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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WESTERN ENERGY ALLIANCE and PETROLEUM ASSOCIATION OF WYOMING, Petitioners, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; DEB HAALAND, in her official capacity as	**No. 21-CV-13-SWS (Lead Case)**

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.

STATE OF WYOMING,

Petitioner,

v.

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

Respondents, and

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

Intervenor-Respondents.

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

RESPONDENTS' OPPOSITION TO WYOMING'S BRIEF ON THE MERITS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Wyoming asks the Court to infer the existence of a *de facto* blanket moratorium on agency leasing based on little more than Wyoming's skepticism and misinformation about how the agency implemented Executive Order 14,008. The Court, in Wyoming's view, should: ignore that that the agency's decision documents identify compliance with the National Environmental Policy Act (NEPA)—not such a moratorium—as the basis for leasing postponements; overlook that the administrative record explicitly reflects the absence of a "blanket policy" against leasing; and disregard that the Department of the Interior sold and issued oil and gas leases while the alleged moratorium was supposedly in effect. Simply put, Wyoming requests that the Court review an alleged agency action that the administrative record explicitly states did not exist when Wyoming filed its petition.

Wyoming tries in two ways to overcome the lack of record support for the supposed *de facto* moratorium that it seeks to challenge. It first directs the Court to a variety of post-petition agency activity that is irrelevant to its case because jurisdiction must exist from the outset of the suit. If Wyoming believes Interior adopted a *de facto* moratorium at some time after it filed suit, its appropriate remedy was to file a new or supplemental petition challenging that post-petition activity so that the Court could undertake judicial review based on an appropriate

administrative record. Wyoming has not done so, and thus the Court lacks jurisdiction over that activity.

Wyoming next asks the Court to dismiss Interior's NEPA concerns as a pretextual cover for the agency's true motivation: implementing the leasing pause directive of Executive Order 14,008. But "court[s] may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019). Instead, to reject the agency's stated rationale as pretextual, Wyoming must provide irrefragable proof that the stated rationale was contrived. Wyoming has provided no such evidence, let alone irrefragable proof.

Far from being pretextual, Interior's NEPA concerns were shared by the prior administration. A November 2020 district court decision rejected how the Bureau of Land Management (BLM) approached evaluating the greenhouse gas (GHG) impacts of its Wyoming leasing decisions under NEPA. Shortly after that decision issued, the prior administration recognized that the decision placed nearly eighteen months of BLM-Wyoming lease sales at risk because those sales used the same approach to GHG analysis that had just been rejected. And the prior administration explicitly determined that preparing remediative NEPA analysis in accordance with that court decision would take substantial time.

Wyoming may be frustrated that nearly five years of BLM-Wyoming leasing decisions are subject to challenge before a court that has twice rejected BLM's NEPA analysis. Having elected not to appeal those decisions, however, Wyoming cannot collaterally attack those decisions by asking this Court to force BLM to hold lease sales before it has prepared corrective NEPA analysis. Not only would such an approach force the agency to leap before looking in violation of NEPA, but issuing leases without NEPA documentation that would be upheld would merely add to the backlog of sold Wyoming leases that cannot be issued or developed. Instead, the Court should allow BLM to prepare corrective NEPA analysis—which it has been diligently working on and expects to release by November—so that leasing activity can proceed on a firmer NEPA footing.

BACKGROUND

I. LEGAL BACKGROUND

A. The Mineral Leasing Act (MLA)

The Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181–287, "gave the Secretary of the Interior broad power to issue oil and gas leases on public lands" while giving "discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1, 4 (1965). Section 17(a) of the MLA establishes the Secretary's discretion by providing that lands "may"—not must—be leased by the Secretary. 30 U.S.C. § 226(a). And courts have consistently recognized the Secretary's discretion in oil and gas leasing decisions. *E.g.*, *United States ex rel McLennan v. Wilbur*, 283

U.S. 414, 419 (1931); *W. Energy All. v. Salazar*, 709 F.3d 1040, 1044 (10th Cir. 2013).

Congress enacted the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (1987 Reform Act), Pub. L. No. 100–203, tit. V, subtitle B, 101 Stat. 1330, 1330-256 (1987), to address concerns that leasing procedures under the MLA as originally enacted allowed the vast majority of leases to be sold on a non-competitive basis, thus depriving the public of a fair return. *W. Energy All. v. Salazar*, No. 10-CV-0226, 2011 WL 3737520, at *4 (D. Wyo. June 29, 2011) (summarizing the MLA's original leasing provisions). But those amendments were not intended to displace the Secretary's general discretion over oil and gas leasing in Section 17(a). H.R. Rep. No. 100-378 (1987). Thus, the "MLA, as amended by the Reform Act of 1987, continues to vest the Secretary with considerable discretion to determine which lands will be leased." *W. Energy All.*, 709 F.3d at 1044.

To implement this shift toward competitive leasing, the 1987 Reform Act established that "[l]ease sales shall be held for each State where eligible lands are available at least quarterly." 1987 Reform Act § 5102(a) (codified at 30 U.S.C. § 226(b)(1)(A)). While Congress did not elaborate on the meaning of the phrase "eligible lands," it indicated that the Secretary had discretion to make lands "available for leasing" as part of her long-established discretionary authority under the MLA. H.R. Rep. No. 100-378, at 11 (noting "the Secretary's discretionary

authority under [30 U.S.C. § 226(a)] *to make lands available for leasing*" (emphasis added)).

Indeed, when asked at that time to explain how this discretion was exercised, Interior explained that it could decline to lease based on concerns about "compliance with NEPA protection of the environment." Ex. 1, Legislation to Reform the Federal Onshore Oil and Gas Leasing Program: Hearing on H.R. 933 and H.R. 2851, Before the H. Comm. on Interior and Insular Affairs, Ser. No. 100-11, 100th Cong. 66, 82–83 (1987) (Interior Hearing). And while the Senate initially sought to exempt lease sales from NEPA, S. Rep. No. 100-188, at 6, 49 (1987), the Senate receded from that position after conferencing with the House, H.R. Rep. No. 100-495 at 782 (1987) (Conf. Rep.).

Consistent with its position before Congress during the enactment of the 1987 Reform Act, Interior has interpreted the phrase "where eligible lands are available," 30 U.S.C. § 226(b)(1), to require, at a minimum, that "all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act." Ex. 4, BLM Manual 3120.11. That longstanding interpretation has been in place for over three decades. AR00008; AR00017.

B. **The National Environmental Policy Act (NEPA)**

NEPA—the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m-12—is a procedural statute that requires federal agencies to consider potential

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

Interior complies with NEPA for oil and gas lease sales through detailed documents called Environmental Assessments (EAs), 40 C.F.R. § 1501.5, or even more detailed documents called Environmental Impact Statements (EISs), *id.* § 1502.1, that analyze environmental impacts associated with leasing. Errors in these NEPA documents can result in lease sales being vacated by a court or lease development being enjoined. *See infra* 7–10.

C. Federal Land Policy and Management Act (FLPMA)

The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1787, establishes general policies and procedures for managing public lands. FLPMA authorizes the Secretary to make "withdrawals" of public lands. 43 U.S.C. § 1714. The term "withdrawal," in relevant part, "means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to

maintain other public values in the area or reserving the area for a particular public purpose or program." 43 U.S.C. § 1702(j). FLPMA also authorizes the Secretary to "segregate[]" land for up to two years while considering a withdrawal proposal. 43 U.S.C. § 1714(b)(1).

II. FACTUAL BACKGROUND

A. Recent NEPA Challenges to Oil and Gas Leasing Decisions Have Substantially Increased BLM's Workload and Created Significant Instability for Lessees.

In recent years, BLM's oil and gas leasing decisions have faced numerous NEPA challenges alleging failures to consider groundwater impacts, greenhouse gas emissions, and impacts on the greater sage-grouse, as well as other issues. *See* Doc. 52-2, Cowan Decl. ¶ 3, Ex. C. Many of these lawsuits have exposed weaknesses in the relevant environmental reviews, resulting in judgments vacating leases or enjoining development. *Id.* ¶ 4 (listing cases). Additional lawsuits have challenged dozens of lease sales in a single action. *Id.* ¶ 3, Ex. C. As a result, BLM has had to go back to the drawing board on some lease sales and conduct supplemental NEPA analysis. *Id.* ¶ 5. The judicial determinations—and corresponding expanded NEPA reviews—have generated heavy workloads for BLM in completing environmental analyses for its oil and gas lease sales. *Id.* ¶¶ 5–6. And they have placed clouds of uncertainty over millions of leased acres, thus complicating lessees' investment and development expectations.

For example, a trio of lawsuits pending in the District of Columbia illustrate how NEPA challenges to BLM's oil and gas leasing decisions have substantially increased NEPA workloads and prevented lessees and operators from developing purchased leases. A 2019 decision in the first of those cases found that five Wyoming lease sales—held between 2015 and 2016—violated NEPA for failing to adequately evaluate greenhouse gas emissions. *WildEarth Guardians v. Zinke* (*WEG I*), 368 F. Supp. 3d 41, 67–77 (D.D.C. 2019) (enjoining lease development pending remand to BLM to prepare additional NEPA analysis).

Following the 2019 *WEG I* decision, BLM prepared supplemental NEPA analysis for the challenged 2015 and 2016 Wyoming lease sales. *See WildEarth Guardians v. Bernhardt (WEG II),* 502 F. Supp. 3d 237, 245 (D.D.C. 2020). Plaintiffs soon challenged that supplemental analysis as containing still inadequate assessments of greenhouse gas emissions. *Id.* And plaintiffs filed their second lawsuit challenging 23 more lease sales—including nine lease sales by BLM-Wyoming—as violating *WEG I*. *WildEarth Guardians v. Bernhardt*, No. 1:20-cv-00056, 2020 WL 111765, ¶¶ 133–135, tbl.A (D.D.C. Jan. 9, 2020). After concluding that the NEPA analysis underlying 20 of the 23 challenged lease sales contained similar methods already rejected in *WEG I*, BLM successfully sought a remand of those sales without vacatur, *WildEarth Guardians v. Bernhardt*, No. 1:20-cv-00056, ECF No. 46 (D.D.C. Oct. 23, 2020) (remanding all but three leasing decisions), to

revisit NEPA in light of the intervening *WEG I* decision. Significantly, drilling approvals for leases from those sales remain vulnerable to similar NEPA challenges until BLM is able to complete supplemental NEPA analysis on remand.

On November 13, 2020, the court issued its *WEG II* decision, finding that BLM's post-*WEG I* supplemental NEPA analysis inadequately analyzed greenhouse gas emissions, by failing to adequately address issues such as carbon budgeting. *See WEG II*, 502 F. Supp. 3d at 247–56. The court again enjoined BLM from approving drilling permits or other lease development activity, while remanding to BLM for further NEPA analysis. *Id.* at 258–59. In remanding, the court "urge[d] BLM to conduct a robust analysis, using conservative estimates based on the best data, analyzed in an unrushed fashion, so that the analysis can effectively serve as a model for the other leases." *Id.* at 259 n.16. Although appeals were initially taken from *WEG II*, all parties to that appeal—including Wyoming—later stipulated to dismissal. Ex. 3, Stipulation for Dismissal, *WildEarth Guardians v. Haaland*, No. 21-cv-5006.

Following the November 2020 *WEG II* decision, plaintiffs filed their third lawsuit challenging 28 additional lease sales—including three Wyoming sales from 2019–2020—as violating *WEG I* and *WEG II*. *WEG v. De La Vega*, No. 1:21-cv-00175-RC, Am. Compl. ¶¶ 6, 11–13, ECF No. 13 (D.D.C. Feb. 17, 2021). Thus, this trio of lawsuits brought by a single set of plaintiffs before a single district court

judge has effectively forced BLM to (1) undertake a third round of NEPA analysis for five Wyoming oil and gas lease sales from 2015 and 2016, (2) consider additional NEPA analysis for twenty oil and gas lease sales—including nine in Wyoming from 2016–2019—in light of new caselaw in *WEG I* and *WEG II*, and (3) defend thirty-seven more oil and gas lease sales against ongoing NEPA challenges, including three Wyoming sales from 2019–2020. And there are numerous other ongoing NEPA challenges to BLM's oil and gas lease sales involving different issues, different plaintiff groups, and different courts. Doc. 52-2, Cowan Decl., Ex. C. All of this litigation places issued leases under significant uncertainty, as developing a lease subject to a NEPA challenge carries substantial financial risks.

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

BLM has historically postponed lease sales for several reasons. *Id.* ¶ 7. For example, under the prior administration, BLM repeatedly deferred lease sales in order to better comply with NEPA, often in light of recent adverse court decisions. *E.g.*, *id.*, at PR087–91. The prior administration also deferred lease sales "due to workload and staffing considerations." *Id.* at PR099. And BLM postponed numerous oil and gas lease sales in 2020 in light of complications from the COVID-19 pandemic. *Id.* ¶ 8. Additionally, BLM postponed sales without public explanations as recently as December 2020. *Id.* at PR100.

Indeed, the history of lease sales from 2017–2020 demonstrates that quarterly lease sales do not regularly occur in most states. For example, in North Dakota, Louisiana, and Texas, BLM offered oil and gas leases for sale in only 4 or 5 out of 16 quarters from 2017–2020. Declaration of Merry Gamper (Gamper Decl.), Att. G (Oct. 5, 2021). In Montana, leases were offered for sale in only 10 of 16 quarters from 2017–2020; in New Mexico, it was only 12 of 16. *Id.* And no lease sales were held in any state in the second quarter of 2020. *Id.*

C. On January 27, 2021, President Biden Signed Executive Order 14,008.

On January 27, 2021, the President signed Executive Order 14,008, "Tackling the Climate Crisis at Home and Abroad," which directs various agencies to take actions to address climate change. 86 Fed. Reg. 7,619. That Order directs Interior to undertake a comprehensive review of federal oil and natural gas leasing—including royalty rates—while "to the extent consistent with applicable law" pausing new leases to preserve the status quo. *Id.* at 7,624–25.

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

In the first quarter of 2021, one BLM office held a lease sale and six offices postponed proposed sales, as explained below.

New Mexico: On January 14, 2021, BLM-New Mexico held an oil and gas lease sale.[1]

Nevada: BLM-Nevada postponed the December 2020 Nevada sale by publishing an errata without further explanation to its ePlanning website. Doc. 52-2, at PR100. On January 25, 2021, BLM-Nevada made a similar decision to postpone its lease sale and announced this decision on its website. AR1131, AR1184. That decision was confirmed by formal errata published on January 27, 2021. AR1132. Although neither errata details a rationale for the postponements, Wyoming does not challenge the December 2020 postponement.

Utah: On February 11, 2021, the BLM-Utah Director recommended postponing Utah's proposed March 2021 lease sale to account for a December 10, 2020 court decision, *Rocky Mountain Wild v. Bernhardt*, 506 F. Supp. 3d 1169 (D. Utah 2020), *appeal filed,* No. 21-4020 (10th Cir. Feb. 16, 2021). That recommendation stated that the draft EA for the March 2021 sale "took a similar approach [of] analyz[ing] only two alternatives: lease all or lease nothing," where that approach was found deficient in *Rocky Mountain Wild*. AR1164. The BLM

[1] U.S. BLM New Mexico Office, January 2021 Oil and Gas Lease Sale Results https://eplanning.blm.gov/public_projects/2000534/200380399/20033220/250039419/January%2014%202021%20Sale%20Results_508.pdf (last visited Oct. 5, 2021).

Deputy Director, Operations, Michael Nedd approved that recommendation on February 12, postponing the sale. *Id.*

On a parallel track that began on February 4, BLM-Utah sent a memorandum to Laura Daniel-Davis, who was exercising the delegated authority of the Assistant Secretary, Land and Minerals Management, requesting authorization by February 12 to post a competitive sale notice for a March 2021 Utah sale. AR1148–49. That memo explained that while BLM-Utah had posted a draft EA for public comment, it had not yet prepared an "updated EA, responding to [the eight] comments received." AR1149. On February 12, Acting Deputy Solicitor Travis Annatoyn recommended postponing the Utah sale given "serious questions as to NEPA compliance," and Daniel-Davis approved that recommendation on February 12.

Eastern States: On February 12, the BLM-Eastern States Director recommended postponing its March 2021 lease sale because the underlying environmental assesment "need[ed] additional air quality analysis, including [GHG] analysis" following *WEG II*. AR1165–66. Nedd approved that recommendation on February 12.

Colorado & Montana-Dakotas: On February 4, both BLM-Colorado and BLM-Montana-Dakotas sought approval by February 12 to post competitive sale notices for March 2021 sales. AR1150–55. Their respective submissions indicated that their EAs were ready for review as the agency had responded to public

comments. AR1153 ("BLM responded to [public] comments [on a draft EA]"); AR1152 (referencing "response to comment section of the EA").

On February 12, Annatoyn recommended postponing the Colorado and Montana-Dakotas sales, because their EAs "may be problematic in their evaluation of greenhouse gasses" in light of recent court decisions such as *WEG II* and *Columbia Riverkeeper v. U.S. Army Corps of Engrs.*, No. 19-6071, 2020 WL 6874871, at *4 (W.D. Wash. Nov. 23, 2020). AR1170. Annatoyn explained that "[g]iven the rapidly-evolving state of the law, the complex and novel challenges posed by greenhouse gas analysis, and the truncated period of your review, we advise you that there is a significant likelihood that analysis of the Colorado and Montana/Dakotas leases does not satisfy NEPA and is therefore vulnerable to litigation." *Id.* Daniel-Davis approved that recommendation on February 12. *Id.*

Wyoming: On February 4, BLM-Wyoming requested next-day approval to hold a March 2021 lease sale. AR1156–57. Unlike the Colorado and Montana requests, BLM-Wyoming's request did not indicate that its EA was ready for review. AR1157. Instead, BLM-Wyoming sought authorization to proceed with offering leases for sale based merely on the assurance that "[c]oncerns raised in ongoing litigation, including [*WEG II*, climate change and GHG emissions], *Western Watersheds Project vs. Zinke*, 1:18-cv-00187-REB [D. Idaho, BLM leasing policy IM 2018-034], and *Montana Wildlife Federation vs. Bernhardt*, 4:18-cv-00069-

BMM [D. Mont., Greater Sage-Grouse leasing prioritization], will be satisfactorily addressed in the Environmental Assessment and Protest Decision before any lease is issued." AR1157. On February 12, the Wyoming sale was postponed due to "serious questions as to NEPA compliance." AR1169–70.

E. An Early Second-Quarter New Mexico Sale Was Temporarily Postponed On March 1.

On February 11, BLM-New Mexico announced a postponement of its planned April lease sale. AR1183. That announcement surprised BLM and Interior leadership, as "there's not a blanket policy even with direction in the [Executive Order]." AR2421. After investigating to understand the reason for the postponement, BLM and Interior leadership learned that BLM-New Mexico had developed a "'perception' that all future sales would be postponed," that was based on "misinformation." *Id.* Thus, the state office postponement was reversed and BLM-New Mexico submitted a request to proceed with an April lease sale. AR2424.

After receiving that request, Interior decided on March 1 to temporarily postpone the April sale "pending decisions on how the Department will implement the Executive Order . . . with respect to onshore sales. The Department has not yet rendered any such decisions, but we hope to have further information in the coming weeks." AR1180. Although Interior subsequently made an April 21, 2021 decision not to hold that lease sale, that decision was rendered after all operative pleadings were filed in these consolidated cases.

F. **Wyoming Filed Suit On March 24**.

On March 24, 2021, Wyoming filed its lawsuit alleging that the Secretary had "instituted a de facto moratorium on all federal oil and gas lease sales on the public lands through a series of individual lease sale postponements and cancellations in Wyoming and across the nation." Doc. 1, Case No. 20-cv-56-SWS, Wyo. Pet., 2. Wyoming has not supplemented its petition.

G. A Louisiana Court Preliminarily Enjoined Interior From Implementing The "Pause" In Executive Order 14,008, But Did Not Enjoin NEPA-Based Postponements.

On June 15, the Western District of Louisiana entered a preliminary injunction enjoining Interior "from implementing the Pause of new oil and natural gas leases on public lands or in offshore waters as set forth in Section 208 of Executive Order 14008 . . . as to all eligible lands." *Louisiana v. Biden*, No. 2:21-CV-00778, 2021 WL 2446010, at *22 (W.D. La. June 15, 2021) *appeal filed,* No. 21-30505 (5th Cir. Aug. 17, 2021). The Louisiana court found that "some of the onshore leases were cancelled due to the Pause" and "[s]ome were cancelled to do additional environmental analysis." *Id.* at *21. But the court did not enjoin Interior from postponing lease sales in order to conduct additional environmental analysis, finding instead that "postponements based on an additional need for further environmental analysis . . . . will need to be explored on the merits of this lawsuit." *Id.* at *16.

H. On August 24, Interior Announced Next Steps In Its Onshore Leasing Program.

On August 24, Interior announced the next steps for its onshore leasing program, including "post[ing] for scoping parcels included in Quarter 1 and Quarter 2 2021 leasing deferrals by the end of August," "undertak[ing] environmental reviews of parcels for potential leasing after a 30-day scoping period," and posting "lease sale notices . . . later this year."[2] Before those scoping notices were posted on August 31, Wyoming filed its brief one week early on August 30.

Since deferring the first-quarter 2021 proposed sales, Interior has devoted substantial efforts to preparing more robust NEPA analysis. Gamper Decl. ¶¶ 16. That work has included inventorying greenhouse gas (GHG) emissions from federal production in fiscal year 2020 and from reasonably foreseeable production and leasing over the next 12 months. *Id.* Additionally, BLM has worked on preparing assessments of future GHG emissions trends and climate change impacts. *Id.* BLM is currently considering how to use those assessments and other analytic tools, such as carbon budgeting, to evaluate cumulative impacts of its leasing decisions. *Id.* BLM presently anticipates publishing updated draft NEPA

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[2] U.S. Department of Interior, *Interior Department Files Court Brief Outlining Next Steps in Leasing Program,* https://www.doi.gov/pressreleases/interior-department-files-court-brief-outlining-next-steps-leasing-program (last visited Oct. 5, 2021).

analysis for public comment by early November in preparation for lease sales in the first quarter of 2022. *Id.*

STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C. §§ 701–706 (APA) governs judicial review of agency actions. Courts may "set aside" agency action that is arbitrary and capricious or contrary to law. 5 U.S.C. § 706(2). And courts may "compel" unreasonably delayed agency action. *Id.* § 706(1). Because judicial review is confined to "circumscribed, discrete agency actions," however, courts lack broader supervisory authority over agencies. *Norton v. Utah Wilderness All.*, 542 U.S. 55, 62 (2004).

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER WYOMING'S CHALLENGE TO A SUPPOSED *DE FACTO* MORATORIUM.

The gravamen of Wyoming's challenge targets a supposed "*de facto* moratorium on leasing" Interior allegedly adopted by March 24, 2021, the date Wyoming's petition was filed, in order to "blindly implement Executive Order 14008." *See* Br. In Supp. of Wyoming's Pet. For Review of Final Agency Action, 19-20, Doc. 81 (Wyo. Br.). But the administrative record reflects no such moratorium, as the "Department ha[d] not yet rendered any such decisions" "on how the Department will implement the Executive Order on Tackling the Climate Crisis at Home and Abroad with respect to onshore sales" before Wyoming filed suit.

AR1180. Indeed, Wyoming's apparent "'perception' that all future sales would be postponed was based on misinformation" because "there's not a blanket policy even with direction in the [Executive Order]." AR2420–21. After the Executive Order issued, during the period of the supposed moratorium, Interior has continued to sell and issue leases, demonstrating the absence of any blanket policy against new leases.[3] And Interior is presently undertaking competitive leasing in Wyoming, after substantial efforts to strengthen its NEPA approaches in the state.

Following the policy directive in Executive Order 14,008, Interior had a wide range of administrative options to determine how to implement the President's directive, to "the extent consistent with applicable law," to "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." 86 Fed. Reg. 7,624. On one extreme, Interior could have taken a single agency-wide action to determine the limits of applicable law across its various leasing programs and then implement the directive accordingly. On the other extreme, Interior could have evaluated leasing decisions on a case-by-case basis, making individualized determinations on how to proceed in light of the

[3] Doc. 52-2, Cowan Decl. ¶ 11, Ex. D ("BLM sold leases in Wyoming in February 2021. BLM also issued leases in Oklahoma, Texas, Kansas, New Mexico and Colorado in April and May 2021.").

Executive Order. The record plainly reflects that Interior did not pursue an agency-wide course of action. Whereas Interior took offshore actions "to comply with Executive Order 14008" in February, 86 Fed. Reg. 10,132, it had "not yet rendered any such decisions" "with respect to onshore sales" by March, AR1180.

Given this record, Wyoming has failed to meet its threshold jurisdictional "burden of identifying specific federal conduct [constituting a moratorium] and explaining how it is 'final agency action'" subject to challenge by way of its petition. *Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000). Tellingly, Wyoming's efforts to identify specific federal conduct constituting a moratorium focus almost exclusively on post-filing agency activity. Wyo. Br. 14 (citing statements on March 25, April 21, and April 27); *id.* at 24. But that post-filing activity is irrelevant to jurisdiction, which must exist "when the suit was filed." *Davis v. FEC*, 554 U.S. 724, 734 (2008). And even that post-filing activity discusses "the pause" in reference to the policy directive "in Executive Order 14008," rather than any agency action that Interior has taken. Doc. 51-1, at 1–2. The policy directives "of the President cannot be reviewed under the APA because the President is not an 'agency' under that Act." *Dalton v. Specter*, 511 U.S. 462, 476 (1994).

When it comes to the administrative record, Wyoming tacitly concedes that the agency actions contained therein are both geographically and temporally limited in scope. *See* Wyo. Br. 31–33 (acknowledging limited to the first quarter of 2021);

id. at 12–13 (acknowledging limited to certain different states). Wyoming nonetheless strains to find some sort of blanket decision, e.g., "a blanket decision not to hold any First Quarter 2021 lease sales." *Id.* at 22. But even that claim finds no support in the record as there are four different decision documents deferring six first-quarter sales. *Supra* 11–15. While one of those decision documents covers four BLM offices, it offers different decision rationales from inadequate NEPA analysis to missing NEPA analysis depending on the underlying state office. AR1169–70.

Given the different decision documents at issue, Wyoming cannot lump them together for programmatic review; "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations are, even when premised on allegations of several instances of violations of law, rarely if ever appropriate for federal-court adjudication." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 568 (1992) (internal quotations omitted). Here, Wyoming is not content to challenge the individual postponement decisions; it seeks programmatic relief extending to actions not only outside the scope of its Petition but also actions that have yet to be taken. Wyo. Br. 55 (seeking an order compelling the Secretary to "hold all future quarterly lease sales on time"). Such challenges to future agency actions are outside the jurisdiction of Article III courts. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890–93 (1990)

("The flaws in the entire 'program'—consisting principally of the many individual actions referenced in the complaint and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA."). Because requests for "*wholesale* improvement" of Executive Branch programs must be brought "in the offices of the Department or the halls of Congress, where programmatic improvements are normally made," *id.* at 891, courts "intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect," *id.* at 894.

Wyoming cannot overcome the prohibition on programmatic challenges by invoking the rare instances in which courts have allowed challenges to unwritten agency actions to proceed.[4] *See* Wyo. Br. 24–25 (citing cases). As Wyoming notes, those cases involve "essentially conceded but ostensibly unwritten" agency action. *Id.* at 25 (internal quotations omitted). In contrast, Interior has vigorously disputed the existence of any final agency action constituting the challenged *de facto* moratorium. To be final, an action must mark "the consummation of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal

[4] Nor is Wyoming aided by Western Energy Alliance's (WEA's) previous failure-to-lease challenge, where WEA did not "seek to amend [BLM's] definition" of "when eligible lands are available." *See W. Energy All. v. Jewell*, No. 1:16-CV-00912-WJ-KBM, 2017 WL 3600740, at *13 (D.N.M. Jan. 13, 2017). Here, by contrast, Wyoming brings challenges to the agency's discretionary authority to construe the statutory term "available." *See infra* 28–34.

quotations omitted). Here, the administrative record explicitly states that the Department had not rendered decisions on how to implement Executive Order 14,008 for onshore lease sales at the time Wyoming brought suit. AR1180.

At bottom, Wyoming is simply asking the Court to disbelieve the administrative record and infer the existence of another agency action lurking behind the scenes based on nothing more than its skepticism. But the court "may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019). And Wyoming has failed to carry its heavy burden to show that the agency's stated reasons for acting were pretextual. *Infra* 41–44.

There is a final prudential reason why the Court should decline Wyoming's invitation to conjure and then set aside a *de facto* moratorium. In doing so, the Court would need to define not only the scope of, but also the rationale for, the moratorium it was setting aside. Whereas the individual postponement decisions have discrete rationales, *supra* 11–15, Wyoming seeks a broad ruling that any postponement is unlawful. In issuing a ruling untethered to a specific agency action, the Court would need to issue an advisory opinion about all potential postponements, including the widespread postponements that occurred just last year during the global pandemic. Because "federal courts do not render advisory opinions" "based largely on speculation and hypotheticals," the Court should dismiss Wyoming's attempt to

challenge a *de facto* moratorium as unripe if for no other reason. *Sierra Club v. Yeutter*, 911 F.2d 1405, 1420 (10th Cir. 1990) (dismissing programmatic challenge as unripe).

II. THE COURT LACKS JURISDICTION OVER ANY POSTPONEMENTS BEYOND THE FIRST-QUARTER WYOMING POSTPONEMENT.

In addition to challenging a supposed *de facto* moratorium, Wyoming also mentions a variety of individual decisions: first- and second-quarter postponements in Wyoming; deferrals in other states; and offshore deferrals. As explained, below, however, the Court lacks jurisdiction over any postponements other than the first-quarter postponement involving Wyoming.

It is unclear if Wyoming challenges postponements in other states. Although it mentions those postponements, Wyo. Br. 12–13, it directs its arbitrary and capricious arguments solely at the Wyoming postponement, *id.* at 31–33. Its FLPMA and NEPA arguments, however, appear to implicate postponements in other states. *Id.* at 35–55. In any event, Wyoming has provided no theory or evidence of standing to challenge the five other first-quarter postponement decisions, as it does not receive revenue from lease sales in other states. Accordingly, the Court lacks jurisdiction over Wyoming's challenge, if any, to the five other first-quarter postponement decisions, as well as the New Mexico temporary postponement.

As to the second-quarter Wyoming postponement, there is no jurisdiction over that action because it did not exist at the outset of this suit. *Davis*, 554 U.S. at 734. Wyoming never supplemented its pleading to challenge that postponement; as a result the Court has no administrative record to review. If Wyoming thought that action was somehow within the scope of its March 24 Petition, it should have raised the issue during the administrative record stage of this case. Respondents clearly explained in correspondence to Wyoming that the administrative record did not include actions that postdated its Petition. Ex. 5, Letter from M. Sawyer to T. Jordan, at 1–2 (Aug. 4, 2021). If Wyoming disagreed with that position, its remedy was to bring a motion to complete the record seeking to include materials related to second-quarter sales. Having failed to do so, it cannot ask the Court to review a post-filing action without an administrative record.

Given these failures, Wyoming claims that the Secretary had already failed to hold a second-quarter lease sale by the time Wyoming filed its Petition on March 24. Wyo. Br. 34. But Wyoming misstates the law, as no agency guidance, let alone a binding law, required BLM to publish a sale notice and NEPA documentation 90 days prior to lease sales. The regulations establish that such postings must be made 45 days before the sale date, 43 C.F.R. § 3120.4-2, and the agency's guidance was updated in 2018 to reflect that the 45-day timeline applied to both the sale notice and

NEPA documentation.[5] Wyoming's arguments rely on outdated 90-day guidance in the BLM Manual, which has not been updated since 2013. Wyo. Br. 34. Even if 90 days were the governing law, however, Wyoming's claim would still fail because it filed its Petition 98 days before the end of the second quarter.

As to the offshore postponements, the Court lacks jurisdiction for two reasons. *First*, Wyoming's Petition did not bring a challenge to those postponements; as a result, there is no administrative record for those actions. If Wyoming thought its Petition described a challenge to the offshore leasing postponements, then it had an obligation to raise that issue at the administrative record stage of this case.[6] Having declined to do so, Wyoming cannot ask the Court to review the validity of those offshore postponements without an administrative record. *Fla. Power & Light v. Lorian*, 470 U.S. 729, 743-44 (1985).

Second, Wyoming has no standing to challenge the offshore postponements. Its only theory of standing is that offshore postponements might result in less revenue going to the Land and Water Conservation Fund (LWCF), which then might result in less revenue being distributed to state parks. Wyo. Br. 52. That argument is factually speculative and contrary to the only economic projections in the record,

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[5] Instruction Memorandum 2018-034, https://www.blm.gov/policy/im-2018-034.
[6] Though Wyoming sent correspondence regarding the administrative record, it did not raise any concerns about the administrative record omitting offshore leasing postponements. Ex. 6, Letter from T. Jordan to M. Sawyer (July 8, 2021).

which establish that there would not be any decrease in LWCF funds. Doc. 52-3, ¶ 11. The argument is also legally wrong, as generalized losses of revenue are neither cognizable injuries in fact nor redressable in this context. *See El Paso Cnty. v. Trump*, 982 F.3d 332, 338–42 (5th Cir. 2020) (rejecting claims of generalized revenue losses and diversion of funds from project for lack of injury and redressability).

In sum, the Court lacks jurisdiction over any agency action aside from the first-quarter Wyoming postponement.

III. THE COURT CANNOT COMPEL LEASE SALES

The Tenth Circuit has recognized that the Secretary has considerable discretion over oil and gas leasing decisions, even after the enactment of FLPMA and the 1987 Reform Act. *W. Energy All.*, 709 F.3d at 1044. Consistent with this "broad discretion," the Tenth Circuit has required BLM to undertake NEPA analysis at the leasing stage. *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 715–719 (10th Cir. 2009). Thus, federal courts have the power to set aside leasing decisions based on NEPA inadequacies. *Id.* But they "do not have the power to order competitive leasing" because "that discretion is vested absolutely in the federal government's executive branch and not in its judiciary." *Wyo. ex rel. Sullivan v. Lujan*, 969 F.2d 877, 882 (10th Cir. 1992). Instead, the APA allows claims seeking to compel agency action to "proceed only where a plaintiff asserts

that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton*, 542 U.S. at 64.

A. Determining Whether "Eligible Lands Are Available" Involves Agency Discretion Exercised Through NEPA

Wyoming asks the Court to force BLM to hold lease sales even though adequate NEPA analysis was not prepared. In doing so, Wyoming concedes that it is asking the Court to overturn BLM's longstanding interpretation that the term "available," requires, *inter alia*, that "all statutory requirements and reviews have been met, including compliance with [NEPA]." Wyo. Br. 28 (quoting BLM Manual 3120.11). Strangely, however, Wyoming cannot articulate the alternate definition it believes should supplant BLM's longstanding interpretation: it first contends that "the term available means any lands subject to leasing under the Mineral Leasing Act," *id.* (quoting 53 Fed. Reg. 22,828); it later contends that "lands 'available' for leasing are those open to leasing in the applicable RMP," *id.* at 40 (quoting, indirectly, BLM Manual 3120.11).[7] Thus, Wyoming asks the Court to rely on the BLM Manual both to define the term "eligible" and to define the term "available" for its FLPMA claim, *id.* at 27–28, 40, but it asks the Court to look to a different source—a quotation plucked from a regulatory preamble—as defining "available"

[7] Although Wyoming cites to *W. Energy All. v. Zinke*, 877 F.3d 1157, 1162 (10th Cir. 2017), the Tenth Circuit was quoting BLM Manual 3120.11.

for its § 706(1) claim, *id.* at 28. The only thing consistent about Wyoming's approach to construing the term "available" is its desire to excise NEPA compliance from leasing decisions, a result that both Congress and the Tenth Circuit have specifically rejected. The Court should reject Wyoming's statutory construction for four reasons.

First, in cobbling together these two different sources, Wyoming erroneously arrives at a construction in which different statutory terms—"eligible" and "available"—are accorded the same meaning, *i.e.*, that lands are merely "subject to leasing" without regard to Interior's discretion (at least under Wyoming's first construction of "available"). But that result runs afoul of the strong presumption that "differences in language . . . convey differences in meaning" especially when enacted by the same Congress. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071–72 (2018) (internal quotations omitted). And that presumption carries particular force here, as both Congress and Interior intended that the term "available" preserve the Secretary's leasing discretion when that term was added to the 1987 Reform Act. H.R. Rep. No. 100-378, at 11 (1987) (stating that competitive leasing was "[s]ubject to the Secretary's discretionary authority under [30 U.S.C. § 226(a)] to make lands *available for leasing*"); AR8 ("us[ing] 'available' for those eligible lands subject to leasing by exercise of discretion").

Second, Wyoming's proposed construction cannot be reconciled with the ordinary meaning of the Mineral Leasing Act. Congress enacted the quarterly lease sale provision in 1987, nearly two decades after NEPA was enacted into law. It would be quite unusual for Congress to casually impose one statutory obligation under the MLA that requires an agency to violate another preexisting statutory obligation under NEPA. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest" (internal citations and quotations omitted)). Wyoming also cites the canon against implied repeal, but it misunderstands how that applies to the legislative timeline. *See* Wyo. Br. 33 (citing *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788 (1976)). In *Flint Ridge*, the Supreme Court held that a later-enacted law (NEPA) was not intended to impliedly repeal a previously enacted law (the Interstate Land Sales Full Disclosure Act of 1968). Here, by contrast, the later-enacted law is the 1987 Reform Act, not NEPA.

Third, the legislative history explicitly demonstrates that the 1987 Reform Act was not intended to repeal NEPA's application to leasing decisions. When considering the 1987 Reform Act, Congress asked Interior to explain "some of the most common reasons" why the Secretary would exercise her "discretion to reject a lease offer after a reasoned determination that leasing is not in the public interest."

Ex. 1, Interior Hearing, 100th Cong. at 66. Interior responded that it would exercise its discretion not to lease based on, *inter alia*, "compliance with NEPA protection of the environment." *Id.* Although Congress considered restricting that discretion by exempting lease sales from NEPA, S. Rep. No. 100-188, at 6, 49, Congress ultimately decided not to exempt lease sales from NEPA, H.R. Rep. No. 100-495, at 782 (1987) (Conf. Rep.).

Fourth, the Court should defer to BLM's longstanding interpretation that "eligible lands are available" when, at a minimum, "all statutory requirements and reviews have been met, including compliance with [NEPA]." BLM Manual 3120.11 (2013); AR17; AR8. Such longstanding agency interpretations in complex statutory schemes are entitled to significant deference, including up to *Chevron* deference, even they are not adopted through notice and comment. *See Barnhart v. Walton*, 535 U.S. 212, 222 (2002). Because BLM has consistently followed this interpretation since the 1987 Reform Act was enacted—and prepared numerous RMPs over decades—based on this definition, the Court should afford that interpretation substantial deference.

Wyoming strangely suggests that the Court should reject the BLM Manual definition of "available" in favor of a regulatory preamble statement because the

BLM Manual was not subject to notice and comment. Wyo. Br. 28.[8] But the same criticism applies to the "regulatory preamble [which] is not legally binding because it is not subject to notice and comment." *Peabody Twentymile Mining, LLC v. Sec'y of Lab.*, 931 F.3d 992, 998 (10th Cir. 2019). The regulatory preamble statement that Wyoming focuses on was not offered in a proposed rulemaking for public comment; instead, it was provided in response to a comment and is entitled to no greater weight than the BLM Manual. Moreover, there is little, if any, distinction between the approaches to describing "available" lands in the regulatory preamble and the BLM Manual.[9]

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[8] Although Wyoming also points to a regulation, Wyo. Br. 28 (citing 43 C.F.R. § 3120.1-1), it focuses its argument on the non-binding regulatory preamble. In any event, the plain language of § 3120.1-1 does not purport to define—much less exhaustively define—the term "available"; instead, that section merely serves "to identify the lands subject to competitive leasing," 53 Fed. Reg. 9,218, as opposed to noncompetitive leasing. *Compare* 43 C.F.R. § 3120.1-1 ("All lands available for leasing shall be offered for competitive bidding under this subpart, including but not limited to: …."), *with id.* § 3110.1 ("Only lands that have been offered competitively under subpart 3120 of this title, and for which no bid has been received, shall be available for noncompetitive lease.").

[9] Wyoming's present-day interpretation of the 1988 regulations contradicts all contemporaneous evidence of their meaning. In responding to comments regarding the meaning of "the term 'available' in § 3120.1-1," BLM's regulatory preamble explained "It is Bureau policy prior to offering the lands to determine whether leasing will be in the public interest and to identify stipulation requirements, obtain surface management agency leasing recommendations and consent where applicable and required by law." 53 Fed. Reg. 22,828. And in 1989, Interior confirmed that the "preamble to the final rulemaking clearly shows the Department interpreted the . . . competitive leasing provisions as retaining Secretarial discretionary power to lease lands," because it had "explained that 'available' lands are those statutorily open to

Wyoming next claims that the Court cannot consider the BLM Manual because it was not cited in the decision documents and is not contained in the administrative record. Wyo. Br. 29. That claim is wrong, as the relevant definition contained in the BLM Manual is included in the administrative record. AR17 ("Eligible lands are available for leasing when all statutory requirements and reviews, including compliance with the National Environmental Policy Act (NEPA) of 1970, have been met."). And that definition is explicitly referenced in the relevant decision documents. AR1170 ("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."). Wyoming appears to be arguing that the decision documents must explicitly cite the BLM Manual and include the current version of the BLM Manual in the administrative record. But that is not the law because "courts uphold a decision of less than ideal clarity if the agency's path may reasonably be

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leasing under the MLA, that have met other statutory requirements, and for which leasing is in the public interest." AR7–8, "Eligible" and "Available" Land Under the Federal Onshore Oil and Gas Leasing Reform Act of 1987, U.S. Department of the Interior, Office of the Solicitor (1989); *see also* AR9 ("BLM may never include a parcel in a sale for which it has not completed its statutory requirements under laws such as the National Environmental Policy Act, the Endangered Species Act, and the MLA."). The Court should defer to these longstanding, considered interpretations of the term "available" in the 1988 regulations. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) ("When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean.").

discerned." *Home Builders*, 551 U.S. at 658 (internal quotations omitted). And the Tenth Circuit authorizes taking judicial notice of agency websites in APA cases, *Richardson*, 565 F.3d at 703 n.22, and has taken judicial notice of the BLM Manual, *W. Energy All.*, 877 F.3d at 1162. Indeed, Wyoming asks the Court to take judicial notice of another section of the BLM Manual. Wyo. Br. 34.

In sum, the Court should reject Wyoming's construction that lands are "available" whenever they are "subject to leasing under the MLA" and identified in an "expression of interest," as that construction would force Interior to violate numerous statutory requirements. BLM's regulations establish that state offices "shall hold sales at least quarterly if lands are available for competitive leasing." 43 C.F.R. § 3120.1-2(a). If the public expressed interest in non-wilderness lands closed to leasing under an RMP, Wyoming's proposed construction would nonetheless require such lands to be sold, contrary to FLPMA. Similarly, Wyoming's proposed construction would require Interior to offer Forest Service lands subject to an EOI for lease over the objection of the Secretary of Agriculture, contrary to the MLA. 30 U.S.C. §§ 226(g)–(h). The Court should reject such an interpretation of "available" lands because it would improperly assign the same meaning to distinct statutory terms, contradict other provisions of the MLA, and exempt leasing decisions from NEPA, a result that Congress specifically considered and rejected when enacting the

1987 Reform Act. Instead, the Court should defer to the agency's longstanding construction of "available" that has been in place for three decades.

B. There Were No Eligible Lands Available In The First Quarter Of 2021.

Given the appropriate construction of "where eligible lands are available," there was no discrete, non-discretionary duty on Interior to hold lease sales in the first quarter of this year. Although some NEPA work had been done for those sales, the draft work was prepared before relevant adverse court decisions issued in November and December 2020. *See supra* 11–15. While some BLM offices, such as Montana-Dakotas, responded to comments raising those decisions, *supra* 13–14, other BLM offices, such as Wyoming, did not respond to comments, *supra* 13, 14–15, and instead sought authorization to proceed with a lease sale based on NEPA analysis that a court had already rejected, AR1157. Critically, Wyoming does not claim that the November 2020 draft EA that BLM-Wyoming prepared for the proposed March 2021 sale complied with *WEG II*; nor could it, as the GHG approach in that draft EA was based on the supplemental NEPA analysis that the *WEG II* court had just rejected. *See* Wyo. Br. 25–30 (arguing only that "available" lands do not require NEPA compliance).

Wyoming nonetheless contends that BLM should have rushed out additional NEPA analysis to continue holding first-quarter lease sales. That argument fails because NEPA is not merely a box-checking exercise; it is the "centerpiece of

environmental regulation in the United States, [and] 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." *Richardson*, 565 F.3d at 703. Here, a court overseeing NEPA challenges to dozens of lease sales—including nearly every Wyoming sale over the last five years—rejected BLM-Wyoming's second attempt at NEPA as reflective of a "sloppy and rushed process" and "urge[d] BLM to conduct a robust analysis, using conservative estimates based on the best data, analyzed in an unrushed fashion, so that the analysis can effectively serve as a model for the other leases." *WEG II*, 502 F. Supp. 3d at 256, 259 n.16.

Wyoming suggests that the several months following *WEG II* was sufficient time to undertake corrective NEPA analysis, but that argument ignores the discretionary nature of the NEPA process. *WildEarth Guardians v. Conner*, 920 F.3d 1245, 1258 (10th Cir. 2019) ("NEPA leaves substantial discretion to an agency to determine how best to gather and assess information about a project's environmental impacts." (internal quotations omitted)). Wyoming cannot use a putative statutory deadline to bind the incoming administration to the prior administration's discretionary policy choices about how to conduct NEPA analysis. *See Org. for Competitive Markets v. U.S.D.A.*, 912 F.3d 455, 458–61 (8th Cir. 2018) (declining to impose mandamus—despite an "absolute congressional deadline"—

when the outgoing administration "left their successors a time bomb" in the form of "proposed agency action[s]" that relied on a legal "interpretation that had been consistently rejected by numerous courts"). Here, the prior administration's approaches to evaluating greenhouse gas emissions—as well as other NEPA issues such as groundwater and greater sage grouse impacts—have been rejected by numerous courts. *See supra* 7–10; Doc. 52-2, Cowan Decl. ¶ 4. Following an election, the new administration cannot be forced to adopt the prior administration's NEPA approaches. *Richardson*, 565 F.3d at 703 ("By focusing both agency and public attention on the environmental effects of proposed actions, NEPA . . . allows the political process to check those decisions."). At the time of the challenged postponements, the new administration had been in office for less than a month and was forced to reckon with a significant amount of NEPA litigation—and a growing queue of corrective NEPA analysis on remand for leasing decisions that had already occurred. Because the new administration was entitled to a reasonable amount of time to make discretionary decisions about how to conduct NEPA analysis for lease sales, and because the pre-existing analysis had been deemed inadequate, there were no "eligible lands available" at the time of the challenged postponements.

Interior has been working diligently to improve its NEPA approach, with a particular focus on providing a more robust and legally defensible analysis of the complex issue of GHG emissions. *Supra* 17–18. Just one example of how Interior

has been revising that NEPA approach involves carbon budgeting. The *WEG II* court rejected the approach to carbon budgeting that BLM-Wyoming had been using in November 2020. 502 F. Supp. 3d at 255. And it gave the agency a choice: "BLM either had to explain why using a carbon budget analysis would not contribute to informed decisionmaking, in response to WildEarth's comments, or conduct an 'accurate scientific analysis' of the carbon budget." *Id.* Faced with such guidance, the current administration has expended substantial personnel time considering how carbon budgeting should be used in leasing decisions since first-quarter lease sales were postponed. Gamper Decl. ¶ 16. Following that, and similar efforts, Interior presently anticipates publishing updated NEPA analysis by early November, in preparation for lease sales in the first quarter of 2022. *Id.* Rather than force BLM to hold a rushed sale on deficient NEPA, the Court should allow BLM to complete its new NEPA approach in conjunction with leasing activity currently underway.

IV. THE CHALLENGED LEASING POSTPONEMENTS WERE NOT ARBITRARY AND CAPRICIOUS.

The arbitrary and capricious standard of review is "deferential" and "narrow," in which courts "determine only whether the Secretary examined the relevant data and articulated a satisfactory explanation for h[er] decision, including a rational connection between the facts found and the choice made." *New York*, 139 S. Ct. at 2569 (internal quotations omitted). Wyoming makes three arguments for why the first-quarter postponements were arbitrary: that BLM did not cite all statutory

language; that statements about lack of NEPA analysis were contrary to the record; and that Interior's NEPA concerns were pretextual. None has merit.

As to statutory language, Wyoming makes an unprecedented argument that a decision document is arbitrary because, although the decision cited the relevant statutory provision, it did not quote the entirety of that provision. Wyo. Br. 31–32. The challenged decision document explicitly acknowledges the MLA provision stating that "oil and gas lease sales 'be held for each State where eligible lands are available.'" AR1170 (quoting 30 U.S.C. § 226(b)(1)(A)(c)). Wyoming objects that this document did not quote the words "shall" and "at least quarterly,"[10] but the arbitrary and capricious standard does not require agencies to fully quote all relevant sources of law. Even if it did, the unquoted words are quoted repeatedly elsewhere in the administrative record, which is composed of materials the agency considered. *E.g.*, AR1216.

As to contrary evidence in the record, Wyoming focuses on a putative contradiction between the existence of a draft EA for the first-quarter BLM-

[10] Wyoming also contends that Interior's omission of these four words constitutes "deafening" silence because it suggests Interior was not planning how to hold quarterly lease sales. Wyo. Br. 32. But that argument wrongly assumes this decision was intended to guide Interior's plans for future leasing activity. To the contrary, the sole purpose of the document was to determine "whether proposed first quarter oil and gas lease sales in Colorado, Montana/the Dakotas, Utah, and Wyoming satisfy" NEPA. AR1169.

Wyoming sale and the decision document's characterization that there was a "complete lack of environmental analysis for proposed sales" in Wyoming. Wyo. Br. 32 (quoting AR1170). But Wyoming misunderstands how the draft EA relates to the decision document. BLM-Wyoming's draft EA was published on November 13, 2020, AR256, the same day *WEG II* issued. Because the GHG analysis in that draft EA was based on the supplemental NEPA analysis that the *WEG II* court had just rejected, that draft EA was inadequate the day it was published. BLM-Wyoming nonetheless submitted the draft EA with its request for authorization to proceed with the March 2021 lease sale, based on nothing more than the assurance that it would somehow address *WEG II* concerns at some future point before leases issued. AR1157. Because BLM-Wyoming had not yet prepared any NEPA responding to *WEG II*, the decision document reasonably explained that BLM-Wyoming had "not prepared [an] Environmental Assessment[]" for its first-quarter sale, at least since the *WEG II* decision rejected the GHG analysis in its draft EA. AR1170. Because courts "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Home Builders*, 551 U.S. at 658, the Court should affirm the first-quarter Wyoming postponement.

As to pretext, Wyoming contends in passing that the NEPA concerns that motivated the first-quarter deferrals were pretextual. Wyo. Br. 33 (accusing Secretary of "refus[ing] to complete NEPA analysis in a timely manner"). This

argument fails because Wyoming ignores governing law on pretext and overlooks that the prior administration shared similar concerns about NEPA deficiencies. While the current administration selected a different approach for addressing these NEPA deficiencies, it had ample discretion to do so.

A challenger alleging that an agency decision is pretextual bears a significant burden. "[A]n agency's decision is entitled to a presumption of regularity, and the challenger bears the burden of persuasion." *San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1045 (10th Cir. 2011) (internal citations omitted)). The "presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations . . . stands unless there is irrefragable proof to the contrary." *Madewell v. Dep't of Veterans Affs*., 287 F. App'x 39, 43 (10th Cir. 2008) (quoting *Lachance v. White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999)).

Moreover, "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *New York*, 139 S. Ct. at 2573. Instead, demonstrating that an agency's stated rationale was "pretextual" requires showing that the agency's reasons were "contrived" instead of "genuine." *Id.* at 2575–76. If there is "objective evidence supporting the agency's conclusion," then "the agency's subjective desire to reach a particular result" will not invalidate the action. *Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th

Cir. 2014). Here, Wyoming has failed to show—much less demonstrate through irrefragable proof—that Interior's NEPA compliance concerns were contrived.

Notably, Wyoming does not even attempt to carry its burden by demonstrating that the November 13 draft EA complied with *WEG II*. Wyo. Br. 33. Where a court just rejected a very similar EA as reflective of a "sloppy and rushed process," *WEG II*, 502 F. Supp. 3d at 256, Wyoming has made no effort to show that any NEPA analysis by BLM-Wyoming in the administrative record adequately addressed the concerns of the *WEG II* court.

Wyoming's pretext argument also cannot be squared with BLM's recent history of NEPA litigation. *Supra* 7–10. As the prior administration recognized, *WEG II* raised serious NEPA compliance concerns, although they had a different view about how those NEPA concerns should affect lease sales. In a memo dated November 18, 2020, BLM-Wyoming explicitly recognized that *WEG II* placed all of its lease sales from May 2019 to December 2020 "at risk." Gamper Decl., Att. H. And it analyzed three options for how to proceed: postponing sales "until remediative NEPA can be completed"; proceeding with sales, while flagging "the need to do additional NEPA prior to issuing sold leases"; or moving forward with the sale based solely upon the existing NEPA analysis. *Id.* BLM-Wyoming ultimately chose the second option of proceeding with the fourth-quarter 2020 lease sale before "remediative NEPA [was] completed," *id.*, in the hope that it would be

able to complete remediative NEPA analysis within 60-80 days (*i.e.*, by March 7, 2021) after holding the lease sale but before leases were issued. *Id.*[11] But that remediative NEPA was still not prepared in time to publish a first-quarter competitive sale notice. AR1157. When BLM-Wyoming sought permission to proceed with a sale based upon the deficient November 13 draft NEPA, the Office of the Secretary returned the package to BLM-Wyoming with the instruction to resubmit the package with updated documents. Gamper Decl. ¶¶ 8–9. By February 12, however, BLM-Wyoming had not submitted an updated package. *Id.*

Given this consistent recognition of litigation risk due to inadequate NEPA across administrations, Wyoming has failed to carry its burden to establish that the agency's NEPA compliance and litigation risk concerns were pretextual. While the current administration arrived at a different determination about how to respond to those concerns, that does not make the underlying concerns contrived or pretextual.

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[11] BLM-Wyoming recognized that the first option would be the "lowest risk option," but that it would take "much longer than the approximately three weeks remaining before the December sale dates," Gamper Decl., Att. H. BLM-Wyoming took the view that "with parcels available it would not comply with the Mineral Leasing Act requirement to hold quarterly lease sales . . . ." *Id.* In reaching that conclusion, BLM-Wyoming overlooked the governing definition of "available" as requiring compliance with all statutory requirements, including NEPA. *Compare id.*, *with* Ex. 4, BLM Manual 3120.11.

See New York, 139 S. Ct. at 2570 ("the choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make").

V. INTERIOR DID NOT VIOLATE THE FEDERAL LAND POLICY AND MANAGEMENT ACT.

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

Second, the challenged postponements do not meet the FLPMA definition of "withdrawal" because they were not done "for the purpose of limiting activities under [the general land laws] in order to maintain other public values in the area or

reserving the area for a particular public purpose or program." 43 U.S.C. § 1702(j). To the contrary, the postponements were undertaken to "provide time to complete" additional NEPA analysis of the leasing decision. *E.g.*, AR1166. Thus, these postponements are unlike the inaction in *Andrus*, which was taken to maintain wilderness values. 499 F. Supp. at 391. No such purpose animated the challenged postponements; rather, the same parcels that were considered for leasing in the first quarter of this year are presently being considered for leasing. *See supra* 17–18.

Third, the challenged postponements are not withdrawals because they do not close any "area" of land to oil and gas leasing. Public lands that were offered but not sold through competitive lease sales over the last two years remain open to leasing under 30 U.S.C. § 226(b)(2). And BLM has sold such leases under the current administration. Doc. 52-2, Cowan Decl. ¶ 11, Ex. D. Thus, BLM has not "with[held] an area of Federal land from settlement, sale, location, or entry," as required to have a withdrawal under FLPMA.

Fourth, even if Wyoming succeeded in establishing that challenged agency actions constituted a "withdrawal" under FLPMA, it would not be entitled to its requested relief of compelled lease sales. *See Andrus*, 499 F. Supp. at 397 ("we do not purport to [require] the Secretary of the Interior to accept, reject, or even take action on the outstanding oil and gas leases"). Instead, after finding a "withdrawal" under FLPMA, courts in this District have directed the agency to either report the

withdrawal to Congress or cease the activity. *Hodel*, 668 F. Supp. at 1476 (D. Wyo. 1987); *Andrus*, 499 F. Supp. at 397. Given the incredibly short duration of the alleged "withdrawal," Wyoming would not even be entitled to the Congressional reporting remedy, as Interior could instead simply publish a Federal Register notice to segregate the lands for up to two years. Thus, there is a tremendous mismatch between Wyoming's "withdrawal" claim, and its requested relief.

Wyoming's FLPMA "amendment" claim also fails for three reasons. *First*, it is Wyoming—not Interior—that is attempting to rewrite dozens of RMPs throughout the United States by re-defining the statutory term "available." Wyo. Br. 40. Wyoming concedes that BLM has for decades defined the term "available," to require NEPA compliance: "Lands are available for leasing when [1] they are open to leasing in the applicable resource management plan, and [2] when all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act (NEPA)." BLM Manual 3120.11 (2013); *see also* AR17; AR8–9. Based on that definition, BLM has adopted dozens of RMPs that govern millions of acres of land around the country. And those RMPs generally do not designate land as "available" for leasing; instead, they designate land as "open" to leasing, with the expectation that further leasing decisions will be subject to a further exercise of the Secretary's discretion. After all of those RMPs were written based on BLM's definition of "available," Wyoming now asks the Court to throw out half

of that definition and excise NEPA compliance from leasing decisions. The Court should reject that approach because it would upset settled expectations on millions of acres of land around that nation.

Second, Wyoming's FLPMA "amendment" claim demonstrates the programmatic nature of its challenge to a supposed *de facto* moratorium. It concedes that there are "dozens of governing RMPs across the United States," including "ten RMPs" just in Wyoming. Wyo. Br. 40. Yet rather than place those numerous different plans before the Court for careful analysis, it asks the Court to issue a wholesale correction based on one example RMP that is likely not representative. Such requests for "*wholesale* improvement" must be brought "in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891.

Third, Wyoming's FLPMA "amendment" claim cannot support its requested relief of compelled lease sales. Even if Wyoming were correct that "open" to leasing in an RMP meant "available" for leasing under the MLA, its FLPMA claim would still not entitle Wyoming to an order compelling lease sales. As the Supreme Court explained in *Norton*, "a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them." *Norton*, 542 U.S. at 71. Thus, the Court held that while RMPs can support a § 706(2) claim to set aside agency action, they cannot support a § 706(1) claim to compel

action "absent clear indication of binding commitment in the terms of the plan." *Id.* at 69.

VI. THE CHALLENGED LEASING POSTPONEMENTS WERE NOT PROCEDURALLY DEFECTIVE.

Wyoming finally asks the Court to impose an unprecedented new procedural requirement on Interior: conducting NEPA analysis before postponing leasing activity to prepare additional NEPA analysis. There are six fatal flaws with this argument.

First, the Court cannot grant relief on Wyoming's NEPA claim, as it has not presented an environmental interest in this case. The "court may grant relief only when a petitioner shows its claims fall within the zone of interests protected by the statute forming the basis of [its] claims." *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1058 n.25 (10th Cir. 2014) (internal quotations omitted). And "economic injuries do not fall within the 'zone of interest' protected by NEPA," even when they are tied to "changes to the physical environment." *Lower Arkansas Valley Water Conservancy Dist. v. United States*, 578 F. Supp. 2d 1315, 1339 (D. Colo. 2008) (dismissing NEPA claim brought by local government based on lost revenue due to changed water usage). Though Wyoming discusses environmental issues, "generalized harm to the forest or the environment will not alone support standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494

(2009).[12] Instead, a plaintiff must show "an increased risk of environmental harm . . . to the litigant's concrete and particularized interests." *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996). Wyoming does not identify any specific NEPA interest aside from a speculative loss of LWCF funding. Wyo. Br. 49–53. (And even that interest is tied only to offshore postponements, which are outside the scope of the administrative record. *Supra* 25–27.) When it comes to environmental harms, Wyoming claims that pausing leasing will move the environmental impacts associated with oil and gas production "overseas," potentially to nations with "higher rates of carbon intensity." *Id.* at 49. But Wyoming does not identify any concrete interest it has in environmental impacts overseas. Nor has it shown how changes in carbon intensity will affect any concrete interest it has within Wyoming. In sum, Wyoming has failed to establish any cognizable environmental interest that would enable it to assert a NEPA claim.

Second, Wyoming's NEPA argument fails insofar as it contends Respondents failed to undertake any particular quarterly lease sale, because a "failure to act" is,

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[12] Although *Summers* addresses Article III standing requirements, Wyoming "cannot assert a NEPA claim" unless it "establish[es] a single injury that both satisfies the requirements of Article III and falls within NEPA's zone of interests." *Yount v. Salazar*, No. CV11-8171 PCT-DGC, 2014 WL 4904423, at *7 (D. Ariz. Sept. 30, 2014), *aff'd sub nom. Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845 (9th Cir. 2017).

by definition, not a "major Federal action." *See* 40 C.F.R. § 1508.1(q) (defining "Major Federal action"). This is because, "in the case of a 'failure to act,' there is no proposed action and therefore there are no alternatives that the agency may consider." 85 Fed. Reg. at 43,347.

Third, Wyoming's NEPA argument fails insofar as it contends Respondents took a major Federal action when they decided to postpone particular quarterly lease sales to prepare additional environmental analysis. As noted above, NEPA requires environmental analysis when an agency proposes to take major Federal action, *see* 40 U.S.C. § 4332(2)(C), and here that action consisted of proposing to auction leases for the specified parcels. Agencies also may, and sometimes must, supplement or otherwise elaborate upon their initial environmental analysis before finalizing their decision process. *See*, *e.g.*, 40 C.F.R. § 1502.9(d)(1)–(2). When an agency opts to prepare such a supplemental analysis, it must prepare, circulate, and file that analysis in the same fashion as is required of an original analysis. *Id*. §1502.9(d)(3). And an agency may not implement the proposed action until it has completed all of this analysis and issued either a finding of no significant impact or a record of decision. *Id.* §§ 1501.6, 1505.2, 1506.1(a). Notably absent from this regulatory scheme is the requirement Wyoming attempts to impose on Federal Respondents here: that a *second* environmental analysis must be completed before postponing a proposed decision to improve a *first* environmental analysis. To the contrary, "agencies may

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

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

Fifth, perhaps because of the above weaknesses, Wyoming now pursues a new tack: contending that the Secretary undertook a "major Federal action" triggering NEPA review because she decided to abandon all quarterly leasing. But this argument fails because the administrative record reflects that there was "not a blanket policy even with direction in the [Executive Order]." AR2421; *see also* AR1180 ("the "Department ha[d] not yet rendered any such decisions" on how to implement the Executive Order before Wyoming brought suit). Even if there were a blanket policy against action before the Court, the remedy would be to remand for development of a programmatic NEPA analysis, not to vacate, enjoin, or otherwise direct BLM's general management of the onshore leasing program. *Monsanto Co.*

v. Geertson Seed Farms, 561 U.S. 139, 161–62 (2010) (reversing district court's programmatic injunction because "if and when [the agency] pursues [another action] that arguably runs afoul of NEPA, respondents may file a new suit challenging such action and seeking appropriate preliminary relief").

Sixth, regardless of how Wyoming's NEPA claims are ultimately construed, the law is clear that NEPA is not triggered when the alleged major federal action does nothing to change the environmental status quo. Here, the Secretary was not required to prepare a NEPA analysis before postponing oil and gas lease sales because the postponements did not change the leasing status of any land—the same lands were leased before and after the postponements. *See Utah v. Babbitt*, 137 F.3d 1193, 1214 (10th Cir. 1998) (holding that administrative action that did not "of itself, change or prevent change of the management or use of public lands" was not subject to NEPA (quoting 43 U.S.C. § 1711(a)); *Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1175-78 (9th Cir. 2016) (agency was not required to prepare a NEPA analysis for changes to the operation of a dam that were within the range of actions already analyzed); *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234-35 (9th Cir. 1990) (no EIS required to adjust water releases in a manner consistent with the way that the dam had operated over the preceding ten years). Nor did it change already leased lands, because drilling permits continue to be issued and production continues to occur.

Nor does it matter that, without federal leases, oil and gas leasing developments might shift to other land, causing different environmental impacts. In *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669 (5th Cir. 1992), a water authority challenged the U.S. Fish and Wildlife Service's acquisition of a conservation easement for a wetland that, if not for the easement, could potentially have been used to construct a reservoir. *See id.* at 671-72. The court rejected the argument that the acquisition of the conservation easement was a major federal action requiring the preparation of an EIS because it did not alter the environmental status quo. *See id.* at 679-80 (holding that NEPA did not require the agency to "discuss the environmental effects of continuing to use land in the manner which it is presently being used" because the agency was not "undertaking a project that changes the character or function of the land"); *accord Babbitt*, 137 F.3d at 1214. Likewise here, merely postponing lease sales for a temporary period "continu[es] to use land in the manner which it is presently being used" and thus is not a major federal action. *Sabine River*, 951 F.2d at 679.[13]

[13] Wyoming relies on *Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248 (D. Idaho 2001), for the proposition that an action that serves to "leave nature alone" may nonetheless trigger NEPA obligations. Wyo. Br. 48. But the court in that case found that the Forest Service's Roadless Rule would alter the environmental status quo because it would "add to, modify and remove decisions embodied in forest plans governing the management of the national forests." *Kempthorne*, 142 F. Supp. 2d at 1259. No similar action is at issue here.

For all of these reasons, the Court should reject Wyoming's NEPA-based arguments.

VII. WYOMING IS NOT ENTITLED TO INJUNCTIVE RELIEF.

In addition to APA remedies (holding unlawful and setting aside individual postponements; compelling unlawfully withheld sales), Wyoming asks the Court to enter injunctive relief requiring the agency to "hold all future quarterly sales on time." Wyo. Br. 55. The Court should deny Wyoming's requested injunctive relief.

An injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the [movant] is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *Monsanto*, 561 U.S. at 156–57. Here, Wyoming has not even attempted to brief those factors, let alone provided a clear evidentiary showing that it is entitled to such relief.

Critically, Wyoming has not established any form of irreparable injury. "[T]o constitute irreparable harm, an injury must be imminent, certain, actual and not speculative." *Colorado v. EPA*, 989 F.3d 874, 886 (10th Cir. 2021) (citing *New Mexico Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1251 (10th Cir. 2017)). Wyoming has failed to show that it will face any actual, imminent injury from future leasing decisions, let alone a sufficient injury, to justify a perpetual injunction governing all future lease sales. Nor has Wyoming shown

entitlement to injunctive relief for lease sales in other states. Such an injunction would be particularly disfavored as it would change the status quo in numerous states, where regularly quarterly sales are simply not the norm. *See supra* 11.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny any relief to Wyoming.

Submitted respectfully this 5th day of October, 2021,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(B), I certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B)(i) because it contains 12,989 words, excluding the parts of the briefs exempted by Rule 32(f).