

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF LOUISIANA**

STATE OF LOUISIANA, ET AL.	)	
	)	
Plaintiffs,	)	Case No. 2:21-cv-00778
	)	
v.	)	
	)	Honorable Judge Terry A. Doughty
JOSEPH R. BIDEN, Jr., in his official capacity	)	
as President of the United States, ET AL.	)	Magistrate Judge Kathleen Kay
	)	
Defendants.	)	
	)	

**DEFENDANTS' MOTION TO TRANSFER, OR ALTERNATIVELY TO SEVER AND TRANSFER, TO THE DISTRICT OF WYOMING UNDER THE FIRST-TO-FILE RULE**

Defendants Joseph R. Biden, Jr., in his official capacity as the President of the United States, et al. respectfully move to transfer this action to the United States District Court for the District of Wyoming, where a substantially similar case was filed before Plaintiffs initiated this lawsuit. *See* Ex. A, Pet. for Review of Final Agency Action, *Wyoming v. U.S. Dep't of the Interior*, No. 0:21-cv-56 (D. Wyo. Mar. 24, 2021), ECF No. 1. Alternatively, Defendants move to sever and transfer Counts V to VIII, which are limited to onshore leasing, to the District of Wyoming under the first-to-file rule.

As explained in the accompanying memorandum, transfer of this matter to the Wyoming Court satisfies the Fifth Circuit’s first-to-file rule given the potential significant overlap between these two matters. *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 917 (5th Cir. 1997). Alternatively, should this Court find it appropriate to consider severing the second-filed suit, Plaintiffs’ onshore leasing claims should be severed and transferred to the District of Wyoming, which has a much stronger interest in onshore oil and gas activity than this District.

Respectfully submitted this 27th day of April, 2021.

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 27, 2021, I filed the foregoing document electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Michael S. Sawyer  
MICHAEL S. SAWYER

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**MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO  
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TO THE DISTRICT OF WYOMING UNDER THE FIRST-TO-FILE RULE**

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## INTRODUCTION

Defendants Joseph R. Biden, Jr., in his official capacity as the President of the United States, et al. respectfully submit this memorandum in support of their motion to transfer this action to the United States District Court for the District of Wyoming, where a substantially similar case was filed before Plaintiffs initiated this lawsuit. *See* Ex. A, Pet. for Review of Final Agency Action, *Wyoming v. U.S. Dep't of the Interior*, No. 0:21-cv-56 (D. Wyo. Mar. 24, 2021), ECF No. 1. Alternatively, Defendants move to sever and transfer Counts V to VIII, which are limited to onshore leasing, to the District of Wyoming under the first-to-file rule.

Transfer of this matter to the Wyoming Court satisfies the Fifth Circuit's first-to-file rule given the potential significant overlap between these two matters. *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 917 (5th Cir. 1997). Both cases present the same unusual claims under the Administrative Procedure Act (APA), *viz.*, that the Secretary of the Interior has taken non-public final agency action to establish a nationwide moratorium on federal oil and gas leasing. Both cases deduce the existence of this unpublished moratorium from President Biden's Executive Order 14,008 and individual lease sale postponements in the first quarter of this year. And both cases allege that this moratorium should be set aside as contrary to law, arbitrary and capricious, and adopted without observance of procedure required by law. Because there will likely be substantial overlap between these two cases, the Court should transfer this action to the District of Wyoming, so that the first-filed "court may decide whether the second suit filed must be dismissed, stayed or transferred and consolidated." *Id.* at 920.

Alternatively, should this Court find it appropriate to consider severing the second-filed suit, Plaintiffs' onshore leasing claims should be severed and transferred to the District of Wyoming, which has a much stronger interest in onshore oil and gas activity than this District. That approach would permit Plaintiffs' offshore leasing claims to remain in this Court.

## BACKGROUND

### I. Legal Background

#### A. The Outer Continental Shelf Lands Act governs federal offshore leasing activity.

The Outer Continental Shelf Lands Act of 1953 (OCSLA), 43 U.S.C. §§ 1331–1356, was enacted to establish a regime for offshore oil and gas leasing. It prescribes a multi-stage process for development of offshore oil and gas resources.

The first stage is the development of the “five-year program.” *See* 43 U.S.C. § 1344. OCSLA directs the Secretary to prepare “a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval.” 43 U.S.C. § 1344(a). Sales and dates in the five-year plan are not set in stone. To the contrary, OCSLA provides that the Secretary “shall review” that program “at least once each year.” *Id.* § 1344(e).

The second stage is the lease sale. *See generally id.* § 1337. At this stage, Interior chooses whether and when to hold a sale, which lease blocks to offer in any sale, and the terms of the sale. *Id.* § 1337(a)(1). The Secretary is “authorized” to grant leases “to the highest responsible qualified bidder.” *Id.* Those lessees may then conduct limited preliminary activities, such as lower-impact geophysical surveys. *See* 30 C.F.R. § 550.207 (2019).

The third stage includes the lessee’s filing and the Bureau of Ocean Energy Management’s (BOEM’s) review of an exploration plan pursuant to 43 U.S.C. § 1340(c) to explore for oil and gas deposits. The fourth and final stage, which is contingent upon discovery of commercially feasible deposits of oil or gas, is the lessee’s filing and the agency’s review of a

development and production plan for the purposes of actually producing oil and gas from the leaseholds. 43 U.S.C. § 1351.

**B. The Mineral Leasing Act governs federal onshore leasing activity.**

The Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181–287,<sup>1</sup> “gave the Secretary of the Interior broad power to issue oil and gas leases on public lands” while leaving “the Secretary discretion to refuse to issue any lease at all on a given tract.” *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *see also* 30 U.S.C. § 226(a) (“All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may* be leased by the Secretary.” (emphasis added)); 43 C.F.R. § 3101.7-2 (2019) (recognizing the Secretary’s “final authority and discretion to decide to issue a lease”). The Secretary, in turn, delegated her “regulatory authority over onshore oil and gas development” on public lands to the Bureau of Land Management (BLM). 43 C.F.R. § 3170.1 (2019).

The MLA establishes that “[l]ease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary.” 30 U.S.C. § 226(b)(1)(A). The Secretary has long interpreted this requirement not to upset her leasing discretion. Minerals Management; General Oil and Gas Leasing, 53 Fed. Reg. 22,814, 22,828 (June 17, 1988) (“It is Bureau policy prior to offering the lands to determine whether leasing will be in the public interest . . . .”); BLM Manual MS-3120.1.11 (Feb. 18, 2013), *available at* <https://www.blm.gov/sites/blm.gov/files/uploads/>

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<sup>1</sup> The MLA authorizes leasing of oil and gas in public domain lands. 30 U.S.C. § 181. *See Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 65 n.2 (1966). The Mineral Leasing Act for Acquired Lands of 1947 authorizes leasing of oil and gas in acquired lands. 30 U.S.C. §§ 351–360. Leasing of acquired lands is subject to the same regulations as leasing public domain lands. 30 U.S.C. § 359. *See* 43 C.F.R. 3100.0-3 (2019) (citing statutory authorities and exceptions for BLM’s oil and gas leasing regulations). For purposes of this motion, the distinction makes no difference, and thus this motion refers only to the MLA for brevity.

mediacenter\_blmpolicymanual3120.pdf (“Lands are available for leasing when they are open to leasing in the applicable resource management plan, and when all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act (NEPA).”).

**C. The National Environmental Policy Act governs environmental assessment of leasing decisions.**

NEPA—the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m–12—is a procedural statute that requires federal agencies to consider the impacts of, and alternatives to, federal actions significantly affecting the environment. It ensures that federal agencies take a “hard look” at the environmental consequences of their proposed actions before deciding to proceed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989).

In recent district court decisions, environmental interests have succeeded in challenging many of BLM’s lease sales under NEPA. *E.g.*, *Rocky Mountain Wild v. Bernhardt*, No. 2:19-cv-00929, --- F. Supp. 3d ---, 2020 WL 7264914, at \*8–10 (D. Utah Dec. 10, 2020) (challenging 2018 Utah lease sale under NEPA for failing to consider reasonable alternatives); *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 457 F. Supp. 3d 880, 885–896 (D. Mont. 2020) (challenging 2017 and 2018 Montana leases sales under NEPA for failing to consider groundwater and climate change impacts); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 67–77 (D.D.C. 2019) (*WEG I*) (challenging 2015 and 2016 Wyoming lease sales under NEPA for failing to consider greenhouse gas impacts); *WildEarth Guardians v. Bernhardt*, Civ. No. 16-1724, --- F. Supp. 3d ---, 2020 WL 6701317, at \*6–13 (D.D.C. Nov. 13, 2020) (*WEG II*) (rejecting BLM’s supplemental NEPA analysis for the 2015 and 2016 Wyoming lease sales). And some of these decisions have inspired follow-on lawsuits that challenge numerous lease sales in a single action. *E.g.*, *WildEarth Guardians v. Bernhardt*, No. 1:20-cv-00056, 2020 WL

111765 (D.D.C. Jan. 9, 2020), Compl. ¶¶ 6, 10–11 (challenging “23 BLM oil and gas lease sales across five Western states—Colorado, Montana, New Mexico, Utah, and Wyoming” as violating *WEG I*); *WildEarth Guardians v. De La Vega*, No. 1:21-cv-00175 (D.D.C. Feb. 17, 2021), Am. Compl. ¶¶ 6, 11–13, ECF No. 13 (challenging “28 BLM oil and gas lease sales across four Western states—Colorado, New Mexico, Utah, and Wyoming” as violating *WEG I* and *WEG II*).

In light of these recent decisions, BLM has postponed individual lease sales to allow sufficient time to consider additional NEPA analysis. *E.g.*, Ex. B, Mem. from M. Leverette, BLM Eastern States Director, to M. Nedd, BLM Deputy Director, Operations (Feb. 12, 2021) (“Postpon[ing] the March 18, 2021, Competitive Oil and Gas Lease Sale until June 17, 2021, to complete additional air quality analysis to comply with the [November 2020] WildEarth Guardians opinion.”); Ex. C, Mem. from G. Sheehan, BLM Utah State Director to M. Nedd, BLM Deputy Director, Operations (Feb. 11, 2021) (postponing the March 2021 Utah lease sale in order to address the December 2020 *Rocky Mountain Wild* decision); *see also* Compl. ¶ 105, ECF No. 1 (“lease sales are postponed to confirm the adequacy of the underlying environmental analysis” (internal quotation marks omitted)).

**D. Executive Order 14,008 directs the Secretary of the Interior, to “the extent consistent with applicable law,” to “pause” leasing pending a “comprehensive review.”**

On January 27, 2021, President Biden directed that:

To the extent consistent with applicable law, the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices in light of the Secretary of the Interior’s broad stewardship responsibilities over the public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters.

Exec. Order No. 14,008 § 208, 86 Fed. Reg. 7,619, 7,624–25 (Feb. 1, 2021).

The Secretary has not yet published any Secretarial Order, or taken any other final agency action, implementing Section 208 of Executive Order 14,008. *See, e.g., Am. Petroleum Inst. v. U.S. EPA*, 216 F.3d 50, 68 (D.C. Cir. 2000) (“A decision by an agency to defer taking action is not a final action reviewable by the court.”). Instead, the Secretary recently hosted a public forum with “industry representatives, labor and environmental justice organizations, natural resource advocates, Indigenous organizations, and other experts” as “part of Interior’s comprehensive review of the federal oil and gas program as called for in Executive Order 14008” to “help inform an interim report from the Department that will be completed in early summer.” Ex. D, Secretary Haaland Delivers Remarks at Interior’s Public Forum on the Federal Oil and Gas Program, Mar. 25, 2021. Although Plaintiffs identify lease postponement activity between January 27, 2021 and March 4, 2021, Compl. ¶¶ 103–09, that activity occurred before Secretary Haaland was confirmed by the Senate on March 15, 2021.

## **II. The State of Wyoming Filed Its Case With Overlapping Claims First.**

On Secretary Haaland’s tenth day in office—March 24, 2021—a pair of lawsuits were filed in the United States District Court for the District of Wyoming and in this Court. Those lawsuits allege that Secretary Haaland has taken non-public action to implement a nationwide moratorium on oil and gas leasing. Not content to challenge individual lease sale postponements, fourteen state plaintiffs allege that Secretary Haaland has already taken final agency action to implement Section 208 of Executive Order 14,008. As explained below, the Wyoming action was filed first.

### **A. The first action to allege a nationwide moratorium on oil and gas leasing was filed in the District of Wyoming.**

At 8:44 AM Mountain Time on March 24, 2021, Decl. of Michael Sawyer ¶ 3 (Sawyer Decl.), the State of Wyoming initiated suit in the United States District Court for the District of

Wyoming.<sup>2</sup> *See* Ex. A. That action alleges that Interior has “instituted a de facto moratorium on all federal oil and gas lease sales on the public lands” without “taking this action publically and transparently.” *Id.* at 2. In support of its claim of “de facto” agency action, Wyoming provided only two specific allegations: (1) that Executive Order 14,008 directed the Secretary to “pause new oil and natural gas leases,” *id.* ¶ 4; and (2) that BLM State Offices and BOEM subsequently postponed oil and gas lease sales, *id.* ¶ 5.

Wyoming alleges that this “de facto moratorium” is unlawful for several reasons, including that: (a) it is “contrary to law” by violating the MLA’s “quarterly lease sale[.]” provision, *id.* ¶ 9; (b) it is “arbitrary and capricious” in “depart[ing] from prior policy *sub silentio* and fail[ing] to provide an explanation for the new policy,” *id.* ¶ 10; and (c) it was adopted without “observ[ing] procedure required by law” in the form of public comment and participation opportunities, *id.* ¶¶ 6, 14. Wyoming also contends that the Secretary has “unlawfully withheld agency action” under 5 U.S.C. § 706(1) by postponing first quarter lease sales. *Id.* ¶¶ 5, 15. Finally, Wyoming alleges that the moratorium violates NEPA and the Federal Land Policy and Management Act (FLPMA). *Id.* ¶¶ 6–8, 11.

In terms of requested relief, Wyoming seeks to set aside the moratorium, as well as to obtain preliminary and permanent injunctive relief against “a moratorium on federal oil and gas

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<sup>2</sup> When the State of Wyoming filed its lawsuit, it indicated in its civil cover sheet that its lawsuit was related to another case already pending in the District of Wyoming, *Western Energy Alliance v. Biden*, No. 21-cv-00013 (D. Wyoming), which was filed on January 27, 2021 and assigned to Judge Skavdahl. The District of Wyoming has established local rules for processing such related-case claims. *See* D. Wyo. L.R. 40.2(a)(1)(A). Following receipt of Wyoming’s notice of related cases, the District of Wyoming assigned Wyoming’s case to Judge Freudenthal (and subsequently to Judge Johnson) rather than Judge Skavdahl. Wyoming has since indicated that it intends to seek to consolidate its lawsuit with the *Western Energy Alliance* action.

lease sales in Wyoming and across the nation.” *Id.* p.9 ¶ C. Wyoming also asks the court to compel the Secretary to hold a first quarter 2021 lease sale. *Id.* ¶ D.

**B. Plaintiffs subsequently filed claims virtually identical to those already pending in Wyoming.**

Thirty-nine minutes after Wyoming filed suit, Plaintiffs initiated their lawsuit in this District. Sawyer Decl. ¶ 4. Similar to the Wyoming lawsuit, Plaintiffs allege that Interior has implemented a “moratorium on lease sales on public lands,” Compl. ¶ 67, through an “opaque and nonpublic process,” *id.* ¶ 5. Like Wyoming, Plaintiffs provide only two specific factual allegations supporting their contention that Interior has adopted a “nonpublic” “moratorium”: that Executive Order 14,008 directed the Secretary to pause oil and gas leasing, *id.* ¶¶ 66–67, 102, and that previously planned BOEM and BLM lease sales were postponed, *id.* ¶¶ 73, 86, 103–10.

Most of Plaintiffs’ claims mirror the earlier claims made by the State of Wyoming. Like Wyoming, Plaintiffs claim that the moratorium is “contrary to law” because it violates the MLA’s “quarterly lease sale” provision. *Compare* Compl. ¶¶ 102, 151–55, *with* Ex. A ¶ 9. Plaintiffs also claim—like Wyoming—that the moratorium is “arbitrary and capricious” for failing to provide a reasoned explanation or accounting for prior inconsistent agency positions. *Compare* Compl. ¶¶ 112, 147–50, 160–63, *with* Ex. A ¶ 10. Again following Wyoming’s pleading, Plaintiffs contend that the moratorium was adopted “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D), in the form of public comment opportunities. *Compare* Compl. ¶¶ 114, 134–41, 164–67, *with* Ex. A ¶¶ 6, 14. Finally, like Wyoming, Plaintiffs contend that the Secretary has “unlawfully withheld agency action” under 5 U.S.C. § 706(1) by postponing first quarter lease sales. *Compare* Compl. ¶¶ 113, 127–33, 156–59, *with* Ex. A ¶¶ 5, 15.

Plaintiffs also present two counts absent from the Wyoming litigation. First, they bring suit under OCSLA’s citizen-suit provision, Compl. ¶¶ 168–74, but Plaintiffs invoke that provision merely to provide an additional statutory cause of action for presenting overlapping claims. *Compare id.* ¶¶ 170–71, *with id.* ¶¶ 144–45 (presenting the same contrary-to-law arguments under the APA and OCSLA’s citizen-suit provision). Second, Plaintiffs directly challenge Executive Order 14,008 as *ultra vires*, Compl. ¶¶ 175–77, but that claim is not even colorable as Plaintiffs never explain how an executive direction to take action “[t]o the extent consistent with applicable law,” Exec. Order No. 14,008 § 208, can be *ultra vires*. (Indeed, nowhere in the fifty-one-page Complaint do Plaintiffs even acknowledge that the Executive Order contains that provision.)

Plaintiffs’ requested relief is also quite similar to the relief requested in the Wyoming lawsuit: they seek a judgment setting aside the “Leasing Moratoriums,” as well as an injunction against the Secretary taking any actions based on the moratoria. Compl. p.50 ¶¶ a–e. Plaintiffs also seek an order compelling Defendants to proceed with previously scheduled lease sales. *Id.* ¶ f.

## ARGUMENT

### **I. Under The First-To-File Rule, This Court’s Role Is Confined To Determining The Likelihood Of A Substantial Overlap Between This Case And The Wyoming Case.**

Under the first-to-file rule, when two federal court cases “overlap on the substantive issues, the cases [should] be . . . consolidated in . . . the jurisdiction first seized of the issues.” *Sutter Corp.*, 125 F.3d at 917 (citation omitted). “The [first-to-file] rule rests on principles of comity and sound judicial administration.” *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999). “Courts use this rule to maximize judicial economy and minimize embarrassing inconsistencies by prophylactically refusing to hear a case raising issues that might

substantially duplicate those raised by a case *pending* in another court.” *Id.* at 604. “The concern manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result.” *W. Gulf Mar. Ass’n v. ILA Deep Sea Loc. 24*, 751 F.2d 721, 729 (5th Cir. 1985). For these reasons, the Fifth Circuit has “long advocated that district courts exercise their discretion to avoid duplication of proceedings where related claims are being litigated in different districts.” *Schauss v. Metals Depository Corp.*, 757 F.2d 649, 654 (5th Cir. 1985).

Here, Wyoming’s suit was filed in the District of Wyoming before Plaintiffs filed this action. Although both actions were filed on March 24, the “first-to-file rule governs even for petitions filed on the same day.” *Wynnewood Refin. Co. v. Occupational Safety & Health Review Comm’n*, 933 F.3d 499, 500 (5th Cir. 2019). The Clerk’s Office for the District of Wyoming reports that Wyoming’s action was filed at 8:44 AM Mountain Time, which is thirty-nine minutes before Plaintiffs filed their action in this District at 10:23 AM Central Time. Sawyer Decl. ¶¶ 3–4. And “the first-to-file rule is no less applicable even when parallel suits are filed ‘almost simultaneously.’” *Twin City Ins. Co. v. Key Energy Servs., Inc.*, Civ. No. 09-0352, 2009 WL 1544255, at \*5 (S.D. Tex. June 2, 2009) (quoting *Eastman Med. Prods., Inc. v. E.R. Squibb & Sons, Inc.*, 199 F. Supp. 2d 590, 595 (N.D. Tex. 2002)); *see also Formaldehyde Inst., Inc. v. U.S. Consumer Prod. Safety Comm’n*, 681 F.2d 255, 261–62 (5th Cir. 1982) (awarding venue to the petition filed ten seconds earlier); *Southland Mower Co. v. U.S. Consumer Prod. Safety Comm’n*, 600 F.2d 12, 14 (5th Cir. 1979) (applying first-to-file rule when one petition “was time stamped one minute before” the other).

Because this Court received the latter-filed case, it “considers only the *potential* overlap between the two cases and no other matters.” *Tex. Health Mgmt. LLC v. HealthSpring Life &*

*Health Ins. Co.*, 380 F. Supp. 3d 580, 588 (E.D. Tex. 2019) (emphasis added); *see also Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 408 (5th Cir. 1971) (“Once the *likelihood* of substantial overlap between the two suits had been demonstrated, it was no longer up to the [second-filed] court” because “the ultimate determination of whether there actually was a substantial overlap requiring consolidation of the two suits” belonged to the first-filed court. (emphasis added)). Thus, the Court need not consider issues such as the jurisdiction of the first-filed court, *Cadle*, 174 F.3d at 604–05, or voluntary venue transfer, *Twin City*, 2009 WL 1544255, at \*6 (“the Fifth Circuit made clear that it is the first-filed court, not [the second-filed] court, that should make the § 1404(a) determination”); *see also Salazar v. Bloomin’ Brands, Inc.*, No. 2:15-cv-105, 2016 WL 1028371, at \*5 (S.D. Tex. Mar. 15, 2016) (“addressing the voluntary venue transfer factors, including the convenience to parties and witnesses, under 28 U.S.C. § 1404(a) trespasses upon the exclusive preserve of the first-filed court”).<sup>3</sup>

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<sup>3</sup> Although the *Salazar* court was unable to locate a “Fifth Circuit case addressing whether the first-filed court’s primacy over matters such as consolidation and transfer extends to severance,” *Salazar*, 2016 WL 1028371, at \*5, questions of severance are most appropriately resolved by the first-filed court because “[o]nce the likelihood of substantial overlap between the two suits had been demonstrated, it was no longer up to the [second-filed court] to resolve the question of whether both should be allowed to proceed.” *Mann Mfg.*, 439 F.2d at 408. Because “[t]he Fifth Circuit adheres to the general rule, that the court in which an action is first filed is the appropriate court to determine whether subsequently filed cases involving substantially similar issues should proceed,” only the first-filed “court may decide whether the second suit filed must be dismissed, stayed or transferred and consolidated.” *Sutter Corp.*, 125 F.3d at 920 (citation omitted). As questions of severance are related to questions of consolidation, *compare Beechgrove Redevelopment, L.L.C. v. Carter & Sons Plumbing, Heating & Air Conditioning, Inc.*, Civ. No. 07-8446, 2009 WL 382713, at \*5 (E.D. La. Feb. 11, 2009) (setting forth multi-factor test for severance), *with Russo v. Alamosa Holdings, Inc.*, Nos. Civ.A. 5:03-cv-289, Civ.A. 5:03-cv-289, Civ.A. 5:03-cv-317, Civ.A. 5:04-cv-018, Civ.A. 5:04-cv-042, 2004 WL 579378, at \*1 (N.D. Tex. Feb. 27, 2004) (setting forth similar multi-factor test for consolidation), the approach most consistent with Fifth Circuit law would be allowing the first-filed court to resolve any questions of severance, should they be raised, in the first instance. *Cf. Tex. Instruments Inc. v. Micron Semiconductor, Inc.*, 815 F. Supp. 994, 999 (E.D. Tex. 1993) (recognizing that motion to sever in first-filed court was the “appropriate vehicle” to resolve questions of severance).

**II. Because There Is A Strong Likelihood Of Substantial Overlap Between The Wyoming Lawsuit And This Case, This Case Should Be Transferred To Wyoming.**

Given the similarity of the allegations and requested relief in the two cases, it is highly likely that these two cases will substantially overlap on at least eight significant issues:

1. whether the Secretary has actually adopted the alleged leasing moratorium;
2. whether a preliminary injunction should issue against the alleged moratorium;
3. whether the alleged moratorium violates the MLA “quarterly lease sale” provision;
4. whether the alleged moratorium is arbitrary and capricious for lacking an adequate explanation;
5. whether the alleged moratorium is arbitrary and capricious for ignoring prior inconsistent agency positions;
6. whether the alleged moratorium has been adopted without procedures required by law;
7. whether the alleged moratorium should be set aside or remanded without vacatur; and
8. whether previously planned first-quarter lease sales should be compelled under 5 U.S.C. § 706(1).

When the same agency action is challenged on the same grounds in two cases, there is a likelihood of substantial overlap. *Shawnee Tribe v. Mnuchin*, No. 20-cv-290, 2020 WL 4334908, at \*3 (N.D. Okla. July 28, 2020) (transferring second-filed challenge to a Treasury Department distribution formula to first-filed court because “the issues in this case substantially overlap with the issues in the first-filed cases”); *En Fuego Tobacco Shop LLC v. FDA*, No. 4:18-cv-00028, 2018 WL 10126071, at \*2–3 (E.D. Tex. July 2, 2018) (transferring second-filed challenge to FDA rule to the first-filed court after finding “a likelihood of substantial overlap between the two cases”), *aff’d*, No. 4:18-cv-00028, 2018 WL 11247716 (E.D. Tex. July 30, 2018).

That rule applies even when the second-filed suit is brought by different plaintiffs, because the Fifth Circuit has made clear that “[c]omplete identity of parties is not required” for

purposes of the first-to-file rule. *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 951 (5th Cir. 1997). Here, although the two cases have different named plaintiffs, their interests in the litigation substantially overlap, as both cases are brought by states claiming an interest in revenue from federal oil and gas activity. The similar interests of parties—even sovereign parties—are sufficient to create substantial overlap between two cases. *Shawnee Tribe*, 2020 WL 4334908, at \*3 (transferring second-filed challenge brought by sovereign tribe with a revenue interest to first-filed court in which actions filed by other tribes with revenue interests were already pending); *see also Cherokee Nation v. Nash*, 724 F. Supp. 2d 1159, 1169 (N.D. Okla. 2010) (transferring second-filed action to court hearing first-filed action brought by different plaintiffs with similar interests, because “it makes little difference which individual” plaintiffs brought the first-filed suit when “they could be readily substituted as [parties] in this case without effecting any substantive change in the declaratory action”); *En Fuego*, 2018 WL 10126071, at \*3 (transferring second-filed case brought by different plaintiffs to first-filed court); *Tillery v. Higman Barge Lines, Inc.*, No. 2:14-cv-40, 2014 WL 1689942, at \*2 (S.D. Tex. Apr. 29, 2014) (same).

The two lawsuits also have overlapping defendants. In both cases, the defendants include officials within the Department of the Interior and BLM, including Secretary Haaland and Kim Liebhauser, Acting Director of the BLM Wyoming State Office. *Compare* Compl. at 2–3, *with* Ex. A at 1. That identical defendants are named in both actions is itself sufficient to demonstrate overlapping parties. *Thakkar v. United States*, 389 F. Supp. 3d 160, 173 (D. Mass. 2019) (“Parties may be sufficiently similar even where only one of several defendants in the second filed action is the same as the first filed action.” (collecting cases) (internal quotation marks omitted)).

In any event, the more important inquiry is “whether *the issues raised* in both suits substantially overlap.” *Tillery*, 2014 WL 1689942, at \*2 (citing *Save Power*, 121 F.3d at 950). In *Tillery*, the Southern District of Texas transferred the second-filed case to the first-filed court even though there were no overlapping plaintiffs, because “both lawsuits involve the exact same legal issue: whether Defendant’s classification of its tankermen as seamen is in violation of the” Fair Labor Standards Act. *Id.* Similarly here, there are eight identical legal questions about the conduct of the defendant officials in the Department of the Interior and BLM. Thus, as in *Tillery*, the Court should transfer the case to avoid “judicial waste as well as piecemeal resolution of the [legal] issues, risking inconsistent judgments.” *Id.* (citation omitted).

Of course, the overlap between the two cases is not complete. The Wyoming litigation presents claims under FLPMA and NEPA, Ex. A ¶¶ 7–8, 11, while Plaintiffs present a claim under OCSLA’s citizen-suit provision and a direct challenge to Executive Order 14,008, Compl. ¶¶ 168–77. “Where the overlap between two suits is less than complete, the judgment is made case by case, based on such factors as the extent of overlap, the likelihood of conflict, the comparative advantage and the interest of each forum in resolving the dispute.” *Salazar*, 2016 WL 1028371, at \*4 (quoting *Save Power*, 121 F.3d at 951). As explained below, these three factors weigh in favor of transfer.

[1] Though not complete, the extent of the overlap between the two cases is quite significant as the crux of each lawsuit is identical. At the heart of both cases is the unusual allegation that the Secretary of the Interior has taken unpublished, final agency action to implement a nationwide moratorium on oil and gas leasing. Both cases rely on BLM and BOEM lease sale postponements as evidence of this supposed moratorium. *See* Ex. A ¶ 5; Compl. ¶¶ 73, 86, 103–110. And both cases contend that this alleged moratorium violates the “quarterly lease

sale” provision of the MLA and the APA in four different ways: as arbitrary and capricious, contrary to law, implemented without procedures required by law, and unlawfully withholding agency action. *See supra* pp.7–9. When the central issue in a case has been previously presented to a sister court, transfer should occur under the first-to-file rule. *Shawnee Tribe*, 2020 WL 4334908, at \*3 (transferring because “the primary issue in this case . . . would require the Court to determine the degree to which the Department can further delay distribution of the Title V funds, which was the question in” the earlier-filed case); *En Fuego*, 2018 WL 10126071, at \*3 (transferring case because “the crux of the present lawsuit . . . is squarely before the [first-filed] court”).

While Plaintiffs’ Complaint also brings a claim under OCSLA’s citizen suit provision and a direct *ultra vires* challenge to Executive Order 14,008, those two counts do not meaningfully alter the core of this ten-count lawsuit. Plaintiffs rely on the OCSLA citizen-suit provision simply to provide additional statutory standing for their central APA claims. *Compare* Compl. ¶¶ 170–71, *with id.* ¶¶ 144–45 (presenting the same contrary-to-law arguments under the APA and OCSLA’s citizen-suit provision).<sup>4</sup> And Plaintiffs’ *ultra vires* count is not even colorable as the Executive Order’s direction to “pause” leasing is explicitly limited “[t]o the extent consistent with applicable law.” Exec. Order No. 14,008 § 208.

[2] Given this substantial overlap of eight issues between the two cases, *see supra* p.12, there is a high likelihood of conflict without transfer:

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<sup>4</sup> Although Plaintiffs invoke OCSLA and Wyoming invokes FLPMA, they make parallel arguments under those statutes. *Compare* Compl. ¶ 144 (“Neither agency action complied with OCSLA’s notice-and-comment and consultation requirements.”), *with* Ex. A ¶ 6 (“The Secretary’s action also denied the State of Wyoming and the public with an opportunity to participate in the decision-making process. The Federal Land Policy and Management Act (FLPMA) requires the Secretary to give notice and an opportunity to comment on public land management decisions.”).

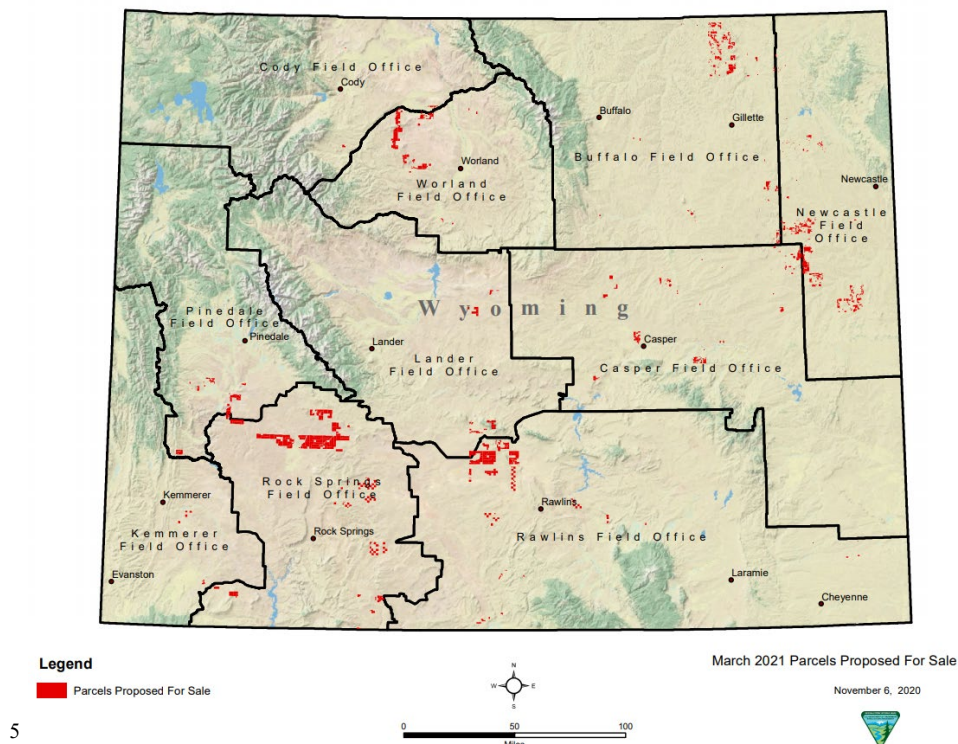
[F]ederal courts long have recognized that the principle of comity requires federal district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other’s affairs. . . . The concern manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result.

*Sutter Corp.*, 125 F.3d at 917 (quoting *W. Gulf*, 751 F.2d at 728–29). Not only would it be wasteful for both courts to expend judicial resources evaluating whether the Secretary has actually adopted the so-called “moratorium,” it would also risk this Court and the District of Wyoming issuing conflicting rulings “which may trench upon the authority of sister courts,” *id.*, particularly in the form of jurisdictional rulings about ripeness or the “agency action” requirement of 5 U.S.C. § 702. *Cf. Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 890 (1990) (holding that courts could not review a challenge to a “so-called ‘land withdrawal review program’” because claims were not ripe until reduced to a challenge to a specific “agency action” that affected plaintiffs). Because “[t]hese are precisely the type of problems that the first-to-file rule seeks to avoid,” the case should be transferred to the first-filed court. *Shawnee Tribe*, 2020 WL 4334908, at \*3.

[3] Finally, the interests of the two forums—though largely in equipoise—tilt slightly toward the District of Wyoming because of how Congress has drafted the pertinent venue statutes. Although both forums share an interest in the litigation due to home-state plaintiffs and the residence of oil and gas workers within their borders, the District of Wyoming has an additional interest due to the presence of subject land within that district, *Compass Bank v. P.R. Invs., LLP*, No. 6:09-cv-20, 2009 WL 2590083, at \*4 (E.D. Tex. Aug. 18, 2009) (“residents of this District have a strong interest in . . . the real property found within the District”). While parcels in Wyoming were slated for sale in the now-postponed first quarter 2021 BLM Wyoming

sale,<sup>5</sup> no Louisiana parcels were present in the now-postponed first-quarter 2021 BLM Eastern States sale, *see* Ex. B (listing parcels in Alabama and Mississippi). And Wyoming’s comparatively stronger interest is reflected in the general venue statute, which authorizes bringing suits against U.S. officials in a district in which “a substantial part of property that is the subject of the action is situated.” 28 U.S.C. § 1391(e)(1)(B). Notably, Wyoming relies on that provision to establish venue, Ex. A ¶ 2, while Plaintiffs do not, Compl. ¶ 43.

Although this coastal forum has a stronger interest in Outer Continental Shelf (OCS) matters than a landlocked forum like Wyoming, that stronger interest does not extend to this case under OCSLA’s venue provisions. Land on the OCS is not within this—or any—forum. *Compare* 28 U.S.C. § 98(c) (defining this District as “compris[ing]” certain parishes within Louisiana), *with Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1887 (2019)



available at [https://eplanning.blm.gov/public\\_projects/2003636/200393911/20029513/250035714/ParcelsProposedForSaleMarch2021.pdf](https://eplanning.blm.gov/public_projects/2003636/200393911/20029513/250035714/ParcelsProposedForSaleMarch2021.pdf).

(“the Federal Government exercise[s] exclusive control over the OCS, defined as ‘all submerged lands’ beyond the lands reserved to the States”). Congress has thus established specific venue provisions for OCS-based disputes. *See* 43 U.S.C. § 1349. While coastal districts such as this one are appropriate venues for controversies arising out of OCS mineral operations or lease terminations, *id.* § 1349(b), that venue provision does not apply to failure-to-lease claims. In contrast, challenges to OCSLA leasing program approvals may only be brought in the United States Court of Appeal for the District of Columbia. *Id.* § 1349(c)(1).

In any event, the stronger interest of a coastal district such as this one in addressing Plaintiffs’ failure-to-lease claims under OCSLA can best be addressed with severance, should Plaintiffs decide to sever the OCSLA portion of their case from the MLA portion of their case. But it makes little sense for two sister courts to duplicate proceedings over identical MLA claims. Because the District of Wyoming is the first-filed court, it should be the forum to resolve any severance requests. *See supra* pp.11–12 n.3.

In sum, there is a strong likelihood of substantial overlap between this litigation and the first-filed litigation in the District of Wyoming. Once this Court determines that there is such potential overlap, under Fifth Circuit law, it should transfer the case to the District of Wyoming because “the ultimate determination of whether there actually was a substantial overlap requiring consolidation of the two suits” belongs to the first-filed court. *Mann Mfg.*, 439 F.2d at 408.

### **III. Alternatively, The Court Should Sever And Transfer The Onshore Claims To Wyoming.**

Defendants alternatively request that the Court sever the claims limited to onshore leasing activity (Counts V–VIII) and transfer the onshore portion of this litigation to the District of Wyoming. This request implicates a threshold question lacking explicit precedent in this Circuit: whether it is appropriate for the second-filed court to resolve questions of severance. *See*

*Salazar*, 2016 WL 1028371, at \*5 (reporting an inability to locate a “Fifth Circuit case addressing whether the first-filed court’s primacy over matters such as consolidation and transfer extends to severance,” though identifying cases that implicitly reached different results about whether the second-filed court may address severance). As explained *supra* pp.11–12 n.3, Defendants submit that questions of severance are best left to the first-filed court under Fifth Circuit law.

Should the Court determine that it is appropriate for the second-filed court to resolve severance questions, however, the onshore claims should be severed from the remainder of the litigation and transferred. Severance is governed by the following multi-factor test:

(1) whether the claims arise out of the same transaction or occurrence; (2) whether the posture of discovery as to the respective claims suggests that they should not be tried jointly; (3) whether the claims present common questions of fact or law; (4) whether the claims will require testimony of different witnesses and documentary proof; and (5) the prejudice to either party in the event separate trials are ordered.

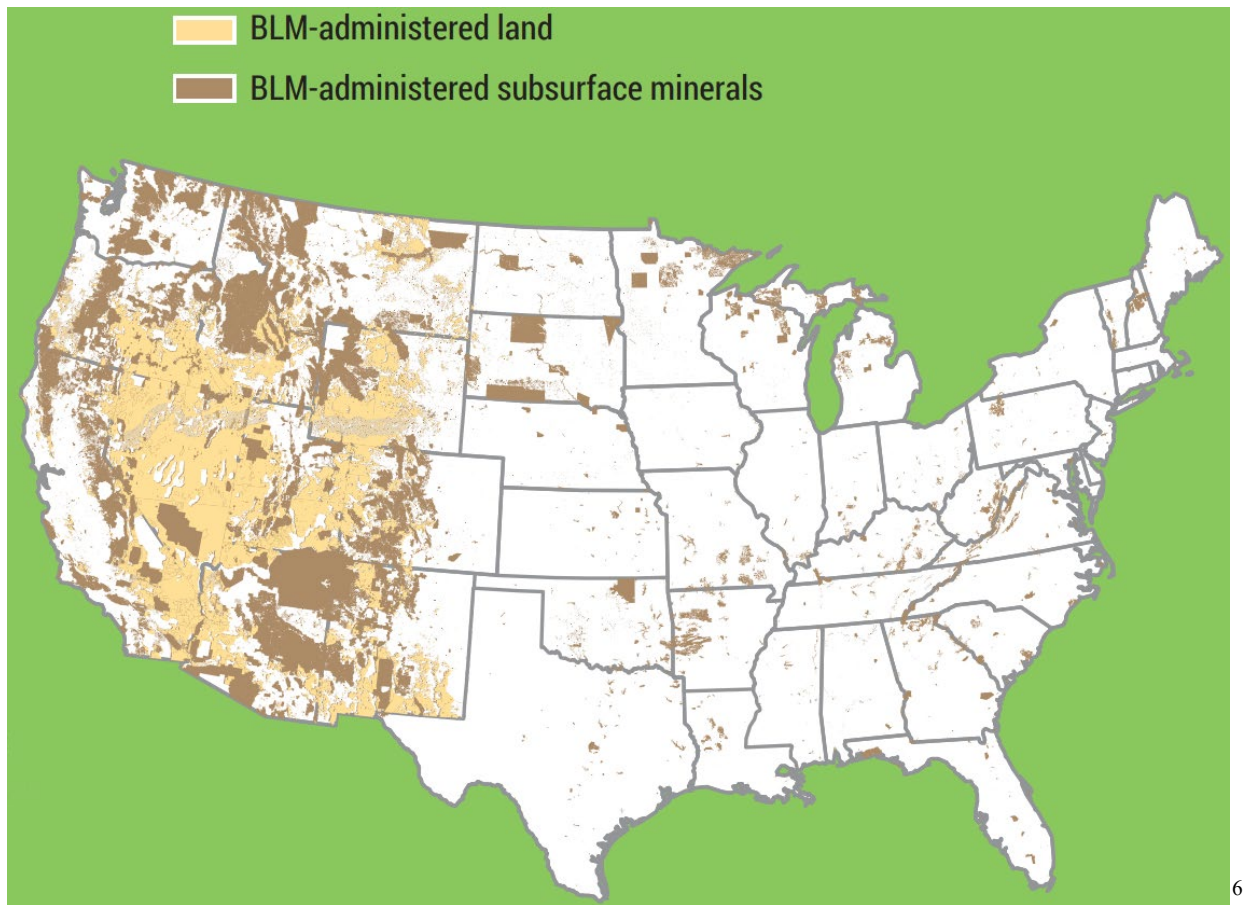
*Beechgrove Redevelopment*, 2009 WL 382713, at \*5. Because the onshore claims arise under the APA, considerations of trial and discovery under factors (2), (4), and (5) are irrelevant as APA claims are resolved on the basis of an administrative record and briefing, not through discovery and trial. *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019) (“in reviewing agency action, a court is ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record”). Thus, the severance analysis reduces to two factors: “whether the claims arise out of the same transaction or occurrence” and “whether the claims present common questions of fact or law.” *Beechgrove Redevelopment*, 2009 WL 382713, at \*5. As explained below, both of these factors tilt towards severing the OCSLA claims from the MLA claims.

*First*, although the overarching theory of Plaintiffs’ case is that the Secretary has established an unpublished nationwide moratorium on oil and gas leasing, *see supra* pp.8–9, Plaintiffs’ OCSLA and MLA claims largely involve different published transactions. Plaintiffs’ OCSLA claims focus on two Federal Register notices: the rescission of the Record of Decision for Lease Sale 257, 86 Fed. Reg. 10,132 (Feb. 18, 2021), *see* Compl. ¶¶ 73–85, and the delay of Lease Sale 258, 86 Fed. Reg. 10,994 (Feb. 23, 2021), *see* Compl. ¶¶ 86–90. In contrast, Plaintiffs’ MLA claims do not rely on any Federal Register notices; they focus instead on a limited number of BLM website postings. *See* Compl. ¶¶ 103–10. While Plaintiffs surmise that those actions were motivated by unpublished moratoria arising out of Executive Order 14,008, they allege that there are two such moratoria—an OCSLA moratorium and an MLA moratorium. *Compare id.* ¶ 67 (referring to the so-called “OCSLA Leasing Moratorium”), *with id.* ¶ 100 (claiming that Defendants “institute[d] an MLA Leasing Moratorium to complement [their] OCSLA Leasing Moratorium”). And while the Executive Order is a common thread connecting the MLA and OCSLA claims, it is specifically challenged only in non-colorable Count X of the Complaint. *See supra* p.9.

*Second*, Plaintiffs’ OCSLA and MLA claims present distinct questions of law due to the different statutory schemes Congress has enacted for onshore and offshore leasing. While the MLA establishes that onshore “[l]ease sales shall be held for each State where eligible lands are available at least quarterly,” 30 U.S.C. § 226(b)(1)(A), OCSLA contains no such statutory provision. Instead, OCSLA’s leasing schedule is established by an administratively promulgated “schedule” of sales over a “five-year period,” 43 U.S.C. § 1344(a), which the Secretary has explicit authority to “revise and reapprove . . . at any time,” *id.* § 1344(e).

The Complaint's OCSLA and MLA claims also present distinct questions of law due to the underlying justifications for the postponement decisions. Whereas Plaintiffs allege that the OCSLA postponements rely on Executive Order 14,008 as their "sole reason for delay," Compl. ¶¶ 83, 86, the MLA "lease sales [were] postponed to confirm the adequacy of the underlying environmental analysis," *id.* ¶ 105 (internal quotation marks omitted); Ex. B; Ex. C, thereby implicating the Secretary's obligations under NEPA. Thus, while Plaintiffs' challenge to the MLA postponements turns on the interaction of the Secretary's obligations under NEPA and the MLA, their challenge to the OCSLA postponements apparently implicate OCSLA procedures. *See* 43 U.S.C. § 1344(e). Thus, although both the OCSLA and MLA claims invoke the allegation that the Secretary of the Interior implemented an unpublished nationwide moratorium on oil and gas leasing, these claims also implicate distinct legal issues.

Finally, severance should occur out of solicitude for the respective forums' interests and experience. Although this District's residents have a significant interest in offshore oil and gas activity, their interest in onshore activity is dwarfed by the interests of Wyoming residents. *See* Decl. of Merry Gamper ¶¶ 6–7 (reporting that Wyoming produced more than 100 times as much oil and more than 40 times as much gas from federal onshore leases as Louisiana did during fiscal year 2020); Ex. E, Office of Natural Resources Revenue Production Data, *available at* <https://revenuedata.doi.gov/downloads/production/>. As seen in the map below, BLM administers vastly more land and subsurface minerals in the District of Wyoming than in this District:



And while this District has substantial experience in disputes arising under OCSLA, the District of Wyoming has similar experience with the MLA.<sup>7</sup>

Once severed, transfer of Plaintiffs' MLA claims should occur under the first-to-file rule because there would be complete overlap between those severed claims and the first-filed suit in the District of Wyoming. *See supra* pp. 12–14.

### CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court transfer this litigation to the District of Wyoming under the first-to-file rule. Alternatively, Defendants

<sup>6</sup> [https://www.blm.gov/sites/blm.gov/files/about\\_missionblminfographic.pdf](https://www.blm.gov/sites/blm.gov/files/about_missionblminfographic.pdf).

<sup>7</sup> *E.g.*, *Mountain States Legal Found. v. Hodel*, 668 F. Supp. 1466 (D. Wyo. 1987); *Learned v. Watt*, 528 F. Supp. 980 (D. Wyo. 1981); *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980).

request that the Court sever Counts V–VIII of the Complaint and transfer those counts to the District of Wyoming.

Respectfully submitted this 27th day of April, 2021.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 27, 2021, I filed the foregoing document electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Michael S. Sawyer  
MICHAEL S. SAWYER