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

Attorneys for Petitioner State of Wyoming

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WESTERN ENERGY ALLIANCE and PETROLEUM ASSOCIATION OF WYOMING, Petitioners, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; DEB HAALAND, in her official capacity as Secretary of the Interior; and THE UNITED STATES BUREAU OF LAND MANAGEMENT, Respondents, and CENTER FOR BIOLOGICAL DIVERSITY, *et al.* ("Conservation Groups"), and ALTERRA MOUNTAIN COMPANY, *et al.* ("Business Coalition"), Intervenor-Respondents.	No. 21-cv-13-SWS (Lead Case) **BRIEF IN SUPPORT OF WYOMING'S PETITION FOR REVIEW OF FINAL AGENCY ACTION**

STATE OF WYOMING, Petitioner, v. THE UNITED STATES DEPARTMENT OF INTERIOR; DEBRA ANNE HAALAND, in her official capacity as Secretary of Interior; THE BUREAU OF LAND MANAGEMENT; NADA CULVER, in her official capacity as acting Director of the Bureau of Land Management; and KIM LIEBHAUSER, in her official capacity as the acting Wyoming State Bureau of Land Management Director, Respondents, and CENTER FOR BIOLOGICAL DIVERSITY, *et al.* ("Conservation Groups"), and ALTERRA MOUNTAIN COMPANY, *et al.* ("Business Coalition"), Intervenor-Respondents.	No. 21-cv-56-SWS (Joined Case)

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INTRODUCTION

The Secretary of Interior regularly held quarterly oil and gas lease sales across the United States under the express direction of Congress for over three decades. This changed on January 27, 2021, after President Biden issued Executive Order 14008, which required the Secretary, consistent with applicable law, to "pause" new oil and gas leasing on public lands and offshore waters pending a review of all federal oil and gas leasing practices. (BLM_I001133-47). The Secretary, through the United States Department of Interior and the Bureau of Land Management (collectively the Secretary[1]), acted on the Executive Order and indiscriminately canceled lease sales nationwide.

The Secretary's "pause" on oil and gas leasing initiated a *de facto* moratorium on lease sales which is subject to review by this Court under the Administrative Procedure Act. The Secretary's action is patently unlawful and must be set aside. Specifically, the Secretary's cancelation of scheduled lease sales: (1) violates the Mineral Leasing Act and its implementing regulations that require quarterly lease sales; (2) is an unlawful mineral withdrawal under the Federal Land Policy and Management Act; (3) violates governing Resource Management Plans which have designated specific areas of the public lands as available to oil and gas leasing; and

[1] "The Secretary" includes acting Secretary Scott de la Vega, Secretary Deb Haaland, and Department of Interior officials exercising delegated authority under Secretarial Order 3395. (*See* BLM_I001130).

(4) violates the National Environmental Policy Act by failing to consider the environmental impacts of suspending federal oil and gas leasing. For these reasons, the Court should declare the Secretary's action unlawful, set aside the *de facto* moratorium, and compel the Secretary to hold the lease sales that were unlawfully withheld as soon as reasonably possible and hold all future quarterly lease sales on time.

BACKGROUND

The Mineral Leasing Act (MLA) has governed federal leasing of oil and gas resources on public lands for over 100 years. *See* 30 U.S.C. §§ 181-287. Initially, the Secretary retained broad discretion to lease oil and gas resources on public lands. *See United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 419 (1931). In 1976, however, Congress limited the Secretary's discretion to withdraw lands from mineral leasing with the passage of the Federal Land Policy and Management Act (FLPMA). *See, e.g.*, 43 U.S.C. § 1714. In 1987, Congress subsequently amended the MLA to require the Secretary to hold competitive lease sales "at least quarterly" where eligible lands are available for leasing. Federal Onshore Oil and Gas Leasing Reform Act, Pub. L. No. 100-203, § 5102, 101 Stat. 1330-256 (1987). From 1987 until the Secretary began implementing Executive Order 14008, quarterly federal oil and gas lease sales were a "routine and continuing" occurrence under this statutory framework. *See, e.g., S. Utah Wilderness All.*, 166 IBLA 270, 277-78 (2005).

A. Mineral Leasing Act

Congress amended the MLA in 1987 with the following language: "[l]ease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary." 30 U.S.C. § 226(b)(1)(A); Pub. L. No. 100-203, § 5102, 101 Stat. at 1330-256. Federal regulation similarly provides that "[e]ach proper BLM S[t]ate office shall hold sales at least quarterly if lands are available for competitive leasing." 43 C.F.R. § 3120.1-2(a).

When Congress amended the MLA in 1987, it rejected a proposal that would have authorized the Secretary to "delay or postpone" quarterly lease sales. *Compare* Legislation to Reform the Federal Onshore Oil and Gas Leasing Program: Hearing Before the Sub Comm. on Mining and Natural Resources of the H. Comm. on Interior and Insular Affairs, 100th Cong. 7 (1987), *with* 30 U.S.C. § 226(b). Following the passage of the 1987 MLA amendments, the Assistant Solicitor at the Department of Interior concluded, "[Section 226(b)(1)(A)] requires a quarterly lease sale wherever eligible lands are available for leasing. The Committee reports indicate that **Congress did not intend to give the Secretary any discretion in this regard**." (BLM_I000008) (emphasis added). The Assistant Solicitor then explained, "[w]e must caution, however, that the obligation to hold quarterly lease sales carries

with it the responsibility to plan the activities necessary to have eligible lands available for sale." (BLM_I000009).

A broad swath of the public domain is eligible and available for oil and gas leasing. Any lands not excluded from leasing by a statutory or regulatory prohibition are eligible for leasing. *W. Energy All. v. Zinke*, 877 F.3d 1157, 1162 (10th Cir. 2017); (BLM_I000008). For example, National Park lands, Indian reservations, incorporated cities and towns, petroleum reserves, and lands recommended or designated as wilderness are not eligible for leasing. 43 C.F.R. § 3100.0-3(a)(2). From the federal lands eligible for leasing, the applicable resource management plan (RMP) identifies the lands that are available for oil and gas leasing. *W. Energy All.*, 877 F.3d at 1161; BLM Manual 3120 at .1(.11) (2013).[2]

The Bureau manages federal oil and gas resources through a three-phase decision-making process. First, it develops the RMPs. 43 U.S.C. § 1712; 43 C.F.R. Part 1600. Generally, an RMP "describes, for a particular area, allowable uses, goals for future condition of the land, and specific next steps." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 59 (2004) (hereinafter *SUWA*). When developing RMPs, the Bureau "prepare[s] an environmental impact statement" in compliance with NEPA. *Id.* at 72; 43 C.F.R. § 1601.0-6. The public must have a chance "to meaningfully participate in and comment on the preparation [and] amendment[]" of

[2] https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual3120.pdf

RMPs. 43 C.F.R. § 1610.2(a); *see also Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1129 (10th Cir. 2006). All subsequent activity on the land, including oil and gas development, must conform to RMPs. *See* 43 C.F.R. § 1610.5-3(a).

During the second phase of federal oil and gas leasing, Bureau state offices identify which specific parcels to offer for lease in a competitive lease sale. *See* 43 C.F.R. Subpart 3120. Lands available for leasing "shall be offered for competitive bidding" and include, but are not limited to, "[l]ands included in any expression of interest." 43 C.F.R. § 3120.1-1(e). The Bureau generally posts the lease sale notice and NEPA compliance documentation at least ninety calendar days prior to holding a competitive lease sale. BLM Manual 3120 at .52. Notices must be posted at least forty-five days before conducting a competitive lease sale. 43 C.F.R. § 3120.4-2.

In the final stage, the Bureau decides whether to permit specific oil and gas projects on leased lands. *See* 30 U.S.C. § 226(g). It regulates surface activities on leased lands and sets reclamation and other conservation requirements before drilling occurs. *See* 43 C.F.R. § 3162.3-1 (providing for drilling applications and plans).

B. Federal Land Policy Management Act

FLPMA governs the Secretary's management of public lands. At its core, FLPMA is a planning statute. *See Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 555 (9th Cir. 2006). To accomplish this objective, the Secretary must

"develop, maintain, and, when appropriate, revise land use plans which provide … for the use of public lands." 43 U.S.C. § 1712(a). The Secretary's land use planning objectives are adopted in RMPs, which are prepared and maintained by Bureau state offices following public input. *See Id.*; 43 C.F.R. § 1610.1(b).

The "main thrust" of FLPMA is to ensure that management actions conform to RMPs. George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. Colo. L. Rev. 307, 324-25 (1990). FLPMA prohibits the Secretary from taking actions inconsistent with the provisions of RMPs. *See SUWA,* 542 U.S. at 69; 43 U.S.C. § 1732(a) ("The Secretary shall manage the public lands … in accordance with the land use plans developed by him[.]"); 43 C.F.R. § 1610.5-3(a) ("All future resource management authorizations and actions … shall conform to the approved plan."). The Secretary is allowed to change an RMP, but only through a formal land use amendment process that includes public participation. *See* 43 U.S.C. § 1712; *see also* 43 C.F.R. §§ 1610.1-1610.8. RMP amendments are "major federal actions" with potential environmental impacts that must also be assessed under NEPA. 42 U.S.C. § 4332(2)(C); *see also New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 689 (10th Cir. 2009).

When FLPMA was enacted, Congress eliminated the Executive Branch's implied authority to withdraw federal lands from mineral extraction. *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 856 (9th Cir. 2017) (citing Pub. L. 94-579, § 704, 90

Stat. 2743, 2792 (1976)). FLPMA conditions withdrawal on the Secretary's adherence to strict procedures. *See id.* at 856-57. Congress has defined a "withdrawal" as:

> [W]ithholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than "property" governed by the Federal Property and Administrative Services Act, as amended from one department, bureau or agency to another department, bureau or agency.

43 U.S.C. § 1702(j).

Before making any withdrawal, FLPMA requires the Secretary to publish notice in the Federal Register, afford an opportunity for public hearing and comment, and obtain consent from any other department or agency involved in the administration of lands. 43 U.S.C. § 1714(b), (h), (i); *see also Nat'l Mining Ass'n*, 877 F.3d at 856. The Secretary's notice must include an inventory of the current natural resource uses and values of the land and a clear explanation of the proposed use which led to the withdrawal. *See, e.g.*, 43 U.S.C. § 1714(c)(2).

FLPMA also allows the Secretary to "segregate" lands for up to two years while considering a withdrawal proposal. *See* 43 U.S.C. § 1714(b)(1); *see also* 43 C.F.R. § 2310.2. However, when the Secretary proposes to segregate lands on her own motion, FLPMA requires the Secretary to publish a notice in the Federal

Register describing "the extent to which the land is to be segregated while [a withdrawal] application is being considered[.]"43 U.S.C. § 1714(b)(1).

C. National Environmental Policy Act

NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives. *See New Mexico ex rel. Richardson*, 565 F.3d at 703 (citations omitted). "NEPA has two aims, [] it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action" and "it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1236-37 (10th Cir. 2011) (citations omitted).

Before embarking upon any "major federal action," an agency must conduct an environmental assessment (EA) to determine whether the action "significantly affects the quality of the human environment." *New Mexico ex rel. Richardson*, 565 F.3d at 703 (quoting 42 U.S.C. § 4332(2)(C)). The "human environment" comprehensively means "the natural and physical environment and the relationship of present and future generations of Americans with that environment." 40 C.F.R. § 1508.1(m). Impacts to the human environment include ecological, aesthetic, historic, cultural, economic, social, or health effects. 40 C.F.R. § 1508.1(g)(1). Impacts also include actions which may result in "both beneficial and detrimental

effects, even if on balance the agency believes that the effect is beneficial." *Id.; see also WildEarth Guardians v. Conner*, 920 F.3d 1245, 1261 (10th Cir. 2019).

If the action does not significantly affect the human environment, the agency may issue a "finding of no significant impact" (FONSI). 40 C.F.R. § 1508.1(*l*). But if the action results in a significant impact, the agency must prepare a thorough environmental impact statement (EIS) assessing the predicted impacts of the proposed action on all aspects of the environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. Part 1502. In an EIS, federal agencies must take a "hard look" at environmental impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citation omitted). Agencies must also consider alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14.

NEPA prohibits uninformed agency action. *Utah Shared Access All. v. U.S. Forest Serv.*, 288 F.3d 1205, 1207-08 (10th Cir. 2002). For example, agencies must publish a draft EIS for public comment and respond to those comments in the final EIS. 40 C.F.R. §§ 1502.9, 1503.1, 1503.4. The purpose of soliciting public comment is to "inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. When preparing an EIS, the Bureau must also request comment from state agencies, local governments, and interested persons or organizations. 43 C.F.R. § 46.435(b). These procedural requirements ensure that the

agency, in reaching its decision, will make relevant information available to the public who may have a role in both the decision-making process and the implementation of that decision. *See Robertson*, 490 U.S. at 349.

D. The Secretary's Action

The Wyoming Bureau office prepared for the First Quarter 2021 lease sale by collecting parcel nominations, deciding which specific parcels to include in the sale, and releasing the EA and FONSI for comment in November 2020. (BLM_I000246-557; BLM_I000558-67). Other Bureau state offices also prepared for First Quarter 2021 lease sales by releasing similar environmental review documents in 2020. (*See* BLM_I000568-1128).

On January 20, 2021, the Secretary issued Order 3395, which temporarily removed authority for all Interior bureaus, including state-level offices, to authorize any onshore or offshore fossil fuel activity including leasing. (BLM_I001129-30). Under Order 3395, the Department of Interior's decisionmaking authority was vested in only the Secretary, Deputy Secretary, Solicitor, and six Assistant Secretaries. (*Id.*).

President Biden then issued Executive Order 14008 on January 27, 2021, which requires:

> To the extent consistent with applicable law, the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices in light of the

> Secretary of the Interior's broad stewardship responsibilities over the public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters.

86 Fed. Reg. at 7624-25 (Feb. 1, 2021).

The next day, on January 28, 2021, the Bureau submitted a briefing paper to the Assistant Secretary for Land and Minerals Management to request direction on how to manage First Quarter 2021 lease sales. (BLM_I001313-15). The Bureau acknowledged Executive Order 14008, Order 3395, and the Bureau's obligation to hold quarterly lease sales. (*Id.* at I001313). The Bureau also stated that it "paused" lease sale notices for scheduled March 2021 lease sales in Wyoming and other states. (*Id.* at I001313-14) ("The [Wyoming] Sale Notice is paused and has not been issued."). The Bureau then identified three options for the Secretary to consider in response to Executive Order 14008:

> Option 1 – Continue with the planned upcoming lease sales.
>
> Option 2 – The BLM is obligated to offer parcels when "eligible lands are available." The DOI could make the decision that none of the lands are available, as the BLM will be reviewing the existing criteria under availability based on the land use plans to determine if additional analysis is necessary.
>
> Option 3 – Prioritize offering only parcels within the planned upcoming lease sales to focus on parcels that are addressing drainage, including unleased lands accounts, and the protection of federal mineral resources from trespass.

(*Id.* at I001314-15).

The Wyoming Bureau office requested secretarial authorization to notice the First Quarter 2021 lease sale scheduled for March 23-26 on February 4, 2021. (BLM_I001156-57). Several other Bureau state offices also requested authorization to notice lease sales on February 4, 2021. (*See* BLM_I001148-55). On February 12, 2021, Senior Advisor Laura Daniel-Davis (exercising the Secretary's delegated authority) concurred with a recommendation from the Acting Deputy Solicitor to postpone quarterly lease sales across the nation purportedly based on concerns about compliance with NEPA. (BLM_I001169-70).

The Secretary's decision with respect to Wyoming was based on the conclusion that the Bureau had not prepared an EA for the proposed Wyoming lease sales. (BLM_I001170) ("The complete lack of environmental analysis for proposed lease sales in Utah and Wyoming make it impossible for BLM to ascertain and evaluate the impacts of the proposed lease sales in those states … ."). Bureau communications staff then directed Bureau state offices on February 12, 2021, to update their websites with identical notices stating "BLM lease sales in Colorado, Montana, Utah, and Wyoming are postponed to confirm the adequacy of underlying environmental analysis." (BLM_I002415; *see also* BLM_I001171-73).

On February 18, 2021, the Secretary published a Federal Register notice rescinding the Record of Decision for the Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sale 257 to "comply with Executive Order 14008." Gulf of

Mexico, Outer Continental Shelf, Oil and Gas Lease Sale 257, 86 Fed. Reg. 10132 (Feb. 18, 2021). Next, the Secretary published a Federal Register Notice on February 23, 2021, rescinding the public review period for the Cook Inlet, Alaska Lease Sale 258 "in response to Executive Order 14008." Withdrawal of the Public Review Period for Cook Inlet Lease Sale 258, 86 Fed. Reg. 10994 (Feb. 23, 2021). Unlike notices for onshore quarterly lease sales which are posted on Bureau state office websites, sale notices for offshore lease sales must be published in the Federal Register. *See* 30 C.F.R. § 556.304(c); BLM Manual 3120 at .5(.52).

On February 24, 2021, Laura Daniel-Davis expressed concern that the New Mexico Bureau Office posted, without authorization, that the lease sale scheduled for April 15, 2021, was postponed. (*See* BLM_I002420-22). The New Mexico Bureau Office posted the postponement based on its "perception" that all future lease sales were postponed. (*Id*. at I002420). It agreed to prepare a memorandum for suitability review under Order 3395 and noted that information for the lease sale was posted in November 2020 for public comment and "[t]he NEPA is ready." (BLM_I002423). The New Mexico lease sale scheduled for April 15, 2021, was subsequently postponed with no further explanation.[3]

[3] *See* https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/new-mexico

Although the Secretary acknowledged in her February 18, 2021 Federal Register notice that the Department was complying with Executive Order 14008, on February 24, 2021, Laura Daniel-Davis stated that, with respect to quarterly lease sales, "there's not a blanket policy even with the direction of the EO." (BLM_I002421). Nevertheless, on March 1, 2021, email communication between senior Interior Department staff acknowledged that the Secretary postponed consideration of Second Quarter 2021 lease sales "pending decisions on how the Department will implement the Executive Order[.]" (BLM_I001180).

Secretary Haaland was confirmed by the Senate and sworn into office on March 16, 2021. (Press Release, *Statement from Deb Haaland on Becoming the 54th Interior Secretary* (Mar. 16, 2021)).[4] On March 25, 2021, Secretary Haaland acknowledged in prepared remarks that the "pause" was in effect and "gives us space to look at the federal fossil fuel programs." (ECF No. 51-1 at 2). The Secretary announced on April 21, 2021, that the Bureau was "exercising its discretion to not hold lease sales in the 2nd quarter of Calendar Year 2021." (ECF No. 51-5 at 1); *See also* Prepared Remarks of Nada Wolff Culver, Bureau of Land Management, Deputy Director of Policy & Programs before the U.S. Senate Committee on Energy & Natural Resources at 6 (Apr. 27, 2021) ("[T]he pause on new leasing is not only

[4] https://www.doi.gov/news/statement-deb-haaland-becoming-54th-interior-secretary

prudent, but necessary").[5] The Secretary provided no further information about the postponement and did not hold the Second Quarter 2021 lease sale in Wyoming or any other state.

On June 15, 2021, the United States District Court for the Western District of Louisiana granted a nationwide preliminary injunction enjoining the Secretary from implementing the "pause" on quarterly oil and gas lease sales. *See Louisiana v. Biden*, No. 2:21-CV-00778, 2021 WL 2446010, at *22 (W.D. La. June 15, 2021).

The Third Quarter 2021 Wyoming lease sale is scheduled for the week of September 20, 2021. (BLM_I002428). Despite assurances that the Secretary is complying with the injunction issued by the Western District of Louisiana, the Secretary has not issued a public notice for this lease sale under 43 C.F.R. § 3120.4-2. Instead, the Secretary advised the Western District of Louisiana on August 24, 2021, that she has no intention of conducting a quarterly lease sale in the 2021 calendar year. Decl. of Principal Deputy Assistant Secretary for Land & Mineral Mgmt. Laura Daniel-Davis at 10, *Louisiana v. Biden*, No. 2:21-CV-00778-TAD-KK (W.D. La. June 15, 2021) (ECF No. 155-1) ("BLM then anticipates that it will publish notices of competitive sale in December 2021, followed by holding a lease sale approximately forty-five days after the lease sale notices are posted."). As a

[5] https://www.energy.senate.gov/services/files/7D526CBD-0034-437C-914B-3A70A63FA287

consequence of the Secretary's action, not a single quarterly lease sale has been held in Wyoming or any other lease sale in the United States since President Biden issued Executive Order 14008.

E. Federal Oil and Gas Leasing Revenue in Wyoming

Wyoming receives 49% of all revenue collected from federal oil and gas leasing within the state, including revenue from competitive leasing, non-competitive leasing, and bonus bids. 30 U.S.C. § 191(a). The first $200 million in revenue that Wyoming receives each year from federal oil and gas development is distributed by a formula: education (44.80%), highway fund (30.375%), cities and counties (9.375%), the University of Wyoming (6.75%), capital construction (3.75%), school construction (2.70%), and county roads (2.25%). Wyo. Stat. Ann. § 9-4-601(a). Revenue that Wyoming receives over $200 million is distributed to the state's budget reserve account (66.67%) and the school foundation program (33.33%). *Id.* at § 9-4-601(d).

Wyoming ranks first in the nation for natural gas production on federal lands and second for oil production. (ECF No. 45-3, ¶ 5 (Obermueller Aff., Case No. 21-cv-00056 (Mar. 24, 2021)). Wyoming also receives considerable revenue from federal oil and gas leasing to support government services. From November 2016 through March 2019, Wyoming estimates that it received $193 million in bids from federal oil and gas lease sales conducted by the Bureau. (ECF No. 45-5, ¶ 6 (Smith

Aff., Case No. 21-cv-00056 (Mar. 24, 2021)). In 2020, Wyoming received approximately $5.7 million in revenue directly from federal quarterly lease sales held by the Bureau. (*Id.* ¶ 8).

Revenue from federal oil and gas leasing accounts for a significant portion of the budget for the State of Wyoming. (*See id.* ¶¶ 5-6, 11). Once oil and gas resources are developed on federal land, Wyoming also receives royalty revenue from federal oil and gas production from leased lands. *See* 30 U.S.C. § 191(a). In fiscal year 2020, Wyoming's combined share of federal mineral sales, bonuses, royalties, and rentals totaled $488 million. (ECF No. 45-5, ¶ 11). Wyoming, independently, imposes severance taxes on oil and gas production, including production on federal land. *See* Wyo. Stat. Ann. §§ 39-14-203(a), -204(a). Wyoming counties also collect ad valorem tax revenue from oil and gas produced from federal land. Wyo. Const. art. 15, § 3; Wyo. Stat. Ann. § 39-13-102(m). In some Wyoming counties where oil and gas development is the most active, this revenue makes up over 50% of the county's annual budget. (ECF No. 45-6, ¶ 22 (Willox Aff., Case No. 21-cv-00056 (Mar. 24, 2021)). The suspension of federal oil and gas leasing not only eliminates a direct source of revenue to Wyoming, but also results in additional losses of state revenue because oil and gas resources go undeveloped.

STANDARD OF REVIEW

This Court reviews whether the Secretary's actions comply with FLPMA, the MLA, and NEPA under the standard set forth in § 706 of the Administrative Procedure Act (APA). *See Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998) (reviewing FLPMA and NEPA claim); *and Wyoming v. U.S. Dep't of Interior*, 493 F. Supp. 3d 1046, 1060-62 (D. Wyo. 2020) (reviewing MLA claim). The APA authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); *see also Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997). "[A] claim under [Section] 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 63.

The APA also authorizes courts to "hold unlawful and set aside agency action" found to be arbitrary and capricious or without observance of procedure required by law. 5 U.S.C. § 706(2)(A), (D); *see also Am. Wild Horse Pres. Campaign v. Jewell*, 847 F.3d 1174, 1186 (10th Cir. 2016). "[T]he essential function of judicial review is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (citations omitted). The task of the reviewing court is to apply the appropriate APA standard of review

to the agency decision based on the record the agency presents to the reviewing court. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (citation omitted).

Under the arbitrary and capricious standard, a court must ascertain "whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Olenhouse*, 42 F.3d at 1574. The agency must provide a reasoned basis for its action and the action must be supported by the facts in the record. *Id.* at 1575. Agency action is arbitrary if not supported by "substantial evidence" in the administrative record. *Id.*; *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1156 (citation omitted). "Because the arbitrary and capricious standard focuses on the rationality of an agency's decisionmaking process rather than on the rationality of the actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Olenhouse*, 42 F.3d at 1575 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 50 (1983)).

ARGUMENT

The Secretary's decision to blindly implement Executive Order 14008 was a final agency action and the cancelation of quarterly oil and gas lease sales was

agency action unlawfully withheld. Even if the Secretary had the discretion to cancel all lease sales, which she does not, the Secretary's action was based on a false pretext and she did not provide an adequate explanation. The Secretary's *de facto* moratorium on leasing also violated FLPMA by unlawfully withdrawing lands and amending RMPs without adhering to procedures prescribed by Congress. Finally, the institution of a nationwide policy to stop leasing on federal lands is a major federal action and the Secretary violated NEPA by failing to consider the environmental impacts of her decision before implementing the "pause" on lease sales.

The Secretary's violations of the law fall into three categories subject to review by this Court under the APA: (1) agency action unlawfully withheld; (2) agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; and (3) agency action without observance of procedure required by law. *See* 5 U.S.C. § 706(1)-(2).

I. The suspension of federal oil and gas leasing is final agency action.

In this case and the Louisiana litigation, the Secretary has asserted that her cancelation of every lease sale in the country since the Executive Order is not a final agency action subject to review. *See* (ECF No. 52 at 21); *see also* Def.'s Mem. Opp'n to Pl.'s Mot. Prelim. Inj., *Louisiana v. Biden* at 13, No. 2:21-CV-00778-TAD-KK (W.D. La. May 19, 2021) (ECF No. 120). But the Secretary's actions, public

statements, and the administrative record uniformly contradict her assertion. The Secretary adopted a final, binding decision to stop holding quarterly oil and gas lease sales in response to Executive Order 14008. Although cleverly disguised, the Secretary's cancelation of lease sales constitutes final agency action reviewable by this court.

The United States Supreme Court has established a two-part test to determine whether agency action is final. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Agency action is final when it "mark[s] the consummation of the agency's decisionmaking process" and when the action is one "by which rights or obligations have been determined, or from which legal consequences will flow[.]" *Id.* (internal quotation marks and citation omitted); *see also Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173-74 (10th Cir. 2000) (reaffirming the standard). "The label an agency attaches to its action is not determinative." *Cont'l Air Lines v. Civil Aeronautics Bd.*, 522 F.2d 107, 124 n.5 (D.C. Cir. 1974) ("[W]hat is decisive is the substance of what is done."). The Secretary's suspension of federal oil and gas leasing satisfies both prongs of the *Bennett* test.

The Secretary's action to implement a suspension of scheduled federal oil and gas lease sales marks the consummation of the Secretary's decisionmaking process because the decision resulted in "direct and immediate" impacts. *See Colo. Farm Bureau Fed'n*, 220 F.3d at 1173 (citation omitted). Her action to implement, without

hesitation, Executive Order 14008 resulted in a cascading chain of cancellations and postponements. For example, immediately following the issuance of Executive Order 14008, lease sale notices in Wyoming, Utah, Colorado, Montana/Dakotas, and the Eastern States were suddenly "paused" without any explanation. (*See* BLM_I001313-14). Despite individual requests to the Secretary from Bureau state offices to proceed with lease sales, the Secretary made a blanket decision not to hold any First Quarter 2021 lease sales. (*See* BLM_I001148-57; BLM_I001169). Courts consider whether the practical effects of an agency's decision make it a final agency action, regardless of how it is labeled. *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014). Here, the Secretary's decision to implement the "pause" satisfies the first element of the *Bennett* test because it led directly to lease sales not being noticed and the cancelation of lease sales.

Significant legal consequences also flowed from the Secretary's action because suspending federal oil and gas lease sales "alter[ed] the legal regime to which the [agency action] is subject." *Bennett*, 520 U.S. at 169 (1997). Before the Secretary's action, federal regulation required quarterly lease sales and the Bureau held lease sales regularly on a quarterly basis. *See, e.g.,* 43 C.F.R. § 3120.1-2(a). The Secretary's action eviscerated the quarterly lease sale requirement in federal regulation and in effect changed the law. However, nothing in statute, prior regulation, or case law authorizes the Secretary to enforce a wholesale suspension

of federal lease sales. To the contrary, the Secretary has a statutory obligation under the MLA to hold lease sales at least quarterly, and "more frequently if the Secretary of the Interior determines such sales are necessary." 30 U.S.C. § 226(b)(1)(A). Because the Secretary also prevented Bureau state offices from issuing sale notices and holding lease sales, the Secretary's action has appreciable legal consequences. (BLM_I001129-30); *Bennett*, 520 U.S. at 178. The Secretary's cancelation of quarterly lease sales, therefore, satisfies the second prong of the *Bennett* test.

The Secretary cannot evade judicial review by merely claiming her action is "interim" in nature. *Connecticut v. U.S. Dep't of Interior*, 363 F. Supp. 3d 45, 59 (D.D.C. 2019) ("Couching a final decision in preliminary terms does not make it less final."). Courts measure administrative finality pragmatically, looking to "whether the impact of the [agency action] is sufficiently 'final' to warrant review in the context of the particular case." *Citizens Ass'n of Georgetown v. FAA*, 896 F.3d 425, 431 (D.C. Cir. 2018) (citations omitted); *Sierra Club v. Yeutter*, 911 F.2d 1405, 1417-18 (10th Cir. 1990). Here, the impact of the Secretary's action is sufficiently final with respect to the First and Second Quarter 2021 Wyoming lease sales because those sales did not happen. *See Friedman v. FAA*, 841 F.3d 537, 544 (D.C. Cir. 2016) (finding that an agency consummated its decisionmaking process when it "set deadlines, counted down towards them, and then allowed them to pass without discussion; its actions suggest the [agency] ha[d] made up its mind, yet it [sought]

to avoid judicial review by holding out a vague prospect of reconsideration"); *see also Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) ("[The court's] precedents make clear that an interim agency resolution counts as final agency action despite the potential for a different permanent decision, as long as the interim decision is not itself subject to further consideration by the agency.").

Nor does it matter that the Secretary did not issue any formal order suspending federal oil and gas lease sales. Courts routinely acknowledge that "agency action … need not be in writing to be final and judicially reviewable" under the APA. *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015); *see also Grand Canyon Tr. v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249, 1252 (D.N.M. 2003) (holding that "[b]oth law and logic" dictate that an unwritten agency policy is reviewable). An unwritten policy can still satisfy the APA's pragmatic final agency action requirement. *Venetian Casino Resort LLC v. EEOC*, 530 F.3d 925, 929 (D.C. Cir. 2008).

In this case, the Secretary's attempts to conceal her decision made it no less final. Quarterly lease sales were not noticed, the sales did not happen, and Wyoming was deprived of its share of revenue that federal law affords states directly from federal lease sales. The Secretary's March 25, 2021 public acknowledgement that the pause exists demonstrates that she adopted a final agency action through an unwritten policy that led to the cancelation of quarterly lease sales. (ECF No. 51-1

at 2). This Court should not allow the Secretary to evade judicial review merely because her decision was not made in writing. *R.I.L–R*, 80 F. Supp. 3d at 184 (quoting *FTC v. Standard Oil Co. of Cal.,* 449 U.S. 232, 239 (1980)) ("Denying review of agency action that is essentially conceded but ostensibly unwritten would fly in the face of the Supreme Court's instruction that finality be interpreted 'pragmatic[ally].'").

Final agency action can also come from a "series of agency pronouncements rather than a single edict." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 n.7 (D.C. Cir. 1986). The Secretary's pause of oil and gas lease sales, as a whole, constitutes a final agency action. However, the Secretary's action resulted in a series of individual lease sale postponements that this Court can similarly view as final agency actions in and of themselves. *See Louisiana,* 2021 WL 2446010, at *12-13. No matter how the Secretary characterizes the action, her individual decisions to cancel First and Second Quarter lease sales in Wyoming and around the United States are subject to review as final agency actions under the APA. *See id.* at *14.

II. The Secretary violated the Mineral Leasing Act.

A. The Secretary's failure to hold quarterly lease sales was agency action unlawfully withheld.

The Secretary violated the MLA when she implemented the "pause" and did not hold quarterly lease sales. The Secretary has a mandatory obligation under the MLA to hold quarterly lease sales of eligible and available lands. *See* 30 U.S.C. §

226(b). Her refusal to hold quarterly lease sales is reviewable under 5 U.S.C. § 706(1) because she "failed to take a *discrete* agency action that [she] is *required to take*." *SUWA*, 542 U.S. at 64.

First, the obligation to hold lease sales "at least quarterly" is a discrete agency action. *See SUWA*, 542 U.S. at 63. Congress amended the MLA in 1987 to require that lease sales "be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary." Pub. L. 100-203, § 5102, 101 Stat. at 1330-256. Federal regulation subsequently codified the Secretary's duty to hold quarterly lease sales. 43 C.F.R. § 3120.1-2(a). The quarterly lease sale requirement is a discrete agency action because the MLA requires the Secretary to perform a specific action at clear, statutorily imposed, intervals. *SUWA*, 542 U.S. at 63 (distinguishing an agency "denial" with a discrete action subject to review under 5 U.S.C. § 706(1) that requires action by a statutory deadline).

Second, the MLA imposes a non-discretionary duty upon the Secretary to hold quarterly lease sales. "The Supreme Court and [the Tenth Circuit] have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (citing *United States v. Monsanto*, 491 U.S. 600, 607 (1989)). The use of the word "shall" in Section 226(b)(1)(A) provides the Secretary with no

discretion to ignore Congress. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 190-92 (D.C. Cir. 2016) (finding that a statute imposes a mandatory duty by providing that certain actions "shall" occur within specified time frames). At least one court has agreed that the decision to hold quarterly lease sales is mandatory. S*ee W. Energy All. v. Jewell*, No. 1:16-cv-912, 2017 WL 3600740, at *7 (D.N.M. Jan. 13, 2017) (unpublished) ("BLM is under no such discretion and 'shall' hold lease sales for each state **where eligible parcels are available at least quarterly**."). The Secretary's own Solicitors Office has similarly interpreted Section 226(b)(1)(A) as requiring quarterly lease sales. (BLM_I00008) ("The Committee reports indicate that Congress did not intend to give the Secretary any discretion in this regard.").

The Secretary attempts to evade her statutory duty by concluding that there are no **"eligible"** or **"available"** lands for leasing because the Bureau allegedly did not complete its NEPA analysis. (BLM_I001170) (emphasis added). However, "[a]dministrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991).

The implementing regulations for the MLA establish the framework for conducting lease sales at least quarterly. *See* 43 C.F.R. § 3120.1-2(a). Lands "eligible" for leasing are described in 43 C.F.R. § 3100.0-3. (BLM_I000008); *see also W. Energy All.* 877 F.3d at 1162. The Secretary retains no discretion to lease

"ineligible" lands. (BLM_I000008). Lands "available" for leasing are described in 43 C.F.R. § 3120.1-1 and include, but are not limited to lands where leases have terminated or expired, lands subject to drainage, lands included in any expression of interest, and lands selected by the authorized officer. *See* 43 C.F.R. § 3120.1-1. When the regulation requiring quarterly lease sales of available land was promulgated in 1988, the then-Secretary explained **"[t]he term 'available' means any lands subject to leasing under the Mineral Leasing Act."** 53 Fed. Reg. 22814, 22828 (June 17, 1988) (emphasis added).

Instead of relying on her own regulations, the Secretary appears to rely on definitions in the Bureau Manual that were not subject to the notice-and-comment rulemaking process. (*See* ECF No. 52 at 5). According to the Manual, "[l]ands **eligible** for leasing include those identified in 43 CFR 3100.0-3 as being subject to leasing, i.e., lands not excluded from leasing by a statutory or regulatory prohibition." BLM Manual 3120 at .1(.11) (emphasis added). "Lands are **available** for leasing when they are open to leasing in the applicable resource management plan, and when all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act (NEPA)." *Id*. (emphasis added).

The Secretary, however, cannot rely on the Bureau Manual for several reasons. First, agencies cannot use a guidance document to render an interpretation

that is manifestly contrary to the statute or agency's own regulations. *See Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984). Second, this Court does not owe *Chevron*-style deference to the Secretary's interpretation in the Bureau Manual because it does not carry the force of law. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). Third, the Secretary's decision documents do not reference the Bureau Manual as a basis for the decision to cancel lease sales. (*See* BLM_I001169-70; BLM_I001313-14). Finally, the administrative record does not contain the relevant portions of the Bureau Manual that the Secretary could have relied on in making her decision to cancel lease sales.[6] This Court cannot uphold final agency action on a basis the agency does not itself articulate in its decisionmaking process. *See Olenhouse*, 42 F.3d at 1575 ("[I]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

[6] The administrative record only includes a portion of a Bureau Handbook, Section H 3101-1, relating to the adjudication of **lease issuances**. (*See* BLM_I000013-18). Bureau handbooks are used to implement the Bureau Manual. Wyoming, however, has challenged the Secretary's failure to hold **competitive lease sales**. (ECF No. 1 at 4-5 (Wyo. Pet., No. 21-cv-56 (Mar. 24, 2021)). The relevant portion of the Bureau Manual governing competitive lease sales is found at Section 3120-1. *See* BLM Manual 3120.

The Secretary's failure to hold quarterly lease sales allows this Court to compel agency action unlawfully withheld. *See Rounds v. U.S. Forest Serv.*, 301 F. Supp. 2d 1287, 1293-94 (D. Wyo. 2004). "When agency recalcitrance is in the face of clear statutory duty or is of such a magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates." *Pub. Citizen Health Research Grp. v. Comm'r, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984); *see also Marathon Oil Co.*, 937 F.2d at 500 (holding that "[a]dministrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform").

B. The Secretary's failure to hold quarterly lease sales was arbitrary and capricious.

Even if she had the discretion to cancel all lease sales, which she does not, the Secretary's cancelation of the First and Second Quarter 2021 lease sales was arbitrary, capricious, and an abuse of discretion. This Court may review the Secretary's implementation of the "pause" as a series of pronouncements about individual lease sales because courts view final agency action pragmatically. *Yeutter*, 911 F.2d at 1417; *see also Ciba-Geigy Corp.*, 801 F.2d at 435 n.7. The Secretary's justification for canceling the First Quarter 2021 lease sale in Wyoming was based on a false pretext and, with respect to the Second Quarter 2021 lease sale, the Secretary did not provide any explanation for the cancelation. This Court may set

aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance to law." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41.

1. The Secretary's cancelation of First Quarter 2021 Lease Sales failed to take into account the mandatory language in the MLA requiring quarterly lease sales.

The Secretary's cancelation of First Quarter 2021 lease sales was based on a determination that all parcels proposed for that sale "are not now 'eligible' and 'available' because, at minimum, BLM has not completed its NEPA analysis." (BLM_I001170). Her decision regarding the proposed First Quarter lease sale in Wyoming was based on the determination that "BLM has not prepared Environmental Assessments" for the proposed lease sale. (*Id.*).

The Secretary's explanation for canceling First Quarter lease sales did not consider a necessary relevant factor – the statutory obligation to hold quarterly oil and gas lease sales. In the decision document canceling First Quarter lease sales in Wyoming and several other states, the Secretary made no reference to the mandatory language in the MLA requiring quarterly lease sales. Notably, her explanation **omitted** the "shall" and "at least quarterly" language from 30 U.S.C. § 226(b)(1)(A):

> Any decision to postpone would comply with the Mineral Leasing Act. That Act provides that oil and gas lease sales "be held for each State where eligible lands are available." 30 U.S.C. § 226(b)(1)(A)(c). The parcels proposed for each of the above lease sale are not now "eligible" and "available" because, at a minimum, BLM has not completed its NEPA analysis.

(BLM_I001170).

The Secretary's silence on the relevant provisions of the statute is deafening in light of the Department of Interior's own interpretation of the 1987 amendments to the MLA. Specifically, the Assistant Solicitor concluded, "[w]e must caution, however, that the obligation to hold quarterly lease carries with it the responsibility to plan the activities necessary to have eligible lands available for sale." (BLM_I000009). Agency action is arbitrary and capricious when the agency ignores the plain language of a statute. *See GasPlus, LLC v. U.S. Dep't of Interior*, 510 F. Supp. 2d 18, 33 (D.D.C. 2007). In making the decision to cancel First Quarter lease sales, the Secretary threw caution to the wind and did not acknowledge, consider, and explain how the decision complied with the congressional requirement to hold lease sales "at least quarterly."

The Secretary's decision was also arbitrary and capricious because canceling the First Quarter lease sales due to concerns that the Bureau had not completed its NEPA analysis runs directly counter to the evidence in the administrative record. The Secretary canceled the First Quarter Wyoming lease sales on the basis that "[t]he complete lack of environmental analysis for proposed sales in [Wyoming] make it impossible for BLM to ascertain and evaluate the impacts of the proposed lease sales[.]" (BLM_I001170). The Bureau, in fact, published a draft EA for the First Quarter Wyoming lease sale on November 13, 2020, and it is included in the administrative record. (BLM_I00246-557; *see also* BLM_I000256). The Wyoming

Bureau office's request for authorization to notice the First Quarter lease sale in Wyoming cited to this draft EA and did not raise any concern about any deficiencies with the document. (BLM_I001156). The Secretary's decision, which rested on a conclusion that no environmental analysis was prepared for the Wyoming lease sale, was contrary to the evidence before her.

Even if the Bureau had in fact failed to prepare any environmental analysis for the First Quarter lease sale, the Secretary cannot base her decision to cancel lease sales on her inability, or more accurately, refusal to complete NEPA analysis in a timely manner. *See Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788 (1976) ("[W]here a clear and unavoidable conflict in statutory authority exists, NEPA must give way … '[a]s NEPA was not intended to repeal by implication any other statute.'") (internal citation omitted). The Secretary had an obligation to ensure that she met her statutory duty under the MLA to hold quarterly lease sales and complete the necessary NEPA analysis in advance. (*See* BLM_I000009). This Court should set aside the Secretary's pretextual justification for canceling lease sales because it is incongruent with the administrative record, and therefore, is arbitrary and capricious. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

2. The Secretary failed to provide an explanation for the cancelation of Second Quarter 2021 Lease Sales.

The Secretary's failure to prepare an environmental analysis or post a lease sale notice for the Second Quarter 2021 Wyoming lease sale was also arbitrary, capricious, and an abuse of discretion. The Secretary must post notices for competitive quarterly lease sales at least forty-five days before the sale. 43 C.F.R. § 3120.4-2. The Bureau maintains a practice of posting lease sale notices and NEPA compliance documents at least ninety calendar days prior to holding a competitive auction. BLM Manual 3120 at .52. Wyoming filed its Petition for Review after the Secretary failed to publish the NEPA compliance documentation or a sale notice for the Second Quarter 2021 lease sale. (ECF No. 1 at 5-6 (Wyo. Pet., No. 21-cv-00056 (Mar. 24, 2021)).

The Secretary provided no reasoning, explanation, or justification for canceling Second Quarter 2021 lease sales other than the following statement in a press release and on Bureau websites: "the Bureau of Land Management is exercising its discretion to not hold lease sales in the 2nd quarter of Calendar Year 2021." (ECF No. 51-5). The Secretary also provided no legal basis for the discretion that she exercised nor any explanation for the grounds in which the Second Quarter lease sale was canceled.

Where an agency has not stated any reasons to support a decision, its decision is arbitrary and capricious for failure to "articulate a satisfactory explanation."

Devon Energy Prod. Co., LP v. Gould, 421 F. Supp. 3d 1213, 1221 (D. Wyo. 2019) (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). The Secretary's single sentence justification for canceling Second Quarter lease sales is not a satisfactory explanation. There is no precedent since the enactment of the 1987 amendments to the MLA that allows the Secretary to unilaterally exercise "discretion" to cancel all lease sales. Additionally, the Secretary has not produced any evidence in the administrative record that supports the Secretary's "discretion." The Secretary's cancelation of Second Quarter 2021 lease sales is arbitrary and capricious because the Secretary failed to provide an explanation for the action. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41.

III. The Secretary violated the Federal Land Policy and Management Act.

The Secretary's cancelation of quarterly lease sales violated FLPMA and its implementing regulations because the action closed vast areas of the public domain previously open to oil and gas leasing without following procedures prescribed by law. The Secretary violated FLPMA by unlawfully withdrawing the entire public domain from federal oil and gas leasing. The Secretary's action also was inconsistent with existing RMPs that designate which federal lands are available for oil and gas leasing. Because the Secretary's action was not in accordance with the law this Court has the authority to set it aside. *See Mountain States Legal Found. v. Hodel*, 668 F.

Supp. 1466, 1473 (D. Wyo. 1987) (citing 5 U.S.C. § 706(2)(A)); *see also* 5 U.S.C. § 706(2)(D).

A. The Secretary's withdrawal of all federal land from oil and gas leasing violates FLPMA.

President Biden issued Executive Order 14008 for the purported purpose of assessing the potential climate impacts resulting from federal oil and gas leasing. 86 Fed. Reg. at 7624-25. The Secretary's action implementing Executive Order 14008 violated FLPMA because it unlawfully withdrew federal land from sale and entry in order to further that purpose. *See Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383, 391 (D. Wyo. 1980); 43 U.S.C. § 1714(c)(1).

The Secretary's action was clearly a withdrawal under FLPMA. A withdrawal makes land unavailable for certain kinds of private appropriation under the public land laws. *S. Utah Wilderness All. v. BLM*, 425 F.3d 735, 784 (10th Cir. 2005). FLPMA defines withdrawal as:

> **[W]ithholding an area of Federal land from** settlement, **sale, location, or entry, under some or all of the general land laws,** for the purpose of limiting activities under those laws **in order to maintain other public values** in the area or reserving the area for a particular public purpose or program …

43 U.S.C. § 1702(j) (emphasis added). Congress has also associated the term withdrawal with the exclusion of lands from operation of the Mineral Leasing Act. *See* 43 U.S.C. § 1714(*l*); *see also Pac. Legal Found. v. Watt*, 529 F. Supp. 982, 996 (D. Mont. 1981). On two occasions, this Court has held that suspending mineral

leasing constitutes a withdrawal under FLPMA. *See Andrus*, 499 F. Supp. at 391; *see also Hodel*, 668 F. Supp. at 1474 (citing *Pac. Legal Found.*, 529 F. Supp. at 995-97). Moreover, an action by the Secretary that makes land unavailable for even a short amount of time can constitute a withdrawal because the Secretary's authority to withdraw large tracts of land is limited expressly to **temporary** withdrawals. *See Nat'l Mining Ass'n*, 877 F.3d at 856 (citing 43 U.S.C. § 1714(c)).

Here, the Secretary removed millions of acres of federal land from sale or entry under the MLA. Suspending oil and gas leasing in the name of climate preservation withdraws land from the operation of the MLA "to maintain other public values." *See Andrus*, 499 F. Supp. at 392 ("To withhold vast tracts of land from oil and gas leasing for the purpose of wilderness preservation is, to withdraw and withhold the lands from the purposes and operation of the Mineral Leasing Act."). Thus, the Secretary's action suspending federal oil and gas lease sales constitutes a "withdrawal" under FLPMA.

FLPMA also requires the Secretary to follow certain procedural requirements before withdrawing lands. *See* 43 U.S.C. § 1714(a) ("[T]he Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions of [Section 1714]"). Before a withdrawal, the Secretary must conduct an inventory of the resources subject to withdrawal, notice the action in the Federal Register, and hold a public hearing. 43 U.S.C. § 1714(b)(1), (c)(2), (h). Here, the

Secretary conducted no such inventory, issued no notice in the Federal Register, and held no public hearing before suspending federal oil and gas lease sales and closing off millions of federal acres to leasing. The Secretary's failure to comply with Section 1714 is an abuse of discretion and not in accordance with law. *Hodel*, 668 F. Supp. at 1475; *Andrus*, 499 F. Supp. at 395 ("[I]t was the intent of Congress with the passage of FLPMA to limit the ability of the Secretary of the Interior to remove large tracts of public land from the operation of the public land laws by generalized use of his discretion authorized under such laws."). Because Congress retained for itself control over the use and disposition of federal land, this Court should enjoin the Secretary from continuing the suspension of all federal lease sales in Wyoming. *See New Mexico v. Watkins*, 969 F.2d 1122, 1138 (D.C. Cir. 1992) (upholding district court's permanent injunction of Secretary for exceeding withdrawal authority under FLPMA).

The Secretary has suggested she has the authority to "segregate" land for up to two years while considering a withdrawal proposal. (ECF No. 52 at 30). The Secretary, however, did not properly segregate lands before withdrawing the entire public domain from oil and gas leasing. FLPMA requires that "whenever [the Secretary] proposes a withdrawal on [her] own motion, the Secretary shall publish in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which land is to be segregated … from

the operation of public lands laws[.]" 43 U.S.C. § 1714(b). According to the FLPMA implementing regulations, a "segregation" is "the removal for a limited period, subject to valid existing rights, of a specified area of the public lands from the operation of the public land laws … pursuant to the exercise by the Secretary of regulatory authority to allow for the orderly administration of the public lands." 43 C.F.R. § 2300.0-5(m). By removing millions of acres from the operation of the MLA, the Secretary did not follow the procedure prescribed by law for segregating lands.

Congress set forth specific procedures the Secretary must follow to effect particular types of withdrawals. *See Yount v. Salazar*, 933 F. Supp. 2d 1215, 1237 (D. Ariz. 2013). The Secretary's failure to adhere to any procedural requirements in FLPMA, including publishing notice and holding hearings, before removing substantial portions of the public domain from the operation of the MLA is unlawful and should be set aside as failing to observe procedure required by law. 5 U.S.C. § 706(2)(D); *see also Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 374-75 (6th Cir. 2010) (finding that agency's failure to follow regulation for revising a land management plan was without observance of procedure required by law).

B. The Secretary violated FLPMA by unlawfully amending existing RMPs.

The Secretary's suspension of federal oil and gas leasing also violated FLPMA's land planning requirements. Under FLPMA, federal land management

decisions must conform to the approved RMP. 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a). This statutory directive prevents the Bureau from "taking actions inconsistent with the provisions of a land use plan." *SUWA*, 542 U.S. at 69. The existing RMPs identify which lands are open or closed to oil and gas leasing. *See W. Energy All.*, 877 F.3d at 1161. In other words, lands "available" for leasing are those open to leasing in the applicable RMP. *Id.* at 1162. Unless and until the RMP is amended, unlawful land use plan amendments can be set aside as contrary to law under 5 U.S.C. § 706(2). *SUWA*, 542 U.S. at 69.

Here the Secretary's action violates dozens of governing RMPs across the United States that designate millions of federal acres as "available" to oil and gas development. At least ten RMPs govern management decisions in Wyoming over approximately twenty-nine million acres of federal mineral estate. *Programs: Planning and NEPA: Plans in Development: Wyoming*.[7] The Casper RMP alone designates 1,080,935 acres of federal land as available for leasing subject to standard conditions as well as 2,506,530 acres available for leasing under moderate constraints. (U.S. Bureau of Land Management, Wyoming State Office – Casper Field Office, *Record of Decision and Approved Casper Resource Management Plan*

[7] https://www.blm.gov/programs/planning-and-nepa/plans-in-development/wyoming

at 2-16 (Dec. 2007)).[8] Before an agency action can change "the scope of resource uses" or the "terms, conditions and decisions" of the RMP, the Secretary must first amend the RMP. *Klamath Siskiyou Wildlands Ctr.*, 468 F.3d at 556. Here, the Secretary did not lawfully amend existing RMPs and instead unilaterally determined millions of acres of federal land in Wyoming and across the United States are simply no longer "available" for leasing.

The administrative record reveals how the Secretary justified making federal land not available for leasing without amending RMPs. On January 28, 2021, the day after Executive Order 14008 was issued, the Bureau presented the Secretary with three options for how to proceed with the "pause." (BLM_I001314). Option 1 was to continue with planned lease sales. (*Id.*). Option 2 acknowledged the Secretary's obligation to offer parcels when "eligible lands are available" and recommended "[t]he DOI could make the decision that none of the lands are available, as the BLM will be reviewing the existing criteria under availability based on the land use plans to determine if additional analysis is necessary." (*Id.*). Option 3 was to offer only a limited set of parcels that would help the Bureau "address[] drainage, including unleased lands accounts, and the protection of federal mineral resources from trespass." (BLM_I001315).

[8] https://eplanning.blm.gov/public_projects/63199/200115978/20036679/250042876/Casper%20RMP-ROD%20Updated%202020.pdf

On February 12, 2021, Senior Advisor Laura Daniel-Davis, exercising delegated authority from the Secretary, concurred with a recommendation from the Acting Deputy Solicitor that adopted Option 2 – simply declare that all lands are not "available" for federal oil and gas leasing because the Bureau has not completed NEPA. (BLM_I001169-70). With respect to Wyoming, the Solicitor's memo states "BLM has not prepared Environmental Assessments for proposed lease sales in [Utah/Wyoming]." (BLM_I001170). The Solicitor's memo concludes that "[t]he Utah and Wyoming sales do not satisfy NEPA because they are not accompanied by any environmental analysis." (*Id.*).

The Secretary's justification for making public land not "available" for leasing in Wyoming is dubious for two reasons. First, the Bureau requested the Secretary's authorization to conduct the First Quarter Wyoming 2021 lease sale on February 4, 2021. (BLM_I001156-57). The Bureau's request to hold the First Quarter lease sale in Wyoming made no reference to inadequate or missing NEPA analysis. (*See id.*). Instead, the Bureau acknowledged that it was ready to post the appropriate draft EA with the sale notice and that the Bureau believed "[c]oncerns raised in ongoing litigation … will be satisfactorily addressed in the Environmental Assessment and Protest Decision before any lease is issued." (BLM_I001157).

Second, the Solicitor's memo published eight days after the Bureau's request provided a recommendation to not hold the First Quarter Wyoming lease sale based

on the premise that the Bureau "has not prepared Environmental Assessments" for the proposed lease sale. (BLM_I001170). In fact, the Bureau prepared a draft EA and FONSI in November 2020. (*See* BLM_I000246-567). The administrative record demonstrates the Bureau was not working from a blank slate with respect to NEPA when it sought the approval to hold the First Quarter Wyoming lease sale.

This Court should set aside the Secretary's action suspending quarterly lease sales because it contravened governing RMPs and, therefore, violates FLPMA. *See Mont. Wildlife Fed'n v. Bernhardt*, No. 4:18-CV-00069, 2020 WL 2615631, at *8-11 (D. Mont. May 22, 2020); *see also W. Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1227-28 (D. Idaho 2005). Additionally, the Secretary's purported justification for canceling the First Quarter Wyoming lease sale was not only after-the-fact but was arbitrary and capricious because the Secretary failed to articulate a rational connection between the facts found and the decision made. 5 U.S.C. 706(2)(A); *see also New Mexico ex rel. Richardson*, 565 F.3d at 713. The administrative record shows that the EA for the First Quarter Wyoming lease sale existed and that the Bureau was prepared to move forward with the lease sale. (BLM_I001156-57; BLM_I000246-557) Instead, the Secretary improperly determined the lands were not "available" for leasing under the false pretext that the NEPA analysis simply did not exist.

IV. The Secretary violated the National Environmental Policy Act

NEPA requires federal agencies to "look before they leap." Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and Peak Behind the Curtains*, 100 Geo. L.J. 1507, 1510 (2012). The Secretary's action here does just the opposite. In the name of further environmental review, the Secretary suspended oil and gas leasing nationwide without first considering the environmental impacts as required by NEPA. Even if the Secretary is correct in assuming that suspending federal oil and gas leasing will only result in beneficial impacts to the environment, she was not excused from complying with the substantive requirements of NEPA before taking action. *See Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248, 1259 (D. Idaho 2001). Because NEPA is a procedural statute, the Secretary's failure to consider the environmental impacts before implementing the "pause" was arbitrary, capricious, and not in accordance with the law. *See* 5 U.S.C. § 706(2)(A).

To establish an injury-in-fact from failure to perform a NEPA analysis, a litigant must show: 1) that in making its decision without following the NEPA's procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm; and 2) that this increased risk of environmental harm injures its concrete interest. *Comm. to Save Rio Hondo v. Lucero,* 102 F.3d 445, 449 (10th Cir. 1996). Here, the Secretary's decision failed to consider the impact that the

"pause" will have on the environment and the injuries to Wyoming's recreational opportunities and public lands. The unexamined impacts of the "pause" that Wyoming identifies will intensify the longer the Secretary withholds quarterly lease sales. *See id*. at 449 n.4.

A. The Secretary's "pause" triggered NEPA.

The Secretary violated NEPA by failing to prepare an EIS before suspending federal oil and gas leasing because suspending all quarterly lease sales is a major federal action. Under NEPA, the federal government must prepare an EIS on "major federal actions significantly affecting the quality of the human environment." *High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217, 1223 (10th Cir. 2020) (citing 42 U.S.C. § 4332(2)(C)). A major federal action can include the adoption of a policy to implement an executive directive. 40 C.F.R. § 1508.1(q)(3)(iii). A major federal action can also include the adoption of an official policy which substantially alters agency programs or the adoption of formal plans which prescribe alternate uses of federal resources upon which future agency actions will be based. See 40 C.F.R. § 1508.1(q)(3)(i-ii). The Secretary's suspension of federal leasing triggers NEPA on both grounds.

For example, a policy that suspends an entire class of activities on federal land constitutes a major federal action and requires the preparation of an EIS. *See, e.g., California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 894, 903-04

(N.D. Cal. 2006); *see also Sierra Club v. Morton*, 514 F.2d 856, 878 (D.C. Cir. 1975), *rev'd on other grounds sub nom. Kleppe v. Sierra Club*, 427 U.S. 390 (1976) ("It is [the court's] view that when the federal government, through exercise of its power to approve leases, mining plans, rights-of-way, and water option contracts, attempts to 'control development' of a definite region, it is engaged in a regional program constituting major federal action within the meaning of NEPA, whether it labels its attempts a 'plan,' a 'program,' or nothing at all.").

Additionally, the Secretary's action to suspend all federal oil and gas leasing "is a coherent plan of national scope, and its adoption surely has significant environmental consequences." *Kleppe*, 427 U.S. at 400. The Secretary was obligated to complete NEPA before suspending federal oil and gas leasing programs nationwide because the "pause" is a major federal action. *See Davis v. Morton*, 469 F.2d 593, 597-98 (10th Cir. 1972) (enjoining a leasing decision on tribal lands until an EIS was completed); *see also Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) ("If any 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared before the action is taken."). The Secretary's suspension of all federal oil and gas leasing was also a *de facto* RMP amendment, triggering NEPA requirements. 43 C.F.R. § 1601.0-6 ("Approval of a resource management plan is considered a major Federal action significantly

affecting the quality of the human environment."). No matter how the Secretary characterizes its "pause" on leasing, it is a major federal action.

Decisions about federal lease sales routinely require some environmental analysis under NEPA.[9] The Secretary's cancelation of all lease sales, however, goes beyond routine and justifies the preparation of an EIS. The Secretary disturbed the status quo of all oil and gas leasing on federal land. *See Citizens for Clean Energy v. U.S. Dep't of Interior*, 384 F. Supp. 3d 1264, 1278 (D. Mont. 2019) (explaining that secretarial order on federal coal leasing "changed the status quo" under NEPA); *see also Comm. for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-03 (D.C. Cir. 1979) ("The duty to prepare an EIS normally is triggered when there is a proposal to change the status quo."). There is no doubt the Secretary changed the regulatory status quo when she contravened statute and federal regulation by stopping all quarterly lease sales.

The Secretary also cannot avoid her obligations under NEPA by presenting the cancelation of lease sales as a series of independent actions. Under NEPA, agencies cannot "segment" their proposals in a manner that disguises their

[9] *See, e.g., New Mexico ex rel. Richardson*, 565 F.3d at 718 (concluding that an EIS was necessary at the leasing stage "[b]ecause BLM could not prevent the impacts resulting from surface use after a lease issued"); *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009) (EIS is required when the effects of a lease sale are "highly uncertain."); *WildEarth Guardians v. Bernhardt*, No. 1:19-cv-00505-RB-SCY, 2020 WL 6799068, at *15 (D.N.M. Nov. 19, 2020) (EA was adequate for 68,232 acre federal oil and gas lease sale).

environmental effects. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987).

The Secretary also cannot presume that suspending an entire class of activity on federal lands will result in no environmental impact. Other courts recognize that NEPA equally applies to actions which serve to "leave nature alone" including nationwide actions to change or limit management on federal lands. *Idaho ex rel. Kempthorne*, 142 F. Supp. 2d at 1259 (finding the Forest Service was required to prepare an EIS prior to adopting rule preserving roadless areas in national forests, although the rule did not alter the natural physical environment). Either way, the Secretary was obligated to consider the environmental consequences of suspending federal oil and gas leasing and failed to do so before enforcing the President's Executive Order.

B. The Secretary did not consider the environmental impacts before implementing the "pause."

The Secretary did not evaluate **any** potential environmental impacts before canceling all leasing on federal land. NEPA requires agencies to take a "hard look" at the environmental consequences of proposed actions. 42 U.S.C. § 4332(2)(C)(ii); *Robertson*, 490 U.S. at 350 (citation omitted). The "hard look" requirement ensures that the "agency has adequately considered and disclosed the environmental impact of its actions and that the decision is not arbitrary and capricious." *Utah Shared Access All.*, 288 F.3d at 1208. The administrative record is incontrovertible that the

Secretary did not consider any environmental impacts of her decision to suspend all leasing on federal land. The Secretary violated NEPA by taking action before considering the impacts of moving oil and gas production overseas and eliminating the funding source for conservation programs that promote recreational opportunities in Wyoming.

Suspending federal oil and gas leasing in the United States moves production, and any associated environmental impacts, overseas to other oil producing nations. (Jennifer A. Dlouhy & Ari Natter, *Biden Poised to Freeze Oil and Coal Leasing on Federal Land* (Bloomberg Green (Jan. 21, 2021)) (quoting Dan Naatz, senior vice-president with the Independent Petroleum Association of America) ("A leasing ban is just going to ship that production to Saudi Arabia, to Russia, where there are far less stringent environmental controls.")).[10] This impact includes shifting production to OPEC nations, such as Algeria, Nigeria, and Iraq with higher rates of carbon intensity for producing a single barrel of oil than the United States. (*See* Mohammad S. Masnadi et al., *Global carbon intensity of crude oil production*, 361 Science 6405, at 5-6, 8 (Aug. 31, 2018)).[11]

[10] https://www.bloomberg.com/news/articles/2021-01-21/biden-poised-to-freeze-oil-and-coal-leasing-on-federal-land

[11] https://www.osti.gov/servlets/purl/1485127

The environmental impact of shifting oil and gas production overseas is potentially significant, but remains unknown because the Secretary did not perform any NEPA analysis before implementing her decision. Greenhouse gas emissions of "outsourcing" production are amplified by the fact that foreign sources of crude oil have varying levels of environmental controls, must be transported to the United States, and may have physical characteristics that increase environmental impacts. For example, imported crude oils are on average heavier (often with higher sulfur content) and are sourced from countries with fewer regulations on venting and flaring during the production process. (National Energy Technology Laboratory, *An Evaluation of the Extraction, Transport and Refining of Imported Crude Oils and the Impact on Life Cycle Greenhouse Gas Emissions*, DOE/NETL-2009/1362 at ES-1 (Mar. 27, 2009)).[12]

The Secretary cannot rely on an unsupported assumption that her cancelation of all lease sales will result in no environmental consequences. *See, e.g., Rocky Mountain Wild. v. Vilsack*, Case No. 09-cv-01272-WJM, 2013 WL 3233573, at *3 n.3 (D. Colo. June 26, 2013) ("[A] court cannot accept at face value an agency's supported conclusions."). The Secretary's assumption that her action will result in no environmental consequences is arbitrary and capricious because it lacks any

[12] https://ethanolrfa.org/wp-content/uploads/2015/09/An-Evaluation-of-the-Extraction-Transport-and-Refining-of-Imported-Crude-Oils-and-the-Impact-on-Life-Cycle-Greenhouse-Gas-Emissions-.pdf

support in the administrative record. *See, e.g., WildEarth Guardians v. BLM*, 870 F.3d 1222, 1235 (10th Cir. 2017). Additionally, the Secretary's action was an uninformed decision that ignored basic supply and demand principles and failed to provide any rationale as to why shifting the production of oil and gas resources would not result in environmental consequences under NEPA. *See id.* at 1237-38.

The Secretary's action also violated NEPA by suspending the federal oil and gas leasing program without considering the impacts to conservation programs that rely on funding directly from federal offshore oil and gas lease sales. Federal action impacting outdoor recreation falls within the scope of NEPA analysis. *See, e.g., Biodiversity Conservation All. v. U.S. Forest Serv.*, No. 2:11-CV-226, 2012 WL 3264523, at *6 (D. Wyo. July 27, 2012) (unpublished); *see also High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1199 (D. Colo. 2014). Congress enacted the Land and Water Conservation Fund (LWCF) Act, currently codified at 54 U.S.C. §§ 200301 through 200310, to benefit persons using outdoor recreation resources. *Sportsmen's Wildlife Def. Fund v. U.S. Dep't of Interior*, 949 F. Supp. 1510, 1519 (D. Colo. 1996). The LWCF Act achieves this goal by providing outdoor recreation grants to both states and federal agencies. *See* 54 U.S.C. § 200304(b)(1)-(2). Approximately $900 million in annual receipts from offshore oil and gas leasing under the Outer Continental Shelf Lands Act directly

support LWCF Act programs. *The Great American Outdoors, P.L 116-152* (2020)[13]; 54 U.S.C. § 200302.

Wyoming received over $4.8 million in obligated funds from the LWCF Act between 2015 and 2020. (ECF No. 45-1, ¶ 6 (Glenn Aff., Case No. 21-cv-00056 (Mar. 24, 2021)). Wyoming relied on LWCF Act funds for maintenance at state parks, for the construction of playgrounds, and for supporting other outdoor recreational opportunities. (*Id.*). The Secretary's action threatens the $1.8 million Wyoming expected to receive from LWCF in 2021. (*Id.* ¶ 7). These 2021 LWCF Act funds are intended to support the construction of new trails on the Platte River Parkway in Casper, the development of open space and cross-country ski trails in Sheridan, and the upgrading of pedestrian trails in Teton County to make Miller Park ADA accessible. (*Id.*). The Secretary's "pause" on offshore federal leasing means fewer LWCF Act dollars are available to Wyoming to fund these projects. (*Id.* ¶ 5). Because parks and outdoor recreation play an important role in community health, cuts to LWCF Act funding are likely to result in adverse mental and physical health impacts to Wyoming citizens. (*Id.* ¶ 10).

[13] Prior to the passage of The Great American Outdoors Act, P.L. No. 116-152, 134 Stat. 682, in August 2020, funds for LWCF were subject to appropriation by Congress. The Great American Outdoors Act provided mandatory funding for LWCF activities from offshore oil and gas leasing revenue. https://www.everycrsreport.com/reports/IF11636.html

The Secretary's suspension of offshore federal oil and gas leasing has an equally harmful impact on federal lands in Wyoming. In 2020, Congress directed federal agencies to use $1.9 billion in federally-allocated LWCF Act monies to address deferred maintenance needs at national parks, national forests, and other federal recreation sites. (*Id.* ¶ 12). The National Park Service alone has identified millions of dollars in deferred maintenance needs in Wyoming at Yellowstone National Park, Grand Teton National Park, Devils Tower National Monument, Fossil Butte National Monument, and Fort Laramie National Historical Site (*Id.*). The Secretary's action jeopardizes the funding source needed to meet the deferred maintenance needs on federal lands and adversely impacts the enjoyment of those visiting federal lands in Wyoming. (*See id.*).

The Secretary's failure to consider the impacts to outdoor recreation before enforcing a "pause" on federal oil and gas leasing violates NEPA. *See Nat'l Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523, 1533 (10th Cir. 1993) (finding agency failure to consider effects on recreational interests violates the APA).

C. The Secretary did not provide notice and an opportunity for comment before implementing the "pause."

"The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information, and the public has been informed regarding the decision-making process." 40 C.F.R. § 1500.1(a). The implementing regulations provide for varying levels of notice and comment at each stage of the

NEPA process. *See, e.g.*, 43 C.F.R. § 46.305(c) (bureaus must publish notices for a finding of no significant impact); 43 C.F.R. § 46.435(a) (bureaus must seek public comment when initiating an EIS); 43 C.F.R. § 46.230 (bureaus must to the fullest extent possible collaborate with cooperating agencies). Throughout the NEPA process, "the public must be informed and its comments considered." *New Mexico ex rel. Richardson*, 565 F.3d at 704. The Secretary did not provide any notice or opportunity to comment on her action suspending federal oil and gas leasing before she took action.

Wyoming actively participates in decisions involving federal oil and gas leasing. (*See* ECF No. 45-4, ¶ 6 (Scoggin Aff., Case No. 21-cv-00056 (Mar. 24, 2021)). Wyoming's participation in the NEPA process includes its role as a cooperating agency. *See* 43 C.F.R. § 46.225(a). The purpose of having cooperating agencies is to emphasize agency cooperation in the NEPA process. *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1262 (D. Wyo. 2004). When the federal government fails to meet its obligations with respect to cooperating agencies under NEPA, the court may set aside the agency action. *See id.* at 1262, 1266.

The Secretary committed to a plan of action before engaging in an objective, good faith inquiry into the environmental consequences of suspending all quarterly lease sales. *See Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010). When an agency predetermines the NEPA analysis by committing

itself to an outcome, the agency likely failed to take a hard look at the environmental consequences of its actions and, therefore, acted arbitrarily and capriciously. *Sierra Club v. Bostick*, 539 F. App'x 885, 893 (10th Cir. 2013) (citing *Davis v. Mineta*, 302 F.3d 1104, 1112-16 (10th Cir. 2002)), *abrogated on other grounds by Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016). Here, the Secretary enforced Executive Order 14008 blindly, without any consideration of the environmental consequences or any input from the public.

CONCLUSION

Executive Order 14008 directed the Secretary to "pause" oil and gas leasing "consistent with applicable law." (BLM_I001138). Rather than taking this action transparently and adhering to the law, the Secretary instead instituted a *de facto* moratorium by indiscriminately canceling all lease sales. After the dust settled, the Secretary then attempted to justify her action using a *post hoc* rationale that has no basis in fact or the record. This she cannot do. This Court, like the court in Louisiana, should conclude that the Secretary's cancelation of lease sales is unlawful and set it aside.

Accordingly, this Court should declare the Secretary's action unlawful, set aside the *de facto* moratorium, and compel the Secretary to hold the lease sales that were unlawfully withheld as soon as reasonably possible and hold all future quarterly lease sales on time.

Submitted this 30th day of August 2021.

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

Attorneys for Petitioner
State of Wyoming

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,998 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type style requirements of D. Wyo. Local Civ. R. 10.1(a) and Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Word 2010 in 14 point font size and Times New Roman.

/s/ *Travis Jordan*

CERTIFICATE OF SERVICE

I certify that on this 30th day of August 2021, I electronically filed the foregoing with the Clerk of the U.S. District Court for the District of Wyoming and served all parties using the CM/ECF system.

/s/ *Travis Jordan*