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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. 21-CV-00013-SWS (Lead Case)
STATE OF WYOMING, Petitioners, vs. U.S. DEPART OF THE INTERIOR, *et al.*, Federal Respondents, CENTER FOR BIOLOGICAL DIVERSITY, et al., and ALTERRA MOUNTAIN COMPANY, et al., Intervenor-Respondents.	Case No. 21-CV-00056-SWS (Joined Case)

BUSINESS COALITION'S RESPONSE BRIEF ON THE MERITS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Other Authorities

INTRODUCTION

The Bureau of Land Management (BLM) must consider the economic and environmental impacts of any major action it takes, including a decision to issue oil and gas leases on public lands. In recent years, states in the Rocky Mountain region have actively pursued these leases even where they may go unused; in Wyoming alone, nearly 5 million acres of federal leases are not in production and nearly 3,000 approved drilling permits are unused. Mineral development is not the only possible use of public lands, though, and BLM is tasked with balancing multiple potential interests in its approach to public lands management. So, although oil and gas development is certainly a prevalent use of lands, economic conditions are changing, and oil and gas leasing may or may not be the best option for any given area.

A few specific macro-trends are converging, all of which are changing the economic prospects of many communities dependent on the availability of public lands. First, cities and municipalities are increasingly transitioning to non-fossil fuel energy sources, often motivated in part by an understanding that human use of fossil fuels is substantially impacting our lands, air, and climate. Second, many public land-adjacent communities are working to pivot away from dependence on fossil fuels and promote their proximity to public lands in their natural state to attract business investment and remote workers. Increasingly, businesses and workers have more flexibility in their choice of location, and many choose to be in or near places

with access to public lands. Third, and relatedly, the outdoor recreation industry continues to flourish, and folks are seeking out opportunities to travel to and recreate in places where they can easily access outdoor recreation experiences.

Courts agree that BLM must consider a broader range of impacts when it evaluates whether to lease a particular parcel of land for oil and gas development. BLM has been forced to defend against a host of lawsuits over its oil and gas leasing decisions, including allegations that it failed to consider impacts to greater sage grouse, groundwater, and greenhouse gas emissions when issuing leases. This is hardly surprising: when one begins to consider the true environmental impacts and myriad economic costs of extensive oil and gas drilling, the problems with the current approach are brought into clear view. After all, BLM's objective is to balance the many competing uses to which land can be put, including, among others, recreation, range, wildlife and fish, and uses supporting natural scenic, scientific and historical values.

President Biden's Executive Order 14008 provided BLM with the time necessary to reevaluate its approach to land management by pausing the issuance of new lease sales. The Order acknowledged the climate crisis, and the threat it poses to communities and our economy, but did not stop drilling on existing leases.

Ignoring the fact that it could identify no *agency* action to challenge, WEA filed its Administrative Procedure Act lawsuit on the day President Biden's

executive order was signed and before the Secretary had an opportunity to implement it. Wyoming followed suit roughly two months later. Neither petitioner has satisfied the requirements of the APA.

First, WEA and Wyoming have failed to clearly identify a single, final agency action from which many of their claims arise. Wyoming characterizes the pause as "suspension" or "cancelation" of lease sales on a nationwide basis, which violates the APA's prohibition of programmatic challenges. Their efforts to cast the implementation of the Executive Order as "final agency action" are defective for similar reasons. Even under a generous interpretation of what is a "final agency action" in these cases, Petitioners' claims that the Secretary withheld a nondiscretionary duty and acted arbitrarily and capriciously fail for multiple reasons. First, Petitioners mischaracterize the language of the Mineral Leasing Act and seek to impose a mandatory duty where the Secretary continues to enjoy broad discretion. Second, Petitioners misread the Federal Land Policy and Management Act to assert that the Secretary withdrew eligible and available lands and amended resource management plans; she did neither. Lastly, Petitioners would have this court require an environmental assessment or an environmental impact statement of the impacts of the Secretary's decision to comply with the National Environmental Policy Act—a strained attempt to undo compliance with federal law. None of these arguments are persuasive.

The Business Coalition urges this Court to decline Petitioners' invitation to enlarge this case beyond its true boundaries. The scope of issues and reviewable action is narrower than Petitioners would have the court believe, while the economic impacts stemming from a temporary pause and reevaluation of the oil and gas leasing program are more diverse than Petitioners present. The Business Coalition has provided the court with descriptions of the economic benefits that a revised oil and gas leasing program might yield, and reiterates the importance of BLM's role as a steward of public lands under the principle of "multiple use management." No entity should have a singular right to use public lands in any way that it pleases, at any time, in perpetuity; rather, we entrust the federal government to strike an appropriate balance of many uses. Here, the temporary postponement of certain leases and a pause to evaluate the overall federal program allows BLM to do just that.

STANDARD OF REVIEW

The Administrative Procedure Act (APA) governs judicial review of agency actions. 5 U.S.C. § 701 *et seq*. The APA provides that a "reviewing court shall…hold unlawful and set aside agency action, findings, and conclusions found" not to meet six separate standards. *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1573 (10th Cir. 1994) (*citing Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 n.30 (1971)). The Tenth Circuit has held that the "essential function of judicial review is a determination of (1) whether the agency acted within the scope of its

authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious, or an abuse of discretion." *Id*. at 1574 (citations omitted).

Where a petitioner seeks to compel agency action unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), such a claim may only proceed when the petitioner asserts that the agency failed to take a *discrete* agency action that it *is required to take*. *Western Energy All. v. Salazar*, 2011 WL 3737520 *2 (D. Wyo. 2011) (emphasis in original). In connection with judicial review under the "arbitrary or capricious" standard, 5 U.S.C. § 706(2)(A), the Tenth Circuit provides that the reviewing court must "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Id*. (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983)). In addition to requiring a reasoned basis for agency action, the "arbitrary or capricious" standard requires an agency's action to be supported by the facts in the record. *Id*. at 1575.

To satisfy the statutory requirements for judicial review under the APA, petitioners bear of the burden of showing that the challenged action is a "final agency action." *Wyoming v. U.S. Dept. of Interior*, 360 F.Supp.2d 1214, 1227 (D. Wyo. 2005) (citing *Colo. Farm Bureau Fed'n v. U.S. Forest Serv*., 220 F.3d 1171, 1173-74) (10th Cir. 2000)). The APA defines an "agency action" as "the whole or a part

of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The action must also be "final," which means it has satisfied two requirements: "[f]irst, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotations omitted).

BACKGROUND

I. Legal Framework

A. The Mineral Leasing Act

The Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181-287, provides that federal lands "may be leased" for oil and gas development. *Id*. at § 226(a) (emphasis added). Under the MLA, the Secretary of the Interior enjoys "broad power to issue oil and gas leases on public lands" and "discretion refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1, 4 (1965). Courts have repeatedly recognized this discretion. *See, e.g*., *W. Energy All. v. Salazar*, 709 F.3d 1040, 1044 (10th Cir. 2013) (noting the Secretary's "considerable" discretion); *Schraier v. Hickel*, 419 F.2d 663, 665-68 (D.C. Cir. 1969) (affirming the Secretary's discretion to "decline to lease").

Driven by concerns that most leases were being issued through a

noncompetitive—rather than competitive bidding—process, Congress amended the MLA in 1987. Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, title V, subtitle B, 101 Stat. 1330 (1987); S. Rep. No. 100-188, at 2 (1987) (discussion of concern that public is not receiving fair market value for minerals when "over 95 percent of all outstanding leases have been issued on a noncompetitive basis."). These amendments directed the Secretary to offer most oil and gas leases through a competitive bidding process for a short period of time; if a parcel did not receive a minimum bid, it could then be available for noncompetitive leasing for a two-year period. *See* 30 U.S.C. §§ 226(b)(1), 226(c). In connection with the 1987 amendments, Congress also added language to ensure that competitive auctions would occur on a regular basis when Interior wanted to offer leases for sale, but did not displace the Secretary's broad discretion to decide when lands were "eligible" and "available" for leasing in the first place. 30 U.S.C. § 226(b)(1)(A) ("lease sales shall be held for each State where eligible lands are available at least quarterly.").

B. The Federal Land Policy and Management Act

The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 *et seq*., sets out the policies and procedures by which public lands will be managed. FLPMA requires a "multiple use" approach, with the intent to "best meet the present and future needs of the American people" with a "combination of

balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources[.]" *Id*. at §§ 1701(a)(7); 1702(c).

In some circumstances, the Secretary may make "withdrawals" of public lands pursuant to FLPMA. *Id*. at § 1714. The Secretary makes a "withdrawal" when she "withhold[s] 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." *Id*. at § 1702(c). While the Secretary considers a withdrawal proposal, she may "segregate[]" an area of land for up to two years. *Id*. at § 1714(b).

C. The National Environmental Policy Act

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq*., and its implementing regulations are "our national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA has twin aims: first, to require agencies to consider every significant aspect of the environmental impact of a proposed action, and second, to promote transparency to the public about its decisionmaking process. *Baltimore Gas and Elec. Co. v. Nat'l Resources Defense Council*, 462 U.S. 87, 97 (1983) (citations omitted). When agencies propose to undertake a major action, NEPA requires them to take a "hard look" at the environmental consequences

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

To comply with NEPA, the Department of Interior completes Environmental Assessments (EAs) of proposed oil and gas lease sales, and sometimes completes more extensive analyses in Environmental Impact Statements (EISs). When these analyses are incomplete or fail to consider an important aspect of the problem, BLM's leasing decisions have been challenged in court. *See, e.g*., *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019); *WildEarth Guardians v. Bernhardt*, No. 1:20-cv-00056, 2020 WL 111765 (D.D.C. Jan. 9, 2020); ECF No. 52 at 7-9 (discussing same).

II. Factual Background

A. The Business Coalition

The "Business Coalition" consists of six businesses with cycling, farming, hunting, ranching, and snowsports operations in the Rocky Mountain region. ECF No. 23 at 5-8. While the individual members of the coalition vary in type, size, and

focus, all seek to derive income from activities on or near public lands other than mineral extraction, yet all are negatively impacted by the government's current approach to mineral extraction.

For example, recreation businesses like Western Spirit Cycling and Hunt to Eat depend on public lands with healthy wildlife habitats, clean air and water, unimpeded view, and natural soundscapes for customers to enjoy their services. Western Spirit Cycling relies on trail access and trail infrastructure in states like Wyoming, and would like to see this access and infrastructure increased. ECF No. 51-6 at 2. This becomes difficult when so much geographic area is leased to oil and gas development, because while it is possible to build trails on leased land, the trail experience remains under constant threat of noise, truck traffic, leaking methane, and viewshed disruption. *Id*. at 3. Hunt to Eat's ability to succeed financially depends on the ongoing existence of healthy wildlife and plentiful habitat. ECF No. 51-7 at 2. When public lands are leased to oil and gas operations, the ability to camp on the land is lost, and the prevalence of wildlife is diminished. *Id*. at 2-3. When oil and gas operations pollute watersheds and cause habitat fragmentation, these businesses are harmed. *Id*.

Ranching and farming operations, like Roan Creek Ranch and Thistle Whistle Farm, are impacted by oil and gas operations, too. ECF Nos. 23-1, 23-6. Ranching operations like Roan Creek Ranch make use of public lands for grazing, and consider

public lands "paramount" to their operation. ECF No. 23-1 at 2. Mineral extraction can pose risks to the health and safety of cattle, which ultimately impacts the ranch's bottom line. *Id*. at 2-3. Similarly, farms like Thistle Whistle Farm, whose operations depend, in part, on a certain reputation and suitability of soils, water, and air quality, are negatively affected when pollution from the oil and gas industry threatens that quality. ECF No. 23-6 at 2, 4.

And while climate change impacts threaten many types of business, the effects are especially visible in the snow sports industry, when a "dry year" can cost the snow sports economy a billion dollars in lost revenue. ECF No. 23-5 at 3. Businesses like Aspen Skiing Company and Alterra Mountain Company have invested millions of dollars to upgrade their equipment so that operations may continue at the traditional start and end of the ski season. *Id*.; ECF No. 23-4 at 3. Recognizing the direct effect that a changing climate has on their businesses, Aspen Skiing Company and Alterra Mountain Company have also committed to transition away from fossil fuel use toward carbon-neutral energy sources. ECF No. 23-4 at 3; ECF No. 23-5 at 2.

The members of the Business Coalition are directly harmed by continued oil and gas leasing on public lands, but they are also concerned about economic affects to cities and communities who wish to convert their local economies from resource extraction to recreation, tourism, or some other more sustainable economic driver.

ECF No. 51-6 at 5. The Business Coalition has offered an example of one such rural, recreation-based economy that came under threat because of proposed oil and gas leasing, and has observed positive economic benefits in communities like Fruita, Colorado, Bozeman, Montana, and Driggs, Idaho. *Id*. at 6.

B. Lease sale postponements

Following the invalidation and remand of numerous lease sales that failed to comply with NEPA, BLM postponed several lease sales that would have taken place in March and April 2021. The postponements resulted not from a single, national moratorium, but from a collection of decisions by different agency staff in various states. The events surrounding and explanations given for postponements occurring prior to the filing of WEA's and Wyoming's petitions are discussed below:

Nevada: the Nevada BLM office decided to postpone its March lease sale on or before January 25, 2021, and announced the postponement on January 27. Administrative Record BLM_I0001131-32 (hereafter AR1131-32).

Colorado, Montana, Utah, and Wyoming: due to the change in Presidential administrations, the decision-making authority for certain decisions was vested in the Secretary, rather than in regional BLM offices. AR1129-30 (Order 3395). Pursuant to that order, on February 4, BLM's Deputy Director Michael Nedd sought approval from Assistant Secretary Laura Daniel-Davis to notice March leases for sale in Colorado, Montana, Utah, and Wyoming. AR1148-57. The February 4

requests noted that the NEPA process had not been completed for any of the lease sales, and that organizations, tribes, and private individuals had raised objections to certain sales. *Id*. For the Wyoming and Montana requests, specifically, Nedd acknowledged several instances in which lease sales in those states had been invalidated due to NEPA violations. AR1155, 1157.

Approximately one week later, BLM Utah's State Director Gregory Sheehan recommended that the March 2021 lease sale be postponed. AR1163. In that recommendation, Sheehan noted concerns over a prior Utah lease sale that violated NEPA, and the similarities of that sale's NEPA analysis to the March 2021 lease sale's draft NEPA analysis. AR1164 ("[i]n the Leasing EA [for the March 2021 lease sale] like the EA at issue in the *Rocky Mountain Wild* case, the BLM took a similar approach[.]") Sheehan stated "BLM requires additional time to review the court's ruling and rationale in order to determine to what extent, if any, [the *Rocky Mountain Wild*] decision affects the Leasing EA prepared in connection with the March 2021 Lease Sale." AR1164. Deputy Director Nedd approved State Director Sheehan's recommended postponement. AR1164.

On February 12, Acting Deputy Solicitor Travis Annatoyn sent a memorandum to Assistant Secretary Daniel-Davis, advising that the First Quarter 2021 lease sales in Colorado, Montana & the Dakotas, Utah, and Wyoming "raise[] serious questions as to NEPA compliance, and we therefore recommend that the

sales be postponed." AR1169. The memorandum offered recent examples of additional cases in which a court had invalidated BLM lease sales for failure to analyze impacts to the climate, and explained that the analysis of proposed lease sales at issue may pose similar problems. AR1170. The memorandum also noted that Colorado's public health and environmental regulatory agency 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.

Ultimately, the memorandum concluded that lease sales in each of the four regions may not satisfy NEPA and should be postponed. AR1170. The Assistant Secretary concurred with Acting Deputy Solicitor Annatoyn's recommendation, AR 1169, and BLM posted a public notice of the March lease sale postponement on its website, stating that "lease sales in Colorado, Montana, Utah, and Wyoming are postponed to confirm the adequacy of underlying environmental analysis." AR1172.

Alabama and Mississippi: on February 12, BLM's Eastern States Director, Mitchell Leverette, recommended to Deputy Director Nedd that the proposed March 2021 sale of parcels in Alabama and Mississippi be postponed. AR1165-66. Leverette pointed to a November 2020 court decision invalidating a lease sale in approximately the same geographic area as the proposed March 2021 sale, and recommended that the proposals undergo "additional air quality analysis, including

greenhouse gas (GHG) analysis." AR1166. Deputy Director Nedd approved Eastern States Director Leverette's recommendation. AR1166.

New Mexico: on or before February 23, BLM's New Mexico office website was updated to announce that a proposed April 2021 lease sale would be postponed. AR2422. Assistant Secretary Daniel-Davis inquired about the postponement in an email to Deputy Director Nedd, stating that "there's not a blanket policy" concerning postponement. AR2421. Deputy Director Nedd responded that the BLM-New Mexico office experienced "confusion" following postponement of March sales. AR2420. The Assistant Secretary followed up via email of March 1, explaining that Quarter Two sales would be postponed "pending decisions on how the department will implement [President Biden's Executive Order]," and that "the Department has not yet rendered any such decisions[.]" AR1180.

Second Quarter Lease Sales: on April 21, BLM announced that it was reviewing the federal oil and gas program as directed by Executive Order 14008, and would not hold lease sales in the second quarter. ECF No. 51-5 at 2. BLM explained that its ongoing review would assess, among other issues, "whether the current leasing process provides taxpayers with a fair return for extraction of the Nation's oil and gas resources, how to ensure it complies with applicable laws, such as the National Environmental Policy Act…and how it will take into account climate change and environmental justice." ECF No. 51-5 at 2. The announcement noted

that in recent years, courts had invalidated BLM guidance and lease sales that failed to comply with governing laws, and the review would help the agency ensure that future sales would adhere to legal requirements, including requirements to analyze greenhouse gas emissions and climate change impacts. ECF No. 51-5 at 2.

III. Procedural History

On January 27, 2021, President Biden issued Executive Order 14008, which provides:

> to the extent consistent with applicable law, the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices in light of the Secretary of Interior's broad stewardship responsibilities over public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters.

AR1138-39. Later that day, WEA filed a "Petition for Review of Government Action." WEA Pet. ECF No. 1, Case No. 21-cv-00013-SWS (Jan. 27, 2021). Five weeks later, WEA amended its petition to add the sentence: "On or about February 12, 2021, the Secretary added notations on the Bureau of Land Management's website indicating that all oil and gas lease sales scheduled for March or April 2021 have been postponed." WEA Am. Pet., ECF No. 4, Case No. 21-cv-00013-SWS (Feb. 23, 2021). On March 24, 2021, Wyoming filed its lawsuit, challenging a "de facto moratorium on all federal oil and gas lease sales on public lands through a

series of individual lease sale postponements and cancellations in Wyoming and across the Nation." Wyoming Pet., ECF No. 2, Case No. 21-cv-00056 (Mar. 24, 2021). Both petitions were filed before BLM announced on April 21 that second quarter lease sales would not be held.

ARGUMENT

I. Wyoming's broad challenge to a fictitious national "moratorium" is barred by the APA.

Petitioners struggle to identify a final agency action in these cases because the real target of their ire is Executive Order 14008. *See, e.g.*, WEA Petition (filed the day that the Order was signed, and failing to identify an individual agency action subject to review). During the briefing of their motion requesting preliminary injunctive relief, Petitioners seemed to recognize their errors and shifted focus to the postponement of individual lease sales. Still, Wyoming continues to argue that the nationwide "suspension" and "cancelation" of lease sales violates the APA. Wyoming is wrong.

A. Wyoming's challenge to a national lease sale "moratorium" is a prohibited programmatic challenge.

To sue a federal agency under the APA, a petitioner must challenge an "agency action," defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 702(13). Further, the challenge must be to a "final agency action," *id*. § 704, which

means satisfying two requirements: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quotations omitted). A "final agency action" is limited to "an identifiable action or event." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 899 (1990).

The requirement that a final agency action be limited to an "identifiable action or event" precludes jurisdiction over claims seeking broad, programmatic relief. *Id.* at 891. The prohibition of programmatic challenges is "motivated by institutional limits on courts which constrain [their] review to narrow and concrete actual controversies." *Sierra Club v. Peterson*, 228 F.3d 559, 556 (5th Cir. 2000). Importantly, the prohibition of programmatic challenges applies equally to an agency's "failure to act." 5 U.S.C. § 551(13); *Norton v. Southern Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 63 (2004). By barring review of broad, programmatic attacks to large-scale policies, courts avoid encroaching on other branches of government and continue to respect the expertise of agencies expressly tasked with dealing with complex and technical issues. *Sierra Club*, 228 F.3d at 556.

Parties' previous efforts to manufacture "programmatic" or nationwide actions where none exist have been rejected. The Supreme Court has held that a

party cannot craft nonexistent programmatic actions to avoid perceived inefficiencies associated with challenging individual final agency actions. In denying review of the "so-called land withdrawal review program," *Lujan*, 497 U.S. at 890 (quotations omitted), the court held that "[u]nder the terms of the APA, [the plaintiff] must direct its attack against some particular 'agency action' that causes it harm," *id*. at 891 (explaining plaintiff "cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made") (emphasis in original); *see also Forest Guardians v. Forsgren*, 478 F.3d 1149, 1159-60 (10th Cir. 2007) (holding "[e]fficiency and systemic improvement by wholesale correction, however, cannot justify skirting the 'agency action' requisite to § 7(a)(2) consultation"); *W. Org. of Res. Councils v. Bureau of Land Mgmt.*, 591 F. Supp. 2d 1206, 1241 (D. Wyo. 2008) (reaffirming that plaintiff must identify and challenge "discrete agency action," and "broad programmatic attack[s]" are prohibited). Courts reject ploys to conjure a national agency policy without evidence that one actually exists. *See, e.g.*, *Citizens for Resp. and Ethics in Wash. v. FEC*, 380 F.Supp.3d 30, 44-45 (D.D.C. 2019); *PETA v. U.S. Dep't of Agric.*, 7 F.Supp.3d 1, 13 (D.D.C. 2013).

Here, Wyoming's challenge of a nationwide "moratorium" is the type of programmatic challenge the APA prohibits. ECF No. 74 at 1. As in *Lujan*, the term

"moratorium" is "not derived from any authoritative text[,]" but are merely names used to refer to continuing operations of BLM in evaluating the leasing program. 497 U.S. at 890. Wyoming takes the inconsistent position that the Secretary's pause of oil and gas lease sales was both a "blind…implement[ation]" of Executive Order 14,008, yet also "marks the consummation of the Secretary's decisionmaking process[.]" ECF 74 at 19, 21. Put another way, Wyoming argues that the pause is both an action taken without thought, and action that concludes a period of thought. Wyoming's confusion is a symptom of its larger problem: the single, nationwide pause it conceived of when filing its petition does not exist. This problem is fatal to Petitioners' claims that depend on a single, national action (see discussion *infra*).

B. Executive Order 14008 is not a final agency action.

Petitioners' true grievances stem from the Executive Order directing Interior to pause new oil and gas leasing. But an Executive Order is not an agency action, and the President is not an "agency," as defined in 5 U.S.C. § 551(1). Presidential actions, like those of Congress, cannot be litigated under the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992); *Utah Ass'n of Ctys. v. Bush*, 316 F.Supp.2d 1172, 1184 (D. Utah 2004) ("The President is not an agency.").

WEA's petition reveals its true intent: filed on the day that Executive Order 14,008 was issued, the petition fails to identify any action taken by the Secretary, instead naming President Biden as a defendant and seeking to review "government

action" instead of "agency action." ECF No. 73 at 1. WEA's effort to execute an end-run around the doctrine of sovereign immunity and use the APA as a vehicle to challenge the President's action should not be allowed.

C. Agency conduct that implements a prior decision is not a final agency action.

Wyoming's labored effort to characterize the "action to implement a suspension" as a final agency action subject to judicial review comes up short. *Id*. at 21. This argument ignores the evidence the record that points to NEPA compliance as the reason for postponing lease sales. And, even for the sole postponement that did appear premised on implementing President Biden's Order, that postponement withstands APA scrutiny. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 899 (1990) (under APA, courts do not review day-to-day operations of federal agencies).

Because neither petitioner has shown that a final, reviewable, nationwide agency action exists, this court lacks jurisdiction over any claims premised on the existence of such an action.

II. The Federal Respondents have complied with the Mineral Leasing Act, Federal Land Policy and Management Act, and National Environmental Policy Act.

A. The Federal Respondents have complied with the Mineral Leasing Act.

1. BLM has not withheld any nondiscretionary duty mandated by the Mineral Leasing Act.

The MLA governs the leasing of public lands for developing deposits of

minerals in the United States. In part, the act dictates how lands are to be leased for oil and gas development. 30 U.S.C. § 226. This section of the act specifically addresses the authority of the Secretary in leasing lands for oil and gas development. 30 U.S.C. § 226(a) ("All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary."). Petitioners mischaracterize the Secretary's duties under the MLA when asserting that the mandatory occurrence of quarterly lease sales requires the Secretary to determine that any land must be included in the sale. ECF No. 74 at 26. The MLA dictates that lands "may," rather than must, be leased by the Secretary. 30 U.S.C. § 226(a).

Congress amended the MLA in 1987. While these amendments address the frequency of lease sales when eligible lands are available, they do not address the authority or discretion of the Secretary in leasing lands. In the same paragraph of the amendments cited by petitioners, the amendment states that this paragraph applies to "[a]ll lands to be leased which are not subject to leasing under paragraph (2)." Federal Onshore Oil and Gas Leasing Reform Act, Pub. L. No. 100-203, § 5102, 101 Stat. 1330-256 (1987). This language suggests that there are some lands *not* to be leased; Congress would not have modified the phrase "all lands" with the phrase "to be leased" if the modifier was unnecessary or superfluous. Further, the language indicates that the quarterly lease sale process spelled out by the MLA is not even

relevant until BLM has determined that a parcel is "to be leased."

The Supreme Court has historically upheld the Secretary's discretion in leasing oil and gas lands, including when the Secretary "effectuate[d] the conservation policy of the President" through a "general order" rejecting or refusing applications for permits to prospect for oil and gas. *United States ex rel. McLennan v. Wilbur*, 283 US 414, 418 (1931). In light of the language and history of the MLA, BLM's postponement of lease sales for oil and gas lands is within the agency's discretion. The 1987 amendments preserve the decision to lease "if at all" as a discretionary decision on the part of the agency. *See Salazar*, 2011 WL 3737520, at *4 (interpreting statutory language "to merely mean that the Secretary must issue a lease…if he is going to lease at all.").

Petitioners misread the MLA's definition of "available" to mandate the occurrence of lease sales even when parcels have not undergone a complete NEPA analysis. ECF No. 74 at 4-5; ECF No. 73 at 24-25, 27. Their interpretations would alter BLM's discretion under the MLA and impose a duty to offer lands for leasing any time that a company expresses interest on a parcel that is not protected from leasing by a Resource Management Plan. *Id.* While convenient to resource-rich states and industry, this interpretation is at odds with the language and history of the MLA and with courts' repeated recognition of the BLM's discretion. This court should decline Petitioners' invitation to misconstrue the law.

2. The postponement of lease sales was not arbitrary or capricious.

"[A]n agency rule would be arbitrary and capricious if the agency…offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 43 (1983).

Petitioners argue that the agency failed to explain its decision to postpone lease sales for oil and gas lands. To the extent that a reviewable decision or "final agency action" occurred in this case, significant deference is owed to the Secretary's action or actions. In review of agency action, courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 US 644, 658 (2007).

Here, BLM's path can be reasonably discerned. The record shows that BLM was aware (1) that NEPA analysis was incomplete for certain parcels, (2) that NEPA analysis must be complete in order for lands to become "eligible" for sale under the MLA, and (3) that many recent lease sales were suffering invalidation and remand in courts due to failure to comply with NEPA. AR1148-57; AR1163-64; AR1169-70 (documents identifying NEPA and MLA legal requirements, and concerns about NEPA noncompliance). BLM has previously deferred lease sales to better comply with NEPA. ECF No. 52-2, ¶¶ 3-7 (Declaration of Peter Cowan). The record reflects that it did so again here.

The postponements were temporary, interim actions. By postponing new lease

sales, BLM and Interior were not doing anything new nor permanent, and its reasons for doing so are discernible from the record. Petitioners are inaccurate in asserting that BLM's decision is unfounded based on evidence in the record and should not succeed on these § 706(2) claims.

B. The Federal Respondents have complied with the Federal Land Policy and Management Act.

Congress expressly laid out the intent of the Federal Land Policy and Management Act of 1976 (FLPMA) in the policy declaration that the public lands must be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental…. that, where appropriate, will preserve and protect certain public lands in their natural condition…. and [in a manner] that will provide for outdoor recreation and human occupancy and use." 43 U.S.C §§ 1714, 1701(a)(8); *see also National Mining Association v. Zinke*, 877 F.3d 845, 856 (9th Cir. 2017); *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1302 (W.D. Wash. 1994). FLPMA directs the Secretary of the Interior, in developing and revising land use plans, to "observe the principles of multiple use and sustained yield;" to "achieve integrated consideration of physical, biological, economic" objectives and to "give priority to the designation and protection of areas of critical environmental concern." *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1303 (W.D. Wash. 1994); 43 U.S.C. §§ 1701(a)(7), (8); 43 U.S.C. § 1712(c).

FLPMA authorizes the Secretary to "withdraw" land. 43 U.S.C §§ 1714,

1701(a)(4). In relevant part, "withdrawal" is judiciously defined as "withholding an area of Federal land from settlement, sale, location or entry under some or all of the general land laws." 43 U.S.C §§ 1714, § 1702(j); *Bob Marshall All. v. Hodel*, 852 F.2d 1223 1229-30 (9th Cir. 1988).

1. Federal Respondents have not "withdrawn" lands pursuant to FLPMA.

FLPMA outlines a process for conducting a "withdrawal." 43 U.S.C. § 1714. Initiating a withdrawal requires, among other things, public notice in the Federal Register, a public hearing, and submission of a report to Congress. *Id*. The decision to withdraw lands is thus a formal one that results in the temporary suspension of certain lands for a specific period of time. *S. Utah Wilderness All. v. 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).

Wyoming's complaint that the Secretary did not follow the prescribed procedural requirements before withdrawing lands is circular. ECF No. 74 at 37. Interior did not go through the requisite withdrawal procedures because there has been no withdrawal. There is no evidence of a legally flawed withdrawal because there was no withdrawal to begin with; therefore, the non-adherence to withdrawal procedures is a non-starter.

The March and April 2021 lease sale postponements were a proper exercise of Interior's discretion under the MLA, and were not a "withdrawal." The

postponements did not remove parcels from the purview of the MLA, but instead reflect the degree of discretion that the Department enjoys pursuant to the MLA. *See Bob Marshall All.*, 852 F.2d at 1230 (no withdrawal because the deferral of leasing "constituted a legitimate exercise of the discretion granted to the Interior Secretary" and did not remove it from the operation of the MLA). Also, the fact that some lease sales have been postponed does not mean that an indefinite postponement of all lease sales exists; postponements may be reversed at any time. Were the postponements in this case a withdrawal, they could be in effect for up to twenty years. 43 U.S.C. § 1714(c)(1). FLPMA's formal withdrawal procedures might take a lengthy period of time to complete as well. 43 U.S.C. § 1714(c) (requiring the preparation and submission of a report to Congress). Yet BLM lease sale postponements frequently last only a few months. ECF No. 51-5 ¶ 5. Having to undertake formal withdrawal procedures in cases of temporary postponements would be a waste of time and resources, and is not what FLPMA requires.

Wyoming relies on two outdated and factually-distinct cases. In those cases, Interior withheld areas from leasing for many years; here, the lease sales have been postponed for only a handful of months. *Mountain States Legal Foundation v. Andrus*, 499 F.Supp. 383 (D. Wyo. 1980); *Mountain States Legal Foundation v. Hodel*, 668 F. Supp. 1466 (D. Wyo. 1987). Even if this Court did question the postponements in this case, there is authority permitting the closure of a region to

oil and gas leasing where withdrawal procedures were not followed. *Learned v. Watt*, 528 F. Supp. 980, 982 (D. Wyo. 1981). Furthermore, any remedy would be limited to an order instructing Interior to comply with FLPMA's withdrawal process, and not the discontinued "suspension of lease sales in Wyoming" that Wyoming seeks. Wyoming Br. at 38.

Because the oil and gas lease postponements do not satisfy the definition of withdrawal under FLPMA, and because Wyoming relies on two factually-distinct cases, the Business Coalition respectfully asks this court to conclude that no withdrawal has occurred.

2. Federal Respondents have not completed a *de facto* amendment to any Resource Management Plan.

A Resource Management Plan (RMP) is a zoning-type document in which BLM establishes permitted uses on public lands and where and how they may occur. 43 U.S.C. § 1712(a), (c); 43 C.F.R. § 1601.0-5(n). RMPs "are designed to guide and control future management actions." 43 C.F.R. § 1601.0-2; *see also* 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a).

Wyoming offers nothing to substantiate its claims that BLM's temporary postponement of leasing—to date, involving leases in the first and second quarters of 2021—amounts to a *de facto* amendment of its RMPs. ECF No. 74 at 46. The leasing postponements were of a limited duration—and BLM can choose to offer the leases at any time in the future. ECF No. 51-1 at 2. When RMPs designate lands as

"open" to leasing, BLM has the option of leasing those lands, but it is not *required* to lease them.

The Tenth Circuit has considered and rejected a similar argument as the one Wyoming offers here. In *Utah Shared Access Alliance v. Carpenter*, the court held that a BLM temporary closure order—which precluded off-road vehicles upon finding resource damage until consequences were eliminated—was not a *de facto* amendment to the relevant RMP. 463 F.3d 1125, 1130-36 (10th Cir. 2006). The court understood the "realities of public land management" and BLM's obligation to avoid "unnecessary or undue degradation of the lands," so even though the RMPs designated certain lands as "open" to off-road vehicles, temporarily closing the lands was within BLM's discretion. *Id*. at 1136 (quoting 43 U.S.C. § 1732(b).

Perhaps, after the analysis required by the January 27, 2021, Executive Order is completed, it could be necessary to amend the relevant RMPs to change permitted use on some of the Nation's public lands. At this stage, the argument that any amendment has occurred is premature. BLM_I001133-BLM_I001147.

C. The Federal Respondents have complied with NEPA.

NEPA was enacted to "prevent or eliminate damage to the environment and biosphere" by focusing Government and public attention on the environmental effects of proposed agency action. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 371 (1989) (quoting 42 U.S.C. § 4321 (2012)). Furthermore, "[a]gencies shall

review their policies, procedures, and regulations accordingly and revise them as necessary to ensure full compliance with the purposes and provisions of the Act." 40 C.F.R. § 1500.6.

The threshold question for deciding when an agency must comply with NEPA's procedural requirements is whether the agency is considering a major Federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). As discussed above, Wyoming's challenge to a fictitious national "major federal action" must fail.

1. Wyoming's contrived nationwide "moratorium" is not a "major federal action."

"Major Federal actions do not include . . . [a]ctivities or decisions that do not result in final agency action under the Administrative Procedure Act or other statute that also includes a finality requirement." 40 CFR § 1508.1(q)(1). As described above, President Biden's Executive Order is not a "major federal action." And, as the record makes clear, the individual postponements did not flow from a top-down, single national directive, but instead arose from multiple agency staff at various BLM state offices. The Assistant Secretary expressly stated that no broad national policy of postponing lease sales existed. Wyoming is simply wrong that a single "major federal action" exists on the national level. 40 CFR § 1508.1(q)(3).

Furthermore, "major Federal actions" 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." 42 U.S.C. § 4332(2)(C)(iii); 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"). Therefore, the temporary postponements should not be construed as a "major federal action," as they are only a "failure to act" on holding the leases.

Courts have held that inaction of this type does not trigger NEPA. For example, the Tenth Circuit stated,

> the ESA consultation requirement cannot be invoked by characterizing agency nonaction as action, it cannot be invoked by trying to piggyback nonaction on an agency action by claiming that the nonaction is really part of some broader action. When an agency action has clearly defined boundaries, we must respect those boundaries and not describe inaction outside those boundaries as merely a component of the agency action.

WildEarth Guardians v. U.S. E.P.A., 759 F.3d 1196, 1209 (10th Cir. 2014).

In deciding *WildEarth Guardians*, the court relied on *Defenders of Wildlife v. Andrus*, where that court specifically addressed whether an agency's inaction could be construed as a "major federal action." The court stated, "as it is written, NEPA only refers to decisions which the agency anticipates will lead to actions. This common-sense reading of the statute is confirmed by the statutory directive that the impact statement is to be part of a 'recommendation or report' on a 'proposal' for action." *Defs. of Wildlife v. Andrus*, 627 F.2d 1238, 1243 (D.C. Cir. 1980).

A "common-sense" reading of the statute should prevail here, too. Conducting an environmental assessment or environmental impact statement for not holding the lease sales would be impossible, because there is no proposed action directing a change to the lands or resources to which the agency might consider alternatives. Currently, the lands continue to be managed as they were prior to the lease sales, with no environmental impact or commitment of resources to be considered. *Wyoming Outdoor Council v. U.S. Forest Service,* 165 F.3d 43, (D.C.Cir.1999) ("the law does not require an agency to prepare an EIS until it reaches the critical stage of a decision which will result in 'irreversible and irretrievable commitments of resources' to an action that will affect the environment").

The *Andrus* court stated, "in no published opinion of which we have been made aware has a court held that there is 'federal action' where an agency has done nothing more than fail to prevent the other party's action from occurring." *Andrus*, at 1244. There is no reason to depart from precedent here. Because the postponement of lease sales has only postponed petitioners' presumed access to oil and gas lease sales and is not a final agency action, the postponements do not rise to the level of a "major federal action."

2. BLM's explanation for postponing individual lease sales is supported by evidence in the record.

In evaluating whether an agency action is arbitrary or capricious, a reviewing court will "ascertain whether the agency examined the relevant data and articulated

a rational connection between the facts found and the decision made." *Olenhouse*, 42 F.3d at 1574. Agency explanations need not be perfect; courts should "uphold a decision of less than ideal clarity" so long as the agency's reasoning can reasonably be discerned. *Nat'l Ass'n of Home Builders v. Defs. Of Wildlife*, 551 U.S. 644, 658 (2007). Petitioners' arguments that BLM acted arbitrarily and capriciously are unpersusasive.

The administrative record contains ample evidence that BLM postponed most of the individual lease sales at issue due to concerns over NEPA compliance. In light of the incomplete or inadequate NEPA analyses in existence at the time the various BLM offices were required to post notices of lease sales, postponing the March lease sales was not arbitrary or capricious; rather, it was necessary to render the lands "available" as defined by the MLA.[1] Additionally, only one postponement appears based on President Biden's order (New Mexico's April sale), but even this decision satisfies the APA as the agency articulated a "rational connection" between the decision to postpone lease sales and the need to determine how to comply with the President's Order.

3. Federal Respondents have not "irreversibl[y] and irretrievabl[y]" committed any resources.

Taking time to conduct further NEPA analysis before committing resources

[1] BLM concluded that parcels were not "available" as defined by the MLA because the required NEPA analyses had not been completed.

to an "irreversible and irretrievable" process is not a violation of NEPA. In fact, it is what NEPA requires. Under 42 U.S.C. § 4332(C)(v), an EIS must include a statement regarding "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." The Tenth Circuit affirmed this requirement in *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, stating that, "[t]he centerpiece of environmental regulation in the United States, NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives." *Id.*, 565 F.3d 683, 703 (10th Cir. 2009) (*citing* 42 U.S.C. § 4331(b)).

Petitioners' NEPA arguments attempt to put the cart before the horse. They insist upon a NEPA analysis where there have been no changes in the status quo of the lands. ECF No. 73 at 44; ECF No. 74 at 47. Their view of status quo presumes that lands will be offered for leasing in the future. *Id*. This view disregards both BLM's discretion to determine whether a parcel is "to be leased" pursuant to the MLA, and its history of postponing lease sales for NEPA compliance.

Here, Federal Respondents are simply maintaining the "environmental status quo" because all resources remain in their current state and, pending completion of NEPA impact analysis and subject to other laws, they may be accessed with no diminishment at a future date. *See 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). BLM state officials recognized the need for careful and complete NEPA analysis when deciding to temporarily postpone certain March lease sales. Thus, because the pause on lease sales is not a proposal to "irreversibl[y] and irretrievabl[y]" commit resources, the pause cannot trigger a NEPA analysis.

4. Petitioners' proffered interpretation of NEPA's applicability is chicanery that subverts the Act's true goals.

Petitioners' suggested reading of NEPA would thwart the Act's purposes. According to them, the decision to postpone some potential future action in order to complete a NEPA analysis of that action must be preceded by a separate NEPA analysis of the impacts of the decision to comply with NEPA in the first place. Such an interpretation borders on *reductio ad absurdum* and runs the risk of severely overburdening federal agencies by infinitely expanding NEPA. *See, e.g., Andrus*, 627 F.2d at 1246. A decision to postpone lease sales so that NEPA analysis may be completed needs no further NEPA review.

III. The temporary pause in new lease sales allows the government the opportunity to fix a broken system.

Interior's "multiple use approach" must attempt to strike a balance of multiple uses on public lands. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004). This is no easy task; Interior must balance 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." *Id*. (quoting 43 U.S.C. § 1702(c)).

The uses to which members of the Business Coalition would seek to put public lands are as important as the uses that derive income through mineral extraction. When one use of a shared resource substantially harms other uses of that shared resource, a temporary pause to evaluate the government's approach to public land stewardship offers the potential to arrive at a better solution. Our federal government should be taking a close look at the way that a shared, finite resource is used, and the Business Coalition respectfully requests that this court allow the government time to conduct this important review.

CONCLUSION

For the reasons stated above, the Business Coalition respectfully asks this court to deny WEA's and Wyoming's requested relief, and to uphold the BLM's lease sale postponements.

Respectfully submitted this 5th day of October, 2021,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8574 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

Further, I hereby certify that this brief complies with the typeface and style requirements of D. Wyo. Local Civ. R. 10.1(a) and Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in Times New Roman, 14-point font using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5th, 2021, I electronically transmitted the attached above-document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to:

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