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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WESTERN ENERGY ALLIANCE and PETROLEUM ASSOCIATION OF WYOMING,

Petitioners,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; DEB HAALAND, in her official capacity as Secretary of the Interior; and THE UNITED STATES BUREAU OF LAND MANAGEMENT,

Respondents, and

No. 21-CV-13-SWS
(Lead Case)

CENTER FOR BIOLOGICAL DIVERSITY, et al ("Conservation Groups"), and ALTERRA MOUNTAIN COMPANY, et al ("Business Coalition"),

Intervenor-Respondents.

STATE OF WYOMING,

Petitioners,

v.

THE UNITED STATES DEPARTMENT OF INTERIOR; DEBRA ANNE HAALAND, in her official capacity as Secretary of the Interior; THE BUREAU OF LAND MANAGEMENT; NADA CULVER, in her official capacity as Acting Director of the Bureau of Land Management; and KIM LIEBHAUSER, in her official capacity as the Acting Director of the Wyoming State Bureau of Land Management,

Respondents, and

CENTER FOR BIOLOGICAL DIVERSITY, et al ("Conservation Groups"), and ALTERRA MOUNTAIN COMPANY, et al ("Business Coalition"),

Intervenor-Respondents.

No. 21-CV-56-SWS
(Joined Case)

RESPONDENTS' COMBINED OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

I. LEGAL BACKGROUND 2

A. The Mineral Leasing Act (MLA) 2

B. The National Environmental Policy Act (NEPA) 6

C. Federal Land Policy and Management Act (FLPMA) 6

II. FACTUAL BACKGROUND 7

A. Recent NEPA Challenges to Oil and Gas Leasing Decisions Have Substantially Increased BLM's NEPA Workload. 7

B. BLM Has Historically Postponed Planned Quarterly Sales For A Variety Of Reasons. 10

C. BLM Deferred First-Quarter 2021 Lease Sales For NEPA Compliance Reasons. 10

D. On January 27, 2021, President Biden Signed Executive Order 14,008, Which Western Energy Alliance Immediately Challenged. 12

E. On March 1, 2021, The Second-Quarter 2021 BLM New Mexico Sale Was Temporarily Postponed Pending Decisions About Executive Order 14,008. 13

F. On March 24, 2021, Wyoming Filed Its Petition Challenging a *De Facto* Moratorium. 13

STANDARDS OF REVIEW 14

I. Judicial Review of Agency Action; the APA Standard 14

II. The Preliminary Injunction Standard 14

ARGUMENT 15

I. PETITIONERS ARE UNLIKELY TO SUCCEED ON THE MERITS. 15

A. Petitioners' Challenges to the *De Facto* "Moratorium" or "Suspension" Are Unlikely to Succeed 16

B. Petitioners' Efforts to "Set Aside" Individual Agency Decisions Are Unlikely to Succeed 21

C. Petitioners' Efforts to "Compel" Agency Action Are Unlikely to Succeed 25

1. Petitioners' MLA arguments are unlikely to succeed. 26

2. Petitioners' FLPMA Arguments Are Unlikely to Succeed..... 30

3. Petitioners' NEPA Arguments Are Unlikely to Succeed. 31

II. PETITIONERS HAVE NOT MET THEIR BURDEN TO SHOW IRREPARABLE HARM. 38

A. The Alleged Procedural Injuries Do Not Establish Irreparable Harm. 39

B. WEA's Alleged Economic Injuries Are Speculative and Cannot Be Remedied By a Preliminary Injunction..... 40

C. Wyoming Will Not Be Irreparably Harmed by Lost Federal Revenue..... 41

D. Wyoming Will Not Be Irreparably Harmed by Lost State Revenue. 44

E. Wyoming Will Not Be Irreparably Harmed by Lost Opportunity Costs..... 45

F. Wyoming Will Not Be Irreparably Harmed by Lost Jobs. 45

G. Wyoming Will Not Be Irreparably Harmed by Lost Recreational Opportunities..... 46

H. Wyoming Will Not Be Irreparably Harmed by Stranded Oil and Gas. 47

III. The Threatened Injury Alleged by Petitioners Does Not Outweigh the Harm the Injunction Could Do to Respondents. 47

IV. A Preliminary Injunction Is Not in the Public Interest. 49

CONCLUSION..... 50

TABLE OF AUTHORITIES

Cases

Alabama-Coushatta Tribe of Tex. v. United States,
757 F.3d 484 (5th Cir. 2014) 18, 19, 21

Alaska v. Andrus,
591 F.2d 537 (9th Cir. 1979) 32

Alford v. Moulder,
No. 3:16-cv-350, 2016 WL 3449911 (S.D. Miss. June 20, 2016) 42

Am. Petroleum Inst. v. EPA,
216 F.3d 50 (D.C. Cir. 2000) 22

Atieh v. Riordan,
727 F.3d 73 (1st Cir. 2013) 14

Awad v. Ziriax,
670 F.3d 1111 (10th Cir. 2012) 16

Barnhart v. Walton,
535 U.S. 212 (2002) 27

Bennett v. Spear,
520 U.S. 154 (1997) 21

Blanchard v. Wyo. Dep't of Corr. Dir.,
No. 17-CV-0124, 2017 WL 10350606 (D. Wyo. Nov. 9, 2017) 16, 47

California ex rel. Lockyer v. U.S. Dep't of Agric.,
459 F. Supp. 2d 874 (N.D. Cal. 2006) 34

California v. Bureau of Land Mgmt.,
Nos. 18-cv-00521-HSG, 18-cv-00524-HSG, 2020 WL 1492708 (N.D. Cal. Mar. 17, 2020).. 35

Citizens for Clean Energy v. U.S. Dep't of Interior,
384 F. Supp. 3d 1264 (D. Mont. 2019) 37

Colo. Farm Bureau Fed'n v. U.S. Forest Serv.,
220 F.3d 1171 (10th Cir. 2000) 22

Colorado v. EPA,
989 F.3d 874 (10th Cir. 2021) 15, 39, 40, 41, 47

Cross-Sound Ferry Services, Inc. v. ICC,
934 F.2d 327 (D.C. Cir. 1991) 32

Cure Land, LLC v. U.S. Dep't of Agric.,
833 F.3d 1223 (10th Cir. 2016) 38

Dallas, Texas v. Hall,
562 F.3d 712 (5th Cir. 2009) 36

Dalton v. Specter,
511 U.S. 462 (1994) 16

Davis v. FEC,
554 U.S. 724 (2008) 17

Davis v. Morton,
469 F.2d 593 (10th Cir. 1972) 37

Dep't of Com. v. New York,
139 S. Ct. 2551, 2573 (2019) 19, 20

Drakes Bay Oyster Co. v. Jewell,
747 F.3d 1073 (9th Cir. 2014) 33

DTC Energy Grp., Inc. v. Hirschfeld,
912 F.3d 1263 (10th Cir. 2018) 38

El Paso Cnty. v. Trump,
982 F.3d 332 (5th Cir. 2020) 23

Fed. Power Comm'n v. Idaho Power Co.,
344 U.S. 17 (1952) 23

First W. Capital Mgmt. Co. v. Malamed,
874 F.3d 1136 (10th Cir. 2017) 39

Fisheries Survival Fund v. Jewell,
236 F. Supp. 3d 332 (D.D.C. 2017) 15, 40

Heideman v. S. Salt Lake City,
348 F.3d 1182 (10th Cir. 2003) 39

Idaho Conservation League v. Bonneville Power Admin.,
826 F.3d 1173 (9th Cir. 2016) 35

Idaho ex rel. Kempthorne v. U.S. Forest Serv.,
142 F. Supp. 2d 1248 (D. Idaho 2001) 38

Image of Greater San Antonio v. Brown,
570 F.2d 517 (5th Cir. 1978) 38

Impact Energy Resources, LLC v. Salazar,
Nos. 2:09–CV–435, 2:09–CV–440, 2010 WL 3489544 (D. Utah Sept. 1, 2010) 48

In re Am. Fed'n of Gov't Emps.,
837 F.2d 503 (D.C. Cir. 1988) 26

Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.,
140 F. Supp. 3d 1123 (D.N.M. 2015) 24

Judulang v. Holder,
565 U.S. 42 (2011) 14

Kansas ex rel. Schmidt v. Zinke,
861 F.3d 1024 (10th Cir. 2017) 21

Kleppe v. Sierra Club,
427 U.S. 390 (1976)..... 34

Kolluri v. U.S. Citizenship & Immigr. Serv.,
No. 3:20-cv-02897, 2021 WL 183316 (N.D. Tex. Jan. 17, 2021)..... 26

La. Pub. Serv. Comm'n v. FERC,
761 F.3d 540 (5th Cir. 2014) 14

Louisiana v. United States,
948 F.3d 317 (5th Cir. 2020) 21, 24

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990)..... 17, 18, 19

Martin v. Franklin Capital Corp.,
546 U.S. 132 (2005)..... 26

Martinez v. Mathews,
544 F.2d 1233 (5th Cir. 1976) 48

Mayaguezanos por la Salud y el Ambiente v. United States,
198 F.3d 297 (1st Cir. 1999)..... 32

Mountain States Legal Found. v. Andrus,
499 F. Supp. 383 (D. Wyo. 1980)..... 30, 31

Mountain States Legal Found. v. Hodel,
668 F. Supp. 1466 (D. Wyo. 1987)..... 30, 31

NAACP v. Bureau of the Census,
945 F.3d 183 (4th Cir. 2019) 24

Nat'l Wildlife Fed'n v. Espy,
45 F.3d 1337 (9th Cir. 1995) 34

New Mexico Dep't of Game & Fish v. U.S. Dep't of Interior,
854 F.3d 1236 (10th Cir. 2017) 15, 39, 40, 41

New Mexico ex rel. Richardson v. Bureau of Land Mgmt.,
565 F.3d 683 (10th Cir. 2009) 31, 37

Norton v. S. Utah Wilderness All.,
542 U.S. 55 (2004)..... 2, 14, 19, 24, 25, 26

Pennaco Energy, Inc. v. U.S. Dep't of Interior,
377 F.3d 1147 (10th Cir. 2004) 6, 33

Prairie Band of Potawatomi Indians v. Pierce,
253 F.3d 1234 (10th Cir. 2001) 44

Ross v. Fed. Highway Admin.,
162 F.3d 1046 (10th Cir. 1998) 31

S. Utah Wilderness All. v. Palma,
707 F.3d 1143 (10th Cir. 2013) 17

Sabine River Auth. v. U.S. Dep't of Interior,
745 F. Supp. 388 (E.D. Tex. 1990) 36

Sabine River Auth. v. U.S. Dep't of Interior,
951 F.2d 669 (5th Cir. 1992) 33, 36

Schraier v. Hickel,
419 F.2d 663 (D.C. Cir. 1969) 3

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 23

Shawnee Trail Conservancy v. Nicholas,
343 F. Supp. 2d 687 (S.D. Ill. 2004) 22

Sierra Club v. Glickman,
67 F.3d 90 (5th Cir. 1995) 14

Sierra Club v. Morton,
514 F.2d 856 (D.C. Cir. 1975) 34

Sierra Club v. Peterson,
717 F.2d 1409 (D.C. Cir. 1983) 37

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 32

Udall v. Tallman,
380 U.S. 1 (1965) 3

United States ex rel McLennan v. Wilbur,
283 U.S. 414 (1931) 3, 26

Upper Snake River Chapter of Trout Unlimited v. Hodel,
921 F.2d 232 (9th Cir. 1990) 35

Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council,
435 U.S. 519 (1978) 23

W. Energy All. v. Salazar,
709 F.3d 1040 (10th Cir. 2013) 3, 5, 26

W. Energy All. v. Salazar,
No. 10-CV-0226, 2011 WL 3737520 (D. Wyo. June 29, 2011) 3, 4, 48

W. Energy All. v. Jewell,
No. 1:16-CV-00912-WJ-KBM, 2017 WL 3600740 (D.N.M. Jan. 13, 2017) 20

W. Energy All. v. Zinke,
877 F.3d 1157 (10th Cir. 2017) 28, 29, 41

W. Watersheds Project v. Bernhardt,
No. 1:16-CV-00083-BLW, 2021 WL 517035 (D. Idaho Feb. 11, 2021) 35

Wells Fargo Bank, N.A. v. ESM Fund I, LP,
No. 10-cv-7332, 2012 WL 3023997 (S.D.N.Y. Apr. 3, 2012) 45

Whitman v. Am. Trucking Associations,
531 U.S. 457 (2001) 22

WildEarth Guardians v. Bernhardt,
No. 1:19-cv-00505-RB-SCY, 2020 WL 6799068 (D.N.M. Nov. 19, 2020) 37

WildEarth Guardians v. Bernhardt,
No. 1:20-cv-00056, 2020 WL 111765 (D.D.C. Jan. 9, 2020) 8

WildEarth Guardians v. Bernhardt,
No. 16-1724 (RC), 2020 WL 6701317 (D.D.C. Nov. 13, 2020) 8, 9, 49

WildEarth Guardians v. De La Vega,
No. 1:21-cv-00175-RC (D.D.C. Feb. 17, 2021) 8

WildEarth Guardians v. Zinke,
368 F. Supp. 3d 41 (D.D.C. 2019) 7, 8, 37

Wildlife v. Andrus,
627 F.2d, 1238 (D.C. Cir. 1980) 32

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 14

Wyo. Outdoor Council v. U.S. Forest Serv.,
165 F.3d 43 (D.C. Cir. 1999) 48

Wyoming v. U.S. Dep't of Agric.,
661 F.3d 1209 (10th Cir. 2011) 50

Statutes

28 U.S.C. § 1331 12

30 U.S.C. § 226(a) 3, 26

30 U.S.C. § 226(b)(1) 3, 4, 5

30 U.S.C. § 226(b)(2) 31

30 U.S.C. § 226(c) 4

30 U.S.C. §§ 181–287 2

30 U.S.C. §§ 351 – 360 3

40 U.S.C. § 4332(2)(C) 32
42 U.S.C. § 4332(2)(C) 31
42 U.S.C. § 4332(2)(C)(iii) 6
42 U.S.C. §§ 4321–4370m-12 6
43 U.S.C. § 1701 6
43 U.S.C. § 1701(a)(7) 6, 50
43 U.S.C. § 1702(c) 6, 7, 50
43 U.S.C. § 1702(j) 30
43 U.S.C. § 1714 7
43 U.S.C. § 1714(b) 7, 30
5 U.S.C. § 702 12
5 U.S.C. § 704 21
5 U.S.C. § 706(1) 2, 14, 24
5 U.S.C. § 706(2) 2, 14
5 U.S.C. §§ 701–706 14
Pub. L. No. 100–203, title V, subtitle B, 101 Stat. 1330 ..... 4, 5

Rules

LR 83.6 (b)(2) 41
LR 83.6(c) 42

Regulations

40 C.F.R. § 1501.5 6
40 C.F.R. § 1501.6 33
40 C.F.R. § 1502.1 6
40 C.F.R. § 1502.2 33
40 C.F.R. § 1502.9(d)(1) 32
40 C.F.R. § 1502.9(d)(2) 32
40 C.F.R. § 1502.9(d)(3) 33
40 C.F.R. § 1506.1(a) 33
40 C.F.R. § 1508.1(q) 6, 32
40 C.F.R. § 1508.18(b)(1) (2019) 34

40 C.F.R. §1508.1(q)(3)(i-ii) 33

43 C.F.R. § 3100.0-3 3

43 C.F.R. § 3203.14(b) 11

43 C.F.R. part 3130 3

Other Authorities

100th Cong. S. Hrg. 100-464 (June 30, 1987) 4

85 Fed. Reg. 43,304 (July 16, 2020) 6

85 Fed. Reg. 43,347 (July 16, 2020) 29

86 Fed. Reg. 7,619 (Feb. 1, 2021) 12

H.R. 2851 (1987) 5

H.R. 933 (1987) 5, 25

H.R. Conf. Rep. No. 100-495 (1987) 4, 5, 26

H.R. Rep. No. 100-378 (1987) 4

S. Rep. No. 100-188 (1987) 5

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INTRODUCTION

These are not typical petitions for review of agency action. Petitioners Western Energy Alliance *et al.* (WEA) and Wyoming do not challenge a published agency action. Instead, they ask the Court to infer that the Secretary of the Interior has adopted a *de facto* moratorium on all oil and gas leasing in order to implement the leasing pause directive of President Biden's Executive Order 14,008. The Court, in Petitioners' view, should: overlook that the agency's decision documents identify compliance with the National Environmental Policy Act (NEPA)—not the Executive Order—as the basis for the deferrals; ignore that the agency has not yet announced how it will address future lease sales like the third- and fourth-quarter Wyoming sales; and disregard that the Secretary has continued to issue and sell oil and gas leases since the issuance of the Executive Order. Simply put, Petitioners request that the Court ignore the record and deduce the existence of a *de facto* agency moratorium from several website postings.

Petitioners bring such unwieldy claims because the Court lacks jurisdiction to hear their true quarrel—that the Executive Order violates the Administrative Procedure Act (APA). Because the President is not an "agency" under the APA, he has sovereign immunity against such a challenge. While they purport to challenge actions of the Secretary, WEA tellingly filed its suit the day the Executive Order was signed, before the Secretary had any opportunity to take action implementing the order. Although both Petitioners now point to post-filing agency activity, that post-filing activity cannot create jurisdiction, which must exist at the outset of a suit.

When winnowed to "agency" actions, Petitioners' challenges fail on several jurisdictional grounds. Their attempt to conjure a nationwide moratorium out of numerous individual actions violates the APA's prohibition on programmatic challenges. And their challenges to individual postponement decisions fails to establish that those lease sale postponements are "final agency

action" necessary to support the Court's jurisdiction. Finally, the Court cannot redress most of Petitioners' claims because the Court cannot set aside agency inaction under 5 U.S.C. § 706(2).

Given these jurisdictional defects, Petitioners' claims are reduced to requests to compel unlawfully withheld or unreasonably delayed agency action, which are governed by 5 U.S.C. § 706(1). But Petitioners spend scant portions of their briefs seeking such relief, as courts can compel only "*discrete* agency action that [an agency] is *required to take*." *Norton v. SUWA*, 542 U.S. 55, 64 (2004). No statute requires the Secretary to issue leases; instead, the relevant statutes grant the Secretary considerable discretion over the leasing and management of federal lands.

Nor can Petitioners show that any of the remaining Rule 65 considerations weigh in their favor. They have not demonstrated a likelihood of imminent irreparable harm because their harm projections are based on false assumptions. No existing lease has been cancelled as a result of any of the actions challenged here. Further, there is no indication that jobs or domestic production are being lost due to the Executive Order or agency action, and Wyoming will continue to receive revenues during the pendency of this litigation. Balanced against that, both the United States' interests and the public interest would be harmed by a preliminary injunction, because compelling the permanent disposal of federal property now would frustrate Interior's ongoing process of determining how best to manage those resources under its governing statutes.

BACKGROUND

I. LEGAL BACKGROUND

A. The Mineral Leasing Act (MLA)

The Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181–287, "gave the Secretary of the Interior broad power to issue oil and gas leases on public lands" while giving "discretion to

refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1, 4 (1965).[1] Section 17(a) of the MLA establishes the Secretary's discretion by providing that lands "may"—not must—be leased by the Secretary. 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."). And courts have consistently recognized the Secretary's discretion in oil and gas leasing decisions. *E.g.*, *United States ex rel McLennan v. Wilbur*, 283 U.S. 414, 419 (1931) (MLA "goes no further than to empower the Secretary to execute leases"); *W. Energy All. v. Salazar*, 709 F.3d 1040, 1044 (10th Cir. 2013) (Secretary has "considerable" discretion in leasing decisions); *Schraier v. Hickel*, 419 F.2d 663, 665–68 (D.C. Cir. 1969) (affirming Secretary has "discretion to decline to lease" even if BLM had published a notice that it would receive offers). Indeed, a unanimous Supreme Court has affirmed the Secretary's authority under the MLA to issue a "general order" rejecting oil and gas applications "[i]n order to effectuate the conservation policy of the President." *Wilbur*, 283 U.S. at 418.

As originally enacted, the MLA directed the Secretary to offer leases in two ways: "BLM initiated competitive bidding only for those parcels within a 'known geologic structure of a producing oil or gas field' (KGS). 30 U.S.C. § 226(b)(1). All other areas were leased through a noncompetitive lease process." *W. Energy All. v. Salazar*, No. 10-CV-0226, 2011 WL 3737520, at *4 (D. Wyo. June 29, 2011). By 1987, however, Congress noted concerns that the vast majority

[1] Generally speaking, the MLA applies on public domain lands. The Mineral Leasing Act for Acquired Lands, 30 U.S.C. 351 – 360, applies on acquired lands. Congress provided exceptions and authorizations for leasing oil and gas on specific lands as summarized in 43 CFR 3100.0-3. Leasing in the National Petroleum Reserve – Alaska, and in the Arctic National Wildlife Refuge, are pursuant to separate statutory authorities and procedures. *See, e.g.*, 43 CFR part 3130. Petitioners' pleadings address only leasing under the MLA, and thus reach only public domain lands subject to that Act.

of leases were being issued through the noncompetitive process, thus depriving the public of a fair return in certain situations. *E.g.*, S. Rep. No. 100-188, at 2 (1987) (recounting "the criticism that the Federal Government is not receiving fair market value for potentially valuable deposits" when "over 95 percent of all outstanding leases have been issued on a noncompetitive basis"). Accordingly, Congress enacted the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (1987 Reform Act), Pub. L. No. 100–203, title V, subtitle B, 101 Stat. 1330 (1987).

The 1987 Reform Act amended Section 17(b) of the MLA by directing the Secretary to offer most oil and gas leases through a competitive process, at least initially. *Id.* § 5102(a) (codified at 30 U.S.C. § 226(b)(1)). Parcels that did not receive a minimum bid would then be available for noncompetitive leasing for a two-year period. *Id.* § 5102(b) (codified at 30 U.S.C. § 226(c)). But these amendments to Sections 17(b)–(c) of the MLA were not intended to displace the Secretary's general discretion over oil and gas leasing in Section 17(a). H.R. Rep. No. 100-378, at 11 (1987) ("*Subject to the Secretary's discretionary authority under section 17(a) of the 1920 Act to make lands available for leasing*, section 2(a) establishes a competitive oil and gas leasing program where lands are leased to the highest responsible qualified bidder by competitive bidding." (emphasis added)); Hearing Before the Senate Subcommittee on Mineral Resources Development and Production of the Committee on Energy and Natural Resources, 100th Cong. S. Hrg. 100-464 at 108 (June 30, 1987) (sponsor of Senate bill explaining that his bill did "not change the Secretary's discretion in refusing to lease").[2] Thus, the "MLA, as amended by the Reform Act

[2] While the 1987 Reform Act did not authorize the Secretary "to reject a bid at or over the minimum bid if he determines it does not represent a reasonable return to the public," H.R. Conf. Rep. No. 100-495, at 780 (1987), the 1987 Reform Act otherwise, "like the previous version of the MLA, . . . vests the Secretary at the outset with considerable discretion to determine which public lands are suitable for leasing," *Salazar*, 2011 WL 3737520, at *5.

of 1987, continues to vest the Secretary with considerable discretion to determine which lands will be leased." *W. Energy All.*, 709 F.3d at 1044.

To implement this shift toward competitive leasing, the 1987 Reform Act established that "[l]ease sales shall be held for each State where eligible lands are available at least quarterly." Pub. L. No. 100–203, 101 Stat. 1330 (1987) title V, subtitle B § 5102(a) (codified at 30 U.S.C. § 226(b)(1)). While Congress did not elaborate on the meaning of the phrase "where eligible lands are available," the Department of the Interior informed Congress of its view that it retained discretion not to lease based on, *inter alia*, "compliance with NEPA protection of the environment." Legislation to Reform the Federal Onshore Oil and Gas Leasing Program on H.R. 933, H.R. 2851, Before the H. Comm. on Interior and Insular Affairs, at 66, 82–83 (July 28, 1987). And while the Senate initially sought to exempt lease sales from NEPA, S. Rep. No. 100-188, at 6, 49, the Senate receded from that position after conferencing with the House, H.R. Conf. Rep. No. 100-495, at 782 (1987).

Consistent with its position before Congress during the enactment of the 1987 Reform Act, Interior has interpreted the phrase "where eligible lands are available," 30 U.S.C. § 226(b)(1), to require, at a minimum, that "all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act." BLM Manual MS-3120 Competitive Leases (P).1.11 (2013). That longstanding interpretation has been in place for at least a quarter century. Declaration of Peter Cowan ¶ 10 (citing 1996 BLM Manual); *see also* Thomas L. Sansonetti & William R. Murray, *A Primer on the Federal Onshore Oil & Gas Leasing Reform Act of 1987 and its Regulations,* 25 Land & Water L. Rev. 375, 388 (1990) ("Public lands may only be leased after BLM has completed the requisite analyses under such laws as the National Environmental Policy Act of 1969").

B. The National Environmental Policy Act (NEPA)

NEPA—the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m-12—is a procedural statute that requires federal agencies to consider potential environmental impacts of a "proposed action" as well as "alternatives to the proposed action," 42 U.S.C. § 4332(2)(C)(iii). NEPA applies only to "major Federal actions," *id.*, which do not include a "failure to act," because in such a situation "there is no proposed action and therefore there are no alternatives that the agency may consider." Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,347 (July 16, 2020); *see also* 40 C.F.R. § 1508.1(q) (defining "Major Federal action").

Interior complies with NEPA for oil and gas lease sales through detailed documents called Environmental Assessments (EAs), 40 C.F.R. § 1501.5, or even more detailed documents called Environmental Impact Statements (EISs), *id.* § 1502.1, that analyze environmental impacts associated with leasing. Errors in these NEPA documents can result in lease sales being vacated by a court or lease development being enjoined. *See infra* 7–9.

Interior also "may use non-NEPA procedures to determine whether new NEPA documentation is required." *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1162 (10th Cir. 2004) (discussing Determinations of NEPA Adequacy (DNAs)).

C. Federal Land Policy and Management Act (FLPMA)

The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 *et seq.*, establishes general policies and procedures for managing public lands. In relevant part, FLPMA establishes that lands shall be managed for "multiple use," 43 U.S.C. § 1701(a)(7), including to "best meet the present and future needs of the American people" for "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources," 43 U.S.C. § 1702(c).

FLPMA also authorizes the Secretary to make "withdrawals" of public lands. 43 U.S.C. § 1714. The term "withdrawal," in relevant part, "means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program." 43 U.S.C. § 1702(c). FLPMA also authorizes the Secretary to "segregate[]" land for up to two years while considering a withdrawal proposal. 43 U.S.C. § 1714(b).

II. FACTUAL BACKGROUND

A. Recent NEPA Challenges to Oil and Gas Leasing Decisions Have Substantially Increased BLM's NEPA Workload.

In recent years, BLM's oil and gas leasing decisions have faced numerous NEPA challenges alleging failures to consider groundwater impacts, greenhouse gas emissions, and impacts on the greater sage-grouse, as well as other issues. *See* Declaration of Peter Cowan ¶ 3, Ex. C. Many of these lawsuits have exposed weaknesses in the relevant environmental reviews, resulting in several courts vacating leases or enjoining development. *Id.* ¶ 4 (listing cases). Additional lawsuits have challenged dozens of lease sales in a single action. *Id.* ¶ 3, Ex. C. As a result, BLM has been required to go back to the drawing board on some lease sales and conduct supplemental NEPA analysis. *Id.* ¶ 5. The judicial determinations—and corresponding expanded NEPA reviews—have generated heavy workloads for BLM in completing environmental analyses for its oil and gas lease sales. *Id.* ¶¶ 5–6.

For example, a trio of lawsuits pending in the District of Columbia illustrate how NEPA challenges to BLM's oil and gas leasing decisions have substantially increased NEPA workloads and prevented lessees and operators from developing purchased leases. *See WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019) (*WEG I*) (challenging eleven oil and gas lease sales

covering over 460,000 acres of land in Wyoming, Utah, and Colorado); *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" covering more than two million acres of land); *WildEarth Guardians v. De La Vega*, No. 1:21-cv-00175-RC (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" covering over 1.3 million acres of land). A 2019 decision in the first of those cases found that five BLM lease sales in Wyoming—held between May 2015 and August 2016—violated NEPA for failing to adequately evaluate greenhouse gas emissions. *WEG I*, 368 F. Supp. 3d at 67–77 (enjoining lease development pending remand to BLM to prepare additional NEPA analysis).

Following the 2019 *WEG I* decision, BLM prepared supplemental NEPA analysis for its 2015–16 Wyoming lease sales. *See WildEarth Guardians v. Bernhardt*, Civil Action No. 16-1724 (RC), 2020 WL 6701317, at *4–5 (D.D.C. Nov. 13, 2020) (*WEG II*). Plaintiffs soon challenged that supplemental analysis as containing still inadequate assessments of greenhouse gas emissions. *Id.* at *5. And plaintiffs filed their second lawsuit challenging 23 more lease sales—including nine lease sales in Wyoming covering more than 1.6 million acres—as violating *WEG I*. *WEG v. Bernhardt*, 2020 WL 111765, ¶¶ 101, 133. BLM successfully sought remand without vacatur for 20 of the 23 challenged lease sales, *WildEarth Guardians v. Bernhardt*, No. 1:20-cv-00056, ECF No. 46 (D.D.C. Oct. 23, 2020) (remanding all but three leasing decisions), but drilling approvals for leases sold during those sales remain vulnerable to similar NEPA challenges until BLM prepares supplemental NEPA analysis.

On November 13, 2020, the court issued its *WEG II* decision, finding that BLM's post-*WEG I* supplemental NEPA analysis was also deficient in analyzing greenhouse gas emissions, by failing to adequately address issues such as carbon budgeting. *See WEG II*, 2020 WL 6701317, at *12. The court again enjoined BLM from approving drilling permits or other lease development activity, while remanding to BLM for further NEPA analysis. *Id.* at *15. In remanding, the court "urge[d] BLM to conduct a robust analysis, using conservative estimates based on the best data, analyzed in an unrushed fashion, so that the analysis can effectively serve as a model for the other leases." *Id.* at n.16.

Following the November 2020 *WEG II* decision, plaintiffs filed their third lawsuit challenging 28 additional lease sales as violating *WEG I* and *WEG II*. *WEG v. De La Vega*, No. 1:21-cv-00175-RC, Am. Compl. ¶¶ 6, 11–13, ECF No. 13. Thus, this trio of lawsuits brought by a single set of plaintiffs before a single district court judge has effectively forced BLM to (1) undertake a third round of NEPA analysis for five oil and gas lease sales from 2015 and 2016, (2) consider additional NEPA analysis for twenty oil and gas lease sales in light of new caselaw in *WEG I* and *WEG II*, and (3) defend thirty-seven[3] more oil and gas lease sales against ongoing NEPA challenges. And there are numerous other ongoing NEPA challenges to BLM's oil and gas lease sales involving different issues, different plaintiff groups, and different courts. Cowan Decl. Ex. C. At the same time, BLM recently lost 87 percent of its headquarters staff, following an August 2020 relocation from Washington, D.C., to Grand Junction, Colorado.[4]

[3] This includes six outstanding lease sales from the first lawsuit, three from the second lawsuit, and twenty-eight from the third lawsuit.

[4] R. Beitsch, *Bureau of Land Management exodus: Agency lost 87 percent of staff in Trump HQ relocation*, The Hill (Jan. 28, 2021), *available at* https://thehill.com/policy/energy-environment/536384-blm-exodus-agency-lost-87-percent-of-staff-in-trump-relocation.

B. BLM Has Historically Postponed Planned Quarterly Sales For A Variety Of Reasons.

Despite Petitioners' interpretation of the MLA's quarterly lease sale provision, BLM has historically postponed lease sales for several reasons. Cowan Decl. ¶ 7. For example, under the prior administration, BLM deferred lease sales in order to better comply with NEPA, often in light of recent adverse court decisions. *E.g.*, PR091[5], Dear Reader Letter, BLM Montana State Office (Apr. 24, 2018) (deferring June 12, 2018 lease sale "to ensure compliance with a court order issued on March 26, 2018" regarding NEPA); PR087–88, Mem. from J. Connell to M. Nedd, (Nov. 15, 2019) Postponement of the December 19, 2019, Competitive Oil and Gas Lease Sale (postponing Colorado sale by six months to do additional NEPA analysis); PR089–90, Decision, BLM Idaho State Office (Jan. 10, 2018) (postponing March 5, 2018 Idaho sale to prepare additional NEPA analysis). The prior administration also deferred lease sales "due to workload and staffing considerations." PR099, Mem. from J. Mehlhoff to Dep. Dir., Policy and Programs, Deferral of Parcel for the Montana-Dakotas, June 23, 2020, Competitive Oil and Gas Lease Sale (Jan. 10, 2020). And BLM postponed numerous oil and gas lease sales in 2020 in light of complications from the COVID-19 pandemic. Cowan Decl. ¶ 8.

C. BLM Deferred First-Quarter 2021 Lease Sales For NEPA Compliance Reasons.

In light of its growing NEPA workload and several recent adverse NEPA decisions, BLM postponed lease sales in the first quarter of 2021 to complete additional NEPA analysis. Cowan Decl. ¶ 6; *see also* PR081–82, 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

[5] PR cites are to attachments to the Declaration of Peter Cowan, submitted herewith.

to comply with the [November 2020] WildEarth Guardians opinion."); PR083–84, Mem. from G. Sheehan, BLM Utah State Director to M. Nedd, BLM Deputy Director, Operations (Feb. 12, 2021) (postponing the March 2021 Utah lease sale in order to address the December 2020 *Rocky Mountain Wild* decision); PR079–80, Mem. from T. Annatoyn to L. Daniel-Davis (Feb. 12, 2021) (postponing first-quarter lease sales in Montana, Colorado, Utah and Wyoming to prepare additional NEPA analysis); PR076 ("lease sales in Colorado, Montana, Utah, and Wyoming are postponed to confirm the adequacy of underlying environmental analysis."). Though BLM had prepared draft NEPA analysis for many of the first-quarter lease sales in the fall of 2020, recent court decisions, such as the November 2020 *WEG II* decision or December 2020 *Rocky Mountain Wild* decision, motivated the agency to take additional time to address potential NEPA deficiencies in light of those decisions. *See* PR076–84. Because Interior's regulations require notices of competitive lease sales to be published forty-five days before the sale date, 43 C.F.R. § 3203.14(b), many of these postponement decisions were made on Friday, February 12, 2021, forty-six days before the expiration of the first quarter.

But not all first-quarter postponement decisions were made on February 12; nor did all such decisions expressly invoke NEPA compliance as the basis for the postponement. Following the November 2020 *WEG II* decision, the prior administration postponed the December 2020 Nevada sale by publishing an errata without further explanation to its ePlanning website. PR100, Errata #5, BLM Nevada (Dec. 7, 2020) (postponing December 2020 sale). The incoming administration made a similar decision to postpone the first-quarter 2021 Nevada sale, which had been scheduled for March 9, 2021. PR078, Errata #1, BLM Nevada (Jan. 27, 2021) (postponing March 2021 lease sale). That decision was published on BLM's website on January 25, 2021, PR109, followed by a formal errata published on January 27, 2021. Cowan Decl. ¶ 6 n.3.

D. On January 27, 2021, President Biden Signed Executive Order 14,008, Which Western Energy Alliance Immediately Challenged.

Also on January 27, 2021, the President signed Executive Order 14,008, "Tackling the Climate Crisis at Home and Abroad," which directs various agencies to take actions to address climate change and was published in the Federal Register on February 1, 2021. 86 Fed. Reg. 7,619. That Order directs Interior to undertake a comprehensive review of federal oil and natural gas leasing—including royalty rates—while "to the extent consistent with applicable law" pausing new leases to preserve the status quo. *Id.* at 7624–25. Pursuant to the Executive Order, Interior is working on an interim report that it expects to complete in early summer.[6]

Western Energy Alliance (WEA) immediately filed its petition for review of agency action, without specifying which agency action—if any—it is challenging. WEA Pet., ECF No. 1, Case No. 21-cv-13-SWS (Jan. 27, 2021). That petition states in its entirety:

> Petitioner Western Energy Alliance submits respectfully this petition for review of government action under Local Civil Rule 83.6. On January 27, 2021, the Secretary of the Interior, acting at the President's direction, suspended indefinitely the federal oil and gas leasing program. The suspension is an unsupported and unnecessary action that is inconsistent with the Secretary's statutory obligations. Because the suspension is both arbitrary and capricious and contrary to law, the Court should find the suspension invalid and set aside the challenged government action.
>
> This Court has federal-question jurisdiction under 28 U.S.C. § 1331. Respondent President Biden is an officer of the United States; Respondent de la Vega is an officer of the United States; the Bureau of Land Management is an entity of the United States Government. The United States has waived its sovereign immunity under the APA, 5 U.S.C. § 702.

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[6] In March, the Secretary 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. F, Secretary Haaland Delivers Remarks at Interior's Public Forum on the Federal Oil and Gas Program, Mar. 25, 2021.

Id. On February 23, 2021, WEA filed an amended petition adding one sentence: "On or about February 12, 2021, the Secretary added notations on the Bureau of Land Management's website indicating that all onshore oil and gas lease sales scheduled for March or April 2021 have been postponed." WEA Am. Pet., ECF No. 4, Case No. 21-cv-13-SWS (Feb. 23, 2021).

E. On March 1, 2021, The Second-Quarter 2021 BLM New Mexico Sale Was Temporarily Postponed Pending Decisions About Executive Order 14,008.

On March 1, 2021, Interior made the decision to postpone the second-quarter 2021 oil and gas lease sale for BLM's New Mexico office. PR085–86, Email from L. Daniel-Davis to M. Nedd (Mar. 1, 2021).[7] That decision states:

> Department officials with delegated authority to approve fossil fuel authorizations, including onshore lease sales, are postponing further consideration of Quarter Two sales (including authorization of the sales) pending decisions on how the Department will implement the Executive Order on Tackling the Climate Crisis at Home and Abroad with respect to onshore sales. The Department has not yet rendered any such decisions, but we hope to have further information in the coming weeks. In the meantime, please post the following update on the relevant website(s): "The oil and gas lease sale scheduled for April, 2021 has been postponed."

PR086. The decision was announced on BLM's website on March 2, 2021. PR110. But it is not challenged in either petition. *See* WEA Am. Pet.; Wyo. Pet., ECF No. 1, Case No. 21-cv-56-SWS (Mar. 24, 2021).

F. On March 24, 2021, Wyoming Filed Its Petition Challenging a *De Facto* Moratorium.

On March 24, 2021, Wyoming filed its lawsuit alleging that the Secretary had "instituted a de facto moratorium on all federal oil and gas lease sales on the public lands through a series of

[7] WEA incorrectly states that "[o]n or about February 12, 2021," the "New Mexico State Office indicated that '[t]he oil and gas lease scheduled for April 2021 has been canceled.'" WEA Br. 8–9 (quoting BLM website). That text was added to the website on March 2. PR110.

individual lease sale postponements and cancellations in Wyoming and across the nation." Wyo. Pet., 2. Wyoming alleges that this moratorium violates FLPMA, NEPA, the MLA, and the APA.

STANDARDS OF REVIEW

I. Judicial Review of Agency Action; the APA Standard

The Administrative Procedure Act, 5 U.S.C. § 701–706 (APA) governs judicial review of agency actions. Courts may "set aside" agency action that is arbitrary and capricious or contrary to law. 5 U.S.C. § 706(2). And courts may "compel" unreasonably delayed agency action. *Id.* § 706(1). Because judicial review is confined to "circumscribed, discrete agency actions," however, courts lack broader supervisory authority over agencies. *Norton*, 542 U.S. at 62.

APA review generally "involves neither discovery nor trial" because the "focal point of APA review is the existing administrative record." *Atieh v. Riordan*, 727 F.3d 73, 76 (1st Cir. 2013). A reviewing court's role is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (internal quotation marks omitted). Under this highly deferential standard, agency actions are presumed to be valid. *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 558 (5th Cir. 2014). The court must not "substitute its judgment for that of the agency as to which particular features might be most desirable or efficacious." *Sierra Club v. Glickman*, 67 F.3d 90, 97 (5th Cir. 1995).

II. The Preliminary Injunction Standard

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the [movant] is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The movant must establish a "clear and unequivocal" right to relief based on four factors: "(1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant's threatened injury

outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest." *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1245–46 (10th Cir. 2017) (internal quotations omitted).

Certain types of preliminary injunctions are "disfavored" and require a stronger showing of entitlement to relief. *Id.* at 1246 n.15. There are three types of these disfavored injunctions: "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Id.* (internal quotations omitted). "When seeking such an injunction [the movant] must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of the harms." *Id.* (internal quotations omitted).

"[T]o constitute irreparable harm, an injury must be imminent, certain, actual and not speculative." *Colorado v. EPA*, 989 F.3d 874, 886 (10th Cir. 2021) (citing *New Mexico*, 854 F.3d at 1251). Procedural injuries alone are insufficient to establish irreparable harm. *E.g.*, *Fisheries Survival Fund v. Jewell*, 236 F. Supp. 3d 332, 336 (D.D.C. 2017) ("To establish irreparable harm under a NEPA claim, Plaintiffs must allege some concrete injury beyond the procedural injury caused by [the agency's] alleged failure to comply with NEPA when it conducted its environmental assessment.").

ARGUMENT

I. PETITIONERS ARE UNLIKELY TO SUCCEED ON THE MERITS.

Petitioners concede that they are seeking "disfavored" affirmative injunctions that require a "heightened showing." Mem. in Supp. of. Wyo.'s Mot. for Prelim. Inj., ECF No. 45, No. 21-cv-56-SWS (Wyo. Br.) 18. As the Court has held, "There are three types of disfavored preliminary injunctions that require heightened scrutiny: '(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all

the relief that it could recover at the conclusion of a full trial on the merits.'" *Blanchard v. Wyo. Dep't of Corr. Dir.*, No. 17-CV-0124, 2017 WL 10350606, at *2 (D. Wyo. Nov. 9, 2017) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012)). Because such preliminary injunctions are "highly disfavored," movants must make a "strong showing" as to each of the four elements. *Id.* at *5–7 (denying preliminary injunction motion seeking a disfavored injunction for missing two of four elements).

A. Petitioners' Challenges to the *De Facto* "Moratorium" or "Suspension" Are Unlikely to Succeed.

Both Petitions evince an intent to challenge President Biden's Executive Order 14,008. *See* Wyo. Pet. 3 ("A President cannot order the Secretary to take far reaching actions of national consequence without any public process, fact finding, environmental review, or even an explanation."); WEA Am. Pet. 1 ("On January 27, 2021, the President of the United States directed the Secretary of the Interior to suspend indefinitely the federal oil and gas leasing program."). WEA's lawsuit even names President Biden as a defendant and seeks to review "government action" rather than "agency action." WEA Pet. at 1. Most tellingly, WEA's lawsuit was filed the day the Executive Order was signed, without identifying any agency action that the Secretary had taken. *Id.* To the extent Petitioners seek to review Executive Order 14,008, their claims must fail because the APA has not waived sovereign immunity over challenges to presidential actions. *Dalton v. Specter*, 511 U.S. 462, 476 (1994) ("The actions of the President cannot be reviewed under the APA because the President is not an 'agency' under that Act."). Thus Petitioners' only chance for success is to challenge agency actions.

Petitioners' challenges fail at this threshold by directing the gravamen of their lawsuits not at specific agency actions but instead at a vaguely described agency "suspension" or "moratorium" comprising numerous individual decisions. *See* WEA Am. Pet. 1–2 ("On or about February 12,

2021, the Secretary added notations on the Bureau of Land Management's website indicating that all onshore oil and gas lease sales scheduled for March or April 2021 have been postponed. The suspension of the leasing program is an unsupported and unnecessary action that is inconsistent with the Secretary's statutory obligations."); Pets.' Mot. for Prelim. Inj., ECF No. 41, No. 21-cv-13-SWS (WEA Br.) 18. 17 (claiming that through "coordinated action," BLM "has abandoned the practice of conducting quarterly lease sales for some unspecified and indeterminable time in the future"); Wyo. Pet. 2 ("the Secretary has instead instituted a de facto moratorium on all federal oil and gas lease sales on the public lands through a series of individual lease sale postponements and cancellations in Wyoming and across the nation"). In fact, none of those individual decisions constitutes a moratorium or suspension of lease sales. Nor does any of those decisions practically accomplish a moratorium as each action is temporally and geographically limited in scope.[8] *See supra* 10–11, 13 (explaining the differing rationales leading to the individual deferrals for different BLM State Offices).

Despite failing to identify a single discrete agency action tantamount to a program-wide moratorium, Petitioners seek a court order governing "the federal oil and gas leasing program," Wyo. Br. 1, in violation of the prohibition on programmatic challenges. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890–93 (1990). In *Lujan*, the plaintiff sought judicial review of a "so-called 'land withdrawal review program'" that it described as consisting of numerous individual land use decisions. *Id.* at 890. But the Supreme Court held that "the flaws in the entire 'program'—

[8] To the extent that Petitioners point to post-filing agency activity as the so-called moratorium or suspension, post-filing activity is outside the scope of the petitions and insufficient to create jurisdiction, which must exist "when the suit was filed." *Davis v. FEC*, 554 U.S. 724, 734 (2008); *see also S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1152–53 (10th Cir. 2013) (holding that the jurisdictional inquiry focuses on the time the original complaint was filed even if the complaint is later amended).

consisting principally of the many individual actions referenced in the complaint and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA." *Id.* at 893. Instead, requests for "*wholesale* improvement of this program" must be brought "in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Id.* at 891.

Alabama-Coushatta Tribe of Tex. v. United States, 757 F.3d 484 (5th Cir. 2014), is also instructive. There, the plaintiff Tribe sought to challenge the approval of all "drilling leases and permits to third parties" on land to which the Tribe asserted title. *Id.* at 486. The court held that it lacked jurisdiction to hear such a "blanket challenge to *all* of the Government's actions with respect to *all* permits and leases" that was directed at "the way the Government administers these programs and not to a particular and identifiable action taken by the Government." *Id.* at 490–92.

Petitioners' challenges to the alleged moratorium or suspension bear three hallmarks of an improper programmatic challenge. *First*, like the "so-called 'land withdrawal review program'" in *Lujan*, the terms "moratorium" and "suspension" are "not derived from any authoritative text" from the agency but are "simply the name[s] by which [Petitioners] have occasionally referred to the continuing (and thus constantly changing) operations of the BLM" in evaluating oil and gas lease sales. 497 U.S. at 890.

Second, Petitioners seek to control future conduct of the agency in "actions yet to be taken," *Lujan*, 497 U.S. at 893, namely an indefinite number of future lease sales. Even though the Secretary has not yet made a decision about future Wyoming lease sales, for example, Wyoming seeks "an order enjoining the Secretary's suspension of federal quarterly oil and gas lease sales in Wyoming during the pendency of this litigation." Wyo. Br. 49. WEA similarly raises concerns that agency action may impact "additional lease sales in the future." WEA Br. 1, 17 (claiming that

BLM "abandoned the practice of conducting quarterly lease sales at least for some unspecified and indeterminable amount of time in the future"). But allegations "cover[ing] actions that have yet to occur . . . . do not challenge specific 'agency action,'" *Alabama-Coushatta*, 757 F.3d at 490, and instead seek wholesale correction that "cannot be laid before the courts," *Lujan*, 497 U.S. at 892–93. Courts "intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Id.* at 894.

Third, Petitioners' moratorium challenges focus on systemic changes, rather than individual agency decisions, *see* WEA Br. 17 (expressing concern about "systematic and connected agency decisions" that collectively "abandoned the practice of conducting quarterly lease sales"), and improperly seek to inject this Court into day-to-day management of Interior's oil and gas leasing program, *see id.* at 34 (seeking an order requiring "BLM to adopt promptly revised lease sale schedules that comply with the terms of the Mineral Leasing Act and other applicable law"). As the Supreme Court has explained, such "systemic improvement[s]" must be sought before the legislative or executive branches, *Lujan*, 497 at 894. And "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with [broad statutory mandates] is not contemplated by the APA." *Norton*, 542 U.S. at 55.

Petitioners cannot overcome the prohibition on programmatic challenges by invoking the rare instances in which courts have allowed challenges to oft-conceded-but-unwritten agency actions to proceed. *See* Wyo. Br. 14 (citing such cases). None of those cases authorized looking past the stated rationales for agency actions to infer the existence of a broader unstated agency policy. Nor could they because "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Dep't of Com. v. New York*, 139

S. Ct. 2551, 2573 (2019). Thus, Plaintiffs cannot look past the agency decision documents to challenge a *de facto* moratorium or suspension.

Nor are Petitioners aided by WEA's previous failure-to-lease challenge. *See W. Energy All. v. Jewell*, No. 1:16-CV-00912-WJ-KBM, 2017 WL 3600740 (D.N.M. Jan. 13, 2017). There, WEA sought "only to enforce the statutory obligation to conduct quarterly lease sales when eligible lands are available," without "seek[ing] to amend [BLM's] definition" of "when eligible lands are available." *Id.* at *13.[9] Because WEA did "not challenge any of BLM's discretionary authority," the court found that WEA's complaint was directed to discrete agency action rather than a programmatic challenge. *Id.* Here, by contrast, Petitioners bring wholesale challenges to the agency's discretionary authority to interpret a statute it has been entrusted to administer. *See infra* 26–30. And because Petitioners direct their challenges to alleged nationwide moratoria in which BLM has "abandoned the practice of conducting quarterly lease sales at least for some unspecified and indeterminable amount of time in the future," WEA Br. 17, they have brought an improper programmatic challenge rather than a challenge to discrete agency action.

Relatedly, Petitioners should not be allowed to re-characterize their relief in their forthcoming replies to avoid an adverse programmatic challenge ruling. As the Tenth Circuit recognized in an appeal from WEA's previous failure-to-lease challenge, WEA avoided adverse rulings only by re-characterizing its relief sought through an opposition brief. *W. Energy All. v. Zinke*, 877 F.3d 1157, 1166–67 (10th Cir. 2017); *see also Jewell*, 2017 WL 3600740, at *13 (engaging in similar tactics to avoid a programmatic challenge dismissal). It would be particularly

[9] *See also* Ex. E, WEA's Resp. in Opp'n to Mot. to Dismiss, at 1, *WEA v. Jewell*, NO. 16-cv-912-WJ-KBM (Nov. 30, 2016) ("applying BLM's own standards," to the statutory phrase "eligible lands are available").

prejudicial to Respondents to allow Petitioners to both recast their lawsuits and get the last word in reply briefs.

In sum, Petitioners' APA challenges to the so-called moratorium or suspension are unlikely to succeed. Either they challenge Executive Order 14,008, which is not an "agency" action and thus not subject to the APA, or they challenge "the way the Government administers these programs and not . . . a particular and identifiable action taken by the Government." *Alabama-Coushatta*, 757 F.3d at 491; *Louisiana v. United States*, 948 F.3d 317, 321 (5th Cir. 2020) (dismissing state's programmatic challenge because "the term 'action' as used in the APA is a term of art that does not include all conduct such as, for example, . . . operating a program."). Neither challenge can succeed under the APA.

B. Petitioners' Efforts to "Set Aside" Individual Agency Decisions Are Unlikely to Succeed.

In addition to programmatically challenging the alleged moratorium, Petitioners challenge the deferral of individual lease sales by the various BLM State Offices. Petitioners' challenges to the deferrals are not likely to succeed because the Court lacks jurisdiction over those deferrals on the independent grounds of finality and redressability. Nor are Petitioners likely to prevail in challenging the individual actions as arbitrary and capricious.

First, the individual actions are not "final" agency actions as required by 5 U.S.C. § 704. If there is no "final agency action," a court lacks subject matter jurisdiction under the APA. *Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1034 (10th Cir. 2017). To be "final," an agency action "must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotations omitted).

Here, the challenged decisions are merely interim postponements of lease sales; they are not decisions to forego the sales entirely. *E.g.*, PR084 ("Because the BLM needs additional time to carefully review that [court] decision and determine whether it implicates the Leasing EA, the BLM recommends postponing the March 2021 Lease Sale"). Indeed, contrary to Petitioners' suggestions that the Secretary implemented Executive Order 14,008 before deferring first-quarter sales, Wyo. Br. 10, the record reflects that no such decisions were made before Petitioners filed suit. *See* PR086 (explaining that the "Department ha[d] not yet rendered" "decisions on how the Department will implement the Executive Order" as of March 1, 2021). Deferrals or postponements of agency decisions are generally not "final" agency actions because they are merely interlocutory actions. *See, e.g.*, *Am. Petroleum Inst. v. 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."); *Shawnee Trail Conservancy v. Nicholas*, 343 F. Supp. 2d 687, 701 (S.D. Ill. 2004) (postponing a decisional process regarding public land use "does not mark the consummation of an agency decisionmaking process but instead reflects an interim or interlocutory decision to postpone the decisionmaking process to a more convenient time and to a more comprehensive process. It is not, as the plaintiffs imply, an affirmative agency decision to prohibit" use). Instead, "[o]nly if the [agency] has rendered its last word on the matter in question, is its action final and thus reviewable." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 478 (2001) (internal quotations and citations omitted). Because neither WEA nor Wyoming provides any cogent argument explaining how the Secretary had consummated decisionmaking on first-quarter lease sales, let alone on implementing Executive Order 14,008, before they brought suit, they have failed to carry their burden of establishing that the Court has jurisdiction over their claims. *See Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000) ("Plaintiffs have

the burden of identifying specific federal conduct and explaining how it is final agency action." (internal quotations omitted)).

Second, Petitioners lack standing to challenge individual agency actions under § 706(2) because setting aside those individual postponements will not redress Petitioners' alleged injuries. "To establish redressability, a plaintiff must show a substantial likelihood that the requested relief will remedy the alleged injury in fact." *El Paso Cnty. v. Trump*, 982 F.3d 332, 341 (5th Cir. 2020) (internal quotations and citations omitted). In *El Paso*, plaintiffs alleged injury based on a diversion of funds from their preferred project to build a border wall. The court held that it lacked jurisdiction over their claim because plaintiffs had not shown that enjoining the diversion of funds would result in the funds being reallocated to their preferred project.

Similarly here, Petitioners allege injuries in the form of lost revenue and economic harms due to lease sale postponements. *See* Wyo. Br. 37–42. But a favorable decision on their § 706(2) claims will not redress those injuries, as it would merely "set aside" and remand the postponement decisions for further consideration—not compel lease sales to occur. After setting aside agency decisions under § 706(2), courts cannot "impose upon the agency [their] own notion of which procedures are 'best'" on remand, *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 549 (1978), without intruding "into the domain which Congress has set aside exclusively for the administrative agency," *id.* at 545 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Rather, "the function of the reviewing court ends when an error of law is laid bare." *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). Thus, were the Court to "set aside" one of the individual postponement decisions as arbitrary and capricious, such relief would not compel the agency to hold a lease sale; the agency would remain free to implement another postponement with a different rationale. Nor does WEA's tactic of seeking to "reinstate" lease

sales provide redressability, *see* WEA Br. 34, because there is nothing to reinstate as BLM did not issue competitive sale notices.

Instead, the only way Petitioners could endeavor to compel Interior to hold lease sales is by seeking relief under § 706(1). *Louisiana*, 948 F.3d at 323 ("seek[ing] to compel the [agency] to act in accordance with law . . . implicates a different section of the APA, § 706(1)"); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 140 F. Supp. 3d 1123, 1197 (D.N.M. 2015) ("The only way to 'set aside' a failure to act is to compel agency action, however, which is the relief that § 706(1) provides."); *see also Norton*, 542 U.S. at 63 ("A 'failure to act' is . . . simply the omission of an action without formally rejecting a request—for example, the failure to . . . take some decision by a statutory deadline."). Petitioner Wyoming nonetheless devotes only three paragraphs of its brief to § 706(1) relief, Wyo. Br. 16–17, perhaps concerned that it cannot meet the strict requirements for such relief. *See infra* 25–26. And WEA has not even pled a § 706(1) claim, let alone shown entitlement to the extraordinary relief of a preliminary injunction, though it seeks an order compelling BLM to take action. *See* WEA Br. 34 (requesting that the Court direct BLM to "reinstate the first and second quarter oil and gas lease sales" and "adopt promptly revised lease sale schedules"). Petitioners "cannot escape" the limits on judicial direction of agency action by seeking to set aside agency inaction under § 706(2). *Jarita Mesa*, 140 F. Supp. 3d at 1197; *see also NAACP v. Bureau of the Census*, 945 F.3d 183, 190 (4th Cir. 2019) (questioning "whether the plaintiffs can avoid the strict limitations on suits to 'compel agency action' under Section 706(1) simply by framing their APA claims as requests to 'set aside' the Census Bureau's 'decisions' *not* to act," before rejecting their appeal as an improper programmatic challenge).

Third, Petitioners are not likely to succeed on the merits of their § 706(2) challenge. Courts "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."

Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) (internal quotations omitted). Here, Respondents analyzed draft NEPA analysis in light of recent court decisions before determining that additional time was need to either prepare additional NEPA analysis or confirm the adequacy of the existing analysis. *See supra* 10–11. Rather than identify any flaws in that analysis, Petitioners simply pretend that the agency provided no rationale for its deferral decisions, *e.g.*, Wyo. Br. 25–27, which is insufficient to establish arbitrariness.[10]

Because Petitioners have failed to challenge discrete and final agency actions, because they cannot show that even an order in their favor would redress their alleged injury, and because they have not established arbitrary action, Petitioners have failed to show any likelihood of success on their Section 706(2) claims.

C. Petitioners' Efforts to "Compel" Agency Action Are Unlikely to Succeed.

"Failures to act are sometimes remediable under the APA, but not always," because the APA places strict limits on "judicial review of agency inaction." *Norton*, 542 U.S. at 61. Those limits allow a claim seeking to compel agency action to "proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64. Those limitations preclude both "broad programmatic attack[s]" like the one in *Lujan* and "judicial direction of even discrete agency action that is not demanded by law." *Id.* at 64–65.

As explained below, Petitioners have not established a likelihood of success on their claims to compel agency action because they have not identified a discrete agency action that the agency

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[10] Petitioners should not be allowed to articulate new arbitrary and capricious arguments in their reply briefs, as much of the deferral rationale was publicly disclosed before Petitioners filed their preliminary injunction motions. *See Louisiana v. Biden*, ECF Nos. 71-5 & 71-6, No. 2:21-cv-778 (W.D. La. Apr. 27, 2021). It would be prejudicial to Respondents to allow Petitioners to present new critiques of individual statements in their reply briefs, as Respondents would be deprived of an opportunity to show that "the agency's path may reasonably be discerned" based on other agency documents. *Nat'l Ass'n*, 551 U.S. at 658.

is required to take. Even if Petitioners had identified a non-discretionary legal obligation, however, the §706(1) claims would still fail because Petitioners have not carried their burden to establish that the delay was unreasonable. *See Kolluri v. U.S. Citizenship & Immigr. Serv.*, No. 3:20-cv-02897, 2021 WL 183316, at *4–7 (N.D. Tex. Jan. 17, 2021) (describing six-factor test for evaluating whether delay is unreasonable). Nor is injunctive relief appropriate to prevent future delay. *See In re Am. Fed'n of Gov't Emps.*, 837 F.2d 503, 507 (D.C. Cir. 1988) ("[T]he possibility of unreasonable delay in the future," "does not justify burdening the [agency] with a court-ordered schedule for managing its docket.").

1. Petitioners' MLA arguments are unlikely to succeed.

The Secretary has considerable discretion over oil and gas leasing decisions. *See supra* 2–5. The MLA provides only that the Secretary "may"—not "must"—lease these lands, 30 U.S.C. § 226(a), a choice of words that "clearly connotes discretion." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). The Supreme Court unanimously affirmed the Secretary's authority under the MLA to issue a "general order" rejecting oil and gas applications "[i]n order to effectuate the conservation policy of the President." *Wilbur*, 283 U.S. at 418. And the Tenth Circuit has recognized that the "MLA, as amended by the Reform Act of 1987, continues to vest the Secretary with considerable discretion to determine which lands will be leased." *W. Energy All.*, 709 F.3d at 1044. Given the Secretary's considerable discretion in this area, the Court cannot compel her to sell any particular parcel or quantity of parcels. *See Norton*, 542 U.S. at 65. Nor can the Court compel her to sell land in contravention of her other statutory obligations, *e.g.*, NEPA compliance, as such a ruling would contravene the ordinary meaning of "where eligible lands are available." 30 U.S.C. § 226(b)(1)(A).

Petitioners nonetheless claim that the MLA's provision that "[l]ease sales shall be held for each State where eligible lands are available at least quarterly" establishes a "discrete, ministerial

obligation." WEA Br. 14; Wyo. Br. 16–17.[11] Petitioners disagree, however, about what the statutory phrase "where eligible lands are available" means. Wyoming contends that lands "are **eligible** for leasing [when] they are not excluded by a statutory or regulatory prohibition and are **available** [when] they are identified as open to oil and gas development in the underlying" resource management plans. Wyo Br. 25. While WEA appears to agree with Wyoming's interpretation of "eligible," WEA espouses a different interpretation of the term "available," *viz.*, that "eligible parcels become 'available' when nominated through an expression of interest." WEA Br. 15–16. But all Petitioners appear to disagree with BLM's longstanding interpretation that "eligible lands are available" when, at a minimum, "all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act." BLM Manual MS-3120 Competitive Leases (P).1.11 (2013); *see also* Cowan Decl. ¶ 10 (explaining that BLM has used this interpretation for at least a quarter century).

Petitioners wrongly exclude NEPA compliance from the definition of "where eligible lands are available" in two ways. *First*, Petitioners simply ignore a longstanding agency interpretation in a complex statutory scheme.[12] The Supreme Court has recognized that such interpretations are entitled to deference, including up to *Chevron* deference. *See Barnhart v. Walton*, 535 U.S. 212, 222 (2002) ("the interstitial nature of the legal question, the related expertise of the Agency, the

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[11] Citing a law review article, WEA incorrectly claims that the obligation to offer lands for lease is mandatory without regard to NEPA compliance. WEA Br. 16 (citing Sansonetti & Murray, 25 Land & Water L. Rev. at 386 n.97). To the contrary, that same law review article states that "Public lands may only be leased after BLM has completed the requisite analyses under such laws as the National Environmental Policy Act of 1969." Sansonetti & Murray, 25 Land & Water L. Rev. at 388.

[12] Petitioners wrongly suggest that BLM's interpretation should be accorded no deference because it was not the basis for the challenged decisions. To the contrary, BLM explicitly recognized that the "parcels proposed for each of the above lease sale are not now 'eligible' and 'available' because, at a minimum, BLM has not completed its NEPA analysis." PR080.

importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue"). Because BLM has followed this interpretation for at least a quarter century, *see supra* 5, the Court should afford that interpretation substantial deference.

Second, Petitioners' construction that "eligible lands are available" without regard to NEPA compliance contradicts the legislative history. When Congress was considering the 1987 Reform Act, Interior informed Congress that it had discretion not to lease based on, *inter alia*, "compliance with NEPA protection of the environment." Legislation to Reform the Federal Onshore Oil and Gas Leasing Program on H.R. 933, H.R. 2851 Before the H. Comm. on Interior and Insular Affairs, at 66, 82–83 (July 28, 1987). Although Congress considered restricting that discretion by exempting lease sales from NEPA, S. Rep. No. 100-188, at 6, 49, Congress ultimately decided not to exempt lease sales from NEPA, H.R. Conf. Rep. No. 100-495, at 782 (1987). Petitioners' suggestion that the Secretary can be required to hold lease sales even when NEPA remains to be done cannot be reconciled with this legislative history.

Additionally, WEA takes a sentence out of context from a Tenth Circuit decision to support its unduly lenient interpretation of "available." It contends that "when eligible parcels are nominated, they become legally 'available' and '[t]he [BLM] State Office then conducts a competitive lease sale auction.'" WEA Br. 15 (quoting *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017)); *id.* at 16 (referring to the "Tenth Circuit's observation that eligible parcels become 'available' when nominated through an expression of interest"). WEA's interpretation would thus shift the Secretary's discretion over leasing to interested bidders, by requiring the Secretary to offer for sale—as a merely ministerial act—lands nominated through an expression

of interest, at least if those were the only lands "available" in a state. But such a lenient interpretation of "available" was plainly not intended by the Tenth Circuit; to the contrary, the Tenth Circuit's "observation" occurred only after it affirmed that "BLM retains discretion to choose which parcels to lease" and that "'Available' lands are those 'open to leasing in the applicable [RMP], . . . when all statutory requirements and reviews have been met.'" *Zinke*, 877 F.3d at 1162 (quoting, indirectly, the BLM Manual). Thus, WEA's suggestion that a mere expression of interest can render lands "available" is contrary to most of the *Zinke* decision.[13]

WEA's misplaced reliance on *Zinke* betrays the weakness of its statutory construction argument. In *Zinke*, WEA: (1) "defer[red] to BLM's interpretation of 'eligible' and 'available,'" Petitioner-Appellee's Resp. Br., 16, *W. Energy All. v. Zinke*, 2017 WL 1325405 (10th Cir. Apr. 15, 2017); (2) disavowed any challenge to "BLM's discretion to withhold nominated parcels from oil and gas leasing," *id.* at *9, and (3) disclaimed efforts to force nominated parcels to "be offered for oil and gas leasing before being subject to environmental review," *id.* WEA's current statutory construction approach thus represents a near-complete reversal from the positions it took in *Zinke*. Tellingly, WEA cites no stronger evidence than *Zinke* to support its newfound construction.

In sum, because NEPA compliance work remained to be done at the time of the postponements, *see supra* 10–11, there were no eligible lands available. Were the Court to hold otherwise, it would effectively be forcing the agency to ignore the requirements of NEPA, thereby exposing the agency to significant litigation risk in NEPA challenges. As NEPA-based

[13] Indeed, taken out of context, the full sentence from *Zinke* would lead to absurd results. *See Zinke*, 877 F.3d at 1162 ("The regulations provide that '[l]ands included in any expression of interest' are 'available for leasing' and 'shall be offered for competitive bidding.'" (quoting 43 C.F.R. § 3120.1-1(e))). If an expression of interest could require BLM to offer parcels for competitive bidding, the long-recognized discretionary foundation of the MLA would be shattered.

postponements from the prior administration demonstrate, Cowan Decl. ¶ 7, additional time is necessary to account for new NEPA circumstances, such as intervening court decisions.

2. Petitioners' FLPMA Arguments Are Unlikely to Succeed.

Petitioners' FLPMA claims are unlikely to succeed for four reasons. *First*, it is simply too soon for Petitioners to bring a FLPMA withdrawal claim. Petitioners cite no precedent—and Respondents are aware of none—establishing that a withdrawal can occur from agency inaction over several months. Petitioners cite cases where agency inaction for numerous years resulted in a withdrawal. *See Mountain States Legal Found. v. Hodel*, 668 F. Supp. 1466 (D. Wyo. 1987) (considering failure to act on leasing applications that had been pending for as many as twelve years); *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980) (considering "several years without action by the Secretary"). In contrast, FLPMA authorizes the Secretary to "segregate[]" land for up to two years while considering a withdrawal proposal. 43 U.S.C. § 1714(b). Thus, if FLPMA allows the Secretary to segregate land for two years without the procedures required for a withdrawal, it surely allows the Secretary to postpone lease sales for a few months while she considers additional NEPA analysis. Petitioners nonetheless brought their FLPMA claims several weeks after any agency deferrals occurred.

Second, the challenged postponements do not meet the FLPMA definition of "withdrawal" because they were not done "for the purpose of limiting activities under [the general land laws] in order to maintain other public values in the area or reserving the area for a particular public purpose or program." 43 U.S.C. § 1702(j). To the contrary, the postponements were undertaken to "provide time to complete" additional NEPA analysis of the leasing decision. *E.g.*, PR082. Thus, these postponements are unlike the inaction in *Andrus*, which was taken to maintain wilderness values. 499 F. Supp. at 391 (finding a "withdrawal" when "[t]he combined actions of the Secretaries have (1) effectively removed large areas of federal land from oil and gas leasing and

the operation of the Mineral Leasing Act of 1920, (2) in order to maintain other public values in the area, namely those of wilderness preservation").

Third, the challenged postponements are not withdrawals because they do not close any "area" of land to oil and gas leasing. (Nor did they amend any land use plan.) Public lands that were offered but not sold through competitive lease sales over the last two years remain open to leasing under 30 U.S.C. § 226(b)(2). And BLM has sold such leases under the Biden administration. Cowan Decl. ¶ 11, Ex. D. Thus, BLM has not "with[held] an area of Federal land from settlement, sale, location, or entry," as required to have a withdrawal under FLPMA.

Fourth, even if Petitioners succeeded in establishing that challenged agency actions constituted a "withdrawal" under FLPMA, they would not be entitled to their requested injunction. *See Andrus*, 499 F. Supp. at 397 ("we do not purport to [require] the Secretary of the Interior to accept, reject, or even take action on the outstanding oil and gas leases"). Instead, after finding a "withdrawal" under FLPMA, courts in this District have directed the agency to either report the withdrawal to Congress or cease the activity. *Hodel*, 668 F. Supp. at 1476 (D. Wyo. 1987); *Andrus*, 499 F. Supp. at 397. Thus, Petitioners are simply not entitled to a preliminary injunction setting aside the challenged agency decisions, let alone compelling the agency to hold lease sales.

3. Petitioners' NEPA Arguments Are Unlikely to Succeed.

NEPA requires an agency to prepare an environmental impact statement prior to taking a "major federal action" with potentially significant impacts on the environment. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703–04 (10th Cir. 2009) (citing 42 U.S.C. § 4332(2)(C). A major federal action is an action taken by the federal government or an action over which the government exercises a significant degree of control through its regulatory authority, funding, or other type of support. *See Ross v. Fed. Highway Admin.*, 162 F.3d 1046, 1051 (10th Cir. 1998).

Petitioners fail to identify any major Federal action triggering NEPA, and thus fail to allege a cognizable NEPA claim, for several reasons. *First*, and most fundamentally, their NEPA claim fails insofar as they contend Respondents failed to undertake any particular quarterly lease sale, because a "failure to act" is, by definition, not a "major Federal action." *See* 40 C.F.R. § 1508.1(q) (defining "Major Federal action"). This is because, "in the case of a 'failure to act,' there is no proposed action and therefore there are no alternatives that the agency may consider." 85 Fed. Reg. at 43,347.[14]

Second, Petitioners' NEPA claims fail insofar as they contend Respondents took a major action when they decided to postpone particular quarterly lease sales "[i]n the name of further environmental review." Wyo. Br. 27. As noted above, NEPA requires environmental analysis when an agency proposes to take major Federal action, *see* 40 U.S.C. § 4332(2)(C), and here that action consisted of proposing to auction leases for the specified parcels. Agencies also may, and sometimes must, supplement or otherwise elaborate upon their initial environmental analysis before finalizing their decision process. *See*, *e.g.*, 40 C.F.R. § 1502.9(d)(1) (identifying circumstances when an agency must supplement its NEPA analysis); *id.* § 1502.9(d)(2) (identifying circumstance when an agency may supplement its NEPA analysis). When an agency

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[14] The Council on Environmental Quality added the referenced regulatory definition to NEPA's implementing regulations in 2020. Even before that revision, however, many courts had rejected the notion that an agency's failure to act could fairly be characterized as a major Federal action triggering analysis under NEPA. *See Alaska v. Andrus*, 591 F.2d 537, 541-42 (9th Cir. 1979) (Secretary's decision to allow State of Alaska to manage its own wildlife was not a major federal action); *Defs. of Wildlife v. Andrus*, 627 F.2d, 1238, 1243–47 (D.C. Cir. 1980) (Secretary's decision not to act to prevent a wolf hunt was not a major federal action); *Cross-Sound Ferry Services, Inc. v. ICC*, 934 F.2d 327, 334 (D.C. Cir. 1991) (agency finding that a ferry was exempt from regulation did not trigger NEPA), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 301–02, 305–06 (1st Cir. 1999) (decision not to regulate the transport of nuclear waste through coastal waters was not a major federal action).

opts to prepare such a supplemental analysis, it must prepare, circulate, and file that analysis in the same fashion as is required of an original analysis. *Id*. §1502.9(d)(3). And an agency may not implement the proposed action until it has completed all of this analysis and issued either a finding of no significant impact or a record of decision. *Id.* §§ 1501.6, 1505.2, 1506.1(a). Notably absent from this regulatory scheme is the requirement Petitioners attempt to impose on Federal Respondents here: that a *second* environmental analysis must be completed before postponing a proposed decision to improve a *first* environmental analysis. To the contrary, "agencies may use non-NEPA procedures to determine whether new NEPA documentation is required." *Pennaco Energy*, 377 F.3d at 1162.

Third, Petitioners' NEPA claims fail even insofar as they contend Federal Respondents affirmatively canceled the proposed lease sales. Because, while a NEPA analysis is generally required before an agency takes an action approving significant potential environmental changes, the converse is not true. "If agencies were required to produce an EIS every time they denied someone a license, the system would grind to a halt." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1089 (9th Cir. 2014).

Perhaps because of the above weaknesses, Petitioners largely pursue a fourth tack; they argue that the various deferrals, taken together, amount to a *de facto* nationwide Secretarial suspension of (or moratorium on) oil and gas leasing. *See* Wyo. Br. 28 (arguing that "the adoption of an official policy … or formal plans" constitutes major Federal action under 40 C.F.R. §1508.1(q)(3)(i-ii)). But this argument is flawed for the same reasons discussed *supra* 16–21. Most importantly, the record reflects that the "Department ha[d] not yet rendered any such decisions" before Petitioners brought suit. PR086. Even if it had, a decision by the agency not to act is effectively inaction to which NEPA does not apply. *See Sabine River Auth. v. U.S. Dep't of*

Interior, 951 F.2d 669, 680 (5th Cir. 1992) ("We view the Fish and Wildlife Service's 'action' in accepting the negative easement as tantamount to 'inaction.'").

Even putting aside Petitioners' failure to identify any nationwide moratorium or policy, however, this argument fails because the cases Petitioners cite do not support their contention that the alleged broad policy triggers obligations under NEPA. For example, *California ex rel. Lockyer v. U.S. Department of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006), involved a challenge to a Forest Service rule that eliminated environmental protections for roadless areas. *See id.* at 879-83. The case indisputably dealt with a final rule, which clearly qualified as a major Federal action under the regulations in effect when the case was decided, *see* 40 C.F.R. § 1508.18(b)(1) (2019). But the case says nothing about the applicability of NEPA to the amorphous alleged policy Petitioners contend exists here, let alone agency inaction or deferred action. The other case that Petitioners rely on involved a challenge to a decision to authorize the development of coal resources on federal land. *See Sierra Club v. Morton*, 514 F.2d 856, 878 (D.C. Cir. 1975), *rev'd on other grounds sub. nom. Kleppe v. Sierra Club*, 427 U.S. 390 (1976). The case demonstrates only that an agency is required to comply with NEPA before *taking* an action with potentially significant environmental effects. *See id.* Indeed, when the case reached the Supreme Court, the Court rejected the argument that an EIS was required for a potential regional leasing plan that had not been proposed, stating, in part, "the statutory language requires an impact statement only in the event of a *proposed action*." *Kleppe*, 427 U.S. at 401 (emphasis added).

Finally, regardless of how Petitioners' NEPA claims are ultimately construed, a long line of case law makes clear that NEPA analysis is not required when the alleged major federal action does nothing to change the environmental status quo. *See*, *e.g.*, *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343-44 (9th Cir. 1995) (an EIS was not required for a land transfer when the lands

were available for grazing both before and after the transfer); *Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1175-78 (9th Cir. 2016) (agency was not required to prepare a NEPA analysis for changes to the operation of a dam that were within the range of actions already analyzed); *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234-35 (9th Cir. 1990) (no EIS required to adjust water releases in a manner consistent with the way that the dam had operated over the preceding ten years).

Just as in the preceding cases, the Secretary was not required to prepare a NEPA analysis before postponing oil and gas lease sales because doing so did not result in a change in the environmental status quo. The postponements did not change the leasing status of any land, as the same lands that were leased before and after the postponements. As there was no change to the status quo, no NEPA analysis was required. *See California v. BLM*, No.'s 18-cv-00521-HSG, 18-cv-00524-HSG, 2020 WL 1492708, at *14-15 (N.D. Cal. Mar. 17, 2020) (no NEPA analysis was required for the repeal of rulemaking that had never gone into effect because the repeal did not change the status quo); *W. Watersheds Project v. Bernhardt*, No. 1:16-CV-00083-BLW, 2021 WL 517035, at *28-29 (D. Idaho Feb. 11, 2021) (no NEPA analysis was required to cancel a proposal to withdraw lands from mineral entry under the mining laws).

The *Western Watersheds Project* case is illustrative. In that case, the Secretary of the Interior proposed to withdraw certain areas from mining in order to protect Sage Grouse habitat. *W. Watersheds Project*, 2021 WL 517035, at *3. The proposal had the automatic effect of segregating the lands from mining for a two-year period while the agency went through the necessary process to decide whether to accept the proposal. *Id.* at *8. The agency initiated a NEPA process and circulated a draft EIS, but although it prepared an administrative final EIS, it did not publish the final EIS and did not complete the NEPA process. *Id.* at *4-7. Over two years

after the initial proposal, and thus after the temporary segregation had lapsed, the BLM Director cancelled the proposal. *Id.* at 8. The court rejected a claim that the BLM Director's cancellation of the proposal had violated NEPA because the cancellation left the environment in the same position as it was before and thus did not alter the environmental status quo. *See id.* at *28. The result should be the same in this case.

Nor does it matter that, without federal leases, oil and gas leasing developments might shift to other land, causing different environmental impacts. In *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669 (5th Cir. 1992), a water authority challenged the U.S. Fish and Wildlife Service's acquisition of a conservation easement for a wetland that, if not for the easement, could potentially have been used to construct a reservoir. *See id.* at 671-72. The court rejected the argument that the acquisition of the conservation easement was a major federal action requiring the preparation of an EIS because it did not alter the environmental status quo. *See id.* at 679-80 (holding that NEPA did not require the agency to "discuss the environmental effects of continuing to use land in the manner which it is presently being used" because the agency was not "undertaking a project that changes the character or function of the land"); *see also Dallas, Texas v. Hall*, 562 F.3d 712 (5th Cir. 2009) (following *Sabine River* and likewise holding that the acquisition of a negative easement for purposes of environmental conservation was not a major federal action); *Sabine River Auth. v. U.S. Dep't of Interior*, 745 F. Supp. 388, 394 (E.D. Tex. 1990) ("NEPA does not require a federal agency to prepare an EIS in order to leave nature alone.") (internal quotation marks omitted). Likewise here, merely postponing lease sales for a temporary period "continu[es] to use land in the manner which it is presently being used" and thus is not a major federal action. *Sabine River*, 951 F.2d at 679.

The cases that Petitioners rely on do not support the notion that a temporary postponement of oil and gas sales is an action that alters the environmental status quo. In *Citizens for Clean Energy v. U.S. Dep't of the Interior*, 384 F. Supp. 3d 1264, 1279 (D. Mont. 2019), the plaintiffs claimed that the Department of the Interior was required to prepare a NEPA analysis before lifting a moratorium on coal leasing on federal land. The court found that the lifting of the moratorium was a major federal action because it allowed coal leasing to proceed, thus raising the potential for environmental harm. *See id.* at 1278-79. No similar circumstances are present here because the temporary pause on leasing would avoid potential environmental harm to federal public lands.

Petitioners essentially argue that a decision to postpone lease sales is legally indistinct from a decision to proceed with lease sales, but this proposition stands NEPA on its head. It is well established in the oil and gas leasing context that, prior to taking an action that would irreversibly and irretrievably commit resources towards development, the Department of the Interior must analyze the potential environmental effects of such development in accordance with NEPA. *See Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983). But the opposite is not true—the Department of the Interior does not need to prepare a NEPA analysis in order to *not* commit resources towards development. *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), demonstrates this point. In that case, the court found that the *issuance* of oil and gas leasing constituted a major federal action, *id.* at 597-98, not that a pause prior to issuing leases was a major federal action.[15]

[15] All of the cases that Petitioner cites in the oil and gas context are cases involving the issuance of leases or the approval of development, not cases involving a pause of oil and gas leasing. *See Richardson*, 565 F.3d at 718-19 (oil and gas leasing); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 54 (D.D.C. 2019) (oil and gas leasing); *WildEarth Guardians v. Bernhardt*, No. 1:19-cv-00505-RB-SCY, 2020 WL 6799068, at *5 (D.N.M. Nov. 19, 2020) (oil and gas leasing).

Petitioners' reliance on *Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248 (D. Idaho 2001), also is to no avail. Petitioner relies on *Kempthorne* for the proposition that an action that serves to "leave nature alone" may nonetheless trigger NEPA obligations. Wyo. Br. 30. But the court in that case found that the Forest Service's Roadless Rule would alter the environmental status quo because it would "add to, modify and remove decisions embodied in forest plans governing the management of the national forests." *Kempthorne*, 142 F. Supp. 2d at 1259. No similar action is at issue here—various BLM offices have postponed lease sales for reasons explained in the corresponding decision documents, but none of those BLM offices have altered the provisions of any governing land use plans. Thus, while it is true that major federal actions with beneficial environmental effects often trigger NEPA obligations, actions that simply have no effect on the current environmental status quo do not.

Similarly, Petitioners' reliance on socioeconomic impacts is unavailing. As the Tenth Circuit has recognized, "[i]t is well-settled that socioeconomic impacts, standing alone, do not constitute significant environmental impacts cognizable under NEPA." *Cure Land, LLC v. U.S. Dep't of Agric.*, 833 F.3d 1223, 1235 (10th Cir. 2016). Instead, only when an action "'will have primary impact on the natural environment'" will "'secondary socio-economic effects ... be considered.'" *Id.* at 1235 n.10 (quoting *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978)).

For all these reasons, Petitioners are unlikely to succeed on their NEPA claims.

II. PETITIONERS HAVE NOT MET THEIR BURDEN TO SHOW IRREPARABLE HARM.

"[B]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements will be considered." *DTC Energy Grp.,*

Inc. v. Hirschfeld, 912 F.3d 1263, 1270 (10th Cir. 2018) (*quoting First W. Capital Mgmt. Co.*, 874 F.3d at 1141). Courts have a "high bar" for finding irreparable harm: "to constitute irreparable harm, an injury must be imminent, certain, actual and not speculative." *Colorado v. EPA*, 989 F.3d 874, 886 (10th Cir. 2021); *see also N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1251 (10th Cir. 2017) ("'To constitute irreparable harm, an injury must be certain, great, actual and not theoretical.'" (*quoting Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003))). "And if the harm is not likely to occur before the district court rules on the merits, there is no need for preliminary injunctive relief." *Colorado*, 989 F.3d at 887. Petitioners have presented only hypothetical scenarios where they could eventually suffer harm, but they have not met their burden to provide a strong showing that harm is imminent, certain, great, and not speculative.

WEA posits irreparable harm in that its members suffer (1) procedural injuries from an inability to participate in quarterly oil and gas lease sales and (2) "damages to operational continuity and project economics resulting from extended delay between lease sales." WEA Br. 26. In addition to claiming procedural injuries, Wyoming's irreparable harm theories are (3) lost revenue from federal sales, (4) lost revenue from state sales, (5) lost opportunity costs from lost revenue, (6) lost jobs, (7) lost recreational opportunities, and (8) waste from stranded oil and gas resources, including environmental harm. Wyo. Br. 37–42. As explained below, none of these theories establishes a likelihood of irreparable harm, let alone provides the requisite strong showing of harm.

A. The Alleged Procedural Injuries Do Not Establish Irreparable Harm.

Petitioners claim that they have suffered irreparable harm in the form of procedural injuries from the lost ability to comment on postponement decisions, Wyo. Br. 42, or to participate in postponed sales, WEA Br. 26. But to "establish irreparable harm," Petitioners "must allege some

concrete injury beyond the procedural injury." *Fisheries Survival Fund v. Jewell*, 236 F. Supp. 3d 332, 336 (D.D.C. 2017). As explained below, Petitioners have failed to establish an imminent, concrete injury beyond their alleged procedural injuries. Accordingly, without concrete injuries, Petitioners cannot establish irreparable harm.

B. WEA's Alleged Economic Injuries Are Speculative and Cannot Be Remedied By a Preliminary Injunction.

WEA's assertions of irreparable economic harm are based exclusively on a few vague paragraphs from two declarants: Pete Obermueller, President of the Petroleum Association of Wyoming, and Robert S. Boswell, CEO of Laramie Energy, LLC.[16] Those declarations make speculative, unquantified assertions, such as the claim that "[t]he Secretary's cancellation of lease sales makes it more difficult to develop units that include federal parcels," Obermueller Decl. ¶ 15, or that "[t]he delay in offering nominated parcels for sale restricts Laramie Energy's ability to plan properly," Boswell Decl. ¶ 12. But the Tenth Circuit has repeatedly rejected preliminary injunctions based on such vague allegations of harm. *E.g.*, *Colorado*, 989 F.3d at 886–87 (reversing district court's preliminary injunction relying on a declaration that failed to "describe when these unidentified enforcement actions occurred, what they entailed, or where the violations occurred"); *N.M. Dep't of Game & Fish*, 854 F.3d at 1252–53 (same for a declaration that "could only speculate on whether the planned releases would have any effect on predator-prey dynamics or other attributes of the ecosystem, irrespective of when and where they occur").

Like the insufficient declarations in those cases, WEA's declarations provide no specific information about where the harm will occur based on particular leases or planned projects. That

[16] WEA Br. 27–29 (citing Decl. of Pete Obermueller ¶ 15, ECF No. 41-2, Case No. 21-cv-13-SWS (Obermueller Decl.) and Decl. of Robert S. Boswell ¶¶ 7–12, ECF No. 41-3, Case No. 21-cv-13-SWS (Boswell Decl.).

omission is telling for two reasons. First, Laramie Energy does not explain why the substantial leased federal acreage it owns that is not yet producing is insufficient for it to continue developing during the pendency of this litigation. Nor does the Boswell Declaration explain why additional federal acreage is necessary to support a specific project. Second, the Tenth Circuit has recognized that "BLM retains discretion to choose which parcels to lease." *Zinke*, 877 F.3d at 1162. Thus, any preliminary injunction could not require BLM to sell specific parcels that WEA's members desire to complete planned projects. Absent any specific project information establishing "imminent, certain, actual and not speculative" harm, these declarations establish only "the mere possibility of the potential for a small increase" in project planning overhead or economic inefficiency that is insufficient to establish irreparable harm. *Colorado*, 989 F.3d at 886–87.

In sum, because these declarations do nothing more than "allege[] the mere possibility of an unidentified class and degree of harm," the Court cannot find irreparable harm based on these unsupported declarations without violating the Tenth Circuit's "general rule, that a preliminary injunction should not issue on the basis of affidavits alone." *N.M. Dep't of Game & Fish*, 854 F.3d at 1253 (internal citation omitted).

C. Wyoming Will Not Be Irreparably Harmed by Lost Federal Revenue.

Wyoming's lead theory of irreparable harm is that the challenged leasing postponements will cause it to lose its share of federal revenue from oil and gas activity on federal lands. Wyo. Br. 37. But Wyoming has failed to establish that this harm is "likely to occur before the district court rules on the merits," as required for a preliminary injunction. *Colorado*, 989 F.3d at 886. Under the local rules, Respondents' administrative record in Wyoming's case is due on June 27, 2021. *Compare* LR 83.6 (b)(2) (requiring administrative record to be filed 90 days after proper service of the petition), *with* ECF No. 9-6 (showing that proper service was effected on March 29, 2021). And under the default briefing schedule, the case would be fully briefed by September 24,

2021. *See* LR 83.6(c). In light of this schedule, Wyoming has provided no reason to expect that the Court would even need until 2022 to issue a ruling on the merits, let alone the requisite "strong showing" that the case would take that long to decide. *See Alford v. Moulder*, No. 3:16-cv-350, 2016 WL 3449911, at *2 (S.D. Miss. June 20, 2016) (ruling harms were not sufficiently imminent where they could occur "within the next three years" or "at least six months away").

This anticipated timeline for the litigation is fatal to Wyoming's irreparable harm theory because numerous economic analyses of the leasing pause called for by Executive Order 14,008 conclude that the pause will not result in any decreased production in 2021. Declaration of James Tichenor ¶ 7 (discussing analyses from economist Brian Prest, the U.S. Energy Information Administration (EIA), and the Federal Reserve Bank of Dallas). Those conclusions are supported by the fact that more than half of federal oil and gas leases are not yet producing, including 56% of leases in Wyoming, leaving nearly 13.9 million acres of leased federal estate on which oil and gas development can continue even if no further lease sales occur during the pendency of the litigation. Haque Decl. ¶ 4, Ex. A. And BLM continues to issue drilling permits that will allow development on that leased-but-not-producing land to proceed. *E.g.*, PR107. Accordingly, Petitioners have failed to establish any imminent, irreparable harm from decreased royalty payments. *See* Tichenor Decl. ¶ 5 (explaining that the Federal Reserve Bank forecasts no decrease in production this year and only a minimal 2.3% decrease in production after five years of paused federal leasing).

Wyoming overlooks the foregoing analyses and instead relies on revenue reductions derived from a study using an unorthodox and impenetrable well-spud model. *See* Wyo Br. 39 (citing Timothy J. Considine, *The Fiscal and Economic Impact of Federal Onshore Oil and Gas Lease Moratorium and Drilling Ban Practices* at 17 (Dec. 14, 2020)). Considine purports to rely

on unidentified "data from the U.S. Department of the Interior on all new federal leases and well spuds" to create a "model that estimates the effect of new leases on well completion activity." Considine, at 10. And Considine applies his model to conclude that "During the first year, no new leases reduce well spuds by 62 percent." *Id.* at 11. But Considine's model cannot be reproduced because he neither identifies the data from the Interior Department on which he relied nor explains with sufficient specificity how he used that data to create his model. Tichenor Decl. ¶ 8.

In any event, Interior's well spud data demonstrates that Considine's predictions were wrong. *See id.* 9. As an initial matter, new well spuds have been declining for decades, even when leasing increased. *Id.* This includes a steady decline of the number new well spuds per new lease over the last seven years. *Id.* Despite that decline, after the first-quarter 2021 lease sale was postponed, well spudding increased markedly. *Id.* There were more new wells spudded on federal land in Wyoming in 2021 than the entire year prior, contrary to Considine's prediction of a 62% decline. *Id.* And new wells spudded in each of April and May 2021 exceeded any other month since August 2019. *Id.* Thus, in addition to not being reproducible, Considine's model produces predictions that are disproved by the available data.

Even had Wyoming established that the challenged actions would cause a decrease in production during the pendency of this litigation, it would still not have established irreparable harm because it has not shown that its revenue from production will decrease. To the contrary, sales held after the conclusion of this litigation might generate *more* royalties for Wyoming because the Secretary is considering adjusting royalty rates as part of the comprehensive review ordered by the President. Thus, a preliminary injunction could decrease Wyoming's royalty revenue, thereby causing—not preventing—harm.

Petitioners' only potential harm incurred during the pendency of this litigation would be a potential delay in revenue obtained from the lease sale (such as bonus bids) rather than from lease production. But that harm is not irreparable because the Court can "remedy [the injury] following a final determination on the merits." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). Wyoming seeks a final judgment compelling Interior to hold postponed lease sales, and if it could receive that relief now, then it would have an equally adequate remedy after a final determination on the merits. And should Wyoming prevail in a final determination on its § 706(1) claim, it would receive bonus bids from ensuing lease sales. In contrast, were the Court to issue a preliminary injunction compelling Interior to hold lease sales, it would not necessarily address Wyoming's claimed injuries as the scope and size of the lease sale is within Interior's discretion. *See supra* 2–5. Forcing sales to occur before Interior has had adequate time to consider the environmental impacts of those sales could backfire, resulting in smaller sales and smaller bonus revenue for Wyoming.

D. Wyoming Will Not Be Irreparably Harmed by Lost State Revenue.

Wyoming also incorrectly asserts that a federal leasing pause will cause a decrease in revenue obtained from Wyoming's sale of state minerals. Wyo. Br. 41. To support this claim, Wyoming provides only a perfunctory comparison of three state lease sales in 2019, 2020, and 2021. *See* Scoggin Decl. ¶ 14. But revenue from state lease sales has varied widely over the last five years, ranging from several hundred dollars to nearly 30 million dollars. Tichenor Decl. ¶ 10. That variability is largely due to quantity and quality of land being offered. *Id.* And against that backdrop, there is nothing unusual about the outcome of Wyoming's March 2021 sale, let alone something unusual that can be attributed to federal action. *Id.* To the contrary, available studies have found that a federal leasing pause would increase, not decrease, oil and gas interest in state land. Federal Reserve Bank of Dallas, Garret Golding & Kunal Patel, Anticipated Federal

Restrictions Would Slow Permian Basin Production (Mar. 4, 2021), available at https://www.dallasfed.org/research/economics/2021/0304.

E. Wyoming Will Not Be Irreparably Harmed by Lost Opportunity Costs.

Next, Wyoming claims that it will suffer lost opportunity costs through delayed receipt of bonus bids. But the Court has previously held that mere delay in receiving funds is insufficient justification for a preliminary injunction. *See, e.g.*, *Merit Energy Co. v. Bernhardt*, No. 20-cv-32, at *15-16 (D. Wyo. Apr. 29, 2020) (finding delay in recovering money was insufficient to warrant preliminary injunction); *see also Wells Fargo Bank, N.A. v. ESM Fund I, LP*, No. 10-cv-7332, 2012 WL 3023997 at *6 (S.D.N.Y. Apr. 3, 2012) ("[A] party's general expectations as to his ability to earn above-market rates if he had access to contested funds does not ordinarily demonstrate irreparable harm and is not, in itself, an adequate basis on which to deny a stay [of judgment enforcement pending appeal]."), *report & recommendation adopted*, No. 10 CIV. 7332 AJN, 2012 WL 3023985 (S.D.N.Y. July 24, 2012). Wyoming has not established any particular spending it will not be able to undertake but for a preliminary injunction; nor could it, as the amount of land to be leased (and thus bonus bids to be received) are subject to Secretarial discretion. *See supra* 2–5. Because Wyoming cannot establish that a preliminary injunction will ensure it receives any significant amount of bonus bid revenue, it cannot establish irreparable harm from lost opportunity costs.

F. Wyoming Will Not Be Irreparably Harmed by Lost Jobs.

Wyoming also claims that it will lose 8,950 jobs during the first year of a leasing pause, again relying on Considine's well-spud model. As discussed *supra* 43, that well-spud model cannot be reproduced and is contrary to BLM's recent well-spud data. Moreover, Considine's conclusion that there will be an immediate loss of production (and thus jobs), is contrary to three other analyses, which uniformly conclude that there will not be any decrease in production this

year. Given the lack of information regarding how Considine created his model—and the significant countervailing information—Wyoming has not provided the requisite strong showing that a leasing pause will cause a loss of jobs during the pendency of this litigation.

G. Wyoming Will Not Be Irreparably Harmed by Lost Recreational Opportunities.

Next, Wyoming claims that it will lose recreational opportunities because the leasing pause will diminish *offshore* oil and gas leasing revenue that contributes to the Land and Water Conservation Fund (LWCF), from which Wyoming expects to receive disbursements. Wyo. Br. 41. This claimed injury is doubly speculative, as Wyoming has not shown that a leasing pause will decrease LWCF revenue during the pendency of this litigation, let alone that such decrease would result in Wyoming's projects not being funded. To the contrary, the offshore oil and gas industry has released a report predicting that there will be no significant decrease and there may be an increase in LWCF revenue in the near term under a leasing pause scenario. Tichenor Decl. ¶ 11. And Wyoming has not provided any nonspeculative evidence that future decreases in LWCF revenue will imperil its recreational projects.

In any event, it makes little sense for this Court to enjoin *offshore* oil and gas activity in a suit brought by a landlocked state, when numerous coastal states are currently bringing a parallel challenge to offshore oil and gas leasing decisions in another forum. *See Louisiana v. Biden*, No. 21-cv-778 (W.D. La.). The Louisiana court at least has the benefit of adversarial briefing over the complex framework for offshore oil and gas leasing decisions under the Outer Continental Shelf Lands Act. Because Wyoming has not provided any such briefing, the Court should decline to address offshore oil and gas activity.

H. Wyoming Will Not Be Irreparably Harmed by Stranded Oil and Gas.

Finally, Wyoming presents a complicated theory of environmental harm: that a federal leasing pause will lead to less efficient oil and gas production approaches, thereby causing stranded oil and gas or environmental harm. Wyo. Br. 40. But federal leasing is not necessary to prevent stranded oil and gas, as BLM has the ability to enter into Compensatory Royalty Agreements when nonfederal activity drains unleased federal land. *See* BLM Manual 3160-9.11H, 2-7, 2-8. Thus, a leasing pause will not cause irreparable harm in the form of stranded oil and gas.

Nor will it cause environmental harm. Wyoming theorizes that the oil and gas industry will undertake more environmentally harmful practices, such as flaring gas, rather than building pipelines to capture gas, because a federal leasing pause will reduce project economics that would have made pipelines possible. *See* Wyo Br. 41. But this is pure conjecture, as Wyoming does not provide any evidence about specific projects in which such a decision would be made. *See supra* 40–41. Moreover, the decisions of third parties to harm the environment cannot be fairly traced to a federal deferrals. *See Colorado*, 989 F.3d at 889 ("Colorado relies on too tenuous a causal link between its allegations of environmental harm and the" challenged federal activity).

III. The Threatened Injury Alleged by Petitioners Does Not Outweigh the Harm the Injunction Could Do to Respondents.

As noted above, Petitioners face heightened scrutiny when seeking "disfavored preliminary injunctions" that "alter the status quo," "mandat[e]" action by the non-movant, or "afford the movant all the relief that it could recover" after a final determination on the merits. *Blanchard*, 2017 WL 10350606, at *2. Petitioners' requested preliminary injunctions would require all three disfavored results: they would alter the status quo by selling unleased federal land; they would mandate that the Secretary hold such sales; and they would afford all the relief—compelled lease

sales—that could be obtained after a final decision on the merits. Accordingly, Petitioners' requested preliminary injunctions are "highly disfavored." *Id.*

In order to prevent their alleged harms, Petitioners would need to compel the agencies to transfer mineral estates from the United States to third-party purchasers,[17] thereby incurring an "irreversible and irretrievable commitment of resources," *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999). Such a remarkable change in the status quo is "particularly disfavored" in any context, *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976), and could not be easily undone, at least not without exposing BLM to additional litigation risk from third-party purchasers, who may seek to challenge agency actions undoing the compelled lease sales. *E.g.*, *Impact Energy*, 2010 WL 3489544, at *7. Even if BLM were not compelled to issue leases, a preliminary injunction requiring lease sales would still subject BLM to increased litigation risk from conservation groups seeking to challenge the compelled lease sales on NEPA grounds. *See supra* 7–9. Such additional litigation risk would be particularly harmful to an agency already facing a heavy NEPA workload with a depleted headquarters staff. Tellingly, Petitioners do not offer any security—let alone adequate security—under Rule 65(c) to cover BLM's costs and damages from being wrongfully enjoined. Those costs could be quite substantial, as BLM could be required to pay substantial attorneys' fees in ensuing litigation. And Petitioners cannot provide sufficient security to compensate BLM for the significant disruption the ensuing litigation would cause to the agency's resources.

[17] Merely requiring BLM to hold lease sales is likely insufficient because BLM has discretion not to issue leases to the winning bidder when, for example, a protest is filed. *Salazar*, No. 10-CV-0226, 2011 WL 3737520, at *7; *but see Impact Energy Resources, LLC v. Salazar*, 2010 WL 3489544, at *7 (D. Utah Sept. 1, 2010). And not issuing the leases would mean that BLM would return bonus bids, thus depriving Wyoming of any revenue.

In contrast, the allegedly threatened injuries caused by waiting a relatively short time for a ruling on the merits are far less harmful. Petitioners have not provided any compelling showing that irreparable harm will occur during the pendency of the litigation; oil and gas development remains ongoing, people continue to work in the industry, and Wyoming continues to receive its share of royalties. At most, Wyoming has shown only some delay in receiving its share of any potential bonus bids. *See supra* 41–44. That modest delay is far outweighed by the litigation risk, associated costs, and ensuing disruption a preliminary injunction would place on BLM.

IV. A Preliminary Injunction Is Not in the Public Interest.

Petitioners incorrectly claim that a preliminary injunction is in the public interest because it would fulfill the public policies behind NEPA and FLPMA. To the contrary, a preliminary injunction would conflict with the public policies embodied in those statutes, by forcing BLM to sell nonrenewable resources before it had adequately analyzed the environmental consequences associated with such sales.

As Petitioners' recognize, NEPA requires agencies to "look before they leap." Wyo. Br. 27 (citation omitted). But a preliminary injunction would require BLM to leap without looking, by compelling it to hold a lease sale before it had prepared adequate NEPA analysis. In contrast, other courts have "urge[d] BLM to conduct a robust analysis, using conservative estimates based on the best data, analyzed in an unrushed fashion, so that the analysis can effectively serve as a model for the other leases," in order to comply with NEPA in holding lease sales. *See WEG II*, 2020 WL 6701317, at *12 n.16. Given its substantial NEPA workload and the complexity of greenhouse gas analysis, BLM should be allowed sufficient time to develop an appropriate model for other leasing decisions, rather than being forced to rush through a NEPA process to hold a lease sale, especially when the compelled lease sale may be challenged on NEPA grounds. *See supra* 7–9.

Petitioners nonetheless claim that BLM should be compelled to continue holding lease sales until it adequately analyzes the consequences of not holding leases sales. But that argument fails because BLM has repeatedly analyzed the environmental consequences of not holding lease sales, as part of the "no action" alternative in numerous lease sale decisions. *See Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1249 & n.28 (10th Cir. 2011) (vacating district court's injunction against Roadless Rule because the agency's "'no action' alternative evaluated exactly what the district court faulted the agency for 'cavalier[ly] dismiss[ing]'—the status quo"). Further, Petitioners fail to appreciate that NEPA's focus on "proposed actions" mean that it does not apply to agency inaction, such as foregoing lease sales. *See supra* 32–34.

Similarly, the requested preliminary injunction conflicts with the public policy behind FLPMA. In relevant part, FLPMA establishes that lands shall be managed for "multiple use," 43 U.S.C. § 1701(a)(7), including to "best meet the present and future needs of the American people" for "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources," 43 U.S.C. § 1702(c). Petitioners nonetheless seek to compel lease sales disposing of "nonrenewable resources," *i.e.*, oil and gas, and thus deprive future generations of those resources without adequate procedural protections.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny both preliminary injunction motions. Should the Court issue any preliminary relief, however, it should be limited to Wyoming, as neither WEA nor Wyoming has demonstrated entitlement to relief in other States, many of which are currently plaintiffs in parallel litigation pending in the Western District of Louisiana. Nor has Wyoming or WEA demonstrated entitlement to relief in the States that have chosen not to litigate over Executive Order 14,008.

Submitted respectfully this 7th day of June, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2021, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ Michael S. Sawyer
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