land:

a. In July 2019, BLM offered 34 parcels for sale, covering approximately 9,437 acres located in Musselshell, Blaine, Rosebud, and Powder River Counties in Montana and Bottineau, Mountrail, Dunn, Williams, Divide, and McKenzie Counties, North Dakota.

b. In September 2019, BLM offered 12 parcels for sale, covering 7,498 acres located in Musselshell and Wibaux Counties in Montana and Burke, Williams, and Divide Counties in North Dakota.

c. In December 2019, BLM offered 20 parcels for sale, covering 18,879 acres located in Richland and Powder River Counties in Montana and Burke, Williams, and Divide Counties in North Dakota.

d. In March 2020, BLM offered 8 leases for sale, covering 5,181 acres located in Fallon, Richland, Carter, and Powder River Counties in Montana.

e. In September 2020, BLM offered 38 parcels for sale covering 17,302 acres in Dawson, Sheridan, and Richland Counties in Montana and McKenzie, Burke, and Williams Counties in North Dakota.

72. For each lease sale, BLM prepared one or more Environmental Assessments (EAs).

73. The EAs prepared for each of the five subsequent sales suffer from flaws similar to those this Court found to violate NEPA in *Wildearth Guardians*:

a. Although the EAs acknowledged that climate change is happening and is caused by human activities, they failed to adequately address the reasonably foreseeable climate change impacts of the lease sales themselves. BLM acknowledged that fossil fuel development contributes to climate change through emissions of greenhouse gases (especially carbon dioxide and methane) from development activities and combustion. The lease sale EA also acknowledged that climate change is having impacts in Montana, including warmer temperatures with less snowfall, earlier snowmelt, earlier peak stream flow, and more severe and frequent droughts.

b. The EAs, however, failed to fully address the reasonably foreseeable climate change impacts resulting from the lease sale itself, as required by NEPA. The EAs failed to quantify cumulative emissions from other proposed lease sales in Montana, surrounding Western states, and nationally; failed to accurately quantify direct and indirect emissions from oil and gas development; failed to monetize the economic costs of GHG emissions from the lease sales, despite monetizing and trumpeting the economic benefits of the lease sales; failed to provide any measure to demonstrate the context and intensity of the GHG emissions from the lease sales; and failed to include any discussion of the actual environmental effects of the direct, indirect, and cumulative GHG emissions. Without that information, it was impossible for the public or BLM decision-makers to compare the costs and benefits of selling the leases, or to make informed choices between alternative courses of action.

c. The EAs tiered to (i.e., relied on) the Billings, Miles City, HiLine Resource Management Plan of September 2015, the Butte Resource Management Plan of April 2009, and the Dillion Resource Management Plan of 2006 for its discussion of climate change. The RMP analysis, however, is outdated. The RMP analysis fails to adequately quantify and analyze greenhouse gas emissions and resulting climate change impacts for the parcels at issue in the EAs.

d. Although BLM acknowledges that climate change is happening, has human causes, and has specific impacts in Montana, the EAs failed to address the reasonably foreseeable climate change impacts resulting from the lease sale, as required by NEPA. The EAs entirely failed to quantify cumulative emissions on a regional or national scale, failed to

accurately quantify direct and indirect emissions from oil and gas development, failed to provide any measure to demonstrate the context and intensity of those emissions, and failed to include any discussion of the actual environmental effects of the GHG emissions. That critical missing information prevented BLM and the public from comparing the costs and benefits of selling the leases or making informed choices between alternatives.

e. Although the EAs did acknowledge that oil and gas development, and especially fracking, poses risks to groundwater, they did not address the potential impacts to groundwater associated with the lease sales at hand. The EAs did list as potential impacts associated with oil and gas development generally: (1) contamination of aquifers from drilling fluids; (2) contamination of aquifers from fracture propagation that allows fracking fluid migration into fresh water resources; and (3) cross-contamination of aquifers from drilling fluids that travel upward or downward into other aquifer units due to improperly sealed well casings. These risks stem primarily from (1) inadequate casing and cementing of the wellbore, (2) inadequate vertical separation between groundwater aquifers and hydrocarbon formations targeted by hydraulic fracturing; and (3) well communications or "frack hits."

f. However, despite acknowledging these generalized risks, the EAs do not attempt to characterize potential impacts to groundwater from these lease sales specifically. Instead, the EAs assert, without explanation and contrary to substantial evidence, that federal and state regulation will ensure adequate wellbore casing and cementing. The EAs fail to meaningfully assess the issue of vertical separation because they do not

compare the depths of all potentially usable groundwater aquifers to the formations likely to be targeted. Moreover the EAs do not meaningfully assess how things like proper well spacing and properly cemented production casing might reduce the risk of frack hits.

g. Finally, rather than undertaking a meaningful analysis of groundwater impacts, BLM improperly deferred this analysis until a later stage when it approves drilling permits, even though this analysis and groundwater testing is not typically done at the drilling permit stage. None of the leases contained any sort of stipulation or other requirements mandating installation of protective casing to a specific depth to prevent contamination of usable groundwater, or any requirement that oil and gas operators test for usable water before drilling.

h. In addition to the five lease sales challenged here, BLM has sold, and has proposed to sell, hundreds of thousands of acres of other oil and gas leases in Montana, North Dakota, South Dakota, Colorado, Wyoming and other western states. These sales together will have significant cumulative environmental impacts, including on groundwater and climate. The EAs for the Montana lease sales provided no "quantified or detailed information" evaluating the cumulative impacts of these sales or from other reasonably foreseeable actions cumulatively affecting people and the environment. *Klamath-Siskiyou*, 387 F.3d at 993.

i. Despite NEPA's instruction to "[r]igorously explore and objectively evaluate all reasonable alternatives," 40 C.F.R. § 1502.14(a), the EAs neglected to evaluate reasonable alternatives that would have avoided significant impacts to water quality and climate. These alternatives could include, for example, declining to lease lands in areas overlying sensitive

groundwater resources, adding additional stipulations to protect groundwater, deferring leasing of some parcels, or deferring leasing of all parcels until most existing federal oil and gas leases in Montana are put into production.

III. Plaintiffs' Current Challenge to the Five Recent Lease Sales

74. On May 21, 2020, Plaintiffs sent a letter to BLM and the entities that purchased leases in the subsequent sales, alerting them that these sales suffered from the same infirmities the court found in *Wildearth Guardians*, 457 F. Supp. 3d. at 897. The letter requested that BLM "immediately cancel these leases as improperly issued pursuant to the agency's authority under 43 C.F.R. § 3108.3(d), and correct the deficiencies identified by the District Court before reissuing them."

75. BLM did not respond to Plaintiffs letter or take any action on the leases.

76. Plaintiffs now bring this challenge to ensure BLM complies with the court's May 1, 2020 decision in *Wildearth Guardians*, 457 F. Supp. 3d. at 897, by taking a hard look at the impacts of the oil and gas activity it is authorizing, and considering reasonable alternatives.

77. Specifically, Plaintiffs challenge:

a. the final Environmental Assessments for the oil and gas lease sales held on December 11, 2018, March 25–27, 2019, July 30, 2019, September 24, 2019, December 18, 2019, March 24, 2020, and September 22, 2020;

b. the associated Findings of No Significant Impact (dated December 11, 2018, March 22, 2019, July 26, 2019, September 20, 2019, December 16, 2019, March 23, 2020, and September 17, 2020);

c. the associated decision records (dated December 7, 2018, March 22, 2019, July 26, 2019, September 20, 2019, December 16, 2019, March 23, 2020, and September 17, 2020);

d. the decisions to dismiss Plaintiffs' protests of the lease sales (dated November 30, 2018, March 21, 2019, July 24, 2019, September 19, 2019, December 18, 2019, March 20, 2020, and September 18, 2020); and

e. the subsequent issuance of any associated leases.

FIRST CAUSE OF ACTION
FAILURE TO TAKE A HARD LOOK
(Violation of NEPA)

78. All preceding paragraphs are hereby incorporated as if fully set forth herein.

79. NEPA requires BLM to take a "hard look" at all reasonably foreseeable environmental impacts and adverse effects of the proposed lease sales. *Robertson*, 490 U.S. at 349; 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9.

80. BLM failed to take a hard look at the direct, indirect, and cumulative impacts of the lease sales on groundwater.

81. BLM failed to take a hard look at the direct, indirect, and cumulative impacts of the lease sales on climate change and failed to provide any measure to demonstrate the context and intensity of the emissions directly and indirectly caused by the proposed leases.

82. BLM enumerated the economic benefits of its agency actions without acknowledging the economic costs of those actions. Specifically, BLM failed to monetize the economic costs of GHG emissions from the lease sales, despite monetizing and highlighting the economic benefits of the lease sales.

83. BLM unlawfully avoided analyzing significant oil and gas impacts by relying on inadequate past analysis—at the Resource Management Plan stage—and speculative promises of future analysis—at the Application for Permit to Drill stage—to avoid analysis of its current leasing decisions. This approach violates NEPA, which requires BLM to analyze and disclose all reasonably foreseeable impacts not only at the RMP and drilling permit stages, but also before it makes an irreversible commitment of resources by issuing oil and gas leases.

SECOND CAUSE OF ACTION
FAILURE TO ANALYZE CUMULATIVE IMPACTS
(Violation of NEPA)

84. All preceding paragraphs are hereby incorporated as if fully set forth herein.

85. Pursuant to NEPA, BLM must analyze "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7.

86. BLM has sold, and proposes to sell, hundreds of thousands of acres of oil and gas leases in Montana and North Dakota, and the neighboring states of South Dakota, Colorado and Wyoming, and on other federal lands throughout the Nation, but has unlawfully failed to analyze the cumulative impact of these sales. BLM's failure to consider the cumulative effect of its oil and gas leasing program violated NEPA.

THIRD CAUSE OF ACTION

FAILURE TO CONSIDER REASONABLE ALTERNATIVES

(Violation of NEPA)

87. All preceding paragraphs are hereby incorporated as if fully set forth herein.

88. NEPA regulations require an agency to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). The existence of a "viable but unexamined alternative renders [an] environmental impact statement inadequate." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999). An agency fails to satisfy NEPA's alternatives requirement when it provides an inadequate explanation for not considering a party's proposed alternative. *Id.* at 813.

89. Groundwater contamination caused by oil and gas drilling and hydraulic fracturing, as well as climate pollution caused by the production of oil and gas resources, constitute unresolved conflicts concerning alternative uses of groundwater and subsurface mineral resources which require analysis by BLM under 40 C.F.R. § 1507.2.

90. By evaluating only the proposed action, a no action alternative, and (for some EAs) one other alternative that was not designed to ameliorate groundwater or climate impacts, BLM failed to consider reasonable and viable alternatives to the lease sales, including alternatives that would have prevented or minimized the impacts of oil and gas leasing on groundwater quality, climate change, and other resource values.

FOURTH CAUSE OF ACTION

FAILURE TO PREPARE AN EIS

(Violation of NEPA)

91. All preceding paragraphs are hereby incorporated as if fully set forth herein.

92. NEPA requires federal agencies to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA's regulations list ten factors that must be considered in determining the significance of an action's environmental effects. 40 C.F.R. § 1508.27(b). These include, for example, the degree to which the effects on the environment are "highly controversial," "highly uncertain or involve unique or unknown risks," and "whether the action is related to other actions with individually insignificant but cumulatively significant impacts." *Id.* § 1508.27(b)(4)–(5), (7). An EIS must also be prepared to examine actions constituting an "irreversible and irretrievable commitment of resources." *Conner*, 848 F.2d at 1446.

93. The BLM's lease sales, taken together, are an irretrievable commitment of resources, highly controversial, likely to involve unique or unknown risks on water quality, and pose cumulatively significant impacts on the environment. They are therefore a major federal action significantly affecting the quality of the human environment, and BLM violated NEPA by failing to prepare an EIS.

94. Under 40 C.F.R. § 1508.25(a)(1), (2), two or more agency actions must be discussed in the same EIS where they are "connected" or "cumulative" actions. Where the proposed actions are "similar," the agency "may wish" to assess them in the same document and "should do so" when a single document provides

"the best way to assess adequately the combined impacts of similar actions." 40 C.F.R. § 1508.25(a)(3).

95. BLM's sales of oil and gas leases, taken together, have cumulatively significant impacts on the environment, including but not limited to impacts on groundwater quality and climate change. But rather than evaluating the cumulative impacts of lease sales on the environment in a single EIS, BLM unlawfully segmented its review into multiple EAs which failed to evaluate the cumulative impact of the sales.

REQUEST FOR RELIEF

THEREFORE, Plaintiffs respectfully request that this Court:

A. Issue a declaratory judgment that Defendants violated NEPA in approving the lease sales;

B. Issue an order setting aside as unlawful the decision records approving the lease sales, the underlying EAs and FONSIs, the protest decisions, and all leases issued pursuant to such sales;

C. Award Plaintiffs the costs of this action, including reasonable attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412;

D. Retain continuing jurisdiction over this matter until Defendants remedy the violations of law identified herein; and

E. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

DATED this 12th day of January, 2021.

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