IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS, *et al.*, Plaintiffs, v. DEBRA HAALAND,[1] *et al.*, Defendants, and AMERICAN PETROLEUM INSTITUTE, *et al.*, Intervenor-Defendants.	No. 1:20-cv-00056-RC

INTERVENOR-DEFENDANT AMERICAN PETROLEUM INSTITUTE'S MOTION TO DISMISS IN PART

Intervenor-Defendant American Petroleum Institute ("API") respectfully moves the Court for an order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing for failure to comply with the applicable statute of limitations, Plaintiffs WildEarth Guardians' and Physicians for Social Responsibility's (collectively, "Plaintiffs") First and Second Claims for Relief with respect to the leasing decisions for the challenged December 11, 2018 and March 27, 2019 Montana oil and gas lease sales approved and conducted by the Federal Defendants.

API further moves the Court for such other and further relief that this Court may deem just and proper.

[1] Pursuant to Fed. R. Civ. P. 25(d), Secretary of the Interior Debra Haaland has been automatically substituted for former Secretary David L. Bernhardt.

In support of this motion, API submits (1) its memorandum pursuant to Local Civil Rule 7(a); (b) supporting Appendix A, and (c) a Proposed Order.

Respectfully submitted,

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August 2, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2021, I caused a true and correct copy of the foregoing, and all accompanying attachments, to be filed with the Court electronically and served by the Court's CM/ECF System upon all counsel of record.

/s/ Steven J. Rosenbaum
Steven J. Rosenbaum

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INTERVENOR-DEFENDANT AMERICAN PETROLEUM INSTITUTE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS IN PART

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INTRODUCTION

This lawsuit challenges the oil and gas leasing decisions by Defendants Secretary of the Interior and the Bureau of Land Management ("BLM," collectively, the "Federal Defendants") to conduct 3 oil and gas lease sales on public lands in New Mexico and Montana between December 2018 and March 2019. *See* Compl. (Dkt. No. 1), ¶¶ 1, 124–29. Plaintiffs WildEarth Guardians ("WildEarth") and Physicians for Social Responsibility (collectively, "Plaintiffs") contend that the Federal Defendants' leasing actions violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq*., and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq*., because they were allegedly taken "without fully analyzing the direct, indirect, and cumulative impacts of oil and gas leasing on our climate[.]" Compl., ¶ 1.

Plaintiffs' challenges to the Federal Defendants' Montana leasing decisions are barred by the applicable statute of limitations. The Federal Defendants issued the challenged Montana leasing decisions pursuant to the Mineral Leasing Act, which imposes a 90-day statute of limitations on challenges—like Plaintiffs'—to a decision involving any oil and gas lease. 30 U.S.C. § 226-2 ("Section 226-2"). Congress expressly imposed this short limitations period as part of an effort to promote oil and gas development, and imposed it on claims—like Plaintiffs' NEPA claims—brought pursuant to the Administrative Procedure Act. That limitations period is broadly worded, must be strictly enforced, and had already run with respect to the Montana leasing decisions when Plaintiffs filed their Complaint. The corresponding claims should be dismissed.

BACKGROUND

A. BLM's Management of Oil and Gas Leasing.

Through the Mineral Leasing Act ("MLA"), *see* 30 U.S.C. § 181, Congress mandated that "[l]ease sales shall be held for each State where eligible lands are available at least

quarterly," *id*. § 226(b)(1)(A). *See also* Act of Feb. 25, 1920, ch. 85, § 32, 41 Stat. 437 (purpose of MLA is "[t]o promote the mining of . . . oil . . . on the public domain"); *Conway v. Watt*, 717 F.2d 512, 514 (10th Cir. 1983) (congressional purpose behind the MLA "was the development of western portions of the country"); *Harvey v. Udall*, 384 F.2d 883, 885 (10th Cir. 1967) (MLA's "purpose . . . was to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise") (quotation omitted); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 52 (D.D.C. 2019) ("[W]hile oil and gas leasing is mandatory, the Secretary has discretion to determine where, when, and under what terms and conditions oil and gas development should occur.").

Lease sales are conducted through a competitive bidding process. *See* 43 C.F.R. § 3120.1-2(b); *id*. § 3120.5-3. The Secretary of the Interior ("Secretary")—acting through BLM—awards the oil and gas lease to the party that has the highest bid at the lease sale "60 days following payment by the successful bidder of the remainder of the" bid made at the lease sale. *See* 30 U.S.C. § 226(b)(1)(A). The leases are issued "for a primary term of 10 years." 30 U.S.C. § 226(e). As an incentive to fulfill the MLA's developmental purpose, the term of the lease is extended by the lessee's diligence in conducting development operations and by production of oil or gas on the lease. *See id*. ("Each lease shall continue so long after its primary term as oil or gas is produced in paying quantities."); *id*. ("Any lease issued under this section for land on which . . . actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.").

In 1960, Congress amended the MLA's leasing provisions. Among other things, Congress enacted Section 226-2, which provides:

> No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter.

30 U.S.C. § 226-2. Through this provision, Congress sought to create a "statute of limitations providing that any action under the Administrative Procedure Act to review a decision of the Secretary involving an oil and gas lease must be initiated within 90 days after the final decision of the Secretary." S. Rep. No. 86-1549 (1960), *as reprinted in* 1960 U.S.C.C.A.N. 3313, 3317. *See also id*. at 3337. More broadly, the 1960 MLA amendments aimed to reverse "a potentially dangerous slackening in exploration for development of domestic reserves of oil and gas" by "remov[ing] certain legislative obstacles to exploration for development of the mineral resources of the public lands and spur greater activity for increasing our domestic reserves." *Id*. at 3314–15.

B. Plaintiffs' Challenges to BLM's Leasing Authorizations.

Plaintiffs originally challenged 23 oil and gas lease sales across Colorado, Montana, New Mexico, Utah, and Wyoming. *See* Compl., ¶¶ 1, 121–35 & Table A. On October 23, 2020, this Court granted the Federal Defendants' motion for voluntary remand of the leasing decisions relating to 20 of the 23 challenged lease sales in light of the Court's decision in *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). *See* Fed. Defs.' Motion for Voluntary Remand (Dkt. No. 41); Order Granting Federal Defendants' Motion for Voluntary Remand Without Vacatur (Dkt. No. 46).

Following the Court's remand order, only Plaintiffs' challenges to (1) a December 5, 2018 lease sale in New Mexico, (2) a December 11, 2018 lease sale in Montana, and (3) a March

27, 2019 lease sale in Montana remain in this case.[2] Plaintiff WildEarth filed protests to each of these lease sales. *See* Compl., ¶¶ 126, 129.

BLM issued an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") for the New Mexico field offices participating in the December 5, 2018 lease sale.[3] BLM issued Decision Records for each field office on October 30, 2019.[4]

For the December 11, 2018 Montana lease sale, BLM also issued an EA and FONSI under NEPA.[5] On December 7, 2018, BLM issued a Decision Record documenting the Federal Defendants decision to offer "23 lease parcels . . . for competitive and/or noncompetitive lease issuance at the December 11, 2018 competitive sale" and thereafter issue leases "for parcels sold at the sale[.]"[6]

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[2] *See* Compl., ¶¶ 124–29. The decisional documents and results for each lease sale are available for each State office on BLM's website. *See* BLM, Montana-Dakotas Oil and Gas Lease Sales, *available at* https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/montana-dakotas (last visited Aug. 1, 2021); BLM, New Mexico Lease Sales, *available at* https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/new-mexico (last visited Aug. 1, 2021). This Court may take judicial notice of government records and materials available on government websites. *See*, *e.g.*, *Banks v. Warner*, No. 94-56732, 1995 WL 465773, at *1 (9th Cir. Aug. 7, 1995); *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 519 (5th Cir. 2015).

[3] *See* BLM, New Mexico Lease Sales, *available at* https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/new-mexico (last visited Aug. 1, 2021).

[4] *See*, *e.g.*, BLM, Rio Puerco Field Office, DOI-BLM-NM-0000-2018-0042-EA, Decision Record, *available at* https://eplanning.blm.gov/public_projects/110287/200260962/20034270/250040468/December_2018_Competitive_Oil_and_Gas_Lease_Sale_Rio_Puerco_Field_Office_DR_508_esigned.pdf last visited Aug. 1, 2021).

[5] *See* BLM National NEPA Register, DOI-BLM-MT-0000-2018-0002-EA, *available at* https://eplanning.blm.gov/eplanning-ui/project/108993/570 (last visited Aug. 1, 2021).

[6] The Decision Record is available on BLM's website, *see supra* n.5, and attached for reference in Appendix A hereto.

BLM similarly issued an EA and FONSI for the March 27, 2019 Montana lease sale.[7] BLM issued its Decision Record on March 22, 2019 setting forth the "decision to . . . offer 305 parcels for sale," and "issue competitive leases for parcels sold at the sale."[8]

On January 9, 2020, Plaintiffs filed their Complaint in this action seeking "declaratory and injunctive relief against [Federal Defendants], challenging as arbitrary federal leasing authorizations encompassed in" the challenged lease sales. Compl., ¶ 11. To remedy these allegedly improper "leasing decisions," *see*, *e.g.*, *id*. ¶¶ 97–99, 121, made on the basis of allegedly inadequate NEPA reviews, Plaintiffs ask this Court to, *inter alia*, (1) "[d]eclare that Federal Defendants' leasing authorizations . . . violate NEPA," and (2) "[v]acate Federal Defendants' leasing authorizations," *id*., Requested Relief, ¶¶ A–B. *See also*, *e.g.*, *id*. ¶ 138 ("For all of the leasing authorizations . . ., BLM failed to take the required hard look" under NEPA.); ¶ 148 ("BLM's leasing authorizations will result in high levels of [greenhouse gas emissions] that could significantly impact climate.").

ARGUMENT

Despite their admitted contemporaneous knowledge of the leasing decisions challenged in this lawsuit, Plaintiffs sat on their rights and are therefore barred from challenging the two Montana leasing decisions at issue in this case for failure to comply with the applicable statute of limitations.

Plaintiffs' failure to comply with Section 226-2 triggers Federal Rule of Civil Procedure 12(b)(6), which "tests the legal sufficiency of a complaint." *Alford v. Providence Hosp.*, 60 F.

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[7] *See* BLM National NEPA Register, DOI-BLM-MT-0000-2018-0007-EA, *available at* https://eplanning.blm.gov/eplanning-ui/project/114348/570 (last visited Aug. 1, 2021).

[8] The Decision Record is available on BLM's website, *see supra* n.7, and attached for reference in Appendix A hereto.

Supp. 3d 118, 123 (D.D.C. 2014). Having failed to satisfy this threshold requirement with respect to the two challenged Montana leasing decisions, Plaintiffs cannot "state a claim that is plausible on its face" with respect to those lease sales. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).[9]

I. The MLA's Statute of Limitations Bars Plaintiffs' Challenges to the Montana Leasing Decisions.

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. N. Dakota ex rel. Bd. Of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). "A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Id*. Such conditions include statutes of limitations.

Plaintiffs' challenges to the Montana leasing decisions at issue are barred by Section 226-2's 90-day limitations period created by Congress as part of its MLA amendments designed to remove "obstacles" to oil and gas development. *See* 1960 U.S.C.C.A.N. at 3314–15. Failure to comply with the applicable statute of limitations triggers dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Jackson v. Modly*, 949 F.3d 763, 767 (D.C. Cir. 2020). In making this determination, the Court may consider "the facts alleged in the

[9] Although API submitted its Answer to the Complaint (Dkt. No. 28) as required s part of its motion to intervene, the Court may review its challenge to the Complaint for failure to state claim pursuant to Rule 12(b)(6) or for a judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Regardless of the label, this Court applies the same standard in assessing this motion. *See*, *e.g.*, *Maniaci v. Georgetown Univ.*, 510 F. Supp. 2d 50, 58 (D.D.C. 2007) ("The appropriate standard for reviewing a motion for judgment on the pleadings is virtually identical to that applied to a motion to dismiss under Rule 12(b)(6)."); *id*. at 60 (explaining that "the court may consider a premature Rule 12(c) motion under Rule 12(b)(6)").

complaint, any documents either attached to or incorporated in the complaint, and matters of which the court may take judicial notice." *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017) (cleaned up). As detailed below, the Complaint and judicially noticeable public records make clear that Plaintiffs' Montana leasing decision challenges are barred.

A. Section 226-2 Applies to Plaintiffs' NEPA Claims Brought Under the APA.

While Plaintiffs allege that Federal Defendants' challenged leasing decisions violated NEPA, *see supra*, "NEPA itself does not provide a cause of action," *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 177 (D.C. Cir. 2019). Rather, the APA supplies Plaintiffs' cause of action. *See*, *e.g.*, *id*. ("[A]ny challenge to agency action based on NEPA must be brought under the Administrative Procedure Act[.]"); *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1143 (D.C. Cir. 2002). In other words, by challenging Federal Defendants' leasing decisions under NEPA, Plaintiffs "invoke the limited waiver of sovereign immunity provided for in the APA." *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1245 (10th Cir. 2012). *See also*, *e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990).

1. Section 226-2's Specific Statute of Limitations Applies to Plaintiffs' APA Causes of Action.

In the absence of a specific statute of limitations, APA claims "are subject to the statute of limitations contained in 28 U.S.C. § 2401," which generally allows for claims against the United States filed within six years of accrual. *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014). But the APA does not "affect[] other limitations on judicial review . . . ." 5 U.S.C. § 702(1). As the *Attorney General's Manual on the Administrative Procedure Act* ("*APA Manual*") explains, "the time within which review must be sought" for a cause of action under the APA "will be governed, as in the past, by relevant statutory provisions," and "the general

principles stated in [the APA's judicial review provisions] must be carefully coordinated with existing statutory provisions and case law."[10]

Indeed, a specific statute of limitations superseding the general 28 U.S.C. § 2401 limitations period otherwise applicable to APA claims is consistent with the "commonplace of statutory construction that the specific governs the general." *Howard v. Pritzker*, 775 F.3d 430, 438 (D.C. Cir. 2015) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). "This is no less true with respect to statutes of limitations." *Id*. *See also*, *e.g.*, *Kannikal v. Att'y Gen. United States*, 776 F.3d 146, 155 (3rd Cir, 2015) ("Section 2401(a) is meant to apply when other limitations periods are lacking[.]"); *Nagahi v. INS*, 219 F.3d 1166, 1171 (10th Cir. 2008) ("***In the absence of a specific statutory limitations period***, a civil action against the United states under the APA is subject to the six year limitations period found in 28 U.S.C. § 2401(a).") (emphasis added).

Taken together, the APA "prohibits review of agency decisions 'to the extent that . . . statutes preclude judicial review.'" *Impact Energy*, 693 F.3d at 1245 (quoting 5 U.S.C. § 701(a)). "The MLA includes such a prohibition." *Id*. Section 226-2 provides:

> No action contesting ***a decision*** of the Secretary ***involving any oil and gas lease*** shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary ***relating to*** such matter.

30 U.S.C. § 226-2 (emphases added). This statutory deadline constitutes "a condition to the waiver of sovereign immunity and thus must be strictly construed." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990). The plain language, legislative history, and congressional

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[10] *APA Manual* at 98, *available at* https://www.fsulawrc.com/fall/admin/AttorneyGeneralsManual.pdf (last visited August 1, 2021). The Supreme Court has long found the *APA Manual* to be "persuasive" in interpreting the APA. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004).

purpose make clear that Section 226-2's 90-day limitations period applies to bar Plaintiffs' challenges to Federal Defendants' Montana leasing decisions.

Construction of Section 226-2 "begin[s] . . . with the plain language of the statute." *AT&T Inc. v. FCC*, 452 F.3d 830, 835 (D.C. Cir. 2006) (quotation omitted). That language is broad. First, the term "'involving' is broad and indeed the functional equivalent of 'affecting.'" *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 273–74 (1995). Likewise, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). Finally, the phrase "relating to" is "a broad one" that means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association or connection with." *Morales*, 504 U.S. at 383 (quotation omitted). In short, where a party files an action contesting a decision of the Secretary that "involv[es]" at least one oil and gas lease, Congress limited such claims to those filed within 90 days of the decision.

The legislative history confirms that Section 226-2 bars challenges to oil and gas leasing decisions filed more than 90 days after the final decision. The Conference Committee that drafted the final version of Section 226-2 "accepted the principle of the Senate language" on the statute of limitations. 1960 U.S.C.C.A.N. 3313, 3337. That language was meant to enact "[a] statute of limitations providing that ***any action under the Administrative Procedure Act*** to review a decision of the Secretary involving an oil and gas lease must be initiated within 90 days after the final decision of the Secretary." *Id*. at 3317 (emphasis added). Indeed, the 1960 MLA

amendments as a whole were designed to remove "obstacles" to oil and gas exploration and development, "and spur greater activity for increasing our domestic reserves." *Id*. at 3314–15.[11]

Here, Plaintiffs challenge Federal Defendants' decisions "involving any oil and gas lease." 30 U.S.C. § 226-2. Their NEPA challenge relates to NEPA analyses performed solely for purposes of Secretarial decisions regarding the conduct of oil and gas lease sales, and thus plainly "involve" and "relate to" oil and gas decisions. Indeed, the Complaint expressly challenges Federal Defendants' "leasing decisions," Compl., ¶¶ 6; *see also*, *e.g.*, ¶¶ 97–99, to conduct the challenged Montana lease sales resulting in the issuance of oil and gas leases. *See also*, *e.g.*, *id*., ¶ 11 (explaining that Plaintiffs brought this action for "declaratory and injunctive relief against [Federal Defendants], challenging as arbitrary federal leasing authorizations"); *id*., Relief Requested, ¶ A (requesting that the Court "[d]eclare that Federal Defendants' leasing authorizations . . . violate NEPA"); *supra* p. 5.

Those challenged leasing decisions, made in reliance upon the challenged NEPA analyses, were finalized in BLM's Decision Records approving the conduct of the Montana lease sales and issuance of oil and gas leases. *See supra* pp. 4–5; Appendix A. *See also*, *e.g.*, BLM, Decision Record for December 11, 2018 Montana Lease Sale, DOI-BLM-MT-0000-2018-0002-EA, at 1 (Dec. 7, 2018) ("[I]t is my decision to . . . offer 23 parcels for sale" and "issue[]" leases "for parcels sold at the sale[.]'); BLM, Decision Record for March 27 Montana Lease Sale, DOI-

[11] A conference committee report is entitled to "great weight" in assessing congressional intent. *Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 833 n.28 (1983). *See also*, *e.g.*, *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981) ("Because the conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent.").

BLM-MT-0000-2018-0007-EA, at 1–2 (Mar. 22, 2019) ("[I]t is my decision to . . . offer 305 parcels for sale," and "[t]he BLM will issue competitive leases for parcels sold at the sale[.]").

Because the Federal Defendants' Decision Records to "offer" and "issue" leases, *id*., for the challenged Montana lease sales issued more than 90 days before Plaintiffs filed their January 9, 2020 Complaint, Section 226-2 bars Plaintiffs' challenges to those sales. *See*, *e.g.*, *Miami Bldg. & Constr. Trades Council v. Sec'y of Defense*, 143 F. Supp. 2d 19, 24–25 (D.D.C. 2001) (statute of limitations began to run on the date agency decided to prepare a Supplemental Environmental Impact Statement because plaintiffs challenged that decision).

Plaintiffs' challenges must therefore be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *E.g.*, *Jackson*, 949 F.3d at 767, 776–79.

2. NEPA Does Not Salvage Plaintiffs' Time-Barred Challenges.

That Plaintiffs' APA causes of action allege violations of NEPA does not alter application of Section 226-2. Rather, federal courts—including this Court—regularly apply to NEPA claims specific statutes of limitations that are shorter than the default six-year limitations period for APA claims under 28 U.S.C. § 2401(a). *See*, *e.g.*, *Miami Bldg. & Constr. Trades Council*, 143 F. Supp. 2d at 24–25 (NEPA challenge to disposition of former Air Force base property barred pursuant to sixty day limitation period in Defense Base Closure and Realignment Act); *Nuclear Info. & Res. Serv. v. U.S. Dep't of Transp.*, 457 F.3d 956, 958, 962 (9th Cir. 2006) (sixty day limitations period in 28 U.S.C. § 2344 barred NEPA challenges to agency regulations); *New Jersey Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 405–06, 410, 414 (3rd Cir. 1994) (explaining that 28 U.S.C. § 2344's sixty day limitation period would bar petition for review of agency order); *Goos v. Interstate Com. Comm'n*, 911 F.2d 1283, 1288–89 (8th Cir. 1990) (applying sixty day limitations period of 28 U.S.C. § 2344 to bar petitioners' NEPA claims).

These decisions are consistent with the similar rule that exclusive jurisdictional provisions restricting certain lawsuits to the Courts of Appeals equally apply to NEPA claims, and supersede the general federal questions jurisdiction conferred on district courts by 28 U.S.C. § 1331. *See*, *e.g.*, *Edwardsen v. U.S. Dep't of the Interior*, 268 F.3d 781, 784 (9th Cir. 2001) ("Because the alleged NEPA violation arises under [the Outer Continental Shelf Lands Act ("OCSLA")], which provides for exclusive jurisdiction in the court of appeals, we have original jurisdiction over the NEPA claim."); *City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979) ("[W]e disagree that the district court may exercise concurrent jurisdiction merely because a violation of NEPA is alleged. The allegation may be raised directly in the courts of appeals; and insofar as it may affect the lawfulness of a directly appealable order we think it must be.").[12]

Again, NEPA's procedural mandates do not negate the "commonplace of statutory construction that the specific governs the general." *Howard*, 775 F.3d at 438. *See also Nuclear Info. & Res. Serv.*, 457 F.3d at 959 ("[W]here a federal statute provides for direct review of an agency action in the court of appeals, such specific grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts."); *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989) (explaining that "specific jurisdictional provisions" "control over the general and widely applicable procedures"); *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989) ("The courts uniformly hold that

[12] Exercise of exclusive jurisdiction over NEPA claims in the Court of Appeals is common for challenges to the Department of Interior's five-year leasing programs under OCSLA. *See*, *e.g.*, *Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588, 595 (D.C. Cir. 2015) (asserting OCSLA and NEPA violations); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 471–72 (D.C. Cir. 2009) (asserting NEPA, APA and other violations); *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988) (same); *California v. Watt*, 712 F.2d 584 (D.C. Cir. 1983) (asserting NEPA and other violations); *California v. Watt*, 668 F.2d 1290 (D.C. Cir. 1981) (asserting NEPA, APA and other violations).

statutory review in the agency's specially designated forum prevails over general federal question jurisdiction in the district courts."); *Geertson Farms, Inc. v. Johanns*, 439 F. Supp. 2d 1012, 1020 (N.D. Cal. 2006) (explaining that "courts regularly hold that a challenge to the procedure of an agency action is tantamount to challenging the action itself"). *Cf. Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 684 (D.C. Cir. 2004) ("When an agency decision has two distinct bases, one of which provides for exclusive jurisdiction in the courts of appeals, the entire decision is reviewable exclusively in the appellate court.") (internal quotations and citation omitted).

The Ninth Circuit's application of a specific statute of limitations to NEPA claims in *Turtle Island Restoration Network v. United States Department of Commerce*, 438 F.3d 937 (9th Cir. 2006), is instructive. In that case, environmental groups contended that a regulation issued pursuant to the Magnuson-Stevens Fisheries Act violated NEPA (among other statutes). *See Turtle Island*, 438 F.3d at 942. While the environmental groups contended that their NEPA claims were subject to the general six-year limitations period of 28 U.S.C. § 2401(a) that applies to APA claims, the Government argued that the plaintiffs' claims were barred by the Magnuson Act's specific thirty-day limitations period for challenges to "[r]egulations promulgated by the Secretary" of Commerce under the Magnuson Act. *See id*. at 940 (quoting 16 U.S.C. § 1855(f)); *id*. at 942–43. The Ninth Circuit concluded that the "plain language" of the Magnuson Act settled the dispute by broadly applying to any challenges to regulations promulgated pursuant to the Magnuson Act. *See id*. at 943–44. Because the fisheries reopening that the environmental groups challenged "came about as a result of" a Magnuson Act regulation, *id*. at 944, the Magnuson Act's limitations period applied to bar the plaintiffs' NEPA claims, *id*. at 949.

The Ninth Circuit's analysis mirrors the application of Section 226-2 here. As in *Turtle Island*, the language of Section 226-2 is "clear and uncomplicated." *Id*. at 943. *See supra* pp. 8–9. Just as the challenge in *Turtle Island* was aimed at the Magnuson Act regulation, Plaintiffs' complaint is "directed at," *Turtle Island*, 438 F.3d at 945, Federal Defendants' oil and gas "leasing decisions," Compl. ¶¶ 6, 97–99; *see also supra*, and asks this Court to, among other things, "[d]eclare that Federal Defendants' leasing authorizations . . . violate NEPA," *id*., Relief Requested, ¶ A. Further, the MLA limitations period effectuates "Congress's intent to ensure" expeditious leasing and exploration of public lands for oil and gas development "and that challenges are resolved swiftly." *Turtle Island*, 438 F.3d at 948. *See also supra* pp. 9–10. Consistent with the reasoning in *Turtle Island* and the broad language of Section 226-2, Plaintiffs' NEPA claims are likewise barred.

Although the Tenth Circuit declined to apply Section 226-2's broad provisions to NEPA claims in *Park County Resource Council v. United States Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987), that 34 year-old out-of-Circuit decision is neither controlling nor persuasive and, indeed, was sharply criticized by the Ninth Circuit in *Turtle Island*. In rejecting application of Section 226-2, *Park County* relied on the Ninth Circuit's earlier decision in *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986), and the twin assumptions that (1) no statute of limitations (or the APA) applies to NEPA claims, and (2) all NEPA claims must be subject to a uniform limitations period. Each of these underlying bases were misplaced and have been further undermined during the intervening years.

First, *Park County* relied on a purported distinction in *Jones v. Gordon* between substantive challenges to an agency action—to which a statute of limitations applies—and procedural NEPA challenges—to which the limitations period does not apply. *See Park County*,

817 F.2d at 616; *see also id*. ("The thrust of our reasoning parallels that of the Ninth Circuit in *Jones v. Gordon*[.]")). But in *Turtle Island*, the Ninth Circuit noted that *Park County*'s distinction between substantive and procedural challenges for limitations purposes reflected a "misapplication of *Jones*" to the "broad wording" of Section 226-2. *Turtle Island*, 438 F.3d at 947 n.9. As the Ninth Circuit made clear, the "conclusion in *Jones* flowed not from any general proposition about NEPA but from a plain reading of the" particular limitations period at issue in that case. *Id*. at 947. Unlike the statute of limitations at issue in *Jones*, which narrowly applied to challenges to the "terms and conditions" of certain permits, *see Jones*, 792 F.2d at 824 (quoting 16 U.S.C. § 1374(d)(6)), Section 226-2 applies broadly to "a decision of the Secretary involving any oil and gas lease," 30 U.S.C. § 226-2; *supra* pp. 8–9. Like the Magnuson Act limitations provision at issue in *Turtle Island*, "[n]othing in [Section 226-2] purports to distinguish between procedural and substantive challenges" to leasing decisions. *Turtle Island*, 438 F.3d at 946. *Cf. Block*, 461 U.S. at 285 (applying limitation period to challenge by State where "[t]he statutory language makes no exception for civil actions by States"). *Turtle Island* and the broad language of Section 226-2 thus fatally undermine *Park County*'s reasoning.[13]

Second, applying its reading of *Jones*, the Tenth Circuit assumed that the absence of a specific statute of limitations in NEPA meant that no limitations period applies to NEPA claims. Instead, NEPA claims were only subject to the equitable doctrine of laches. *See Park County*, 817 F.2d at 616–17. Alongside this assumption, *Park County* applied a "reasonableness

[13] *Turtle Island* likewise undercuts a related decision in *Conservation Law Foundation v. Mineta*, 131 F. Supp. 2d 19 (D.D.C. 2001), which relied on *Park County* and *Jones* to conclude that "NEPA-only challenges may proceed pursuant to the APA, which has no time limitation, rather than pursuant to a more limited substantive statute." *Id*. at 24. Again, the Ninth Circuit explained that *Conservation Law Foundation* reflected the same "misreading of *Jones*" without "interpreting the relevant statutory language" at issue in the case. *Turtle Island*, 438 F.3d at 947.

standard" to the NEPA claims under review. *See id*. at 621 n.4. Taken together, these positions make clear *Park County*'s assumption that the APA—to which the general limitations period in 28 U.S.C. § 2401(a) applies and which imposes an arbitrary and capricious standard of review—does not supply the cause of action for NEPA claims. It is now well-settled, however, that the APA provides the cause of action for any NEPA claim and such claims are subject to statutes of limitations, not simply the equitable doctrine of laches. *See supra* pp. 7–8, 11–13.

Now unequivocally subject to the APA, Plaintiffs' NEPA claims are barred in order to effectuate Congress's intent to preclude "any action under the Administrative Procedure Act to review a decision of the Secretary involving an oil and gas lease [that is not] initiated within 90 days after the final decision of the Secretary." 1960 U.S.C.C.A.N. 3313, 3317. Allowing Plaintiffs to evade Section 226-2 simply "by artful[ly] pleading," *Block*, 461 U.S. at 285 (quotation omitted), their claim as a NEPA challenge, when their challenge so clearly and directly relates to an MLA oil and gas leasing decision, would "resurrect the very problems that Congress sought to eliminate," *Yeutter*, 887 F.2d at 912, by imposing a 90 day limitations period—late filed legal challenges and other "obstacles" that would undercut prompt development of oil and gas reserves. *See* 1960 U.S.C.C.A.N. at 3314–15.

Finally, *Park County* erroneously assumed that claimed violations of NEPA should not be subject to differing limitations periods "depending upon which statute the underlying agency action is based." *Park County*, 817 F.2d at 616. To the contrary, federal courts have long applied specific limitations periods to NEPA claims depending upon the underlying agency action, and likewise applied specific, exclusive jurisdictional provisions depending on the context. *See supra* pp. 18–19. In other words, it is well settled that there is no uniform time and forum for a NEPA claim.

Viewed as a whole, the reasoning of *Park County* cannot withstand decades of caselaw clarifying the nature and scope of NEPA claims. This court should, as it must, apply "the plain language," *AT&T Inc.*, 452 F.3d at 835 (quotation omitted), of Section 226-2 to bar the bulk of Plaintiffs' claims. *See supra*.

B. Plaintiffs Do Not Qualify for the Extraordinary Remedy of Equitable Tolling.

Where a statute of limitations is not jurisdictional, the doctrine of equitable tolling may "allow[] a plaintiff to avoid the bar of the limitations period[.]" *Oviedo v. Washington Metro. Area Transit Auth.*, 948 F.3d 386, 393 (D.C. Cir. 2020). But the remedy of equitable tolling is "appropriate only in rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Jackson*, 949 F.3d at 778 (quotation omitted). *See also*, *e.g.*, *Irwin*, 498 U.S.at 94 ("Federal courts have typically extended equitable relief only sparingly."); *Impact Energy*, 693 F.3d at 1245 ("Equitable tolling is granted sparingly."). This case does not present the requisite rare circumstances.

To demonstrate an entitlement to this rare remedy, Plaintiffs "must show (1) that [they have] been pursuing [their] rights diligently, and (2) that some extraordinary circumstances stood in [their] way." *Jackson*, 949 F.3d at 778 (quotation omitted). For example equitable tolling may be justified "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 94. *See also Impact Energy*, 693 F.3d at 1245 ("We have held that tolling is appropriate when the defendant's conduct rises to the level of active deception; where a plaintiff has been lulled

into inaction by a defendant, and likewise, if a plaintiff is actively misled or has in some extraordinary way been prevented from asserting his or her rights." (quotation omitted)).

Here, Plaintiffs cannot "meet the high threshold for applying this rare remedy." *Jackson*, 949 F.3d at 778. There is no indication that any extraordinary events outside Plaintiffs' control, let alone any misconduct by Federal Defendants, concealed the allegedly improper leasing decisions from Plaintiffs or otherwise misled Plaintiffs to file their NEPA claims after the 90-day limit prescribed by Section 226-2. To the contrary, by detailing Plaintiffs' participation in the administrative process for each Montana lease sale, the Complaint concedes Plaintiffs' knowledge—well within the limitations period—of the leasing decisions they now challenge. *See* Compl., ¶ 126. In this light, Plaintiffs' decision to file their legal challenges in January 2020 reflects a conscious decision, and the rare remedy of equitable tolling does not protect Plaintiffs from their own decisions.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Plaintiffs' challenges to the challenged Montana leases sales pursuant to Section 226-2's 90 day limitations period.

August 2, 2021

Respectfully submitted,

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Appendix A

United States Department of the Interior
Bureau of Land Management
Montana / Dakotas State Office
5001 Southgate Drive, Billings MT 59101

Decision Record
Environmental Assessment
DOI-BLM-MT-0000-2018-0002-EA

Decision:

It is my decision to select Alternative C for the December 11, 2018 Oil and Gas Lease Parcel Sale. Under Alternative C, the BLM will offer 23 parcels for sale, with standard federal lease terms and conditions, and required stipulations and/or lease notices as identified in Appendix A of the Environmental Assessment (EA); DOI-BLM-MT-0000-2018-0002-EA. The 23 parcels encompass approximately 12,517 Federal mineral acres in Lewis and Clark, Blaine, Toole, Glacier, Dawson, Sheridan, Roosevelt and Big Horn Counties in Montana (Butte, Havre, and Miles City Field Offices). Refer to Table 1 below.

The BLM deferred three parcels in Beaverhead County totaling 3064.93 acres pending review of the ARMP to provide the appropriate level of protection for the area (MTM 105431 GD, GG, and GH). In addition, the BLM moved 76 parcels from the December 2018 oil and gas lease sale to the March 2019 oil and gas lease sale to comply with a preliminary injunction from the U.S. District Court, District of Idaho.

The 23 lease parcels will be offered for competitive and/or noncompetitive lease issuance at the December 11, 2018 competitive sale with the stipulations described in Appendix A and B of the EA. Competitive leases will be issued for parcels sold at the sale, and noncompetitive leases may be issued for applications filed during the 2-year period following the sale.

Authorities:

The authority for this decision is contained in 43 CFR 3100.

Compliance and Monitoring:

Should the parcels be developed, monitoring may be required and would be addressed and

analyzed under future NEPA documentation.

Terms, Conditions, and Stipulations:

Standard terms and conditions, as well as the lease notices and stipulations identified by parcel in Appendix A and B of the EA, would apply and be attached to all of the parcels.

Plan Conformance and Consistency:

The proposed action and alternatives have been reviewed and found to be in conformance with the following BLM plans and associated Record of Decision(s):

- 2015 Rocky Mountain Region Record of Decision (ROD), HiLine and Miles City Resource Management Plans, and associated FEISs
- 2009 Butte Record of Decision, Resource Management Plan, and associated FEIS

All of the parcels are located in areas designated open to oil and gas leasing subject to standard lease terms, moderate constraints such as stipulations that require timing limitations, or major constraints such as stipulations that prohibit surface occupancy and use. The BLM applied stipulations to the 23 lease parcels consistent with the requirements of the applicable RMPs. Alternative C also conforms with the 9/21/18 U.S. District Court order and preliminary injunction; Case 1:18-cv-00187-REB.

Alternatives Considered:

No Action. The No Action Alternative would exclude all nominated parcels across Montana / Dakotas from the lease sale. Surface management would remain the same and ongoing oil and gas development would continue on surrounding federal, private, and state leases.

Proposed Action. The proposed action would offer 102 lease parcels for sale for oil and gas leasing, with standard federal lease terms and conditions, and required stipulations and/or lease notices as identified in Appendix A of the EA, and in conformance with existing land use planning decisions. The parcels encompass approximately 69,270 Federal mineral acres in 21 counties across Montana (Carbon, Musselshell, Sweet Grass, Lewis & Clark, Park, Beaverhead, Madison, Valley, Blaine, Glacier, Toole, Meagher, Petroleum, Big Horn, Custer, Dawson, Fallon, Sheridan, Roosevelt, Rosebud, Sheridan Counties), and Bowman County, North Dakota. Parcel number, size, and detailed locations and associated stipulations are listed in Appendix A of the EA. Descriptions of the stipulations are provided in Appendix B. Maps of the parcels are in Appendix C.

Alternative C. Alternative C was developed in response to public comment and ongoing litigation. During public comment, the BLM received comments from MT FWP identifying a need to conserve existing sage-grouse habitat around leks in close proximity to specific parcels. The BLM reviewed the location of active leks near the parcels identified by MT FWP, and identified an active lek near Parcels MTM 105431 GD, GG, and GH that lies outside the boundaries of sage-grouse habitat designated by the BLM in the 2015 ARMP, and by the State of Montana (core or general habitat). The three lease parcels are located in designated PHMA or GHMA but the lek is not. These three parcels are located within the 3.1-mile buffer of this lek. As the parcels are located in PHMA and GHMA, they have restrictions in place that limit development. However, the immediate area surrounding the active lek lacks stipulations

to conserve the habitat. A NSO stipulation in place in designated PHMA on the proposed parcels could inadvertently push development closer to the unprotected lek. Under Alternative C, the BLM would defer Parcels GD, GG, and GH pending additional analysis to determine the appropriate level of protection for this area. The three parcels encompass 3,065 acres in Beaverhead County.

In response to ongoing litigation related to implementation of BLM Instruction Memorandum 2018-034 (*Western Watersheds Project v. Zinke*, No. 1:18-cv-00187-REB (D. Idaho Sept. 21, 2018), the BLM would not offer any parcels in designated sage-grouse habitat in the December 2018 oil and gas lease sale. Seventy-six parcels encompassing 54206.5 acres were moved from the December 2018 sale to the March 2019 sale in order to meet public participation requirements.

With the deferral of the three sage-grouse parcels in Dillon, and removal of 76 sage-grouse habitat parcels impacted by litigation, the BLM would offer 23 parcels as part of a competitive oil and gas lease sale. The 23 nominated parcels encompass 12,517 Federal mineral acres in Park, Blaine, Toole, Glacier, Dawson, Sheridan, Roosevelt and Big Horn Counties in Montana. Refer to Table 1 below. Parcel number, size, and detailed locations and associated stipulations are listed in Appendix A of the EA. Descriptions of the stipulations are provided in Appendix B. Maps of the parcels are in Appendix C of the EA.

Table 1: Alternative C: 23 Parcels that would be offered in the December 11, 2018 oil and gas lease sale

# Parcels	Field Office	Parcel Number	County	Acres
1	Butte	MTM 79010-S1	Lewis and Clark	1463.26
2	Havre	MTM 108952-H3	Blaine	639.64
3		MTM 108952-G9	Blaine	4.0
4		MTM 108952-H7	Blaine	50.26
5		MTM 108952-J4	Toole	1000.17
6		MTM 108952-J6	Toole	1182.92
7		MTM 108952-J7	Toole	185.76
8		MTM 108952-J8	Toole	913.02
9		MTM 108952-J9	Toole	1156.86
10		MTM 108952-KF	Toole	202.14
11		MTM 108952-KE	Toole	320.0
12		MTM 108952-KT	Glacier	482.87
13		MTM 108952-KU	Glacier	7.28
14	Miles City	MTM 108952-JX	Dawson	712.66
15		MTM 108952-KA	Dawson	320.0
16		MTM 108952-HX	Dawson	107.01
17		MTM 108952-HY	Dawson	138.56
18		MTM 108952-H9	Dawson	1397.29
19		MTM 108952-HD	Sheridan	120.0
20		MTM 108952-H6	Roosevelt	79.76
21		MTM 108952-HG	Big Horn	854.49
22		MTM 108952-HH	Big Horn	1153.45
23		MTM 108952-HQ	Big Horn	25.85
Total				12517.25

Public Comments:

The EA for the December 2018 lease sale was posted to the BLM e-planning website for a 15-day public comment period on August 9, 2018, and an updated EA with a response to comments and unsigned FONSI were posted to the BLM e-planning website for a 10-day protest period on October 23, 2018. The BLM mailed or emailed notification letters to interested parties (i.e. anyone that commented on scoping or the EA), local, state, and federal agencies, and tribes to inform them of the relevant review and comment or protest period.

The public, tribes, or governmental agencies submitted approximately 5000 form letters and 250 individual comments, including comments from fifteen environmental groups and five government or tribal agencies. The BLM reviewed and considered all of the comments that were submitted, and modified the EA in response to substantial public comments. Appendix F of the EA provides a summary of the comments as well as the BLM response. The updated EA includes analysis of Alternative C, and provides additional water resources analysis related to consumptive uses and the Tongue River watershed.

Rationale for the Decision:

My decision to approve Alternative C, is based on the following: 1) consistency with the applicable Butte, HiLine, and Miles City resource management and land use plans; 2) national policy; 3) agency statutory requirements; 4) relevant resource issues; 5) application of stipulations that are incorporated as design criteria to avoid or minimize environmental impacts, and 6) public comment.

1. **Resource Management Plan.** This decision is in conformance with 2015 Rocky Mountain Region Record of Decision (ROD), 2015 HiLine and Miles City Approved Resource Management Plans and the associated Final EISs, and the 2009 Butte ROD, Resource Management Plan, and associated FEIS. Each of these RMPs provide opportunities for responsible oil and gas development. All of the parcels are located in areas designated open to oil and gas leasing subject to standard lease terms, moderate constraints such as stipulations that require timing limitations, or major constraints such as stipulations that prohibit surface occupancy and use. Stipulations were applied to all of the lease parcels consistent with the requirements of the RMP.

2. **National Policy**. BLM Manual Section 3120 sets forth the policy and procedures required for competitive oil and gas leasing in accordance with the Federal Onshore Oil and Gas Leasing Reform Act of December 22, 1987, and the regulations in the Competitive Leases Rule, 43 CFR Subpart 3120 (2011). It is the Bureau of Land Management's (BLM) policy to encourage the orderly development of Federal onshore oil and gas resources by offering lands for oil and gas leasing by competitive oral bidding when eligible lands are available. It is also BLM's policy to exercise its discretionary authorities, including its oil and gas leasing authority, through the use of an informed, deliberative process that includes:

    - Communication with the public, tribal governments, and Federal, state, and local agencies;
    - Consideration of current science and other available data;
    - Compliance with existing laws, regulations, and policies; and

- Consideration of important resources and values.

My decision to offer 23 parcels in a lease sale is tiered the analysis in the 2015 HiLine and Miles City RMPs, 2009 Butte RMP, and associated FEIS and further supported by the analysis in the December 11, 2018 Oil and Gas Lease Parcel Sale Environmental Assessment. The EA included a public participation process that included the opportunity for public comment through a scoping and EA comment period, and coordination with other state, federal, and tribal resource management agencies. The EA includes an affected environment and describes effects to resources that could be affected by oil and gas development with stipulations in place to avoid or minimize impacts.

3. **Statutory Requirements**: The EA for this lease sale is tiered to the 2015 HiLine and Miles City RMPs and the 2009 Butte RMP, and associated FEISs, which were developed in compliance with the Mineral Leasing Act (MLA) of 1920, as amended (30 U.S.C. 181 et seq.), Federal Lands and Policy Management Act (FLPMA), National Environmental Policy Act (NEPA), and other applicable laws, regulations, and policies. My decision to offer 23 parcels for lease is consistent with requirements under the MLA to authorize leases of federally owned minerals for oil and gas development through a competitive bidding process, is consistent with the multiple-use and sustained yield mandates under FLPMA, and has satisfied all of the procedural requirements under NEPA.

4. **Relevant Resource Issues**: The EA analyzes the environmental effects to resources that are present in proposed lease parcels and/or resources that could be affected by oil and gas leasing. Consistent with Title 43 Code of Federal Regulations 3131.3, the BLM identified lease stipulations for proposed parcels based upon resource concerns that were identified during previous land use planning processes. Based upon the analysis presented in the EA, I have not identified any significant effects from offering 23 parcels for the lease sale that would require analysis in an Environmental Impact Statement, as defined in 40 CFR §1508.27. Additional site-specific NEPA analysis would occur at the Application for Permit to Drill (APD) stage of development, at which time additional conditions of approval could be identified to address a particular resource concern.

5. **Stipulations**: Appendix G of the Miles City and HiLine RMPs, and Appendix M of the Butte RMP describe all of the stipulations applicable to the applicable planning area that would be applied to future leases within the planning area under the Approved Plan. BLM resource specialists reviewed and applied applicable stipulations to all of the lease parcels consistent with these appendices, which are identified by parcel in Appendix A of the EA, and defined in Appendix B. The BLM will incorporate all of these stipulations as design criteria into any future decision that authorizes oil and gas development.

   A stipulation included in an oil and gas lease shall be subject to modification or waiver only if the authorized officer determines that the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified or if proposed operations would not cause unacceptable impacts. Any requests for exceptions, modifications, and waivers from these stipulations would be processed by the appropriate BLM office at the Application for Permit to Drill (APD) stage of development. Any exceptions, modifications, or waivers that the

authorized officer deems of major public concern or substantial would be subject to public review for at least a 30-day period (43 CFR 3101.1-4).

6. **Public Comment:** The BLM received numerous public comments during the scoping and EA comment periods, and throughout the protest period in opposition to leasing parcels in sage-grouse habitat without demonstrating compliance with prioritization objectives in the RMP. Through public comment and additional analysis, the BLM identified an active sage-grouse lek that was not adequately protected, and deferred three parcels in Beavershead County pending a review of the RMP to determine the adequate level of protection for the area. In addition, 76 parcels in sage-grouse habitat were removed from the December 2018 sale due to ongoing litigation. Therefore, none of the parcels in this sale affect sage-grouse or sage-grouse habitat.

   The BLM also received numerous comments expressing concerns related to water quality impacts to the Tongue River watershed. The BLM responded to public comments by including additional information in the EA.

Recommended by:

Kathryn Stevens, Acting District Manager
Western Montana District

12/7/2018
Date

DIANE FRIEZ Digitally signed by DIANE FRIEZ
Date: 2018.12.07 09:48:07 -07'00'

Diane Friez, District Manager
Eastern Montana/Dakotas District

Date

MARK ALBERS Digitally signed by MARK ALBERS
Date: 2018.12.07 10:50:25 -07'00'

Mark Albers, District Manager
North Central Montana District

Date

Approved by:

JOSHUA ALEXANDER Digitally signed by JOSHUA ALEXANDER
Date: 2018.12.07 13:54:13 -07'00'

Joshua Alexander; Acting Deputy State Director
Division of Energy, Minerals, & Realty

Date

United States Department of the Interior
Bureau of Land Management
Montana / Dakotas State Office
5001 Southgate Drive, Billings MT 59101

BLM

Decision Record
Environmental Assessment
DOI-BLM-MT-0000-2018-0007-EA

Oil and Gas Lease Parcel Sale
March 25-27, 2019

Billings, Glasgow, Havre, Miles City, and South Dakota Field Offices

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Decision

It is my decision to select Alternative C for the March 25-27, 2019 Oil and Gas Lease Parcel Sale. Under Alternative C, the BLM will offer 305 parcels for sale, with standard federal lease terms and conditions, and required stipulations and/or lease notices as identified in Appendix A of the Environmental Assessment (EA); DOI-BLM-MT-0000-2018-0007-EA. The 305 parcels encompass approximately 166,885 Federal mineral acres in Carbon, Musselshell, Blaine, Toole, Valley, Big Horn, Carter, Custer, Fallon, Powder River, Richland, Roosevelt, Rosebud, and Wibaux Counties in Montana and Harding County, South Dakota (Billings, Glasgow, Havre, Miles City, Montana Field Offices and US Forest Service Buffalo Gap National Grassland, South Dakota).

By selecting Alternative C, I am deferring 13480.8 acres, including:

- Eleven parcels in Beaverhead County (9,539.42 acres) and one parcel in Madison County (398.69 acres) because additional analysis is needed to determine the appropriate level of protection for the area.
- One parcel in Bowman County, ND (40 acres) and three parcels in Harding County, SD (1320.0 acres) because off-site development would negatively affect active sage-grouse leks and additional coordination is needed with North and South Dakota to address resource concerns.
- One parcel and parts of four others in Valley County, MT (2182.69 acres) to protect a migratory corridor designated by the State of Montana as a Connectivity Area.
- Note deferred acres listed here were tabulated using the legal description acres

identified in Appendix A, and may differ from that using GIS acres noted in the EA. For example, the Executive Summary and Chapter 2 of the EA report approximately 166,999 Federal Mineral Acres for Alternative C; legal acres from Appendix B is 166,885 acres).

The BLM will offer the 305 lease parcels at a competitive lease sale on March 25-27, 2019 with the stipulations described in Appendix A and B of the EA. The BLM will issue competitive leases for parcels sold at the sale; BLM may issue noncompetitive leases for applications filed during the 2-year period following the sale.

Authorities

The authority for this decision is contained in 43 CFR 3100.

Compliance and Monitoring

Should the parcels be developed, monitoring may be required and would be addressed and analyzed under future NEPA documentation.

Terms, Conditions, and Stipulations

Standard terms and conditions, as well as the lease notices and stipulations identified by parcel in Appendix A and B of the EA, would apply and be attached to all of the parcels.

Plan Conformance and Consistency

BLM Surface and Split Estate Parcels

The 302 BLM surface / split estate parcels covering approximately 166,445 acres (166,885-440) are located in areas designated open to oil and gas leasing in the Billings, HiLine, or Miles City RMPs, subject to standard lease terms, moderate constraints such as stipulations that require timing limitations, or major constraints such as stipulations that prohibit surface occupancy and use. The BLM applied stipulations to the 302 lease parcels consistent with management decisions in the applicable RMPs (Appendix A), including the 2015 Billings, HiLine, and Miles City RMPs, and associated Records of Decision and Final Environmental Impact Statements (FEISs).

US Forest Service Parcels

Three parcels in Fall River County, SD comprising 440 acres are private surface within the administrative boundary of the Buffalo Gap National Grassland (SDM 97300-TP, TT, and TN). The BLM applied stipulations to these parcels consistent with the June 13, 2002 Record of Decision for Oil and Gas Leasing on the Nebraska National Forest / Buffalo Gap National Grassland, Fall River County, South Dakota. The BLM was a cooperating agency on the Oil and Gas Leasing FEIS, and the ROD states:

> The BLM will offer lands for lease and issue leases for lands within the west half of Fall River County, South Dakota, on the Buffalo Gap National Grassland subject to stipulations required by the Regional Forester in Alternative 3 of the FEIS, in accordance with the regulations at 43, CFR 3101.7-2(a).
>
> The BLM will make all (approximately 58,720 acres) non-federal surface/federal mineral (split estate) lands within the administrative boundary of the previously described study area available for oil and gas leasing. These lands will be offered for lease, and leases will be issued subject to the terms and conditions identified in the selected alternative for the FEIS (Alternative 3) with a slight modification for paleontology resources…

Alternatives Considered

No Action. The No Action Alternative (Alternative A) would exclude all 322 lease parcels from the competitive oil and gas lease sale. Surface management would remain the same and any ongoing oil and gas development would continue on surrounding Federal, private, and State leases.

Proposed Action. The Proposed Action (Alternative B) would be to offer for sale 322 lease parcels covering approximately 180,366 Federal mineral acres for oil and gas leasing, with standard federal lease terms and conditions, and required stipulations and/or lease notices as identified in Appendix A of the EA. The 322 parcels includes 76 parcels moved from the December 2018 sale and 233 parcels moved from the June 2018 sale due to litigation. The BLM identified applicable lease stipulations (as required by Title 43 Code of Federal Regulations 3131.3) to individual parcels to address specific resource concerns and ensure consistency with the RMPs.

Alternative C. The Selected Action (Alternative C) would be to offer for sale 305 parcels covering approximately 166,885 Federal mineral acres for oil and gas leasing, with standard federal lease terms and conditions, and required stipulations and/or lease notices as identified in Appendix A of the EA. The stipulations assigned for Alternative B were carried forward to Alternative C. The parcels are located in the Billings, Glasgow, Havre, Miles City Field Offices and within the administrative boundary of the Buffalo Gap National Grassland.

Alternative C was developed based upon consideration of public comment submitted during the comment periods described below, and upon further consideration of relevant science and analysis of resource concerns. Compared to Alternative B, Alternative C would defer eleven parcels in Beaverhead County, one parcel in Madison County, one parcel in Bowman County ND, three parcels in Harding County, SD, and one parcel and parts of four others in Valley County, MT.

Public Comments

On October 11, 2018, the BLM initiated a scoping comment period by uploading project

information to the BLM's NEPA e-Planning website, and mailing notices to interested parties (including private surface owners), tribes, and local, state, and federal agencies.

On November 20, 2018, the BLM posted the EA (DOI-BLM-MT-0000-2018-0007-EA) and a draft unsigned Finding of No Significant Impact (FONSI) to the e-Planning website for a 30-day public review and comment period (November 20-December 21, 2018). The BLM also mailed or emailed a notice to interested parties that the EA was available for review.
On January 31, 2019, the BLM posted an updated EA, response to comments, and unsigned FONSI to the e-Planning website to initiate a 30-day protest period.

The BLM received nine written comments during the scoping period and approximately 95 written comments during the EA comment period for the March 2019 Oil and Gas Lease Sale. The BLM also received a high volume of comments for the December 2018 Lease Sale (of which, 76 parcels in sage-grouse habitat were moved to the March 2019 sale). The BLM reviewed and considered all of the comments that were submitted, and modified the EA in response to substantial public comments. Appendix F of the EA provides a summary of the comments as well as the BLM response. The updated EA includes analysis of Alternative C.

Rationale for the Decision

My decision to approve Alternative C, is based on the following: 1) consistency with the applicable resource management plans; 2) national policy; 3) agency statutory requirements; 4) relevant resource issues; 5) application of stipulations that are incorporated as design criteria to avoid or minimize environmental impacts, and 6) public comment.

1. **Resource Management Plan.** This decision is in conformance with 2015 Rocky Mountain Region Record of Decision (ROD), 2015 Billings, HiLine, and Miles City Approved Resource Management Plans and the associated Final EISs, and the June 13, 2002 Record of Decision for Oil and Gas Leasing and Revised Land and Resource Management Plan for the Nebraska National Forest/Buffalo Gap National Grassland. Each of these plans provide opportunities for responsible oil and gas development. All of the parcels are located in areas designated open to oil and gas leasing subject to standard lease terms, moderate constraints such as stipulations that require timing limitations, or major constraints such as stipulations that prohibit surface occupancy and use. Stipulations were applied to all of the lease parcels consistent with the requirements of each plan.

2. **National Policy**. BLM Manual Section 3120 sets forth the policy and procedures required for competitive oil and gas leasing in accordance with the Federal Onshore Oil and Gas Leasing Reform Act of December 22, 1987, and the regulations in the Competitive Leases Rule, 43 CFR Subpart 3120 (2011). It is the Bureau of Land Management's (BLM) policy to encourage the orderly development of Federal onshore oil and gas resources by offering lands for oil and gas leasing by competitive oral bidding when eligible lands are available. It is also BLM's policy to exercise its discretionary authorities, including its oil and gas leasing authority, through the use of an informed, deliberative process that includes:

    - Communication with the public, tribal governments, and Federal, state, and local agencies;

- Consideration of current science and other available data;
- Compliance with existing laws, regulations, and policies; and
- Consideration of important resources and values.

My decision to offer 305 parcels in a lease sale is tiered the analysis in the 2015 Record of Decision and Approved Resource Management Plan Amendments for the Rocky Mountain Region including North Dakota, and the Approved Resource Management Plans for Billings, HiLine, Miles City, and South Dakota, and associated FEISs. My decision is further supported by the analysis in the Oil and Gas Lease Parcel Sale, March 25-27, 2019 Environmental Assessment. The EA included a public participation process that included the opportunity for public comment through a scoping and EA comment period, and coordination with other state, federal, and tribal resource management agencies. The EA describes the effects of three alternatives, including no action.

3. **Statutory Requirements**: My decision to offer 305 parcels for lease is consistent with requirements under the Mineral Leasing Act to authorize leases of federally owned minerals for oil and gas development through a competitive bidding process, is consistent with the multiple-use and sustained yield mandates under FLPMA, and has satisfied all of the procedural requirements under NEPA.

4. **Relevant Resource Issues**: The EA analyzes the environmental effects to resources that are present in proposed lease parcels and/or resources that could be affected by oil and gas leasing. Consistent with Title 43 Code of Federal Regulations 3131.3, the BLM identified lease stipulations for proposed parcels based upon resource concerns that were identified during previous land use planning processes. Based upon the analysis presented in the EA, I have not identified any significant effects from offering 305 parcels for the lease sale that would require analysis in an Environmental Impact Statement, as defined in 40 CFR §1508.27. Additional site-specific NEPA analysis would occur at the Application for Permit to Drill (APD) stage of development, at which time additional conditions of approval could be identified to address a particular resource concern.

5. **Stipulations**: Appendix S of the Billings RMP and Appendix G of the Miles City and HiLine RMPs describe all of the stipulations applicable to the applicable planning area that would be applied to future leases within the planning area under the Approved Plan. BLM resource specialists reviewed and applied applicable stipulations to all of the lease parcels consistent with these appendices, which are identified by parcel in Appendix A of the EA, and described in Appendix B. The BLM will incorporate all of these stipulations as design criteria into any future decision that authorizes oil and gas development.

   A stipulation included in an oil and gas lease shall be subject to exception, modification or waiver only if the stipulation allows them under certain conditions (refer to Appendix B of the EA), and additional site-specific analysis supports the exemption, modification, or waiver. For example NSO 11-70 (streams, waterbodies, riparian, wetland, and floodplains) does not allow exceptions in streams, natural lakes, or wetlands. However, an exception may be granted for riparian areas, floodplains, and artificial ponds or reservoirs if the operator can demonstrate that there are no practicable alternatives to locating facilities in these areas, the proposed actions would maintain or enhance resource functions, and all reclamation goals and objectives would be met.

Any requests for exceptions, modifications, and waivers from these stipulations would be processed by the appropriate BLM office at the Application for Permit to Drill (APD) stage of development. Any exceptions, modifications, or waivers that the authorized officer deems of major public concern or substantial would be subject to public review for at least a 30-day period (43 CFR 3101.1-4).

6. **Public Comment:** The BLM received numerous public comments during the scoping and EA comment periods, as well as protests that alleged BLM failed to consider an important resource issue or that the decision to lease 305 parcels does not comply with NEPA, FLPA or other federal laws. BLM reviewed public comments to help inform the effects analysis, and develop Alternative C. BLM provided detailed responses in Appendix F of the EA and for the protest responses. Comments that led to the development of Alternative C included:

    - Leasing parcels in Beaverhead and Madison County could allegedly effect sensitive and recreational fisheries, drinking water, and a wilderness study area. By selecting Alternative C, BLM deferred all Beaverhead and Madison County parcels pending additional analysis to determine the appropriate level of protection for the area.
    - Leasing parcels in Valley County (Glasgow Field Office) allegedly fails to consider best science, and could negatively impact migrating sage-grouse in a State of Montana designated Connectivity Area. BLM added discussion of relevant science to the EA. Under Alternative C, BLM deferred parcels in the Connectivity Area to protect resource values.
    - NSO stipulations on parcels in sage-grouse PHMA fall short in protecting sage grouse in PHMA off site on state and private lands. Poorly planned off-site drilling potentially affects sage grouse leks on adjoining public lands. BLM added additional discussion about off-site impacts to the EA. Under Alternative C, BLM deferred three parcels in PHMA in South Dakota and one parcel in North Dakota because off site impacts would negative affect several remaining sage-grouse leks in North and South Dakota, and BLM cannot ensure impacts would be adequately mitigated.

Recommended by:

Mark K. Albers Digitally signed by Mark K. Albers Date: 2019.03.22 08:01:50 -06'00'

Mark Albers, District Manager,
North Central Montana District

Date

Recommended by:

DIANE FRIEZ Digitally signed by DIANE FRIEZ Date: 2019.03.21 17:41:05 -06'00'

Diane Friez, District Manager,
Eastern Montana/Dakotas District

Date

Approved by:

JOSHUA ALEXANDER Digitally signed by JOSHUA ALEXANDER Date: 2019.03.22 08:26:30 -06'00'

Joshua F. Alexander, Acting Deputy State Director,
Division of Energy, Minerals, & Realty

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS, *et al.*, Plaintiffs, v. DEBRA HAALAND,[1] *et al.*, Defendants, and AMERICAN PETROLEUM INSTITUTE, *et al.*, Intervenor-Defendants.	No. 1:20-cv-00056-RC

[PROPOSED] **ORDER**

Upon Intervenor-Defendant American Petroleum Institute's Motion to Dismiss in Part, the Court having considered the submissions of the parties, it is hereby **ORDERED** that the motion is **GRANTED**. It is **FURTHER ORDERED** that Plaintiffs WildEarth Guardians' and Physicians for Social Responsibility's (collectively, "Plaintiffs") First and Second Claims for Relief in their Complaint are **DISMISSED WITH PREJUDICE** pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to comply with the applicable statute of limitations with respect to the leasing decisions for the challenged December 11, 2018 and March 27, 2019 Montana oil and gas lease sales approved and conducted by the Federal Defendants.

[1] Pursuant to Fed. R. Civ. P. 25(d), Secretary of the Interior Debra Haaland has been automatically substituted for former Secretary David L. Bernhardt.

Dated this _____ day of _____, 2021

Honorable Rudolph Contreras
United States District Judge

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