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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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

Secretary of the Interior; and THE UNITED STATES BUREAU OF LAND MANAGEMENT,

Respondents, and

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

Intervenor-Respondents.

STATE OF WYOMING,

Petitioners,

v.

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

Respondents, and

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

Intervenor-Respondents.

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

RESPONDENTS' OPPOSITION TO INDUSTRY PETITIONERS' OPENING MEMORANDUM ON THE MERITS

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

I. LEGAL BACKGROUND.....1

A. The Mineral Leasing Act (MLA).....1

B. The National Environmental Policy Act (NEPA) 5

II. FACTUAL BACKGROUND 6

A. Recent NEPA Challenges to Oil and Gas Leasing Decisions Have Substantially Increased BLM's Workload and Created Significant Instability for Lessees. 6

B. BLM Has Historically Postponed Planned Quarterly Sales For A Variety Of Reasons Including NEPA Compliance 10

C. On January 27, 2021, President Biden Signed Executive Order 14,008, Which WEA Immediately Challenged.....11

D. BLM Deferred First-Quarter 2021 Lease Sales For NEPA Compliance Reasons 12

E. An Early Second-Quarter New Mexico Sale Was Temporarily Postponed On March 1 15

F. On August 24, Interior Announced Next Steps In Its Onshore Leasing Program.....16

STANDARD OF REVIEW 17

ARGUMENT 18

I. THE COURT LACKS JURISDICTION OVER WEA'S PETITION 18

II. THE COURT LACKS JURISDICTION OVER ANY SECOND-QUARTER POSTPONEMENTS 22

III. THE COURT CANNOT COMPEL LEASE SALES.....24

A. Determining Whether "Eligible Lands Are Available" Involves Agency Discretion Exercised Through NEP 24

B. BLM's Regulations Do Not Compel A Different Construction 32

C. There Were No Eligible Lands Available In The First Quarter Of 2021 37

D. The NEPA-Based Postponements Were Not Pretextual 40

IV. THE CHALLENGED LEASING POSTPONEMENTS WERE NOT ARBITRARY AND CAPRICIOUS 44

V. THE CHALLENGED LEASING POSTPONEMENTS WERE NOT PROCEDURALLY DEFECTIVE 48

VI. WEA IS NOT ENTITLED TO ANY RELIEF 53

CONCLUSION 55

TABLE OF AUTHORITIES

Cases

Am. Petroleum Inst. v. EPA,
216 F.3d 50 (D.C. Cir. 2000) 23

Am. Waterways Operators v. U.S. Coast Guard,
No. 18-CV-12070-DJC, 2020 WL 360493 (D. Mass. Jan. 22, 2020).....20

Amigos Bravos v. U.S. Bureau of Land Mgmt.,
816 F. Supp. 2d 1118 (D.N.M. 2011).....19

Barnhart v. Walton,
535 U.S. 212 (2002) 31

Bennett v. Spear,
520 U.S. 154 (1997) 23

Camp v. Pitts,
411 U.S. 138 (1973) 46, 47

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569 (1994) 30

Citizens Against Ruining the Env't,
535 F.3d 670 (7th Cir. 2008).....19

Colorado v. EPA,
989 F.3d 874 (10th Cir. 2021).....54

Columbia Riverkeeper v. U.S. Army Corps of Engrs.,
No. 19-6071, 2020 WL 6874871 (W.D. Wash. Nov. 23, 2020).....14

Cross Mountain Ranch Ltd. P'ship v. Vilsack,
No. 09-cv-01902-PAB, 2011 WL 843905 (D. Colo. Mar. 7, 2011) 46

Ctr. for Biological Diversity v. U.S. Forest Serv.,
444 F. Supp. 3d 832 (S.D. Ohio 2020).....28

Davis v. FEC,
554 U.S. 724 (2008) 18

Dep't of Com. v. New York,
139 S. Ct. 2551 (2019) 41, 44, 45

Didrickson v. U.S. Dep't of Interior,
982 F.2d 1332 (9th Cir. 1992) 37

Donelson v. United States,
730 F. App'x 597 (10th Cir. 2018) 20

Drakes Bay Oyster Co. v. Jewell,
747 F.3d 1073 (9th Cir. 2014) 50

Fed. Power Comm'n v. Idaho Power Co.,
344 U.S. 17 (1952) 54

Fisheries Survival Fund v. Jewell,
236 F. Supp. 3d 332 (D.D.C. 2017) 54

Fla. Power & Light v. Lorion,
470 U.S. 729 (1985) 22

Harper & Row Publishers, Inc. v. Nation Enterprises,
471 U.S. 539 (1985) 30

Idaho Conservation League v. Bonneville Power Admin.,
826 F.3d 1173 (9th Cir. 2016) 51

Idaho ex rel. Kempthorne v. U.S. Forest Service,
142 F. Supp. 2d 1248 (D. Idaho 2001) 52

Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.,
140 F. Supp. 3d 1123 (D.N.M. 2015) 20, 21

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 34

Lachance v. White,
174 F.3d 1378 (Fed. Cir. 1999) 41

Louisiana v. United States,
948 F.3d 317 (5th Cir. 2020) 21

Madewell v. Dep't of Veterans Affs.,
287 F. App'x 39 (10th Cir. 2008) 41

Martin v. Franklin Capital Corp.,
546 U.S. 132 (2005) 24

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010) 50, 54

Nat'l Ass'n of Home Builders v. Defs. of Wildlife,
551 U.S. 644 (2007) 28, 46

New Mexico ex rel. Richardson v. Bureau of Land Mgmt.,
565 F.3d 683 (10th Cir. 2009) 39, 40, 43

Norton v. S. Utah Wilderness All.,
542 U.S. 55 (2004) 17, 21, 24, 25, 35, 53

Nova Health Sys. v. Gandy,
416 F.3d 1149 (10th Cir. 2005) 18

Org. for Competitive Markets v. U.S. Dep't of Agric.,
912 F.3d 455 (8th Cir. 2018) 39

Pennaco Energy, Inc. v. U.S. Dep't of Interior,
377 F.3d 1147 (10th Cir. 2004) 49

Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Serv.,
12 F. App'x 498 (9th Cir. 2001) 28

Rocky Mountain Wild v. Bernhardt,
506 F. Supp. 3d 1169 (D. Utah 2020) 12

S. Utah Wilderness All. v. Palma,
707 F.3d 1143 (10th Cir. 2013) 18

Sabine River Authority v. U.S. Department of Interior,
951 F.2d 669 (5th Cir. 1992) 51, 52

San Juan Citizens All. v. Stiles,
654 F.3d 1038 (10th Cir. 2011) 41

Schraier v. Hickel,
419 F.2d 663 (D.C. Cir. 1969) 2

Seamon v. Upham,
563 F. Supp. 396 (E.D. Tex. 1983) 19

Udall v. Tallman,
380 U.S. 1 (1965) 1

United States ex rel. McLennan v. Wilbur,
283 U.S. 414 (1931) 2, 25

Upper Snake River Chapter of Trout Unlimited v. Hodel,
921 F.2d 232 (9th Cir. 1990) 51

Utah v. Babbitt,
137 F.3d 1193 (10th Cir. 1998) 51

Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council,
435 U.S. 519 (1978) 55

W. Energy All. v. Salazar,
709 F.3d 1040 (10th Cir. 2013) 2, 3, 25

W. Energy All. v. Salazar,
No. 10-CV-0226, 2011 WL 3737520 (D. Wyo. June 29, 2011) 2, 3

Western Energy Alliance v. Zinke,
877 F.3d 1157 (10th Cir. 2017) 26, 36

WildEarth Guardians v. Bernhardt,
502 F. Supp. 3d 237 (D.D.C. 2020) 7, 8, 38, 39

WildEarth Guardians v. Bernhardt,
No. 1:20-cv-00056, 2020 WL 111765 (D.D.C. Jan. 9, 2020) 7

WildEarth Guardians v. Conner,
920 F.3d 1245 (10th Cir. 2019) 38

WildEarth Guardians v. Zinke,
368 F. Supp. 3d 41 (D.D.C. 2019) 7

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 54

Wis. Cent. Ltd. v. United States,
138 S. Ct. 2067 (2018) 27

Wyoming ex rel. Sullivan v. Lujan,
969 F.2d 877 (10th Cir. 1992) 20, 24, 53

Statutes

30 U.S.C. § 226 26

30 U.S.C. § 226(a) 2, 24, 30

30 U.S.C. § 226(b)(1)(A) ..... passim

30 U.S.C. § 226(g)-(h) 36

30 U.S.C. § 226(h) 27

30 U.S.C. §§ 181–287 1

40 U.S.C. § 4332(2)(C) 48
42 U.S.C. § 4332(2)(C) 5
42 U.S.C. § 4332(2)(C)(i)-(iii) 5
42 U.S.C. §§ 4321–4370m-12 5
43 U.S.C. § 1711(a) 51
5 U.S.C. § 706(1) 11, 17, 24
5 U.S.C. § 706(2) 17
5 U.S.C. §§ 701–706 17
Pub. L. No. 100–203, 101 Stat. 1330 (1987) 2

Rules

Fed. R. App. P. 15(a)(2)(C) 19
Fed. R. Civ. P. 15(d) 18

Regulations

40 C.F.R. § 1501.5 5
40 C.F.R. § 1501.6 49
40 C.F.R. § 1502.1 5
40 C.F.R. § 1502.9(d)(1) 49
40 C.F.R. § 1502.9(d)(2) 49
40 C.F.R. § 1502.9(d)(3) 49
40 C.F.R. § 1505.2 49
40 C.F.R. § 1506.1(a) 49
40 C.F.R. § 1508.1(q) 5, 48
43 C.F.R. § 3101.7–2(c) 28
43 C.F.R. § 3110.1(b) 32
43 C.F.R. § 3110.1(b) 34
43 C.F.R. § 3120.1-1 32
43 C.F.R. § 3120.1-1(e) 32, 33, 36

43 C.F.R. § 3120.1-2(a) 35

Other Authorities

53 Fed. Reg. 22,814 (June 17, 1988) 26, 33
53 Fed. Reg. 9,214 (Mar. 21, 1988).....32
85 Fed. Reg. 43,304 (July 16, 2020).....5, 48
86 Fed. Reg. 7,619 (Jan. 27, 2021) 11
H.R. Rep. No. 100-378 (1987)..... 1, 3, 4, 27, 30, 32
H.R. Rep. No. 100-495 (1987)..... 3, 4, 30
S. Hrg. 100-464, 100th Cong. 106 (1987) 3
S. Rep. No. 100-188 (1987) 4, 30

INTRODUCTION

Petitioners Western Energy Alliance et al. (WEA) ask the Court to enact a dramatic policy change: requiring the Secretary of the Interior to offer land for sale merely because someone has expressed interest in leasing it. Under the guise of interpreting the statutory term "available," WEA seeks to divest Interior of discretion to make leasing decisions on a parcel-by-parcel basis through evaluations under the National Environmental Policy Act (NEPA)—an approach that Congress specifically considered and rejected. The Court should likewise reject WEA's policy plea because Congress used the term "available" to preserve "the Secretary's discretionary authority" over leasing, H.R. Rep. No. 100-378, at 11 (1987), not eliminate it.

Before the Court can reach those statutory construction questions, however, there are several threshold jurisdictional defects that require the dismissal of WEA's petition.

BACKGROUND

I. LEGAL BACKGROUND

A. The Mineral Leasing Act (MLA)

The Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181–287, "gave the Secretary of the Interior broad power to issue oil and gas leases on public lands" while giving her "discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1, 4 (1965). Section 17(a) of the MLA establishes the

Secretary's discretion by providing that lands "may"—not must—be leased by the Secretary. 30 U.S.C. § 226(a). And courts have consistently recognized the Secretary's discretion in oil and gas leasing decisions. *E.g.*, *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 419 (1931) (MLA "goes no further than to empower the Secretary to execute leases"); *W. Energy All. v. Salazar*, 709 F.3d 1040, 1044 (10th Cir. 2013) (Secretary has "considerable" discretion in leasing decisions); *Schraier v. Hickel*, 419 F.2d 663, 665–68 (D.C. Cir. 1969) (affirming Secretary has "discretion to decline to lease" even if the Bureau of Land Management (BLM) had published a notice that it would receive offers). Indeed, a unanimous Supreme Court has affirmed the Secretary's authority under the MLA to issue a "general order" rejecting oil and gas applications "[i]n order to effectuate the conservation policy of the President." *Wilbur*, 283 U.S. at 418.

Congress enacted the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (1987 Reform Act), Pub. L. No. 100–203, tit. V, subtitle B, 101 Stat. 1330, 1330-256 to address concerns that leasing procedures under the MLA as originally enacted allowed the vast majority of leases to be sold on a non-competitive basis, thus depriving the public of a fair return. *W. Energy All. v. Salazar*, No. 10-CV-0226, 2011 WL 3737520, at *4 (D. Wyo. June 29, 2011) (summarizing the MLA's original leasing provisions). The Reform Act amended Section 17(b) of the MLA by directing the Secretary to instead offer most oil and gas leases through a

competitive process, at least initially. 1987 Reform Act § 5102(a) (codified at 30 U.S.C. § 226(b)(1)(A)). Parcels that did not receive a minimum bid would then be available for noncompetitive leasing for a two-year period. *Id.* But these amendments to Section 17(b) of the MLA were not intended to displace the Secretary's general discretion over oil and gas leasing in Section 17(a). H.R. Rep. No. 100-378, at 11 ("*Subject to the Secretary's discretionary authority under section 17(a) of the 1920 Act to make lands available for leasing*, section 2(a) establishes a competitive oil and gas leasing program where lands are leased to the highest responsible qualified bidder by competitive bidding." (emphasis added)); Ex. 2, Federal Onshore Oil and Gas Leasing: Hearing on S. 66 and S. 1388 Before the Subcommittee on Mineral Resources Development and Production of the Committee on Energy and Natural Resources, S. Hrg. 100-464, 100th Cong. 106, 108 (1987) (sponsor of Senate bill explaining that his bill did "not change the Secretary's discretion in refusing to lease").[1] Thus, the "MLA, as amended by the Reform Act of 1987, continues to vest the Secretary with considerable discretion to determine which lands will be leased." *W. Energy All.*, 709 F.3d at 1044.

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[1] While the 1987 Reform Act did not authorize the Secretary "to reject a bid at or over the minimum bid if he determines it does not represent a reasonable return to the public," H.R. Rep. No. 100-495, at 780 (1987) (Conf. Rep.), the 1987 Reform Act otherwise, "like the previous version of the MLA, . . . vests the Secretary at the outset with considerable discretion to determine which public lands are suitable for leasing," *Salazar*, 2011 WL 3737520, at *5.

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

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

Consistent with its position before Congress during the enactment of the 1987 Reform Act, Interior has interpreted the phrase "where eligible lands are available,"

30 U.S.C. § 226(b)(1)(A), to require, at a minimum, that "all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act." Ex. 4, BLM Manual 3120.11. That longstanding interpretation has been in place for over three decades. AR17; AR8–9.

B. The National Environmental Policy Act (NEPA)

NEPA—the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m-12—is a procedural statute that requires federal agencies to consider potential environmental impacts of a "proposed action" as well as "alternatives to the proposed action," 42 U.S.C. § 4332(2)(C)(i)-(iii). NEPA applies only to "major Federal actions," *id.* § 4332(2)(C), which do not include a "failure to act," because in such a situation "there is no proposed action and therefore there are no alternatives that the agency may consider." Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304-01, 43,347 (July 16, 2020) (NEPA Update); *see also* 40 C.F.R. § 1508.1(q) (defining "Major Federal action").

Interior complies with NEPA for oil and gas lease sales through detailed documents called Environmental Assessments (EAs), 40 C.F.R. § 1501.5, or even more detailed documents called Environmental Impact Statements (EISs), *id.* § 1502.1, that analyze environmental impacts associated with leasing. Errors in these

NEPA documents can result in lease sales being vacated by a court or lease development being enjoined. *Infra* 6–10.

II. FACTUAL BACKGROUND

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

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

For example, a trio of lawsuits pending in the District of Columbia illustrate how NEPA challenges to BLM's oil and gas leasing decisions have substantially

increased NEPA workloads and prevented lessees and operators from developing purchased leases. *See WildEarth Guardians v. Zinke* (*WEG I*), 368 F. Supp. 3d 41, 55 (D.D.C. 2019) (challenging eleven oil and gas lease sales covering over 460,000 acres of land in Wyoming, Utah, and Colorado); Complaint ¶¶ 6, 10, 11, *WildEarth Guardians v. Bernhardt*, No. 1:20-cv-00056, 2020 WL 111765 (D.D.C. Jan. 9, 2020) (challenging 23 BLM oil and gas lease sales covering more than two million acres of land across Wyoming, New Mexico, Colorado, Utah, and Montana) (*Bernhardt* Compl.); Amended Complaint ¶¶ 1, 6, 11–13, *WildEarth Guardians v. De La Vega*, No. 1:21-cv-00175-RC (D.D.C. Feb. 17, 2021), Doc. 13 (challenging twenty-eight BLM oil and gas lease sales covering over 1.3 million acres of land) (*De La Vega* Am. Compl.). A 2019 decision in the first of those cases found that five Wyoming lease sales—held between 2015 and 2016—violated NEPA for failing to adequately evaluate greenhouse gas emissions. *WEG I*, 368 F. Supp. 3d at 67–77 (enjoining lease development pending remand to BLM to prepare additional NEPA analysis).

Following the 2019 *WEG I* decision, BLM prepared supplemental NEPA analysis for the challenged 2015 and 2016 Wyoming lease sales. *See WildEarth Guardians v. Bernhardt (WEG II),* 502 F. Supp. 3d 237, 245 (D.D.C. 2020), *dismissed,* No. 21-5006, 2021 WL 3176109 (D.C. Cir. Apr. 28, 2021). Plaintiffs soon challenged that supplemental analysis as containing still inadequate assessments of greenhouse gas emissions. *Id.* And plaintiffs filed their second

lawsuit challenging 23 more lease sales—including nine lease sales by BLM-Wyoming—as violating *WEG I*. *Bernhardt* Compl., 2020 WL 111765 ¶¶ 133–35, tbl.A. After concluding that the NEPA analysis underlying 20 of the 23 challenged lease sales contained similar methods already rejected in *WEG I*, BLM successfully sought a remand of those sales, Oct. 23, 2020 Order, *WildEarth Guardians v. Bernhardt*, No. 1:20-cv-00056 (D.D.C. Oct. 23, 2020), Doc. 46 (remanding all but three leasing decisions), to revisit NEPA in light of the intervening *WEG I* decision. Significantly, drilling approvals for leases sold during those sales remain vulnerable to similar NEPA challenges until BLM is able to complete supplemental NEPA analysis on remand.

On November 13, 2020, the court issued its *WEG II* decision, finding that BLM's post-*WEG I* supplemental NEPA analysis was also deficient in analyzing greenhouse gas emissions, by failing to adequately address issues such as carbon budgeting. *See WEG II*, 502 F. Supp. 3d at 247–56. The court again enjoined BLM from approving drilling permits or other lease development activity, while remanding to BLM for further NEPA analysis. *Id.* at 258–59. In remanding, the court "urge[d] BLM to conduct a robust analysis, using conservative estimates based on the best data, analyzed in an unrushed fashion, so that the analysis can effectively serve as a model for the other leases." *Id.* at 259 n.16. Although appeals were initially taken from *WEG II*, all parties to that appeal—including Petitioners—later

stipulated to dismissal. Ex. 3, Stipulation for Dismissal, *WildEarth Guardians v. Haaland*, No. 21-cv-5006.

Following the November 2020 *WEG II* decision, plaintiffs filed their third lawsuit challenging 28 additional lease sales—including three Wyoming sales from 2019–2020—as violating *WEG I* and *WEG II*. *De La Vega* Am. Compl. ¶¶ 6, 11–13. Thus, this trio of lawsuits brought by a single set of plaintiffs before a single district court judge has effectively required BLM to (1) undertake a third round of NEPA analysis for five Wyoming oil and gas lease sales from 2015 and 2016, (2) consider additional NEPA analysis for twenty oil and gas lease sales—including nine in Wyoming from 2016–2019—in light of new caselaw in *WEG I* and *WEG II*, and (3) defend thirty-seven more oil and gas lease sales against ongoing NEPA challenges, including three Wyoming sales from 2019–2020. And there are numerous other ongoing NEPA challenges to BLM's oil and gas lease sales involving different issues, different plaintiff groups, and different courts. Doc. 52-2, Cowan Decl., Ex. C. At the same time, BLM experienced a significant upheaval that it is still recovering from when its headquarters was relocated from Washington, D.C., to Grand Junction, Colorado.[2] All of this litigation places issued leases under

[2] Rebecca Beitsch, *Bureau of Land Management exodus: Agency lost 87 percent of staff in Trump HQ relocation*, The Hill Jan. 28, 2021, https://thehill.com/policy/energy-environment/536384-blm-exodus-agency-lost-87-percent-of-staff-in-trump-relocation (last visited Oct. 4, 2021).

significant uncertainty, and developing a lease subject to a NEPA challenge carries substantial financial risks.

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

BLM has historically postponed lease sales for several reasons. Doc. 52-2, Cowan Decl. ¶ 7. For example, under the prior administration, BLM repeatedly deferred lease sales in order to better comply with NEPA, often in light of recent adverse court decisions. *Id.* at PR087–91. The prior administration also deferred lease sales "due to workload and staffing considerations." *Id.* at PR099. And BLM postponed numerous oil and gas lease sales in 2020 in light of complications from the COVID-19 pandemic. *Id.* ¶ 8. Additionally, BLM postponed sales without public explanations as recently as December 2020. *Id.* ¶ 6.

Indeed, the history of lease sales from 2017–2020 demonstrates that quarterly lease sales do not regularly occur in most states. For example, in North Dakota, Louisiana, and Texas, BLM offered oil and gas leases for sale in only 4 or 5 out of 16 quarters from 2017–2020. Declaration of Merry Gamper (Gamper Decl.), Att. G. In Montana, leases were offered for sale in only 10 of 16 quarters from 2017–2020; in New Mexico, it was only 12 of 16. *Id.* And no lease sales were held in any state in the second quarter of 2020. Doc. 52-2, Cowan Decl. ¶ 8.

C. On January 27, 2021, President Biden Signed Executive Order 14,008, Which WEA Immediately Challenged.

On January 27, 2021, the President signed Executive Order 14,008, "Tackling the Climate Crisis at Home and Abroad," which directs various agencies to take actions to address climate change. 86 Fed. Reg. 7,619. That Order directs Interior to undertake a comprehensive review of federal oil and natural gas leasing—including royalty rates—while "[t]o the extent consistent with applicable law" pausing new leases to preserve the status quo. *Id.* at 7624–25.

That same day, WEA immediately filed its petition for review of agency action, without specifying which agency action—if any—it challenged. WEA Pet., Doc. 1. That petition alleged, "On January 27, 2021, the Secretary of the Interior, acting at the President's direction, suspended indefinitely the federal oil and gas leasing program." *Id.* On February 23, 2021, WEA filed an amended petition—without consent or court authorization—adding the sentence: "On or about February 12, 2021, the Secretary added notations on the Bureau of Land Management's website indicating that all onshore oil and gas lease sales scheduled for March or April 2021 have been postponed." WEA Am. Pet., Doc. 4.

As for a remedy, the petition requests only that the Court "find the suspension invalid and set aside the challenged government action." *Id.* Nowhere does WEA indicate that it is seeking mandamus relief or seeking to compel agency action under 5 U.S.C. § 706(1).

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

At the time WEA filed its petition, only one of seven BLM offices had postponed its first-quarter lease sale. First-quarter lease sales for five other offices were not postponed until after WEA initiated this litigation, and one—New Mexico—held its first-quarter lease sale in January, as explained below.

New Mexico: On January 14, 2021, BLM-New Mexico held an oil and gas lease sale.[3]

Nevada: Well before Executive Order 14,008, BLM-Nevada postponed a December 2020 Nevada sale by publishing an errata without further explanation to its ePlanning website. Doc. 52-2, at PR100. On January 25, 2021, BLM-Nevada made a similar decision to postpone its lease sale and announced this decision on its website. AR1131, AR1184. That decision was confirmed by formal errata published on January 27, 2021. AR1132. Although neither errata details a rationale for the postponements, WEA does not challenge the December 2020 postponement.

Utah: On February 11, 2021, the BLM-Utah Director recommended postponing Utah's proposed March 2021 lease sale to account for a December 10, 2020 court decision, *Rocky Mountain Wild v. Bernhardt*, 506 F. Supp. 3d 1169 (D.

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

Utah 2020), *appeal filed,* No. 21-4020 (10th Cir. Feb. 16, 2021). AR1163–64. That recommendation stated that the draft EA for the March 2021 sale "took a similar approach [of] analyz[ing] only two alternatives: lease all or lease nothing," where that approach was found deficient in *Rocky Mountain Wild*. AR1164. The BLM Deputy Director, Operations, Michael Nedd approved that recommendation on February 12, postponing the sale. *Id.*

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

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

Colorado & Montana-Dakotas: On February 4, both BLM-Colorado and BLM-Montana-Dakotas sought approval by February 12 to post competitive sale notices for March 2021 sales. AR1150–55.[4] Their respective submissions indicated that their EAs were ready for review as the agency had responded to public comments. AR1153 ("BLM responded to [public] comments [on a draft EA]"); AR1152 (referencing "response to comment section of the EA").

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

[4] Although the BLM-Montana-Dakotas sale was previously planned for March 23—necessitating a February 5 posting—its request acknowledged that "the lease sale date [might] need to be changed from March 23 to March 30," making February 12 the relevant approval date. AR1154.

Wyoming: On February 4, BLM-Wyoming requested next-day approval to hold a March 2021 lease sale. AR1156–57. Unlike the Colorado and Montana requests, BLM-Wyoming's request did not indicate that its EA was ready for review. AR1157. Instead, BLM-Wyoming sought authorization to proceed with offering leases for sale based merely on the assurance that "[c]oncerns raised in ongoing litigation, including [*WEG II*, climate change and GHG emissions], *Western Watersheds Project vs. Zinke*, 1:18-cv-00187-REB [D. Idaho, BLM leasing policy IM 2018-034], and *Montana Wildlife Federation vs. Bernhardt*, 4:18-cv-00069-BMM [D. Mont., Greater Sage-Grouse leasing prioritization], will be satisfactorily addressed in the Environmental Assessment and Protest Decision before any lease is issued." AR1157. On February 12, the Wyoming sale was postponed due to "serious questions as to NEPA compliance." AR1169–70.

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

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

on "misinformation." *Id.* Thus, the state office postponement was reversed and BLM-New Mexico submitted a request to proceed with an April lease sale. AR2424.

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

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

On August 24, Interior announced the next steps for its onshore leasing program, including "post[ing] for scoping parcels included in Quarter 1 and Quarter 2 2021 leasing deferrals by the end of August," "undertak[ing] environmental reviews of parcels for potential leasing" after a 30-day scoping period, and posting "lease sale notices . . . later this year."[5] Before those scoping notices were posted on August 31, WEA filed its brief one week early on August 30.

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

Since deferring the first-quarter 2021 proposed sales, Interior has devoted substantial efforts to preparing more robust NEPA analysis. Gamper Decl. ¶¶ 16. That work has included inventorying greenhouse gas (GHG) emissions from federal production in fiscal year 2020 and from reasonably foreseeable production and leasing over the next 12 months. *Id.* Additionally, BLM has worked on preparing assessments of future GHG emissions trends and climate change impacts. *Id.* BLM is currently considering how to use those assessments and other analytic tools, such as carbon budgeting, to evaluate cumulative impacts of its leasing decisions. *Id.* BLM presently anticipates publishing updated draft NEPA analysis for public comment by early November in preparation for lease sales in the first quarter of 2022. *Id.*

STANDARD OF REVIEW

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

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER WEA'S PETITION

WEA's Petition suffers three fatal jurisdictional flaws related to timeliness, injury, and redressability, as explained below.

First, jurisdiction must exist "when the suit was filed." *Davis v. FEC*, 554 U.S. 724, 734 (2008). When WEA initiated this litigation on January 27, only BLM-Nevada had deferred its first-quarter lease sale. *Supra* 12–15. Although WEA subsequently amended its complaint to address other deferrals, Doc. 4, Tenth Circuit law forbids WEA from relying on that amended pleading for jurisdictional purposes because subject matter jurisdiction "is assessed at the time of the original complaint, even if the complaint is later amended." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013) (internal citations omitted); *see also Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1155 (10th Cir. 2005) ("As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint." (internal citations omitted)). Thus, the Court lacks jurisdiction over WEA's challenge to the six other post-filing postponements as they did not exist and thus could not have injured WEA at the outset of this suit.[6]

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[6] The Court cannot treat WEA's Amended Petition as a Supplemental Petition because supplemental pleadings cannot be filed as a matter of course and instead require "motion," "reasonable notice," and "just terms." Fed. R. Civ. P. 15(d). Had WEA sought to file a Supplemental Petition, Respondents would have at least had an opportunity to oppose that motion and explain how WEA's barebones January 27

As to the BLM-Nevada postponement, that January 25 postponement predates Executive Order 14,008, and is thus outside the scope of WEA's operative petition. *See* Doc. 8 (challenging only the "suspension of the leasing program," based on the Executive Order, as reflected in postponements published "on or around February 12"). It is difficult to see how a January 25 postponement could be based on an Executive Order that had not yet issued. Accordingly, the Nevada postponement is outside the scope of WEA's lawsuit because it was never identified as an "order . . . to be reviewed." Federal Rule of Appellate Procedure 15(a)(2)(C). In sum, the Court lacks jurisdiction over WEA's petition because WEA has failed to establish the existence of even a single agency action identified by its petition at the outset of its suit.

Second, WEA has failed to carry its burden of showing standing to challenge the Nevada postponement, let alone the other postponements. *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1126 (D.N.M. 2011) ("Plaintiffs carry the 'burden of production on standing,' and are therefore required to 'support each element of [their] claim by affidavit or other evidence.'" (quoting *Citizens Against Ruining the Env't,* 535 F.3d 670, 675 (7th Cir. 2008))). "Each specific final agency

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petition should not be supplemented to avoid "untoward legal repercussions." *Seamon v. Upham*, 563 F. Supp. 396, 400 (E.D. Tex. 1983) (explaining how such supplementation can be used "to circumvent established local rules . . . that have been adopted in order to discourage and hamper 'forum shopping'").

action should be treated as giving rise to an independent claim, and thus named plaintiffs must allege that each challenged action has caused some injury to them." *Donelson v. United States*, 730 F. App'x 597, 602 (10th Cir. 2018). WEA's Brief does not even mention standing or injury, let alone provide evidence to support allegations of injury for each of the challenged postponements.

Nor does WEA, a trade alliance, establish any environmental interest within NEPA's zone that would give it statutory "standing" to bring its NEPA challenge. *Am. Waterways Operators v. U.S. Coast Guard*, No. 18-CV-12070-DJC, --- F. Supp. 3d. ---, 2020 WL 360493, at *5–6 (D. Mass. Jan. 22, 2020) (finding that trade association asserting economic injuries lacked statutory standing to bring NEPA claim).

Third, WEA has failed to carry its burden to establish that a favorable judgment is likely to redress its unspecified injuries. The only relief sought by WEA's petition is that the Court "find the suspension invalid and set aside the challenged government action," Doc. 8, *i.e.*, the relief provided by APA § 706(2). But the Court cannot set aside an absence of lease sales. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 140 F. Supp. 3d 1123, 1197 (D.N.M. 2015) (holding that courts cannot "'set aside' a failure to act" under § 706(2)); *see also Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 882 (10th Cir. 1992) (dismissing Wyoming's claim to set aside agency action for lack of redressability when its injury

arose from an absence of competitive leasing). Nor does WEA's tactic of seeking to "reinstate" lease sales provide redressability, *see* Pet'r WEA's Opening Mem. on the Merits 48, Doc. 73 (WEA Br.), because there is nothing to reinstate as BLM did not hold lease sales.

Instead, the only way WEA could endeavor to compel Interior to hold lease sales is by seeking relief under § 706(1). *Louisiana v. United States*, 948 F.3d 317, 323 (5th Cir. 2020) ("[S]eek[ing] to compel the [agency] to act in accordance with law . . . implicates a different section of the APA, § 706(1)"); *Jarita Mesa*, 140 F. Supp. 3d at 1197 ("The only way to 'set aside' a failure to act is to compel agency action, [under] § 706(1) . . . ."); *see also Norton*, 542 U.S. at 63 ("A 'failure to act' is . . . simply the omission of an action without formally rejecting a request—for example, the failure to . . . take some decision by a statutory deadline."). WEA, however, has not even pled a § 706(1) claim, and focuses much of its brief on § 706(2) standards. *See* WEA Br. 31–47 (alleging postponements were pretextual, arbitrary, and procedurally defective). WEA "cannot escape" the limits on judicial direction of agency action by seeking to set aside agency inaction under § 706(2). *Jarita Mesa*, 140 F. Supp. 3d at 1197.

In sum, these three fundamental defects in WEA's suit deprive the Court of jurisdiction and deprive WEA of statutory standing.

II. AT MINIMUM, THE COURT LACKS JURISDICTION OVER ANY SECOND-QUARTER POSTPONEMENTS.

WEA repeatedly describes its challenge as directed to Interior's decision "not to conduct . . . second quarter lease sales." *E.g.*, WEA Br. 28. That is an erroneous description of the challenge before the Court, as WEA tacitly concedes in a footnote. *Id.* 17 n.15 (admitting that the second quarter decision occurred "after Petitioners' filed the operative complaint"). Because that April 21 decision occurred after the operative complaint was filed, the agency has not lodged the administrative record for that decision, and thus there is nothing for the Court to review. *Fla. Power & Light v. Lorion*, 470 U.S. 729, 743-44 (1985) (Judicial review under the APA is "based on the record the agency presents to the reviewing Court.").

Despite this clear record, WEA attempts to muddy the water before the Court by mischaracterizing an email discussing the temporary New Mexico decision. WEA Br. 17 n.15. WEA incorrectly claims that "BLM never considered holding a second quarter lease sale in any State Office other than New Mexico" based on an out-of-context statement in an email thread. *Id.* (stating "the only sale that was anticipated is in NM" (quoting AR1179)). In fact, the referenced email referred only to discussions about the month of April, and explained that only New Mexico had planned a sale for that month. AR1179–80 (referring to "conversations of last week"); AR2421 (showing those conversations were about

"upcoming lease sales" in "April"). The email said nothing about other BLM state offices' plans for the entire second quarter. And, as illustrated by the first quarter sales discussed *supra* 12–15, most BLM offices tend to plan sales near the end of a quarter.

Even the March 1 decision to temporarily postpone the April BLM-New Mexico sale is not a final agency action over which the Court has jurisdiction. To be "final," an agency action "must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotations omitted). Although deferrals or postponements of agency decisions are generally not "final" agency actions because they are merely tentative decisions, *see, e.g.*, *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 68 (D.C. Cir. 2000), WEA contends that this March 1 postponement was a final "decision not to conduct th[is] sale[] *in the . . . second quarter . . . .*," WEA Br. 28 n.17. Not so, as the administrative record expressly contemplated "that the sale date would be moved and we have the flexibility to hold the sale [by] the end of the Quarter (end of June)." AR2424. Because there was ample time remaining in the second quarter to hold a lease sale at the time of the March 1 postponement, and that postponement was intended only to address the "meantime" "pending decisions on how the Department will

implement" Executive Order 14,008, AR1180, it was not a final decision that the agency would not hold a New Mexico lease sale in the second quarter.

III. THE COURT CANNOT COMPEL LEASE SALES

Even if WEA had pled a failure to act claim under 5 U.S.C. § 706(1), the claim would fail. "Failures to act are sometimes remediable under the APA, but not always," because the APA places strict limits on "judicial review of agency inaction." *Norton*, 542 U.S. at 61. Those limits allow a claim seeking to compel agency action to "proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64. Those limitations preclude both "broad programmatic attack[s]" like the one in *Lujan* and "judicial direction of even discrete agency action that is not demanded by law." *Id.* at 64–65. Applying those limitations, the Tenth Circuit has recognized that "federal courts do not have the power to order competitive leasing" because "that discretion is vested absolutely in the federal government's executive branch and not in its judiciary." *Sullivan*, 969 F.2d at 882.

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

The Secretary has considerable discretion over oil and gas leasing decisions. *See supra* 1–5. The MLA provides only that the Secretary "may"—not "must"—lease these lands, 30 U.S.C. § 226(a), a choice of words that "clearly connotes discretion." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). The

Supreme Court unanimously affirmed the Secretary's authority under the MLA to issue a "general order" rejecting oil and gas applications "[i]n order to effectuate the conservation policy of the President." *Wilbur*, 283 U.S. at 418. And the Tenth Circuit has recognized that the "MLA, as amended by the Reform Act of 1987, continues to vest the Secretary with considerable discretion to determine which lands will be leased." *W. Energy All.*, 709 F.3d at 1044. Given the Secretary's considerable discretion in this area, the Court cannot compel her to sell any particular parcel or quantity of parcels. *See Norton*, 542 U.S. at 65. Nor can the Court compel her to sell land in contravention of her other statutory obligations, *e.g.*, NEPA compliance, as such a ruling would contravene the ordinary meaning of "where eligible lands are available." 30 U.S.C. § 226(b)(1)(A).

WEA nonetheless claims that the MLA's provision that "[l]ease sales shall be held for each State where eligible lands are available at least quarterly" establishes a "discrete, ministerial obligation." WEA Br. 23 (citation omitted). Despite nearly a century of consistent judicial precedent firmly establishing the Secretary's discretion over leasing, WEA now asks the Court to divest the Secretary of that discretion when the public has expressed interest in leasing lands. WEA Br. 25 (claiming that "lands included in any expression of interest are available for leasing and shall be offered for competitive bidding" (internal quotations omitted)). WEA takes an impermissible *à la carte* approach to construing the statutory phrase "where

eligible lands are available," 30 U.S.C. § 226. It relies on the BLM Manual to define "eligible." *Compare* WEA Br. 23 ("'Eligible' lands comprise all lands subject to leasing, i.e., lands not excluded from leasing by a statutory or regulatory prohibition." (internal quotations omitted)), *with* Ex. 4, BLM Manual 3120.11 ("Lands eligible for leasing include those . . . subject to leasing, i.e., lands not excluded from leasing by a statutory or regulatory prohibition.").[7] But it discards the subsequent sentence in the BLM Manual, which states: "Lands are available for leasing when they are open to leasing in the applicable resource management plan, and when all statutory requirements and reviews have been met, including compliance with [NEPA]." Ex. 4, BLM Manual 3120.11. WEA instead plucks one sentence out of a regulatory preamble for the proposition that "the 'term available means any lands subject to leasing under the Mineral Leasing Act,'" WEA Br. 26 (quoting 53 Fed. Reg. 22,828), without regard to the subsequent explanation of how that term was "used in the context of this section," 53 Fed. Reg. at 22,828. Even setting aside the impropriety of such a mix-and-match approach, the Court should reject that statutory construction for four reasons.

[7] Though WEA cites *Western Energy Alliance v. Zinke (Zinke),* 877 F.3d 1157, 1162 (10th Cir. 2017) as the source of its construction of "eligible," WEA Br. 23, the cited portion of *Zinke* was merely quoting the BLM Manual.

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

Second, WEA's proposed construction cannot be reconciled with the ordinary meaning of the Mineral Leasing Act. The 1987 Reform Act not only added the quarterly lease sale provision to shift to a competitive leasing system; it also extended significant authority to the Secretary of Agriculture to object to oil and gas leasing on National Forest System lands. *See* 30 U.S.C. § 226(h) ("The Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture."). "Generally,

[the Forest Service] manages the surface of the forest lands, and BLM manages the subsurface of the lands." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 444 F. Supp. 3d 832, 841 (S.D. Ohio 2020) (citing 30 U.S.C. § 226(g)). "While BLM has ultimate authority over leasing, it may not issue a lease on forest lands over [the Forest Service's] objection." *Id.* (citing 43 C.F.R. § 3101.7-2(c)). In exercising its responsibility, the "Forest Service has discretion whether to authorize the leasing of any particular Forest Service lands for mineral exploration." *Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Serv.*, 12 F. App'x 498, 500 (9th Cir. 2001) (citing 30 U.S.C. § 226(h)). Given the Secretary of Agriculture's discretion to object to leasing, a mere expression of interest from a private party cannot render land legally "eligible" and "available" such that it must be sold by BLM.

Nor would a construction of "where eligible lands are available" that excludes NEPA compliance be consistent with the ordinary meaning of the MLA. Land is not "available" for leasing within the ordinary sense of that word if statutory prerequisites have not been met. Indeed, Congress enacted the quarterly lease sale provision in 1987, nearly two decades after NEPA was enacted into law. It would be quite unusual for Congress to casually impose one statutory obligation under the MLA that requires an agency to violate another preexisting statutory obligation under NEPA. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) ("[R]epeals by implication are not favored and will not be presumed unless

the intention of the legislature to repeal is clear and manifest," by "expressly contradict[ing] the original act" or making such a construction "absolutely necessary in order that the words of the later statute shall have any meaning at all" (internal quotations and alterations omitted)). The text refutes rather than supports that unlike notion.

Third, WEA's construction contradicts the legislative history of the 1987 Reform Act. Under the guise of interpreting the term "available," WEA actually asks the Court to enact a policy change that Congress previously rejected. When considering the 1987 Reform Act, the oil and gas industry expressed its concern to Congress that the competitive sale provision placed Interior "under no obligation to nominate lands for lease." Interior Hearing, No. 100-11, at 133.[8] Industry then requested that Congress require the Secretary to promptly offer lands receiving an expression of interest (EOI), by adding the following underlined language to the competitive sale provision: "The public may make confidential expressions of interest about specific lands, and such lands shall be offered in the next scheduled sale in the area of such lands, if qualified under the provisions of this act." *Id.* But Congress declined to adopt industry's proposed revision, explaining instead that the

[8] The proposed quarterly lease sale provision under discussion was in Section 2(a)(1) of H.R. 2851, and stated: "Lease sales shall be held for each State, where appropriate, not less frequently than quarterly. . . . The public may make confidential expressions of interest about specific lands." Interior Hearing, No. 100-11, at 21.

competitive lease sale provision was expressly "[s]ubject to the Secretary's discretionary authority under [30 U.S.C. § 226(a)] *to make lands available for leasing*." H.R. Rep. No. 100-378, at 11 (emphasis added). Because Congress rejected imposing an EOI-based constraint on Interior's discretion through the legislative process, it would be inappropriate for the Court to impose such a dramatic change through interpreting the term "available." *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985) (declining to construe statute in manner that Congress had previously "resisted pressures from special interest groups" to adopt); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (same).

Moreover, Congress specifically considered and rejected eliminating NEPA-based discretion for lease sales. When considering the 1987 Reform Act, Congress asked Interior to explain "some of the most common reasons" why the Secretary would exercise her "discretion to reject a lease offer after a reasoned determination that leasing is not in the public interest." Interior Hearing, No. 100-11, at 66. Interior responded that it would exercise its discretion not to lease based on, *inter alia*, "compliance with NEPA protection of the environment." *Id.* Although Congress considered restricting that discretion by exempting lease sales from NEPA, S. Rep. No. 100-188, at 6, 49, Congress ultimately decided not to exempt lease sales from NEPA, H.R. Rep. No. 100-495, at 782 (Conf. Rep.). Congress thus considered and

rejected WEA's construction that the Secretary can be required to hold lease sales without regard to her duties under NEPA.

Fourth, WEA overlooks Interior's longstanding interpretation that eligible "[l]ands are available" when, at a minimum, "all statutory requirements and reviews have been met, including compliance with [NEPA]." Ex. 4, BLM Manual 3120.11 (2013); AR17; AR8–9. Because that is a longstanding agency interpretation in a complex statutory scheme, it is entitled to significant deference. The Supreme Court has recognized that such interpretations are entitled to deference, including up to *Chevron* deference. *See Barnhart v. Walton*, 535 U.S. 212, 222 (2002) ("[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue").

In sum, the Court should reject WEA's construction of "where eligible lands are available" because it would improperly assign the same meaning to distinct statutory terms, contradict other provisions of the MLA, and implement policy changes that Congress specifically considered and rejected when enacting the 1987 Reform Act. Instead, the Court should defer to the agency's longstanding construction that has been in place since at least 1989.

B. BLM's Regulations Do Not Compel A Different Construction.

Rather than focusing on statutory construction, WEA asks the Court to interpret regulations promulgated in 1988 as divesting BLM of its congressionally recognized "discretionary authority . . . to make lands available for leasing." H.R. Rep. No. 100-378, at 11. WEA claims that "BLM regulations designate 'land[s] included in an expression of interest' as 'Lands available for competitive leasing' and mandate that such parcels 'shall be offered for competitive leasing.'" WEA Br. 6 (alterations in original) (quoting 43 C.F.R. § 3120.1-1(e))). The Court should reject this argument for four reasons.

First, the plain language of § 3120.1-1 does not purport to define—much less exhaustively define—the term "available"; instead, that section merely serves "to identify the lands subject to competitive leasing," 53 Fed. Reg. at 9,218, as opposed to noncompetitive leasing. *Compare* 43 C.F.R. § 3120.1-1 ("All lands available for leasing shall be offered for competitive bidding under this subpart, including but not limited to: …."), *with id.* § 3110.1(b) ("Only lands that have been offered competitively under subpart 3120 of this title, and for which no bid has been received, shall be available for noncompetitive lease."). In other words, for the purpose of deciding which lands will be available *for competitive leasing*, § 3120.1-1 presupposes that the lands are "available" in the first place. The regulation does not direct that any lands be deemed available. Indeed, the EOI provision that WEA

relies on confirms that EOI lands are subject to further review by agency officials before leasing can proceed. *See* 43 C.F.R. § 3120.1-1(e) ("Lands included in any expression of interest . . . *submitted to the authorized officer*." (emphasis added)).

Second, WEA's present-day interpretation of the 1988 regulations contradicts all contemporaneous evidence of their meaning. In responding to comments regarding the meaning of "the term 'available' in § 3120.1-1," BLM's regulatory preamble explained "It is Bureau policy prior to offering the lands to determine whether leasing will be in the public interest and to identify stipulation requirements, obtain surface management agency leasing recommendations and consent where applicable and required by law." 53 Fed. Reg. at 22,828. And in 1989, Interior confirmed that the "preamble to the final rulemaking clearly shows the Department interpreted the . . . competitive leasing provisions as retaining Secretarial discretionary power to lease lands," because it had "explained that 'available' lands are those statutorily open to leasing under the MLA, that have met other statutory requirements, and for which leasing is in the public interest." AR7–8, "Eligible" and "Available" Land Under the Federal Onshore Oil and Gas Leasing Reform Act of 1987, U.S. Department of the Interior, Office of the Solicitor (1989); *see also* AR9 ("BLM may never include a parcel in a sale for which it has not completed its statutory requirements under laws such as the National Environmental Policy Act, the Endangered Species Act, and the MLA."). The Court should defer to these

longstanding, considered interpretations of the term "available" in the 1988 regulations. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) ("When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean.").

Despite this substantial contemporaneous evidence of the meaning of the term "available," WEA asks the Court to construe that term to divest Interior of its ability to make a public interest determination or to complete statutory requirements such as NEPA prior to leasing. WEA Br. 25. WEA wrongly claims that its construction would not divest Interior of discretion, as discretion could still be exercised at the protest stage of leasing or the resource management plan (RMP) stage. *Id.* at 27–28. Neither argument is availing. Confining discretion to the protest stage would impermissibly delegate the agency's discretionary authority and statutory compliance duties to third-party protesters, who may fail to raise relevant issues. Moreover, protests are often not resolved until after the sale is held, and independent legal consequences attach to the act of offering lands at a competitive sale. *See* 43 C.F.R. § 3110.1(b).

As to exercising discretion at the RMP stage, this argument fails because the contemporaneous evidence establishes that BLM could exercise its "discretion through land use planning *or through other appropriate review processes*." AR8 (emphasis added); *see also* Ex. 3, BLM Manual 3120.11 ("Lands are available for leasing when they are open to leasing in the applicable [RMP], *and when all*

statutory requirements and reviews have been met, including compliance with [NEPA]."). WEA cannot arrive three decades later and cabin BLM's discretion solely to the RMP stage, as demonstrated by the fact that RMPs generally make determinations about whether lands are "open" or "closed" to oil and gas leasing, not whether they are "available" for leasing. WEA has failed to carry its burden to establish that any RMP, let alone relevant RMPs in each state, designate lands as "available" for leasing within the meaning of 30 U.S.C. § 226(b)(1)(A). Even if it had carried this burden, its argument would still fail under *Norton*, where the Supreme Court explained that "a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them." 542 U.S. at 71. While RMPs can support claims to set aside actions "as contrary to law pursuant to 5 U.S.C. § 706(2)," they cannot be used to compel action under § 706(1) "at least absent clear indication of binding commitment in the terms of the plan." *Id.* at 69. Because WEA has not provided the Court with a single indication of such binding commitment, the Court cannot compel any lease sales.

Third, WEA's proposed construction that lands are "available" whenever they are "subject to leasing" and identified in an "expression of interest" would force Interior to violate numerous statutory requirements. BLM's regulations establish that state offices "shall hold sales at least quarterly if lands are available for competitive leasing." 43 C.F.R. § 3120.1-2(a). If the public expressed interest in

non-wilderness lands closed to leasing under an RMP, WEA's proposed construction would nonetheless "mandate that such parcels 'shall be offered for competitive leasing,'" WEA Br. 6 (quoting 43 C.F.R. § 3120.1-1(e)), contrary to 43 U.S.C. § 1732(a). Similarly, WEA's proposed construction would require Interior to offer Forest Service lands subject to an EOI for lease over the objection of the Secretary of Agriculture, contrary to 30 U.S.C. § 226(g)–(h). The Court should reject such an interpretation of "available" lands.

Fourth, WEA's reliance on the Tenth Circuit's *Zinke* decision betrays the weakness of its "available" argument, as it again takes an *à la carte* approach to dicta. WEA contends that "when eligible parcels are nominated, they become legally 'available' and '[t]he [BLM] State Office then conducts a competitive lease sale auction.'" WEA Br. 25 (quoting *Zinke*, 877 F.3d at 1164 (10th Cir. 2017)); *id.* at 31 (referring to the "Tenth Circuit's observation that eligible parcels become 'available' when nominated through an expression of interest"). But WEA tellingly ignores the portion of *Zinke* establishing that an EOI alone is insufficient to make land "available." *Zinke*, 877 F.3d at 1162 ("'Available' lands are those 'open to leasing in the applicable [RMP], . . . when all statutory requirements and reviews have been met.'" (quoting BLM Manual 3120.11)). It is clear that the *Zinke* statements WEA relies on are dicta because WEA did not contest the BLM Manual definition of "available" in *Zinke*. Instead, it (1) "defer[ed] to BLM's interpretation

of 'eligible' and 'available,'" Petitioner-Appellee's Response Brief at 16, *W. Energy All. v. Zinke*, No. 17-2005, 2017 WL 1325405 (10th Cir. Apr. 5, 2017), (2) disavowed any challenge to "BLM's discretion to withhold nominated parcels from oil and gas leasing," *id.* at 9, and (3) disclaimed efforts to force nominated parcels to "be offered for oil and gas leasing before being subject to environmental review," *id.* Rather than choosing amongst *Zinke* dicta, the Court should defer to BLM's longstanding interpretation of "available" within its own regulations.

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

Given the appropriate construction of "where eligible lands are available," there was no discrete, non-discretionary duty on Interior to hold lease sales earlier this year. Although some NEPA work had been done for those sales, the draft work was prepared before relevant adverse court decisions issued in November and December 2020. *Supra* 12–15. After reviewing that draft NEPA, Interior determined that additional analysis should be done to avoid litigation risk. *Id.* Such "litigation decisions are generally committed to agency discretion by law, and are not subject to judicial review under the APA." *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1339 (9th Cir. 1992). Since that time, Interior has been working diligently to improve its NEPA approach, with a particular focus on providing a more robust and legally defensible analysis of the complex issue of GHG emissions. Gamper Decl. ¶ 16. The Tenth Circuit has held that such decisions about how to

conduct NEPA analysis are discretionary. *WildEarth Guardians v. Conner*, 920 F.3d 1245, 1258 (10th Cir. 2019) ("NEPA leaves substantial discretion to an agency to determine how best to gather and assess information about a project's environmental impacts." (internal quotations omitted)).

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

WEA nonetheless contends that BLM should have rushed out additional NEPA analysis to continue holding first-quarter lease sales. That argument fails

because NEPA is not merely a box-checking exercise; it is the "centerpiece of environmental regulation in the United States, [and] requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009). Here, a court overseeing NEPA challenges to dozens of lease sales—including nearly every Wyoming sale over the last five years—rejected Interior's second attempt at NEPA as reflective of a "sloppy and rushed process" and "urge[d] BLM to conduct a robust analysis, using conservative estimates based on the best data, analyzed in an unrushed fashion, so that the analysis can effectively serve as a model for the other leases." *WEG II*, 502 F. Supp. 3d at 256, 259 n.16.

WEA suggests that the several months following the late 2020 decisions was sufficient time to undertake corrective NEPA analysis, but that argument ignores the discretionary nature of the NEPA process. WEA cannot use a putative statutory deadline to bind the incoming administration to the prior administration's discretionary policy choices about how to conduct NEPA analysis. *See Org. for Competitive Markets v. U.S. Dep't of Agric.*, 912 F.3d 455, 458–61 (8th Cir. 2018) (declining to impose mandamus—despite an "absolute congressional deadline"—when the outgoing administration "left their successors a time bomb" in the form of "proposed agency action[s]" that relied on a legal "interpretation that had been

consistently rejected by numerous courts"). Here, the prior administration's approaches to evaluating greenhouse gas emissions—as well as other NEPA issues such as groundwater and greater sage grouse impacts—have been rejected by numerous courts. *See supra* 6–10; Doc. 52-2, Cowan Decl. ¶ 4. Following an election, the new administration cannot be bound to the prior administration's NEPA approaches. *Richardson*, 565 F.3d at 703 ("By focusing both agency and public attention on the environmental effects of proposed actions, NEPA . . . allows the political process to check those decisions."). At the time of the challenged postponements, the new administration had been in office for less than a month and was forced to reckon with a significant amount of NEPA litigation—and a growing queue of remand NEPA requirements for leasing decisions that had already occurred. Because the new administration was entitled to a reasonable amount of time to make discretionary decisions about how to conduct NEPA analysis for lease sales, there were no "eligible lands available" at the time of the challenged postponements.

D. The NEPA-Based Postponements Were Not Pretextual.

WEA next claims that BLM "manufacture[d] a lack of eligible and available parcels" through "pretextual" NEPA-based postponements. WEA Br. 31–32. This argument fails because WEA ignores governing law on pretext and overlooks that the prior administration shared similar concerns about NEPA deficiencies. While

the current administration selected a different approach for addressing these NEPA deficiencies, it had ample discretion to do so.

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

Moreover, "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019). Instead, demonstrating that an agency's stated rationale was "pretextual" requires showing that the agency's reasons were "contrived" instead of "genuine." *Id.* at 2574–76. Here, WEA has failed to show—much less demonstrate through irrefragable proof—that Interior's litigation risk and NEPA compliance concerns were contrived.

Notably, WEA does not even attempt to carry its burden by demonstrating that the draft NEPA analysis presented with first quarter lease sales complied with

the specific court decisions that engendered the postponements. WEA Br. 31–35. Here, the administrative record identifies specific concerns with draft NEPA analysis based on cited court decisions—insufficient alternatives analysis based on *Rocky Mountain Wild* and insufficient GHG analysis based on *WEG II* and *Columbia Riverkeeper*. *Supra* 12–15. Rather than identify any flaw in those assessments of the draft NEPA documents, WEA improperly attempts to shift the burden to Interior to demonstrate specific inadequacies in those draft NEPA documents beyond those already identified in the administrative record. WEA Br. 33. Because WEA has failed to carry its burden to show that these NEPA-based concerns are contrived, the Court should reject its pretext argument.

WEA also wrongly claims that "[t]he administrative record demonstrates that NEPA review for each of the cancelled lease sales . . . was on schedule to be completed before the respective lease sale." WEA Br. 32. While such statements may be found in the administrative record for the New Mexico sale, for example, that sale was not postponed for NEPA compliance reasons. *Supra* 15–16. As to other sales, such as Wyoming or Utah, the administrative record demonstrates that WEA's claim is erroneous, as draft NEPA documents responding to comments about the court decisions had not even been prepared at the time of the postponements. *Id.* BLM-Wyoming's request to proceed with its lease sale indicated that concerns based on three court decisions, including *WEG II*, were not going to be addressed until

leases were "issued," AR1157, which typically occurs several months after the sale is held. But NEPA requires agencies to consider environmental impacts before acting. *Richardson*, 565 F.3d at 703.

At bottom, Plaintiffs' claims that NEPA-based postponements were pretextual cannot be squared with BLM's recent history of NEPA litigation. *Supra* 6–10. As the prior administration recognized, *WEG II* raised serious NEPA compliance concerns, although they had a different view about how those NEPA concerns should affect lease sales. In a memo dated November 18, 2020, BLM-Wyoming explicitly recognized that *WEG II* placed all of its lease sales from May 2019 to December 2020 "at risk." Gamper Decl., Att. H. And it analyzed three options for how to proceed: postponing sales "until remediative NEPA can be completed"; proceeding with sales, while flagging "the need to do additional NEPA prior to issuing sold leases"; or moving forward with the sale based solely upon the existing NEPA analysis. *Id.* BLM-Wyoming ultimately chose the second option of proceeding with the fourth-quarter 2020 lease sale before "remediative NEPA [was] completed," *id.*, in the hope that it would be able to complete remediative NEPA analysis within sixty to eighty days (*i.e.*, by March 7, 2021) after holding the lease

sale but before leases were issued. *Id.*[9] But that remediative NEPA was still not prepared in time to publish a first-quarter competitive sale notice. AR1157.

Given this consistent recognition of litigation risk due to inadequate NEPA documentation across administrations, WEA has failed to carry its burden to establish that the agency's NEPA compliance and litigation risk concerns were pretextual. While the current administration arrived at a different determination about how to respond to those concerns, that does not make the underlying concerns contrived or pretextual. *See New York*, 139 S. Ct. at 2570 ("[T]he choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make").

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

The arbitrary and capricious standard of review is "deferential" and "narrow," in which courts "determine only whether the Secretary examined the relevant data and articulated a satisfactory explanation for h[er] decision, including a rational

[9] BLM-Wyoming recognized that the first option would be the "lowest risk option." Gamper Decl., Att. H. It noted, however, that the first option would "require substantial time in determining the appropriate methodology as well as compiling BLM state specific [reasonably foreseeable development] information and providing calculations of estimated direct emissions associated with development of the leases." *Id.* It opted not to pursue that option, recognizing that the development of additional analysis "can be an arduous process taking much longer than the approximately three weeks remaining." *Id.*

connection between the facts found and the choice made." *Id.* at 2569 (internal quotations omitted). Here, most postponement decisions were made based on a determination that lands were not "'eligible' and 'available' because, at a minimum, BLM has not completed its NEPA analysis." AR1170. As they were not "final decision[s] regarding the sale of particular parcels or the holding of these or future sales," *id.*, there was no requirement for the Secretary to evaluate reliance interests on oil and gas revenue. Instead, the Court should determine only whether the Secretary examined the relevant data about whether eligible lands were available and provided a rational connection between that data and her decision. As explained below, the challenged postponement decisions were not arbitrary and capricious.

Colorado, Montana-Dakotas & Eastern-States: WEA does not present any serious argument that the Colorado, Montana-Dakotas, or Eastern States postponements were arbitrary and capricious. Instead, WEA mischaracterizes the pertinent decisions as simply being website postings, WEA Br. 40, ignoring the relevant decision memoranda explaining why additional NEPA analysis was necessary on specific issues in light of cited court decisions. *Supra* 12–15. Those memoranda provide a rational explanation why NEPA analysis remained to be done at the time competitive sale notices were required to be posted. Nothing more is required under the arbitrary and capricious standard.

Utah: WEA does not provide any argument why the BLM-Utah deferral decision (AR1163–64) based on *Rocky Mountain Wild* is arbitrary or capricious. Accordingly, the Court cannot set aside that postponement as arbitrary.

Instead, WEA claims that the additional Utah postponement decision is arbitrary and capricious for overlooking draft NEPA analysis that BLM-Utah had done. But the story is not that simple. When BLM-Utah sought approval to post its competitive sale notice, that approval package was returned to BLM because "the package needs an updated EA that responds to comments." Gamper Decl. ¶ 10, Att. D.[10] By February 12, BLM Utah had not provided an updated EA. *Id.* Because courts "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 U.S. 644, 658 (2007) (internal citation omitted), the Court should affirm the second Utah postponement decision.

Wyoming: For similar reasons, the Court should affirm the Wyoming postponement decision, as even the BLM-Wyoming request for authorization acknowledged that its draft NEPA had not yet responded to several recent court

[10] This declaration is not offered as a *post hoc* rationalization, but instead to "simply recount[] the analysis conducted and data considered during the decision making process," *Cross Mountain Ranch Ltd. P'ship v. Vilsack*, No. 09-cv-01902-PAB, 2011 WL 843905, at *2 (D. Colo. Mar. 7, 2011), as authorized by *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973) (per curiam).

decisions. AR1157. The postponement decision's statement that the Wyoming sale was "not accompanied by any environmental analysis," must be viewed against a backdrop in which other state offices had presented NEPA ready for review by February 12, and BLM-Wyoming failed to present such NEPA by February 12. Gamper Decl. ¶¶ 8–9.

New Mexico: WEA conflates distinct parts of the record on New Mexico, confusing two separate postponement decisions. WEA Br. 39. All of its arguments go to the already-reversed BLM-New Mexico postponement decision, which was based on misinformation, not the later-in-time leadership decision to temporarily postpone the April New Mexico sale. *Supra* 15–16. WEA does not provide any reason why the leadership level temporary postponement of an early second-quarter sale is arbitrary and capricious.

Nevada: As to Nevada, Respondents concede that the administrative record does not reflect a rationale for the January 25 postponement decision. In situations such as this, "[i]f . . . there was [a] failure to explain administrative action as to frustrate effective judicial review, the remedy was . . . to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." *Camp*, 411 U.S. at 142–43. The Nevada January 2021 postponement was made for the same reason as the prior

Nevada December 2020 postponement: the need to prepare updated analysis of GHG emissions following *WEG II*. Gamper Decl. ¶¶ 13–14.

V. THE CHALLENGED LEASING POSTPONEMENTS WERE NOT PROCEDURALLY DEFECTIVE.

WEA finally asks the Court to impose an unprecedented new procedural requirement on Interior: conducting NEPA analysis before postponing leasing activity to prepare additional NEPA analysis. In addition to WEA's failure to assert an interest within NEPA's zone of interests, there are five more fatal flaws with this argument.

First, and most fundamentally, WEA's NEPA argument fails insofar as it contends Respondents failed to undertake any particular quarterly lease sale, because a failure to act is, by definition, not a "major Federal action." *See* 40 C.F.R. § 1508.1(q) (defining "Major Federal action"). This is because, "[i]n the case of a 'failure to act,' there is no proposed action and therefore there are no alternatives that the agency may consider." NEPA Update, 85 Fed. Reg. at 43,347.

Second, WEA's NEPA argument fails insofar as it contends Respondents took a major Federal action when they decided to postpone particular quarterly lease sales to prepare additional environmental analysis. As noted above, NEPA requires environmental analysis when an agency proposes to take major Federal action, *see* 40 U.S.C. § 4332(2)(C), and here that action consisted of proposing to auction leases for the specified parcels. Agencies also may, and sometimes must, supplement or

otherwise elaborate upon their initial environmental analysis before finalizing their decision process. *See*, *e.g.*, 40 C.F.R. § 1502.9(d)(1) (identifying circumstances when an agency must supplement its NEPA analysis); *id.* § 1502.9(d)(2) (identifying circumstance when an agency may supplement its NEPA analysis). When an agency opts to prepare such a supplemental analysis, it must prepare, circulate, and file that analysis in the same fashion as is required of an original analysis. *Id*. § 1502.9(d)(3). And an agency may not implement the proposed action until it has completed all of this analysis and issued either a finding of no significant impact or a record of decision. *Id.* §§ 1501.6, 1505.2, 1506.1(a). Notably absent from this regulatory scheme is the requirement Petitioners attempt to impose on Federal Respondents here: that a *second* environmental analysis must be completed before postponing a proposed decision to improve a *first* environmental analysis. To the contrary, "agencies may use non-NEPA procedures to determine whether new NEPA documentation is required." *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1162 (10th Cir. 2004).

Third, WEA's NEPA argument fails even insofar as it contends Respondents affirmatively canceled the proposed lease sales. While a NEPA analysis is generally required before an agency takes an action approving significant potential environmental changes, the converse is not true. "If agencies were required to

produce an EIS every time they denied someone a license, the system would grind to a halt." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1089 (9th Cir. 2014).

Fourth, perhaps because of the above weaknesses, WEA now pursues a new tack that it previously disavowed. *See* Doc. 57, at 1 (telling the Court that its challenge was directed at "the cancellation of lease sales scheduled for March and April 2021" and not "some undefined 'moratorium' or 'suspension'"). Contrary to its earlier characterization of its case, WEA now contends that Interior undertook a major federal action triggering NEPA review because of "concerted actions" amounting to a "policy or plan" to abandon quarterly leasing, based on second-, third-, and fourth-quarter allegations. WEA Br. 43 (citing 40 C.F.R. § 1508.1(q)(3)(iii)). But this argument fails because the administrative record reflects that there was "not a blanket policy even with direction in the [Executive Order]." AR2421; *see also* AR1180 ("the "Department ha[d] not yet rendered any such decisions" on how to implement the Executive Order even after WEA brought suit). Even if there were a blanket policy against action before the Court, the remedy would be to remand for development of a programmatic NEPA analysis; not to vacate, enjoin, or otherwise direct BLM's general management of the onshore leasing program. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 161–62 (2010) (reversing district court's programmatic injunction because "if and when [the agency] pursues [another action] that arguably runs afoul of NEPA,

respondents may file a new suit challenging such action and seeking appropriate preliminary relief").

Fifth, regardless of how WEA's NEPA claims are ultimately construed, the law is clear that NEPA is not triggered when the alleged major federal action does nothing to change the environmental status quo. Here, the Secretary was not required to prepare a NEPA analysis before postponing oil and gas lease sales because the postponements did not change the leasing status of any land; the same lands were leased before and after the postponements. *See Utah v. Babbitt*, 137 F.3d 1193, 1214 (10th Cir. 1998) (holding that administrative action that did not "of itself, change or prevent change of the management or use of public lands" was not subject to NEPA (quoting 43 U.S.C. § 1711(a)); *Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1175–78 (9th Cir. 2016) (agency was not required to prepare a NEPA analysis for changes to the operation of a dam that were within the range of actions already analyzed); *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234-35 (9th Cir. 1990) (no EIS required to adjust water releases in a manner consistent with the way that the dam had operated over the preceding ten years).

Nor does it matter that, without federal leases, oil and gas leasing developments might shift to other land, causing different environmental impacts. In *Sabine River Authority v. U.S. Department of Interior*, 951 F.2d 669 (5th Cir. 1992),

a water authority challenged the U.S. Fish and Wildlife Service's acquisition of a conservation easement for a wetland that, if not for the easement, could potentially have been used to construct a reservoir. *See id.* at 671–72. The court rejected the argument that the acquisition of the conservation easement was a major federal action requiring the preparation of an EIS because it did not alter the environmental status quo. *See id.* at 679–80 (holding that NEPA did not require the agency to "discuss the environmental effects of continuing to use land in the manner which it is presently being used" because the agency was not "undertaking a project that changes the character or function of the land"); *accord Babbitt*, 137 F.3d at 1214. Likewise here, merely postponing lease sales for a temporary period "continu[es] to use land in the manner which it is presently being used" and thus is not a major federal action. *Sabine River*, 951 F.2d at 679.[11]

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

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[11] WEA relies on *Idaho ex rel. Kempthorne v. U.S. Forest Service*, 142 F. Supp. 2d 1248, 1259 (D. Idaho 2001), for the proposition that an action that serves to "leave nature alone" may nonetheless trigger NEPA obligations. WEA. Br. 47. But the court in that case found that the Forest Service's Roadless Rule would alter the environmental status quo because it would "add to, modify and remove decisions embodied in forest plans governing the management of the national forests." *Kempthorne*, 142 F. Supp. 2d at 1259. No similar action is at issue here.

VI. WEA IS NOT ENTITLED TO ANY RELIEF.

In addition to vacating postponements, WEA asks the Court to "reinstate" lease sales and enter injunctive relief controlling future agency conduct. WEA Br. 48. The Court cannot grant either form of relief.

WEA overreaches in asking the Court to "reinstate" sales, WEA Br. 22, as other than Nevada, there are no relevant competitive sale notices, let alone competitive sale results, to reinstate. Although preliminary steps were taken to hold lease sales in the first quarter of 2021, no formal decision was ever made about the scope of those sales. *E.g.*, AR1154 ("BLM may adjust the number and size of the parcels offered up to the day of the sale."). There is no—and WEA has certainly not identified any—mandatory, discrete duty through which the Court can compel the scope of lease sales, such as by directing the number of parcels that must be sold or by directing which parcels should be sold. *Sullivan*, 969 F.2d at 882 ("federal courts do not have the power to order competitive leasing"). In sum, "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." *Norton*, 542 U.S. at 65. WEA's requests to "reinstate" lease sales exceed the Court's authority under the APA.

Nor can the Court grant WEA's requested injunctive relief. An injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the

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

Critically, WEA has not established any form of irreparable injury. "[T]o constitute irreparable harm, an injury must be imminent, certain, actual and not speculative." *Colorado v. EPA*, 989 F.3d 874, 886 (10th Cir. 2021) (internal citations omitted). Procedural injuries alone are insufficient to establish irreparable harm. *E.g.*, *Fisheries Survival Fund v. Jewell*, 236 F. Supp. 3d 332, 336 (D.D.C. 2017) ("To establish irreparable harm under a NEPA claim, Plaintiffs must allege some concrete injury beyond the procedural injury caused by [the agency's] alleged failure to comply with NEPA when it conducted its environmental assessment."). And WEA has provided no evidence that any of its members has any interest outside Wyoming.

Because WEA has failed to show that it is entitled to any injunctive relief, the most that the Court can do is set aside specific first-quarter postponement decisions, if any, that are found to be in violation of § 706(2) of the APA. Because "the function of the reviewing court ends when an error of law is laid bare," *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952), courts cannot "impose upon the agency

[their] own notion of which procedures are 'best'" on remand, *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 549 (1978), without intruding "into the domain which Congress has set aside exclusively for the administrative agency," *id.* at 544–45 (internal citations omitted).

CONCLUSION

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

Submitted respectfully this 5th day of October, 2021,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(B), I certify that this brief complies with the type-volume limitations of Rule

32(a)(7)(B)(i) because it contains 12,985 words, excluding the parts of the briefs exempted by Rule 32(f).