Shannon Anderson, Wyo. Bar No. 6-4402
Powder River Basin Resource Council
934 N. Main St.,
Sheridan, WY 82801
(307) 672-5809
sanderson@powderriverbasin.org
Counsel for Respondent-Intervenors Center for Biological Diversity, et al.
(Additional counsel listed on signature page)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WESTERN ENERGY ALLIANCE, *et al.,* Petitioners, vs. JOSEPH R. BIDEN, Jr., *et al.*, Federal Respondents, CENTER FOR BIOLOGICAL DIVERSITY, *et al.* and ALTERRA MOUNTAIN COMPANY, *et al.*, Intervenor-Respondents,	Case No. 0:21-cv-00013-SWS [Lead Case]

STATE OF WYOMING, Petitioners, vs. UNITED STATES DEPARTMENT OF INTERIOR, *et al.*, Federal Respondents, CENTER FOR BIOLOGICAL DIVERSITY, *et al.* and ALTERRA MOUNTAIN COMPANY, *et al.*, Intervenor-Respondents.	Case No. 0:21-cv-00056-SWS

CONSERVATION GROUPS' RESPONSE BRIEF ON MERITS

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INTRODUCTION

Earlier this year, Federal Defendants (collectively, BLM) postponed several oil and gas lease sales to allow for additional environmental review and decisionmaking. BLM has taken similar steps dozens of times in recent years, and its discretion to delay lease sales is well-established under existing law and policy. Indeed, the Supreme Court has upheld the agency's authority under the Mineral Leasing Act of 1920 (MLA) to adopt a nationwide oil and gas moratorium. Petitioners Western Energy Alliance (WEA) and the State of Wyoming, however, ask this Court to reinterpret the law in a manner that would radically change federal oil and gas leasing into a program driven by energy companies rather than the broader public interest.

The Court should reject this invitation. Contrary to Petitioners' theory, the MLA provides BLM with ample discretion not to lease and does not require offering leases for sale every three months whenever they are sought by the industry. Moreover, Petitioners' Federal Land Policy and Management Act (FLPMA) and National Environmental Policy Act (NEPA) arguments would turn those statutes on their heads and conflict with established law that recognizes BLM's broad responsibility and discretion when managing federally owned minerals.

Petitioners also mischaracterize the record in arguing that BLM's explanation for postponing the lease sales was a "pretext" and that those decisions were arbitrary and capricious. BLM's explanations were reasonable and supported by the facts and the law. Petitioners' requests for relief should be denied and BLM's lease sale postponements affirmed.

BACKGROUND

I. LEGAL FRAMEWORK

The MLA charges BLM with managing federally owned minerals to protect "the interests of the United States," and "safeguard[ ] the public welfare." 30 U.S.C. § 187. The MLA provides that federal minerals "may be leased" by BLM, id. § 226(a), and gives the agency broad power "to do any and all things necessary to carry out and accomplish the purposes of [the statute]." Id. § 189. This authority allows BLM to protect the broad public interest (including the environment), rather than just promoting mineral development. See Duesing v. Udall, 350 F.2d 748, 751-52 (D.C. Cir. 1965) (rejecting argument that agency lacked authority to decline leasing for the sake of environmental protection); Nat. Res. Def. Council v. Berklund, 458 F. Supp. 925, 936 n.17 (D.D.C. 1978), aff'd, 609 F.2d 553 (D.C. Cir. 1979); 30 U.S.C. § 226(g) (authorizing steps for "conservation of surface resources").

In exercising its MLA authority, BLM must also comply with NEPA and FLPMA. FLPMA directs BLM to manage public lands under the principle of "multiple use management," which requires balancing "the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'" Norton v. S. Utah Wilderness All., 542 U.S. 55, 58 (2004) (alteration in original) (quoting 43 U.S.C. § 1702(c)). In addition, FLPMA requires that BLM develop resource management plans (RMPs) for public lands and conduct all subsequent management activities "in accordance with" those RMPs. 43 U.S.C. § 1732(a); see also 43 C.F.R. § 1610.5-3(a); Norton, 542 U.S. at 69. FLPMA also requires that "[i]n managing the public lands [BLM] shall ... take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b).

Prior to selling leases, BLM must also comply with NEPA. NEPA requires federal agencies to conduct environmental analysis before taking any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA serves two goals. First, the statute "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). Second, NEPA

requires "broad dissemination of relevant environmental information" so the public can effectively participate in agency decision making. Id. at 349-50.

II. THE NEED FOR REFORMS

The federal oil and gas program is plagued by a host of well-documented problems. The Government Accountability Office (GAO) has repeatedly criticized BLM for charging below-market royalty rates and other fiscal terms that shortchange taxpayers, for poor regulatory oversight and enforcement, and for requiring insufficient reclamation bonding, among other issues. ECF No. 50-1 (Delehanty Decl.) ¶ 6. Federal oil and gas development also contributes significantly to global climate change, yet BLM's management plans largely fail to address the issue. Id. ¶¶ 7-8.

Courts have recognized these failures: in recent years dozens of lease sales, involving thousands of leases, have been invalidated or remanded due to NEPA analyses that failed to address climate, groundwater and other adverse impacts, and for violating FLPMA requirements that protect wildlife and provide for public participation. ECF No. 52-2 (Cowan Decl.) ¶ 4, Ex. C.

To address these problems, President Biden on January 27, 2021 ordered the Interior Department to conduct a "comprehensive review" of the federal oil and gas program "in light of the Secretary of the Interior's broad stewardship responsibilities over the public lands." Exec. Order No. 14008, 86 Fed. Reg.

7,619, 7,624-25 (Jan. 27, 2021). The President also directed BLM to "pause" new leasing "to the extent consistent with applicable law" while that review was pending. The President's Order, however, allowed drilling to continue on existing leases, which make many millions of acres available for oil and gas development. Id.; see, e.g., ECF No. 50-2 (Zachary Decl.) ¶ 24 (in Wyoming, nearly five million acres of federal leases are not in production and more than 3,000 drilling permits are approved but not in use).

On June 15, 2021, the U.S. District Court for the Western District of Louisiana issued a preliminary injunction against implementation of a "Pause" pursuant to President Biden's Order. Louisiana v. Biden, No. 2:21-cv-778-TAD-KK, 2021 WL 2446010 (W.D. La. June 15, 2021). The Louisiana order, however, did not enjoin BLM from postponing lease sales to address NEPA compliance or other environmental issues. See pp. 27-29, infra.

III. MARCH AND APRIL 2021 LEASE SALE POSTPONEMENTS

In the first weeks of the Biden administration, BLM assessed how to implement the President's Order. At the same time, BLM postponed several lease sales proposed for March and April 2021. These postponements aimed to assess whether the sales complied with NEPA in light of recent court decisions striking down similar lease sales. One sale also was postponed pending decisions on how to implement the President's Order.

Contrary to Wyoming's claim, ECF No. 74 (Wyo.Br.) at 1, the lease sales were not postponed through a national moratorium announced by the Interior Secretary. Instead, lease sales in different states were postponed in a series of decisions made by different agency officials in various states and offices:

January 25, 2021 – Nevada: On or by January 25, 2021—prior to President Biden's Order—BLM officials in Nevada decided to postpone its March lease sale. Admin. Rec. BLM_I0001131 (AR1131). That postponement was announced on January 27. AR1132. The postponement took the same approach as a late 2020 decision by the Nevada BLM office, which postponed the December 2020 sale after an adverse court ruling. ECF No. 52-2 at PR100; ECF No. 52 at 11. Petitioners have not challenged BLM's postponement of the December 2020 sale.

February 4, 2021 – Colorado, Utah, Wyoming and Montana: As part of the Presidential transition, many decisions (such as holding lease sales) were required to be made at the Secretarial level, rather than in BLM state or field offices. Secretarial Order 3395, AR1129-30. Accordingly, on February 4, BLM's deputy director provided a series of memoranda to the Interior Secretary's office requesting authorization to post notices for March lease sales in four states. AR1148-57. The February 4 memoranda served to elevate those sale decisions to the Secretary's office as directed by Secretarial Order 3395. See AR1148-57.

The memoranda explained that by law, notices must be posted at least 45 days prior to the sales. AR1148-57; 43 C.F.R. § 3120.4-2. Thus, if BLM were going to proceed with the March sales, the notices needed to be posted by February 12. AR1148-57. That February 12 deadline triggered several subsequent decisions by various BLM offices, as described below.

The memoranda indicated that the NEPA process was not yet complete for any of the lease sales. Id. Each memo also noted that tribes and the public had raised objections to the sales. Id. In addition, the Montana and Wyoming memos noted several recent cases where courts had struck down other lease sales in those states for legal violations relating to wildlife, groundwater, climate change, NEPA compliance and public participation. AR1155; AR1157.

February 11, 2021 – Utah: On February 11, BLM's Utah state director recommended postponing the March 2021 lease sale. AR1163. The director noted that in December 2020, a court invalidated a previous Utah sale for violating NEPA's requirement to analyze a range of alternatives and explained that the draft NEPA analysis for the March sale appeared to have the same legal flaw. AR1164 (citing Rocky Mountain Wild v. Bernhardt, 506 F. Supp. 3d 1169, 1187 (D. Utah 2020)). The director recommended postponement "[b]ecause the BLM needs additional time to carefully review [the recent court decision] and determine" how

it would impact the upcoming sale. AR1164. BLM's deputy director approved the state director's recommendation. AR1164.

February 12, 2021 – Colorado, Utah, Wyoming and Montana: On February 12, the Interior Department Solicitor's Office recommended to the Assistant Secretary that the March 2021 sales in Colorado, Utah, Wyoming, and Montana be postponed because "[e]ach sale raises serious questions as to NEPA compliance." AR1169. The Solicitor's memorandum supplemented the list of cases previously provided to the Secretary's office in the February 4 memoranda with two additional court rulings from late 2020 striking down BLM lease sales for failure to properly analyze climate impacts. AR1170 (citing WildEarth Guardians v. Bernhardt, 502 F. Supp. 3d 237 (D.D.C. 2020); Columbia Riverkeeper v. U.S. Army Corps of Eng'rs, --- F. Supp. 3d ---, 2020 WL 6874871 (W.D. Wash. Nov. 23, 2020)).

The Solicitor's memo explained: "[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" for the lease sales "does not satisfy NEPA and is therefore vulnerable to litigation." AR1170.[1] The memo also noted that the State of

[1] The February 12 memorandum stated incorrectly that no environmental assessments had been prepared for the Wyoming and Utah sales. AR1170. However, agency decisionmakers had already been notified of other NEPA

Colorado had asked BLM to "reevaluate the proposed sale to better analyze and disclose the effects of associated air pollutants, including the sale's effects on particulate matter, ozone, and greenhouse gasses." AR1169.

The Assistant Secretary concurred with the Solicitor's memo recommendation, AR1169, and postponement notices were posted on BLM's website. See AR1172 (stating "lease sales in in Colorado, Montana, Utah and Wyoming are postponed to confirm the adequacy of underlying environmental analysis").

February 12, 2021 – Eastern States (Mississippi and Alabama): On February 12, BLM's eastern states director recommended postponing a March 2021 sale with lease parcels in Alabama and Mississippi. AR1165-66. The director explained that in light of a November 2020 court decision, the agency "needs additional air quality analysis, including greenhouse gas (GHG) analysis," before conducting the proposed sale. AR1166. BLM's deputy director approved the recommendation to postpone the sale. AR1166.

March 1, 2021 – New Mexico: The Assistant Secretary directed postponement of an April 2021 New Mexico sale "pending decisions on how the Department will implement" President Biden's Order, stating "we hope to have

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compliance concerns through the February 4 and 11 memoranda, which identified multiple court decisions striking down similar Wyoming and Utah sales.

further information in the coming weeks" on that implementation. AR1179-80. During discussions, BLM staff noted that the NEPA process for the April sale was not yet complete and several objections had been raised over the sale. AR1174-78.

The Assistant Secretary's decision followed a February 23 website posting by BLM's New Mexico office indicating that the sale would be postponed. AR2422. This announcement was based on "confusion" at the New Mexico office, AR2420, and triggered additional discussions within the agency. AR2420-22. In those communications the Assistant Secretary indicated that "there's not a blanket policy [postponing all sales] even with direction in" President Biden's Order. AR2421.

April 21, 2021 – Second Quarter Lease Sales: On April 21, BLM announced that it would not be holding second quarter (i.e., June) lease sales while it reviewed the federal oil and gas program. See ECF No. 51-5. That cancellation occurred several weeks after the petitions in this case were filed, and thus is not properly before the Court. See ECF No. 4 (WEA amended petition filed Feb. 23, 2021); ECF No. 1, Case No. 21-cv-00056 (Wyoming petition filed Mar. 24, 2021); p. 13, infra.

The April 21 announcement explained that BLM was undertaking the review directed by President Biden and listed several issues the agency planned to address. ECF No. 51-5; cf. Wyo.Br. 34-35 (incorrectly stating the announcement offered

only a "single sentence" with "no reasoning, explanation, or justification"). In addition, BLM explained "[i]n recent years, courts have found the current leasing process in violation of various governing laws, invalidating both the BLM's guidance and a number of lease sales. In connection with the review, the BLM will analyze and ensure that any future leasing complies with applicable law—including requirements for evaluating greenhouse gas emissions and climate change impacts—to better withstand administrative and judicial review." ECF No. 51-5.

ARGUMENT

I. THIS COURT'S JURISDICTION IS LIMITED TO PETITIONERS' CHALLENGE TO MARCH 2021 LEASE SALE POSTPONEMENTS IN COLORADO AND WYOMING.

As an initial matter, Petitioners' framing of their case, and request for nationwide relief, extend far beyond this Court's jurisdiction. First, Petitioners have only sought to establish standing regarding lease sales in Wyoming and Colorado, and they filed suit before any post-March 2021 sales in those states were postponed. Second, there is no "nationwide moratorium" for Wyoming to challenge under the Administrative Procedure Act (APA). Third, while Petitioners ask for an order "compel[ling BLM] to hold lease sales," and apparently to issue leases, Wyo.Br. 55; ECF No. 73 (WEA_Br.) 48, the Tenth Circuit has made clear that courts cannot order BLM to issue oil and gas leases. The Court thus lacks

jurisdiction to grant Petitioners' requested relief, beyond invalidating postponements of the March Colorado and Wyoming sales.

A. Petitioners Have Not Established Standing Beyond the March 2021 Wyoming and Colorado Lease Sales.

Petitioners have not established this Court's jurisdiction over their challenges regarding any lease sales except for the March Colorado and Wyoming auctions. Petitioners bear the burden of establishing standing, which is a prerequisite for this Court to exercise jurisdiction. Lujan v. Defs. of Wildlife, 504 U.S. 555, 559-61 (1992). A plaintiff has standing when (1) she has suffered an injury-in-fact, (2) there is a causal connection between the injury and the conduct complained of, and (3) it is likely that the injury will be redressed by a favorable judicial decision. Id. This showing is required for each form of relief being sought. Town of Chester, NY v. Laroe Estates, 137 S. Ct. 1645, 1650 (2017).

At the merits briefing stage of this administrative review case, Petitioners must "produce evidence on each element of standing as if [they] were moving for summary judgment" with affidavits or other evidence. N. Laramie Range v. FERC, 733 F.3d 1030, 1034 (10th Cir. 2013). That evidence also "must show that [a petitioner] had standing when it filed its petition for review." Id.

Petitioners have not met this burden for any lease sales outside Wyoming and Colorado. Wyoming's allegations of harm relate solely to postponement of

sales in that state. See Wyo.Br. 16-17. It has not asserted standing to seek relief related to lease sales in other states.

While WEA claims to represent members "across the western United States," ECF No. 41 at 3; ECF No. 41-1 (Sgamma Decl.) ¶ 3, WEA alleges no injury related to lease sales outside Colorado and Wyoming.[2] Accordingly, WEA lacks standing to seek relief outside of those two states. See United States v. Hays, 515 U.S. 737, 743-47 (1995) (plaintiffs lacked standing where they failed to demonstrate they had been subject to challenged activity outside the district where they lived).

Even in Colorado and Wyoming, the Court lacks jurisdiction to grant relief related to postponements after the March 2021 sales. WEA and Wyoming filed their cases before BLM announced postponement of the June 2021 auctions. See WEA_Br. 17 n.15 (acknowledging BLM postponed June 2021 lease sales on April 21, 2021, "after Petitioners' operative complaint in this action"); ECF No. 1 ¶ 5, No. 21-cv-56 (Mar. 24, 2021 Wyoming petition). The June 2021 sale postponements, and any other subsequent sales in Colorado and Wyoming, fall outside the petitions' scope, and jurisdiction must exist "when the suit was filed."

[2] See, e.g., ECF No. 41-3 (Boswell Decl.) ¶ 3 (alleging harm to operations in western Colorado); ECF No. 41-2 (Obermueller Decl.) ¶¶ 13–15 (alleging harms to Wyoming economic interests); ECF No. 57-1 (Ballard Decl.) ¶¶ 1-4 (discussing March 2021 Wyoming sale and Wyoming operations).

Davis v. FEC, 554 U.S. 724, 734 (2008); see also S. Utah Wilderness All. v. Palma, 707 F.3d 1143, 1152-53 (10th Cir. 2013) (jurisdictional inquiry focuses on the time the original complaint was filed even if complaint is later amended); N. Laramie Range, 733 F.3d at 1034. Thus, this Court should reject on jurisdictional grounds any request for relief beyond the March 2021 Wyoming and Colorado lease sales.

B. Wyoming Has Not Identified Any Agency Action Ordering a Nationwide Leasing Moratorium.

Wyoming's case is also based on a false premise: that the Secretary of the Interior ordered a nationwide moratorium on all new lease sales. See, e.g., Wyo.Br. 1. The State fails to identify any such order.

Instead, Wyoming (and WEA) list a series of narrower agency steps that each postponed individual March and April 2021 lease sales in several states and for offshore waters. Wyo.Br. 7-10; see also WEA_Br. 7-17 (same). None of these actions purport to impose a national leasing moratorium, as claimed by Wyoming, and nothing in the record suggests BLM postponed the March and April sales through a single nationwide agency action. Rather, the record reflects a series of decisions to postpone individual lease sales. Pp. 5-11, supra.

While Wyoming may bring APA claims against specific final agency actions, it cannot challenge a non-existent agency decision. Courts have rejected similar ploys to conjure a national agency policy without evidence. See PETA v.

U.S. Dep't of Agric., 7 F. Supp. 3d 1, 13 (D.D.C. 2013) (rejecting attempt to challenge agency policy where plaintiff "simply alleg[ed] without proof that an agency has a general policy"); Citizens for Responsibility and Ethics in Washington v. FEC, 380 F. Supp. 3d 30, 44-45 (D.D.C. 2019) (rejecting attempt to challenge agency policy where evidence did not establish existence of the policy).[3] As one court explained, without a documented agency action, "there is by definition almost nothing for the Court to review," which forces the Court to go "down the rabbit hole of reviewing the lawfulness of an agency policy that" may not exist. PETA, 7 F. Supp. 3d at 13. Wyoming cannot challenge a nationwide Secretarial directive without proof that one exists.

Wyoming's focus on a phantom secretarial directive reflects its goal of obtaining far-reaching relief. The APA, however, does not authorize such a broad programmatic remedy. In Lujan v. National Wildlife Federation, plaintiffs challenged a group of agency practices they termed a "land withdrawal review

[3] The cases Wyoming cites, Wyo.Br. 24-25, do not support its position. They involved agency actions "that [are] essentially conceded but ostensibly unwritten," R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 184 (D.D.C. 2015); where evidence showed the agency took an action without putting it in writing, Grand Cyn. Trust v. Pub. Serv. Co. of N.M., 283 F. Supp. 2d 1249, 1252 (D.N.M. 2003); or disputes over written agency policies or actions. Venetian Casino Resort LLC v. EEOC, 530 F.3d 925, 927-30 (D.C. Cir. 2008) (dispute over which written policy agency was applying); Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 432-34, 436-37 (D.C. Cir. 1986) (agency decision made in series of written correspondence qualified as final agency action). None of these cases allow a plaintiff to challenge an agency directive it cannot demonstrate exists.

program" and couched as unlawful agency "action" that the plaintiffs wished to have "set aside." 497 U.S. 871, 879, 890 (1990). The Supreme Court rejected this approach, holding that a plaintiff "cannot seek wholesale improvement of this program by court decree …. Under the terms of the APA, [a plaintiff] must direct its attack against some particular 'agency action' that causes it harm," i.e., the individual decisions that were part of the "land withdrawal review program." Id. at 891; see also Alabama-Coushatta Tribe of Tex. v. United States, 757 F.3d 484, 490-91 (5th Cir. 2014) (ruling that "blanket challenge" to "all" oil and gas permits and leases in an area was impermissible programmatic challenge where plaintiff failed to "specifically identify the agency action[s]" challenged).

The same is true here: Wyoming's challenge must be tethered to specific agency actions. Those actions are BLM's cancellation of the March 2021 Wyoming and Colorado lease sales—not a national moratorium order that has not been shown to exist.

C. The Court Cannot Order BLM to Offer Leases for Sale.

Petitioners seek to compel BLM to hold lease sales and, apparently, to issue leases. See WEA_Br. 48; p. 13 n.2, supra (WEA member declarations asserting injury from failure to issue leases and requesting order that BLM conduct leasing); Wyo.Br. 16-17, 55 (same). But Petitioners fail to offer any precedent where a court has ordered BLM to hold a lease sale or issue oil and gas leases.

To the contrary, the Tenth Circuit has held that given BLM's broad discretion over mineral leasing, "federal courts do not have the power to order competitive leasing. By law that discretion is vested absolutely in the federal government's executive branch and not in its judiciary." Wyoming ex rel. Sullivan v. Lujan, 969 F.2d 877, 882 (10th Cir. 1992); Marathon Oil Co. v. Babbitt, 966 F. Supp. 1024, 1026 (D. Colo. 1997), aff'd, 166 F.3d 1221 (10th Cir. 1999); see also United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 419 (1931) (declining to issue mandamus relief in light of Department's discretion over whether to issue leases); see pp. 19-26, infra (describing BLM's discretion under the MLA). Ordering BLM to auction off and issue new leases would be unprecedented and contrary to controlling caselaw.

The APA also does not allow the relief Petitioners seek. Most of Petitioners' claims rely on APA Section 706(2), which authorizes a court to "hold unlawful and set aside" final agency actions found to be invalid. 5 U.S.C. § 706(2). The typical remedy under Section 706(2), however, is to "set aside" the action and remand to the agency for further consideration—not for the court to order the agency to take a different action. See, e.g., High Country Conservation Advocs. v. U.S. Forest Serv., 951 F.3d 1217, 1228-29 (10th Cir. 2020). Thus, even if Petitioners prevail on the merits, the appropriate relief would be to set aside the postponement decisions and to remand to BLM—to prepare a NEPA analysis, for

example—rather than an order directing that lease sales must take place.

Petitioners also seek relief under APA Section 706(1), which authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), but "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. As the Supreme Court explained, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." Id. at 65.

Petitioners' argument that BLM failed a Section 706(1) nondiscretionary duty under the MLA to hold quarterly lease sales does not support their requested relief. Even if successful, the relief would be to direct that BLM proceed with the lease sale decision making process, including environmental analysis and administrative appeals—not to require BLM to offer any particular leases, or to actually issue such leases. See W. Energy All. v. Salazar, No. 10-cv-0226, 2011 WL 3737520, at *6 (D. Wyo. June 29, 2011) (mandatory duty imposed by similar MLA provision only required BLM to make decision on whether to issue leases, not to issue them). Requiring BLM to issue leases would be improper.

II. BLM HAS NOT VIOLATED THE MINERAL LEASING ACT.

Petitioners claim that postponing the March and April lease sales violated

the MLA because the statute "imposes a non-discretionary duty upon [BLM] to hold quarterly lease sales," Wyo.Br. 26-30, and the agency "lacks discretion to postpone lease sales." WEA_Br. 28. They are incorrect.

The MLA provides federal lands "may be leased" for oil and gas, 30 U.S.C. § 226(a) (emphasis added), which leaves BLM with broad discretion to not offer leases. See Udall v. Tallman, 380 U.S. 1, 4 (1965) (MLA "left the Secretary discretion to refuse to issue any lease at all on a given tract"); Haley v. Seaton, 281 F.2d 620, 625 (D.C. Cir. 1960) (legislative intent of "may be leased" language was "to give the Secretary of the Interior discretionary power, rather than a positive mandate to lease").

The Supreme Court, in fact, has upheld a national oil and gas moratorium under the MLA. McLennan, 283 U.S. at 419, aff'g Wilbur v. United States ex rel. Barton, 46 F.2d 217, 218 (D.C. Cir. 1930) (Hoover administration ordered pause to conserve federally owned oil). In McLennan, the Supreme Court accepted the Interior Department's argument that the MLA "empower[s]" Interior to issue leases but does not compel them. Id. at 419-20. This controlling precedent would authorize even the nationwide leasing moratorium Wyoming incorrectly asserts is at issue here. Pp. 14-16, supra.

A. The 1987 Amendments Did Not Restrict BLM's Long-Established Discretion Not to Lease.

Petitioners nevertheless assert that BLM violated a provision of the MLA

(enacted in 1987) stating "lease sales shall be held for each State where eligible lands are available at least quarterly." 30 U.S.C. § 226(b)(1)(A); see WEA_Br. 23-25; Wyo.Br. 25-34. The quarterly lease sale language was added to the MLA in connection with 1987 amendments requiring that oil and gas leases be offered primarily through competitive auctions. Prior to 1987, leasing was accomplished primarily on an over-the-counter basis, without competitive bidding. Salazar, 2011 WL 3737520, at *4. The quarterly leasing provision ensured competitive auctions would occur on a regular basis when BLM wanted to offer leases for sale, but left the agency with broad discretion to determine when lands are not eligible and available.

Petitioners' arguments to the contrary misread the plain language of the MLA and ignore the history of the 1987 amendments.

1. The Text of the 1987 Amendments Maintains BLM's Leasing Discretion.

The 1987 amendments did not alter the MLA's central "may be leased" language, see 30 U.S.C. § 226(a), which courts have ruled gives BLM broad discretion not to lease. P. 19, supra. Moreover, Section 226(b)(1)(A), which was amended in 1987 to require competitive leasing, confirms the agency's discretion. It states: "All lands to be leased…shall be leased as provided in this paragraph…by competitive bidding …. Lease sales shall be held for each State where eligible lands are available at least quarterly…." 30 U.S.C. § 226(b)(1)(A) (emphasis

added). This language indicates that procedural requirements for competitive leasing—including holding quarterly lease sales—only apply once BLM determines that lands are "to be leased." See Salazar, 2011 WL 3737520 at *4-5 (interpreting Section 226(b)(1)(A) as preserving discretion not to lease).

For example, the Supreme Court interpreted pre-1987 MLA language requiring that "lands to be leased … shall be leased" according to certain procedures, as leaving the agency with discretion to refuse to lease at all. See Udall, 380 U.S. at 4; see also Haley, 281 F.2d at 625 (same). The Tenth Circuit similarly reads this language "to merely mean that the Secretary must issue a lease [according to the Section 226(b)(1)(A) procedures] "if he is going to lease at all." Salazar, 2011 WL 3737520 at *4-5 (quoting Justheim Petroleum Co. v. U.S. Dep't of the Interior, 769 F.2d 668, 671 (10th Cir.1985); Sw. Petroleum v. Udall, 361 F.2d 650, 654 (10th Cir.1966)). Accordingly, the MLA's provision for quarterly lease sales when lands are "eligible" and "available" does not preclude BLM from determining that no lands are "to be leased."

2. The Legislative History Confirms That Congress Did Not Intend to Mandate Leasing.

The legislative history of the 1987 amendments also makes clear Congress did not intend to alter the agency's long-established discretion not to lease. As one commentator noted, "nowhere in the legislative history of the [1987 amendments] did Congress suggest that it modified the Secretary's discretion in any way."

Thomas Sansonetti & William Murray, A Primer on the Federal Oil and Gas Leasing Reform Act of 1987 and its Regulations, 25 Land & Water L. Rev. 375, 388 n.112 (1990). Nor is there any evidence that Congress intended to overturn or limit the Supreme Court's McLennan decision recognizing the agency's authority to adopt a nationwide moratorium, or any other established precedent. See Primer at 388 n.112 (citing McLennan in explaining that amendments did not affect pre-1987 discretion).

Just the opposite: the legislative history demonstrates "Congress did not intend to affect the [Interior Department]'s discretion in determining which lands would be suitable for leasing." Salazar, 2011 WL 3737520, at *5 n.10. Congress sought to reform the MLA because the existing non-competitive leasing process had been rife with abuse. See 133 Cong. Rec. S 8322-04, 1987 WL 940033 (Jul. 13, 1987) (statement of Senate sponsor Sen. Melcher); H.R. Rep. 100-378, at 7-8 (ECF No. 50-1 at TD-319-20). In moving to a competitive leasing system, the sponsors of the 1987 amendments made clear that Congress did not intend to limit the agency's existing discretion not to lease.

For instance, in a committee hearing, Senator Melcher stated that his bill "does not change the Secretary's discretion in refusing to lease, because there are overriding reasons why he should not lease." Sen. Hr'g 100-464, at 108 (June 30, 1987) (ECF No. 50-1 at TD-313) (emphasis added); see also H.R. Hr'g 100-11, at

67, 83 (July 28, 1987) (ECF No. 50-1 at TD-300-01) (comments by sponsor Rep. Rahall reflecting his understanding that Department would retain discretion "to reject lease offers ... on the basis of land management considerations"); H.R. Rep. No. 100-378, at 11 (Oct. 15, 1987) (ECF No. 50-1 at TD-323) (quarterly leasing to occur "where appropriate," and competitive leasing process was "[s]ubject to the Secretary's discretionary authority" over leasing).

Interior Department testimony also reflected the Department's understanding that the amendments did "not change the Secretary's discretion not to lease lands." H.R. Hr'g 100-11, at 67 (ECF No. 50-1 at TD-300); Sen. Hr'g 100-464, at 159 (ECF No. 50-1 at TD-316) (explaining that under amendments agency "has discretion to not lease" as provided in the MLA and FLPMA, and "[t]he discretion is limited only by the need not to be capricious").[4]

[4] Tellingly, WEA ignores the legislative history of the 1987 amendments, instead focusing on an entirely different set of MLA amendments from the 1970s dealing with the coal program. WEA_Br. 29-30. Changes made more than decade earlier have no bearing on what Congress intended in 1987. For its part, Wyoming makes a passing reference to an unsuccessful 1987 bill that would have made explicit the Department's existing authority to postpone lease sales. Wyo.Br. 3. Based on that bill, Wyoming asks the Court to disregard the substantial legislative history showing that Congress did not intend to restrict BLM's existing discretion not to lease. Id. This argument ignores the presumption that "Congress acts with knowledge of existing law, and that absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction." United States v. Games-Perez, 667 F.3d 1136, 1141 n.2 (10th Cir. 2012).

In short, the 1987 amendments reformed the MLA to prevent abuses of the leasing process while maintaining the Department's existing discretion not to lease. The Court should reject Petitioners' theory that Congress—without ever mentioning it—sought to overturn controlling Supreme Court precedent and impose a non-discretionary mandate to offer leases for sale every three months. See Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001) (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not ... hide elephants in mouseholes").

3. In Postponing the Lease Sales, BLM Applied Its Longstanding Interpretation of Eligible and Available.

The 1987 amendments did not define the terms "eligible" or "available." For more than 30 years, however, BLM has interpreted those terms in a manner consistent with Congress's intent to preserve the agency's discretion not to lease. BLM applied that interpretation here.

Since shortly after passage of the 1987 amendments, BLM has interpreted "eligible" and "available" in a consistent manner:

- Lands are "eligible" for leasing when they are not barred from leasing by statute or regulation.[5] Lands precluded from leasing, and thus not "eligible," include

[5] BLM Manual MS-3120.11 (2013), https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual3120.pdf; BLM Handbook H-3101-1, § I.A.1, https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_h3101-1.pdf; BLM Instruction Memorandum 2018-034 n.6 (2018),

national parks and wilderness areas, for example. See 43 C.F.R. § 3100.0-3 (1988); BLM Handbook H-3101-1, § I.A.1 (defining "eligible" lands by reference to the regulation).

- Lands become "available" when they are both (a) "open to leasing in the applicable resource management plan," and (b) "all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act (NEPA)." See p. 24 n.5, supra. As BLM explained to a court in 2017, lands become available when they are "selected for lease at BLM's discretion after compliance with all relevant statutory requirements." Br. of United States as Amicus Curiae, W. Energy All. v. Zinke, No. 17-2005, 2017 WL 1383853, at *2 (10th Cir. April 12, 2017).

Thus, lands are not eligible and available, and quarterly lease sales not required, unless: (a) the lands are not precluded by statute or regulation from leasing; (b) they are designated as open for leasing in the RMP; and (c) the agency has determined it wants to offer the lands after completing NEPA review and other statutory requirements to support that decision.

When BLM postponed the March and April 2021 sales, the lands in question

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https://www.blm.gov/policy/im-2018-034; BLM Instruction Memorandum 2010-117 (2010); AR0008, Memorandum from Office of the Solicitor to BLM Director re: 'Eligible' and 'Available' Land Under the Federal Onshore Oil and Gas Leasing Reform Act of 1987, at 8 (Dec. 15, 1989).

were not eligible and available for leasing: the record shows BLM had not completed its NEPA compliance, nor had BLM made a final determination to lease any of these lands.[6] BLM's decision was nothing new: the agency has frequently postponed lease sales for additional review and other reasons. From 2015-2020, BLM canceled at least 29 scheduled sales. See ECF No. 50-1 at TD-002, TD-007-08; ECF No. 55-2 ¶¶ 7-8. In North Dakota, moreover, BLM offered leases in only five of the 16 calendar quarters from 2017-2020. ECF No. 22-1 ¶ 11 in State of North Dakota v. Dep't of the Interior, No. 21-cv-00148 (D.N.D. Sept. 20, 2021).

The Court owes deference to the agency's reasonable and long-standing interpretation of these statutory terms. See Barnhart v. Walton, 535 U.S. 212, 222 (2002). BLM's interpretation conforms with the purpose and plain language of the 1987 amendments and long-standing caselaw and represents a proven standard that has been followed for decades.

B. Petitioners Misread the MLA.

Petitioners do not dispute BLM's understanding of "eligible." See WEA_Br. 23-24 (citing BLM Manual definition of "eligible"); Wyo.Br. 4. But they ask the Court to replace the agency's interpretation of "available" with a new

[6] See pp. 5-11, supra; see, e.g. AR1170 (Solicitor's memo explaining that parcels were "not now 'eligible' and 'available' because, at a minimum, BLM has not completed its NEPA analysis").

definition of their own invention that would require BLM to offer leases for sale whenever lands are sought by oil and gas companies.

WEA and Wyoming contend that lands are "available" whenever: (a) the RMP does not prohibit their leasing, and (b) a company nominates them for leasing. See WEA_Br. 24-25, 27; Wyo.Br. 4-5. This construction drops BLM's requirement that NEPA and other statutory reviews be completed before land becomes available, and instead makes industry nominations the trigger for availability. Thus, according to Petitioners, when BLM has the legal authority to lease under an RMP and other laws, it must hold a lease sale whenever any company proposes lands for leasing in that state. Their reading turns the keys of governance over to industry, and upends the MLA by allowing oil and gas companies to impose a "mandatory" and "non-discretionary obligation" on BLM to offer leases for sale. WEA_Br. 29; Wyo.Br. 26-27. That is not how the MLA works.

Petitioners' theory suffers from numerous flaws. First, they highlight the Louisiana v. Biden order, which enjoined implementation of a nationwide "Pause" on oil and gas leasing contemplated by President Biden's Order. See WEA_Br. 18, 19, 29, 38; Wyo.Br. 15, 25. The Louisiana court, however, did not adopt Petitioners' reading of the MLA. To the contrary: while enjoining a nationwide "Pause" directed by the President, the court distinguished lease postponements for

NEPA or other environmental concerns. It stated that "[t]he agencies could cancel or suspend a lease sale due to problems with that specific lease [sale], but not as to eligible lands for no reason other than to do a comprehensive review pursuant to Executive Order 14008." 2021 WL 2446010 at *14. The court added: "there is a huge difference between the discretion to stop or pause a lease sale because the land has become ineligible for a reason such as an environmental issue," and halting lease sales "with no such issues and only as a result of Executive Order 14008." Id. at *13.[7]

The Louisiana ruling found plaintiffs had a likelihood of success on the merits because at least one postponement relied on Executive Order 14008 rather than NEPA concerns. Id. at *21 (finding "at least some of the onshore lease [sale]s were cancelled due to the Pause, without any other valid reason. Some were cancelled to do additional environmental analysis ... but the Pause has obviously been implemented by Agency Defendants for some of the lease sales"). If anything, the court's reasoning undercuts Petitioners' reading of "available" and

[7] The Louisiana order is currently on appeal, Case No. 21-30505 (5th Cir.), and the Conservation Groups respectfully submit that its injunction against a "Pause" (as distinct from postponements for NEPA concerns) was erroneous. For example, the court never addressed the Supreme Court's McLennan ruling upholding a national moratorium. See 2021 WL 2446010 at *13 (citing McLennan for holding that leasing Pause was final agency action, but not mentioning its holding on the merits).

appears to support BLM's authority to postpone the March sales to address NEPA issues.

Second, Petitioners' reliance on W. Energy All. v. Zinke, 877 F.3d 1157 (10th Cir. 2017), and W. Energy All. v. Jewell, No. 1:16-CV-912-WJ-KBM, 2017 WL 3600740 (D.N.M. Jan. 13, 2017), is also misplaced. See Wyo.Br. 4, 27, 40; WEA_Br. 5, 22-23, 25, 29, 31. Both orders came in the same 2017 lawsuit, and neither ruled on the meaning of the MLA's quarterly lease sale provision. The Tenth Circuit ruling reversed a denial of intervention by conservation groups. In doing so, the court merely acknowledged the MLA's quarterly lease sale provision and cited BLM's manual and regulations as background. See Zinke, 877 F.3d at 1162 (quoting BLM's definition that lands become "available" when "all statutory requirements and reviews have been met"). The district court ruling found WEA's legal claims reviewable in the course of denying a motion to dismiss. Jewell, 2017 WL 3609740, at *6-7, 13. Neither ruling decided the merits issue presented here.

Third, there is no support for Petitioners' theory that BLM's only option for making lands "unavailable"—and thus declining to hold lease sales when sought by oil and gas companies—is to permanently close lands to leasing in the RMP. See p. 24-27, supra. WEA and Wyoming cannot cite to any FLPMA provision imposing such a limit. And in adopting the 1987 MLA amendments, Congress rejected Petitioners' approach: legislators declined to adopt amendments that

would have provided for leasing decisions "to be made up front" in RMPs. See 133 Cong. Rec. E 2682, 1987 WL 941062 (June 30, 1987) (comments of Rep. Rahall introducing House bill); H.R. Rep. No. 100-495 at 779, 1987 WL 61525 (Dec. 21, 1987) (Conf. Rep.) (House bill planning provisions eliminated in conference committee).

Instead, when an RMP designates lands as "open" to leasing it gives BLM discretion to lease but does not compel it. Pp. 50-51, infra (FLPMA discussion). BLM's existing RMPs have been developed in reliance on that understanding, id., which provides for land use planning directed by FLPMA and maintains BLM's leasing discretion under the MLA. See WildEarth Guardians v. Nat'l Park Serv., 703 F.3d 1178, 1189 (10th Cir. 2013) (where two statutes apply, they should be interpreted to give effect to both). BLM has never followed Petitioners' approach, and the Court should reject their attempt to radically change the application of both FLPMA and the MLA.[8]

[8] In practice, Petitioners' interpretation would represent a radical shift with far-reaching impacts. BLM routinely designates the overwhelming majority of land as "open" for leasing based on the recognition that such a classification leaves the agency with discretion not to lease. See The Wilderness Society, Acreage Open to Leasing – BLM Plans Around the West, https://www.wilderness.org/sites/default/files/media/file/TWS%20Acreage%20Open%20to%20Leasing%20June%202016.pdf (2016 analysis showing that 90 percent of acreage in western states designated as open to leasing). WEA and Wyoming's interpretation would make all that acreage "available" whenever companies propose lands for leasing, and effectively give the industry control over when and where BLM must hold lease sales under existing RMPs.

Fourth, Petitioners' reliance on BLM regulations falls short. WEA and Wyoming cite to 43 C.F.R. § 3120.1-1 for their argument that lands become "available" whenever a company nominates them for leasing through an expression of interest, but they neglect to quote its full text. Wyo.Br. 28; WEA_Br. 6, 25-26. The regulation states:

> All lands available for leasing shall be offered for competitive bidding under this subpart, including but not limited to:
>
> (a) Lands in oil and gas leases that have terminated, expired, been cancelled or relinquished.
>
> ***
>
> (d) Lands which are otherwise unavailable for leasing but which are subject to drainage (protective leasing).
>
> (e) **Lands included in any expression of interest** or noncompetitive offer….
>
> (f) Lands selected by the authorized officer.

43 C.F.R. § 3120.1-1 (emphasis added). Section 3120.1-1 simply lists examples of lands that may potentially be "available" for leasing and thus subject to the requirement that any leasing be done competitively. It does not make every parcel in the listed categories automatically "available" for leasing.

This is confirmed by the regulation's silence on RMPs: Section 3120.1-1 does not limit each category to those lands designated as "open" under the RMP. See id. As a result, if the listed categories were automatically "available," they would encompass lands closed to leasing under the RMP. Petitioners'

interpretation of the regulation thus contradicts their interpretation of "available," which is limited to lands open to leasing under the RMP. Indeed, BLM itself has never interpreted the regulation as making the listed categories automatically "available." See pp. 24-25, supra; see also BLM Manual 3120.11 ("if eligible and available for lease," lands in listed categories "may be offered for competitive bidding").

An interpretation making each listed category automatically "available" would lead to an absurd result by requiring that BLM "shall" offer for lease "all lands" in each category. For example, BLM would be required to lease a parcel whenever an oil and gas company files an "expression of interest" for it, or to re-offer a parcel whenever an existing lease expires or is relinquished. 43 C.F.R. § 3120.1-1. BLM did not abdicate leasing decisions to industry or require continual offering of expired leases regardless of the public interest or any countervailing management considerations. Even Petitioners do not contend that BLM must offer every lease parcel nominated by a company. WEA_Br. 27 (asserting that its interpretation of available "does nothing to … force the Secretary to lease any individual parcel"); see also Clinton v. City of New York, 524 U.S. 417, 429 (1998) (rejecting interpretation that "would produce an absurd and unjust result Congress could not have intended").

Petitioners also cherry-pick a sentence from the preamble to Section 3120.1-1 stating "[t]he term 'available' means any lands subject to leasing under the Mineral Leasing Act." 53 Fed. Reg. 22,814, 22,828 (June 17, 1988) (cited in WEA_Br. 26; Wyo.Br. 28). That passing statement cannot bear the weight WEA and Wyoming place on it. As with the regulation itself, their reading of the preamble would make lands "available" even where they are closed to leasing under the RMP. That cannot be what BLM intended and would be inconsistent even with Petitioners' interpretation.

Further, reading "available" as everything "subject to leasing" violates basic canons of construction by making the term "eligible" surplusage. See Jewett v. Comm'r of Internal Revenue, 455 U.S. 305, 315-16 (1980) (declining to adopt interpretation rendering part of law superfluous); United States v. Flaugher, 865 F.3d 1249, 1253 (10th Cir. 2015) (same). As noted above, "eligible" refers to lands that are not barred from leasing by statute or regulation. Pp. 24-25, supra. Under Petitioners' reading, the preamble would make "available" and "eligible" synonymous. Indeed, WEA's own brief refers to "eligible" lands as "all lands subject to leasing"—the same definition it claims for "available" lands. See WEA_Br. 23. BLM's longstanding interpretation of the MLA gives meaning to both "eligible" and "available," but Petitioners' new reading fails to do so. Jewett, 455 U.S. at 315-16; Flaugher, 865 F.3d at 1253.

Moreover, the full text of the preamble makes clear Petitioners read too much into their quoted sentence. The preamble states "prior to offering" lands, BLM determines "whether leasing will be in the public interest." 53 Fed. Reg. at 22,828. The preamble also notes that "many if not most lands will not be 'offered' by the Bureau but are nonetheless available for filing or expressions of interest." Id. (emphasis added).

The Interior Department Solicitor's Office, in fact, addressed this issue more than 30 years ago. In a 1989 memo, the Solicitor explained that the preamble "clearly shows the Department interpreted the [1987 amendments'] competitive leasing provisions as retaining Secretarial discretionary power to lease lands." AR0008. The Solicitor's office stated that "a sale must be held each quarter" where eligible lands are available. Id. But the memo concluded, based on the preamble and the history of the 1987 amendments, that "eligible and available" lands are those: (a) "statutorily open to leasing under the MLA, [b] that have met other statutory requirements, and [c] for which leasing is in the public interest" as determined by BLM after "appropriate review processes." Id. The Solicitor's office also noted that "BLM may never include a parcel in a sale for which it has not completed its statutory requirements under laws such as" NEPA and the Endangered Species Act. AR0009. BLM's reading of the preamble has applied

for over thirty years. The Court should reject Petitioners' attempt to re-write the law and turn federal oil and gas leasing into a process driven by the industry.

III. THE RECORD SUPPORTS BLM'S DECISION TO POSTPONE LEASE SALES FOR ADDITIONAL NEPA REVIEW.

Petitioners recognize BLM has long understood "available" to require completion of the NEPA process. They repeatedly attack BLM's decision to postpone sales for more review of NEPA compliance as a "pretext," suggesting that the real motive was to "blindly" implement President Biden's Order. WEA_Br. 32, 34, 36, 41; Wyo.Br. 19-20, 30, 33, 43; see Louisiana, 2021 WL 2446010 at *16, 21 (plaintiffs argued that reliance on NEPA was "pretext" for following Biden Order). Contradicting their "pretext" theory, Petitioners also claim that the sale postponements were arbitrary and capricious because BLM failed to "offer[ ] any explanation" for them. WEA_Br. 40. Both arguments should be rejected.

A. The Interior Department's Explanations for Postponing Lease Sales Were Not a "Pretext."

The Court should reject Petitioners' theory that BLM's explanation for postponing sales was pretextual. Federal agencies are entitled to "a presumption of regularity" under the APA. Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir. 1994); Defs. of Wildlife v. Everson, 984 F.3d 918, 934 (10th Cir. 2020). Petitioners fail to overcome that presumption.

Courts review an agency's decision based on the explanation it provides in the administrative record. Dep't of Com. v. N.Y., 139 S. Ct. 2551, 2573 (2019). Normally, a court does not "inquire into the mental processes of administrative decisionmakers." Id. at 2573-74. An exception exists, however, where a plaintiff makes a "strong showing of bad faith or improper behavior." Id. In Department of Commerce, the Supreme Court recognized that the bad faith exception can apply where the record shows that an agency's stated rationale is just a "pretext." Id. at 2573-76. In such cases, where there is a "a significant mismatch between the decision the [agency] made and the rationale [it] provided," the decision is arbitrary and capricious because the agency has not provided an explanation supported by the record. Id.

The Supreme Court emphasized, however, that "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." Id. at 2573 (citing Jagers v. Fed. Crop. Ins. Corp., 758 F.3d 1179, 1185-86 (10th Cir. 2014)). The court noted that it is "typical" for an agency to "have both stated and unstated reasons for a decision." Id. at 2575; see also id. at 2579 (Thomas, J., concurring and dissenting in part) (showing of pretext renders decision arbitrary and capricious only where "administrative record establishes that an agency's stated rationale did not factor at all into the decision, thereby depriving the action of an adequate supporting rationale").

Petitioners point to nothing suggesting bad faith or an improper pretext under Department of Commerce. The record reflects that BLM—which was regularly losing cases over its lease sales—postponed the March sales to allow more review and ensure they could comply with NEPA. Pp. 5-11, supra. Neither WEA nor Wyoming even attempts to rebut these facts, much less show that court decisions played no role in BLM's decisions.

Instead, WEA emphasizes that the postponements all were made on or shortly before February 12, and the agency did not make an affirmative finding that the draft NEPA documents violated NEPA. WEA_Br. 33; see also id. at 34 (citing single court decision that ruled in BLM's favor). WEA also claims BLM failed to describe why NEPA "concerns could not be addressed through the on-going NEPA process" without postponing sales. WEA_Br. 41. None of these claims withstands scrutiny.

BLM recognized that it faced a February 12 deadline to determine whether to announce the March sales, and if the sales were posted, the agency would also have to provide a protest (administrative appeal) period in advance of the sale date. Pp. 6-7, supra. That February 12 deadline fell just over three weeks after the Biden administration took office (on January 20), and the recency of the November and December 2020 court decisions of concern made it impractical to assess the need for more NEPA analysis, and then revise the documents, in advance of the March

sales. The BLM memoranda reflect all these considerations and provide a reasonable explanation for needing more time to address NEPA compliance before deciding whether to hold the sales.[9]

Even if BLM were considering how to implement the Biden Order at the same time it postponed the lease sales, see AR1313-15, that does not render the agency's NEPA compliance explanation an improper pretext. As the Supreme Court noted, it is "typical" for an agency to "have both stated and unstated reasons for a decision." Dep't of Com., 139 S. Ct. at 2575. Indeed, the two issues are closely related: BLM is reviewing the oil and gas program under the Biden Order

[9] WEA incorrectly suggests the February 4 memos requesting approval to post the lease sales undercut BLM's explanation that more NEPA review was needed. WEA_Br. 32-34. Those memoranda were a procedural step elevating the agency's decision whether or not to proceed with the sales, as required by Secretarial Order 3395. Pp. 6-7, supra. Indeed, several of the memos support postponement by describing multiple court rulings striking down lease sales in those states, as well as objections raised by state and local governments and citizens. Pp. 5-11, supra.

Wyoming argues that the February 12 Solicitor's memo incorrectly states that no environmental assessment (EA) was prepared for the Wyoming sale. Wyo.Br. 32-33. But BLM's February 4 memo, which had been provided to the Assistant Secretary only one week before, noted that an EA had been prepared in Wyoming and detailed recent court decisions striking down similar Wyoming lease sales. AR1157. While that memo suggested vaguely that the NEPA "concerns" raised in those court cases "will be satisfactorily addressed ... before any lease is issued," it offered no explanation of how that could be done prior to the sale. Id.; see WEA_Br. 34. Under these circumstances, it was reasonable for the agency to decide that it wanted to take additional time for review. See F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 513-14 (2009) (court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned").

in part because courts have repeatedly invalidated lease sales for failure to grapple with climate and other environmental impacts. See pp. 10-11, supra (describing April 21 announcement); see also, e.g., WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41 (D.D.C. 2019); Bernhardt, 502 F. Supp. 3d 237. The presence of multiple related concerns does not negate BLM's desire to ensure compliance with NEPA before holding the lease sales. See Dep't of Com., 139 S. Ct. at 2575, 2579.

B. The MLA Quarterly Leasing Provision Does Not Trump NEPA.

Similar to its pretext theory, WEA also argues that BLM cannot "manufacture a lack of eligible and available parcels through [the agency's] failure to satisfy NEPA's requirements." WEA_Br. 31; see also Wyo.Br. 32 (similar). As described above, the record does not reflect BLM delay tactics. Far from dragging its feet, BLM had to move quickly on postponements in light of the February 12 deadline. That fell well within BLM's MLA authority, and the agency has often taken similar steps when more time was needed for review and environmental analysis. P. 26, supra.[10]

[10] WEA also suggests that postponing lease sales violates 42 U.S.C. § 15921(a)(1)(A), which states to "ensure timely action on oil and gas leases," the Interior Department shall "ensure expeditious compliance" with NEPA. WEA_Br. 22-23. That provision, however, is implemented through adoption of best management practices (BMPs) and proposing regulations. See 42 U.S.C. § 15921(b)(1)(B) (directing Interior Department to develop BMPs and regulations to "ensure timely action on oil and gas leases"). WEA does not identify any such BMPs or regulations that BLM has allegedly violated.

Congress did not restrict the applicability of NEPA when it adopted the MLA quarterly leasing provision in 1987.[11] Implied repeals are strongly disfavored, and courts presume "Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." Kenney v. Helix TCS, Inc., 939 F.3d 1106, 1110 (10th Cir. 2019). That presumption applies here. Congress, in fact, rejected a proposal in 1987 to exempt oil and gas lease sales from NEPA's requirements. S. Rep. No. 100-188, at 6, 49, attached as Ex. 1; H.R. Conf. Rep. No. 100-495 at 782. Moreover, in response to questions from Congress, the Interior Department explained some of the "most common reasons" for rejecting lease offers as "not in the public interest" included "compliance with NEPA [and] protection of the environment." H.R. Hr'g 100-11, at 66 (ECF No. 50-1 at TD-300). There is thus no basis to conclude that the MLA's eligible and available language restricts the applicability of NEPA. See Kenney, 939 F.3d at 1110. BLM must comply both with NEPA's requirements to evaluate the

[11] Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma, cited by Wyoming, Wyo.Br. 33, involved a statute that made a disclosure statement automatically effective 30 days after filing unless the Department of Housing and Urban Development (HUD) determined it was "incomplete or inaccurate." 426 U.S. 776, 788-789 (1976). The court there ruled that no NEPA analysis was required prior to the statements taking effect. An automatic effective date for a disclosure form is not comparable to BLM's broad discretion over leasing decisions.

environmental impacts from selling oil and gas leases, and with the MLA. Pp. 2-4, supra.

WEA claims it does not seek to "curtail NEPA review," ECF No. 57 at 2 n.2, but that is exactly what its reading of the MLA would do. By eliminating NEPA compliance from the definition of "available," WEA would force BLM to rush through NEPA compliance in time to offer leases every three months in each state, regardless of new legal developments or significant questions about whether leasing is in the public interest. WEA_Br. 35-36; Wyo.Br. 33.

WEA's argument is also self-defeating: if BLM were required to offer leases for sale even when it recognizes more NEPA analysis is required or that the sales may not comply with FLPMA or the public interest, those lease sales will inevitably be struck down by courts. Here, had BLM proceeded with the March 2021 lease sales despite its acknowledgment of NEPA concerns, those sales would have been very vulnerable to challenge. Pp. 5-10, supra. For example, in one of the decisions addressed by the Solicitor, the court remanded BLM's NEPA analysis for a second time because after a first adverse decision, the agency rushed out a supplemental analysis that attempted to paper over the deficiencies previously identified by the court. See Bernhardt, 502 F. Supp. 3d at 259 n.16 ("urg[ing] 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").

Similarly, in 2019 and 2020, BLM cancelled several lease sales following court rulings that two agency leasing policies (which had been adopted in 2017-18 and applied to lease sales across the country) violated FLPMA requirements for public participation and protection of greater sage-grouse. See Mont. Wildlife Fed. v. Bernhardt, No. 18-cv-00069-GF-BMM, 2020 WL 2615631 (D. Mont. May 22, 2020) (sage-grouse); W. Watersheds Proj. v. Zinke, 336 F. Supp. 3d 1204 (D. Idaho 2018) (September 2018 public participation ruling); ECF No. 50-1 at TD-002, 007-08 (listing sale postponements in 2019-2020). Under WEA's argument, BLM would have been required to hold the lease sales despite the likelihood they would be struck down as inconsistent with new court rulings. These types of outcomes could become commonplace under Petitioners' interpretation of "available."[12]

[12] WEA's attempt to sidestep this problem by arguing that BLM can "withhold[] individual parcels" from a lease sale rather than postponing the entire sale, WEA_Br. 27-28, 36, fails because many or most of the legal flaws plaguing BLM's lease sales affect every parcel being offered. See, e.g., Zinke, 368 F. Supp. 3d at 77 (climate pollution from leasing); W. Watersheds Proj., 336 F. Supp. 3d at 1238-39 (insufficient public process for lease sale). Withholding a few individual parcels will not bring these sales into compliance with the law, as BLM recognized.

C. BLM's Lease Sale Postponements Were Not Arbitrary or Capricious.

Petitioners also are wrong that the postponements were arbitrary and capricious because BLM failed to adequately explain them. Under the APA's arbitrary-and-capricious standard, courts focus on the decision-making process, not on its wisdom or correctness. Olenhouse, 42 F.3d at 1575. The Court's role is "to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." Id. at 1574. A court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Fox Television, 556 U.S. at 513-14. Petitioners' arguments are unavailing.

First, WEA asserts that President Biden's Order cannot "support the cancellation of the lease sales" because the Order only directs a pause "to the extent consistent with applicable law," and "does not cite any legal authority granting [BLM] the right to cancel lease sales." WEA_Br. 37-38 (quoting AR1138); see also Wyo.Br. 31-32 (similar). This argument fails because the postponements were entirely consistent with the MLA, NEPA and FLPMA. Moreover, as described above, BLM cited the Biden Order as the basis for only one of the postponements (the April New Mexico sale). Pp. 5-11, supra.

WEA also questions President's Biden's policy choice to pause new leasing and objects to the lack of detail in the Executive Order. WEA_Br. 38-39. These

are non sequiturs because President Biden is not an agency and his Order is not subject to challenge under the APA. Dalton v. Specter, 511 U.S. 462, 470 (1994); see ECF No. 57 at 1 (WEA preliminary injunction reply). All BLM did in the April New Mexico sale was to follow the President's broad policy directive while working to flesh out the details of its implementation. That is not arbitrary and capricious—it's how government routinely functions. See e.g., City of Albuquerque v. U.S. Dep't of Interior, 379 F.3d 901, 905 (10th Cir. 2004) (describing agency regulations implementing Executive Order).

Second, WEA is wrong that BLM failed to offer any explanation for postponing lease sales, apart from President Biden's Order. WEA_Br. 38-40. This argument both ignores the record and contradicts Petitioners' "pretext" theory. As discussed above, the March 2021 sales in Colorado, Montana, Wyoming, Utah, and the Eastern states were postponed because more review was necessary for NEPA compliance. Pp. 5-9, supra; ECF No. 52-2 at PR076.[13]

Third, WEA asserts that BLM arbitrarily failed to consider the reliance interests of oil and gas companies and state governments. WEA_Br. 41-42. This

[13] Contrary to Wyoming's assertion, Wyo.Br. 31-33, BLM addressed the MLA's "eligible and available" language and concluded the parcels were not "available" because the NEPA process had not yet been completed. AR1169-70, 1313-15. Wyoming and WEA also are incorrect that the preparation of draft EAs and other draft documents completed BLM's NEPA compliance. Wyo.Br. 32; WEA_Br. 20. Those documents were only in draft form when the sales were postponed. Pp. 5-11, supra.

argument fails because BLM did not reverse any leasing decisions—it postponed sales that had only been proposed but never finalized. WEA cannot assert any reliance interests on discretionary leasing decisions that had not yet been made. See Sierra Club v. U.S. Bureau of Land Mgmt., 786 F.3d 1219, 1226 (9th Cir. 2015) (holding that "BLM's evolving analysis" in the course of making a decision on a wind energy project "was not a change in a published regulation or official policy" for purposes of arbitrary and capricious review). Moreover, BLM's postponements were not a departure from precedent: the agency has a long history of postponing quarterly lease sales. Petitioners thus have no basis for asserting any reliance interest. Pp. 24-26, supra; cf. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (discussing "decades of industry reliance" on "longstanding" agency policy); Grace Petroleum Corp. v. FERC, 815 F.2d 589, 591 n.4 (10th Cir. 1987) (cited at WEA_Br. 42) (addressing agency's departure from 20-year-old precedent). BLM's decisions were not arbitrary and capricious.

IV. BLM HAS NOT VIOLATED NEPA IN POSTPONING LEASE SALES.

Petitioners' argument that BLM must prepare a new NEPA analysis before postponing a lease sale to allow for NEPA compliance is illogical and would turn the statute on its head. As Wyoming acknowledges, NEPA's purpose is to ensure that federal agencies "look before they leap." Wyo.Br. 44. That is exactly what BLM was doing here—temporarily refraining from irreversibly committing public

lands to oil and gas development while fully considering the environmental impacts of those sales. See pp. 5-11, supra. Petitioners, however, would require BLM to offer leases regardless of whether the agency has completed the necessary environmental analysis. This would directly conflict with NEPA.

As their arguments demonstrate, Petitioners' goal is not to further NEPA's purpose of environmental protection, but instead to "maintain the economics of their development projects," WEA_Br. 45-46 n.23, and generate revenue for the State of Wyoming. Wyo.Br. 16-17. This Court should not allow NEPA to be used as an "'obstructionist tactic' to prevent environmental protection." Douglas Cnty. v. Babbitt, 48 F.3d 1495, 1508 (9th Cir. 1995).

NEPA requires preparation of an environmental impact statement (EIS) for any "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). But Petitioners fail to identify any "major federal action" triggering NEPA in the lease sale postponements here. See Kleppe v. Sierra Club, 427 U.S. 390, 399-400 (1976) (rejecting NEPA claim where there was no specific proposal for major federal action).

Although Petitioners attempt to frame their argument as a challenge to a nationwide policy, they fail to identify any such nationwide agency action.

Wyo.Br. 46; WEA_Br. 43; pp. 14-16, supra.[14] Instead, Petitioners challenge BLM's inaction in failing to hold March and April lease sales. As Wyoming concedes, oil and gas lease sales are generally major federal actions that trigger NEPA's requirements. Wyo.Br. 46-47 n.9 (citing cases involving lease sales). There is no support, however, for the claim that temporarily not holding an oil and gas lease sale is also a major federal action. Cf. Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1089 (9th Cir. 2014) (explaining "we have never held failure to grant a permit to the same standard" as issuing a permit under NEPA "and for good reason. If agencies were required to produce an EIS every time they denied someone a license, the system would grind to a halt"); Minn. Pesticide Info. & Educ., Inc. v. Espy, 29 F.3d 442, 443 (8th Cir. 1994) (holding that while Forest Service completed an EIS for a prior decision to use herbicide on a national forest, no EIS was required for its later decision not to use herbicide); Defs. of Wildlife v. Andrus, 627 F.2d 1238, 1243-44 (D.C. Cir. 1980) ("[I]f the agency decides not to act, and thus not to present a proposal to act, the agency never reaches a point at

[14] Petitioners' cited caselaw does not support their position. See Wyo.Br. 45-56 (citing California ex rel. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006); Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975)). Lockyer addressed adoption of a regulation adding permanent protections for pristine national forests nationwide. And Morton was overturned by the Supreme Court in Kleppe, which held an EIS was not required for coal leasing activities across a region because there was no specific proposal for "major federal action" there. Kleppe, 427 U.S. at 399–400.

which it need prepare an impact statement."); All. for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 175 (D.D.C. 2000) (holding FDA's announcement of a presumption against regulation was not an "overt action" subject to NEPA).

Moreover, the failure to hold lease sales does not trigger NEPA because BLM is "maintain[ing] the environmental status quo" pending further analysis. Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1114 (9th Cir. 2002), abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011). This is not a case where BLM has, for example, adopted a regulation permanently changing how public lands are managed nationwide, Idaho ex rel Kempthorne v. U.S. Forest Serv., 142 F. Supp. 2d 1248, 1259 (D. Idaho 2001) (cited at Wyo.Br. 48), or changed the status quo by permanently lifting a national moratorium so that coal leasing could occur. Citizens for Clean Energy v. U.S. Dep't of Interior, 384 F. Supp. 3d 1264, 1278-79 (D. Mont. 2019) (cited at Wyo.Br. 47).

Instead, BLM declined to make an irretrievable commitment of resources through several lease sales while it further analyzed the significant environmental and other impacts of those sales. Temporarily staying its hand does not represent a major federal action. See Anglers Conservation Network v. Pritzker, 70 F. Supp. 3d 427, 442 (D.D.C. 2014) ("Plaintiffs have failed to state a claim under NEPA because Defendants have not taken any final agency action that alters the

substantive status quo or constitutes an 'irreversible and irretrievable commitment of resources' to an action that will affect the environment."), aff'd, 809 F.3d 664 (D.C. Cir. 2016).

Instead of focusing on the impacts to the environment, as NEPA requires, Petitioners make a tortured argument that the "status quo" is BLM offering lands for lease in future auctions. WEA_Br. 44; Wyo.Br. 47. This ignores BLM's discretion under the MLA to determine whether lands are eligible and available for leasing, as well as the agency's common past practice of postponing lease sales. See pp. 19-26, supra. Anticipation of a future discretionary action cannot represent the status quo. BLM's own NEPA documents illustrate this point: they indicate that if the agency takes "no action," the lands will remain unleased. See, e.g., ECF No. 50-1 ¶¶ 9-10, Attachs. 11-12 (examples of 2020 BLM leasing analyses).[15]

[15] Petitioners express concern over the socioeconomic impacts of postponing lease sales. WEA_Br. 45; Wyo.Br. 16-17, 49, 52-53. But "[i]t is well-settled that socioeconomic impacts, standing alone, do not constitute significant environmental impacts cognizable under NEPA." Cure Land, LLC v. U.S. Dep't of Agric., 833 F.3d 1223, 1235 (10th Cir. 2016); see also 40 C.F.R. § 1502.16(b). Petitioners also raise the potential for environmental impacts if development shifts from federal to private lands or overseas. See WEA_Br. 44-45; Wyo.Br. 49-51. However, the record shows that a temporary leasing pause will have little impact on exploration and production because existing leases will not be affected. See ECF No. 50 at 14 n.7 (citing multiple studies).

Petitioners should not be allowed to undermine NEPA by forcing BLM to irretrievably commit public lands to oil and gas development without fully considering the environmental impacts of doing so.

V. POSTPONING THE MARCH AND APRIL LEASE SALES DID NOT VIOLATE FLPMA.

Wyoming offers two theories alleging that the March and April lease sale postponements violated FLPMA. Both arguments lack merit.

A. Postponing the Lease Sales Did Not Amend the Applicable Resource Management Plans.

Wyoming claims that, because the applicable RMPs designated land as "open" for oil and gas leasing, temporarily postponing several lease sales violated FLPMA by improperly amending those RMPs. Wyo.Br. 6, 39-43.[16] The Tenth Circuit rejected a nearly identical "de facto amendment" argument in Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125, 1135-36 (10th Cir. 2006). In that case, even though the relevant RMPs designated certain areas of the public lands as "open" to off-highway vehicle use, the court held that BLM's discretionary decision to temporarily close certain routes to off-highway vehicles to protect wildlife and other resources did not amount to a de facto amendment of the RMP. Id. The court recognized BLM's separate duty under FLPMA to avoid

[16] Petitioners also couch this claim as a NEPA violation because NEPA compliance is required when amending an RMP. Wyo.Br. 46; WEA_Br. 44. The argument fails for the same reason under NEPA and FLPMA.

"unnecessary or undue degradation of the lands," and explained that temporary closures "reflect[] the realities of public land management" because BLM "could not effectively respond to resource degradation only through the [time-consuming] formal planning process." Id. at 1136 (quoting 43 U.S.C. § 1732(b)).

The same is true here. Identifying lands in the RMP as "open" for leasing does not compel BLM to lease them; the agency retains its leasing discretion. See, e.g., New Mexico ex rel. Richardson v. U.S. Bureau of Land Mgmt., 459 F. Supp. 2d 1102, 1124 (D.N.M. 2006), aff'd in relevant part, 565 F.3d 683 (10th Cir. 2009); Roy G. Barton, 188 IBLA 331, 337 (2016); AR000259 (recognizing discretion not to lease lands open under RMP); AR2253, 2255 (lands designated "open" are "potentially" offered, and RMP designation only one factor in leasing decision); AR1030 ("the RMP does not mandate decisions for federal minerals leasing").[17] A temporary decision not to hold a given sale does not violate the RMP or amount to an RMP amendment permanently closing the affected lands to leasing.

[17] See also, e.g., BLM, Record of Decision and Green River Resource Management Plan at pdf p. 27 (Oct. 1997) (lands are "open to consideration of oil and gas leasing"), https://eplanning.blm.gov/public_projects/lup/63096/75581/83689/greenriver-rmp.pdf; BLM, Record of Decision and Approved Casper Resource Management Plan at 2-16 (Dec. 2007) (same) (cited at Wyo.Br. 41 n.7).

B. BLM Did Not Unlawfully Withdraw Lands.

Wyoming also claims incorrectly that the lease sale postponements "unlawfully withdrew federal land from sale and entry." Wyo.Br. 36. Merely postponing a lease sale does not amount to a FLPMA withdrawal.

A "withdrawal" is a formal Interior Department decision that "temporarily suspends the operation of some or all of the public land laws" for a specified time period to protect resources or other uses of the land. S. Utah Wilderness All. v. U.S. Bureau of Land Mgmt., 425 F.3d 735, 784 (10th Cir. 2005); Bob Marshall All. v. Hodel, 852 F.2d 1223, 1229-30 (9th Cir. 1988) (same); 43 U.S.C. §§ 1702(j) (defining withdrawal as decision to "withhold[] an area of Federal land from settlement, sale, location or entry under some or all of the general land laws"), 1714(c)(2)(9) (addressing duration of withdrawal). FLPMA provides a detailed procedural framework for adopting a withdrawal, including submission of a report to Congress, publishing notice in the Federal Register, a public hearing, and other requirements. 43 U.S.C. § 1714.

BLM's postponement of the March and April 2021 lease sales does not meet this definition. Rather than removing lands from operation of the MLA, the postponements involve an exercise of the Department's authority under that statute. See Bob Marshall All., 852 F.2d at 1230 (deferral of leasing in an area is not a withdrawal because, rather than "removing [the area] from the operation of

the mineral leasing law," it "constitute[s] a legitimate exercise of the discretion granted to the Interior Secretary"); Se. Conf. v. Vilsack, 684 F. Supp. 2d 135, 144-45 (D.D.C. 2010) (closing old-growth forests to logging was not a withdrawal because it represented exercise of agency's authority under National Forest Management Act, rather than exempting the lands from operation of public lands laws); see also, Learned v. Watt, 528 F. Supp. 980, 982 (D. Wyo. 1981) (memo closing region of Wyoming to leasing was valid as "an exercise of the Secretary's discretionary power and authority" despite not following withdrawal procedures).

Moreover, unlike a withdrawal, postponing a lease sale does not segregate the area for set time period: BLM can reverse course and offer the lands for lease at any time. Cf. 43 U.S.C. § 1714(c)(1) (large withdrawals can remain in effect for up to 20 years). In fact, when lease sales are postponed for BLM to do additional review and analysis, BLM commonly decides to lease the lands in question a few months later. ECF No. 50-1 ¶ 5. As a result, requiring BLM to institute a formal withdrawal before postponing an individual lease sale would lead to absurd results. If the Department were required to undertake withdrawal procedures, such as submission of a detailed report to Congress, 43 U.S.C. § 1714(c), when postponing a sale, the agency would have to initiate those steps knowing they could likely become moot before they could be completed. FLPMA does not require such a pointless and wasteful exercise.

Wyoming's reliance on Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980), and Mountain States Legal Foundation v. Hodel, 668 F. Supp. 1466 (D. Wyo. 1987), is misplaced because those decisions involved much different situations than this case. In both cases, the Interior Department had not offered leases in an area for several years. Andrus, 499 F. Supp. at 390; Hodel, 668 F. Supp. at 1469. That is a far cry from postponements over a period of less than two months in March and April 2021. It is telling that, while BLM routinely postpones quarterly lease sales, ECF No. 50-1 ¶¶ 3-4, Wyoming cannot cite a single case treating such a postponement as a FLPMA withdrawal in the more than 30 years since Andrus and Hodel were decided.[18] Even in this district, there is authority ruling that BLM can withhold lands from leasing without a withdrawal. See Learned, 528 F. Supp. at 982.

Moreover, Andrus and Hodel do not support Wyoming's request for an order "enjoin[ing BLM] from continuing the suspension of all federal lease sales in Wyoming." Wyo.Br. 38. In both cases, this Court faulted BLM for not following FLPMA's withdrawal requirements when not leasing for an extended period. But the court did not order the offering of leases: instead, it directed the agency to

[18] During that period, several courts have declined to follow Andrus and Hodel. See Bob Marshall All., 852 F.2d at 1229-30 (disagreeing with Andrus); Vilsack, 684 F. Supp. 2d 145 (declining to follow Andrus). The Conservation Groups respectfully submit that Andrus and Hodel are inconsistent with FLPMA.

submit a report to Congress as directed by 43 U.S.C. § 1714(c) if it continued to not lease. Andrus, 499 F. Supp. at 397; Hodel, 668 F. Supp. at 1476. That remedy was consistent with the rule that courts cannot order the Department to sell oil and gas leases, pp. 16-18, supra, and means that even if Wyoming were to prevail on its withdrawal theory it would not be entitled to the relief it seeks.

CONCLUSION

The Court should uphold BLM's decisions postponing lease sales, and deny Petitioners' requests for relief.

Respectfully submitted this 5th day of October, 2021,

/s/ Michael Freeman
Michael Freeman (*admitted pro hac vice*)
Robin Cooley (*admitted pro hac vice*)
Thomas Delehanty (*admitted pro hac vice*)
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
(303) 996-9615 (M. Freeman)
(303) 996-9611 (R. Cooley)
(303) 996-9628 (T. Delehanty)
mfreeman@earthjustice.org
rcooley@earthjustice.org
tdelehanty@earthjustice.org

Counsel for Conservation Colorado, Friends of the Earth, Great Old Broads for Wilderness, National Parks Conservation Association, Sierra Club, Southern Utah Wilderness Alliance, The Wilderness Society, Valley Organic Growers Association, Western Colorado Alliance,

Western Watersheds Project, Wilderness Workshop

/s/ Kyle Tisdel
Kyle Tisdel (*admitted pro hac vice*)
Western Environmental Law Center
208 Paseo del Pueblo Sur, Unit 602
Taos, NM 87571
(575) 613-8050
tisdel@westernlaw.org

/s/ Melissa Hornbein
Melissa Hornbein (*admitted pro hac vice*)
Western Environmental Law Center
103 Reader's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org

Counsel for Center for Biological Diversity, Citizens for a Healthy Community, Diné Citizens Against Ruining Our Environment, Earthworks, Food & Water Watch, Indian People's Action, Montana Environmental Information Center, Powder River Basin Resource Council, Western Organization of Resource Councils, WildEarth Guardians

/s/ Shannon Anderson
Shannon Anderson (Wyo. Bar No. 6-4402)
Powder River Basin Resource Council
934 N. Main St.,
Sheridan, WY 82801
(307) 672-5809
sanderson@powderriverbasin.org

Local Counsel

CERTIFICATE OF COMPLIANCE

I certify with respect to the foregoing that:

(1) This document complies with the type-volume limitation set by Fed. R. App. P. 32(a)(7), because:

[X] this document contains 12,998 words.

/s/ Michael S. Freeman
Michael S. Freeman

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on October 5, 2021, I electronically filed the foregoing **CONSERVATION GROUPS' RESPONSE BRIEF ON MERITS** with the Clerk of the Court via the CM/ECF system, which will send notification of such filing to other participants in this case.

/s/ Michael Freeman