James Kaste (Wyo. Bar No. 6-3244)
Deputy Attorney General
Travis Jordan (Wyo. Bar No. 7-5721)
Assistant Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002
(307) 777-7895 (phone)
(307) 777-3542 (fax)
james.kaste@wyo.gov
travis.jordan@wyo.gov

Attorneys for Petitioner State of Wyoming

IN THE 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 CENTER FOR BIOLOGICAL DIVERSITY, *et al.* ("Conservation Groups"), and ALTERRA MOUNTAIN COMPANY, *et al.* ("Business Coalition"), Intervenor-Respondents.	No. 21-cv-13-SWS (Lead Case) **WYOMING'S REPLY IN SUPPORT OF PRELIMINARY INJUNCTION**
STATE OF WYOMING, Petitioner, v.	No. 21-cv-56-SWS (Joined Case)

THE UNITED STATES DEPARTMENT OF INTERIOR; DEBRA ANNE HAALAND, in her official capacity as Secretary of 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 Wyoming State Bureau of Land Management Director,

Respondents, and

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

Intervenor-Respondents.

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INTRODUCTION

The Secretary responds to Wyoming's motion for preliminary injunction by asking this Court not to believe its own eyes. There can be no serious dispute that the Secretary has instituted a *de facto* moratorium on oil and gas leasing. In fact, outside of this litigation the Secretary freely acknowledges the "pause" on lease sales exists. (ECF No. 52-5 at 3 (Fed. Br. Ex. F, Case No. 21-cv-13-SWS (June 7, 2021))). The fact that the Secretary took this action behind closed doors makes it no less real, no less final, and no less subject to review by this Court.

Wyoming has demonstrated that the injunctive relief it seeks is warranted and necessary to prevent irreparable harm during the pendency of this suit. The Secretary responds with inapplicable law and facts that are irrelevant or have a tendency to mislead. None of the Secretary's arguments withstand scrutiny and this Court should reject all of them. This Court is aware of the recent decision in the Western District of Louisiana which informs most of the issues in this case. *See Louisiana v. Biden*, No. 2:21-cv-778, 2021 WL 2446010 (W.D. La. June 15, 2021). Wyoming will not reiterate the contents of that decision here.

I. This Court has jurisdiction to review the Secretary's action.

The Secretary mischaracterizes Wyoming's case as a "blanket" or "systemic" challenge, but the Secretary's indefinite suspension of quarterly lease sales is a discrete agency action subject to review by this Court. The District of New Mexico concluded that "requesting BLM conduct quarterly leases of eligible and available parcels is not a programmatic challenge, but a request that this [c]ourt enforce a discrete, non-discretionary duty contained in a single statutory provision[.]" *W. Energy All. v. Jewell*, No. 1:16-cv-912, 2017 WL 3600740, at *13 (D.N.M. Jan. 13, 2017) (citing 30 U.S.C. § 226(b)). Wyoming "seeks only to enforce the statutory obligation to conduct quarterly lease sales when eligible lands are available; it does not seek to amend the

definition of "eligible" or to modify the process by which lands become eligible to be offered at a lease sale." *Id.; see also Pub. Emps. for Envtl. Responsibility. v. Nat. Park Serv.,* No. 19-3629, 2021 WL 1198047, at *10 (D.C. Cir. Mar. 30, 2021) (finding challenge to agency actions that resulted in e-bike use on Park Service trails was not programmatic). Accordingly, this case does not involve an improper programmatic challenge.

The Secretary further argues her decision to "pause" lease sales is merely an interim postponement and not a final agency action. (ECF No. 52 at 22). When determining whether agency action constitutes the consummation of the decisionmaking process, courts look to "whether the impact of the [agency action] is sufficiently 'final' to warrant review in the context of the particular case." *Citizens Ass'n of Georgetown v. FAA*, 896 F.3d 425, 431 (D.C. Cir. 2018) (citation omitted). Here, the impact of the Secretary's action is sufficiently final with respect to the First and Second Quarter 2021 Wyoming lease sales because those sales did not happen. *See Friedman v. FAA*, 841 F.3d 537, 544 (D.C. Cir. 2016) (finding that an agency consummated its decisionmaking process when it "set deadlines, counted down towards them, and then allowed them to pass without discussion; its actions suggest the [agency] ha[d] made up its mind, yet it [sought] to avoid judicial review by holding out a vague prospect of reconsideration"). The Secretary cannot evade judicial review by merely claiming her action is "interim" in nature. *Connecticut v. U.S. Dep't of Interior*, 363 F. Supp. 3d 45, 59 (D.D.C. 2019) ("Couching a final decision in preliminary terms does not make it less final.").

The Secretary concedes Wyoming can obtain relief under § 706(1) of the Administrative Procedure Act (APA), but improperly suggests that Wyoming must show the Secretary's action was unreasonably delayed. (ECF No. 52 at 26). However, the APA authorizes this Court to "compel agency action unlawfully withheld **or** unreasonably delayed." 5 U.S.C. § 706(1)

(emphasis added). "[T]he distinction between 'unlawfully withheld' and 'unreasonably delayed' turns on whether Congress imposed a date-certain deadline on agency action." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). "When an agency fails to meet a concrete statutory deadline, it has unlawfully withheld agency action." *Id.* at 1191. The Mineral Leasing Act's (MLA) requirement that lease sales "shall" be held "at least quarterly" is a mandatory statutory deadline. *See* 30 U.S.C. § 226(b)(1)(A). Where Congress has provided that agency action "shall" occur within a specified time frame, the statute imposes a "clear statutory duty" to comply with the deadline. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 190-92 (D.C. Cir. 2016). Failure to comply with such a statutory deadline warrants injunctive relief:

> [W]hen Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld. To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers.

Forest Guardians, 174 F.3d at 1190. Therefore, this Court can compel the Secretary to take an action that has been unlawfully withheld, which is all that Wyoming requests with respect to the lease sales BLM has already missed.

II. Wyoming is likely to succeed on the merits of all its claims.

A. Mineral Leasing Act

The Secretary contends she has "considerable discretion" over oil and gas leasing decisions, but she relies on inapplicable authorities decided before Congress imposed the duty to hold lease sales "at least quarterly." (*See* ECF No. 45 at 2 (Wyo. Br., Case No. 21-cv-00056 (May 3, 2021))). Neither the Secretary nor the Intervenors provide any authority supporting the notion that the Secretary has the discretion to deviate from the unambiguous statutory mandate in 30 U.S.C. § 226(b)(1)(A).

The Secretary also improperly relies on the BLM's inability, or more accurately, its refusal, to complete its NEPA documents on time. (ECF No. 52 at 29-30). But "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way … '[a]s NEPA was not intended to repeal by implication any other statute.'" *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788 (1976) (internal citation omitted). Simply stated, the Secretary cannot avoid her mandatory statutory duty to hold quarterly lease sales because she has not taken the preliminary actions necessary to act. She must do her homework before class.

The Secretary also invokes *Chevron* deference in defense of her purported interpretation of the MLA. (ECF No. 52 at 27). This Court owes no deference to the Secretary's interpretation because the statute is unambiguous. *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). The statute clearly provides that lease sales shall be held "at least quarterly" and the Secretary has made no effort to explain how the operative language in § 226(b)(1)(A) requiring quarterly lease sales is ambiguous. Because the statute is unambiguous, the Secretary may not rely on legislative history. (ECF No. 52 at 28); *see United States v. Gonzales,* 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history."). To the extent that this Court might consider the legislative history, it should be noted that Congress actually proposed giving the Secretary authority to "delay or postpone" quarterly lease sales in early versions of the 1987 amendments, but Congress obviously rejected that proposal. *Compare Legislation to Reform the Federal Onshore Oil and Gas Leasing Program: Hearing Before the Sub Comm. On Mining and Natural Resources of the H. Comm. on Interior and Insular Affairs*, 100th Cong. 7 (1987), *with* 30 U.S.C. § 226(b).

Ultimately, the Secretary retreats to the BLM manual's definition of "available." (ECF No. 52 at 27). But the BLM Manual has no bearing on this Court's inquiry for at least three reasons.

First, this Court does not owe *Chevron* deference to the Secretary's interpretation in the BLM Manual because the Manual does not carry the force of law. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000). Second, agencies cannot use a guidance document to render an interpretation that is manifestly contrary to the statute or the agency's own regulation. *See Chevron*, 467 U.S. at 844. Finally, the Secretary's claim that the Manual contains "a longstanding agency interpretation" is dubious at best. (ECF No. 52 at 27). The competitive leasing regulations provide that "[e]ach proper BLM S[t]ate office shall hold sales at least quarterly if lands are available for competitive leasing." 43 C.F.R. § 3120.1-2(a). When the Secretary promulgated this regulation in 1988, he explained **"[t]he term 'available' means any lands subject to leasing under the Mineral Leasing Act."** 53 Fed. Reg. 22814, 22828 (June 17, 1988) (emphasis added).

B. Federal Land Policy and Management Act

The Secretary argues that Wyoming's FLPMA claims are premature because she has authority to "segregate" lands for up to two years while considering a withdrawal proposal. (ECF No. 52 at 30). Of course, when the Secretary proposes to segregate lands on her own motion, the Secretary must publish a notice in the Federal Register describing "the extent to which the land is to be segregated while [a withdrawal] application is being considered." *See* 43 U.S.C. § 1714(b)(1); *see also* 43 C.F.R. § 2310.2. No such notice was issued and the Secretary's justification, advanced for the first time in her brief, amounts to a post-hoc rationalization. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (rejecting "[a]fter-the-fact rationalization by counsel in briefs or argument").

The Secretary also contends her action was not a "withdrawal" because BLM purportedly "sold" leases under the Biden Administration. (ECF No. 52 at 31). This is misleading. No quarterly lease sales have been held since January 14, 2021, and the Secretary does not contend otherwise.

Instead, BLM **issued** two leases from successful noncompetitive bids resulting from a Wyoming Lease Sale held in 2020.[1] (*See* ECF No. 52-2 at 21 (Declaration of P. Cowan, Ex. D., Case No. 21-cv-13-SWS (June 7, 2021))). The MLA required BLM to **issue** these leases, but the BLM's issuance of a lease is fundamentally distinct from its obligation to hold quarterly lease sales. *See* 30 U.S.C. § 226(b)(1)(A) ("Leases shall be **issued** within 60 days following payment by the successful bidder…") (emphasis added).

The Secretary provides no response to Wyoming's claim that her action unlawfully amended existing Resource Management Plans (RMP) that identify which federal lands are "open" to leasing. The Intervenors rely on *Utah Shared Access Alliance,* but that case involved a temporary closure order promulgated under a special rule related to off-road vehicle use. (ECF No. 50 at 14 (Conservation Br., Case No. 21-cv-13-SWS (June 7, 2021))); *see Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1135 (10th Cir. 2006). Here, no similar regulatory mechanism allows the Secretary to unilaterally determine that lands previously "open" to leasing are no longer available. RMPs may be changed only by amendment instituted by "new or revised policy, a change in circumstances or a proposed action that may result in a change in the scope of resource use[.]" 43 C.F.R. § 1610.5-5; *see also So. Utah Wilderness All. v. Bernhardt*, No. 20-3654, 2021 WL 106384, at *2 (D.D.C. Jan. 12, 2021) ("If a resource management plan authorizes oil and gas development on certain land parcels, BLM must sell leases for those parcels on a quarterly basis.").

C. National Environmental Policy Act

The Secretary argues that Wyoming cannot prevail on its NEPA claim because there is no nationwide agency action, even though the Secretary acknowledges the "pause" on lease sales

[1] Leases WYW-190812 and WYW-190813, identified in Secretary's Exhibit D as "issued" were offered for sale in the December 2020 Wyoming Lease Sale. *See* BLM Wyoming State Office, *Environmental Assessment, 2020 Fourth Quarter Competitive Lease Sale* at 118 (Aug. 14, 2020), https://eplanning.blm.gov/eplanning-ui/project/2001491/570

exists. (ECF No. 52 at 33; ECF No. 52-5 at 3) ("The pause in new oil and gas lease sales gives us space to look at the federal fossil fuel programs"). The only explanation the Secretary provided for canceling each quarterly lease sale was the nearly identical single sentence phrase posted on every BLM State Office website. (*See* ECF No. 52-2 at 24-27). Thus, the Secretary presents her action as a series of independent decisions in an effort to avoid triggering NEPA's "major federal action" threshold and thereby evade judicial review.[2] But it strains credulity for the Secretary to assert that every state office in the country independently decided to take the same action on all lease sales at the same time. These offices clearly received direction from the Secretary consistent with her public acknowledgment that quarterly lease sales have been paused. And even if these were merely a series of independent decisions, under NEPA, agencies cannot "segment" their proposals in a manner that disguises their environmental effects. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987).

The Secretary contends that she has no duty to prepare an EIS because there has been no change in the status quo. (ECF No. 52 at 34-35); *see Comm. for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-03 (D.C. Cir. 1979) ("The duty to prepare an EIS normally is triggered when there is a proposal to change the status quo."). The parties disagree on what constitutes the status quo. Wyoming contends the status quo is the quarterly occurrence of federal oil and gas sales which changed when the Secretary instituted the "pause." (ECF No. 45 at 29). The Secretary measures the status quo by whether the action will perpetuate the same (or beneficial)

[2] The Secretary states no decisions have been made for the third and fourth quarter lease sales. (ECF No. 52 at 1). Environmental analysis for quarterly lease sales in Wyoming is typically posted online four months in advance of a sale. There is no indication BLM has made any effort to prepare for the third or fourth quarter lease sales. *See* BLM Wyoming State Office, *Wyoming Lease Sales, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/wyoming*

environmental effects. (ECF No. 52 at 35). However, courts recognize that a change in the regulatory status quo triggers NEPA. *See Humane Soc'y v. Johanns*, 520 F. Supp. 2d 8, 29-31 (D.D.C. 2007); *Citizens for Clean Energy v. U.S. Dep't of Interior*, 384 F. Supp. 3d 1264, 1278-79 (D. Mont. 2019); *Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248, 1259 (D. Idaho 2001) (NEPA applied to government action "to leave nature alone" because the regulatory status quo changed). Here, there is no doubt the Secretary changed the regulatory status quo when she stopped holding quarterly lease sales. Thus, the Secretary was required to comply with NEPA before taking action and she did not do so. *See Utah v. Babbitt*, 137 F.3d 1193, 1214 (10th Cir. 1998).

III. The Secretary's action has caused and will continue to inflict irreparable harm on Wyoming.

The Secretary and Intervenors incorrectly argue that Wyoming will not suffer harm before the district court rules on the merits. (ECF No. at 41; ECF No. 50 at 16). But Wyoming has already suffered concrete harm from the Secretary's action. Under 30 U.S.C § 191(a), the United States Treasury must pay Wyoming its share of the proceeds from a lease sale no later than the last business day after receipt of those funds by the Treasury. Bidders must submit full payment for lease bids to BLM within ten working days after the auction. *See* 43 C.F.R. § 3120.5-2(c). Thus, Wyoming was due to receive its share of payments from the March 2021 Wyoming lease sale by the end of April 2021. Because of the Secretary's action, Wyoming received no payments from the March 2021 lease sale.

The Secretary argues that royalties from **production** have not been affected, but that argument is irrelevant. (ECF No. 52 at 42). Wyoming's harms result from the failure of the Secretary to hold quarterly **lease sales**, where Wyoming receives 49% of the proceeds immediately. (ECF No. 45 at 38). The Secretary's argument that Wyoming may benefit from a yet

to be proposed adjustment to federal royalty rates from **production** suffers from the same defect. Nor should this Court rely on estimates from the Federal Reserve Bank of Dallas evaluating the impact of the "pause" on **Permian Basin production** in Texas and New Mexico.

The Secretary dismisses injuries to Wyoming state lands as an "environmental harm," which is still harm, but this ignores the substantial impediments the cessation of federal leasing has on Wyoming's mineral rights. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009) (finding injunction warranted when moving party denied an interest in real property). The Secretary's action prevents Wyoming from exercising its own mineral rights on state land because Wyoming is unable to secure unitization agreements and develop Wyoming's intermingled parcels in the absence of federal leasing. (ECF No. 45-4 at ¶¶ 7-13 (Affidavit of J. Scoggin)). Compensatory Royalty Agreements cannot correct this harm because these voluntary agreements apply to "acquired lands" which are federal lands not subject to the MLA. 43 C.F.R. § 3120.7-3; *see also* 30 U.S.C. §§ 351-60. These agreements, therefore, cannot remedy the harm to Wyoming lands because the adjoining federal lands are almost entirely subject to the MLA not "acquired lands."

IV. The balance of harms and public interest warrant injunctive relief.

The Secretary contends an injunction forces the agency to compel BLM to hold lease sales which will result in an "irreversible and irretrievable commitment of resources." (ECF No. 52 at 48). Aside from some purported "disturbance" at BLM, the Secretary offers no unique harm caused by an injunction that compels the Secretary to do what she was told to do by Congress and the BLM did faithfully for three decades. *See Miller v. Carlson*, 768 F. Supp. 1341, 1343 (N.D. Cal. 1991) ("[I]rreparable injury is unlikely where the [c]ourt has merely ordered the defendants' to comply with the law.)"

Moreover, Wyoming is not asking this Court to dictate the outcome of a lease sale; Wyoming simply seeks to require the Secretary to hold lease sales. Contrasted with the harm of non-compliance with federal law and Wyoming's already incurred and certainly reoccurring harm from not receiving its share of revenue from federal lease sales during the pendency of this litigation, the balance of harms weigh in favor of an injunction. The Secretary's reliance on *Wyoming Outdoor Council* is misplaced because that case neither involved injunctive relief nor did it prohibit a court from compelling lease sales from available lands. *See Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49-50 (D.C. Cir. 1999) (discussing standing and ripeness).

As stated plainly by Congress in the MLA, the public interest is served by the Secretary continuing to hold quarterly lease sales. *See Fund for Animals v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) ("[T]here is a strong public interest in meticulous compliance with the law by public officials."). NEPA in particular was designed to keep federal officials from doing what the Secretary did here – taking a major federal action without first engaging the public and considering the consequences. Injunctive relief serves the public interest by protecting the orderly process Congress designed for managing federal lands under FLPMA. Additionally, the Secretary ignores that an injunction will benefit the United States Government by providing revenue to the Treasury just as Congress intended when it enacted the mineral leasing program. (ECF No. 45 at 48). Thus, an injunction not only serves the public interest by ensuring the Secretary complies with the law but brings tangible benefits to the American public.

CONCLUSION

For the foregoing reasons, Wyoming requests that this Court grant Wyoming's Motion for Preliminary Injunction.

Submitted this 17th day of June, 2021.

FOR THE STATE OF WYOMING

/s/ *Travis Jordan*
James Kaste (Wyo. Bar No. 6-3244)
Deputy Attorney General
Travis Jordan (Wyo. Bar No. 7-5721)
Assistant Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002
(307) 777-7895 (phone)
(307) 777-3542 (fax)
james.kaste@wyo.gov
travis.jordan@wyo.gov

Attorneys for Petitioner State of Wyoming

CERTIFICATE OF SERVICE

I certify that on this 17th day of June 2021, I electronically filed the foregoing with the Clerk of the U.S. District Court for the District of Wyoming and served all parties using the CM/ECF system.

/s/ *Travis Jordan*