**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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|---|---|---|
| DAKOTA RESOURCE COUNCIL, *et al*. | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. 1:22-cv-01853-CRC |
| | ) | |
| U.S. DEPARTMENT OF THE INTERIOR, *et al*., | ) | |
| | ) | |
| Federal Defendants, | ) | |
| and | ) | |
| | ) | |
| STATE OF NORTH DAKOTA, *et al*., | ) | |
| | ) | |
| Intervenor Defendants. | ) | |

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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## GLOSSARY OF TERMS

| | |
|---|---|
| APD | Application for Permit to Drill |
| BLM | Bureau of Land Management |
| BLM Handbook | BLM's Land Use Planning Handbook (H-1601-1) |
| CEQ | Council on Environmental Quality |
| $CO_2$ | Carbon Dioxide |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| EPA | Environmental Protection Agency |
| FLPMA | Federal Land Policy and Management Act |
| FONSI | Finding of No Significant Impact |
| GHG | Greenhouse Gas |
| $GtCO_2e$ | Gigaton of Carbon Dioxide Equivalent Emissions |
| IPCC | Intergovernmental Panel on Climate Change |
| $MtCO_2e$ | Megatonne of Carbon Dioxide Equivalent Emissions |
| NEPA | National Environmental Policy Act |
| RFDS | Reasonably Foreseeable Development Scenario |
| RMP | Resource Management Plan |
| SCC | Social Cost of Carbon |
| SC-GHG | Social Cost of Greenhouse Gases |

## INTRODUCTION

Humanity and the world are at an inflection point. After decades of idleness and insufficient action, the remaining window to avert the worst impacts of the climate crisis is rapidly closing. As President Biden articulated clearly:

> The United States and the world face a profound climate crisis. We have a narrow moment to pursue action at home and abroad in order to avoid the most catastrophic impacts of that crisis and to seize the opportunity that tackling climate change presents . . . Together, we must listen to science and meet the moment.

Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021). Despite widespread recognition of the scientific consensus, federal action has been slow to catch up to federal rhetoric. Shortly after the President's call for a "pause" on federal oil and gas leasing to allow for a "comprehensive review and reconsideration" of the federal oil and gas program, including "potential climate" impacts, a district court order purporting to enjoin the "pause" led the Bureau of Land Management ("BLM") to hastily announce its intention to resume federal oil and gas leasing. *See Louisiana v. Biden*, 543 F. Supp. 3d 388, 410 (W.D. La. 2021). Following an equally hurried environmental review, BLM held six lease sales between June 29 and 30 of 2022 that Plaintiff Conservation Groups now challenge.

Despite having acknowledged the scientific consensus, the urgency of the climate crisis, and the need to rapidly end reliance on fossil fuels, the government nonetheless chose to proceed with oil and gas leasing without ever completing a "comprehensive review" of the federal oil and gas program. Interior's answer to Executive Order 14008's assignment was a 14-page report that amounted to little more than a cursory recapitulation of the need for a slate of fiscal and regulatory reforms other government entities have been calling out for nearly a half-century. The Report did not discuss climate change impacts from the federal program and does not constitute

a "comprehensive review" much less the "reconsideration" called for by Executive Order 14008. Of import to the current litigation, BLM declined to utilize its evolving consideration of climate impacts in a manner that resulted in a hard look or a defined threshold of significance for climate change impacts from the challenged lease sales either individually or collectively. Thus, BLM's approach, while aided by the availability of improved tools and analysis, suffers from many of the same defects that have characterized its climate analyses in the past.

BLM's analysis and consideration of the six lease sales challenged here—despite being initiated as the result of a unified decision and clear direction from BLM and Interior leadership, were conducted according to virtually identical administrative schedules, and were held over the same 48-hour period—were advanced as isolated decisions, reflecting a troubling inability to see the forest for the trees. Despite its difficulties analyzing climate change impacts at the level of the individual lease sales, BLM arbitrarily refused to analyze the sales collectively, gave only a nod to their potential cumulative impacts, and ultimately professed itself unable to determine whether the sales would significantly impact the environment. BLM nonetheless issued Findings of no Significant Impact ("FONSIs") for each sale, a decision clearly at odds with the record before it. Such an analysis satisfies neither the requirement that BLM "look before it leap" nor its statutory imprimatur to prevent unnecessary and undue degradation of public lands. For these reasons, BLM's FONSIs were arbitrary and capricious, and the decisions should be remanded back to the agency for an appropriate analysis, which should include preparation of an Environmental Impact Statement ("EIS") analyzing all six challenged lease sales.

## BACKGROUND

### I. THE CLIMATE CRISIS

The scientific consensus is clear: as a result of greenhouse gas ("GHG") emissions, our climate is rapidly destabilizing with potentially catastrophic results, including rising seas, more

extreme heatwaves, increased drought and flooding, larger and more devastating wildfires and hurricanes, and other destructive changes. HQ1882. It is conclusively established that GHG emissions from the production and combustion of fossil fuels are the predominant drivers of climate change, a scientific fact which BLM acknowledges. HQ1878 ("industrialization and the burning of carbon-based fossil fuel sources have caused $CO_2$ concentrations to increase measurably, from approximately 280 ppm in 1750 to 413.67 ppm as of March 2020.") Carbon dioxide ("$CO_2$") is the leading cause of climate change and represents the majority of U.S. GHG emissions. Data from the U.S. Environmental Protection Agency ("EPA") indicates that fossil fuel combustion in 2018 increased to 5,031.8 million metric tons ("MMT") of carbon dioxide equivalent ("$CO_2e$")[1] emissions, a 6.2% increase from 1990 levels. MT22106. In 2018, $CO_2$ comprised 81.3% of total U.S. GHG emissions, or over 5 billion metric tons. MT22012; MT22106. In the United States, "80 percent of the energy used in 2018 was produced through combustion of fossil fuels such as petroleum, natural gas, and coal." MT22108. Although emissions declined at the beginning of the COVID-19 pandemic due primarily to decreased travel and transportation, they have since rebounded. HQ1861.

Methane ("$CH_4$") is an extremely potent GHG, with a global warming potential 88 times that of $CO_2$ over a 20-year period. HQ1825. Over a 100-year period, methane has a climate impact 36 times greater than that of $CO_2$ on a ton-for-ton basis. *Id*. Large amounts of methane are released during the extraction, processing, transportation, and delivery of oil and gas, with significant climate impacts. HQ1822.

The Intergovernmental Panel on Climate Change ("IPCC") is a Nobel Prize- winning

[1] "Carbon dioxide equivalent" or "$CO_2e$" is a "method to express the impact of each different greenhouse gas (methane, nitrous oxide, etc.) in terms of the equivalent amount of $CO_2$ emissions that would create the same amount of warming of the atmosphere." HQ1911.

scientific body within the United Nations that reviews and assesses the most recent scientific, technical, and socio-economic information relevant to our understanding of climate change. As part of its 2022 Sixth Assessment Report, Impacts, Adaptation and Vulnerability, the IPCC confirmed that climate change is not simply a future threat, but that "[w]idespread, pervasive impacts to ecosystems, people, settlements, and infrastructure" are already being seen globally, and "[t]he rise in weather and climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt." MT84963-64.

As BLM acknowledges, the IPCC's warns: "[w]arming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentration of greenhouse gases have increased." HQ1881. BLM also recognizes that the National Climate Assessment ("NCA") provides region specific impact assessments for climate change, that each region has experienced increasing temperatures, and that the largest changes were in the western United States. HQ1882; *see also, e.g.*, MT17677 (warming by region); MT17705 (precipitation by region). BLM also predicts future climate impacts at a state-level based on various emission scenarios. HQ1883-90. Further, BLM concedes, in reliance on the IPCC and NCA, that "[c]urrent ongoing global climate change is caused, in large part, by the atmospheric buildup of GHGs," which include "$CO_2$, $CH_4$, $N_2O$, and fluorinated gases." HQ1878.

The NCA explains that, in the Southwestern U.S., which includes Colorado, New Mexico, and Utah, "increased warming, drought, and insect outbreaks, all caused by or linked to climate change, have increased wildfires and impacts to people and ecosystems." MT7882. For example, hotter temperatures have already contributed to reductions in snowpack, amplifying

drought conditions in the Colorado River Basin, the Rio Grande, and other critical watersheds. MT7884. For the northern Great Plains, which includes Wyoming, Montana, and North Dakota, the NCA found that "communities that are already the most vulnerable to weather and climate extremes will be stressed even further by more frequent extreme events occurring within an already highly variable climate system." MT7861.

BLM recognizes that "[g]lobal fossil $CO_2$ emissions were estimated at 38,000 Mt[2] for 2019" with increases in $CO_2$ emissions being attributable to fossil fuel use in industrial processes and combustion. HQ1861. The agency further acknowledges the "general consensus among climate scientists that to limit global temperature rise to 1.5°C and avoid serious climate changes, global emissions must drop to 25,000 Mt by 2030." *Id*. BLM also knows that global energy related $CO_2$ emissions are projected to increase through 2050 from about 35 billion MT $CO_2$ to about 43 billion MT, and that 82% of total U.S. emissions are due to energy production and use from fossil fuels. HQ1864.

## II. THE FEDERAL FOSSIL FUEL PROGRAM

All of the leasing authorizations challenged herein are a subset of what BLM refers to as its "Federal Oil and Gas Leasing Program." HQ4016. NEPA's implementing regulations[3] refer to a "program" as "a group of concerted actions to implement a specific policy or plan; systematic

[2] BLM generally quantifies emissions in megatonnes ("Mt"), which is the equivalent to one million metric tons (MMT). HQ1808; HQ1913.

[3] On July 16, 2020, the White House Council on Environmental Quality ("CEQ") published in the Federal Register a final rule to revise the NEPA regulations (the "2020 Rule"), which went into effect on September 14, 2020. On April 16, 2021, Secretarial Order 3399 provided that the 2020 rule should be temporarily held in abeyance pending reconsideration and possible additional rulemaking by CEQ. Sec. 5 of Secretarial Order provided that "Bureaus/Offices will not apply the 2020 Rule in a manner that would change the application or level of NEPA that would have been applied to a proposed action before the 2020 Rule went into effect on September 14, 2020. Therefore, all references to the CEQ regulations in Plaintiffs brief are to the 2005 regulations unless explicitly noted otherwise.

and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.18(b)(3). BLM is responsible for the management of nearly 700 million acres of federal onshore subsurface minerals. HQ4019. BLM-managed lands contained 37,496 individual oil and gas lease parcels, covering 26.6 million acres of public lands, on which nearly 96,100 active producible oil and gas wells are drilled. *Id*. Oil and gas from public lands administered under this program "accounts for approximately seven percent of domestically produced oil and eight percent of domestically produced natural gas." *Id.*

BLM's Oil and Gas Leasing Program contributes vast amounts of GHG emissions to the atmosphere, posing a threat to our climate, the natural environment, and public health. As of fiscal year 2020, federal onshore oil and gas leases contributed annual emissions totaling 427.65 $MtCO_2e$. HQ1808. BLM administered lands are responsible for 14% of total U.S. GHG emissions, 1.6% of global emissions, and nearly 20% of all emissions in the U.S. from fossil fuel production. HQ1870. With respect to carbon dioxide, emissions from fossil fuels produced on federal lands represent a quarter of all $CO_2$ emissions. WY516541.

## III. LEGAL FRAMEWORK

### A. The Federal Land Policy and Management Act

The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq*., instructs the Secretary of the U.S. Department of the Interior to "manage the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). "Multiple use" means "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." 43 U.S.C. § 1702(c). In carrying out this directive, BLM is to prevent

"permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output." *Id.*

FLPMA moreover requires that: "public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8). FLPMA thus directs that BLM not elevate the development of oil and gas resources above other critical resource values in the planning area. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 710 (10th Cir. 2009) ("[d]evelopment is a *possible* use, which BLM must weigh against other possible uses—including conservation to protect environmental values[.]"). Instead, FLPMA requires that where oil and gas development would threaten the quality of critical resources, conservation of these resources should be the preeminent goal. 43 U.S.C. §§ 1702(c), 1712(c)(3). BLM is also required to "take any action necessary to prevent unnecessary or undue degradation of the lands" and to "minimize adverse impacts on the natural, environmental, scientific, cultural, and other resources and values (including fish and wildlife habitat) of the public lands involved." *Id.* § 1732(b), (d)(2)(A).

**B. The National Environmental Policy Act**

NEPA is our "basic national charter for the protection of the environment." 40 C.F.R. § 1500.1. Through NEPA, Congress recognized that "each person should enjoy a healthful environment," and that the federal government must "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences," among other policies. 42 U.S.C. § 4331(b)(3), (c). NEPA's purpose is, in part, to "promote efforts which will prevent or eliminate damage to the environment and

biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321.

NEPA achieves its purpose through "action-forcing procedures…requir[ing] that agencies take a hard look at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations omitted). Federal agencies must comply with NEPA *before* making "any irreversible and irretrievable commitments of resources." 42 U.S.C. § 4332(2)(C)(v); *see also* 40 C.F.R. §§ 1501.2, 1502.5(a); *350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022) (agencies must "look *before* they leap"). Additionally, federal agencies must "recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." 42 U.S.C. § 4332(2)(F).

To accomplish these goals, NEPA requires federal agencies to prepare a "detailed statement" regarding all "major [f]ederal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). This EIS must, among other things, describe the "environmental impact of the proposed action." *Id.* To determine whether a proposed action significantly affects the environment, and whether an EIS is required, regulations promulgated by CEQ provide for preparation of an EA. Based on the EA, a federal agency either concludes its analysis with a FONSI, or the agency goes on to prepare a full EIS. 40 C.F.R. § 1501.4. "If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal citations omitted). "The statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential

environmental impact of a project." *Id.*; *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

## IV. THE FEDERAL OIL AND GAS LEASING PROCESS

Oil and gas development is just one of the multiple uses managed in accordance with FLPMA. BLM manages onshore oil and gas leasing and development through a three-phase process of planning, leasing, and drilling. Each phase serves a distinct purpose, and is subject to unique rules, policies, and procedures, though the three phases, ultimately, must ensure "orderly and efficient" development. 43 C.F.R. § 3160.0-4. In the first phase, BLM prepares a broad-scale resource management plan ("RMP") in accordance with FLPMA, NEPA, and associated planning regulations, 43 C.F.R. §§ 1600 *et seq*., with additional guidance from BLM's Land Use Planning Handbook (H-1601-1). Through the RMP, BLM predicts the extent to which different activities, if permitted, would foreseeably occur. For fluid minerals, this process determines which lands containing federal minerals will be open to leasing and under what conditions.

In the second phase, at issue in this case, BLM accepts the nomination of lease parcels from the lands made available for mineral leasing through the RMP, and sells oil and gas development rights for particular lands, in accordance with 43 C.F.R. §§ 3120 *et seq*., with additional agency guidance outlined in BLM Instruction Memoranda. Prior to a BLM lease sale, BLM has the authority to subject leases to terms and conditions, which can serve as "stipulations" to protect the environment. 43 C.F.R. § 3101.1-3. BLM also has authority to refuse to lease public lands, even if such lands were made available for leasing pursuant to an RMP. *See Udall v. Tallman*, 380 U.S. 1, 4 (1965). Oil and gas leases confer "the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold." *Id*. Because the sale of an oil and gas lease represents an "irreversible and irretrievable commitment of resources," BLM must comply with NEPA prior to

selling a lease. *Sierra Club v. Peterson*, 717 F.2d 1409, 1412 (D.C. Cir. 1983).

The third phase occurs when the lessee applies for a permit to drill to develop the lease. 43 C.F.R. § 3162.3-1(c). At this stage, BLM may condition approval of the permit (referred to as an application for permit to drill, or "APD") on the lessees' adoption of "reasonable measures" whose scope is delimited by the lease and the lessees' surface use rights. 43 C.F.R. § 3101.1-2.

## V. PROCEDURAL HISTORY

### A. Executive Order 14008 and Associated Litigation

On January 20, 2021, within days of President Biden taking office, Interior suspended the authority of the BLM to take action to implement the Oil and Gas Leasing Program, including actions to issue onshore or offshore fossil fuel authorizations.[4] One week later, on January 27, 2021, President Biden issued Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*, acknowledging that "the United States and the world face a profound climate crisis." HQ32. Section 208 directed Interior to "pause" new oil and gas leases under the Program:

> pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices in light of the Secretary of the Interior's broad stewardship responsibilities over the public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters. HQ37.

The first lawsuit challenging the Section 208 leasing "pause" was filed on the same day as the Order, January 27, 2021.[5] On February 12, 2021, Interior's acting Solicitor issued an

[4] Secretarial Order No. 3395, Temporary Suspension of Delegated Authority, available at https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3395-signed.pdf.

[5] *Western Energy Alliance (WEA) v. Biden*, 0:21-cv-00013-SWS (D. Wyo., filed Jan. 27, 2021). Four subsequent suits were eventually filed. Those cases are, in order of filing, *State of Wyoming v. U.S. Department of Interior*, 0:21-cv-00056-SWS (D. Wyo., filed March 24, 2021) (now consolidated with *WEA v. Biden*); *Louisiana v. Biden*, 2:21-cv-00778 (W. D. La., filed March 24, 2021); *State of North Dakota v. U.S. Department of Interior*, 1:21-cv-00148-DMT-CRH (D. ND, filed July 7, 2021); and *American Petroleum Institute (API) v. U.S. Department of Interior*, 2:21-cv-02506- TAD-KK (W. D. La., filed Aug. 16, 2021).

opinion on BLM's first quarter lease sales in Colorado, Montana/Dakotas, Utah, and Wyoming, recommending that the sales be postponed because "[e]ach sale raises serious questions as to NEPA compliance." HQ4442.

On April 21, 2021, BLM announced that it was "exercising its discretion to not hold lease sales in the 2nd quarter of Calendar Year 2021" due to Interior's "ongoing review of the federal oil and gas program in assessing compliance with applicable laws and, as directed by Executive Order 14008, reviewing whether the current leasing process provides taxpayers with a fair return."[6] On June 15, 2021, the District Court for the Western District of Louisiana issued a nationwide preliminary injunction forestalling implementation of the lease pause contemplated by Executive Order 14008. *Louisiana v. Biden*, 543 F. Supp. 3d at 410. The *Louisiana* court, importantly, did not preclude the possibility of lease sale postponements due to NEPA or other environmental concerns with a particular sale. *Id*.

In response, Interior ordered BLM to resume its implementation of the Program, beginning with the lease parcels that were deferred in the first and second quarters of 2021 and posting NEPA documents by October 2021. HQ60; HQ62. In its resumption of leasing, BLM emphasized that it was "exercis[ing] the authority and discretion provided under the law to conduct leasing in a manner that fulfills Interior's legal responsibilities, including taking into account the program's documented deficiencies." HQ60; HQ62. At the same time, Interior said it would "review the programs' noted shortcomings, including completing a report," and committed to "undertake a programmatic analysis to address what changes in the Department's programs may be necessary to meet the President's targets of cutting greenhouse gas emissions in half by 2030 and achieving net zero greenhouse gas emissions by 2050." HQ61.

[6] *See* https://www.blm.gov/press-release/statement-second-quarter-oil-and-gas-lease-sales

Interior resumed leasing under its Program without completing the promised programmatic analysis. Instead, as directed by Interior, BLM restarted the Program through the posting of individual scoping notices for each sale on August 31, 2021. HQ62; *see, e.g.,* WY400024. Many of the Plaintiff groups submitted scoping comments for each of the proposed lease sales on October 1, 2021. *See*, *e.g.*, WY424904. BLM thereafter posted draft EAs and unsigned FONSIs for comment on November 1, 2021. *See*, e.g., WY425332; WY425560 (the "November 2021 draft EAs").

The November 2021 draft EAs incorporated by reference, for the first time, BLM's "2020 BLM Specialist Report on Annual Greenhouse Gas Emissions and Climate Trends from Coal, Oil, and Gas Exploration and Development on the Federal Mineral Estate (the "Specialist Report"). HQ1806-1918. Designed to be updated annually, the Specialist Report provides both short- and long-term emissions estimates based on projected development, and "serves as a tool to track the evolution of climate science and policy in order to provide decision makers with the best available data to implement management strategies consistent with regulatory requirements." HQ1812. The Specialist Report is not intended to "take the place of an analysis and disclosure of emissions at the project level that may be completed for NEPA analysis specific to a decision to lease or authorize development," but instead is intended to serve as a "tool for evaluating the cumulative impacts of GHG emissions from fossil fuel energy leasing and development authorizations on the federal onshore mineral estate." HQ1813; HQ1808. Members of Plaintiff groups submitted comments on the November 2021 draft EAs and unsigned FONSIs between December 8 and 10, 2021. CO97036; MT82414.

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### B. The November 2021 Report on Federal Oil and Gas Leasing Program

On November 26, 2021, also known as "Black Friday," Interior quietly released its much anticipated "Report on the Federal Oil and Gas Leasing Program Prepared in Response to Executive Order 14008" (the "Federal Oil and Gas Program Report" or "Report"), which acknowledged "significant shortcomings" in the Program. HQ4016-HQ4033; HQ4012. Interior characterized the Report as "complet[ing] the review of the federal oil and gas programs called for in Executive Order 14008." HQ4012. While the Report recommended a number of fiscal reforms, it failed to provide any analysis of the Program's climate impacts and—despite purporting to complete the review called for in Executive Order 14008—did not include a "programmatic analysis to address what changes in the Department's programs may be necessary to meet the President's targets of cutting greenhouse gas emissions in half by 2030 and achieving net zero greenhouse gas emissions by 2050," as Interior had committed. HQ61. Notably, the Federal Oil and Gas Program Report included no discussion of climate change or of cutting GHG emissions, a disconnect made even more apparent by the Specialist Report—released a month prior—which disclosed the vast quantities of GHG emissions emanating from BLM's Oil and Gas Program.

### C. The Leases Challenged Here

On April 15, 2022, Interior announced its decision to "tak[e] action" called for in the Federal Oil and Gas Program Report and "in compliance with the injunction from the Western District of Louisiana" to proceed with "significantly reformed onshore lease sales that prioritize the American people's interests in public lands and moves forward with addressing deficiencies in the federal oil and gas leasing program." WY480728. In its announcement, Interior acknowledged that the "United States faces an urgent need to reduce greenhouse gas (GHG)

emissions and accelerate its transition to a clean energy economy. The Interior Department has a central role and responsibility in meeting these challenges." WY480729. Incongruously, on April 18, 2022, BLM posted EAs and unsigned FONSIs for protest, along with sale notices for the challenged lease sales.

Conservation Groups filed timely protests with each BLM state office on May 18, 2022. CO119254; MT94488; NMO63; NMP63; NV57215; WY485211. On June 28, 2022, BLM posted the final EA, signed FONSI, and protest response for the Wyoming lease sale.[7] BLM posted final EAs,[8] signed FONSIs,[9] and protest responses[10] for the lease sales in Colorado, Montana/North Dakota, New Mexico/Oklahoma, and Nevada on June 29, 2022.[11]

Each EA discloses estimated GHG emissions individually from the relevant lease sale and relies on the Specialist Report for its disclosure of cumulative GHG emissions. The EAs also disclose the range of potential social cost of GHG ("SC-GHG") damages. BLM did not provide a cumulative tally of the predicted GHG emissions or SC-GHG costs collectively for all of the six lease sales, leaving that arithmetic to the reader. BLM made this task more difficult, however, because it lacked consistency in how it displayed the units of measurement it employed: some EAs used metric tonnes, while others quantified emissions in megatonnes. Some offices, such as Wyoming, used both. WY485717; WY485720. More problematically, the offices used different symbols to denote the same unit of measurement within the same EA. For example, Wyoming expressed emissions in megatonnes using the symbols MT and Mt, engendering confusion as to

[7] WY485685; WY485956; WY485532.
[8] CO115344; MT94893; NMO18520; NMP59599; NV70321; WY485685.
[9] CO115339; MT95443; NMO18513; NMP59587; NV70309; WY485956.
[10] CO119390; MT95495; NMO20; NMO56; NMP20; NMP56; NV70507; WY485532.
[11] On June 29, 2022, BLM's Utah State Office withdrew the parcel proposed to be offered for lease in Utah in response to a protest filed by Southern Utah Wilderness Alliance. No Utah parcels were offered as part of the June 2022 lease sales.

what unit was being used. WY485720.[12] The difference in these units is meaningful, as a megatonne is equivalent to one million metric tons, but it is left to the reader to ascertain what was intended. Assuming the GHG emissions quantified in each EA were disclosed in the same unit of measurement, all told, the lease sales are predicted to add 35.096 *megatonnes* of carbon dioxide equivalent ("$MtCO_2e$") emissions to the atmosphere, resulting estimated environmental harm between $416 million and $4.7 *billion*. *See* Table 1.

**Table 1**

| **June 2022 Lease Sale** | **$MtCO_2e$[13]** | **SC-GHG[14]** |
|---|---|---|
| Colorado | 2.53 | $33,869,000 to $360,607,000 |
| Montana-Dakotas | 0.943 | $11,445,000 to $131,626,000. |
| New Mexico – OK Field Office | 0.173 | $2,350,000 to $25,031,000 |
| New Mexico – Pecos Field Office | 0.653 | $9,222,000 to $97,767,000 |
| Nevada | 0.13 | $1,616,000 to $8,541,000 |
| Wyoming | 30.667 | $357,602,000 to $4,116,251,000 |
| **TOTAL** | **35.096** | **$416,104,000 to $4,739,823,000** |

## STANDARD OF REVIEW

Agency compliance with NEPA and FLPMA is judicially reviewed pursuant to the Administrative Procedure Act, and is set aside if agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[I]n making the factual inquiry concerning whether an agency decision was 'arbitrary or capricious,' the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Marsh v. Oregon Nat. Res. Council,* 490 U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971)). The Court further considers "whether the agency acted within the

[12] *Compare* MT94932 (EA using 0.943 Mt) with MT95447 (FONSI using 0.943 MT); NM18520 (EA using 0.173 Mt) with NM18515 (FONSI using 0.173 MT); NMP059682 (EA using 0.653 Mt) with NMP59590 (FONSI using 0.653 MT).
[13] CO115390; MT94932; NMO18556; NMP59682; NV70355; WY485720.
[14] CO115391; MT94936; NMO18558; NMP59684; NV70357; WY485724.

scope of its legal authority, whether the agency has explained its decision, [and] whether the facts on which the agency purports to have relied have some basis in the record…." *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995); *see also Volpe*, 401 U.S. at 415-16. "Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record … even though the Court does not employ the standard of review set forth in Rule 56, Fed. R. Civ. P." *Id.* (citing *Richards v. I.N.S.*, 554 F.2d 1173, 1177 n.228 (D.C. Cir. 1977)).

## ARGUMENT

### I. PLAINTIFFS HAVE STANDING

Conservation Groups have standing to bring this action. Standing under Article III of the Constitution requires plaintiffs to show that: (1) they have suffered an "injury in fact" due to defendants' allegedly illegal conduct, (2) which can fairly be traced to the challenged conduct of the defendants, and (3) which can be redressed by a favorable decision. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 923-924 (D.C. Cir. 2008); *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000). The Court need only find standing for one plaintiff, and an organizational plaintiff must show that it or one of its members suffers injury in fact from the challenged agency action. See *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990). "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183-184 (citations omitted). Actual environmental harm from complained-of activity need not be shown, as "reasonable concerns" that harm will occur are enough. *Id*.

Here, Conservation Groups meet this standard. Conservation Groups' members are

directly harmed from BLM's unlawful authorizations and issuance of the subject oil and gas leases. Conservation Groups' members have extensively visited and recreated in the proximity of the lease tracts, and they have plans to continue to do so regularly. *See, e.g.*, Declarations of Stephenie Ambrose Tubbs ¶ 6; Patrick Donnelly ¶ 19; Michael Downey ¶ 11; Donald Jones ¶¶ 9, 14; Erik Molvar ¶¶ 7-16; Jeremy Nichols ¶¶ 17-22; Marnie Piehl ¶¶ 4-9; Barbara Vasquez ¶ 12; John Weisheit ¶¶ 12-15, 18-19; Connie Wilbert ¶¶ 12-16. Lands on and in the vicinity of the lease parcels are also culturally and spiritually important to Conservation Groups' members. *See e.g*. Deville Decl. ¶¶ 5-6; Donnelly Decl. ¶ 19; Molvar Decl. ¶ 6. Many of Conservation Groups' members also use public lands, including those in the areas of the challenged lease sales, for professional purposes. *See*, Ambrose Tubbs Decl. ¶ 6; Donnelly Decl. ¶ 10, 21; Downey Decl. ¶¶ 8, 12-14 Declaration of Derf Johnson ¶¶ 5, 9; Declaration of James Kleinert, ¶¶ 4, 11; Molvar Decl. ¶¶ 6, 7, 10; Declaration of Daniel Timmons ¶ 12; Weisheit Decl. ¶ 10. On their recreational visits, Conservation Groups' members have enjoyed the aesthetic and recreational qualities of the lease sale areas by hiking and appreciating the area's remoteness and open skies, photographing and viewing wildlife, and hunting. *See, e.g*., Downey Decl. ¶¶ 8-11; Jones Decl. ¶ 14; Molvar Decl. ¶¶ 13-15; Nichols Decl. ¶¶ 18-22; Timmons Decl. ¶ 24; Vasquez Decl. ¶ 12; Wilbert Decl. ¶¶ 12-16. Conservation Groups' members have observed the effects of existing oil and gas development already occurring on public lands they recreate on, including around the challenged leases, including spills, dead animals, impacted habitat and air pollution. Deville Decl. ¶¶ 7-8; Downey Decl. ¶ 15, Molvar Decl. ¶¶ 19-21; Timmons Decl. ¶¶ 17, 24; Vasquez Decl. ¶ 9; Weisheit Decl. ¶ 21. Development of the challenged leases will degrade air quality in the areas used by Conservation Groups' members, and result in harm to the landscapes, resources, and wildlife enjoyed and visited by Conservation Groups' members, ultimately

reducing their enjoyment of these areas and likelihood of returning in the future. *See e.g.*, Ambrose Tubbs Decl. ¶ 11; Donnelly Decl. ¶ 25; Johnson Decl. ¶ 7; Jones Decl. ¶15; Kleinert Decl. ¶ 12; Peihl Decl. ¶ 9; Wilbert Decl. ¶18.

Conservation Groups' members' injuries can be traced to BLM's authorizations of the leases challenged here. Lease development will degrade air quality by producing increased levels of $PM_{10}$, $NO_2$, and ozone. BLM's authorizations will also result in reasonably foreseeable increases in GHG emissions, which contribute to climate change impacts about which Conservation Groups' members are concerned. *See e.g.*, Deville Decl. ¶ 16, Johnson Decl. ¶ 10; Kleinert Decl. ¶¶ 9-10; Declaration of Natasha Léger ¶¶ 6-9, 19, 21; Molvar Decl. ¶¶ 22-24; Nichols Decl. ¶ 28; Timmons Decl. ¶¶ 27-33; Vasquez Decl. ¶¶ 7-8. Conservation Groups' injuries would be redressed by a favorable result in this suit because BLM would then be made to properly analyze the full impacts of lease development under NEPA and could, for the first time, be forced to address the full environmental and climate impacts of its programmatic decisions. This analysis could lead to a denial of some or all of the challenged leases, or to modifications that would lessen GHG pollution, associated impacts from climate change, and other resource impacts on public lands. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 n.7 (1992); *Massachusetts v. Envtl. Protection Agency*, 549 U.S. 497, 517-18 (2007); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) ("[I]f the agency's eyes are open to the environmental consequences of its actions . . . it may be persuaded to alter what it proposed.").

## II. BLM VIOLATED NEPA BY FAILING TO TAKE A HARD LOOK AT THE CUMULATIVE IMPACTS OF GHG EMISSIONS AND CLIMATE CHANGE IMPACTS OF THOSE EMISSIONS

### A. NEPA's Hard Look Directive Requires more than a Quantification and Comparison of GHG Emissions

NEPA imposes "action-forcing procedures…requir[ing] that agencies take a hard look at environmental consequences." *Robertson*, 490 U.S. at 350; 42 U.S.C. § 4332(2)(C). The purpose of the "hard look" requirement is to ensure that the "agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Balt. Gas v. NRDC*, 462 U.S. 87, 97-98 (1983). BLM is required to provide a hard look at these impacts at the leasing stage before "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C)(v); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 65 (D.D.C. 2019) ("*WildEarth I*"); *Peterson*, 717 F.2d at 1412. "[T]he key requirement of NEPA" is to "consider and disclose the actual environmental effects in a manner that…brings those effects to bear on decisions to take particular actions that significantly affect the environment." *Balt. Gas*, 462 U.S. at 96.

When several projects are pending concurrently "that will have cumulative or synergistic environmental impact," NEPA requires cumulative environmental impacts to be considered together. *Kleppe*, 427 U.S. at 410. A cumulative impact is "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7; *see also id.* § 1508.25(c) (actions that when viewed with other proposed actions have significant impacts should be considered together). In the D.C. Circuit:

> [a] meaningful cumulative impact analysis must involve five things: (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other

> actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

*TOMAC v. Norton,* 433 F.3d 852, 864 (D.C. Cir. 2006) (citation omitted); *see also Diné CARE v. Haaland*, 59 F.4th 1016, 1039 (10th Cir. 2023) (citations omitted).

"The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Ctr. for Biological Diversity v. Natl. Hwy. Traffic Safety Admin*., 538 F.3d 1172, 1217 (9th Cir. 2008). Climate change is the quintessential problem of cumulative impacts, which is why NEPA is the appropriate vehicle for such a review:

> The large-scale nature of environmental issues like climate change show why cumulative impacts analysis proves vital to the overall NEPA analysis. The cumulative impacts analysis was designed precisely to determine whether a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact . . .

*WildEarth Guardians v. Bureau of Land Mgt*., 457 F. Supp. 3d 880, 894 (D. Mont. 2020) ("*Wildearth II*") (internal quotations and citations omitted).

Here, BLM's "hard look" at cumulative impacts is woefully inadequate. In each EA, BLM disclosed the quantity of GHG emissions estimated from the individual lease sale and calculated the monetized damages associated with incremental increases in GHG emissions in a given year for each sale "as a proxy for assessing climate impacts." *See, e.g.*, CO115341; WY485959. BLM then compared the predicted emissions to statewide and nationwide emissions using data compiled in the Specialist Report and claimed that "[c]omparing all potential emissions from fossil fuel approvals within BLM jurisdiction to emissions totals at state, national and global levels represents a comprehensive 'hard look' focused on the subject matter set before BLM decision makers." CO119728; WY481289; NMO18609. The result is that taken together, the challenged lease sales amount to 0.136% to 0.305% of total federal fossil fuel authorization

emissions in the United States.[15] The problem with BLM's approach is that this comparison is designed to yield results that appear *de minimis*. This approach "does not evaluate the incremental impact that these emissions will have on climate change or on the environment," as NEPA requires and BLM admits it did not do. *Ctr. for Biological Diversity*, 538 F.3d at 1216. BLM's comparative analysis of project emissions to total emissions says nothing about how the additional emissions will affect the environment, "only that there are other, larger sources of GHGs." *Diné CARE*, 59 F.4th at 1042; *see also 350 Montana*, 50 F.4th at 1269-70 (BLM's reliance on "an opaque comparison to total global emissions" among other failures "hid the ball and frustrated NEPA's purpose."). Indeed, in comments submitted to the Colorado and Wyoming offices on BLM's draft EAs, the EPA made precisely this point: "EPA recommends the BLM avoid expressing potential future project-level greenhouse gas (GHG) emissions from the proposed leases as a percentage of national or state emissions . . . Conveying the information in this way inappropriately minimizes the significance of future GHG emissions." CO96998; WY480195. BLM ignored this recommendation.

Further, BLM included in each EA an identical table generated from the Specialist Report titled "Reasonably Foreseeable Projected Emissions" from "the development of the projected lease sale acres in 2022." *See, e.g.,* WY485725. This table is based not on the actual acreages offered in the sales and analyzed in the EAs, but rather on a method of modeling future sales developed in the Specialist Report. *Id*. BLM asserts the table "shows the cumulative estimated GHG emissions from the development of the projected lease sale acres in 2022." *Id*. But this is an apples-to-oranges comparison, as the Specialist Report include sources of emissions BLM refused to consider in its analyses of emissions from the sales. For example, BLM included

[15] CO119434; WY485960; NMO18556; NMP59682; NV70312; MT95447.

methane emissions attributable to pipeline and equipment leaks, storage, and maintenance activities. But BLM excluded these emissions from its estimates for each sale, asserting that "such sources of emissions are highly speculative at the leasing stage and, therefore, the BLM instead chose to assume, for the purpose of th[ese] lease sale analys[e]s that all produced oil or gas will be combusted." *See*, *e.g.,* WY485716; *See WildEarth I*, 368 F. Supp. 3d at 67 ("GHG emissions from oil and gas drilling were reasonably foreseeable at the leasing stage here, and that BLM could have reasonably quantified and forecasted those emissions.").

As with its refusal to analyze the projected emissions from the sales cumulatively, BLM fails to explain why such speculation is untenable at the leasing stage but not when employed at a programmatic level, as in the Specialist Report. *See* CO96998, WY480196 (EPA comment letters observing: "The level of speculation involved in the cumulative analysis of BLM's entire leasing program, without further explanation, would be expected to be similar to the level of speculation involved at the lease sale stage."). As this Court has consistently held, the leasing stage represents an irretrievable commitment of resources (*Peterson*, 717 F.2d at 1412), and BLM should have at least attempted to analyze those methane emissions and their potential impacts as part of its GHG analysis for each of the challenged lease sales. Its failure to do so is not consistent with a hard look at the cumulative impacts of these sales.

BLM's consideration of cumulative impacts must include "the cumulative impact of GHG emissions generated by past, present, or reasonably foreseeable BLM [oil and gas projects] in the region and nation." *WildEarth I*, 368 F. Supp. 3d at 77; *see also* 40 C.F.R. §§ 1508.7, 1508.25(a)(2). In *WildEarth II*, plaintiffs challenged two lease sales held by BLM in December of 2017 and March of 2018. The sales were held across four BLM planning areas. Each BLM field office for each planning area prepared an EA for the portion of the sales in its respective

area. 457 F. Supp. 3d at 892. Plaintiffs challenged the sales in part on the grounds that the EAs failed to analyze cumulative climate impacts generally and to discuss the impacts addressed in the other EAs in particular. Much as it did here, BLM contended that "the global nature of climate change prevents it from assessing 'the specific effects of GHG emissions from any particular lease sale either on any particular region or on the planet as a whole.'" *Id*. at 894 (internal quotation omitted). The court rejected this argument and faulted BLM for providing "no catalogue … and little analysis to show the combined environmental impacts" of the sales at issue, and for the failure of the EAs to discuss "the environmental impacts from the other EAs." *Id*. at 892. The court went on to observe that "if BLM ever hopes to determine the true impact of its projects on climate change, it can do so only by looking at projects in combination with each other, not simply in the context of state and nation-wide emissions." *Id.* at 894.

So too here. NEPA requires BLM to take the next step and connect the dots for the public and the decisionmakers because "it is not releases of [pollution] that Congress wanted disclosed; it is the effects, or environmental significance, of those releases." *NRDC v. NRC*, 685 F.2d 459, 487 (D.C. Cir. 1982), r*ev'd sub nom. on other grounds, Balt. Gas*, 462 U.S. at 106–07. Here, BLM "never went the next step and showed how these lease sales cumulatively affect the environment." *WildEarth II*, 457 F. Supp. 3d at 895.

### B. BLM's Refusal to Use Available Tools to Evaluate the Severity of the GHG Emissions and Associated Climate Impacts Fails NEPA's Hard Look Test

BLM cannot satisfy its hard look duty without "properly evaluat[ing] the severity of the adverse effects" from GHG emissions resulting from the challenged leases. *Robertson*, 490 U.S. at 352. BLM attempts to evade this obligation by claiming "[t]he incremental contribution of global GHGs from a single proposed land management action cannot be accurately translated into its potential effect on global climate change or any localized effects in the area specific to

the action." CO119475; WY485714; NMO18544. This is not the hard look that NEPA requires. Nor do such statements discharge BLM's duty to analyze the severity of emission *impacts* or satisfy NEPA's goal of informed decisionmaking. The agency must provide sufficient detail in its NEPA analysis to assist "decisionmaker[s] in deciding whether, or how, to alter the program to lessen cumulative environmental impacts." *WildEarth II*, 457 F. Supp. 3d at 892; *see also Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999).

Here, BLM refused to take the type of meaningful hard look NEPA demands, and as required by the courts, instead claiming the agency:

> has not developed a standard or emissions budget that it can apply uniformly to make a determination of significance based on climate change or GHG emissions. Until such time as the Department develops further tools to analyze the relative emissions impact of its activities nationwide, the BLM can disclose GHG emissions and climate impacts, and provide context and analysis for those emissions and impacts; the agency cannot render a determination of significance for a proposed action based on GHG emissions or climate impacts alone.

CO119760; WY481332; NMO18577. Yet, the entire point of BLM's NEPA analysis is to determine whether the proposed action will have a significant impact on the environment. 42 U.S.C. § 4332(2)(C); *Diné CARE*, 59 F.4th at 1042.

Importantly, NEPA requires BLM to determine whether impacts are significant by accounting for both their "context" and "intensity." *Id.* § 1508.27; *WildEarth I*, 368 F. Supp. 3d at 80; *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004). NEPA requires more than merely disclosing the volume of emissions: BLM must analyze the significance and severity of such emissions, so that decisionmakers and the public can determine whether and how those emissions should influence the choice among alternatives. *See Robertson*, 490 U.S. at 351-52 (recognizing that NEPA analysis must discuss "adverse environmental effects which cannot be avoided[,]" which is necessary to "properly evaluate the severity of the adverse

effects"); *San Juan Citizens Alliance v. Bureau of Land Mgmt*., 326 F. Supp. 3d 1227, 1242 (D.N.M. 2018) (finding BLM arbitrarily failed to "discuss the potential impacts of [greenhouse gas] emissions."); *California v. Bernhardt*, 472 F. Supp. 3d 573, 623 (N.D. Cal. 2020) ("mere quantification [of GHGs] is insufficient"); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 106 (D.D.C. 2006) (agency's significance determination arbitrary where "no determinate criteria" provided for evaluating significance "other than [the agency's] conclusory say-so").

BLM never analyzed the severity of cumulative emissions resulting from the challenged sales its leasing authorizations. Indeed, BLM disavowed its obligation to do so, alleging the agency has not yet developed "thresholds for NEPA analysis to contextualize the quantifiable greenhouse gas emissions or social costs of an action in terms of the action's effect on the climate, incrementally or otherwise." CO119434; WY485960; NMO40; NV70532; MT95447. In essence, BLM contends that—as long as it chooses to keep its head stuck in the sand—it need not determine whether the impacts of its continued authorizations of GHG-emitting projects are significant or not. This position is an abdication of BLM's responsibilities under NEPA, and by definition arbitrary.

At the end of the day, weighing these factors to make a significance determination requires an agency to make a judgment call based on sound science. *W. Org. of Resource Councils v. BLM.*, CV 16-21-GF-BMM, 2018 WL 1475470, at *10 (D. Mont. Mar. 26, 2018)(citations omitted). NEPA requires that BLM clearly articulate the basis for its significance determination as to the cumulative GHG emissions and social costs from the lease sales and the federal fossil fuel program and their associated impacts related to climate change. BLM's failure to do so here was arbitrary and capricious. A failure which highlighted by BLM's piecemeal

approach to analyzing the social cost of GHGs, its refusal to rely on those social cost numbers in its significance determination, and its refusal to use the carbon budget tool.

### 1. BLM's Piecemeal Approach to Evaluating the Social Costs of Greenhouse Gas is Designed to Yield Insignificant Results

According to Executive Order 13990, the social cost of greenhouse gas emissions ("SC-GHG") provides an estimate "of the monetized damages associated with incremental increases in greenhouse gas emissions." HQ28. Further, "[a]n accurate social cost is essential for agencies to accurately determine the social benefits of reducing greenhouse gas emissions when conducting cost-benefit analyses of regulatory and other actions." *Id*. The SC-GHG "reflect[s] the societal value of reducing [GHG] emissions … by one metric ton [MT]." MT25576

Here, BLM attempted to provide SC-GHG estimates for each lease sale individually, but refused to disclose or analyze the cumulative total of the estimated SC-GHG collectively for these sales, or for the its Program as a whole, despite recommendations from EPA that it do so. CO96998, WY480196. Doing the simple arithmetic that BLM failed to do the total social costs of GHG pollution for all of the lease sales equals (in 2020 dollars) between $416,104,000 and $4,739,823,000, depending on the discount rate applied. BLM failed properly account for or disclose, let alone analyze, these large cumulative social costs. In each FONSI, BLM discloses the isolated social cost figures and leaves it at that, providing no analysis of the context or intensity, and no evaluation of the significance of these monetary damages in relation to the environmental impacts. Instead, in each FONSI BLM claims there are "no established thresholds for NEPA analysis to contextualize the quantifiable greenhouse gas emissions or social cost of an action in terms of the action's effect on the climate . . ." *See, e.g.,* WY485960. Even if true, nothing prevented BLM from discussing the types of damage these values represent or the relationship between its leasing decisions and resulting climate harm. Moreover, BLM again

ignored EPA's recommendation that it include combined social cost estimates for the tables depicting "Reasonably Foreseeable Projected Emissions" from "the development of the projected lease sale acres in 2022" that BLM asserts "show[] the cumulative estimated GHG emissions from the development of the projected lease sale acres in 2022." CO96998, WY480196.

Further, BLM never used the SC-GHG tool to assess the cumulative cost of climate damages from BLM's fossil fuel program as a whole in the Specialist Report. Its failure to do so—when the tool was available and used in other contexts—precludes an adequate cumulative impact analysis of the lease sales because—without this information—it is impossible to measure "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7; *Diné CARE*, 59 F.4th at 1043-44 ("Indeed, all agency actions causing an increase in GHG emissions will appear de minimis when compared to the regional, national, and global numbers. Where BLM neither applied the carbon budget method nor explained why it did not, BLM acted arbitrarily and capriciously by failing to consider the impacts of the projected GHGs."). Here, BLM simply leaves it to the reader to (1) compile the individual social cost figures from each EA and add them together and (2) determine whether $416,104,000 to $4,739,823,000 in predicted environmental damages is significant. BLM's choice to disclose (but not rely on) social cost damages for each sale individually, but not for all the sales collectively and without providing a programmatic context, coupled with a complete lack of analysis as to the resulting environmental impacts, is arbitrary and fails NEPA's hard look requirement. *Id.*

**2. BLM's Refusal to Use Carbon Budgeting to Evaluate the Significance of the Cumulative GHG Emissions Violates NEPA**

Under NEPA's hard look requirement, an agency's analysis of environmental impacts must be "fully informed," "well-considered," and based on "[a]ccurate scientific analysis."

*NRDC v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (citations omitted); 40 C.F.R. §§ 1500.1(b), 1502.24. Further, rather than throwing up its hands and claiming ignorance, as it has done here, BLM must work to "develop methods and procedures … which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." 42. U.S.C. § 4332(2)(B).

One of the methods available to the agency for analyzing the magnitude and severity of BLM-managed oil and gas emissions is the analysis of those emissions in the context of the remaining global carbon budget. As the Tenth Circuit explained just last month in *Diné CARE*:

> The carbon budget derives from science suggesting the total amount of GHGs that are emitted is the key factor to determine how much global warming occurs. The carbon budget is a finite amount of total GHGs that may be emitted worldwide, without exceeding acceptable levels of global warming. According to the IPCC, the carbon budget remaining in 2011 was below 1,000 $GtCO_2$ for a 66% probability of limiting warming to 2° Celsius above pre-industrial levels. By 2016, the remaining budget had been reduced to 850 $GtCO_2$.

59 F.4th at 1043. Neither the math, nor the timeline, is encouraging.

As detailed by the IPCC, carbon budgeting is essential to understanding and accounting for the severity and significance of emissions, and for developing a pathway toward climate stabilization. CO5927; *see also* CO5884 (detailing mitigation pathways to limit warming below 2°C threshold); CO5908 (detailing anthropogenic greenhouse gas emissions as the driver of climate change), CO5928 (detailing climate impacts). Notably, BLM relied on global carbon budgets in the Specialist Report, which it describes as "a convenient tool to simplify communication of a complex issue and to assist policymakers considering options for reducing GHG emissions on a national and global scale." HQ1873. Table 7-3 of the Specialist Report "provides an estimate of the potential emissions associated with BLM[']s fossil fuel authorizations in relation to IPCC carbon budgets." HQ1874. BLM-managed fossil fuel

emissions account for 1.47% of the remaining global carbon budget, which is projected to be exhausted in as little as 7 years. HQ1875. Put differently, if BLM-approved emissions and 68 other equivalent emission sources were eliminated, global GHG emissions would be reduced to zero. When put into the proper context of the global carbon budget, the cumulative impact of BLM's oil and gas program is undeniably significant. Because BLM refused to place the impacts of the challenged sales in the appropriate context, it was unsurprisingly difficult—if not impossible—for the agency to make a determination of significance for these sales, individually or collectively.

Despite the Specialist Report's recognition of the carbon budget tool and its application to BLM-approved GHG emissions, BLM chose, rather than simply using the tool, to offer a myriad of excuses for why it could not:

- At this time, BLM has not developed a standard or emissions budget that it can apply uniformly to make a determination of significance based on climate change or GHG emissions. Until such time as the Department develops further tools to analyze the relative emissions impact of its activities nationwide, … the agency cannot render a determination of significance for a proposed action based on GHG emissions or climate impacts alone. CO119726; WY481286; NMO0018616;

- Currently, there is not a formal Federal policy establishing a national carbon budget or a final international consensus on which carbon budget the world should use for limiting global warming (1.5C or 2.0C) that the BLM can use to evaluate the significance of a proposed action. CO119743; WY481349; NMO18577; and

- [T]he Department lacks an established carbon budget. CO119394; WY485983; NMO39; NV70518.

BLM's excuses fall flat. In the Specialist Report, it has already utilized the carbon budget tool at the scale of the federal fossil fuel program as a whole. Its refusal to apply the tool in the case of the quantified GHG emissions from the lease sales to provide further context for the significance of BLM's individual decisions is arbitrary and capricious. The court in *Diné CARE* held that BLM "acted arbitrarily and capriciously in its analysis of GHG emissions by failing to

take a hard look at the . . . cumulative impacts of GHG emissions by relying solely on percentage comparisons where at least one more precise method was available." 59 F. 4th at 1043. This is exactly what BLM did here. While the Specialist Report utilizes carbon budgets to characterize the urgency of the climate crisis and the role of U.S. emissions reductions in stabilizing the global climate, this consideration is entirely divorced—and indeed specifically avoided—in determining the significance of the agency's leasing decisions.

## III. BLM VIOLATED NEPA BY FAILING TO PREPARE AN EIS

According to BLM, "the 2020 Specialists Report represents a focused GHG analysis that would be found in a programmatic level document and thus an EIS is not required." WY481289. But the Specialist Report was not prepared according to the requirements set forth in NEPA or the CEQ regulations, and neither made a determination of, nor contained any discussion of the significance of the federal oil and gas program's impact on the environment generally or on climate change specifically. As discussed *supra*, the Specialist Report specifically disavowed its application to site-specific decisions, such as those at issue here, and BLM did not even include a programmatic social cost analysis. Executive Order 14008's call for "completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices … including potential climate and other impacts," *could* have been accomplished through preparation of a programmatic EIS for BLM's entire onshore oil and gas program. A programmatic EIS "reflects the broad environmental consequences attendant upon a wide-ranging federal program." *Nevada v. Dep't of Energy*, 457 F.3d 78, 92 (D.C. Cir. 2006) (quoting *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 159 (D.C.Cir.1985)). Preparation of a programmatic EIS is appropriate where "the programmatic EIS [could] be sufficiently forward looking to contribute to the decisionmakers' basic planning of the overall program" and where its

failure to prepare such a statement may result in improper segmentation of the program, "thereby unreasonably constricting the scope of primordial environmental evaluation." *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 889 (D.C. Cir. 1981). Both are true with respect to the challenged lease sales. BLM could have fulfilled its NEPA obligations through the preparation of a programmatic EIS for the Program, but it elected not to do so. It may not now rely on the Specialist Report as a proxy for such an analysis.

### A. BLM's failure to determine the significance of the sales' climate change impacts raises "substantial questions" requiring preparation of an EIS.

NEPA requires federal agencies to prepare an EIS for every "major federal action[] significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(c). Therefore, "[a] threshold question in a NEPA case is whether a proposed project will 'significantly affect' the environment, thereby triggering the requirement for an EIS." *Blue Mountains*, 161 F.3d at 1212 (citing 42 U.S.C. § 4332(2)(C)). To determine whether an action is significant, an agency may prepare an EA. If the agency determines on the basis of the EA that there will be significant impacts, it is required to prepare an EIS. If it determines that no significant impacts to the environment will occur as a result of the proposed action, it must prepare a FONSI. 40 CFR § 1501.4(b) – (e). For each of the challenged sales, BLM issued a FONSI, which determined that the chosen alternative "would not have a significant effect on the quality of the human environment." NV70311; *see also* CO119432; MT95445; NMO18514; NMP59587- 88; WY485959.

These findings simply don't square with BLM's conclusion that it is unable to make a determination as to the significance of any of these sales' impacts on climate change:

> There are no established thresholds for NEPA analysis to contextualize the quantifiable greenhouse gas emissions or social cost of an action in terms of the

> action's effect on the climate, incrementally or otherwise. The BLM acknowledges that all GHGs contribute incrementally to climate change and has displayed the greenhouse gas emissions and social cost of greenhouse gas in the EA in comparison to a variety of emissions sources and metrics. As of the publication of this FONSI, there is no scientific data in the record, including scientific data submitted during the comment period for these lease sales, that would allow the BLM, *in the absence of an agency carbon budget or similar standard*, to evaluate the significance of the greenhouse gas emissions from this proposed lease sale.

CO119434; MT95446-47; NMO18516; NMP59590; NV70312; WY485960-61

(emphasis added).

Nowhere does BLM reconcile this determination with its findings of no significant impact. In order to issue a FONSI, an agency must provide reasons why a proposed action "will not have a significant effect on the human environment." 40 C.F.R. § 1508.13. In challenging an agency's decision not to prepare an EIS, "'a plaintiff need not show that significant effects *will in fact occur*;' it is enough for the plaintiff to 'raise substantial questions as to whether a project *may* have a significant effect' on the environment." *Blue Mountains*, 161 F.3d at 1212 (emphasis added) (quoting *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149-1150 (9th Cir.1998)); *see also Save the Yaak Comm. v. Block,* 840 F.2d 714, 717 (9th Cir. 1988) (relevant question is whether responsible agency has "reasonably concluded" that project "will have no significant adverse environmental consequences."). Information and data in each sale's record, particularly the social costs and the contribution of BLM's Program to the remaining global carbon budget, indicate that these sales are both individually and cumulatively significant. As a threshold matter, however, BLM's failure to make that determination is sufficient to require preparation of an EIS to address the issue.

This is true not only because BLM's asserted inability to make such a finding raises "substantial questions" with respect to each EA, but also because BLM's assertion raises the

question of whether the impacts of each sale individually, as well in combination, are "highly uncertain or involve unique or unknown risks" that are required to be analyzed in an EIS. 40 C.F.R. § 1508.27(b)(5). If BLM is correct and it is truly unable to determine the significance of any (or all) of these sales on climate change, then there is clearly a high level of uncertainty surrounding the issue that BLM must evaluate through an EIS. *Id.* If BLM is incorrect, and it is in fact able to determine significance, then it is required to do so (and explain why its FONSIs were appropriate, if it subsequently finds the sales to be insignificant). *Blue Mountains*, 161 F.3d at 1212 (citing 42 U.S.C. § 4332(2)) ("If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant."); *Save the Yaak Comm*., 840 F.2d at 714. Here, BLM did neither, and simply refused to make this determination. At a basic level, logic dictates that BLM cannot have it both ways. It cannot, on the one hand, assert that it is unable make a determination as to the significance of climate change impacts, and on the other, issue findings of no significant impact.

BLM advances the following justification for refusing to probe this uncertainty through an EIS is that "preparation of an EIS solely for the sake of analysis of the issue of climate change is not warranted as any disclosure in such an EIS would be the same as that prepared for this EA and would not better inform decision makers or the public." NV70312. This circular reasoning seems to suggest that the problem is inherent to *any* evaluation of climate change impacts—regardless of magnitude—and insoluble, at least "in the absence of an agency carbon budget or similar standard." *See, e.g.* CO119434. As previously discussed, BLM provides no rational explanation for *why* it cannot employ "an agency carbon budget or similar standard," or for how it can allow these lease sales to proceed in the absence of such a determination. BLM refused to meaningfully address whether it would be able to evaluate significance in the context of an EIS

analyzing all six sales, as urged by Plaintiffs. Its failure to address the issue was arbitrary. *Motor Vehicle Mfrs.*, 463 U.S. at 43 (where agency "entirely failed to consider an important aspect of the problem" its decision was arbitrary).

Ultimately, BLM appears to take the position that a determination of impossibility is equivalent to a finding of no significant impact under 40 C.F.R. § 1501.4(e). Aside from being incorrect as a matter of law, such reasoning fails to fulfill BLM's "obligation [] to articulate a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 59 (internal quotations omitted). There is simply no rational justification for a FONSI where an agency asserts an inherent inability to determine whether its actions (individually or collectively) are significant with respect to a problem of the magnitude of the climate crisis. *Standing Rock Sioux*, *Tribe v. United States Army Corps of Engineers*, 985 F.3d 1043 (D.C. Cir. 2021) ("[A]n EIS is perhaps especially warranted where an agency explanation confronts but fails to resolve serious outside criticism, leaving a project's effects uncertain").

### B. The sales constitute cumulative and similar actions that should have been analyzed together in an EIS

As discussed above, in conducting a NEPA analysis and making a determination of a project's significance, an agency is required to consider an action's context and intensity. As part of its evaluation of a project's intensity, the agency must evaluate: "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by … breaking it down into small component parts." 40 C.F.R § 1508.27(b)(7). When an action, viewed with other proposed actions, results in cumulatively significant impacts, the projects together are considered to be "cumulative actions" which should

"be discussed in the same impact statement." 40 C.F.R. § 1508.25. The GHG emissions from each of the six lease sales challenged here—when combined—are projected to result in anticipated climate damages of a magnitude that BLM should reasonably have anticipated would be significant and which should have impelled BLM to analyze the sales together in a single EIS. Instead, BLM impermissibly fragmented its analysis and insisted it was unable to make a determination as to each project's significance.

In its haste to resume leasing, BLM has proceeded with an apparent inability to see the forest for the trees when it comes to analyzing the effects of the Program. *See, City of Los Angeles v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478, 501 (D.C. Cir. 1990), *overruled on other grounds by Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) ("the evidence in the record suggests that we cannot afford to ignore even modest contributions to global warming. If global warming is the result of the cumulative contributions of myriad sources, any one modest in itself, is there not a danger of losing the forest by closing our eyes to the felling of the individual trees?"). Rather than use the Specialist Report to truly inform its analyses for individual lease sales (or, still better, to provide data for a programmatic EIS to which such individual sales could tier), BLM has instead chosen to employ the Report as a pretextual hard look that enables it to continue holding lease sales in a piecemeal manner, characterized by equally piecemeal analyses, and unencumbered by what that science reveals. This reality is exemplified by the challenged EAs: even with the Specialist Report at its disposal, BLM inexplicably refused to analyze the sales collectively, asserting that such an approach "would not be useful to the decision maker." CO119482; MT94937; NMO18559; NMP59685; NV70358; WY485724. *See also Motor Vehicle Mfrs.*, 463 U.S. at 43. ("agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection

between the facts found and the choice made.'" (internal quotes omitted)).

As discussed *supra*, climate change—*because* of its cumulative nature—is precisely the type of problem NEPA is intended to address through an adequate cumulative impacts analysis *WildEarth II*, 457 F. Supp. 3d at 894. As in *WildEarth II*, BLM impermissibly fragmented its analysis. Rather than analyzing the cumulative effects of all six sales, or even addressing the impacts of *any* of the other sales in its EAs, BLM overtly refused to analyze in each EA any of other EAs prepared for the other June 2022 sales.[16] Instead, BLM relies on the Specialist Report as a proxy for the cumulative impacts of both the challenged sales and its leasing program generally, leaving the reader to make the connections between these analyses. Further, BLM refused to analyze the sales' estimated GHG emissions cumulatively because, it asserts, such an analysis "would result in an inflated, unrealistic, quantity of estimated emissions that would not be useful to the decision maker and would not accurately inform the public of the magnitude of probable cumulative emissions and impacts." CO119482; MT94937; NMO18559; NMP59685; NV70358; WY485724.

But BLM does not explain *why* "combining all of the offered parcels from multiple lease sales"[17] would result in an "inflated, unrealistic quantity of estimated emissions" when, according to BLM, a compartmentalized analysis would not. Indeed, the EPA pointed out that "adding up the emissions and associated costs from this … lease sale and the other current lease sales does not seem to present a level of uncertainty significantly different from the level that has already been deemed not to preclude usefulness to decision maker or the public." CO96998-99;

[16] In the context of the Nevada Sale, the EPA submitted a comment letter which also faulted BLM's failure to "address cumulative effects to the Analysis Area" including its failure to discuss "BLM's March, June, and September 2019 … lease sales." NV32066.
[17] Particularly when those sales occurred over the course of 48 hours.

WY480196. BLM likewise declined to explain why it refused to combine the social cost figures into a single projected social cost number for all the sales. *See* NMO18558, WY485960.

Finally, as BLM has already acknowledged, "[t]he global nature of climate change and greenhouse-gas emissions means that any single lease sale or BLM project likely will make up a negligible percent of state and nation-wide greenhouse gas emissions." *WildEarth II*, 457 F. Supp. 3d at 894 (*citing Ctr. for Biological Diversity*, 538 F.3d at 1217). This basic tenet of climate change means that an adequate evaluation of cumulative actions is particularly critical to avoid underestimating the contributions of BLM activities to the climate crisis. Here, BLM ignored multiple comments requesting that it analyze the sales cumulatively, instead issuing FONSIs for each sale despite its asserted inability—at the individual sale level—to determine the significance of climate change impacts. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.27.

It is difficult to escape the notion that the fragmented approach employed by BLM was designed to accomplish one thing: to allow BLM to avoid having to meaningfully address the combined impacts of these sales and its Program and acknowledge, as EPA urged, "the increasing conflict between GHG emissions and GHG reduction policies." CO96998; WY480195. BLM's refusal to conduct an adequate analysis of cumulative impacts—including from the six EAs at issue here—precludes it from articulating "a rational connection between the facts found and the choice made." *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1327 (D.C. Cir. 2021) (internal quotation omitted); *Motor Vehicle Mfrs.*, 463 U.S. at 59. Because the cumulative damages for the six sales approach five billion dollars at the high end, it would have been reasonable for BLM "to anticipate a cumulatively significant impact on the environment." 40 C.F.R. §1508.27(b)(7). BLM should therefore have prepared an EIS for the six sales collectively. *Blue Mountains*, 161 F.3d at 1211; *see also, WildEarth I*, 368 F. Supp. 3d

at 83 (considering actions "in a vacuum deprives the agency and the public of the context necessary" to evaluate potential impacts).

When actions, such as the six lease sales challenged here, "have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography" they are "similar actions" which can be analyzed together in a single impact statement and should be so analyzed "when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in the same impact statement." 40 C.F.R. §1508.25(a)(3). These six sales were similar actions because they were, (1) promulgated through a single decision from Interior and BLM leadership to resume leasing; (2) their climate analyses were directly influenced by and significant portions appear to have been drafted by BLM headquarters; and (3) their administrative processes occurred on the same schedule and the sales themselves occurred over the same 48-hour period. As discussed above, this programmatic decision also resulted in cumulative actions with projected total emissions of 35.06 $MtCO_2e$ and up to $4,739,823,000 in climate damages, which demand a concerted analysis.

In sum, BLM's refusal to evaluate the sales together, combined with its abdication of a statutory duty to determine their significance raises "substantial questions that they will result in significant environmental impacts." *Blue Mountains*, 161 F.3d at 1215. This is all that is needed to demonstrate that an EIS was required. *Id.* Moreover, BLM's struggles to articulate a significance threshold for its actions' climate change impacts clearly weigh in favor of a unified analysis being "the best way to adequately assess the combined impacts." 40 C.F.R. § 1508.21.

## IV. BLM VIOLATED FLPMA BY FAILING TO AVOID UNNECESSARY AND UNDUE DEGRADATION.

BLM failed to meet its substantive duty to "take any action necessary to prevent unnecessary or undue degradation of the lands[,]" even while admitting that the agency's oil and gas program is substantially contributing to the climate crisis and that such action is causing degradation to occur. 43 U.S.C. § 1732(b). When such unnecessary and undue degradation ("UUD") occurs, BLM must either disallow further oil and gas leasing and development—which is well within its broad discretion—or impose mitigation measures and constraints on oil and gas activity to reduce impacts below this substantive threshold. *See, e.g., Pub. Lands Council v. Babbitt,* 167 F.3d 1287, 1300–01 (10th Cir. 1999) (recognizing the Secretary's broad authority to specify terms and conditions at the project-stage); 43 U.S.C. §§ 1701(a)(8), 1702(c), 1732(b); 43 C.F.R. § 3101.1-2 (establishing regulatory hierarchy, in sequenced priority, to avoid, mitigate, or compensate for climate, public lands, or community impacts); 40 C.F.R. §§ 1502.14(f), 1502.16(h) (requiring BLM to "include appropriate mitigation measures not already included in the proposed action or alternatives."). Here, BLM violated its mandatory duties under FLPMA by taking action that it acknowledges *will cause* further unnecessary and undue degradation of public lands, without defining a threshold of climate degradation or taking any action to avoid it.

FLPMA directs BLM to manage public lands "on the basis of multiple use and sustained yield" and through a coordinated land use planning process. 43 U.S.C. §§ 1701(a)(2), (7).[18] BLM, through this planning process, balances multiple uses of the public lands, inclusive of oil and gas, but also, for example, "air and atmospheric … values" as well as "food and habitat for

[18] This power is derived from the property clause of the United States Constitution, which confers upon Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Constitution, Art. IV., Sec. 3, Cl. 2.

fish and wildlife." *Id.* §§ 1701(a)(8), (12). BLM's obligation to manage for multiple use does not mean that development must be allowed. Rather, "[d]evelopment is a *possible* use, which BLM must weigh against other possible uses—including conservation to protect environmental values[.]" *Richardson*, 565 F.3d at 710 (emphasis original); *see also Wilderness Workshop v. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145, 1166 (D. Colo. 2018) ("[T]he principle of multiple use does not require BLM to prioritize development over other uses" (internal quotations and citations omitted)).

As discussed, BLM manages federal oil and gas resources through a three-stage planning and management framework inclusive of land use planning, leasing, and permitting. BLM is required not only to evaluate the impacts that federal fossil fuel leasing has on public lands, waters, and wildlife resources, under NEPA, but to avoid harm to those resources under FLPMA.

The directive to "prevent unnecessary and undue degradation" is not simply aspirational, but is grounded in the substantive requirements of FLPMA and has been described as its "heart." 43 U.S.C. § 1732(b); *Mineral Policy Ctr. v. Norton*, 292 F.Supp.2d 30, 33, 41-43 (D.D.C. 2003). Written in the disjunctive, BLM must prevent degradation that is "unnecessary" *and* degradation that is "undue." *Id.* at 41-43. This protective mandate applies to BLM planning and management decisions—which are executed through NEPA—and should be considered in light of its overarching mandate that the agency employ "principles of multiple use and sustained yield." 43 U.S.C. § 1732(a); *see also, Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1136 (10th Cir. 2006) (finding that BLM's authority to prevent degradation is not limited to the RMP planning process). While these obligations are distinct, they are interrelated and highly correlated.

"Application of this standard is necessarily context-specific; the words 'unnecessary' and 'undue' are modifiers requiring nouns to give them meaning, and by the plain terms of the

statute, that noun in each case must be whatever actions are causing 'degradation.'" *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011) (citing *Utah v. Andrus*, 486 F. Supp. 995, 1005 n. 13 (D. Utah 1979) (defining "unnecessary" in the mining context as "that which is not necessary for mining" and "undue" as "that which is excessive, improper, immoderate or unwarranted.")); s*ee also Colorado Env't Coalition*, 165 IBLA 221, 229 (2005) (providing that "unnecessary or undue degradation" requires a showing "that a lessee's operations are or were conducted in a manner that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology, such that the lessee could not undertake the action pursuant to a valid existing right.").

Here, for example, BLM's leasing decisions provide a definition of UUD with respect to methane emissions: "methane emissions greater than what would normally occur, or failure to follow best management practices or comply with applicable Federal and State requirements to reduce excessive methane emissions." *See* CO119396; WY485987; NMO50; NV70523; NV70535. However, in the context of BLM's oil and gas program, it is not merely the manner in which operations are conducted, but the very nature of oil and gas extraction that is resulting in public lands degradation. In other words, the purpose of oil and gas extraction is to produce hydrocarbons that cause greenhouse gas emissions which, in turn, are causing climate degradation to public lands. The perpetuation of BLM's oil and gas leasing program—without defining a threshold or tailoring mitigation measures and conditions to avoid degradation—is thus incompatible with the agency's substantive duty under FLPMA. 43 U.S.C. § 1732(b).

While FLPMA "leaves [the] BLM a great deal of discretion in deciding how to achieve" its duty of preventing unnecessary or undue degradation, *Gardner v. Bureau of Land Mgmt*., 638 F.3d 1217, 1222 (9th Cir. 2011), the agency is not permitted to simply ignore its substantive

mandate altogether. Rather, the agency "shall, by regulation or otherwise, take any action necessary." 43 U.S.C. § 1732(b). While a court's role is not to determine whether such regulation represents the best interpretation of FLPMA, it must still determine that the interpretation is a reasonable one. *See Mineral Policy Ctr*., 292 F. Supp. 2d at 45 (citing *Chevron*, *U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. at 843 (1984)). But where, as here, "BLM did not perform its FLPMA or NEPA duties when it should have," this is "the definition of 'arbitrary and capricious' action." *S. Utah Wilderness All. v. Bureau of Land Mgmt*., 551 F. Supp. 3d 1226, 1244 (D. Utah 2021) (citing *Motor Vehicle Mfrs.*, 463 U.S. at 43).

Here, in response to protest comments identifying BLM's failure to comply with its substantive duty under FLPMA, the agency offers that "undue degradation has been previously defined as 'that which is excessive, improper, immoderate or unwarranted' and unnecessary as 'that which is not necessary' for in an authorized action to occur, in this case the leasing of parcels for potential oil and gas development." *See* CO119412; WY486047; NMO49; NV70535. This definition is not provided in the leasing decisions themselves, but is rather a response to comments which, in turn, offers language from a Solicitor's opinion on hardrock mining which was rejected for violating canons of statutory construction. *See Mineral Policy Ctr*., 292 F. Supp. 2d at 42 ("The court finds that the Solicitor misconstrued the clear mandate of FLPMA."); *see also* Solicitor Memorandum M-370007 (Oct 23, 2001).[19] BLM then continued in its response, providing:

> While BLM has considered reasonably foreseeable future development, should the leases be issued and development proposed, the BLM will consider whether the proposed action would cause unnecessary or undue impacts from surface disturbance or occupancy of the leasehold as part of that environmental analysis.
>
> If the parcels are leased, and an APD is submitted, the site-specific proposal would be evaluated to ensure that no undue or unnecessary degradation would

[19] https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37007.pdf.

> occur as a result of this development. Implementation of best management practices at the APD stage is the most effective way to ensure that impacts from an oil and gas project do not result in undue or unnecessary degradation. BLM would review the site-specific proposal and identify measures for reducing or eliminating potential sources of undue or unnecessary degradation.

CO119412; WY486047; NMO0000049; NV70535; *see also* CO119754; WY481266; NMO18623. What BLM fails to acknowledge, however, is that climate degradation does not merely result from poor implementation or a "failure to follow best management practices." Rather, such degradation is caused by the activity itself. And as this Court has made clear, "[w]hile it may be true that after the leasing stage BLM can impose conditions to *limit* and *mitigate* GHG emissions and other environmental impacts, the leasing stage is the point of no return with respect to emissions. Thus, in issuing the leases BLM 'made an irrevocable commitment to allow *some*' GHG emissions." *WildEarth I*, 368 F. Supp. 3d at 66 (quoting *Peterson*, 717 F.2d at 1414). Those emissions will cause further degradation of public lands, and therefore BLM is not permitted to simply defer its substantive duty to the permitting stage.

FLPMA's unnecessary and undue degradation mandate is distinct from the procedural requirements imposed by NEPA. *See, e.g., Ctr. for Biological Diversity v. U.S. Dep't of Interior,* 623 F.3d 633, 645 (9th Cir. 2010) ("A finding that there will not be significant impact [under NEPA] does not mean either that the project has been reviewed for unnecessary and undue degradation or that unnecessary or undue degradation will not occur."). However, "[i]f there is an impact, then FLPMA requires BLM to 'determine whether there are less degrading alternatives' … which triggers NEPA." *S. Utah Wilderness All.*, 551 F. Supp. 3d at 1244.

As detailed above, BLM has an obligation to consider the cumulative climate impacts of its leasing decisions. This consideration must be contextual, and must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum." *Grand Canyon Tr. v. F.A.A.*, 290 F.3d 339, 342 (D.C. Cir. 2002). Just as the agency is not permitted to

list emissions without "analysis of that catalogue and 'their combined environmental impacts,'" *WildEarth II*, 457 F. Supp. 3d at 892, the agency also cannot fail to apply those emissions to its substantive duty to avoid unnecessary and undue degradation.

BLM admits that the agency's oil and gas leasing program results in a substantial contribution of GHG emissions. As discussed above, BLM has endeavored to satisfy the requirement to consider the cumulative climate impacts of its leasing decisions by preparing the Specialist Report. Setting aside the deficiencies of the Specialist Report, discussed above, the underlying conclusions are chilling. Annual greenhouse gas emissions from existing federal fossil fuel production totals 918.6 $MtCO_2e$, with total projected cumulative "life-of-project" emissions of 4,853.6 $MtCO_2e$ over the next 12 months. *See* HQ1808; HQ1810; HQ1870. Already permitted but not yet producing leases add 656.2 $MtCO_2e$ to this total over the next 12 months. HQ1810. And the long-term onshore fossil fuel emissions projection is 24,112.35 MtCO2e. HQ1811; HQ1860. BLM also applies these emissions in the context of the remaining Global Carbon Budget, which recognizes that there are 420 $GtCO_2$ that remain for a 66% chance to prevent warming above a 1.5°C threshold. HQ1872. With a federal fossil fuel emissions estimate of 2.24 GtCO2 during that timeframe, this represents 1.47% of the total remaining global budget to avoid catastrophic warming. HQ1875. In other words, any additional emissions are entirely incompatible with maintaining a livable planet. And, therefore, all such additional emissions are responsible for causing further unnecessary and undue degradation of public lands.

As set forth above, BLM knows that GHGs emissions are causing anthropogenic climate change, and that climate change impacts are resulting in the permanent harm and degradation of public lands. BLM also acknowledges the Fourth NCA's conclusions that fossil fuel emissions are the primary driver of anthropogenic warming. *See* MT17570-74 (describing role of fossil

fuels as anthropogenic drivers of warming); MT17885 (recognizing limit of cumulative $CO_2$ emissions to stabilize warming). BLM recognizes that 82% of total U.S. emissions are due to energy production and use (HQ1864) and that BLM administered lands are responsible for 14% of total U.S. GHG emissions, 1.6% of global emissions, and nearly 20% of all emissions in the U.S. from fossil fuel production. HQ1870.

The disconnect between these findings—all of which have been made or adopted by the agency—and BLM's failure to take any action to prevent unnecessary and undue degradation is inexplicable. 43 U.S.C. § 1732(b). Even worse is BLM's decision to knowingly and actively increase such degradation by continuing to lease public lands for oil and gas without any meaningful mitigation or constraint.

In the instant case, BLM failed to specifically account for the unnecessary and undue degradation caused by its oil and gas program and the agency's decision to lease the challenged parcels. This obligation is distinct from its compliance under NEPA, and was required before the lease issuance. BLM failed to define what constitutes "unnecessary or undue degradation" in the context of its oil and gas program and the greenhouse gas emissions that result, or explain why its chosen alternative will not cause such degradation, as required by FLPMA. 43 U.S.C. § 1732(b). Failure to perform this non-discretionary duty was arbitrary and capricious, and must be set aside. *S. Utah Wilderness All.*, 551 F. Supp. 3d at 1244; 5 U.S.C. § 706(2).

## CONCLUSION

For the foregoing reasons, the Court should vacate BLM's June 2022 lease sales and instruct the agency to conduct an EIS for all six sales and comply with FLPMA by defining "unnecessary or undue degradation" in this context and demonstrate how its chosen alternatives will not cause such degradation.

RESPECTFULLY SUBMITTED on the 9th day of March 2023.

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