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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 UNITED STATES BUREAU OF LAND MANAGEMENT, Respondents.	)	Civil Case No. 0:21-cv-00013-SWS

PETITIONERS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Petitioners Western Energy Alliance and Petroleum Association of Wyoming submit respectfully this reply in support of Petitioners' motion for preliminary injunction. *See* Pet'rs' Mot. for Prelim. Inj., filed May 10, 2021 (ECF No. 41) ("Pet'rs' Mot."). Because Respondents' opposition to the Petitioners' motion is premised on a mischaracterization of Petitioners' action and disregards federal Respondents' failure to meet their obligations under applicable law, the Court should grant the motion.

I. PETITIONERS CHALLENGE THE CANCELLATION OF LEASE SALES.

Both Petitioners' operative complaint and Petitioners' motion identify the cancellation of individual oil and gas lease sales as the agency action at issue in this motion. *See* Second Am. Pet. for Review of Gov't Action at 1-2, filed Mar. 17, 2021 (ECF No. 8) ("Compl.") (identifying the cancellation of lease sales scheduled for March and April 2021); Pet'rs' Mot. at 7-11 (enumerating specific lease sale cancellations that are the subject of the motion). The Court should reject Respondents' attempt to reframe Petitioners' motion as an alleged programmatic challenge to Executive Order 14008 or some undefined "moratorium" or "suspension" of lease sales.[1] *See* Gov't Resp. at 16-17.

[1] Respondents imply that Petitioners' complaint must be a challenge to Executive Order 14008 because Petitioners' original complaint was filed the same day that the Executive Order was issued. *See* Rep'ts' Combined Opp'n to Mots. for Prelim. Inj. at 12 & 16-17, filed June 7, 2021 (ECF No. 52) ("Gov't Resp."). But the original complaint is a legal nullity and has no significance in this action. *See Fullerton v. Maynard*, 943 F.2d 57 (Table), 1991 WL 166400, at *2 (10th Cir. Aug. 29, 1991) ("It is a well-established general rule that an amended complaint . . . supersedes the complaint it modifies and renders the prior complaint of no legal effect."). Nor does President Biden's status as a Respondent support Respondents' argument. *See* Gov't Resp. at 16. Both Executive Order 14008 and President Biden's public statements concerning his intent to terminate federal oil and gas leasing, *see* Pet'rs' Mot. at 7 (collecting statements), constitute evidence that the President was involved in the decision to cancel the lease sales identified in Petitioners' motion; as such, President Biden is a reasonable Respondent in an action challenging those cancellations.

Respondents acknowledge that "[l]ease sales shall be held for each State where eligible lands are available at least quarterly." Gov't Resp. at 5 (quoting 30 U.S.C. § 226(b)(1)(A)). BLM's regulations require that each BLM State office "shall hold sales at least quarterly if lands are available for competitive leasing," 43 C.F.R. § 3120.1-2, and enumerate specific categories of "Lands available for competitive leasing," 43 C.F.R. § 3120.1-1. These categories include, but are not limited to, "Lands included in any expression of interest." 43 C.F.R. § 3120.1-1(e).

Respondents' suggestion that applying the plain language of 43 C.F.R. § 3120.1-1(e) would undermine the "discretionary foundation of the [Mineral Leasing Act]," Gov't Resp. at 29 n.13, or somehow transfer the power to decide which lands may be leased from the Secretary to interested bidders, *see id.* at 28; Conservation Grps.' Resp. to Pet'rs' Mot. for Prelim. Inj. at 9-10, filed June 7, 2021 (ECF No. 50) ("CBD Resp."), is simply incorrect.[2] Petitioners recognize, for example, that current regulations authorize BLM to "suspend the offering of a specific parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale." 43 C.F.R. § 3120.1-3. Parcels deferred under this provision are not the subject of Petitioners' lawsuit.[3] Petitioners

[2] Notwithstanding both the explicit title of 43 C.F.R. § 3120.1-1 – "Lands available for competitive leasing" – and the regulation's plain language, Respondents assert that an agency manual provides the controlling standard for determining which lands will be "available" for leasing. *See* Gov't Resp. at 5 (citing BLM Manual MS-3120). According to the Manual, parcels become available when "all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act ["NEPA"]." *Id.* BLM's manuals and guidance documents do not have the force and effect of law and are not controlling when the provisions of the agency's guidance are inconsistent with the terms of relevant statutes or regulations. *See Atlantic Richfield Co.*, 121 IBLA 373, 380 (1991). But the Court need not reconcile the guidance material with the controlling regulations to resolve this motion. As discussed below, *see* discussion *infra* Part II, Petitioners do not seek to curtail NEPA review of parcels to be leased or to otherwise modify the process by which eligible lands are classified as "available" for leasing. Petitioners seek only to hold federal Respondents to the statutory deadlines applicable to that process.

[3] BLM did not invoke 43 C.F.R. § 3120.1-3 in any notice issued in association with the cancellation of any lease sale referenced in Petitioners' motion. Nor does any respondent address the regulation in their moving papers for this motion. Petitioners raise 43 C.F.R. § 3120.1-3 here to emphasize that if federal Respondents are able to articulate an explanation for withholding individual parcels

allege instead, and Respondents appears to concede, that lease sales have been cancelled not for a lack of eligible parcels "available for leasing," but rather because of BLM's "heavy workloads . . . in completing environmental analyses for its oil and gas lease sales." Gov't Resp. at 7. *See also id.* at 10 (acknowledging cancellations due to "workload and staffing considerations"). It is the cancellations of entire lease sales based on administrative whim, convenience, or preference – despite the existence of parcels that are "available for leasing" – that Petitioners challenge in this case.[4]

Rather than implicate any aspect of federal Respondents' discretion, Petitioners seek a straightforward ruling that federal Respondents' decision not to conduct the first and second quarter lease sales for reasons other than lack of eligible parcels is illegal coupled with an order compelling federal Respondents to reinstate those sales.[5] *See* Pet'rs' Mot. at 34. Federal courts that have considered the identical issue before this Court have confirmed that this request constitutes a permissible action to "enforce a discrete, non-discretionary duty contained in a single statutory

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that was not arbitrary and capricious, a regulatory mechanism exists that would allow federal respondents to withhold parcels that are otherwise "available" under 43 C.F.R. § 3120.1-1(e).

[4] Intervenor-Respondents rely on *New Mexico ex rel. Richardson v. U.S. Bureau of Land Mgmt.*, 459 F. Supp. 2d 1102, 1124 (D.N.M. 2006), for the proposition that "BLM has the discretion not to offer oil and gas leases on lands identified in the RMP as 'open' for leasing" if BLM concludes after subsequent environmental review that a parcel is not suitable for leasing. *See* CBD Resp. at 15. But that is not what happened here. Federal Respondents here have refused to offer parcels *without completing environmental review*. No Respondent has offered any authority that federal Respondents may refuse to lease parcels based on mere whim.

[5] The statutory deadline contained in 30 U.S.C. § 226(b)(1)(A) also undermines Respondents' contention that cancellation of individual lease sales "are merely interim postponements of lease sales," Gov't Resp. at 22, and not final agency action. What Petitioners challenge here is not the decision to simply delay the individual sales identified in Petitioners' motion, but the decision not to conduct those sales *in the first and second quarter* of 2021. The first quarter of 2021 has come and gone; the second quarter will conclude less than two weeks from the date Petitioners' motion is submitted. As such, the decision not to conduct the cancelled sales before the statutory deadline is not interlocutory, but permanent and irreversible.

provision [30 U.S.C. § 226(b)(1)(A)]."[6] *W. Energy All. v. Jewell*, No. 1:16-CV-00912-WJ-KBM, 2017 WL 3600740, at *13 (D.N.M. 2017); *see also Louisiana v. Biden*, No. 2:21-cv-778, 2021 WL 2446010, at *20 (W.D. La. June 15, 2021) (concluding that 5 U.S.C. § 706(1) authorizes the Court to compel BLM to conduct lease sales of eligible and available lands).

II. RESPONDENTS' NEPA FAILURES DO NOT EXCUSE RESPONDENTS' FAILURES UNDER THE MINERAL LEASING ACT.

Respondents' sole argument for the contention that there were no eligible and available parcels at the time the first and second quarter lease sales were cancelled is federal Respondents' failure to complete the NEPA analysis that must be conducted before a lease sale. That argument suggests that federal Respondents are passive actors in the NEPA process; but the NEPA process is not something that happens to agencies, it is a process that agencies control. This Court should not let Respondents manufacture a lack of eligible and available parcels through federal Respondents' failure to comply with NEPA's requirements.

As a preliminary matter, Respondents' NEPA-based defense is procedurally improper as a matter of administrative law. Respondents offer in their response memorandum internal

[6] In an abundance of contradiction, Respondents contend that Petitioners have "not even pled a [5 U.S.C.] § 706(1) claim" despite acknowledging that Petitioners "seek[s] an order compelling BLM to take action." *See* Gov't Resp. at 24. But an action to compel agency action is a quintessential claim under 5 U.S.C. § 706(1). To the extent that Respondents would have preferred that Petitioners cite 5 U.S.C. § 706(1) expressly in Petitioners' complaint, no such requirement exists. This Court's local rules require, in pertinent part, only that a Petitioner seeking review of agency action identify "the final agency action or part thereof to be reviewed," *see* Local Rule 83.6(a)(1)(F), and the "statute by which jurisdiction is claimed," Local Rule 83.6(a)(1)(G). Petitioners met both these requirements. Petitioners' operative complaint identifies the cancellation of lease sales on or about February 12, 2021 as the agency action that is being challenged, *see* Gov't Resp. at 13 (quoting Compl. at 1-2), and cites to 28 U.S.C. § 1331 as the source of the Court's jurisdiction. But even if Respondents were correct and some technical requirement to identify the statute providing the cause of action was applicable, that alleged defect could easily be remedied through an amendment without prejudice to any party.

communications purportedly dated February 12, 2021 – the same day that some of the first quarter lease sales were cancelled – suggesting that those sales were cancelled in response to adverse judicial decisions regarding the adequacy of NEPA analysis prepared in association with previous oil and gas sales.[7] *See* Gov't Resp. at 10-11 (citing Declaration of Peter Cowan and collecting communications). Respondents also cite to an internal e-mail between Interior Department officials as evidence that the April 2021 New Mexico lease sale was to be cancelled "pending decisions on how the Department will implement [Executive Order 14008]."[8] Gov't Resp. at 12. The problem with Respondents' reliance on these communications – besides the fact the communications offer no legal authority that would permit federal Respondents to disregard the deadlines the Mineral Leasing Act imposes – is that the statements represent post hoc rationalizations that this Court may not consider. Whether individuals at Interior could construct explanations for why a lease sale should be cancelled is immaterial if those explanations were never offered to the public. It is a settled tenet of administrative law that "an agency's discretionary order be upheld, if at all, on the same basis articulated *in the order* by the agency itself." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) (emphasis added).

But even if the Court were to consider Respondents' new arguments, Respondents' position must still be rejected as insufficient and pretextual. Respondents offer no authority to support the proposition that either workload priorities or a desire to undertake a comprehensive study of

[7] Referencing 43 C.F.R. § 3203.14(b), Respondents assert that these internal communications were transmitted on February 12, 2021 because the agency's regulations "require notices of competitive lease sales to be published forty-five days before the sale date . . . and February 12 was "forty-six days before the expiration of the first quarter." Gov't Resp. at 11. Besides the fact that none of the internal communications Respondents offer mention any regulatory deadline, Respondents' reliance on 43 C.F.R. § 3203.14 is misplaced. 43 C.F.R. § 3203.14 applies to competitive lease sales of geothermal resources, not oil and gas leases.

[8] Respondents concede that at least some lease sales were cancelled "without further explanation." *See* Gov't Resp. at 11 (describing cancellation of Nevada lease scheduled for first quarter 2021).

agency programs excuses Respondents' failure to meet statutory mandates. *See Louisiana*, 2021 WL 2446010, at *14 ("Although there is certainly nothing wrong with performing a comprehensive review, there is a problem in ignoring acts of Congress while the review is being completed."); *W. Energy All.*, 2017 WL 3600740, at *10 (concluding oil and gas operators are harmed when BLM cancels lease sales for reasons other than a lack of eligible and available parcels). Nor is there any legitimacy to the contention that federal Respondents required additional time to determine how to properly conduct NEPA in association with oil and gas leasing. While Respondents cherry pick judicial decisions from late 2020 that found flaws in aspects of BLM's NEPA work, *see* Gov't Resp. at 11 (referencing district court decisions issued in November and December 2020), Respondents disregard decisions issued contemporaneously that *upheld* BLM's NEPA work in the same leasing context. *See WildEarth Guardians v. Bernhardt*, 501 F. Supp. 3d 1192 (D.N.M. 2020) (rejecting NEPA challenge to three lease sales conducted in New Mexico in a decision issued on November 19, 2020). In other words, the implication that BLM did not have a template for how to successfully prepare NEPA analyses associated with oil and gas lease sales is both inaccurate and pretextual.

Perhaps most important, Respondents' argument relies on an improper compartmentalization of federal Respondents' statutory obligations. The Mineral Leasing Act requires quarterly lease sales whenever eligible lands are available. Meeting that deadline requires BLM to undertake all the steps necessary to satisfy the prerequisites for oil and gas lease sales. Respondents do not deny and, in fact, insist that one of the steps is completion of NEPA analysis. *See* Gov't Resp. at 5. Given that acknowledgement, BLM can no more omit the NEPA step than any other step that must be taken before the statutorily prescribed deadline. *See*, *e.g.*, 43 C.F.R. § 3120.1-2(a)-(b) (requiring lease sales be held quarterly "by a competitive oral or internet-based

bidding process"); *id.* § 3120.3-5 (requiring BLM to include in Notice of Competitive Lease Sale "[p]arcels which receive nominations"); *id.* § 3120.4-2 (requiring BLM to post public notice of lands to be offered for competitive lease).

Respondents assert that Petitioners "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 [NEPA]." Gov't Resp. at 27 (internal quotations omitted); CBD Resp. at 9. Petitioners do disagree that this has been BLM's "longstanding interpretation." If that interpretation had been prevailing, there would have been no role for the regulation concerning protests of specific parcels, 43 C.F.R. § 3120.1-3, a provision that authorizes BLM to suspend the offering of individual parcels when BLM determines environmental review has been inadequate. But even if Respondents' interpretation were correct, what Petitioners dispute here is the suggestion that federal Respondents may simply decline to complete NEPA. The essential point is that, while BLM may have some discretion over how a NEPA analysis is prepared and the conclusions that analysis may reach, Respondents have provided no authority to support the conclusion that federal Respondents have any discretion over whether a NEPA analysis must be undertaken. While it is theoretically possible that after conducting NEPA, BLM may be able to articulate a non-arbitrary explanation for why a particular parcel cannot or should not be included in a specific lease sale, there is no support for the proposition that BLM may avoid compliance with the Mineral Leasing Act's mandate by simply declining to complete work that is statutorily required to satisfy that mandate.

III. PETITIONERS' INJURIES ARE REDRESSABLE.

Respondents' misrepresentation of federal Respondents' obligations under NEPA likewise undermines Respondents' arguments related to redressability. Based on the mistaken assumption that Petitioners have raised a challenge under 5 U.S.C. § 706(2), Respondents' contend that the

Court can only "remand the postponement decisions for further consideration – not compel lease sales to occur." Gov't Resp. at 23. Respondents incorrectly assume that Petitioners seek an order "require[ing] BLM to offer any particular leases, or to actually issue such leases." CBD Resp. at 6. What Petitioners seek in this case is an order that BLM offer *available* parcels at least quarterly, consistent with the agency's non-discretionary procedural obligations under the Mineral Leasing Act. As it stands now, federal Respondents have repeatedly cancelled lease sales, offering reasons for those delays other than a lack of available parcels justified by nothing other than federal Respondents' failure to complete their statutory obligation to complete a NEPA analysis. *See* 42 U.S.C. § 4332(c) (requiring federal agencies conduct a NEPA analysis when taking "major federal actions"). This Court can and should order BLM to cease that practice. Respondents, in fact, appear to concede that the Court may "direct that BLM proceed with the lease sale decision making process." CBD Resp. at 6. Because the Petitioners seek nothing more than the right to bid on eligible lands that are available, but which are being withheld in violation of a non-discretionary statutory obligation, this Court has the power to enter an order that would redress Petitioners' injury. *See W. Energy All.*, 2017 WL 3600740, at *12 (holding Court may "order BLM to comply with its statutory directive and [] ensure that BLM conducts lease sales at least quarterly for eligible, available lands").

IV. PETITIONERS ESTABLISHED IRREPARABLE HARM.

Petitioners motion identifies at least two forms of irreparable harm that Petitioners have already suffered and which remain ongoing: (i) the denial of procedural rights to participate in statutorily mandated quarterly auctions; and (ii) economic harm that cannot be recovered attributable to the delay between lease sales. *See* Petr'rs' Mot. at 25-29. Federal Respondents do not meaningfully deny that cancellation of lease sales inflicts a procedural injury but complain

instead that any economic injury is too speculative to support a finding or irreparable harm.[9] *See* Gov't Resp. at 39-40; CBD Resp. at 20; Bus. Resp. at 20. Citing *Colorado v United States Environmental Protection Agency*, 989 F.3d 874 (10th Cir. 2021), and *New Mexico Department of Game and Fish v. United States Department of the Interior*, 854 F.3d 1236 (10th Cir. 2017), federal Respondents assert that the United States Court of Appeals for the Tenth Circuit "has repeatedly rejected preliminary injunctions" based on allegations of harm similar to those Petitioners advance. Gov't Resp. at 40. Both cases are inapposite.

In *Colorado*, the Tenth Circuit rejected petitioner's assertion that implementation of a rule narrowing EPA's regulatory jurisdiction under the Clean Water Act would impose harm on Colorado in the form of a heavier enforcement burden because petitioner contended only that the enforcement burden "could" be assumed "in the future" and offered no evidence that harm was likely before a decision on the merits. 989 F.3d at 886-887. The Tenth Circuit also noted that petitioner had failed to draw a connection between the rule that was the subject of the suit and the harm alleged, noting that petitioners omitted evidence tying the alleged increased enforcement actions to waters covered under the prior regulation but not under the modified rule. *See id.* at 887. In *Game & Fish*, the petitioner state agency represented that release of Mexican wolves "*has the potential* to affect predator-prey dynamics, and *may* affect other aspects of the ecosystem," but did not explain how those potential effects would impact petitioner's ecological management efforts.

[9] Intervenors do argue that Petitioners' procedural injuries are irreparable, asserting that "if the Court rules in Petitioners' favor and requires BLM to conduct quarterly lease sales or prepare a NEPA analysis, Petitioners will obtain the relief they seek." CBD Resp. at 21; Intervenor-Resp't (Bus. Coal.)'s Resp. to Pet'rs' Mots. for Prelim. Inj. at 20, filed June 7, 2021 (ECF No. 51) ("Bus. Resp.") (suggesting that if BLM is "obliged to hold a lease sale because the 30 U.S.C. § 226(b) prerequisites are met, at best, oil companies may bid when a sale is held"). But as Petitioners have explained, "[t]he value in quarterly lease sales is not simply that the sales occur, but that the sales occur at predictable and regular times." Pet'rs' Mot. at 27. Petitioners' members have already lost the opportunity to participate in oil and gas lease sales *in the first and second quarters of 2021*.

854 F.3d at 1251. The Tenth Circuit therefore observed that these statements provided no evidence that "the time, location, or number of releases . . . was likely to subject [petitioner] to irreparable harm." *Id.* at 1252.

Unlike the Petitioners in *Colorado* and *Game & Fish*, Petitioners here offer precise and specific evidence concerning the timing and nature of harm to their operations. Rather than speculate about potential harm, Petitioners have presented evidence that harm is already occurring and remains on-going. *See* Pet'rs' Mot. at 18-19 & 28 (explaining that because of the geophysical characteristics of shale wells, even a short delay between lease sales will injure project economics); *id.* at 27 (emphasizing that failure to conduct regularly scheduled lease sales compromises members' ability to plan operations in a manner accounting for development timelines and market conditions). Petitioners have also connected the cancellation of lease sales to specific forms of harm, explaining that reducing the number of leases in the market: (i) restricts operators' ability to design efficient projects,[10] *see id.* at 28; (ii) limits operators' ability to reduce waste and promote environmental sensitivity, *see id.*; and (iii) dilutes operators' leverage when negotiating operational and transactional agreements, *see id.* at 28-29. Because Respondents' arguments misrepresent the meaningful and specific evidence of harm that Petitioners have presented, Respondents' arguments must be rejected.

V. CONCLUSION.

Because cancellation of statutorily mandated lease sales causes ongoing and irreparable harm to Petitioners and the Petitioners' members, because BLM has not offered non-arbitrary

[10] The impact of this restriction is felt beyond federal lands. Given the ownership pattern of minerals in many western states, limitations on operators' ability to bid for and acquire federal leases constrains operators' ability to develop state and private minerals intermingled amongst federal parcels. *See* Attach. B ¶ 15 (emphasizing delays in forming and developing drilling and spacing units); Attach. D, Declaration of Bryce Ballard ¶ 5 (June 17, 2021) (explaining that lease sale cancellations have frustrated the development of state and private minerals).

reasons for cancelling the sales, and because the equities and public interest favor a preliminary injunction, the Court should grant Petitioners' motion, reinstate the first and second quarter oil and gas lease sales, and direct BLM to adopt promptly revised lease sale schedules that comply with the terms of the Mineral Leasing Act and other applicable law.

Submitted respectfully this 17th day of June, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2021, a copy of the foregoing **PETITIONERS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Mark S. Barron
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