UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

THE STATE OF LOUISIANA, by and through its Attorney General, JEFF LANDRY, et al., *Plaintiffs,*	Civ. No.: 2:21-cv-00778-TAD-KK
v.	Judge: Terry A. Doughty
JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, et al., *Defendants.*	Mag. Judge: Kathleen Kay

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* BY HEALTHY GULF, ET AL. AND MEMORANDUM IN SUPPORT OF MOTION

NOTICE OF MOTION

Healthy Gulf, Center for Biological Diversity, Cook Inletkeeper, Defenders of Wildlife, Friends of the Earth, Natural Resources Defense Council, Oceana, Sierra Club, and The Wilderness Society ("Conservation Groups") respectfully move for leave to file a brief as *amici curiae* (attached as Attachment A) in the present action.[1]

This unopposed motion is based on the following memorandum of points and authorities. Conservation Groups have filed a proposed order (attached as Attachment B) with this motion.

CERTIFICATE REGARDING CONSENT OF PARTIES TO MOTION

Counsel for Conservation Groups sought consent from counsel for Plaintiffs and Defendants to submit a brief as *amici curiae* regarding Plaintiffs' motion for summary judgment and Defendants' cross-motion for summary judgment. Counsel for Plaintiffs stated Plaintiffs do not oppose this motion so long as it is filed by today, June 21, 2022. Counsel for Defendants stated Defendants do not oppose this motion.

STATEMENT OF INTEREST

Proposed amici curiae Conservation Groups are nonprofit organizations working around the country, including in Louisiana, dedicated to protecting the natural environment, encouraging the transition to clean energy systems, and promoting public health. *See* Mem. Supp. Mot. Interv. (Apr. 27, 2021), R. Doc. 73-1; Decls. Supp. Mot. Interv. (Apr. 27, 2021), R. Docs. 73-4 to 73-12. Their members are affected by continued oil and gas development and Conservation Groups have an interest in ensuring sound regulation of the oil and gas industry. R. Doc. 73-1 at 5–10, 12–14, 17–22; R. Docs. 73-4 to 73-12. Consequently, Conservation Groups have an interest in

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[1] No counsel for a party authored the attached brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of the brief.

the issues in this action, including resolution of questions about the Department of the Interior's statutory authority, the legality of the agency's actions, and the disposition of Plaintiffs' and Defendants' motions for summary judgment.

MEMORANDUM IN SUPPORT OF MOTION

Conservation Groups have expertise in the statutory and regulatory framework governing oil and gas leasing, as well as factual issues related to leasing, developed through their many years of advocacy and seek to contribute this expertise as *amici curiae* in this case.

While denying the Conservation Groups' motion for intervention, Order 8 (May 10, 2021), R. Doc. 111, this Court found Conservation Groups alleged a legally protectable interest in protecting the environment from the effects of the oil and gas industry. *Id.* at 4. This Court also stated that Conservation Groups "may have expertise in the issues in this proceeding," and invited "Conservation Groups to request amicus curiae status in this case and to file briefs addressing the constitutional and statutory authority issues." *Id.* at 8. Conservation Groups also previously were granted *amici curiae* status regarding Plaintiffs' motion for preliminary injunctive relief. R. Docs. 119, 122.

Courts have "exercised great liberality" in allowing amicus briefs to be filed. *See United States v. Davis*, 180 F. Supp. 2d 797, 800 (E.D. La. 2001). "There are no strict prerequisites that must be established prior to qualifying for amicus status," and an applicant must simply show that "participation is useful to or otherwise desirable by the court." *Id.*

Here, the Court has invited Conservation Groups to apply for *amici curiae* status and granted their prior request to participate as *amici curiae* at the preliminary injunction stage.[2]

[2] In opposing Conservation Groups' motion to intervene, Plaintiff States suggested Conservation Groups should participate as *amici curiae*. Mem. Opp. Mot. Interv. 9–10 (May 4, 2021), R. Doc. 96.

Further, Conservation Groups can offer useful expertise on the statutes governing onshore and offshore oil and gas leasing, which are at issue in the present action. *See* Pls.' Mem. Supp. Mot. Summ. J., R. Doc. 199-1; Defs.' Opp'n Pls.' Mot. Summ. J., R. Doc. 208; Defs.' Mem. Supp. Cross-Mot. Summ. J., R. Doc. 209-1. Conservation Groups have worked for decades to protect public lands and waters from the impacts of oil and gas development.[3] Conservation Groups have a long history of litigation against the Department of the Interior, challenging both onshore and offshore leasing and development. *See, e.g.*, *Healthy Gulf v. Bernhardt*, No. 1:19-cv-00707 (D.D.C. filed Mar. 13, 2019); *Gulf Restoration Network v. Zinke*, No. 1:18-cv-01674 (D.D.C. filed July 16, 2018).[4] Conservation Groups also have extensive experience litigating to enforce environmental laws and in administrative law practice. *See* R. Doc. 73-1, at 6–10.

In the course of this work, Conservation Groups have developed deep expertise related to the regulation of onshore and offshore oil and gas development, as well as the requirements of the Administrative Procedure Act and key environmental statutes. Conservation Groups seek to present their perspective on Interior's obligations under the Outer Continental Shelf Lands Act (OCSLA), the Mineral Leasing Act (MLA), and the Administrative Procedure Act (APA), as well as the administration of the oil and gas leasing programs under those statutes, which are germane to the arguments in the motions for summary judgment. In addition, Conservation Groups have expertise on factual issues related to oil and gas leasing and development, such as economic analyses, environmental effects, and safety risks.

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[3] *See* Eustis Decl. ¶ 9, R. Doc. 73-4; Templeton Decl. ¶¶ 3, 9–10, R. Doc. 73-8; Chasis Decl. ¶¶ 6–7, R. Doc. 73-9; Savitz Decl. ¶ 5, 7, R. Doc. 73-10; Jespersen Decl. ¶ 9, R. Doc. 73-12; McKinnon Decl. ¶ 20, R. Doc. 73-5; Nelson Decl. ¶ 21, R. Doc. 73-7.

[4] *See also* Jesperson Decl. ¶ 17; McKinnon Decl. ¶¶ 16–17; Collentine Decl. ¶¶ 8–9, R. Doc. 11; Nelson Decl. ¶¶ 9, 11–12, Templeton Decl. ¶ 8.

Conservation Groups' motion is timely, as it is filed one week after Defendants filed their opposition to Plaintiffs' summary judgment motion and cross-motion for summary judgment.

For the foregoing reasons, Conservation Groups respectfully request this Court's leave to file the attached brief, and supporting exhibits, as *amici curiae*.

Respectfully submitted this 21st day of June, 2022.

/s/ Corinne Van Dalen
Corinne Van Dalen (LA Bar # 21175)
Earthjustice
900 Camp Street, Unit 303
New Orleans, LA 701
T: 415-283-2335
F: 415-217-2040
cvandalen@earthjustice.org

/s/ Thomas Delehanty
Thomas Delehanty (*pro hac vice*)
Michael S. Freeman (*pro hac vice*)
Earthjustice
633 17th St., Suite 1600
Denver, CO 80202
T: 303-623-9466
F: 720-550-5757
tdelehanty@earthjustice.org
mfreeman@earthjustice.org

/s/ Christopher Eaton
Christopher Eaton (*pro hac vice*)
Shana E. Emile (*pro hac vice*)
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
T: 206-343-7340
F: 415-217-2040
ceaton@earthjustice.org
semile@earthjustice.org

/s/ Erik Grafe
Erik Grafe (*pro hac vice*)
Earthjustice
441 W 5th Ave., Suite 301
Anchorage, AK 99501
T: 907-277-2500
F: 907-277-1390
egrafe@earthjustice.org

Counsel for Amici Curiae Healthy Gulf, Center for Biological Diversity, Cook Inletkeeper, Defenders of Wildlife, Friends of the Earth, Oceana, Sierra Club, and The Wilderness Society

UNITED STATES DISTRICT COURT
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THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY, et al., *Plaintiffs,* *v.* JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, et al., *Defendants.*	Civ. No.: 2:21-cv-00778-TAD-KK Judge: Terry A. Doughty Mag. Judge: Kathleen Kay

CONSERVATION GROUPS' AMICI CURIAE BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

A year ago, Plaintiffs State of Louisiana et al. ("the States") requested preliminary injunctive relief against Executive Order 14008, on the theory that it would cause them "substantial and irreparable harms," Mem. Supp. Mot. Prelim. Inj. 9, R. Doc. 3-1, by directing, "to the extent consistent with applicable law," a nationwide pause on new oil and gas leasing, Exec. Order No. 14008, 86 Fed. Reg. 7619, 7624–25 (Jan. 27, 2021). The States claimed that such a pause would violate the Outer Continental Shelf Lands Act ("OCSLA"), the Mineral Leasing Act ("MLA"), and the Administrative Procedure Act ("APA"), on the core legal theory that the U.S. Department of the Interior is obligated to offer public lands and waters for lease. While the Court accepted the States' allegations at the preliminary injunction stage, *see generally* Mem. Ruling re Mot. Prelim. Inj. ("PI Order"), R. Doc. 139, the full administrative record now reveals a different story.

The record shows that, in reality, the Interior Department ("Interior") exercised its broad discretion under OCSLA and the MLA to postpone several lease sales in 2021 for reasons other than the President's Executive Order, such as to comply with NEPA. Established case law from the Supreme Court and other courts, longstanding agency practice, and even this Court's preliminary injunction order allow the government to do that.

The States, however, ignore these facts, asking this Court to disregard the administrative record and re-write the law. The Court should reject that invitation and deny the States' motion for summary judgment.

I. EVENTS SINCE LAST JUNE UNDERMINE THE STATES' CLAIMS.

Last year, when seeking preliminary injunctive relief, the States claimed that a pause on new leasing would drastically reduce "oil production, economic activity, and state revenues due to foregone drilling." Dismukes Decl. ¶ 15, R. Doc. 3-4; Considine Decl. ¶ 7, R. Doc. 3-2.

Among other predictions, one of the States' affiants concluded in March 2021 that the States would "lose significant oil and gas investments in [their] econom[ies]," Considine Decl. ¶ 10, based on a prior modeling report calculating that a leasing pause would reduce onshore drilling by 62 percent in its first year.[1] From these and other dire predictions, the States foretold "billions of dollars" in lost revenue, "thousands of lost jobs," and "substantial and irreparable harm" from "depriv[ation] . . . of this vital revenue." Mem. Supp. Mot. Prelim. Inj. ("PI Mot.") 10, R. Doc. 3-1.

As it turned out, the States' predictions were simply wrong. As Interior describes, oil and gas revenues disbursed to states *increased* in 2021 from the prior year. Defs.' Opp'n to Pls.' Mot. Summ. J., ("Defs.' Opp'n") 21–22, R. Doc. 208; Tichenor Decl. ¶ 5, R. Doc. 208-3. Indeed, data from the Office of Natural Resource Revenue show that federal oil and gas revenues in calendar year 2021 were the highest they have been since 2014.[2]

Likewise, the predicted drop in onshore drilling, which was the basis for the States' claims of economic harm, never materialized. To the contrary, drilling rates in the thirteen plaintiff states have gone up since 2020, with the number of new wells spud nearly tripling from 2020 to 2021. Tichenor Decl. ¶ 7. This increase mirrors the rise in drilling permits approved since President Biden took office: the 9,081 drilling permits issued in fiscal year 2022 (through April 2022) exceeds the 8,470 permits issued at the equivalent point of fiscal year 2021, and both

[1] The States have never filed the underlying report, which is the basis of Considine's predictions. Considine Decl. ¶ 7. The report is available at https://www.wyoenergy.org/wp-content/uploads/2020/12/Final-Report-Federal-Leasing-Drilling-Ban-Policies-121420.pdf. The 62 percent figure is on page 11 of the report.

[2] Data available at https://revenuedata.doi.gov/explore.

figures are higher than the total of 7,091 permits approved in *all* of fiscal year 2020.[3] These facts squarely contradict the States' claims last year of irreparable harm.

Remarkably, the States offer no evidence beyond their 15-month-old affidavits to support their allegations of continuing harm. *See* Mem. Supp. Mot. Summ. J. ("MSJ") 10, R. Doc. 199-1 (citing R. Docs. 3-2, 3-4). This outdated and inaccurate evidence cannot sustain their request for permanent injunctive and other relief.

Moreover, many of the States' claims appear soon to become moot. The Bureau of Ocean Energy Management (BOEM) held offshore Lease Sale 257 on November 17, 2021. Defs.' Mem. Supp. Cross-Mot. Summ. J. 8, R. Doc. 209-1. BOEM also restarted the process for Lease Sale 258 and made a new decision not to hold the sale, due to a lack of industry interest, which neither the States nor industry have challenged. *Id.* Starting next week, the Bureau of Land Management ("BLM") will hold onshore sales across several states, including in plaintiff states Utah, Montana, and Oklahoma, as well as in Wyoming and other states.[4] Over 130,000 acres of public land are set to be offered in Wyoming alone, beginning June 29, 2022.[5] The record shows that BLM developed these sales using *the same parcels* from the cancelled 2021 sales, "working from the lease sales that were deferred in Q1 and Q2 [2021], then moving forward with analysis of parcels for inclusion." BLM-Q3001363; *see also* BLM-Q3001353–54 (showing BLM collecting the full list of postponed parcels to initiate the next round of sales); BLM-Q3001366 ("State Offices should evaluate parcels that were under evaluation for proposed 2021 lease sales

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[3] Onshore drilling permit data available at https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/operations-and-production/permitting/applications-permits-drill.

[4] *See Upcoming Government Resources Opportunities*, EnergyNet, https://www.energynet.com/calendar.pl (last accessed June 21, 2022).

[5] *See BLM National NEPA Register, Proposed Lease Sale, No. DOI-BLM-WY-0000-2021-0003-EA*, BLM, https://eplanning.blm.gov/eplanning-ui/project/2015621/510 (last accessed June 21, 2022).

previously deferred."). Thus, by the end of the month, all the onshore parcels encompassed in the States' complaint will have gone through the full lease sale process.

The upcoming sales, in fact, provide more relief than this Court can order through summary judgment, because courts lack authority to order Interior to lease public lands. *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 882 (10th Cir. 1992) ("[F]ederal courts do not have the power to order competitive leasing. By law, that discretion is vested absolutely in the federal government's executive branch and not in its judiciary."); *see also Marathon Oil Co. v. Babbitt*, 966 F. Supp. 1024, 1026 (D. Colo. 1997) ("Only an order of this court compelling the executive branch to make land available for competitive leasing under the Mineral Leasing Act would likely redress [plaintiff's] claimed injuries. This, I do not have the power to do."), *aff'd*, 166 F.3d 1221 (10th Cir. 1999); *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 419–20 (1931) (declining to issue mandamus relief in light of Department's discretion over whether to issue leases); *Udall v. Tallman*, 380 U.S. 1, 4 (1965) (finding the MLA "left the Secretary discretion to refuse to issue any lease at all on a given tract").

In short, the States have not only failed to prove their allegations of economic harm, but their claims are, or will soon be, moot. These realities, which the States ignore, preclude their request for relief. The Court should deny the States' motion for summary judgment and grant the federal Defendants' cross-motion for summary judgment on those grounds alone.

For the reasons below, their motion for summary judgment also fails on the merits.

II. THE STATE'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To meet that high burden, it is not enough to offer legal arguments divorced from the facts: the movant must "identify[] those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also Pitts v. Shell Oil Co.*, 463 F.2d 331, 335 (5th Cir. 1972) ("The burden of showing the absence of a genuine issue of material fact falls squarely, and with great weight, upon the moving party.").

A. The States' Offshore Arguments Ask This Court to Rewrite OCSLA and Upend Decades of Settled Caselaw and Leasing Practices.

The States' offshore claims are premised entirely on their incorrect theory that a decision to delay or forego an individual proposed lease sale necessarily "constitutes a significant revision of the Five-Year Plan [*sic*]" that is subject to the same complex procedure as developing a five-year program. MSJ 14–17. That can only be the case if the five-year program commits Interior to hold each and every lease sale the program "proposes." But courts have repeatedly explained that is not how OCSLA works. Rather, Congress separated the program stage from the lease sale stage to give Interior broad discretion to make independent decisions at each step. History, too, demonstrates that declining to finalize and hold a proposed sale—as has occurred for 44 percent of proposed sales—has *never* been considered a revision of a program, much less a significant one. The States ask this Court to rewrite OCSLA to craft new extra-statutory requirements for the offshore leasing process and to upend decades of settled caselaw and leasing practices. The Court should decline the States' invitation.

1. Congress Gave Interior Broad Discretion to Delay or Forego Proposed Lease Sales Without Needing to Revise a Program.

The States complain that "adopting the government's position would mean that no lease-sale cancellation can ever constitute a significant revision" of a five-year program. MSJ 15. But that is exactly how OCSLA is structured and the current Five-Year Program is designed: because a five-year program in no way commits Interior to holding the lease sales proposed in the program, a decision to delay or not hold one of the proposed sales in no way revises the program.

Congress crafted OCSLA to be "pyramidic in structure, proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *California ex rel. Brown v. Watt* ("*Watt II*"), 712 F.2d 584, 588 (D.C. Cir. 1983) (quoting *California ex rel. Brown v. Watt* ("*Watt I*"), 668 F.2d 1290, 1297 (D.C. Cir. 1981)). OCSLA sets out a four-step process for leasing and developing offshore oil wells: 1) the five-year leasing program stage; 2) lease sale stage; 3) exploration plan stage; and 4) development and production plan stage. 43 U.S.C. §§ 1337, 1340, 1344, 1351; *see generally Sec'y of the Interior v. California*, 464 U.S. 312, 337–40 (1984). The Supreme Court has explained that "Congress has . . . taken pains to separate the various federal decisions involved in formulating a leasing program [and] conducting lease sales." *Sec'y of Interior*, 464 U.S. at 340.

The States, however, ask this Court to disregard Congress's efforts and collapse the two steps into one. Contrary to the States' argument, a decision at the program step does not commit Interior to taking any particular action during the subsequent lease sale step. Rather, "[a]dditional study and consideration is required before each succeeding step is taken." *Watt II*, 712 F.2d at 588. "Congress calls on Interior to strike an appropriate balance at each stage between local and national environmental, economic, and social needs." *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 594 (D.C. Cir. 2015); *see e.g.*, 43 U.S.C. §§ 1332, 1344(a)(1).

The text and structure of the statute clearly demonstrate that a five-year program does not commit Interior to holding all or any of the sales proposed in the program. OCSLA states the program "consist[s] of a schedule of *proposed* lease sales." 43 U.S.C. § 1344(a) (emphasis added). "Proposed" by its plain meaning does not mean "scheduled" or finalized, as the States appear to believe. A proposal does not become a binding commitment without further action. *See Watt II*, 712 F.2d at 592 ("Before an area is actually put up for sale, other steps must be taken.").

That action occurs at the second step—the lease sale stage—where this case lies. It is at that stage where Interior considers whether to actually schedule and hold a sale proposed in the five-year program. OCSLA by its plain text "authorize[s]," but does not require, Interior to sell leases. 43 U.S.C. § 1337(a)(1); *see Wash. Cnty. v. Gunther*, 452 U.S. 161, 169, n.9 (1981) (noting use of "authorized" in a statute "denotes affirmative enabling action").

The courts have repeatedly explained that OCSLA provides Interior broad latitude at the lease sale stage to decide whether and when to hold sales proposed in a five-year program and that the program does not commit the agency to a particular course of action. *E.g.*, *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009); *Watt II*, 712 F.2d at 588; *see also Ctr. for Sustainable Econ.*, 779 F.3d at 599. The five-year program stage involves one set of decisions that creates the universe of potential lease sales Interior has the option to offer. *See* 43 U.S.C. § 1344(d)(3) ("no lease shall be issued unless it is for an area included in the approved leasing program"); *see also Ctr. for Biological Diversity*, 563 F.3d at 480 (describing program stage as one that "involve[s] only 'the identification and mapping of areas that *might* be suitable for leasing'" (emphasis added) (quoting *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 45 (D.C. Cir. 1999)). The lease sale stage involves a separate set of decisions and steps to determine how much, if any, of the leasing proposed in a five-year program to offer for sale. *See* 43 U.S.C. § 1337(a); 30 C.F.R. §§ 556.301, .302(a), (b). Interior's ultimate decisions about leasing at this stage are not required to match the leasing proposed in a five-year program: "while an area excluded from the leasing program cannot be leased . . . or developed, an area included in the program may be excluded at a latter stage." *Watt II*, 712 F.2d at 588; *see* 30 C.F.R. § 556.302(c) (stating that there may be "changes from the area(s) proposed for leasing"). While the States accuse the government of trying to "establish a one-way ratchet," MSJ 15, it is actually Congress that established that ratchet in OCSLA. *See also* Defs.' Opp'n 18–19 (explaining Five-Year Program also contains one-way ratchet for its implementation). If the States would like it to be different, they must ask Congress to make that change, not this Court.

The States' arguments also contravene established D.C. Circuit precedent that approval of a five-year program does not make an "irreversible and irretrievable commitment of resources" towards subsequent leasing decisions. *Ctr. for Sustainable Econ.*, 779 F.3d at 599; *Ctr. for Biological Diversity*, 563 F.3d at 480. The court explained in *Center for Biological Diversity* that a program "does not require any action" and that "no rights have yet been implicated" at that stage. 563 F.3d at 480, 483. The States' arguments that a program *does* commit Interior to leasing and require action to hold lease sales and *does* implicate the rights of the States and potential lessees to participate in proposed sales are directly contrary to this established caselaw. MSJ 14–17, 19–20.

The option to delay or forego a proposed lease sale is also consistent with and a feature of the 2017–2022 Five-Year Program involved here, which states, "The inclusion of an area in the Proposed Final Program or an approved program . . . does not necessarily mean that a lease sale will be held in that area." 2017–2022 OCS Oil and Gas Leasing Proposed Final Program ("PFP") S-1, R. Doc. 199-3. This is because, as it explains repeatedly, the Program provides the Secretary "flexibility" to limit the number or size of the proposed sales that are actually held without revising the program. *E.g.*, PFP 10-5; *see* Defs.' Statement of Material Facts (Defs.' SMF") ¶ 6 (citing and quoting program); *see also* PFP § S.2.1, Doc. 199-3, at 19 (noting one industry commenter requested Interior to limit lease sales to just one per year). The Program expressly states the Secretary can "cancel lease offerings." PFP S-5. So it cannot possibly be that the cancellation of a proposed lease sale "revises" the Program, as the States argue, when the Program itself provides for such cancellations.

Requiring Interior to revert to program-stage procedures any time it does not convert a "proposed" lease sale to an actual lease sale would vitiate Congress's intent to "separate the various federal decisions" at each stage and create redundant processes. *Sec'y of Interior*, 464 U.S. at 340. It is thus the States who ask this Court "to engraft an extratextual" set of requirements to OCSLA that Congress did not.

2. Imposing New Requirements for Lease Sale Decisions Would Upend Decades of Leasing Practices.

The States' position that a decision to delay or forego a proposed lease sale requires revising the five-year program is inconsistent with decades of leasing practices and would upend Interior's leasing practices going forward. Since OCSLA was amended in 1978 to add the five-year program framework, there has *never* been a program in which all the proposed lease sales were held. *See Five-Year Program for Offshore Oil and Gas Leasing: History and Program for 2017-2022*, at 9–12, Cong. Rsch. Serv. (Aug. 23, 2019), https://fas.org/sgp/crs/misc/R44504.pdf; Defs.' SMF ¶ 2. In fact, nearly half of proposed sales (44 percent) have been delayed or cancelled. Defs.' SMF ¶ 2. The States' apparent position is that those actions were all illegal.

This pattern has spanned presidential administrations from both political parties. For example, the Reagan Administration did not hold 18 of the 41 proposed lease sales in its 1982–1987 Program, and the George W. Bush Administration opted not to hold 5 of the 20 proposed lease sales in its 2002–2007 Program. Cong. Rsch. Serv., *supra*, at 9–12. Interior has more recently cancelled lease sales in Alaska due to lack of industry interest or for conservation reasons, 76 Fed. Reg. 11,506 (Mar. 2, 2011); 80 Fed. Reg. 74,796 (Nov. 30, 2015); 80 Fed. Reg. 74,797 (Nov. 30, 2015), and in the Mid-Atlantic and Gulf of Mexico to allow for the development of stronger protections following the Deepwater Horizon disaster, 75 Fed. Reg. 44,276 (July 28, 2010); *see also Nat. Res. Def. Council v. Hodel,* 865 F. 2d 288, 293 n.3 (D.C. Cir. 1988) (describing other actions to delay proposed sales).

Interior has been developing five-year programs since the early 1980s with the settled understanding that it may subsequently delay, shrink, or decline to hold individual proposed sales in the program at the lease sale stage. Adopting the States' position that a program prevents Interior from doing so without completely revising the program would disrupt that settled practice and likely would impact Interior's current process for developing the next five-year program. *See* Defs.' Opp'n 1–2, 19–20 (explaining position would "imped[e] offshore leasing going forward"); *cf.* Br. Amici Curiae 12–13, R. Doc. 203 (raising concerns about delay in new five-year program).

The States' position boils down to a fundamental misunderstanding of how OCSLA operates. Contrary to the States' assertions, Congress structured OCSLA such that a decision not to proceed with any individual proposed lease sale is *not* a revision of a five-year program but a feature of the program as dictated by statute. The Court should reject the States' request to rewrite the statute and upend decades of established caselaw and leasing practices.

B. The States' Onshore Arguments Ignore the Record, Contradict Settled Agency Practice, and Attempt to Re-Write the MLA.

The States have also failed to meet their summary judgment burden for onshore leasing decisions, for three reasons. First, the record shows that BLM postponed its 2021 lease sales to conduct additional NEPA analysis based on litigation and environmental concerns, contradicting the States' unsupported claim that BLM postponed them "solely" as a result of Executive Order 14008. Second, the record shows that BLM applied its longstanding interpretation of the terms "eligible" and "available" as the legal basis for making those postponements. And third, the States' legal theory asks the Court to re-write the MLA and decades of caselaw interpreting it.

1. The Record Belies the States' Account of the Facts.

In its preliminary injunction order, the Court observed that "there is a huge difference between the discretion to stop or pause a lease sale because the land has become ineligible for a reason such as an environmental issue, and, stopping or pausing a lease sale with no such issues and only as a result of Executive Order 14008." PI Order 25. The Court acknowledged that BLM had canceled many of the lease sales on grounds other than Executive Order 14008, such as the "need for further environmental analysis," and noted the States' allegation that those other rationales were merely "pretextual." *Id.* at 31. The Court expressly noted that this issue would "need to be explored on the merits of this lawsuit." *Id.*

Inexplicably, the States ignore this Court's admonition from last year. Their summary judgment filings offer no evidentiary support for their argument that BLM cancelled all quarterly lease sales "relying solely on the Pause." MSJ 8. Nor do the States develop their 2021 claim that BLM's stated explanations for the cancellations were just a pretext. The States, in fact, do not even mention the administrative record documenting BLM's rationales for postponing the 2021 onshore sales.[6]

The States declare that after President Biden issued Executive Order 14008, BLM published a "fact sheet" acknowledging the Order, "[a]nd then BLM offices began systematically posting postponement or cancellation notices for their March and April 2021 lease sales." MSJ 8. Their summary judgment brief, however, does not provide any further details (or record citations) about the March and April 2021 postponements. The same is true of the States'

[6] Their brief contains only four citations in total to the onshore record: two references to a 1989 Solicitor's memo and two references to Executive Order 14008. MSJ 6, 7, 18, 19.

Statement of Material Facts, which does not lay out undisputed facts supported by the record, but rather offers argumentative and unsupported claims. R. Doc. 199-11.

The States seek factual support from pages 29–31 of this Court's preliminary injunction order, but the cited passages actually support BLM's position. This Court acknowledged that BLM's stated reasons for the postponements included:

- "to confirm the adequacy of underlying environmental analysis," PI Order 30 (citing Doc. No. 120, PR 76);
- "to determine whether additional NEPA needed to be conducted," *id.* (citing Doc. No. 120, PR 77);
- "due to lack of analysis on greenhouse gas emissions," *id.* (citing Doc. No. 120, PR 79–80);
- "due to lack of an environmental analysis," *id.* (citing Doc. No. 120, PR 79–80);
- "to complete additional air quality analysis," *id.* at 31 (citing Doc. No. 120, PR 81–82);
- "to reevaluate the parcels due to an opinion in the *Rocky Mountain Wild* Case," *id.* (citing Doc. No. 120, PR 83–84); and
- "pending decisions on *how* the Department will implement the Executive Order," *id.* (citing Doc. No. 120, PR 86) (emphasis added).

The States' silence on the administrative record is not surprising because the record confirms that BLM's postponements were prompted by exactly the kind of "environmental issue[s]" the Court found to be a legitimate basis for postponement. *Id.* at 25–26. The record shows that:

- BLM postponed the March 2021 Eastern States sale for "additional air quality analysis, including greenhouse gas (GHG) analysis," BLM_I001166;

- BLM postponed the March 2021 Utah sale due to a likely NEPA violation, as identified in *Rocky Mountain Wild v. Bernhardt*, 506 F. Supp. 3d 1169 (D. Utah 2020), BLM_I001164; BLM_I002412;
- BLM postponed the March 2021 Colorado, Montana, Utah, and Wyoming sales due to "serious questions as to NEPA compliance," BLM_I001169–70; *see also* BLM_I002414 (stating these sales were postponed "to confirm the adequacy of underlying environmental analysis"); BLM_I002701–04 (discussing NEPA flaws identified in Wyoming fourth quarter 2020 sale).

This caution—ensuring its sales did not violate NEPA or other laws—was a reasonable and prudent measure in light of the agency's repeated losses in court. BLM-Q3002147–50 (describing the "numerous lawsuits" and "adverse decisions" BLM's lease sale decisions have faced).

The other two sales included in the States' complaint and merits brief are the March 2021 Nevada sale and the April 2021 New Mexico sale. The former was postponed *before* the Executive Order was even issued. BLM_I001131. The latter was temporarily deferred on March 1, 2021, "pending decisions on how the Department will implement the Executive Order . . . with respect to onshore sales," noting that the "Department ha[d] not yet rendered any such decisions," BLM_I001180, and that BLM had received a number of objections and had not completed its NEPA analysis for the sale. BLM_I001174–78.

The States offer no basis for treating these explanations as pretextual. Federal agencies are entitled to a "presumption of regularity" under the APA. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994). Absent a "strong showing of bad faith or improper behavior"—which the States have not made—courts review an agency's decision based on the explanation it provides in the administrative record. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573–74 (2019). The Supreme Court has emphasized that courts "may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Id.* at 2573. Indeed, it is "typical" for an agency to "have both stated and unstated reasons for a decision." *Id.* at 2575.

The fact record described above amply supports BLM's decisions to postpone various 2021 lease sales for reasons other than the Executive Order. The agency's stated explanations are not pretextual or made in bad faith simply because BLM was also considering how to apply the Executive Order at the same time. Indeed, the Executive Order was motivated by concerns very similar to those that justified the lease sale postponements: courts had been repeatedly invalidating BLM's lease sales for failure to comply with NEPA. BLM's stated rationales of ensuring compliance with NEPA were not improper or pretextual. *See Dep't of Com.*, 139 S. Ct. at 2575, 2579.

In short, the fact record tells a much different story than the States' unsupported allegations. Far from "relying solely on the Pause," Mot. at 8, the record shows that BLM recognized its lease sales raised serious environmental issues and were legally vulnerable, and so it chose to postpone them until additional NEPA and other analyses could be completed. The States make no effort to "explore," much less prove, their contrary view of the facts and have therefore failed to carry their summary judgment burden.

2. BLM's Cancellation of the 2021 Sales Followed its Longstanding Interpretation of "Eligible" and "Available."

The States' summary judgment motion also fails on the law because it treats the MLA as imposing a blanket command for BLM to hold lease sales every quarter. *See* MSJ 17–19. That is simply not what the MLA says. The MLA provides that "[l]ease sales shall be held for each State *where eligible lands are available* at least quarterly." 30 U.S.C. § 226(b)(1)(A) (emphasis added). Even though this provision is expressly conditioned on lands being both "eligible" and "available," the States do not grapple with what those terms mean.

Since shortly after passage of the 1987 amendments and through today, BLM has consistently interpreted "eligible" and "available" as follows:

- Lands are "eligible" for leasing when they are not barred from leasing by statute or regulation. Ineligible lands include national parks and wilderness areas, for example.
- Eligible lands become "available" when they are both (a) open to leasing in the applicable resource management plan, and (b) all statutory requirements and reviews, including compliance with NEPA, have been met.

These definitions first appeared in a 1989 memorandum by the Interior Department Solicitor, BLM_I000008; BLM_I000009, and have been maintained ever since, including in BLM's 1996 leasing handbook, Manual 3101-1, BLM_I000017, and in guidance documents issued in 2010, 2013, and 2018, for example.[7]

Thus, under BLM's longstanding and consistent interpretation, the quarterly leasing provision does not apply unless and until:

(a) there are lands not precluded by statute or regulation from leasing;

[7] *See Instruction Memorandum 2010-117* n.8, BLM (2010), https://www.blm.gov/policy/im-2010-117 ("Eligible lands . . . are considered available for leasing when all statutory requirements have been met, including compliance with the NEPA, appropriate reviews have been conducted, and lands have been allocated for leasing in the [resource management plan]."); BLM Manual MS-3120.11 (Feb. 18, 2013), https://tinyurl.com/bdfw2k9k ("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."); *Instruction Memorandum 2018-034* n.6, BLM (2018), https://www.blm.gov/policy/im-2018-034 ("Lands allocated for leasing in the RMP are considered available for leasing when appropriate reviews have been conducted and all statutory requirements have been met, including compliance with the NEPA.").

(b) those lands are designated as open for leasing in the RMP; and

(c) the agency has determined it wants to offer the lands after completing NEPA review and other statutory requirements to support that decision.

As it has for the past 33 years, BLM applied that interpretation to the 2021 lease sales. It determined that its environmental reviews and NEPA compliance were incomplete and postponed the sales on that basis. BLM_I001131; BLM_I001164; BLM_I001166; BLM_I001169–70; BLM_I002412; BLM_I002701–04; BLM-Q2000080; BLM-Q2000478; BLM-Q3002147–50 (explaining that NEPA was incomplete for Q1 and Q2 sales). These types of postponements, moreover, were nothing new: the agency has for decades regularly canceled lease sales for similar reasons. Defs.' SMF ¶ 13; BLM-Q3002150–51 (giving examples of other postponements); R. Doc. 119-3 (same). BLM's application of its consistent and long-standing interpretation of eligible and available is entitled to deference and should not be disturbed. *Smiley v. Citibank*, 517 U.S. 735, 740 (1996) ("[A]gency interpretations that are of long standing come before [a court] with a certain credential of reasonableness, since it is rare that error would long persist.").

The States, moreover, provide no basis for rejecting BLM's interpretation of eligible and available: they simply assert that it would "eviscerate" their view of the MLA as imposing a mandate to offer leases every three months. *See* MSJ 17–19. However, the States' unsupported gut sense of what these terms ought to mean does not supplant BLM's reasonable and longstanding interpretation of the statutory language. *See Barnhart v. Walton*, 535 U.S. 212, 222 (2002). The States' novel and belated attempt to disrupt over 30 years of consistent agency operation should be rejected.

3. The States Ask This Court to Re-Write the MLA.

More broadly, the States' view of the MLA as an unyielding mandate to lease public lands every three months would fundamentally re-write the MLA in a manner that conflicts with its plain language and the intent of Congress. The Supreme Court and other courts have repeatedly affirmed that the MLA does not require the Interior Department to offer leases—a point underscored by the States' failure to cite *a single case* where a court has ordered BLM to issue a lease. The Court should reject the States' attempt to re-write the law.

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

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

The quarterly lease sale language the States rely on was added to the MLA in connection with 1987 amendments requiring that oil and gas leases be offered primarily through competitive auctions. Prior to 1987, leasing was accomplished primarily on an over-the-counter basis, without competitive bidding. *W. Energy All. v. Salazar*, No. 10-cv-0226, 2011 WL 3737520, at *4 (D. Wyo. 2011). The quarterly leasing provision was a housekeeping measure that served to ensure competitive auctions would occur on a regular basis when BLM wanted to offer leases for sale. Both (1) the text of the 1987 amendments and (2) their legislative history demonstrate that Congress retained BLM's long-established discretion not to offer leases and did not intend the amendments to fundamentally alter the MLA as claimed by the States.

i. The amendments' text retains Interior's discretion not to lease.

The 1987 amendments did not alter the MLA's central "may be leased" language, *see* 30 U.S.C. § 226(a), which courts have ruled gives BLM broad discretion not to lease. *See, supra*, pp. 5–7. Moreover, the MLA provision amended in 1987 to require competitive leasing, Section 226(b)(1)(A), retained language in that section providing such discretion. Section 226(b)(1)(A) states: "All lands *to be leased* . . . shall be leased as provided in this paragraph . . . by competitive bidding . . . . Lease sales shall be held for each State where eligible lands are available at least quarterly." 30 U.S.C. § 226(b)(1)(A) (emphasis added). The term "lands to be leased" was not changed in 1987, and it indicates that procedural requirements for competitive leasing—including holding quarterly lease sales—only apply once BLM determines that lands are "to be leased." *Salazar*, 2011 WL 3737520, at *4–5 (interpreting Section 226(b)(1)(A) as preserving discretion not to lease).

For example, the Supreme Court interpreted pre-1987 MLA language requiring that "lands to be leased . . . shall be leased" according to certain procedures, as leaving the agency with discretion to refuse to lease at all. *See Udall*, 380 U.S. at 4; *see also Haley*, 281 F.2d at 625 (same). The Tenth Circuit similarly reads this language "to merely mean that the Secretary must issue a lease [according to the Section 226(b)(1)(A) procedures] *if he is going to lease at all*." *Salazar*, 2011 WL 3737520, at *4–5 (quoting *Justheim Petroleum Co. v. Dep't of Interior*, 769 F.2d 668, 671 (10th Cir. 1985); *Sw. Petroleum Corp. v. Udall*, 361 F.2d 650, 654 (10th Cir.

1966)). Accordingly, the MLA's provision for quarterly lease sales when lands are "eligible" and "available" does not preclude BLM from determining that no lands are "to be leased."

ii. The legislative history confirms that Congress did not intend to mandate leasing.

The legislative history of the 1987 amendments also makes clear Congress did not intend to alter the agency's long-established discretion not to lease. As one commentator noted, "nowhere in the legislative history of the [1987 amendments] did Congress suggest that it modified the Secretary's discretion in any way." Thomas Sansonetti & William Murray, *A Primer on the Federal Oil and Gas Leasing Reform Act of 1987 and its Regulations*, 25 Land & Water L. Rev. 375, 388 n.112 (1990). Nor is there any evidence that Congress intended to overturn or limit the Supreme Court's *McLennan* decision recognizing the agency's authority to adopt a nationwide moratorium, or any other established precedent. *See id.* at 388 n.112 (citing *McLennan* in explaining that amendments did not affect pre-1987 discretion).

Just the opposite: the legislative history demonstrates that "Congress did not intend to affect the [Interior Department]'s discretion in determining which lands would be suitable for leasing." *Salazar*, 2011 WL 3737520, at *5 n.10. Congress sought to reform the MLA because the existing non-competitive leasing process had been rife with abuse. *See* 133 Cong. Rec. S8322-04, 1987 WL 940033 (Jul. 13, 1987) (statement of Senate sponsor Sen. Melcher); H.R. Rep. No. 100-378, at 7–8 (1987), attached as Ex. 1.

In moving to a competitive leasing system, the sponsors of the 1987 amendments made clear that Congress did not intend to limit the agency's existing discretion not to lease. For instance, in a committee hearing, Senator Melcher expressly stated that his bill "does not change the Secretary's discretion in refusing to lease, because there are overriding reasons why he should not lease." Sen. Hr'g 100-464, at 108 (June 30, 1987), attached as Ex. 2; *see also* H.R.

Hr'g 100-11, at 83 (July 28, 1987), R. Doc. 208-4 (comments by sponsor Rep. Rahall reflecting his understanding that Department would retain discretion "to reject lease offers" for "land management consideration"); H.R. Rep. No. 100-378, at 11 (quarterly leasing to occur "where appropriate," and competitive leasing process was "[s]ubject to the Secretary's discretionary authority" over leasing). Interior Department testimony also reflected the Department's understanding that the amendments did "not change the Secretary's discretion not to lease lands." H.R. Hr'g 100-11, at 67; Sen. Hr'g 100-464, at 159 (explaining that under the amendments, Interior "has discretion to not lease" as provided in the MLA, and "[t]he discretion is limited only by the need not to be capricious").

Put simply, the 1987 amendments reformed the MLA to prevent abuses of the leasing process while maintaining the Department's existing discretion not to lease. The Court should reject the States' invitation to do what Congress declined to do in 1987: overturn decades of precedent and fundamentally re-cast the MLA as a non-discretionary mandate requiring Interior to offer leases for sale. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes.").

In conclusion, the States have failed their summary judgment burden on both the facts and the law. The administrative record—which the States ignore—demonstrates that BLM postponed its 2021 onshore lease sales for reasons other than Executive Order 14008, and that those decisions align with the agency's longstanding interpretation of the terms "eligible" and "available." The States' novel objection to this decades-old practice, and effort to re-write the MLA, should be denied.

III. Conclusion

For the reasons above, the Court should deny the States' motion for summary judgment and grant the federal Defendants' cross-motion for summary judgment.

Respectfully submitted this 21st day of June, 2022.

/s/ Corinne Van Dalen
Corinne Van Dalen (LA Bar #21175)
Earthjustice
900 Camp Street, Unit 303
New Orleans, LA 701
T: 415-283-2335 F: 415-217-2040
cvandalen@earthjustice.org

/s/ Thomas R. Delehanty
Thomas R. Delehanty (pro hac vice)
Michael S. Freeman (pro hac vice)
Earthjustice
633 17th St., Suite 1600
Denver, CO 80202
T: 303-623-9466 F: 720-550-5757
tdelehanty@earthjustice.org
mfreeman@earthjustice.org

/s/ Christopher Eaton
Christopher Eaton (pro hac vice)
Shana E. Emile (pro hac vice)
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
T: 206-343-7340 F: 415-217-2040
ceaton@earthjustice.org
semile@earthjustice.org

/s/ Erik Grafe
Erik Grafe (pro hac vice)
Earthjustice
441 W 5th Ave., Suite 301
Anchorage, AK 99501
T: 907-277-2500 F: 907-277-1390
egrafe@earthjustice.org

Counsel for Amici Curiae Healthy Gulf, Center for Biological Diversity, Cook Inletkeeper, Defenders of Wildlife, Friends of the Earth, Oceana, Sierra Club, and The Wilderness Society

Brief of Healthy Gulf et al. as *amici curiae*

Exhibit 1

100TH CONGRESS
1st Session | HOUSE OF REPRESENTATIVES | REPT. 100-378
Part 1

AMENDING THE MINERAL LANDS LEASING ACT OF 1920 TO REFORM THE ONSHORE OIL AND GAS LEASING PROGRAM

OCTOBER 15, 1987.—Ordered to be printed

Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

together with

DISSENTING AND ADDITIONAL VIEWS

[To accompany H.R. 2851]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 2851) to amend the Mineral Lands Leasing Act of 1920 to reform the onshore oil and gas leasing program, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following in lieu thereof:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS; REFERENCES.

(a) SHORT TITLE AND TABLE OF CONTENTS.—This Act, together with the following table of contents, may be cited as the "Federal Onshore Oil and Gas Leasing Reform Act of 1987"

TABLE OF CONTENTS

19-006

SEC. 9. SHORT TITLE.

The Mineral Lands Leasing Act of 1920 (30 U.S.C. 181 et seq.) is amended by inserting after section 43 the following new section:

"SEC. 44. SHORT TITLE.

"This Act may be cited as the 'Mineral Lands Leasing Act of 1920'."

SEC. 10. TECHNICAL AMENDMENTS.

Section 1008 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3148) is amended as follows:

(1) Subsections (c) and (e) are repealed.

(2) The second sentence of section 1008(d) is repealed.

PURPOSE

The purpose of H.R. 2851 is to provide for the orderly exploration and development of the Nation's onshore oil and gas resources in a manner which ensures a fair return to the public.

BACKGROUND AND NEED FOR LEGISLATION

The Department of the Interior's onshore oil and gas leasing program consists of a competitive and noncompetitive system. The noncompetitive component was set up to emphasize oil and gas resource development by offering lands of unknown potential less expensively and for longer terms. Lands within a "known geological structure of a producing oil and gas field" (KGS) are offered through the competitive leasing program. Under this system, leases of not more than 640 acres may be awarded to the highest qualified bidder for five-year primary terms conditioned upon a production royalty rate of at least 12½ percent and annual rental of $2 per acre per year.

Lands outside of a KGS are leased noncompetitively with tracts not previously leased issued "over-the-counter" to the first applicant. Tracts covered by leases that have expired or have been relinquished and which are not within a KGS are offered through the simultaneous leasing system (referred to as the "lottery") with a lessee randomly selected from many applicants. These noncompetitive leases, up to 10,240 acres in size, have 10-year primary terms with a fixed 12½ percent production royalty rate and annual rentals of $1 per acre per year during the first through fifth years and $3 per acre per year thereafter except for OTC leases where the rental is fixed at $1 per acre per year throughout the lease term.

As of September 30, 1986, 102,885 federal onshore oil and gas leases covering 92,730,783 acres were outstanding. The vast majority of these leases, 93 percent, were issued on a noncompetitive basis. During the course of fiscal year 1986, 1,263 competitive and 7,746 noncompetitive federal onshore oil and gas leases were issued. Of the total amount of outstanding leases, only 18 percent were in production at the end of fiscal year 1986 and represented about 11 percent of total U.S. oil and gas production. These producing leases covered 12,700,808 acres of public land. Federal onshore oil and gas leasing accounted for $865 million in royalties, rents and bonuses during fiscal year 1986 with $424 million of this amount distributed to 28 states. The seven states of Alaska, California, Colorado, Montana, New Mexico, Utah and Wyoming received 94 percent of this amount. Wyoming and New Mexico combined received 61 percent of the total state share distribution.

Various problems in the federal onshore oil and gas leasing system have been the subject of numerous investigations, studies and Congressional hearings. Fraud and abuse has long been associated with the lottery used to issue the vast majority of leases on a noncompetitive basis. On occasion, the system has been subject to manipulation and due to continuing deficiencies in making geological determinations relating to oil and gas structures, lands which should have been issued by competitive leasing to the highest bidder were instead issued noncompetitively for a minimal filing fee. Another major problem involves the so-called "40 Acre Merchants" who obtain leases which contain no known oil or gas resources, divide them into parcels of less than 40 acres, and peddle them using false promises of high return to unsuspecting citizens. There has also been a growing conflict between oil and gas development and other multiple use values in national forests and public lands primarily in the West. These conflicts can generally be attributed to the lack of proper land planning and the failure to consider potential developmental consequences prior to lease issuance.

Due to these situations, there currently exists uncertainty over whether the noncompetitive leasing system can withstand fraud and abuse, the Bureau of Land Management's ability to determine which tracts of land should be made available for leasing under the competitive or noncompetitive systems and the propriety of reserving environmental review of leasing decisions until after lease issuance. This uncertainty threatens the stability of the program and calls into question its ability to contribute to the energy needs of the Nation as well as provide for a fair rate of return to the public from the development of federally owned resources.

Overview of Legislation

The "Federal Onshore Oil and Gas Leasing Reform Act of 1987" provides for a "two-tier" leasing system. All lands available for leasing would first be offered competitively and issued to the highest qualified bidder with the minimum acceptable bid set at $2 per acre. Lease sales would primarily be conducted by oral bidding although sealed bids could be submitted. A non-refundable bidding fee of at least $75 must be paid.

The bill provides for lease sales to be held for each state at least on a quarterly basis and the public could make confidential expressions of interest about specific lands. Leases could not be issued in units larger than 2,560 acres except in Alaska where the maximum lease size would be 5,760 acres. Competitive leases would have five-year primary terms.

Lands for which no bids are received, or no bids at or above $2 per acre, would then become available for leasing during a one-year period to the first person making application for the lease and upon the payment of a non-refundable application fee of at least $75. Noncompetitive leases would have 10-year primary terms. If at the expiration of the one-year period no lease application is pending, or if a lease terminates, expires, is cancelled or is relinquished, the land covered by the lease would again be available under the competitive leasing program.

All leases would be conditioned upon the payment of a royalty rate of not less than 12½ percent of production value and rentals of not less than $1 per acre per year for the first through fifth years of the lease and not less than $3 per acre per year for each year thereafter. A minimum royalty of not less than $3 per acre in lieu of rental would be payable on or after the discovery of oil or gas in paying quantities.

The bill would require that at least 60 days before offering lands for lease and 30 days before substantially modifying the terms of any lease the Secretary of the Interior would provide public notification through a Federal Register notice. The Secretary would also periodically notify the public of pending drilling permit applications. These notices would include information on lease terms and maps or descriptions of the affected lands.

Prior to approving a permit to drill, the legislation requires that a plan of operations must be approved by the Secretary. The plan would cover the proposed surface-disturbing activities within the lease area. A bond in an amount sufficient to ensure reclamation must also be posted. The legislation directs the Secretary to prohibit the issuance of new oil or gas leases to any person who has failed to comply with reclamation requirements in the past.

Under the legislation, the Secretary of the Interior could not issue any oil and gas leases on public domain national forest lands without the consent of the Secretary of Agriculture.

Provision is made to authorize the Secretary to disapprove any lease assignment of less than 640 acres outside of Alaska or less than 2,560 acres within Alaska. Current law lease cancellation provisions are clarified.

The land use planning provisions of the bill provide that oil and gas leases may be issued only if leasing of the affected lands has been evaluated and approved in a land use plan meeting the requirements of the section. Affected areas are public lands and public domain national forest lands on which the public has expressed substantial interest in oil and gas leasing or which the Secretary finds there is a high potential for oil and gas recovery. Where a land use plan has been completed, or there has been substantial progress toward its completion, it could be amended in compliance with the requirements of the section. The Secretary of the Interior and the Secretary of Agriculture would be required to publish in the Federal Register a list of affected plans and their completion dates which in no case shall be later than January 1, 1991. After the specified date, no oil and gas lease may be issued until the plan is effective.

Land use plans affected by this legislation must include consideration of the potential oil and gas resources including a map and narrative description indicating known oil and gas reserves and lands already under lease; an analysis of the most likely social, economic and environmental consequences of exploration and development; and an identification of specific protective stipulations and the specific areas for which they apply. The Secretary is authorized to use no surface occupancy stipulations only where recovery of oil and gas from an area is feasible without surface occupancy.

The bill stipulates that oil and gas leases could not be issued on lands in wilderness study areas. Oil and gas exploration could be allowed in these areas by means not requiring the construction or improvement of roads if this activity is found to be compatible with the preservation of the wilderness environment.

Simultaneous applications filed prior to enactment may be processed as could competitive lease bids. Over-the-counter applications filed prior to September 15, 1987, could be processed. The Secretary could hold one or more lease sales in accordance with the legislation prior to regulation promulgation. A number of measures are authorized to combat fraud and abuse in oil and gas leasing.

COMMITTEE VIEWS

The Committee believes the problems which have plagued the federal onshore oil and gas leasing system over the years can be addressed only through a comprehensive reform of the current program.

The legislation seeks to address these problems by requiring that all lands available for leasing be first subjected to competitive leasing. This will allow market forces, rather than geology and administrative ineptitude, to be the determining factor in the leasing program while ensuring that the public receives a fair return on the disposition of federal resources. However, subject to the competitive test, H.R. 2851 would maintain a noncompetitive "second tier" leasing system in an effort to encourage exploration and wildcatting. Under the leasing regimes proposed by the bill, the lottery would be abolished.

With respect to the "40 Acre Merchants," the legislation would provide the Secretary of the Interior with the authority to disapprove lease assignments of less than 40 acres. In addition, H.R. 2851 would establish strict penalties for fraudulent sales schemes.

In an effort to resolve many of the growing conflicts between oil and gas leasing and other land uses and values, the bill would also provide for more consistency in, and the quality and timeliness of, the manner by which the Bureau of Land Management and Forest Service management plans consider oil and gas leasing issue. The Committee intends for the legislation to promote a complete evaluation of potential exploration and developmental consequences of oil and gas leasing during the land planning stage. The current practice is to reserve these considerations until lease issuance. The basis for section 5 of H.R. 2851 is the Bureau of Land Management's most recent supplemental program guidance for oil and gas leasing. Establishing a statutory underpinning for oil and gas leasing evaluation during the land use planning stage will ensure consistent application and provide the Forest Service with a specific directive relating to oil and gas leasing.

The bill would also give the Forest Service statutory consent authority for leasing on national forest lands, authorize surface managing agencies to take the steps needed to assure the adequate reclamation of drilling operations and prohibit further leasing of lands under consideration for wilderness designation. These matters are as significant and important in ensuring the integrity of the federal onshore oil and gas leasing program as is the reform of the leasing mechanism.

SECTION-BY-SECTION ANALYSIS

Section 1 provides that this Act may be cited as the "Federal Onshore Oil and Gas Leasing Reform Act of 1987," sets forth a table of contents and notes that references in the bill to the Mineral Lands Leasing Act of 1920 are to the Act of February 25, 1920, entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain."

Section 2 amends section 17 of the Mineral Lands Leasing Act of 1920. 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. The bill provides that where appropriate lease sales be held at least quarterly for each state with the public making confidential expressions of interest about specific lands to be made available for leasing. The Committee notes that to the extent practicable such sales are to be conducted within each state where the lands available for leasing are located.

The legislation stipulates that lease sales be conducted by oral bidding, except that sealed bids may be submitted. When sealed bids are submitted, the Committee intends they become part of the oral bidding process with the amount contained in the sealed bid known on a confidential basis to the person conducting the lease sale and publicly announced only if it is matched by an oral bid. Prior to bidding on any lease, a non-refundable bidding fee of at least $75 must be paid for each lease offered. The Committee intends for this bidding fee to also be paid by persons submitting sealed bids.

The legislation directs the Secretary to accept the highest bid at or above $2 per acre from a responsible qualified bidder without evaluation of the lands proposed for lease. The $2 per acre figure represents a minimum acceptable bid. No discretionary authority is provided for the Secretary to require a higher minimum bid.

The Secretary is not required to issue a lease if he determines that accepting the highest bid fails to represent a reasonable return to the public. The Committee intends for this discretionary authority to be used in only the most extraordinary circumstances as the legislation is premised on the concept of market forces being the determining factor of the price at which leases are sold. As such, the highest bid resulting from the competitive bidding process shall be presumed to yield a reasonable return to the public. This presumption is buttressed by the fact that the Secretary may not conduct evaluations of lands which have received the highest bid in a lease sale. The Committee notes that in the rare instances where this discretionary authority may be used, the Secretary may take into consideration factors such as whether dramatic and rapid fluctuations in prevailing market conditions between the time of the lease sale and the time of actual lease issuance.

Lands for which no bids, or no bids at or above $2 per acre, are received in a competitive lease sale shall immediately become available under a non-competitive leasing program under section 2(b) for a period not to exceed one year after the date the competitive lease sale was conducted. These lands may be leased to the

Brief of Healthy Gulf et al. as
amici curiae

Exhibit 2

S. Hrg. 100-464

FEDERAL ONSHORE OIL AND GAS LEASING

HEARING

BEFORE THE

SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION

OF THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 66

TO PROVIDE FOR COMPETITIVE LEASING FOR ONSHORE OIL AND GAS

S. 1388

TO AMEND THE ACT OF FEBRUARY 25, 1920, TO REFORM FEDERAL ONSHORE OIL AND GAS LEASING PROCEDURES

JUNE 30, 1987

Printed for the use of the
Committee on Energy and Natural Resources

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FEDERAL ONSHORE OIL AND GAS LEASING

JUNE 30, 1987

U.S. SENATE,
SUBCOMMITTEE ON MINERAL RESOURCES
DEVELOPMENT AND PRODUCTION,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:07 a.m., in Room SD-366, Dirksen Senate Office Building, Hon. John Melcher, presiding.

OPENING STATEMENT OF HON. JOHN MELCHER, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator MELCHER. The subcommittee will come to order. This morning we are going to hold a hearing to receive testimony on two bills, S. 66 and S. 1388, which would reform the Federal Onshore Oil and Gas Leasing Program.

On January 6th of this year Senator Bumpers introduced S. 66, and on June 18th I introduced S. 1388. Both bills would provide for a two-tiered leasing system and would eliminate the problems we have with "known geologic structure." That is a designation that in current law the Department must decide on in case of oil leases.

When we had the oil price drop from $30 a barrel to as low as $9 a barrel, well, exploration and drilling dropped off on the continental United States. In Montana drilling rigs went down 57 percent in the course of just a few months.

In Colorado this decline was 50 percent. In Wyoming it was down over 61 percent. Now, there is a little price improvement in oil. It has come back to $20 a barrel. There is a chance that that figure, if it is going to remain at $20, that we will see rigs getting out, drilling some more oil.

I think we have five rigs working in Montana, for instance, this year, right now, which is not very much but it is better than none working, which was the case about a year ago. I do not know what the case is in Wyoming or North Dakota or Colorado, or New Mexico. But I hope it is on the upswing.

These two bills have some similarity. But it is fair to say that the one I introduced is more designed to encourage independent producers to get out there and look for some more oil, and try drilling. That is what it is all about. It is all about production.

Now I believe it is about time that Congress do something about production of our own domestic supplies. So I drafted a bill that I think would bring that about. In our case in Montana, we probably will not have a great deal of interest in our share of the Wilston Basin unless oil prices get up to around \$23 or \$24 per barrel.

I do not know if the price of oil is going to get that high. But I do believe that it is time now to set the stage to where, if oil prices recover to that level, we are going to have more activity in fields such as Wilston Basin.

Now other states can speak for themselves. But I believe that what we see in Montana, we are kind of on the fringe. We need that \$23 to \$24 per barrel price in order to encourage production.

A lot of oil patches in Texas are probably showing more activity now at the \$18 to \$20 per barrel range. I have been here since 1969, either in the House or in the Senate, and I want to recite just very briefly my experience in working with various administrations on trying to develop "an energy policy."

There was not any energy policy under Nixon. Ford was there only for a short time, and it would probably be unfair to expect him to develop an energy policy. The Carter Administration did not develop an energy policy of any great magnitude.

And this administration, having had now, what is it, six and a half years to start doing something, they are not out of the blocks yet. Almost every bill that I have been involved with in production has been opposed at some stage by whatever administration was in power.

The Alaskan Pipeline bill had only two questions. Were we going to build it, number one. Number two, when. The administration at that time, the Nixon Administration, says, well, let us build it.

When we got to the question of when, that was pretty fuzzy. Maybe two or three years from that time. It had been taken into court by environmental groups. The court found that they had to just widen the right-of-way so it could be built.

So we passed that kind of a bill. And as to when, the House said, now. Not two or three years from then, but now. I was in the House then and that was our position. The Senate's position was like the administration's position.

They said, oh, well, do not rush it. Do not waive further judicial review. But we did. The House won on that point, and so it was built right then. And as events proved, it seemed to be the right judgment because we had the oil embargo occurring right at the same time.

We wanted to open Elk Hills up, the residents sit on that oil. And the administration opposed opening it up. But we did, to produce the oil.

We have got ANWR before this committee now, with the same types of arguments we heard on the Alaskan Pipeline bill. What about the caribou, for instance. We decided finally when we passed the Alaskan Pipeline bill, the caribou do fine. And they have.

But I am not trying to prejudge what this committee will do on ANWR. I just mention that as one of the arguments from the passage of the Alaskan Pipeline bill.

In later years we have developed the legislation here in this committee that says, we are going to have a Department of Energy. It seemed like a good idea, and I still think it is a good idea. But that has not brought us to an energy policy.

At the same time we are talking about this bill here and should we have more drilling, onshore drilling in the United States. We are debating what should be our policy in the Persian Gulf.

So I think we find ourselves sort of coming and going at the same time. But that is not anything new. When we passed the Alaskan Pipeline bill, we were talking about what could happen in the Gulf.

Now it is happening. And it is a case of uncertainty. And whether or not we make the right judgments to minimize that uncertainty, while that will be our intentions, we are still subject to what other people do.

But what we do in developing our own production on our own shores is our business and no one else is going to interfere with it from abroad. And it is that certainty, which is not trying to draw a conclusion, that this passage of a bill like this will be 100 percent sure of producing more domestic oil.

At least we would be doing the right thing to set the stage for that opportunity. The arguments that we have over the environmental concerns are going to be enunciated today by an environmental witness who will say that we should attach more requirements to the Mineral Leasing bill on decision-making on whether or not we are going to lease.

Now that is not in itself an unfair request or position. But I shall resist that very vigorously in attaching it to the mineral leasing amendments. And the reason I shall resist it is because it properly belongs as an amendment, if there are going to be amendments of that nature, to the Forest Management Act and to FLPMA, the Federal Land Policy Management Act.

As to this administration, they are going to testify that they would like to sort of continue with some rather detailed, rather confusing stipulations, requirements, new language, new law regarding leasing.

I do not share their opinion at all. I am of the opinion if you believe in production, that we could possibly have more production here onshore in the United States, we might as well write the bill very simply and very much to the point.

That is probably the major difference between Senator Bumpers' bill and my bill, and the committee, if we move a bill, will decide which is the best course, and I will bow to that decision.

Senator Bumpers.

[The texts of S. 66 and S. 1388 follow:]

grade and revamp its KGS procedures to adopt the NAS recommendations.

As well, we would like to see them include three elements that are featured in both of the bills. Elimination of sealed bids in favor of oral bidding. Elimination of sliding scale royalties in favor of flat royalties. And elimination of any post sale value determinations.

We think those are positive elements from both bills, which could be done administratively. There is nothing in the present mineral leasing act that would keep those from going into place.

We do recognize, however, that it is your prerogative to reconsider previous legislative enactments. And it is undoubtedly true, as the National Academy of Science has concluded, that there will always be some errors in KGS classification.

Can we live with those, given the risks of opening up the mineral leasing act? That is your decision.

If it is determined that you have to go in and change the system, there are five features, common to both bills, which we think are paramount, and which we think should be maintained.

Those are avoidance of new environmental restrictions. Retention of noncompetitive leasing—and Steve Smith will get into the difference between the two bills and how they do that. Reliance on oral bidding. Institution of a flat royalty rate. And elimination of post sale value determination.

Those are five common features to the bill which must be included in any legislative fix to the system.

I would be prepared to discuss any of those in more detail pursuant to your questions.

At this point I would like to ask Steve Smith to talk in more detail about the noncompetitive leasing aspect, which is of such vital importance to the independents.

Mr. SMITH. Mr. Chairman, thank you for the opportunity to address this Committee on a matter that is of vital importance to oil and gas producers all over, but particularly in the Rockies, where most of the Federal lands are.

I am going to focus my comments on the way these two bills treat the over the counter leasing system, which is a very workable system that has not been the source of the problems in our opinion, given—or excluding lands which were withdrawn from leasing, such as the Ft. Chaffee incident.

And we would agree that lands which have not been continuously available for leasing to the first qualified applicant should go through a competitive test, should one of these bills, or some combination, be instituted.

Just to take a look at each bill and how the main elements would work in this regard, S. 66 substitutes a minimum bid test for the geologic determination for which lands should be leased competitively.

Anything receiving a $20 an acre minimum bid would be leased competitively; anything that did not would fall to a noncompetitive tier which, as it has been explained to me, would include a simultaneous drawing phase, and anything that was not leased in that phase, would then revert to over-the-counter availability to the first qualified applicant.

This approach would result in less competitive leasing because of the $20 minimum bid, and would preserve a meaningful role for the SIMO, if that's the intent of the Congress.

S. 1388 substitutes what we could call a market test with a $1 per acre minimum bid. For all practical purposes, that would eliminate the SIMO. And then any lands not leased would be available for over-the-counter leasing to the first qualified applicant.

IPAMS does not take a position regarding which of these approaches is preferable. However, in the area of over-the-counter leasing, which is the procedure by which lands that have not been leased for oil and gas initially enter the leasing system on a first-come first-serve basis, by the payment of a filing fee and an advance rental.

IPAMS believes S. 1388 is preferable. 1388 would preserve the OTC system in its current form, without subjecting lands to an additional minimum bid test prior to issuance.

And a recent survey of our membership indicated that 72 percent of the respondents favored keeping OTC lands out of a competitive sale process, thus preserving continuous access to frontier exploration prospects.

It is these unexplored and remote areas where OTC leasing typically takes place that is the lifeblood of many independents who traditionally drill 90 percent of the Nation's wildcat wells.

It is also these wild and remote regions that often offer the greatest prospects for significant oil and gas discovery, particularly on shore.

Under the current system, upon termination of a lease, originally granted under the OTC phase, because each lease starts out at that phase, upon termination or expiration of that lease, the lands are offered in a simultaneous drawing, or, if they're in a KGS, they're offered in a competitive sale.

If the lands are not in a KGS, and therefore, offered SIMO, and they don't draw enough interest to receive even one application, then they become open and available to leasing again to the first qualified applicant.

If they're leased subsequent to that, they reenter the system, and upon termination or expiration of that lease, they again go through the test, that is, either the geologic KGS test, or the SIMO test, to see if they will either fall within a geologic KGS or receive SIMO application.

And thus, you have a complete leasing loop. Lands enter the system through the OTC. When they have been leased, they cannot be leased again OTC until they have been through a test, either a geologic test or a SIMO test, or both.

Under these proposed bills, they would go through either the minimum bid test or the market test.

The problem that we see with S. 66 in the OTC area is twofold. One is, forcing all newly applied for OTC lands through the minimum bid test prior to lease issuance as well as after expiration or termination of the initial lease.

So all OTC lands are going to go through the competitive test, but we believe the proper time is after the termination of expiration of the lease; and two, forcing lands back through the minimum bid test after they have already failed that test once upon lease expiration, possibly only after a little more than a year.

Forcing these lands through this extra competitive test over and above the test that they all will go through on expiration or termination destroys the complete loop of land availability by adding two additional minimum bid SIMO tests, which we believe all lands should go through upon termination or expiration.

Some of the reasons that OTC lands should not be subjected to these extra tests include the following.

One, the OTC system is a good workable system. It has not caused problems except in the case of lands that were not continuously available to the first qualified applicant, and this would include the Fort Chaffee type situations.

I think it is important to remember that the Amos Draw incident did not involve over-the-counter lands. It involves SIMO lands. These lands had already been leased at some point, and they had been withdrawn from leasing during a period prior to coming up on a simultaneous drawing.

So we would propose that lands which have not been continuously available for leasing would not be made available for leasing OTC until they had been through a competitive test, thus addressing the Fort Chaffee type problem.

Once leased, then they would be treated like all other lands, and have a test after the expiration or termination.

Number two, OTC lands are daily subject to a competitive test of a dollar per acre, with thousands of exploration companies and independents, although our numbers are somewhat reduced these days.

OTC lands are leased at the time they become worth a dollar an acre to someone, thus, never having the opportunity to sit open for years and become more valuable, as may be the case with withdrawn lands.

Three, subjecting the lands to an additional competitive test will hinder the strong incentive to lease Federal lands first which assembling exploration plays. These exploration plays, as has been mentioned earlier, necessitate large blocks of land to economically justify drilling the rank wildcat prospects.

And when there are open Federal lands, over-the-counter available lands, in one of these wild prospect areas, they are always the first to be leased. There is an incentive to be there first, and I believe this causes the leasing of possibly millions of more acres at times, because of that incentive to be there first.

And under the current system, if you want to put a block of leases together to justify drilling a well, you can go file applications on the Federal land, knowing that you have priority applications on those lands, and then proceed to make additional investment in intermingling B lands or State lands.

You can make an investment in other types of exploration costs, because you know that—you are assured that you have priority on those parcels, and if they issue, they will issue to you.

Senator BUMPERS. Mr. Chairman, I am going to have to leave. Would it be permissible to interrupt for one minute to ask one question?

Senator MELCHER. Certainly.

Senator BUMPERS. Well, make that two questions.

Let me ask you first of all, if you had a 1,000-acre tract of land that you thought might or might not have oil or gas under it, would you lease it to the first guy that offered you a dollar an acre?

Mr. SMITH. If I had as much as the Federal Government does, I would lease that land.

Senator BUMPERS. Can you answer that question, yes or no?

Mr. SMITH. I would make an evaluation as to whether I wanted to accept that. And if I thought that was an offer I wanted to accept——

Senator MELCHER. Do you own any land? Let us establish what the circumstances are. Do you own any land?

Mr. SMITH. Well, I own a lot of oil and gas leasehold interest.

Senator MELCHER. He is asking you as a landowner.

Mr. SMITH. No. Well, I own some land, but I do not really have any significant mineral rights in those lands.

Senator BUMPERS. The values change from time to time, do they not? For example, back in the forties and fifties, where I come from, land was ready to lease for $1 an acre, and I come from a poor area, and people were tickled to death to get $1 an acre.

In the 1970s that went up as high as $1,000 an acre bonus bid. Now it is back down to about $100.

Mr. SMITH. Well, that varies significantly.

Senator BUMPERS. That depends on what the market for oil and gas is. But under S. 1388, let me ask you this question.

You said that it would eliminate the Amos Draw type situation. And I am not so sure that is true. Let us take a case under S. 1388 where BLM puts up a 1,000-acre tract of land.

And it does not get a $20 bid, so it goes back to OTC, where it remains. And let us assume that it remains there for 10 years, and nobody has bid $1 an acre on it, so it is still just sitting in their inventory, available for OTC leasing.

And let us assume further that sometime during that 10- or 12-year period, that somebody makes a very significant find in the vicinity.

The value of that land might go up for leasing purposes to $1,000 an acre. But under S. 1388, because it had not been leased after it was put up for competitive bids, would still have to go for $1 an acre over the OTC counter.

Do you think that is fair?

Mr. SMITH. Well, there are a couple of things I would like to say.

One is, it is my understanding under S. 66 that if the land did not get a minimum bid, it would not go directly to OTC. At least, the implementation, as envisioned by the Department of the Interior, it would go to a SIMO.

Senator BUMPERS. No, under S. 66, it does go back to OTC.

Mr. SMITH. Does it not go through a SIMO? Or would it not require SIMO——

Senator BUMPERS. It depends on where it came from. It would depend on where it came from.

You heard the questions this morning. We have asked BLM to give us a definitive answer as to how they would do that. But right now, we will have to clean that up when we go to markup on that to make sure everybody is clear on that.

But if it came out of OTC, and it did not get a $20 bid, it would go back to OTC.

Mr. WONSTOLEN. Senator, I think there are two points to be made on the final question you put there.

The scenario you paint is extremely unlikely. No one goes out and drills a rank wildcat prospect with open, unleased Federal land surrounding them.

The leasing place are moving out 10, 20, 30, 100 miles away.

Senator BUMPERS. But that is precisely the Amos Draw case. They did drill Amos Draw with a lot of unleased land around.

Mr. WONSTOLEN. But that land was not continuously available. That land should have gone through some test before going into the noncompetitive tier; there is no question about that.

And both of your bills would provide for that. Your bill that passed last year provided for a transitional period similar to what would be an ongoing exemption in Senator Melcher's bill.

The other point is that the Secretary does have discretion under the law, in the very unlikely circumstance that you paint, to refuse to issue an inappropriate lease.

And that discretion has been upheld by the Supreme Court in the case of *Udall* v. *Tomlin*. I think that the very unlikely scenario you draw is not sufficient reason to disrupt the OTC system as it works very well today; that is our point.

Senator BUMPERS. Well, what we are trying to deal with here——

Senator MELCHER. Dale, yield to me at this moment, because you have been painting my bill with a broad stroke with the wrong paint.

Senate bill 1388 does not change that discretion of the Secretary. What you have been describing continuously has been somehow that there be some great potential in that the Secretary would be powerless to say, oh, well, that's over the counter, rather than stepping in prudently and saying, well, that would be an inappropriate lease; it obviously has more value than that; and then go back into using his own authority, go right back into competitive bidding.

Secondly, maybe we need to draw a line in the United States. But you have been describing $100 leases, per acre, as if it applies to our part of the world.

There are no $100-an-acre leases. There were no $100-an-acre leases when oil was up to $35 or $40 a barrel. If there were, we would not have any agricultural problem with landowners out there. They would all be sitting with great money in the bank, just forgetting about any farming or ranching operations.

They could lose a whole lot every year.

Mr. WONSTOLEN. Senator, another response to your question about would I or Steve lease 1,000 acres at $1. We are not in the position of the Federal Government.

You have millions and millions of acres at stake. Ninety percent of the revenues from the oil and gas leasing system come from royalties.

It is to the advantage of the Federal Government, as trust holders for the people of this country, to get those leases out, get them drilled and explored for, and get production established on those leases.

And I think it is appropriate in OTC areas to give those leases to the first person who wants to spend $1 for them. They are probably not worth a dollar.

But someone is out there with a geologic idea, and they are willing to put that dollar down. And I think we ought to encourage that, get those leases drilled, and get some production possibly on them that will help the domestic energy security of this Nation, and it will help the revenue stream from oil and gas leasing.

Senator BUMPERS. Why do you think not one State nor one private individual in this country sees it that way?

Mr. WONSTOLEN. Well, the States do not have minimum bids over $1. Their competitive systems are at $1 an acre, sir.

Senator BUMPERS. I say, why do you think they do not see it just in terms of royalty, in terms of bonus bids, or both?

Mr. WONSTOLEN. I think they see it in terms of both.

Senator BUMPERS. Why should we not?

Mr. WONSTOLEN. I think you should. I think you should design a system, if you are going to design one, that encourages getting those leases in the hands of people who will drill them and try to find some production.

And the fewer roadblocks you can put in place of that, the better.

Now the one-year recycle is a roadblock. That lease would have gone through a competitive test, failed to get the minimum bid, dropped back out in that year, and someone wants to go spend a dollar on it at the end of a year, it has got to run back through a test, maybe 90 days away, 6 months away, whatever.

His geologic idea is exposed to scrutiny. It is just going to backlog the system, disrupt the way the industry is going to get those leases drilled.

Senator BUMPERS. I want to clarify one thing about Senator Melcher's bill, because I may be wrong about this, John.

But I was under the impression that once OTC land is put up competitive, and does not receive a $20 bid, it goes back into the OTC inventory

Mr. WONSTOLEN. Senator Melcher's bill, it would be a $1 bid.

Senator BUMPERS. Well, yes, $1 under his bill. It goes back to the OTC inventory, where it may not be let competitively again until it has been leased under the OTC system.

Mr. WONSTOLEN. Well, there is a difference in terms here. What you are saying is, it may not go through the competitive test that is established in these bills. But our position is, it is undergoing daily competition at that point.

It is out there for the first taker at $1 an acre. The competitive aspect is, when is someone willing to pay that dollar. That is a competitive event.

Senator BUMPERS. Well, now using the scenario I gave you a moment ago, if somebody found a significant find in the area, it would be worth $1 an acre then, would it not?

Mr. WONSTOLEN. If someone found a significant find, most likely the Federal lands for a 100-mile radius have already been leased up years in advance.

Senator BUMPERS. A hundred mile radius?

Mr. WONSTOLEN. That is very possible.

Senator BUMPERS. Are you telling me someone wouldn't drill a well unless they had everything leased within 100 miles?

Mr. WONSTOLEN. I am not saying that individual would not. But there are other players in there who would have gone out well in advance of that well being drilled and taken a chance on some of that very rank acreage, quite a long distance away.

Now, maybe not 100 miles today, with the state of the industry, and the contracting lease inventory.

Senator BUMPERS. My point is very simple, and I just want this clarified for my own edification.

In the hypothetical case I gave you a moment ago, if there is a significant find, and this land has not been leased, or it is still in the OTC inventory, it may not be let competitively, I do not care if the wells are drilled right next to it, it cannot be let competitively; is that not correct?

Mr. WONSTOLEN. I think that—I am not sure that is correct. Because the Secretary does have residual discretion under the act.

Senator BUMPERS. But I am just saying that under Senator Melcher's bill, he does not have that discretion.

Mr. WONSTOLEN. I am not sure Senator Melcher's bill takes away that discretion.

Senator BUMPERS. Well, that is the way we read it, and that is the reason we have these hearings.

Senator MELCHER. Let the author clarify it, if I can.

We do not change anything, in 1388, the discretionary authority of the Secretary.

Senator BUMPERS. Are you telling me that the Secretary could then lease that land competitively, even though it had not been through the OTC leasing system?

Senator MELCHER. Yes, if the circumstances warranted, he could. Because we have not changed his discretionary authority, where he would find that a lease was not—simply was not appropriate.

He would still retain that authority. Now, that is the way I read it.

Mr. WONSTOLEN. You may wish to have the solicitor for the Interior Department confirm that question for you.

Senator BUMPERS. Well, it is certainly a point worth clarifying. I will say that. Because it has been my impression all along, that once under Senator Melcher's bill—and there are some things I like about his bill better than I do mine.

Mr. WONSTOLEN. I think you are right, in the general case.

Senator MELCHER. What my bill does not do, and it does this very deliberately, it does not set up a weird procedure that is complicated to allow this BLM and this Department of Interior and probably the same under any admninistration, to have to jump through the hoops to get that land leased.

Now, that is what it does not do. But it does not change the Secretary's discretion in refusing to lease, because there are overriding reasons why he should not lease.

One thing, Dale, I would want to answer your question as a landowner, because I earlier did it for Burford, and used him for the sounding board.

APPENDIXES

APPENDIX I

Responses to Additional Committee Questions

SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION
HEARING ON S. 1388 and S. 66
June 30, 1987

ADDITIONAL QUESTIONS FROM SENATOR MELCHER
TO THE DEPARTMENT OF THE INTERIOR

1. Q. The Administration's views on S. 66, dated May 14, 1987, state that S. 66 would encourage oil and gas exploration and development on federal lands. Do you believe that S. 1388 would do so as well?

A. Both S. 66 and S. 1388 should encourage exploration and development. Both bills make land available through competitive and noncompetitive leasing. S. 66 will keep more land under lease and may result in more exploration, development, output and royalty and rental income because while providing sufficient competition to capture valuable tracts it also provides the broadest noncompetitive outlets for speculative new frontier leasing.

Senator Melcher

2. Q. Do you support a ten-year lease term for all federal onshore oil and gas leases?

A. There are arguments for both 5 and 10 year lease terms. The short term favors circulation of acreage at the expense of less time for development, play building and administrative costs. Longer terms do the reverse. We have generally favored longer terms except where prospects are quite certain.

Senator Melcher

3. Q. What discretion does the Secretary have under existing law to deny the issuance of a lease?

   o What discretion would the Secretary have to deny the issuance of a lease under S.66?

   o What discretion would the Secretary have to deny the issuance of a lease under S. 1388?

   A. Under both S. 66 and S. 1388 the Secretary has discretion to not lease. The discretion is generally provided in the Mineral Leasing Act of 1920 and the Federal Land Policy and Management Act. The discretion is limited only by the need to not be capricious. Generally, denial of any leasing issuance that would result in unacceptable environmental impacts or unduly restrict other needed land uses is easily defended.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY, et al., *Plaintiffs,* *v.* JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, et al., *Defendants*,	Civ. No.: 2:21-cv-00778-TAD-KK Judge: Terry A. Doughty Mag. Judge: Kathleen Kay

[PROPOSED] ORDER

The Motion for Leave to File Brief of *Amici Curiae* by Healthy Gulf, Center for Biological Diversity, Cook Inletkeeper, Defenders of Wildlife, Friends of the Earth, Natural Resources Defense Council, Oceana, Sierra Club, and The Wilderness Society, regarding Plaintiffs' motion for summary judgment and Defendants' cross-motion for summary judgment, is GRANTED. The proposed brief and supporting exhibits, which accompanied the motion for leave, shall be deemed to have been filed and served by ECF on the date of this Order.

Dated: ________________________

____
TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE