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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WESTERN ENERGY ALLIANCE and PETROLEUM ASSOCIATION OF WYOMING, Petitioners, v. JOSEPH R. BIDEN, Jr., in his official capacity as President of the United States, DEB HAALAND, in her official capacity as Secretary of the Interior, and UNITED STATES BUREAU OF LAND MANAGEMENT, Respondents.	) Civil Case No. 0:21-cv-00013-SWS

REPLY IN SUPPORT OF
PETITIONERS' ARGUMENTS ON THE MERITS

Petitioners Western Energy Alliance ("Alliance") and Petroleum Association of Wyoming ("PAW") submit respectfully this reply in support of Petitioners' arguments on the merits. Rather than address the arguments raised in Petitioners' opening memorandum, respondents raise a series of strawman arguments mischaracterizing both Petitioners' claims and the relief Petitioners seek. Indeed, the *first two* sentences of federal respondents' memorandum are, in fact, direct misrepresentations of Petitioners' lawsuit. Federal Respondents open their memorandum by stating that Petitioners would "require[] the Secretary of the Interior to offer land for sale merely because someone has expressed interest in leasing it" and "seek[] to divest Interior of discretion to make leasing decisions on a parcel-by-parcel basis through evaluations under the National Environmental Policy Act (NEPA)." Resp'ts' Opp'n to Industry Pet'rs' Opening Mem. on the Merits at 1, filed Oct. 5, 2021 (ECF No. 86) ("Gov't Resp."). Both these assertions are false. Petitioners have described in detail the regulatory mechanisms that authorize the Secretary to withhold parcels that have been nominated for leasing through an expression of interest. *See* Pet'rs' Opening Mem. on the Merits at 27-28, filed Aug. 30, 2021 (ECF No. 73) ('Pet'rs' Mem."). And Petitioners have expressly acknowledged that NEPA review is a "statutorily required analysis" that must be done in association with any oil and gas lease sale. *See id.* at 41 (emphasizing that if the Bureau of Land Management ("BLM") had concerns about the environmental

review conducted for any sale, the "agency remedy was to identify and fix those problems" in advance of the sale). Because the cancellation of the first and second quarter lease sales is inconsistent with federal Respondents' express obligations under applicable law, the Court should immediately reinstate the oil and gas lease sales that have been canceled and order BLM to adopt revised lease sale schedules that comply with the terms of the Mineral Leasing Act.

I. THE COURT HAS JURISDICTION.

Federal respondents assert "three jurisdictional flaws related to timeliness, injury, and redressability." *See* Gov't Resp. at 18. Each of these jurisdictional arguments are based on mischaracterizations of Petitioners' action and should be rejected.

A. RESPONDENTS CONFLATE JURISDICTIONAL QUESTIONS.

Petitioners' operative complaint, filed on March 17, 2021, is directed at the cancellation of "all onshore oil and gas lease sales scheduled for March or April 2021." Second. Am. Pet. for Review of Gov't Action at 2, filed Mar. 17, 2021 (ECF No. 17) ("Compl"). Respondents contend that, because "jurisdiction must exist 'when the suit was filed,'" Gov't Resp. at 18 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)), and some of those cancellations occurred after Petitioners' original complaint was filed on January 27, 2021, Petitioners lack standing to raise at least some of the claims in Petitioners' operative complaint. *See*

also Conservation Grps. Resp. Br. on Merits at 13, filed Oct. 5, 2021 (ECF No. 84) ("Intv'r Resp."). While Respondents characterize their argument as one of standing, *see* Gov't Resp. at 18; Intv'r Resp. at 12 (arguing "Petitioners have not established standing"), the argument Respondents present is really ripeness. Because Respondents apply incorrect law, Respondents' timeliness arguments are misplaced.

"[T]he doctrines of standing and ripeness serve separate and distinct purposes." *Lacewell v. Office of Comptroller of Currency*, 999 F.3d 130, 149 (2d Cir. 2021). Whereas "standing deals with which party can appropriately bring suit," the question of "ripeness relates to the timing of the suit." *Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006). Petitioners' original petition, filed January 27, 2021, complains that: (i) "the Secretary of the Interior . . . suspended indefinitely the federal oil and gas leasing program" Pet. for Review of Gov't Action at 1, filed Jan. 27, 2021 (ECF No. 1); (ii) contends that this suspension was unlawful, *see id.* at 1-2; and (iii) requests that the Court "find the suspension invalid and set aside the challenged government action," *id.* at 2. On that date, the President had directed the Secretary to "pause" the oil and gas leasing program, *see* A.R. at 1138, and Petitioners had reason to believe that upcoming oil and gas lease sales had been cancelled. As discussed more fully below, *see* discussion *infra* Part I.B, Petitioners' members suffer concrete injury when federal oil and gas lease sales are not

conducted in accordance with law and Petitioners were therefore appropriate parties to bring suit at the time the original petition was filed, *i.e.*, Petitioners have standing.

But Petitioners' claims are also ripe. Petitioners' operative complaint, filed on March 17, 2021, explains that, "[o]n 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." Compl. at 1-2. Federal Respondents assert that Petitioners may not challenge the specific cancellations that occurred "on or about February 12" because these cancellations "did not exist" at the time Petitioners filed their original complaint on January 27, 2021. Respondents are incorrect.

Because "it is irrelevant whether the case was ripe for review when the complaint was filed," federal courts understand that "[i]ntervening events relevant to the ripeness inquiry should be considered and may be determinative." *Am. Motorists Ins. Co. v. United Furnace Co.*, 876 F.2d 293, 302 n.4 (2d Cir. 1989); *see also Roman Catholic Diocese of Dallas v. Sebelius*, 927 F. Supp. 2d 406, 424 (N.D. Tex. 2013) ("While standing to sue is assessed at the time of filing the complaint, in determining ripeness, a court may consider events that occurred after the filing of the complaint.") (internal quotation omitted). It is uncontested that every onshore oil and gas lease sale scheduled for March or April 2021 was cancelled. It is the cancellation of lease sales that Petitioners challenge. And "since ripeness is

peculiarly a question of timing, it is the situation now . . . that must govern." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 140 (1974)). Because none of the cancelled sales have been reinstated, Petitioners' action remains ripe and this Court has jurisdiction to decide the case.[1]

B. PETITIONERS HAVE DEMONSTRATED INJURY IN FACT.

Federal Respondents' suggestion that Petitioners have not suffered an injury capable of establishing standing is likewise unavailing. *See* Gov't Resp. at 20. Petitioners' members are actively engaged in responsible production of oil and natural gas on federal lands. *See* Pet'rs' Mot. for Prelim. Inj., Attach. A ¶ 3, filed May 10, 2021 (ECF No. 41) ("Sgamma Decl."); *id.*, Attach. B ¶ 3 ("Obermueller Decl."). Denying the right to bid for eligible lands that are available deprives Petitioners' members of a statutory right under the Mineral Leasing Act and limits the members' ability to optimize their economic well-being.[2] *See Spokeo v. Robins*,

[1] Federal Respondents contend that the decision to cancel the April 2021 lease should be excluded from the Court's consideration because, when the sale was cancelled, "there was ample time remaining in the second quarter to hold a lease sale" and therefore the cancellation "was not a final decision that the agency would not hold a New Mexico lease sale in the second quarter." Gov't Resp. at 23-24. Even if federal Respondents were correct that the decision to cancel the New Mexico lease sale was not ripe as final agency action at the time the decision was made, the second quarter has now expired and the decision not to conduct a New Mexico lease sale in the second quarter is final and irreversible. Because as discussed above, ripeness depends on the circumstances now and not at the time the New Mexico sale was originally cancelled, federal Respondents' argument must be rejected.

[2] Despite acknowledging that Petitioners' membership is comprised of companies across the United States, Intervenor-Respondents incorrectly assert that Petitioners

578 U.S. 330, 342 (2016) ("[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact."); Pet'rs' Mot. for Prelim Inj., *supra*, Attach. C ¶ 7 ("Boswell Decl.") (explaining that even a "delay of six months between lease sales – combined with uncertainty regarding when lease sales will commence – diminishes [an operator's] ability to conduct operational planning and preclude [the operator] from optimizing project economics"). Without oil and gas lease sales, there would be no oil and natural gas production on federal and Indian lands. It is axiomatic that "[g]overnment acts constricting a firm's supply of its main raw material clearly inflict the constitutionally necessary injury." *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1233 (D.C. Cir. 1996) (holding that the Forest Service's postponement of timber sales "clearly inflict injury on the firm's economic well-being, which an order reducing the cutbacks would

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allege no injuries outside Colorado and Wyoming. *See* Intv'r Resp. at 13. That contention misunderstands the injury to Petitioners' members. When BLM fails to meet its statutory obligation to offer available parcels, the injury is not limited to the individual companies that submitted expressions of interest for parcels being withheld; rather all Petitioners' members are harmed. When sales are cancelled improperly, *all* Petitioners' members have lost their statutorily protected right to bid on eligible parcels available for leasing. *See B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 719 (2d Cir. 1983) (conferring standing on unsuccessful bidder for government contract because "arbitrary deprivation of government contracts on non-discretionary grounds is a serious wrong"); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 808 n.12 (11th Cir. 1993) (citing *B.K. Instrument* for the proposition that even a losing bidder has "a right that bid procedures be conducted in accordance with the applicable statutes and regulations, and that its bid not be arbitrarily rejected").

redress"); *see also Sierra Club v. Morton*, 405 U.S. 727, 733-34 (1972) ("[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review.").

Other federal courts have recognized standing for plaintiffs asserting injuries to rights identical to those Petitioners advance here. In *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984), plaintiff Arkla Exploration contested the award of oil and gas leases to a competitor, Texas Oil & Gas Corp., without competitive bidding on the basis that the Secretary arbitrarily classified the leased acreage as being outside a known geologic structure of a producing oil or gas field.[3] *Id.* at 349-50. In upholding Arkla's standing to bring its claim against the Department of the Interior, the United States Court of Appeals for the Eighth Circuit recognized two distinct rights that the Secretary's erroneous classification was alleged to have injured.

> Arkla's asserted right is the right to bid competitively on [known geologic structure] tracts of land which the Secretary has reasonably classified and offered. Correlatively, they assert the rights to have the lands not classified arbitrarily, to have the Secretary utilize his discretion properly, and the right to bid for all properly categorized and offered [known geologic structure] lands for potential profit and exploratory public benefit.

[3] At the time of the decision in *Arkla*, the Mineral Leasing Act required that lands within the known geologic structure of a producing oil or gas field be subject to competitive bidding. *See* 30 U.S.C. § 226(b) (1984).

Id. at 353-54 (quoting *Arkla Expl. Co. v. Watt*, 548 F. Supp. 466, 471 (W.D. Ark. 1982)). The Eighth Circuit emphasized that "a proper [known geologic structure] determination will protect Arkla's interest in having an opportunity to participate in a lawful bidding process." *Id.* at 354.

Like Arkla, Petitioners assert the right to bid competitively on those tracts of land which BLM "has reasonably classified and offered." *Id.* at 353-54. Like Arkla, Petitioners also assert the right to have "the Secretary utilize [her] discretion properly," *id.* at 354, and once that discretion is exercised, "to bid for all properly categorized and offered [] lands for potential profit and exploratory public benefit." *Id.* Should the Court determine that federal Respondents arbitrarily cancelled lease sales for reasons other than a lack of available lands, that will clearly represent an injury to both those rights.

Nor is Petitioners' legal position inconsistent with the acknowledgment that the Secretary has discretion over which lands will be made available for leasing. *See W. Energy All. v. Salazar*, 709 F.3d 1040, 1044 (10th Cir. 2013) (recognizing that the Mineral Leasing Act "vest[s] the Secretary with considerable discretion to determine which lands will be leased"). In *Wyoming Timber Industry Association v. United States Forest Service*, 80 F. Supp. 2d 1245 (D. Wyo. 2000) ("*WTIA*"), the United States District Court for the District of Wyoming rejected the Forest Service's contention that a timber trade association's members did not suffer

economic harm as a result of reductions and delays in timber sales, because "no statute or regulation confers the right to harvest timber in the forest." *Id.* at 1253 (quoting *Wind River Multiple Use Advocates v. Espy*, 835 F. Supp. 1362, 1369 (D. Wyo. 1993)). The district court explained that the Forest Service's position improperly conflated whether the trade associations' members had a "legal interest" in harvesting timber – which related to the merits of the trade association's claims – with the question of standing. *Id.* at 1254 ("Modern standing doctrine seeks to separate the standing inquiry from the merits, and the 'legal interest' test goes to the merits and is not a part of standing."). *See also Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (observing that the "'legal interest' test goes to the merits" and emphasizing that the "question of standing is different"). Applying this distinction, the court in *WTIA* concluded that the trade association's members "suffered an injury in fact sufficient to meet Article III requirements as a result of reductions or delays in timber sales, even if the companies had no legal right to harvest timber on National Forest Lands." *WTIA*, 80 F. Supp. 2d at 1254.

This Court should reach the same result. A reduction in the amount of federal oil and gas leaseholds and delays in offering leases that have been classified as "available" clearly injures companies whose business involves developing oil and gas resources on federal lands. *Glickman*, 92 F.3d at 1233. Because the Alliance's members are "aggrieved by agency action" that violates the Mineral Leasing Act,

the Alliance has satisfied the injury component of the standing inquiry.[4] *Data Processing Serv. Orgs.*, 397 U.S. at 153 (quoting 5 U.S.C. § 702).

C. PETITIONERS' INJURIES ARE REDRESSABLE.

Respondents' arguments related to redressability likewise fail because respondents misrepresent the relief Petitioners seek in this case. Petitioners do not ask this Court to "set aside an absence of lease sales." Gov't Resp. at 20. What Petitioners seek in this case is an order that BLM offer *available* parcels at least quarterly, consistent with the agency's non-discretionary procedural obligation under the Mineral Leasing Act. *See State of Utah v. Babbitt*, 137 F.3d 1193, 1215-

[4] Petitioners also object vigorously to respondents' contention that Petitioners lack any environmental interest that would allow Petitioners to bring a claim under NEPA, implying that Petitioners interest in the outcome of this case is purely economic. *See* Gov't Resp. at 20; Intv'r Resp. at 46. The exact opposite is true. Petitioners' essential purpose is the promotion of responsible exploration and production of oil and natural gas on federal and Indian lands. *See* Sgamma Aff. ¶ 3; Obermueller Decl. ¶ 3 (describing PAW's commitment to "uphold[ing] the values of science-based environmental stewardship"). Petitioners' routinely advocate for regulatory policy that affords producers the operational flexibility necessary to maximize environmental sensitivity, and economic policy that enhances the security and prosperity of the communities in which Petitioners' members live and work. *See* Sgamma Decl. ¶ 4 (explaining that the Alliance promotes "the important economic, environmental, and energy security solutions the oil and gas industry provides"); Obermueller Decl. ¶ 6 (emphasizing that PAW's members "recognize the importance of sustainability"). This advocacy is consistent with NEPA's purposes to "encourage productive and enjoyable harmony between man and his environment" and "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. Because advocating for optimal environmental outcomes is germane to Petitioners' purpose, Petitioners have standing to raise claims under NEPA.

16 & n.37 (10th Cir. 1998) ("The redressability and immediacy requirements are relaxed somewhat for those persons seeking to enforce procedural rights.") (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572-73 n.7 (1992)). As it stands, BLM has cancelled lease sales for reasons other than a lack of available parcels. This Court can and should order BLM to cease that practice.

Petitioners have never argued that the failure to conduct lease sales is, in and of itself, unlawful. This is not a case where a government agency had some general management authority that a petitioner claims is unfulfilled; this case involves cancellation of specific lease sales that Petitioners assert federal Respondents had no discretion to cancel (because eligible parcels were available).[5] *See* Pet'rs' Mem. at

[5] This non-discretionary feature of the Secretary's leasing responsibility distinguishes this case from the authorities on which federal Respondents rely. *See* Gov't Resp. at 20-21. In *Jarita Mesa Livestock Grazing Association v. U.S. Forest Service*, 140 F. Supp. 3d 1123 (D.N.M. 2015), the United States District Court for the District of New Mexico determined the plaintiff's allegations concerning the Forest Service's "failure to remove wild horses" was non-justiciable because the Forest Service was required to round up horses only when, in the Forest Service's opinion – and after the application of numerous subjective considerations – various ecological conditions were met. *Id.* at 1197. In *Wyoming ex rel. Sullivan v. Lujan*, 969 F. 2d 877 (10th Cir. 1992), the United States Court of Appeals for the Tenth Circuit affirmed the dismissal of Wyoming's challenge to the federal government's exchange of coal lands in exchange for a conservation easement. Observing that Wyoming's interest in the case "begins and ends with the royalties it expected to receive had the Secretary chosen to offer the coal for competitive leasing," *id.* at 882, the Tenth Circuit explained that no favorable order could redress Wyoming's concern because discretion to lease coal was "vested absolutely" in the Secretary of the Interior and "a favorable ruling . . . [would] not guarantee the State one nickel of coal leasing royalties," *id.*

8-17 (describing the affirmative cancellation of sales that should have been conducted in the first and second quarters of 2021). The Administrative Procedure Act ("APA") expressly authorizes a district court to "hold unlawful and set aside agency action . . . not in accordance with law." 5 U.S.C. § 706(2)(A). So if Petitioners are correct, this Court may declare the cancellation notices invalid and set them aside.

Equally important, if the Secretary lacks discretionary authority to cancel the first and second quarter lease sales, an order directing BLM to reinstate those sales is both within the Court's power and a straightforward way to redress Petitioners' injuries. *See* 5 U.S.C. § 706(1) (authorizing court to "compel agency action unlawfully withheld or unreasonably delayed").[6] Petitioners recognize that

[6] Federal Respondents contend that Petitioners have "not even pled a [5 U.S.C.] § 706(1) claim" despite acknowledging that Petitioners seek an order to reinstate the cancelled lease sales. Gov't Resp. at 21. But an action to compel agency action is a quintessential claim under 5 U.S.C. § 706(1). To the extent that Respondents would have preferred that Petitioners cite 5 U.S.C. § 706(1) expressly in Petitioners' complaint, no such requirement exists. This Court's local rules require, in pertinent part, only that a Petitioner seeking review of agency action identify "the final agency action or part thereof to be reviewed," *see* Local Rule 83.6(a)(1)(F), and the "statute by which jurisdiction is claimed," Local Rule 83.6(a)(1)(G). Petitioners met both these requirements. Petitioners' operative complaint identifies the cancellation of lease sales scheduled to occur in March and April 2021 as the agency action that is being challenged, *see* Compl. at 1-2, and cites 28 U.S.C. § 1331 as the source of the Court's jurisdiction, *see id.* at 2. But even if federal respondents were correct and some technical requirement to identify the statute providing the cause of action was applicable, that alleged defect could easily be remedied through an amendment without prejudice to any party.

reinstating the lease sales and compelling BLM to complete the process associated with each sale does not guarantee Petitioners' members any specific leases. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (cautioning that the APA "empowers a court to compel an agency only to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing how it shall act") (citation and quotation marks omitted). But that is not the point. Holding an auction would provide Petitioners' members the opportunity to bid on available parcels that is presently being denied in violation of the Mineral Leasing Act. See *W. Energy All. v. Jewell*, No. 1:16-CV-00912-WJ-KBM, 2017 WL 3600740, at *12 (D.N.M. Jan. 13, 2017) (finding the Alliance's challenge to cancelled lease sales was redressable because even though "the Court cannot order BLM to hold lease sales, the Court *can* order BLM to comply with the statutory mandate"). And requiring BLM to complete the statutory process for conducting a lease sale – including the environmental review process under NEPA – would at least result in a final decision that Petitioners' members could challenge if BLM's decision to withhold a parcel that would otherwise be eligible and available is arbitrary and capricious. Because Petitioners seek nothing more than the right to bid on eligible lands that are available, but which are being withheld in violation of a non-discretionary statutory obligation, this Court has the power to enter an order that would redress Petitioners' injury.

II. CANCELLATIONS VIOLATE STATUTORY REQUIREMENTS.

Petitioners' allegations in this case are straightforward: Petitioners allege only that the federal Respondents have not complied with its statutory obligation to conduct quarterly oil and gas lease sales even though, applying BLM's own standards, "eligible lands are available." Respondents counter with many pages emphasizing the broad discretion the Secretary has in choosing which parcels to offer for sale, *i.e.*, to decide which eligible parcels are available. But that response is inapposite. The Secretary's discretion to choose which parcels to offer is not an issue in this suit. What the Court must decide is whether the Secretary has met her obligation to offer those eligible parcels that have already been designated available. With respect to this latter question, the Secretary has no discretion.[7] *See* A.R. at 3 ("Once the Secretary exercises [her] discretion to lease a particular tract, the [Mineral Leasing Act] then sets forth a mandatory procedure to be followed.").

[7] While irrelevant, federal Respondents' observations about the Secretary's discretion over oil and gas leasing are also misleading. Citing *Sullivan*, federal respondents represent that "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.'" Gov't Resp. at 24 (quoting *Sullivan*, 969 F.2d at 882). Federal Respondents omit the context of this observation, failing to note that *Sullivan* involved coal, not oil and gas leasing. As described more fully in Petitioners' opening brief, *see* Pet'rs' Mem. at 29-30, the statutory provisions governing the Secretary's coal leasing responsibilities are distinct from those governing oil and gas leasing.

Because Respondents do not dispute that "eligible" lands existed at the time the lease sales were cancelled, *see* Intv'r Resp. at 26; the parties' dispute reduces to whether "available" lands existed. On this point, Respondents offer a series of strawman arguments that mispresent the arguments Petitioners have presented.

Without any citation to Petitioners' opening memorandum, federal Respondents contend that Petitioners construe "eligible" and "available" to have the same meaning. *See* Gov't Resp. at 27. Respondents are incorrect. Petitioners, like respondents, classify "eligible" lands as those "lands not excluded from leasing by a statutory or regulatory prohibition.'" Petr's Mem. at 23 (quoting *W. Energy All. v. Zinke*, 877 F.3d 1157, 1162 (10th Cir. 2017). And Petitioners recognize that "available" lands constitute a subset of eligible lands; in other words, the Secretary must exercise her discretion to make eligible lands available. Petitioners explain that the Secretary exercises this discretion through the land use planning and regulatory processes. Respondents propose – in contravention to fundamental tenets of administrative law – that the designation of available parcels is subject to nothing more than the Secretary's whim.[8]

[8] It is Respondents, not Petitioners, that conflate the terms "eligible" and "available." Federal Respondents contend that Petitioners' construction of "eligible" and "available" cannot be reconciled with the ordinary meaning of the Mineral Leasing Act, noting that the Reform Act "not only added the quarterly lease sale provision . . . [but] also extended significant authority to the Secretary of Agriculture to object to oil and gas leasing on National Forest System lands." Gov't Resp. at 27. But contrary to federal Respondents' suggestion, Petitioners have never argued that "a

Respondents argue that Petitioners' interpretation of "eligible" and "available" contradicts the legislative history of the 1987 Reform Act, s*ee* Gov't Resp. at 29, emphasizing the Department of the Interior's contemporaneous "understanding that the amendments did not change the Secretary's discretion not to lease lands," Intv'r Resp. at 21-24 (internal quotation omitted). Respondents' reliance on legislative history is meritless. Petitioners do not challenge the Secretary's discretion not to lease lands and, at the time the Reform Act was passed, the Department of Interior understood that there was a "lack of legislative history behind the phrase 'where eligible lands are available.'" A.R. at 7.

To the extent the statute is vague, however, the regulations implementing the Reform Act are precise. BLM's regulations require that each BLM State office "shall hold sales at least quarterly if lands are available for competitive leasing," 43 C.F.R. § 3120.1-2, and enumerate specific categories of "Lands available for competitive leasing," 43 C.F.R. § 3120.1-1. These categories include, but are not limited to, "Lands included in any expression of interest." 43 C.F.R. § 3120.1-1(e). Respondents urge the Court to ignore this plain language, asserting that 43 C.F.R. §

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mere expression of interest from a private party" could "render land [within the National Forest System] legally 'eligible' *and* 'available.'" *Id.* at 28 (emphasis added); *see also* Intv'r Resp. at 33. To the contrary, Petitioners have expressly acknowledged that, if the Secretary of Agriculture objected to the leasing of a particular parcel, that land would be statutorily excluded from leasing under 30 U.S.C. § 226(h) and therefore not *eligible*. *See* Pet'rs' Mem. at 3.

3120.1-1 merely enumerates categories of parcels that are to be leased through competitive leasing and "does not direct that any lands be deemed available." Gov't Resp. at 32. But the Court need not adjudicate what "available" means in the context of 43 C.F.R. § 3120.1-1 because the regulatory preamble for the provision answers that question directly: "The term 'available' means any lands subject to leasing under the Mineral Leasing Act." 55 Fed. Reg. 22,814, 22,828 (June 17, 1988).

Federal respondents argue that this language cannot mean what it says because the regulatory preamble to the 1988 regulations also states that "[i]t is [BLM] 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." Gov't Resp. at 33. But there is no conflict between this observation and Petitioners' interpretation of the regulatory language. Petitioners have never argued that federal Respondents should offer parcels without completing these tasks. To the contrary, Petitioners have pointed out that, during the preparation of resource management plans, the impacts of reasonably foreseeable development are analyzed and stipulations necessary to provide extra protection for sensitive resources in the planning area are established. *See* Pet'rs' Mem. at 5. Petitioners understand that all subsequent oil and gas development must conform to the resource management plans. *See id.* And Petitioners have noted that, at least in the case of the sales that are the subject of this

suit, BLM made express finding that the parcels to be leased met the agency's criteria necessary for leasing. *See* Pet'rs' Mem. at 24-25 (collecting record citations confirming that the proposed lease sales were in full conformance with all applicable requirements).

Perhaps most important, Petitioners have not and do not omit satisfying NEPA (or any other applicable statutory requirement) from the definition of "available." *See* Gov't Resp. at 36; Intv'r Resp. at 27 (stating incorrectly that Petitioners' construction "drops BLM's requirement that NEPA and other statutory reviews be completed before land becomes available"). Petitioners have never argued that any parcel should be issued before any required environmental analysis – under NEPA or otherwise – is completed. Petitioners simply seek to enforce the statutory deadlines applicable to that completion.

Citing *Organization for Competitive Markets v. U.S. Department of Agriculture*, 912 F.3d 455 (8th Cir. 2018) ("*OCM*"), federal Respondents argue that Petitioners "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." Gov't Resp. at 39. That is wrong. As a preliminary matter, this case does not implicate any "discretionary policy choices about how to conduct NEPA." Petitioners have not raised any challenge in this specific lawsuit to the methodologies applied or conclusions reached in BLM's NEPA analyses. This

lawsuit is instead about whether federal Respondents must complete NEPA in the first instance. In the Tenth Circuit, threshold questions concerning NEPA's applicability, i.e., whether NEPA must be conducted, represent "legal conclusions" – not discretionary policy choices – for which no deference is due the agency. *See Sierra Club v. Lujan*, 949 F.2d 362, 367 (10th Cir. 1991).

Nor does the holding in *OCM* support federal Respondents' assertion. In *OCM*, plaintiffs alleged that the Department of Agriculture failed to satisfy a directive to "promulgate regulations" within a two-year statutory deadline when the Department issued a final rule weeks before an administration change, but the subsequent administration deferred the effective date of the rule, and eventually withdrew the rule after several additional rounds of notice and comment rulemaking. The Eighth Circuit rejected plaintiffs' challenge, explaining that the directive to promulgate regulations was "subject to different interpretations," that the Department's regulatory efforts had arguably satisfied the requirement, and explaining that "[t]his is not a case where an agency has failed to take action in the face of multiple unambiguous commands." 912 F.3d at 463. The opposite is true here. Multiple federal courts have ruled that, when eligible and available parcels exist, the obligation to conduct quarterly lease sales is a discrete, ministerial obligation that must be followed. *See Louisiana*, 2021 WL 2446010, at *20 (concluding that 5 U.S.C. § 706(1) authorizes the court to compel BLM to conduct

lease sales of eligible and available lands); *Jewell*, 2017 WL 3600740, at *13 (describing the obligation to conduct quarterly lease sales as "a discrete, non-discretionary duty contained in a single statutory provision"). And no interpretation is needed to assess whether federal Respondents conducted lease sales in the first and second quarters of 2021. They did not.

"NEPA is a procedural statute that does not modify an organic statute." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 665 (D.C. Cir. 2011) (internal quotations omitted). Because "NEPA does not expand an agency's substantive powers . . .[,] any action taken by a federal agency must fall within the agency's appropriate province under its organic statute(s)." *Nat. Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*, 859 F.2d 156, 169 (D.C. Cir. 1988). It is uncontested that the Court must complete NEPA before conducting an oil and gas lease sale. *See* Pet'rs' Mem. at 7 (describing the NEPA review process that must be completed once parcels are nominated for leasing). But that procedural obligation is not dispositive in this case and has no effect on whether a parcel is "eligible" and "available" under the Mineral Leasing Act and the Act's implementing regulations. Federal Respondents here cannot excuse their failure to meet substantive deadlines under an organic statute simply because there is a procedural obligation under NEPA that must also be satisfied – NEPA cannot and does not change the Secretary's substantive obligations. The fact that the Secretary has *other* obligations she must

meet – including obligations related to environmental and resource review – does not excuse the agency from its obligation to comply with 30 U.S.C. § 226(b). *See* A.R. at 9 (recognizing "that the obligation to hold quarterly lease sales carries with it the responsibility to plan the activities necessary to have eligible lands available for sale"); Intv'r Resp. at 40-41 (conceding that "BLM must comply *both* with NEPA's requirements to evaluate the environmental impacts from selling oil and gas leases, and with the [Mineral Leasing Act]").

Respondents' suggestion that Petitioners' interpretation of "eligible" and "available" would divest Interior of its ability to make a public interest determination or complete statutory requirements such as NEPA prior to leasing," Gov't Resp. at 34, distorts Petitioners' claims. Federal respondents assert that Petitioners would "[c]onfine [Interior's] discretion to the protest stage." *See id.* But Petitioners note that federal Respondents have discretion to determine a parcel's suitability for leasing on at least three different occasions: (i) when determining whether a parcel should be open or closed to leasing during the land use planning process; (ii) when conducting the NEPA process that must precede a lease sale; and (iii) when resolving any protests that might be filed against a parcel's inclusion in a sale.[9] If at any of

[9] Federal respondents argue that "confining discretion to the protest state would impermissibly delegate the agency's discretionary authority and statutory compliance duties to third-party protesters, who may fail to raise relevant issues." Gov't Resp. at 34. That is baseless. Nothing stops federal Respondents from raising any concerns about a parcel's suitability during the NEPA process.

these stages, federal Respondents can articulate a non-arbitrary and capricious explanation for withholding a parcel, nothing stops the Secretary from exercising her discretion to do so.

III. RESPONDENTS' EXPLANATIONS ARE INSUFFICENT.

Respondents offer two categories of excuses for why federal Respondents failed to meet their statutory obligations to conduct the first and second quarter 2021 sales: (i) NEPA could not be completed because of BLM's "heavy workloads" associated with performing environmental analyses for oil and gas lease sales, *see* Gov't Resp., Part II.A; *id.*, Part III.C; and (ii) BLM has historically postponed quarterly sales for a variety of reasons other than a lack of eligible and available parcels, *see id.*, Part II.B. Respondents' reliance on these excuses fails as a matter of both administrative and substantive law.

Federal Respondents represent that the need to respond to numerous lawsuits that have "exposed weaknesses" in BLM's environmental review associated with lease sales have "required [BLM] to go back to the drawing board on some lease sales," generating "heavy workloads for BLM in completing environmental analyses for its oil and gas lease sales." Gov't Resp. at 6; *id.* at 38. Federal respondents suggest this workload problem was exacerbated because, at the same time decisions in these lawsuits were being issued, "BLM experienced a significant upheaval that

it is still recovering from when its headquarters was relocated from Washington, D.C., to Grand Junction, Colorado." *Id.* at 9.

These inconveniences, of course, cannot excuse an agency's failure to meet a statutory obligation, but even if they could, the problem with Respondents' argument is that there is not a single reference to the agency's workload or the move to Grand Junction in the administrative record. It is a settled tenet of administrative law that when "reviewing an agency action and the adequacy of an agency's articulation of its action, including findings of fact and reasoning processes, courts must look to the record that was considered by the agency and to the factual findings and reasoning of the agency–not to post hoc rationalizations of counsel." *Dry Color Mfrs. Ass'n v. Dep't of Labor*, 486 F.2d 98, 104 n. 8 (3d Cir. 1972). *See also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) (observing that "an agency's discretionary order be upheld, if at all, on the same basis articulated *in the order* by the agency itself"). It is revealing that neither Part II.A or Part III.C of federal Respondents' memorandum – the two sections that discuss federal Respondents' NEPA workload – contain even a single citation to the administrative record.[10]

[10] Even if the Court were to consider federal Respondents' new arguments, Respondents' position must still be rejected. Though Executive Order 14008 calls for a "comprehensive review" of federal oil and gas leasing, *see* A.R. at 1138, nothing in the administrative record or Respondents' memoranda makes any reference to when such a review will be completed and federal respondents acknowledge that no lease sales will be conducted in 2021, *see* Gov't Resp. at 17. *See also Louisiana*, 2021 WL 2446010, at *14 ("Although there is certainly nothing

Exacerbating this omission, Respondents' description of the factual record relevant to federal Respondents' reliance on NEPA as a basis for cancelling sales is inaccurate. Federal Respondents deny, for example, that "NEPA review for each of the cancelled lease sales . . . was on schedule to be completed before the respective lease sale." Gov't Resp. at 42. But that is exactly what the record demonstrates. *See* Pet'rs' Mem. at 32 (collecting citations). Federal Respondents provide no explanation why, if that statement was false, BLM submitted requests for authorizations to conduct least sales on February 4, 2021.[11] *See id.* at 33-34.

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wrong with performing a comprehensive review, there is a problem in ignoring acts of Congress while the review is being completed."). Respondents offer no authority to support the proposition that either workload priorities or a desire to undertake an additional analyses of agency programs excuses federal Respondents' failure to meet statutory mandates. *See W. Energy All.*, 2017 WL 3600740, at *10 (concluding oil and gas operators are harmed when BLM cancels lease sales for reasons other than a lack of eligible and available parcels). And while federal Respondents now offer that an affirmative decision was made to postpone sales until "remediative NEPA [could] be completed," Gov't Resp. at 43, that argument is premised exclusively on new evidence comprised of affidavit testimony and a memorandum which are *not* in the administrative record, *see id.* (citing Gamper Declaration and November 18, 2020 memorandum).

[11] Federal Respondents note that the approval package for the first quarter sale in Utah was returned to the Utah State Office because the package required an Environmental Assessment responsive to public comments. *See* Gov't Resp. at 46. That contention – which relies on newly presented affidavit testimony, *see id.* (citing Gamper Declaration) – is not in the administrative record and, so even if true, is not properly before the Court for consideration. But even if the Court were to consider it, the contention does not disprove the assertion that the environmental review for the Utah sale was on schedule to be completed before the respective lease sale.

Beyond the NEPA context, Federal Respondents' description of the second quarter cancellation in New Mexico is equally misleading. Federal Respondents now imply that the initial cancellation of the April 2021 sale in New Mexico – which federal Respondents represent occurred on February 11, 2021, *see* Gov't Resp. at 15 (citing A.R. at 1183) – was "reversed" and represent that the New Mexico State Office subsequently "submitted a request to proceed with an April lease sale," *id.* at 16 (citing A.R. at 2424). Federal Respondents state that, on March 1, 2021, after receiving this renewed request, BLM leadership again cancelled the April sale in New Mexico. *See* Gov't Resp. at 16. But the very same document on which federal Respondents rely for this contention states plainly that, as of March 1, 2021, the New Mexico State Office had *not* yet submitted a request for authorization to hold a second quarter lease sale. *See* A.R. at 2424 (noting that the BLM New Mexico State Director had not yet submitted a request to approve a New Mexico lease sale). In other words, on March 1, 2021, there would have been nothing for BLM's leadership to cancel.

Respondents' descriptions of BLM's previous failures to meet its statutory obligations to conduct quarterly lease sales is equally unpersuasive. *See* Gov't Resp. at 10 (describing previous lease sale cancellations); Intv'r Resp. at 26 (describing BLM's failures as "nothing new"). Respondents are essentially arguing that federal Respondents should not be held accountable for BLM's current failure to comply

with statutory obligations because BLM has always failed to meet those obligations. The Court must reject that argument.

Nor are Respondents correct that BLM has never been held accountable for past cancellations. In August 2016, the Alliance sued the Secretary and BLM in the United States District Court for the District of New Mexico alleging that BLM improperly cancelled lease sales around the country for reasons other than a lack of eligible and available parcels. *See W. Energy All. v. Jewell*, No. 1:16-CV-00912-WJ-KBM (D.N.M.). The federal district court in that case held that the Alliance's members were harmed whenever BLM cancelled a lease sale for reasons the Mineral Leasing Act does not allow, *see Jewell*, 2017 WL 3600740, at *10, and that the Court could redress that harm by ordering BLM to comply with the Mineral Leasing Act's quarterly sales mandate, *see id.*, at *11. The *Jewell* case was eventually settled when, on January 31, 2018, the Department of the Interior issued Instruction Memorandum 2018-034, a guidance document that implemented revised practices to ensure that quarterly lease sales were conducted on time. *See* Notice of Stipulation, *W. Energy All. v. Zinke*, No. 1:16-cv-00912-WJ-KBM (D.N.M. July 30, 2018), ECF No. 68. To the extent BLM's history of cancelling leases sales is relevant to the questions this lawsuit presents, that history demonstrates that when BLM cancels lease sales for

reasons other than a lack of eligible and available parcels, those cancellations are actionable and BLM can be compelled to correct the agency's procedures.[12]

IV. CONCLUSION.

The Secretary's discretion to choose which parcels to lease does not equate to unfettered power to cancel lease sales once those parcels have been chosen. Because BLM's cancellation of all oil and gas lease sales in 2021 is inconsistent with federal Respondents' obligations under substantive and administrative law, the Court should vacate those cancellations and enter an order requiring that: (i) BLM immediately reinstate the canceled oil and gas lease sales; (ii) all cancelled sales be held as expeditiously as logistical arrangements allow; and (iii) BLM adopt immediately revised lease sale schedules that comply with the terms of the Mineral Leasing Act and other applicable law.

[12] Like Respondents' references to BLM's workload, Respondents' reliance on the agency's history of cancelling lease sales is a new argument that should not be considered in this suit. There is no reference to BLM's prior leasing schedule nor any attempt to use that history to justify the first and second quarter cancellations in the administrative record.

Submitted respectfully this 19th day of October, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, a copy of the foregoing **REPLY IN SUPPORT OF PETITIONERS' ARGUMENTS ON THE MERITS** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Mark S. Barron
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